
# JOURNAL

JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS

VOLUME 4 ❖ 2003

## ISSUES FACING FAMILY COURTS

**Disestablishment Suits: What Hath Science Wrought?**
*Mary R. Anderlik*

**Parents With Disabilities: Problems in Family Court Practice**
*Megan Kirshbaum, Daniel O. Taube & Rosalinda Lasian Baer*

**Effective Intervention With High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court**
*Lyn R. Greenberg, Jonathan W. Gould, Hon. Robert Alan Schnider, Dianna J. Gould-Saltman & David A. Martindale*

**The Invisible Havoc of Prenatal Alcohol Damage**
*Kathryn Page*

**The Santa Clara County Juvenile Domestic and Family Violence Court**
*Inger Sagatun-Edwards, Hon. Eugene M. Hyman, Tracy Lafontaine & Erin Nelson-Serrano*

**The Scope of Family Court Intervention**
*Steve Baron*

## ISSUES FORUM

**Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court**
*Robert Victor Wolf*

**Expected Controversies: Legacies of Divorce**
*Mary A. Duryee*

## PERSPECTIVES

**Don't Go to Court, Everybody Said**
*Russell Fuller*

**Ten Years in Family Law Court**
*Pamela Besser Theroux*


JUDICIAL COUNCIL OF CALIFORNIA ❖ ADMINISTRATIVE OFFICE OF THE COURTS


# JOURNAL

JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS

VOLUME 4 ❖ 2003


JUDICIAL COUNCIL OF CALIFORNIA ❖ ADMINISTRATIVE OFFICE OF THE COURTS


The *Journal of the Center for Families, Children & the Courts* welcomes submissions addressing contemporary issues in family and juvenile law, the administration of family and juvenile courts, and the provision of court-connected services to children and families. The journal seeks to foster dialogue among various practical and academic disciplines, and so invites contributions from the fields of law, court administration, medicine and clinical psychology, the behavioral and social sciences, and other disciplines concerned with the welfare of children and families.

Manuscripts submitted for publication should be sent to Corby Sturges, Editor in Chief, *Journal of the Center for Families, Children & the Courts,* Judicial Council of California, 455 Golden Gate Avenue, Sixth Floor, San Francisco, CA 94102-3688, corby.sturges@jud.ca.gov. A manuscript—including endnotes, tables, and figures—should not exceed 30 double-spaced typed pages. Authors should follow the style guidelines of *The Bluebook: A Uniform System of Citation* (17th ed.), published and distributed by the *Harvard Law Review,* when preparing their manuscripts. Authors should send one copy of the manuscript along with a 100-word abstract and a biographical sketch. Authors may submit their manuscripts electronically, in Microsoft® Word 97 or later, to the e-mail address above.

The *Journal of the Center for Families, Children & the Courts* (ISSN 1532-0685), formerly the *Journal of the Center for Children and the Courts* (ISSN 1526-4904), is published annually by the Judicial Council of California. The journal is published free of charge with the generous support of the U.S. Department of Health and Human Services. The views expressed are those of the authors and may not represent the view of the journal, the Judicial Council of California, or the funder.

 This issue should be cited as 4 J. CENTER FOR FAM. CHILD. & CTS. __ (2003).

To be placed on the subscription list, contact:
*Journal of the Center for Families, Children & the Courts*
Judicial Council of California
455 Golden Gate Avenue, Sixth Floor
San Francisco, California 94102-3688
415-865-7739
fax: 415-865-7217
e-mail: cfcc@jud.ca.gov

The journal is also available on the California Courts Web site:
http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/journal/

*Printed on 100% recycled and recyclable paper*

# JUDICIAL COUNCIL OF CALIFORNIA

**Hon. Ronald M. George**
*Chief Justice of California and Chair of the Judicial Council*

**Hon. Marvin R. Baxter**
*Associate Justice of the Supreme Court*

**Hon. Ellen M. Corbett**
*Member of the Assembly*

**Hon. Eric L. Du Temple**
*Presiding Judge of the Superior Court of California, County of Tuolumne*

**Hon. Norman L. Epstein**
*Associate Justice of the Court of Appeal, Second Appellate District, Division Four*

**Hon. Martha M. Escutia**
*Member of the Senate*

**Hon. Michael T. Garcia**
*Presiding Judge of the Superior Court of California, County of Sacramento*

**Hon. William C. Harrison**
*Judge of the Superior Court of California, County of Solano*

**Mr. Rex S. Heinke**
*Attorney at Law, Los Angeles*

**Hon. Richard D. Huffman**
*Associate Justice of the Court of Appeal, Fourth Appellate District, Division One*

**Hon. Laurence Donald Kay**
*Presiding Justice of the Court of Appeal, First Appellate District, Division Four*

**Hon. Jack Komar**
*Judge of the Superior Court of California, County of Santa Clara*

**Hon. William A. MacLaughlin**
*Assistant Presiding Judge of the Superior Court of California, County of Los Angeles*

**Hon. Heather D. Morse**
*Judge of the Superior Court of California, County of Santa Cruz*

**Hon. William J. Murray, Jr.**
*Judge of the Superior Court of California, County of San Joaquin*

**Hon. Michael Nash**
*Judge of the Superior Court of California, County of Los Angeles*

**Mr. David J. Pasternak**
*Attorney at Law, Los Angeles*

**Ms. Ann Miller Ravel**
*County Counsel, County of Santa Clara*

**Hon. Richard Strauss**
*Presiding Judge of the Superior Court of California, County of San Diego*

**Mr. Thomas Joseph Warwick, Jr.**
*Attorney at Law, San Diego*

**Hon. Barbara Ann Zúñiga**
*Judge of the Superior Court of California, County of Contra Costa*

## ADVISORY MEMBERS

**Hon. Frederick Paul Horn**
*Presiding Judge of the Superior Court of California, County of Orange*

**Ms. Tressa S. Kentner**
*Executive Officer, Superior Court of California, County of San Bernardino*

**Ms. Susan Null**
*Executive Officer, Superior Court of California, County of Shasta*

**Hon. Gregory C. O'Brien, Jr.**
*Judge of the Superior Court of California, County of Los Angeles*

**Mr. Alan Slater**
*Chief Executive Officer, Superior Court of California, County of Orange*

**Hon. Patricia H. Wong**
*Commissioner of the Superior Court of California, County of Sacramento*

**Mr. William C. Vickrey**
*Administrative Director of the Courts and Secretary of the Judicial Council*

# FAMILY AND JUVENILE LAW ADVISORY COMMITTEE

**Hon. Mary Ann Grilli, Co-chair**
*Judge of the Superior Court of California, County of Santa Clara*

**Hon. Susan D. Huguenor, Co-chair**
*Judge of the Superior Court of California, County of San Diego*

**Hon. Sue Alexander**
*Commissioner of the Superior Court of California, County of Alameda*

**Mr. Steven L. Bautista**
*Chief Probation Officer, Contra Costa County*

**Hon. Aviva K. Bobb**
*Judge of the Superior Court of California, County of Los Angeles*

**Ms. Judy Lynn Bogen**
*Attorney at Law, Beverly Hills*

**Hon. Jerilyn L. Borack**
*Judge of the Superior Court of California, County of Sacramento*

**Hon. Jeffrey Bostwick**
*Judge of the Superior Court of California, County of San Diego*

**Hon. Charles W. Campbell, Jr.**
*Judge of the Superior Court of California, County of Ventura*

**Hon. Norma Castellanos Perez**
*Commissioner of the Superior Court of California, County of Tulare*

**Ms. Patricia Chavez-Fallon**
*Director, Family Court Services, Superior Court of California, County of San Diego*

**Mr. L. Michael Clark**
*Lead Deputy County Counsel, Office of the County Counsel, County of Santa Clara*

**Hon. Becky Dugan**
*Judge of the Superior Court of California, County of Riverside*

**Hon. Leonard P. Edwards**
*Judge of the Superior Court of California, County of Santa Clara*

**Ms. Ana España**
*Supervising Attorney, Office of the Public Defender, Dependency Section, County of San Diego*

**Ms. Polly Franson**
*Executive Director, Court Appointed Special Advocates (CASA) of Fresno County*

**Ms. Keri Griffith**
*Court Program Manager, Superior Court of California, County of Ventura*

**Ms. Sharon Kalemkiarian**
*Attorney at Law, San Diego*

**Hon. Jo Kaplan**
*Attorney/As-Needed Referee, Juvenile Court, Superior Court of California, County of Los Angeles*

**Ms. Miriam Aroni Krinsky**
*Executive Director, Children's Law Center of Los Angeles*

**Mr. Kurt Kumli**
*Supervising Deputy District Attorney, Office of the District Attorney, County of Santa Clara*

**Hon. James M. Mize**
*Judge of the Superior Court of California, County of Sacramento*

**Mr. Lee D. Morhar**
*Chief Counsel, Office of Legal Services, California Department of Child Support Services*

**Hon. Arnold D. Rosenfield**
*Judge of the Superior Court of California, County of Sonoma*

**Hon. Frances Rothschild**
*Judge of the Superior Court of California, County of Los Angeles*

**Mr. David Sanders**
*Director, Department of Children and Family Services, County of Los Angeles*

**Hon. B. Tam Nomoto Schumann**
*Judge of the Superior Court of California, County of Orange*

**Hon. Dean Thomas Stout**
*Presiding Judge of the Superior Court of California, County of Inyo*

**Ms. Diane Wasznicky**
*Attorney at Law, Sacramento*

**Mr. Dale Wells**
*Family Law Facilitator, Superior Court of California, County of Riverside*

**Ms. Shannan L. Wilber**
*Executive Director, Legal Services for Children, San Francisco*

**Ms. Jane Winer**
*Senior Judicial Attorney, Court of Appeal, Second Appellate District*

**Ms. Kate Yavenditti**
*Senior Staff Attorney, San Diego Volunteer Lawyer Program*

## MISSION STATEMENT

The *Journal of the Center for Families, Children & the Courts* is a periodical dedicated to publishing a full spectrum of viewpoints on issues regarding children, families, and the interplay between these parties and the courts. Focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California.

# Contents

**x** Editor's Note

**xii** Contributors

**ISSUES FACING FAMILY COURTS**

**3** Disestablishment Suits: What Hath Science Wrought?
*Mary R. Anderlik*
Anderlik discusses the trend toward using DNA testing to disprove paternity and its consequences for parent-child relationships. After canvassing a variety of legal responses to this trend, she reviews important issues yet to be resolved.

**27** Parents With Disabilities: Problems in Family Court Practice
*Megan Kirshbaum, Daniel O. Taube & Rosalinda Lasian Baer*
After describing the statutory, judicial, and professional barriers to family court access confronting parents with disabilities, the authors recommend strategies for lowering those barriers.

**49** Effective Intervention With High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court
*Lyn R. Greenberg, Jonathan W. Gould, Hon. Robert Alan Schnider, Dianna J. Gould-Saltman & David A. Martindale*
The authors explore the proper role of mental health professionals providing treatment of children and families involved in custody and visitation cases and offer a framework for judicial officers to use in ordering and assessing appropriate treatment.

**67** The Invisible Havoc of Prenatal Alcohol Damage
*Kathryn Page*
Describing fetal alcohol spectrum disorders and the damage they cause, Dr. Page documents the child welfare system's response to these disorders and proposes practical approaches to addressing their effects.

**91** The Santa Clara County Juvenile Domestic and Family Violence Court
*Inger Sagatun-Edwards, Hon. Eugene M. Hyman, Tracy Lafontaine & Erin Nelson-Serrano*
The authors describe and evaluate an innovative court-based program designed to address juvenile domestic and family violence. Drawing on a comparison of the records of youth in the program with those of a control group, the authors conclude that the program effectively reduces recidivism.

**115** The Scope of Family Court Intervention

*Steve Baron*

A mediator argues that the family court was not designed to solve a family's problems, but changing statutory mandates and social realities require the court to intervene in the lives of families affected by substance abuse, child abuse, or domestic violence.

**ISSUES FORUM**

**133** Promoting Permanency: Family Group Conferencing at the Manhattan Family Treatment Court

*Robert Victor Wolf*

Wolf presents an overview of the Manhattan Family Treatment Court's use of family group conferencing to speed permanency planning and parental sobriety.

**149** Expected Controversies: Legacies of Divorce

*Mary A. Duryee*

The author reflects on controversies over Dr. Judith Wallerstein's work on the effects of divorce on children.

**PERSPECTIVES**

**163** Don't Go to Court, Everybody Said

*Russell Fuller*

A father describes his painful experience fighting to maintain his relationship with his children after the dissolution of his marriage.

**173** Ten Years in Family Law Court

*Pamela Besser Theroux*

A mother details the 10 years she spent in family court over custody and visitation issues.

# Editor's Note

The Judicial Council of California is pleased to present Volume 4 of the *Journal of the Center for Families, Children & the Courts*. The Judicial Council and the California courts are dedicated to improving the quality of justice and service to the people of California through informed efforts to promote equal access to the courts and equal ability to participate in court proceedings. These efforts have particular application to the family court, where many litigants represent themselves in matters in which their families' futures are at stake. The family courts, working together with court-connected professionals and the communities they serve, have been developing innovative, practical methods to increase access to the family courts for self-represented litigants, adapt to today's changing family structure, and respond to the increasing awareness of the effects of substance abuse and domestic violence on families. Priorities include expanding the use of Court Appointed Special Advocates (CASAs) in family court, improving coordination of proceedings involving children and families, and coordinating social service provision with judicial proceedings.

## ***Issues Facing Family Courts:*** *Strategies that expand access to justice and fair outcomes in judicial proceedings for California's children and families*

To cover a broad spectrum of issues, the journal has gathered articles by judicial officers, attorneys, court personnel, mental health professionals, and academic researchers. The articles provide substantive background information and suggest strategies that expand access to justice and fair outcomes in judicial proceedings for California's children and families. Leading off, Mary Anderlik discusses the trend toward using DNA testing to disprove paternity and its consequences of disrupting parent-child relationships and triggering demands for relief from financial responsibility. After canvassing legal responses to this trend, Anderlik reviews important issues yet to be resolved. Megan Kirshbaum, Daniel Taube, and Rosalinda Baer describe the statutory, judicial, and professional barriers to family court access confronting parents with disabilities and recommend reforms to lower these barriers. Lyn Greenberg, Jonathan Gould, Judge Robert Schnider, Dianna Gould-Saltman, and David Martindale explore the proper role of mental health professionals providing treatment

to children and families involved in custody and visitation cases. Pointing out the pitfalls of inappropriate mental health practice, the authors provide a framework for judicial officers to use to order and assess appropriate treatment. Next, Kathryn Page describes fetal alcohol spectrum disorders and the severe damage they cause in the lives of their victims. She documents the child welfare system's response to these disorders and proposes approaches for addressing their effects. Inger Sagatun-Edwards, Judge Eugene Hyman, Tracy Lafontaine, and Erin Nelson-Serrano describe and evaluate an innovative court-based program designed to address juvenile domestic and family violence, concluding that the program is effective in reducing repeat offending. Steve Baron winds up the focus section with a look at the scope of the family court's intervention into families' lives. He argues that, though the family court was not designed to solve a family's problems, changing statutory requirements and social realities require the court to intervene more actively in the lives of at-risk families.

The second section of the journal is a forum for addressing important and timely issues relevant to children and families in the court system that fall outside the focus topic's scope. Here, Robert Victor Wolf of New York's Center for Court Innovation presents an overview of the Manhattan Family Treatment Court's use of family group conferencing to speed permanency planning and parental sobriety. Psychologist Mary Duryee then reflects on controversies among professionals over Dr. Judith Wallerstein's work on the effects of divorce on children.

The Perspectives section dissects two family dissolutions and illustrates the difficult issues that arise in cases with high conflict. Russell Fuller describes his painful experience fighting to maintain his relationship with his children after the dissolution of his marriage, and Pamela Besser Theroux details the 10 years she spent in family court over custody and visitation issues.

The journal's goal is to disseminate information and encourage scholarly discussion of issues concerning children and families in the California court system. Although focusing on issues of national importance, the journal encourages a dialogue for improving judicial policy in California. We hope that the journal continues to fulfill its mission as a useful information and research tool and provider of thought-provoking perspectives. We welcome comments and suggestions for improvement.

*—Corby Sturges*

# Contributors

**Mary R. Anderlik, J.D., Ph.D.,** is an associate professor at the Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine. She received her J.D. from Yale Law School in 1989 and her Ph.D. from Rice University in 1997. Her research is currently focused in the area of genetics and ethics.

**Rosalinda Lasian Baer** is a custody analyst in the National Resource Center for Parents with Disabilities at Berkeley's Through the Looking Glass. She previously was an advocate for mental health patients' rights and a staff member of the Administrative Office of the Courts' Center for Judicial Education and Research. Her advocacy interests include the rights of parents with disabilities in child custody cases and mental health civil commitment and medication issues. Baer received her J.D. from the Santa Clara University School of Law.

**Steve Baron, M.A.,** a licensed marriage and family therapist, is director of Family Court Services in Santa Clara County, California, where he has worked for 21 years in the field of child custody and visitation mediation and investigation and supervises the Dependency Mediation Program. He was a primary contributor to the development of the California Uniform Standards of Practice for Court-Connected Child Protection/Dependency Mediation. Baron has taught for 16 years on the subjects of child abuse, domestic violence, and substance abuse as an adjunct faculty member of Santa Clara University. He is on the faculty of the National Council of Juvenile and Family Court Judges.

**Mary A. Duryee, Ph.D.,** a psychologist and mediator in private practice in Oakland, has published numerous articles and has taught mediation and other family law–related topics. She currently teaches at the Administrative Office of the Courts' Center for Judicial Education and Research and the National Council of Juvenile and Family Court Judges in Reno. She consults with various county and state agencies concerned with providing services to families in the family law arena. She was director of Family Court Services in Alameda County for 12 years.

**Russell Fuller** is a freelance writer who has published memoirs, articles, film and book reviews, and award-winning photographs. Raised and schooled on the East Coast, he moved to Northern California in 1968. Because a court decision allowed his ex-wife to move their young son and two daughters east in 1999, Russell recently moved to central New Jersey to live close to his kids.

**Jonathan W. Gould, Ph.D.,** is in private practice in Charlotte, North Carolina, and specializes in child custody and child abuse and maltreatment evaluations. He is author of *Conducting Scientifically Crafted Child Custody Evaluations* (Sage Publ'ns 1998) and co-author, with Allan E. Barsky, of *Clinicians in Court: A Guide to Subpoenas, Depositions, Testifying, and Everything Else You Need to Know* (Guilford Press 2002). Gould has authored some 20 articles on child custody evaluations and is presently completing a book with David Martindale on that subject.

**Dianna J. Gould-Saltman** is a principal in the Los Angeles firm of Gould-Saltman Law Offices, L.L.P., specializing in mediation and litigation of family law issues. Gould-Saltman is a certified family law specialist and a fellow of the American Academy of Matrimonial Lawyers. She currently serves as programs vice-president of the American Academy of Matrimonial Lawyers, Southern California Chapter, and vice-chair of the Executive Committee of the Los Angeles County Bar Association Family Law Section.

**Lyn R. Greenberg, Ph.D.,** specializes in work with children and families involved with the courts. She performs child custody evaluations and evaluations of alleged abuse, as well as provides specialized treatment for court-involved children and families. She has written and lectured both in California and nationally on forensic psychology, professional ethics, child custody evaluation, and court-related treatment. Her publications include "The Treating Expert: A Hybrid Role With Firm Boundaries," co-authored with Jonathan W. Gould (32 Prof. Psychol.: Res. & Prac. 479 [2001]). Greenberg is a member of the Standing Subcommittee on Children's Issues (Los Angeles Area) of the State Bar of California Family Law Section's Executive Committee. She chairs the Forensic Committee of the Los Angeles County Psychological Association.

**Hon. Eugene M. Hyman** is a judge in the Superior Court of California, County of Santa Clara, where his legal interests have focused on delinquency and the related issues of substance abuse, mental health, and domestic violence. He has extensively lectured and written on these topics in Canada, Australia, and the United States. He received his J.D. in 1977 from the Santa Clara University School of Law and was in private practice until his appointment in 1990 to the Santa Clara County Municipal Court.

**Megan Kirshbaum, Ph.D.,** is executive director and founder of Berkeley's Through the Looking Glass (TLG) and co-director and custody specialist of TLG's National Resource Center for Parents with Disabilities. She also has been a family and infant-parent therapist in the disability community since 1974—work that grew out of her experience as a spouse and parent of people with disabilities. She developed TLG's model intervention projects and has been principal investigator of most of its many studies regarding parents with disabilities and their children. Kirshbaum was the 1996 recipient of the Betts Award, the primary national award in the disability field.

**Tracy Lafontaine, M.S.,** is a program manager with the Superior Court of California, County of Santa Clara, assisting in the development and implementation of a new computerized case management system for the court. She holds an M.S. degree in criminal justice administration from San Jose State University. She previously was an analyst with the Administrative Office of the Courts, Center for Families, Children & the Courts, where she assisted in the programming and analysis of state-level data on contested child custody cases. Lafontaine also assisted in the overall program design, data collection, and statistical evaluation of the Santa Clara County Juvenile Domestic and Family Violence Court program.

# *Contributors, continued*

**David A. Martindale, Ph.D., A.B.P.P.,** is a diplomate in forensic psychology, American Board of Professional Psychology. For 16 years he performed court-appointed evaluations of comparative custodial fitness in New York. He now is in private practice in New Jersey as a forensic psychological consultant to attorneys and psychologists. His work is concentrated in the areas of child custody, professional ethics, and malpractice. He regularly lectures on custody-related topics and has authored or co-authored numerous books and articles. Martindale is an adjunct clinical supervisor in the graduate program in psychology at John Jay College of Criminal Justice of The City University of New York and has taught graduate courses in ethical issues in forensic psychology there. He is also an adjunct clinical professor of psychiatry at the State University of New York at Stony Brook.

**Erin Nelson-Serrano** received her master's degree from San Jose State University. She presently works as a juvenile probation officer in Santa Cruz County.

**Kathryn Page, Ph.D.,** chairs the Fetal Alcohol and Drug Spectrum Task Force in Santa Clara County and co-founded the FASD diagnostic clinic in that county's hospital. Through a joint project of the clinic and the Family Drug Treatment Court of the Superior Court of Santa Clara County, she is currently engaged in screening clients' children for signs of neurological impairment characteristic of fetal substance exposure. Page consults with agencies, families, and individuals affected by fetal alcohol damage and is in the process of forming another diagnostic clinic with targeted treatment for children with FASD. She is the adoptive mother of a 22-year-old with fetal alcohol damage.

**Inger Sagatun-Edwards, Ph.D.,** has been chair of the Administration of Justice Department at San Jose State University since 1992. She received her M.A. in 1971 and her Ph.D. in 1972 from Stanford University. She has written more than 50 scholarly publications, primarily in the areas of child abuse, family violence, and juvenile justice, and is the co-author, with Leonard Edwards, of the book *Child Abuse and the Legal System* (Wadsworth Publ'g 1995). She is a past president of the Western Society of Criminology. In 1999, as a senior Fulbright scholar, she studied child abuse and family violence legislation in Norway and legal and social welfare responses to fetal drug exposure and parental child abductions.

**Hon. Robert Alan Schnider,** Superior Court of California, County of Los Angeles, received his J.D. from Boalt Hall School of Law, University of California, Berkeley, in 1970. A certified family law specialist, he was in private practice until his election as a commissioner in 1981. Elevated to superior court judge in 2002, he has served in the Family Law Department at the Central Civil (Mosk) Courthouse throughout his career on the bench. Judge Schnider has lectured and taught extensively and has received several awards, including the Judicial Officer of the Year Award in 1997 from the State Bar of California Family Law Section and Outstanding Jurist Award in 2000 from the Los Angeles County Bar Association.

**Daniel O. Taube, J.D., Ph.D.,** is associate professor in the forensic family track at Alliant International University, California School of Professional Psychology, San Francisco Bay Area Campus. His interests include child protection, child custody, the rights of parents with disabilities, and law and ethics in mental health care. He is a consultant to the National Resource Center for Parents with Disabilities. Taube received his J.D. from Villanova University in 1985 and his Ph.D. in clinical psychology from Hahnemann University in 1987 as a member of the Hahnemann/Villanova Joint Psychology and Law Graduate Program.

**Pamela Besser Theroux,** born and raised in the Chicago area, has a bachelor of science degree from Southern Illinois University. After moving to California in 1975, she worked as an elementary school teacher and in the high-tech industry. In 1988 she began working on family law legislation with the Coalition for Family Equity in Los Angeles and testified at the Judicial Council's statewide gender bias hearings in 1988–1989. Since 1993 she has testified numerous times in Sacramento on family law legislation involving mediation, joint custody, and the right to relocate. In April 2002 she testified in support of Senator Sheila Kuehl's Senate Bill 1406, which would have made mediation uniform in the entire state. She has appeared on a number of television shows, including *The Oprah Winfrey Show,* and news broadcasts focusing on custody issues. She now works part time as a family law paralegal and continues to work on family law legislation in Sacramento. She is remarried with a 13-year-old daughter, Jordyn. Her son, Josh, is now 21 and a senior in college in Washington State.

**Robert Victor Wolf** is director of communications at the Center for Court Innovation, a public-private partnership that serves as the independent research and development arm of the New York State Unified Court System. Previously a reporter, a columnist, and an editor, Wolf has written numerous articles and white papers about the criminal justice system. His work has appeared in the *New York Times, Justice System Journal, Judges' Journal,* and *Texas Journal of Corrections.* His article "Fixing Families: The Story of the Manhattan Family Treatment Court" appeared in the 2000 edition of the *Journal of the Center for Families, Children & the Courts.* A graduate of Columbia University, Wolf is also the author of two books for young adults, *Capital Punishment* (Chelsea House 1997) and *The Jury System* (Chelsea House 1999).

# ISSUES FACING FAMILY COURTS

# Disestablishment Suits

## *What Hath Science Wrought?*

**Mary R. Anderlik, J.D., Ph.D.**

*Institute for Bioethics, Health Policy and Law, University of Louisville School of Medicine*

Developments in science and technology are raising questions about established principles and procedures for determination of parentage. DNA-based identity testing, long used in the public realm to establish father-child relationships, is increasingly employed to challenge legal paternity and its attendant obligations. So-called disestablishment suits have ignited a charged debate centering on the interests of children and the rights of fathers. This article begins by describing the context of the debate, then provides an overview of the complex legal landscape of disestablishment suits, discussing factors contributing to the issue's complexity as well as underlying policy considerations, the "legislative backlash" generated by court decisions restricting disestablishment suits, and the solutions proposed in the revised Uniform Parentage Act and the American Law Institute's *Principles of the Law of Family Dissolution.* The article concludes with a review of points that remain to be considered,

*Continued on page 4*



The first wave of DNA-based identity testing coincided with an aggressive program of paternity establishment for nonmarital children receiving federal welfare benefits. Although this development was significant, the public purposes behind testing were well understood, the rules for testing were relatively clear, and the program was consistent with long-standing public policy commitments to establishing family relationships and promoting responsibility. The second wave of testing to verify or disprove paternity in child support proceedings that is currently under way is quite distinct from the first: it is driven by private interests, the rules for testing are unclear, and the genetic test results increasingly have the effect of disrupting, or "disestablishing," parent-child relationships and triggering demands for the elimination of an adult's financial responsibility for a child. Courts and state legislatures are searching for ways to reconcile the competing rights and interests of parents, nonparents, and children. So far, there is little evidence of consensus.

In collaboration with the Hastings Center, an independent, interdisciplinary research institute located in Garrison, New York, the Institute for Bioethics, Health Policy and Law at the University of Louisville School of Medicine is studying the ethical, social, and legal issues surrounding DNA-based identity testing as it affects families. In particular, we are working with a group of expert consultants in law, philosophy, social science, and social services to advance understanding of these issues and contribute to a coherent policy response. At this point we are not making the case for a particular position. We offer, instead, a review of developments in science, society, and the law and an overview of legal and policy options. We invite comment from those in the field.

### THE CHALLENGE FROM SCIENCE

The current problem consists of a confrontation with the potentially destabilizing effects of DNA-based identity testing and, more particularly, paternity testing. This problem would not exist were it not for advances in science and technology. The Human Genome Project has accelerated the development of techniques for cheap, efficient analysis of DNA and comparison of genetic profiles. Scientists and engineers are constantly refining those techniques, so that testing is becoming ever faster, cheaper, and more widely

*Continued from page 3*

including standards for genetic testing and significant privacy issues, the requirements for standing to bring a disestablishment suit, the elements of the best-interest analysis, the handling of arrearages and claims for recoupment, fraud and related actions against the mother, alternative dispute resolution, and arguments regarding the proper use of estoppel. ■

*This article draws on research funded by the National Institutes of Health, Grant No. R01 HG02485-01, "Genetic Ties and the Future of the Family." The views expressed are the author's own and do not represent the opinions or policies of the National Institutes of Health.* *Please direct correspondence regarding this article to Mary R. Anderlik, Institute for Bioethics, Health Policy and Law, University of Louisville, 501 East Broadway, Suite 310, Louisville, KY 40202 (tel.: 502-852-4983; fax: 502-852-4963; e-mail: mrande02@gwise.louisville.edu).*

*The author wishes to thank Dr. Laura Gahn of Identigene for her guidance on technical issues and Mark A. Rothstein, director of the institute, for his guidance and support throughout the writing of this article and for suggesting the typology of positions used in the second section. The research assistance of Ms. Elizabeth Stepian is gratefully acknowledged.*

available. Even with existing technologies, analysis can be performed on DNA extracted from almost any biological material, which has important implications for privacy. While testing at one time involved a blood draw, many laboratories now offer testing with sample collection by mail (sometimes referred to as "mail-order" or "home" testing) using cheek swabs. Testing of hair and other materials easily collected without the knowledge or cooperation of the subject is increasingly available.[1]

The Human Genome Project has also increased interest in genetic identity. For example, there is a greater emphasis on the genetic family as an aspect of health care. Diagnostic testing for inherited conditions associated with heightened disease risk will sometimes produce ambiguous results, and a thorough family medical history or testing of genetic relatives may provide information useful in clinical decision making. Likewise, DNA testing and genetic relationship are important in identifying prospective donors who match on relevant biological properties for the purposes of organ and tissue transplantation.

The new emphasis on genetic identity is not confined to the clinical context. It has reinforced the view that biological relationship and parental status are tightly linked. DNA-based identity testing has now become part of the culture, with paternity testing a staple of talk shows and daytime and primetime dramas.[2] Media attention and the marketing efforts of laboratories have contributed to demand for testing by sowing suspicion about paternity and fidelity and suggesting that testing is a natural and acceptable response to suspicion. Given the growing influence in both the law and popular culture of genetic thinking and "genetic essentialism," it is easy to slide into the view that genetic contribution is the essence of family and fatherhood.[3] And if proof of paternity by means of genetic testing establishes a duty of support, then, the reasoning goes, exclusion through testing should end that duty.

Reliable evidence concerning the extent of misidentified paternity in the general population is not available. There are some indications that the number of cases may be surprisingly high.[4] Historically, the law has favored familial stability over genetic accuracy in attribution of paternity in circumstances where definitive proof of paternity or nonpaternity was not obtainable. Science and technology have all but eliminated these circumstances. Should the law change as well?[5]

## A REVIEW OF THE LEGAL LANDSCAPE

The stories of men such as Gerald Miscovich,[6] Dennis Caron,[7] and Morgan Wise[8] have been the catalysts for debate concerning a husband's power to terminate legal responsibility where testing reveals or confirms the absence of biological relationship. Cases in which men attempt to end child support obligations assumed in connection with a voluntary acknowledgment of paternity raise a similar set of issues. Both kinds of cases create concerns

about the psychological, emotional, and financial welfare of the children and adults involved as well as concerns about fairness. Furthermore, the financial importance of a parentage determination does not end with child support; social security, health insurance, survivors' benefits, military benefits, and inheritance rights hang in the balance. There are also broader social policy considerations, even where the disappearance from the scene of a presumed, an acknowledged, or an adjudicated father has no consequences for the public purse. If stable family units are the foundation of a well-ordered society, the destabilization of the family may lead to social chaos. Nevertheless, the possible consequences of such policies have not been widely recognized. While the men bringing delayed disestablishment suits have often been unsuccessful, losses in court have sometimes translated into victories in the legislature.

## A COMPLEX BACKGROUND

A long and convoluted history lies behind the presumption that a husband is the legal father of the children born to his wife during their marriage, a presumption commonly referred to as the "marital presumption" or "presumption of legitimacy," and with advances in testing, the application of the presumption has become a matter of increasing perplexity. California may be unusual among the states in having a "conclusive" marital presumption, but in fact even in California the situation is not as simple as the adjective might suggest. Presumptions linked to marriage are supplemented by other presumptions based on a man's conduct toward a child. For example, in California, as in many states, a presumption of paternity arises when a man receives a child in his home and openly holds the child out as his natural child.[9]

In virtually every state, the law in this area is exceedingly complex. There are at least four sources of complexity: statutes burdened with vestiges of legal evolution, the interplay between family law and rules of civil procedure, the application of equitable doctrines, and constitutional constraints.

### *Statutes Burdened With Vestiges of Legal Evolution*

Historically, the marital presumption was perhaps best characterized as a rule of evidence. Prior to the development of blood tests capable of excluding biological relationship, marital status was a reasonable proxy for biological relationship in circumstances in which a man's status as progenitor could seldom be established with certainty. Where the husband's paternity was a physical impossibility (that is, in cases of absence, impotence, or sterility), the presumption did not apply or could be rebutted. Yet that was not the whole story; the courts developed supplemental rules affecting standing and admissibility of evidence that blocked challenges to legitimacy even in cases where the biological fatherhood of a man other than the husband was all but certain. Hence, other social policy considerations, such as protecting the institution of marriage or the welfare of children, have long played a role in the application of the presumption. With the emergence of human leukocyte antigen (HLA) testing and then genetic testing, some courts "converted" the presumption to a substantive rule of law intended to protect the integrity of the marital family or secure the welfare of children.[10]

The process of historical evolution has, unfortunately, left the law in many states with distinctions that make little sense regardless of rationale. For example, in keeping with the traditional formulations removing cases of physical impossibility from the scope of the presumption, California's conclusive presumption operates only if husband and wife are "cohabiting" and the husband is not impotent or sterile.[11] A related statutory provision allows for challenges based on blood tests, but only for two years after the child's birth.[12] There is little logic here. If marriage with cohabitation operates in paternity determination as a proxy for biological paternity, then blood-test evidence of the husband's exclusion as a potential biological father, like evidence of impotence or sterility, should remove the case from the scope of the presumption. If marriage with cohabitation matters in paternity determination for

social policy reasons, then the same restrictions should apply to all efforts to disestablish the husband as legal father. Given the statutory language and structure, though, at least one court has ruled that proof of impotence or sterility is not subject to the two-year limitation on motions for blood tests.[13]

In addition, in many states, statutory provisions that relate to presumptions of paternity and actions to establish the existence or nonexistence of paternity, standing to invoke or challenge presumptions, and time limits on these challenges have been drawn from diverse sources over time and are lodged in multiple sections of the family law code or title. For example, in California, the conclusive presumption has been grafted onto provisions drawn from the Uniform Parentage Act (UPA).[14] In other states, provisions relevant to paternity establishment and disestablishment may also be found in the law of trusts and estates.[15] In Florida, the law presents a confusing jumble of presumptions and rules relating to obligations of support derived from the common law and statutory procedures for establishment of paternity that can be traced back to a bastardy law enacted in 1828.[16] It is not always clear how these provisions are to be reconciled.

### *Interplay Between Family Law and Rules of Civil Procedure*

The mutual adjustment of provisions in the family code—or a related body of substantive law—and rules of civil procedure becomes an issue when a man's status as legal father has been created or affirmed by a judgment or order, typically at the conclusion of a divorce or paternity proceeding. For example, in 1993 the Alabama Supreme Court denied relief to a man who had reason to question his biological relationship to the child in a paternity proceeding but waited nine years to challenge the paternity judgment with DNA evidence.[17] The court relied on a general rule of civil procedure rather than any limitation in the law concerning parentage determination itself; the procedural rule required that a motion to reopen a judgment owing to mistake or newly discovered evidence be filed within a "reasonable period of time." In 1994, apparently as a reaction to the case, the Alabama Legislature passed a law that allows a defendant declared a legal father in a paternity proceeding to reopen the case at any time with "scientific evidence" of nonpaternity.[18] Likewise, the Maryland Court of Appeals ruled that a statutory provision concerning paternity was subject to a procedural rule that limited the authority of trial judges to alter or amend a final judgment.[19] The state legislature "reversed" this ruling by passing a law making an exception to the finality of paternity orders where a blood or genetic test establishes the exclusion of the individual named as the father in the order.[20]

In a number of cases, courts have refused to find in a woman's silence or reassurance concerning paternity the kind of extrinsic fraud necessary to prompt the reopening of a final judgment. Morgan Wise tried this strategy and lost. According to a Texas court, Wise's allegations that his ex-wife concealed and lied about affairs did not establish extrinsic fraud; rather, these were "allegations of intrinsic fraud concerning an issue that was admitted, uncontested, and settled in the divorce proceeding."[21]

### *Application of Equitable Doctrines*

In addition to the doctrine of res judicata, courts may invoke a number of equitable doctrines to change the outcome in paternity cases. In the context of disestablishment cases, the most significant may be equitable estoppel. *Clevenger v. Clevenger*[22] is perhaps the leading case in California on estoppel in parentage disputes. According to the court, the elements that must be proven to estop a husband from asserting nonpaternity to avoid a child support obligation are (1) the husband represented himself to the child as the child's *natural* father, (2) the husband intended that his representation be accepted and acted upon by the child, (3) the child relied upon the representation and treated the husband as father, and (4) the child was ignorant of the true facts.[23] The application of the doctrine in these circumstances is justified by the benefits already enjoyed by the husband and, perhaps more important, the prejudice to

the child's interests. The "consequences and detriments" of the representation include depriving the child of an action to hold the natural father liable for support at birth (through the mother) and inducing the child to accept the husband as the child's natural father and render to him a child's affection and love, with the concomitant "reasonable expectation of care, support and education until adulthood."[24] A later case adds that an express representation of paternity is not required where such a representation can be inferred from the husband's conduct.[25]

In cases that turn on the application of the doctrine of equitable estoppel, the main points of contention are whether the doctrine applies where the man as well as the child was ignorant of the "true facts" and whether and how financial detriment enters the picture. On the first point, the courts appear most ready to estop a presumed, an acknowledged, or an adjudicated father asserting nonpaternity where the man knew or should have known that he was not the natural or biological father much earlier in time and failed to act. On the second point, courts appear most ready to estop where the alleged detrimental reliance is at least in part financial and there is reason to believe that another man would have been pursued for support had the presumed or acknowledged or adjudicated father taken himself out of the way.[26]

Some commentators urge courts to consider possible gender bias as they exercise their equitable powers. When women advance estoppel arguments against husbands and others on behalf of children, they stand a good chance of losing, whereas men have generally been successful with estoppel arguments when women seek to oust the men from relationships with children. In these cases, there may be a tendency to label the men dupes and the women schemers, with the inequitable application of the doctrine of estoppel the possible result.[27]

### *Constitutional Constraints*

Presumptions and other rules affecting parentage determination may impinge on constitutional rights. Usually, challenges are based on the due process clause of the U.S. Constitution or a parallel provision in a state constitution. One common scenario involves a contest between a presumed father and a putative biological father, where establishment of the paternity of the latter amounts to disestablishment of the former.

The most famous case of this nature is *Michael H. v. Gerald D.,*[28] decided by the U.S. Supreme Court in 1989. The issue in *Michael H.* was whether California's conclusive presumption of paternity could survive a due process challenge by a man who had obtained proof of his biological paternity through genetic testing and had taken steps to develop a parent-child relationship. A fractured Supreme Court upheld the California law. Justice Scalia, writing for the plurality, construed the due process clause as a source of protection for *traditional* values. With reference to a line of Supreme Court cases recognizing fathers' rights in relation to nonmarital children, he wrote that those rights arose from the "sanctity" of the "unitary family" rather than biological contribution. Other justices were more solicitous of interests based on biological connection plus some kind of relationship.

*Dawn D. v. Superior Court,*[29] decided by the California Supreme Court in 1998, involved a triangle similar to the one in *Michael H.* Since the husband and wife were not cohabiting at the time of conception, the conclusive presumption did not apply. The challenge was to a statutory provision derived from the UPA, which incorporates a more expansive and less conclusive kind of marital presumption, as well as other grounds for a presumption of paternity. Standing to rebut this presumption is limited to mothers, children, and presumed fathers. The putative biological father in this case did not qualify as a presumed father of any description because the mother and her husband had prevented him from developing a relationship with the child. The court ruled that biological fathers do not have a constitutionally protected liberty interest in being allowed to form a parental relationship, and hence the restrictions on standing were valid.[30]

Due process considerations were also a factor in *Brian C. v. Ginger K.,*[31] a contest between a man claiming the protection of the conclusive marital presumption and a putative biological father who qualified as a presumed father because he had a pre-existing relationship with the mother and the child. The court said that, under these circumstances, the state interest in the integrity of the family was relatively weak; in contrast to *Michael H.,* there was no extant marital union at the time of the child's birth, although the marital family re-formed thereafter. Hence the due process rights created by a biological connection plus a social relationship would be strong enough to preclude application of the statute to deny the putative biological father the opportunity to test his claims through genetic testing.

In a third variation, in *Susan H. v. Jack S.,*[32] an alleged biological father used the conclusive marital presumption as a defense to a paternity action brought by the child's mother, and the mother countered that its application to block her suit would violate the child's due process rights. She asserted that the child's protected interests included an interest in knowing the truth. In turning aside the due process challenge, the court noted that in this case the biological facts were fairly clear even in absence of a judicial declaration and stated that it was "questionable whether it is to the child's benefit, emotionally and developmentally, to establish biological parenthood for some abstract interest in truthfulness." The U.S. Supreme Court dismissed similar interests in *Michael H.,* and other courts have rejected related claims in cases involving access to adoption records.

The case law in other states is consistent with this pattern, with wide variation in the kinds of interests recognized as constitutionally protected and the strength of the protection accorded those interests when they conflict. In 1993, an Ohio court ruled that a statute *granting* a putative biological father legal standing to establish paternity in relation to a child within an intact marital family violated the due process clause of the state constitution by infringing on the right to marital privacy and the right to raise children without state-authorized intrusion. The court found the state's interest in determining paternity strictly on the basis of genetics "at most insubstantial, if not completely nonexistent."[33] One year later, in striking down a state statute *denying* a putative father standing to establish paternity, the Texas Supreme Court expressed the view that the state's interest in minimizing familial disruptions may have "had merit in an earlier era when the true biological father could not be established with near certainty and when illegitimacy carried a significant legal and social stigma," but that it no longer did.[34]

Rules affecting determination of paternity may also be challenged on equal protection grounds. In Florida, the procedure for establishment of paternity for children born "out of wedlock" can be traced back to the Florida Bastardy Act. As late as the 1970s, the right to bring an action was limited to unmarried women. A married woman who wished to establish the paternity of a man not her husband challenged this restriction. The Florida Supreme Court, in *Gammon v. Cobb,* noted the potential for "anomalous" situations where "the reputed father of an illegitimate child born to his wife can attack the child's parentage and be relieved of the obligation to support the child, but at the same time the wife may not maintain a suit to compel the putative or natural father to provide support for the child."[35] Given that the purpose of the law was to protect the interests of (illegitimately conceived) children and impose a support obligation on natural fathers, the portion of the law limiting actions to unmarried women was unconstitutional.

Equal protection issues also arise in connection with "backlash" laws of the type discussed in greater detail later in this article. An early example illustrates the point. As noted above, the Alabama Legislature, as a reaction to a specific case, passed a law allowing a defendant declared a legal father in a paternity proceeding to reopen the case at any time with scientific evidence of nonpaternity.[36] By its terms, the law benefits only male defendants; it would not appear to allow a mother or child to reopen a case on the basis of scientific evidence. In fact, an equal protection challenge to the law surfaced in the case of *S.M.V. v.*

*D.W.M.,*[37] but the appellate court declined to address the issue as it was not raised before the trial court.

## POLICY CONSIDERATIONS

A basic question underlying much of the policy debate regarding parentage determination is, To what degree should biology control the formation of families and, more particularly, the award of the rights and responsibilities of parenthood? The possible responses can be organized in terms of four positions.

***1. Biological imperative.*** For those who adopt this position, legal rules and outcomes are, or ought to be, dictated by biology. Parenthood and the rights and responsibilities associated with parent-child relationships are seen as necessarily grounded in and flowing out of biological relationships. This is an ancient and still highly influential way of thinking about the family. On the one hand, this position may reflect a view that biological connection itself creates a bond between parent and child so strong that separation is virtually unendurable, so powerful that the biological parent is compelled to subordinate his or her own interests to those of the child. Therefore, biological matching of parent and child must, in some sense, advance the welfare of the child, since the parent known or revealed as having a mere social connection to the child will inevitably fail to fulfill the child's deepest needs. This view may be fostered and strengthened by the increasing attention to genes and genetics in the media. On the other hand, the biological imperative may be viewed solely in terms of financial responsibility. Engaging in activity that may produce a child creates a duty to pay; conversely, one should not be required to pay for a child for whom one is not causally responsible.

***2. Biological presumption.*** For those who adopt this position, all other things being equal, biology controls. In other words, claims based on biology may sometimes be limited to accommodate important individual rights and interests (child or adult) or to serve the interests of society, but the burden of proof is clearly on the one arguing for a departure from biology. By making biology nearly, but not quite, controlling, it is possible to preserve some of the benefits associated with having a "bright-line" rule—for example, efficiency in decision making, with fewer cases going to the courts and faster resolution when they do. Also, if the belief that genetically related adults are likely to be better nurturers of children than other adults has any truth to it, there is reason to favor biology, with exceptions permitted only to avoid bad results or serious violations of rights in particular cases. By allowing some room for rights and other types of claims not based in biology, this position is in line with broader trends in law and public policy concerning the family. For example, intention has become increasingly important in family law, as reflected in cases dealing with assisted reproduction. In addition, there has been a movement to make the best interest of the child the standard for decision making in areas of law affecting children despite worries that it is vague and open to bias in application.

***3. Biological relevance.*** *Relevance* means that biology counts—along with other factors. Biology is entitled to some weight, but it is not the whole story nor perhaps even the most important part of the story. The view that biological relationship is the exclusive determinant or essence of the parent-child relationship has never been without challenge. The Romans used the term *alumnus* to designate an abandoned child taken in and raised by a biological stranger. Inscriptions establish that such children were cherished, and indeed, such an arrangement could be cited as a model of the kind of disinterested love and kindness characteristic of the highest forms of human relationship.[38] A contemporary parallel would be the celebration of "psychological parenting." As Goldstein et al. define the term, "for the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation."[39] A reduction in the emphasis on the biological tie may also reflect greater comfort

with the idea that, through their relationships with children, presumed fathers may incur responsibilities that continue even after the biological basis for the relationship is revealed as an illusion. While the law cannot force men to continue as psychological parents, it could foster and reinforce an expectation that bonds of affection and care nourished over time will sustain the relationship once the initial shock of a finding of biological exclusion has passed.

***4. Biological indifference.*** Opposite the biological imperative is the position that biology is a matter of indifference. According to this view, policy, and outcomes in particular cases, should be dictated by one's intention to parent, one's engagement in parenting behavior, considerations of child welfare, or social factors such as the goal of strengthening the institution of marriage. If biology is to be considered at all, it is solely as a matter of convenience. For example, for pragmatic reasons, a society might decide that children should stay with birth parents unless and until some kind of dispute arises. In the event of dispute, the judge charged with assigning parental rights and responsibilities would ask which person would be the better parent—that is, the more nurturing parent, the more consistent presence, the one better equipped financially to support the child, and so on. Biological relationship to the child would have no independent significance.

The "biological imperative" position seems to show up most frequently in concurring or dissenting opinions, suggesting that it is somewhat idiosyncratic among judges. Concurring in part and dissenting in part in a disestablishment case, a justice on the Alabama Supreme Court wrote: "While debate continues over the relative influences of heredity and environment, one thing is clear—the mystic bonds of blood are strong. The strength of these bonds is illustrated in various ways and is observable in ordinary experience. A familiar example is that of adopted children who are nurtured to maturity by exemplary adoptive parents, but, nevertheless, ultimately feel compelled to seek out their biological parents. . . . A strong sense of personal identity is an asset, and personal identity derives in large measure from knowledge of, and association with, individuals of biological kinship."[40] Allied with this view are statements that science promises truth concerning fatherhood. For example, in his *Michael H.* dissent, Justice Brennan wrote that California law "stubbornly" insisted on labeling the mother's husband as father in the face of evidence showing a 98 percent probability to the contrary.[41] The idea of a biological imperative also appears to exert considerable influence on some state legislators, as discussed in the next section.

The two intermediate positions are, perhaps predictably, given wider expression. Their influence on legislators can be detected in "hybrid" statutes that make biology determinative for a limited period of time, and their influence on judges is reflected in a willingness to moderate the effects of bright-line rules in disestablishment cases. *In re Paternity of Cheryl,* decided by the Supreme Judicial Court of Massachusetts in 2001, is a good illustration.[42] In that case, a man who became a legal father by means of a voluntary acknowledgment moved to set aside the judgment based on genetic tests obtained five years later. The court ruled against him in light of his failure to exercise his right to genetic testing before acknowledgment, evidence of the development of a father-child relationship, and his persistence in the relationship even after he had reason to suspect an absence of biological connection. The court affirmed the public interest in the finality of paternity judgments, citing the best interest of the child. Furthermore, in the best-interest analysis the court stressed stability and continuity. The court was careful to note the empirical foundation for this weighting of factors: "Social science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships. This holds true even where the father is a noncustodial parent or where the stable relationship is with an individual not genetically linked to the child."[43] Yet the court did not declare biology irrelevant. Having noted the anomaly of continuing to enforce a legal

relationship that was based solely on an asserted biological connection in the face of proof of that connection's absence, the court suggested that a different result might be required if a man challenged a paternity judgment promptly upon obtaining information raising doubts about the judgment's biological basis.

Intermediate positions allow for considerable flexibility and may be associated with greater receptivity to nonexclusive family structures. In Louisiana, cases brought by marital children seeking benefits based on recognition of the paternity of their extramarital biological fathers opened the door to a variety of actions, eroding the "fiction" that the legal father was the only father.[44] But the legal or presumed father did not simply go away. The Louisiana courts recognize the potential for continuing responsibilities and rights if no disavowal is made within the statutorily prescribed period and if this continuation is in the best interest of the child.

The judgment whether the legal or presumed father's continued involvement would be in the child's best interest is context-specific. For example, in *Geen v. Geen,*[45] the legal father and primary custodial parent retained that status even after testing proved that another man, who eventually married the mother, was the biological father, and even after the mother and her new husband sought custody. The decision rested on a best-interest analysis that gave most weight to psychological parenthood: "Geen has provided Ryan with a stable, wholesome environment, a permanent custodial home, and a close and continuing, loving relationship since Ryan's birth, always putting Ryan's interest above his own. He has fed him, dressed him, bathed him, provided medical care, and selected a school, after thoroughly investigating that school. From the very beginning, he has encouraged and facilitated a close and continuing relationship between Ryan and his other two parents."[46]

As might be expected, adoption of the position of biological irrelevance is rare in law. Both Justice Scalia in his *Michael H.* opinion and the Ohio court that held unconstitutional a challenge to a husband's paternity use language suggestive of that position, but in the specific context of a third-party challenge to the sanctity of the intact marital family.[47] In a number of states, it is at least clear that biological relationship is not privileged. The Supreme Court of Hawaii recently declared that the presumption of paternity based on genetic testing "is not more important" than other presumptions, such as the one based on marriage.[48] The Supreme Court of Colorado has strongly affirmed that the best interest of the child must be the paramount consideration throughout any paternity proceeding.[49]

California's semiconclusive, semirebuttable presumption of a husband's paternity within marriage suggests a position of biological relevance: biology is not the whole story or even the most important part of the story. The guiding philosophy of the state statutory scheme might be described as "biology will control determination of paternal responsibility for a limited period early in a child's life" and thereafter the "predominant consideration" will be social relationship.[50] An alternative reading, based on the case law, is that biology plus a social relationship always controls, absent a powerful countervailing private interest supported by the public interest. Courts have readily suspended the operation of the marital presumption when they find that the underlying policy of preserving families is not advanced.[51] This is most likely to occur where a marriage has fallen apart before the battle over paternity, although one court has suggested that the state's interest in preserving and protecting the dignity of parental relationships comes into play "*especially* when a marriage is being dissolved and instability is being introduced into a child's life."[52] In cases involving nonmarital children, there are frequent statements that biology is not as important as an ongoing parent-child relationship.[53]

In California, as in other states, there is considerable turbulence at the moment. In a case decided in 2002, the San Francisco Department of Human Services sought to disestablish a willing, albeit somewhat erratic, presumed father. (This is notable because in cases where a man is subject to a child support order and there is no other potential father

in the picture, the state child support enforcement authority, at least, is typically inclined to ignore biology.) *In re Raphael P.*[54] involved a nonmarital child. Initially, the appellate court in *Raphael P.* concluded that the California statute compels judges to conform legal status to the biological evidence. However, a footnote to that ruling suggested some wrestling with the implications of landing at various points on the spectrum of positions:

> We recognize that the policy implications of any given means of determining paternity (and maternity) are tremendous. When confronted with a man who has every reason to believe he is a child's biological father and who has developed a strong paternal relationship with a child who has no other parent able to assume parental responsibility, it may seem quite difficult to justify termination of the existing relationship solely because of a belated discovery of the absence of a biological tie. On the other hand, obvious problems would be created by a statutory scheme that allowed any person, however unrelated, to forge a parental type relationship with a child which could then potentially be used to assert rights against the child's relatives (by blood or marriage).[55]

And indeed, on rehearing the Court of Appeal reversed itself.

In June 2002, the California Supreme Court weighed in on the issue in a different case. The question in *In re Nicholas H.*[56] was whether a presumption of fatherhood based on receiving a child in the home and holding out the child as one's own is necessarily rebutted when the presumed father seeking parental rights admits that he is not the biological father. The statute, in relevant part, provides that such a presumption "is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action" by clear and convincing evidence.[57] The court's answer to the question turned on its interpretation of the phase "appropriate action." The court ruled that an action is not appropriate where there is a presumed father who has an established relationship with and has taken responsibility for the child and there is no other candidate for the privilege and responsibility of fathering the child.

## THE LEGISLATIVE-BACKLASH PHENOMENON

Fathers' rights groups have been vocal participants in debates over the significance of genetic testing for family relationships. Cases in which men are refused release from obligations to children in the face of genetic test results excluding them as biological fathers—or, alternatively, are refused genetic testing—have prompted vigorous advocacy for change in the law. Those within the fathers' rights movement tend to view family law through the lens of criminal law. The crusade to free men of unwanted paternity in such cases is presented as a kind of "Innocence Project."[58] It is common to find the issue framed as one of justice or fairness, in the sense that evidence admissible to "convict" should also be available to "exonerate."[59]

Anger and a desire to strike back at the women involved have clearly been significant factors in the movement, and the same complex of emotions may motivate some disestablishment suits. The Web site for the group U.S. Citizens Against Paternity Fraud is the most emphatic in this regard; it compares paternity fraud to rape and includes a "Hall of Paternity Fraud Victims."[60] In media interviews and documents filed with courts, the men challenging court orders will often say that they do not necessarily want to discontinue support for a child.[61] Rather, they want to end the legal obligation to pay child support viewed as flowing to the women who deceived them in two ways, by cheating on them and by lying to them about a child's paternity.[62]

In some cases the insult seems fresh, but in others long-simmering suspicions, perhaps suppressed or contained in the interests of maintaining a valued relationship with a child, prompt action when a request is lodged for increased child support or the man starts another family.[63] The cynical interpretation is that fatherhood is embraced unless and until it becomes inconvenient. More charitably, financial

or other competing interests fuel resentment against the mother and the legal system for its imposition of responsibilities. The result is a readiness to file an action to disavow paternity, with its implicit rejection of the child, and, if need be, to end the relationship altogether. Men who experience some trigger event will find a "cultural script" to guide response to their predicament that gives little or no place for empathy, care, and caution.

Such niceties have not counted for much where anger over the outcome of a particular case has fueled fierce lobbying in the legislature for a law to correct the perceived injustice. One instance of legislative backlash occurred in Ohio. In 2000, following the uproar over the treatment of Dennis Caron,[64] Ohio passed a law requiring relief from child support orders at any time upon proof of biological exclusion. The right of action is limited to the men subject to the orders.[65] The evidence must be in the form of a genetic test showing zero probability that the man is the father of the child. A marriage to the mother or any admission or acknowledgment of paternity is irrelevant if the man was not aware of his nonpaternity at the time. The court is empowered to issue an order canceling any child support arrearages, and the man is free to commence an action to recover child support already paid. The law includes a declaration that it is a man's "substantive right" to obtain the contemplated relief.

Carnell Smith's case[66] had a similar influence in Georgia. A bill signed into law on May 9, 2002, allows a "male ordered to pay child support" to file a motion to set aside a paternity determination at any time based on newly discovered evidence.[67] Relief is mandatory if specified conditions are satisfied, e.g., testing was properly conducted, the man did not act to prevent the biological father from asserting his rights, and the man did not voluntarily assume the support obligation with knowledge that he was not the biological father.

Targeted laws set the stage for a broader assault on what is perceived as an unjust status quo. On February 20, 2002, a member of the California Legislature introduced a bill proposing a new section of the Family Code under the title "Paternity Justice Act of 2002."[68] As introduced, it included the following legislative declarations:

- In the year 2000, the State of California recognized the validity of DNA testing and created a procedure for an individual convicted of certain crimes to petition a court to reopen his or her case.
- A growing number of states now have antifraud paternity statutes permitting an individual previously adjudicated to be the father of a child to reopen his case and present or obtain DNA testing if he believes he may have been erroneously identified as the father.

The proposed bill provided that fathers' rights advocacy groups were to be consulted in development of the form used for voluntary declaration of paternity, and that the form would have to include, in underlined boldface type, a statement by the mother that the man who had signed was the only possible father (thereby establishing the basis for a charge of perjury). The core provision allowed a man previously named as a child's father in a judgment to move to vacate that judgment if genetic testing yielded a finding of exclusion after the time period for motions to vacate generally had expired. If the man was excluded as the biological father, the bill required the motion to vacate to be granted with few exceptions. The bill passed, though with modifications, such as a provision giving judges discretion to deny a motion based on the best interest of the child, but was later vetoed by Governor Gray Davis. The concept of "paternity fraud" also surfaced in a Vermont bill, introduced in the 2001–2002 session, subjecting a "person who knowingly and intentionally alleges that a person is the biological father of a child when such person knows the allegation to be false" to imprisonment for up to two years or a fine of up to $5,000, or both.[69]

## THE UPA 2000 AND THE ALI'S PRINCIPLES OF DISSOLUTION

The revised Uniform Parentage Act (UPA 2000), like the original UPA, includes a presumption of paternity

based on the existence of a social relationship plus conduct indicative of a parental relationship.[70] The UPA 2000 eliminates the rule resolving conflicts among competing presumptions according to "the weightier considerations of policy and logic" on the grounds that "the existence of modern genetic testing obviates this old approach." A proceeding to adjudicate parentage for a child with a presumed father may be commenced within two years after birth (versus five years in the original UPA), but not thereafter.[71] There is also a two-year window for challenges to voluntary acknowledgments of paternity on the basis of "fraud, duress, or material mistake of fact" once the rescission period has passed.[72] The child is not legally bound by a determination of parentage under the act unless the outcome is supported by genetic test results or he or she is represented in the proceeding.[73]

The article concerning genetic testing authorizes a court to deny a request for genetic testing where there is a presumed father if (1) the conduct of the mother or presumed father estops that party from denying parentage and (2) disproving the relationship would be "inequitable."[74] The model law provides that in making its determination, the court "shall consider the best interest of the child," to include, among other things, the length of time elapsed since the presumed father was placed on notice that he might not be the genetic father, the length of time the presumed father occupied the role of father, the facts surrounding the discovery of possible nonpaternity, the nature of the father-child relationship, the child's age, the potential harm to the child, and the potential for establishing paternity with respect to another man. In such a case, a guardian ad litem is to be appointed for the child. A denial of testing by a judge would have to be based on clear and convincing evidence.

If a child has a presumed, an acknowledged, or an adjudicated father, the results of genetic testing are inadmissible to adjudicate parentage unless the test was performed with the consent of the mother and father or pursuant to a court order.[75] According to the commentary in an earlier draft of the UPA 2000, this subsection "is intended to discourage unilateral genetic testing, usually done in the context of a suspicious spouse seeking to determine whether a child is actually the child of the presumed father"; if "such testing cannot be stopped," then at least the results can be excluded.[76] It appears that those able to afford a first round of surreptitious testing to confirm suspicions and a second round of testing in the context of a court proceeding would not be affected.[77]

To date, the UPA 2000 has been enacted by four states, Delaware, Texas, Washington, and Wyoming.[78] Some commentators have asserted that the guidelines for the exercise of judicial discretion are too vague.[79] For example, the law does not provide clear guidance to judges faced with contests between putative biological fathers and presumed fathers during the first two years of a child's life, although the commentary concerning the handling of contests between multiple presumed fathers and the genetic-testing chapter suggest that biology will almost always prevail.

The American Law Institute (ALI) takes a somewhat similar position on these issues in its *Principles of the Law of Family Dissolution.*[80] The ALI principles are concerned with custody decisions and determination of child support obligations rather than parentage determination per se. In keeping with an emphasis on the functional components of parenting, the definition of *parent* includes not only the persons defined as parents under other state law, but also a "parent by estoppel," e.g., an individual who had a reasonable, good-faith belief that he was the child's father, lived with the child, and fully accepted the responsibilities of parenthood for at least two years.[81] In deciding whether to impose a support obligation upon a person who is not a legal parent, courts must consider factors such as how the person and the child have acted toward each other, whether the relationship supplanted the child's opportunity to develop a relationship with an absent parent, and whether the child otherwise has two parents who are able and available to discharge obligations of support.[82]

Like the UPA 2000 provisions on genetic testing in the presumed-father scenario, the ALI principles

have been faulted for failing to provide clear guidelines to judges.[83] Examples are offered, but these do not address the middle-range cases on the spectrum between an 11-year familial relationship and a relationship that terminates before a child's birth. On estoppel, the drafters have been accused of ignoring the case law. According to Theresa Glennon,

> [a] close examination of the reasoning on behalf of the Principles' approach to estoppel and the reasoning adopted by the majority of courts reveals two very different approaches to the underlying issues. These issues involve: the effect of prior financial support and development of a social relationship; the motives of men who seek to disestablish paternity upon divorce; and basic notions of fairness.[84]

In the drafters' defense, it might be argued that these issues are intertwined. An evaluation of the prospects for restoring or holding together functional relationships rests in part on an assessment of the quality of such relationships, in the particular case and in general, and on the factors behind challenges to legal obligations. Fairness is both a criterion for assessment of conduct within a relationship, at least among adults, and an independent consideration that may complement or compete with a determination based upon the best interest of the child or societal welfare. Still, greater clarity in this area would be beneficial.

## SURVEY OF CURRENT OPTIONS AND POINTS TO BE CONSIDERED

The possible responses to disestablishment suits include a straightforward best-interest-of-the-child analysis, a statute of limitations approach that makes the lapse of time the decisive factor, a hybrid approach that combines a time bar with a best-interest analysis in at least some spheres (as with the UPA 2000 and the ALI principles), and the "DNA-testing-yields-truth" approach reflected in laws removing any bar to the introduction of genetic evidence to end a legal obligation, at least by the man who is the subject of the obligation.

Proposed, but not yet adopted in any jurisdiction, is a preventative variation of the DNA-testing-yields-truth approach: mandatory genetic testing at birth or at some other key juncture. This may seem far-fetched, but it is being taking seriously in some quarters. In the course of oral argument for a disestablishment case involving the presumed father of a marital child, a justice on the Florida Supreme Court queried, "Are we really saying . . . in the future DNA testing will have to be part of every divorce or custody hearing?"[85] At least one Florida legislator thought the answer was yes. House Bill 73, prefiled in 2001 but withdrawn prior to introduction, would have required DNA paternity testing in all divorce and child support proceedings. And the Supreme Judicial Court of Massachusetts, in a footnote in *Cheryl,* stated:

> Where the State requires an unmarried woman to name her child's putative father, the department should require that the parties submit to genetic testing prior to the execution of any acknowledgment of paternity or child support agreement. To do otherwise places at risk the well-being of children born out of wedlock whose fathers subsequently learn, as modern scientific methods now make possible, that they have no genetic link to their children.[86]

A countervailing consideration in the public context is the cost of genetic testing. Glennon appears to favor testing at birth in all public and private cases as a matter of child advocacy.[87]

Whatever general approach is selected, it must be implemented through a series of more specific choices, including

1. what standards to adopt for genetic testing
2. who has standing to bring an action that has the effect of disestablishing a presumed or an acknowledged or adjudicated father
3. whether a judge has discretion to block testing of children with presumed fathers, and if the judge does, the factors to be considered in his or her analysis as well as the possibility of legal recognition of dual paternity

4. whether any modification of a judgment based on genetic testing is purely prospective (i.e., whether there is potential for recovery of child support already paid or cancellation of arrearages)
5. whether an action is permitted against the child's mother to recover child support already paid, legal expenses, and, potentially, damages for infliction of emotional distress, in addition to or as an alternative to other kinds of relief
6. whether mediation or court-ordered family counseling is encouraged or required
7. whether estoppel arguments are permitted and under what circumstances

***1. Testing standards.*** Although some legislators and judges, and much of the public, take the view that a "genetic test" will provide certainty concerning biological relationship, as a technical matter this is simply not true. Standards may vary even among reputable laboratories. Experts continue to dispute the definitiveness of results from a single round of testing with the widely used polymerase chain reaction (PCR) method. Even without mistakes in sample collection, handling, analysis, or interpretation of results, a finding of inclusion may be reversed with further testing, as in the case of *Cauthen v. Yates.*[88] Given a trajectory of continuing scientific and technological progress, there is also the question of whether to permit a case to be reopened for technical reasons. *In Manning v. Manning,*[89] the court refused to order further testing absent proof by the plaintiff that a new test would yield a result different from the test used in the initial proceeding.

Genetic testing remains a matter of probabilities based on a variety of assumptions. The UPA 2000 allows for a determination of paternity based upon a 99 percent probability of paternity, using a prior probability of .50, and a combined paternity index of at least 100 to 1. According to the comments, the standard was chosen primarily because it conformed to then-current industry practice and could likely be met even in cases involving degraded specimens or missing individuals.[90] The drafters note that even results above this threshold are rebuttable and that a second round of testing will be ordered upon request. However, unsophisticated parties may not understand the technical issues well enough to know when a second round of testing is advisable.

Consent issues add a layer of complexity. Some courts appear little troubled by evidence of a first round of private testing conducted on a presumed father's initiative without the consent of the mother.[91] In barring any action to determine the nonexistence of a father-child relationship *unless* DNA test results showing exclusion are first obtained, Illinois may provide an incentive to surreptitious testing.[92]

The Massachusetts high court had this to say about consent:

> The father apparently obtained the genetic tests on the advice of counsel in 1999. It is, therefore, unlikely that he could be denied relief on the basis of unclean hands. We nevertheless note that the father should have obtained the mother's approval before subjecting Cheryl to the genetic tests, particularly where, as here, a judge had denied him that relief. The father points out that no judge explicitly prohibited him from obtaining the test, that he took Cheryl for testing during a legal visitation period, and that the test posed virtually no risk of physical pain or trauma. Even if the father is correct on each point, absent emergency circumstances, a noncustodial parent must consult with the parent with legal custody of a child before subjecting a child to a medical procedure that may have a significant effect on the child's emotional development. Because the results of a paternity test may, as in this case, lead to protracted paternity litigation, serious conflict between the parents, identity confusion for a child, and an incentive for a parent to withdraw emotional or financial support, the agreement of the child's legal custodian or an order of the court would in most circumstances be required before the noncustodial parent may submit the child to genetic marker and blood group testing years after a paternity judgment has entered.[93]

Further complicating matters, it is apparently not uncommon for the paternal grandparents to under-

take testing in the first instance, and some laboratories in fact advertise "grandparent tests."[94]

If the courts hearing paternity cases fail to sanction testing without proper consent, those adversely affected may have little recourse. Genetic information about paternity is often excluded from the protections contained in state genetic privacy laws. Further, in the majority of states that have such laws, protections are restricted to information or testing relating to a disease, disorder, or syndrome or an illness or impairment. Beyond this, many genetic privacy statutes affect only the conduct of insurers or employers, although a few require that "any person" obtain informed consent before performing a genetic test. There are also jurisdictional issues if the person collecting the sample and the laboratory performing the analysis are in different states, as may well be the case with testing by mail. Although it is important for judges to be alert to privacy issues, the concern expressed by one court over potential insurance or employment discrimination is probably not justified where testing is confined to noncoding regions of DNA, at least so long as there is adequate provision for sample destruction.[95]

***2. Standing.*** Standing issues have been discussed at some length above. In cases involving the usual triangle of husband, wife, and putative biological father, any court will have to take into account the analysis of constitutionally protected interests in *Michael H.* and subsequent cases. More open structures, such as found in the UPA 2000, seem to invite new categories of actors who are differently motivated to disestablish paternity. Examples include the state or a state surrogate, as in *Raphael P.,* or paternal grandparents. Here, too, there may be constitutional issues.[96] With regard to laws that mandate the reopening of paternity judgments because of "scientific evidence" but restrict these actions to male defendants in child support actions, more equal protection challenges should be anticipated.

***3. Judicial discretion and factors to be considered.*** In some states, the best-interest analysis simply has no place in decision making about testing or paternity determination, although the best interest of the child may be considered in relation to such corollary matters as custody or visitation. In other jurisdictions, a best-interest analysis is possible only prior to testing; once a finding of exclusion exists, it must be given legal effect through disestablishment of paternity. This seems unfortunate, since the interests affected by the generation of information through genetic testing may be different, or balance differently, from the interests affected by determinations of legal paternity and decisions concerning support, visitation, and custody.

Some elements are virtually always considered as part of a best-interest analysis, such as the desirability of permanence or stability in the life of a child and provision for material support. Unfortunately, there are no studies that track the effects of different decision rules or guidelines on child welfare. Those who endorse multiple fatherhood must address the concern that diffusion of responsibility will lead to neglect on the part of the parents and confusion on the part of the child. Other elements particularly relevant to the genetic-testing context include identity formation and interests related to health or medical care. Some have put forward a concept of "genealogical bewilderment" to describe the negative psychological consequences of ignorance of one's origins, but the primary evidence for such a phenomenon appears to be literary (e.g., the Oedipal myth and the story of the Ugly Duckling) and anecdotal.[97] The legislative findings and declarations accompanying the California law on voluntary acknowledgment of paternity include the statement that "knowledge of family medical history is often necessary for correct medical diagnosis and treatment."[98] Courts may be more inclined to recognize an interest in an accurate family medical history than an abstract "right to know" one's origins.[99]

Theresa Glennon offers the Oklahoma statute as a model for guidance on best-interest analysis. The Oklahoma law "looks to readily identifiable factors, such as the child's age and residence with the alleged parent," and hence "gives courts a more easily administrable guideline and prevents courts from

having to engage in more detailed, time-consuming, and ultimately confounding inquiries into the 'strength' of the parent-child bond."[100] Glennon favors tailoring time limits and restrictions on disestablishment of paternity to child welfare. In other words, the best interest of the child would trump adult interests. Her argument is reproduced here because it addresses some of the concerns about fairness raised by fathers' rights groups:

> While some individuals are innocent victims of deceptive partners, adults are aware of the high incidence of infidelity and only they, not the children, are able to act to ensure that the biological ties they may deem essential are present…. The law should discourage adults from treating children they have parented as expendable when their adult relationships fall apart. It is adults who can and should absorb the pain of betrayal rather than inflict additional betrayal on the involved children.[101]

The most compelling argument from the fathers' rights advocates may be their assertion that it is fundamentally unfair to hold a man liable for financial support while giving him no protected interest in the opportunity to develop a relationship with a child.[102] If the notion of fatherhood as necessarily an *exclusive* status is abandoned in nontraditional family situations, it becomes easier to join responsibilities with at least some correlative rights.

The empirical assumptions underlying a more-or-less conclusive, exclusive presumption of paternity include

- a man can function as a good parent even where a question has been raised about his genetic connection to a child;
- a marriage can survive the shock of an allegation of infidelity relatively intact;
- social relationships are more important contributors to well-being than genetic relationships, e.g., having an intact family is more important to the child's well-being than having an accurate understanding of genetic origins; and
- even though social relationships count for more than genetic relationships, it is important to preserve the appearance of a neat family unit in which genetic and social relationships are aligned; therefore secrecy, or the suppression of information about (the absence of) genetic connection, may be required for a man to function as a good parent or for a marriage to survive.

The last assumption seems particularly difficult to sustain given the increasing prevalence of blended families. Culturally, the blended family is less of an oddity than it once was, and hence social isolation or rejection is unlikely to result from acknowledgment of familial complexity in the area of biological and social relationship. Further, some studies conducted in the context of assisted reproduction have found that openness concerning a father's lack of biological connection to a child is associated with better outcomes, although there are inherent difficulties with studies of secrecy.[103] The plurality opinion in *Michael H.* invoked "nature itself" to rule out the option of dual paternity.[104] Interestingly, anthropologists have identified 16 societies in South America marked by a belief in "partible paternity," that is, "the conviction that it is possible, even necessary, for a child to have more than one biological father."[105] Although the idea of multiple biological paternity may be at odds with science, short of some tricky genetic engineering, multiple fatherhood may make good social sense.

Mandatory involvement of a guardian ad litem is one procedural means of protecting the interests of children on a case-by-case basis, in the absence of bright-line rules well supported by the results of research concerning child welfare. The UPA 2000 requires involvement of a guardian in cases involving presumed fathers.

A final issue not typically addressed in the best-interest analysis, but perhaps worthy of attention, is the heightened potential for harm where there are multiple children in the family. It is not unheard of for a man to terminate, or attempt to terminate, ties with a child while continuing visitation with siblings

confirmed to be his biological offspring.[106] This seems a recipe for disaster.

***4. Modification of judgments.*** One of the most vexing questions currently is what to do when a statute or an appellate decision directs courts to allow the reopening of paternity judgments. In Maryland, the Court of Appeals, rebuked by the Legislature with a law allowing modification of final paternity judgments, gave the law retroactive application and later ruled that the modification of a judgment cancels any arrearages for child support.[107] On the latter point, a dissenting justice worried that this would provide "a powerful new incentive for men to ignore both the responsibility they voluntarily assumed and their obligation to obey court orders."[108] The Maryland court has not yet ruled on the issue of recoupment of child support already paid; the Ohio law passed in response to *Caron* clearly contemplates the recovery of child support but offers no guidance on the details.

***5. Relief.*** A law review article published in 2000 examines this issue in depth, noting that courts have in the past been unreceptive to lawsuits based on harms connected to misrepresentation of paternity.[109] At the same time, courts in California and elsewhere have not foreclosed the possibility that a man might recover the actual costs incurred in supporting another man's children on a theory of unjust enrichment. In recent years, court decisions in a growing number of states have recognized misrepresentations of paternity as sufficient for claims of intentional infliction of emotional distress.[110]

***6. Mediation or counseling.*** With an increasing emphasis on alternative dispute resolution (ADR) or the offer of resources, the value of mediation or counseling is worth considering. At least one state, Wisconsin, has a law expressly authorizing judges hearing paternity cases to order the parties to attend a program providing training in parenting or co-parenting, with the proviso that it be "educational rather than therapeutic."[111] Few opinions in disestablishment cases describe the use of ADR or related services. In its unpublished opinion in *Rebecca R. v. David R.,* the California Court of Appeal noted the involvement of a family mediator in decision making about genetic testing.[112] In *Stitham v. Henderson,* a case concerning the recognition of de facto parenthood in the aftermath of genetic testing, the Supreme Judicial Court of Maine expressed its hope that "these parties, keeping the best interests of the child uppermost in their minds, either on their own, or with the assistance of an able case management officer and/or mediator, will agree upon the best arrangement for the child."[113] Since a request for an increase in child support seems to be a frequent trigger for private genetic testing and the subsequent filing of a disestablishment case, judges should consider what might be done at that point to head off an ill-considered rush to testing.

***7. Estoppel.*** The issues surrounding estoppel are discussed at some length above and in a number of recent law review articles. The ALI principles suggest a more expansive application of the doctrine of parenthood by estoppel and a widening of the notion of detriment to include psychological harm to a child. Where a man is bringing an action to end a legal obligation of support on the basis of genetic testing, special care is required to avoid creating perverse incentives. For example, if the length or quality of the father-child relationship is a factor in determining whether to continue a support obligation, evaluation should focus on the period *before* the action was filed. Otherwise, there is an incentive for the man to sever the relationship with the child immediately upon receipt of evidence of nonpaternity.[114]

The power of judges to heal fractured relationships is limited. In deciding a disestablishment case in December 2001, the justices of the Wyoming Supreme Court confronted the tragic dimension of their work: "Courts simply are not always capable of resolving the sorts of profound human dilemmas that are brought to their doorsteps, at least not in a way that will avoid all potential hardship to even innocent parties. Here, though Child has two presumptive

fathers, he has none who wishes to fully embrace that role and the responsibility that goes with it."[115] Gearing the law toward modest goals of achieving greater consistency and minimizing harm, especially to innocent children, may be the best policy. In his special concurrence in the Wyoming case, Justice Golden, joined by Chief Justice Lehman, stated that while the "legal system certainly cannot bring love into a family," it should "at least provide a clear and coherent process when called upon to define a family."[116]

Adoption of this sober approach does not, of course, preclude a hope that generosity and affection will triumph eventually. An Iowa man protested the continuation of a duty of support to a son with whom he had at one time enjoyed a warm, loving relationship, labeling it a "charade." The court hearing the case rejected this characterization of the outcome of the disestablishment proceeding, expressing its hope that in the end the father's "heart will follow his money."[117]

## NOTES

1. If hairs are pulled (rather than cut) and have intact roots, it is theoretically possible to derive DNA for paternity testing. At the same time, with this kind of sample, a failure to obtain a usable result is more likely than with a standard form of DNA collection. If results are obtained, they are just as powerful and accurate as those from tests using blood or buccal swabs. Interview with Dr. Laura Gahn (Nov. 15, 2002).

2. Alessandra Stanley, *So, Who's Your Daddy? In DNA Tests, TV Finds Elixir to Raise Ratings,* N.Y. Times, Mar. 19, 2002, at C1. At least one case involving "live paternity testing" performed on a TV talk show has made it into the courts. *See* Barbara Ann W. v. David W., 701 N.Y.S.2d 845, 850 (N.Y. Fam. Ct. 1999) (testing that triggered litigation was performed by self-described "paternity expert" Alan Gelb on the *Sally Jesse Raphael* show).

3. *See, e.g.,* Dorothy Nelkin & M. Susan Lindee, The DNA Mystique: The Gene as a Cultural Icon (W.H. Freeman 1995); Genes and Human Self-Knowledge: Historical and Philosophical Reflections on Modern Genetics (Robert F. Weir et al., eds., Univ. of Iowa Press 1994).

4. The evidence in this area is limited. Scientist Jared Diamond describes a personal communication from a respected scientist who conducted a research study of the genetics of human blood groups in the 1940s. Samples were collected at a "highly respectable" U.S. hospital from 1,000 newborn babies and their mothers and the men identified as their fathers. Analysis revealed that in nearly 10 percent of cases, the men tested could not have been biological fathers. Jared Diamond, The Third Chimpanzee: The Evolution and Future of the Human Animal 85–87 (HarperCollins 1992). This information is secondhand and unverifiable because the finding was never published; however, Diamond is himself a highly respected scientist. Even assuming the finding's validity, however, World War II may have been a factor, since an increase in infidelity might be anticipated when spouses or significant others are absent for extended periods of time. Physicians doing tissue typing for organ donation have estimated that from 5 to 20 percent of donors are genetically unrelated to the men identified as their fathers. Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society 225 (W.W. Norton 1989). Laboratories performing paternity testing consistently report exclusion rates of around 30 percent, but this number cannot be generalized to the population at large for obvious reasons.

5. The question is not limited to the United States. The author of a study of Canadian law concludes that "the judiciary seems to be emphasizing, without providing any detailed justification, a general belief in the social worth of knowing one's biological heritage." Timothy A. Caulfield, *Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing,* 26 Queen's L.J. 67, 89–90 (2000). He finds evidence of the same trend in European law. *Id.* at 75–76.

6. *See* Miscovich v. Miscovich, 688 A.2d 726 (Pa. Super. Ct. 1997), *aff'd* 720 A.2d 764 (Pa. 1998), *cert. denied,* 526 U.S. 1113 (1999); Maggie Gallagher, *Who's Daddy? It's Not Just DNA,* N.Y. Post, Aug. 14, 1999, at 15; Richard Willing, *DNA and Daddy: Explosion of Technology Is Straining Family Ties,* USA Today, July 29, 1999, at 1A; William C. Smith, *Daddy No More,* A.B.A. J., July 1999, at 30.

7. *See In re* Caron, 110 Ohio Misc. 2d 58, 744 N.E.2d 787 (Ohio Ct. Com. Pl. 2000); *Case Points Out Judicial System Flaws,* Columbus Dispatch, Nov. 18, 2000, at 11A; *Foe of Child Support Laws Is Jailed for Nonpayment,* St. Louis Post-Dispatch, Apr. 30, 2000, at A8; *The O'Reilly Factor: Should the State Force Victims of Fraud to*

NOTES

*Pay Child Support?* (Fox News Network broadcast, May 16, 2000).

8. *See* Wise v. Fryar, 49 S.W.3d 450 (Tex. Ct. App. 2001); Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science,* N.Y. Times, Mar. 11, 2001, at A1.

9. Cal. Fam. Code § 7611(d) (West 1994 & Supp. 2003).

10. *See, e.g.,* Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 298–99 (Cal. Ct. App. 2000).

11. Cal. Fam. Code § 7540.

12. *Id.* § 7541. *If* blood tests are performed in accordance with the chapter concerning blood tests to determine paternity and the experts conclude that the husband is not the father, *then* this section provides that "the question of paternity of the husband shall be resolved accordingly." However, this section restricts motions for blood tests by time and party. Motions for testing may be made only within two years of the child's birth and only by (i) the husband; (ii) a presumed father (as defined in sections 7611 and 7612), only for purposes of establishing paternity; (iii) the child's guardian ad litem; or (iv) the mother, if the child's biological father has filed an affidavit acknowledging paternity. *Id.*

13. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 444 (Cal. Ct. App. 1996).

14. Cal. Fam. Code § 7611.

15. For example, in Maryland, blood tests for the purpose of establishing paternity may be sought under a provision of the Estates and Trusts Code as well as the Family Law Code. Turner v. Whisted, 607 A.2d 935 (Md. 1992).

16. *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform,* 26 Fla. St. U. L. Rev. 219, 236 (1999).

17. *Ex parte* W.J., 622 So. 2d 358 (Ala. 1993).

18. Act of Apr. 26, 1994, 1994 Ala. Acts 633 (codified at Ala. Code § 26-17A-1 (2003)); *see Ex parte* Jenkins, 723 So. 2d 649 (Ala. 1998) (attributing passage of § 26-17A-1 to denial of relief in *Ex parte* W.J.).

19. Tandra S. v. Tyrone W., 648 A.2d 439 (Md. 1994).

20. Langston v. Riffe, 754 A.2d 389, 393 (Md. 2000) (noting that 1995 Maryland Laws 248 was passed specifically to overturn the effect of *Tandra S.*).

21. Wise v. Fryar, 49 S.W.3d 450, 455 (Tex. Ct. App. 2001), *cert. denied,* 534 U.S. 1079 (2002). A series of recent state supreme court rulings demonstrate the difficulty of disestablishing paternity where a divorce decree or judgment recites that a child is "of the marriage" or contains similar language. *See* D.F. v. Dept. of Revenue *ex rel.* L.F., 823 So. 2d 97 (Fla. 2002); Doe v. Doe, 52 P.3d 255 (Haw. 2002); Betty L.W. v. William E.W., 569 S.E.2d 77 (W. Va. 2002).

22. Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961).

23. *Id.* at 714.

24. *Id.*

25. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 447 (Cal. Ct. App. 1996).

26. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity,* 102 W. Va. L. Rev. 547, 578–82 (2000).

27. Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World,* 8 Duke J. Gender L. & Pol'y 269, 280 (2001); Glennon, *Somebody's Child, supra* note 26, at 585.

28. Michael H. v. Gerald D., 491 U.S. 110 (1989).

29. Dawn D. v. Superior Court, 72 Cal. Rptr. 2d 871 (1998), *cert. denied,* 525 U.S. 1055 (1998).

30. Other states have recognized such an interest. For example, in several cases, the Iowa Supreme Court has ruled that putative fathers have a constitutionally protected liberty interest in relationships with their biological children even where another man is the presumed father by marriage. At the same time, the court readily finds a waiver where the putative father delays in pursuing his rights. *See, e.g.,* Huisman v. Miedema, 644 N.W.2d 321 (Iowa 2002); *see also In re* J.W.T., 872 S.W.2d 189, 197 (Tex. 1994).

31. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000).

32. Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (Cal. Ct. App. 1994).

33. Merkel v. Doe, 63 Ohio Misc. 2d 490 (Ohio Ct. Com. Pl. 1993).

34. *In re* J.W.T., 872 S.W.2d at 197.

35. Gammon v. Cobb, 335 So. 2d 261, 265 (Fla. 1976).

36. *See supra* note 18 and accompanying text.

NOTES

37. S.M.V. v. D.W.M., 723 So. 2d 1271 (Ala. Civ. App. 1998).

38. Thomas H. Murray, The Worth of a Child 50 (Univ. of Cal. Press 1996).

39. Joseph Goldstein et al., Beyond the Best Interests of the Child 17 (Free Press 1979).

40. *Ex parte* Jenkins, 723 So. 2d 649, 677 (Ala. 1998) (Cook, J., concurring in part and dissenting in part).

41. Michael H. v. Gerald D., 491 U.S. 110, 148 (1989) (Brennan, J., dissenting). Others assert that "father" is a legal construction, not a biological fact. *See, e.g., In re* J.W.T., 872 S.W.2d 189, 202 (Tex. 1994) (Cornyn, J., dissenting). Again, in *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816 (1977), Justice Brennan, this time writing for the majority, stressed the centrality of biology to family and suggested that solicitude for a constitutionally protected liberty interest founded on blood relationship with a child precludes a similar concern for competing interests founded on social relationship.

42. *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001).

43. *Id.* at 494 n.15 (citations omitted).

44. Smith v. Cole, 553 So. 2d 847, 851 (La. 1989).

45. Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 1995).

46. *Id.* at 1197.

47. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989); Merkel v. Doe, 63 Ohio Misc. 2d 490 (Ohio Ct. Com. Pl. 1993); *see also supra* note 33 and accompanying text.

48. Doe v. Doe, 52 P.3d 255 (Haw. 2002).

49. N.A.H. v. S.L.S., 9 P.3d 354, 365 (Colo. 2000).

50. Freeman v. Freeman, 53 Cal. Rptr. 2d 439, 446 (Cal. Ct. App. 1996).

51. *See, e.g.,* Comino v. Kelley, 30 Cal. Rptr. 2d 728 (Cal. Ct. App. 1994).

52. *See Freeman,* 53 Cal. Rptr. 2d at 448 (emphasis added).

53. *See, e.g., In re* Kiana A., 113 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001).

54. *In re* Raphael P., 118 Cal. Rptr. 2d 610 (Cal. Ct. App. 2002).

55. *In re* Raphael P., 117 Cal. Rptr. 2d 795 (Cal. Ct. App. 2002), *rev'd on reh'g by In re* Raphael P., 118 Cal. Rptr. 2d 610.

56. *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

57. Cal. Fam. Code § 7612(a) (West 1994 & Supp. 2003).

58. *See* Web site for U.S. Citizens Against Paternity Fraud, *at* http://www.paternityfraud.com (visited Oct. 21, 2003); *see also* Christopher Quinn, *As DNA Tests Rule Out Paternity, Men Sue to Stop Support Payments,* Atlanta J. & Const., May 16, 2001, at 1A ("DNA tests clear nearly one of every three men who contest paternity when named as fathers by women applying for state assistance"); *The Early Show* (CBS television broadcast, Apr. 18, 2000) (quoting Carnell Smith, director of U.S. Citizens Against Paternity Fraud: "At least somebody should get a chance for their freedom here. The innocent man should always be allowed to be set free, based on the evidence").

59. "It's amazing to me that the same evidence that can be used to convict an individual is not readily used to exonerate an individual. You can't have it both ways. If this is the high-tech science we both know it is, the court has to deal with the results, despite the extenuating circumstances." Steve Duin, *This DNA Test Is a Test of His Patience,* The Oregonian, June 6, 2000, at B01 (quoting Brad Popovich, director of the DNA diagnostic lab at Oregon Health Sciences University).

60. *See* U.S. Citizens Against Paternity Fraud, *at* http://www.paternityfraud.com.

61. *See, e.g.,* Monica Brady, *All Things Considered: DNA Testing Is Causing State Courts to Relook at Laws Regarding Paternity* (National Public Radio broadcast, Apr. 9, 2001) (interview with acknowledged father challenging child support obligations in *Cheryl* case, expressing continuing affection for the child).

62. On suits against mothers for misrepresentation of paternity, *see* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships,* 33 Loy. L.A. L. Rev. 449, 501–08 (2000).

63. *See, e.g., In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001); K.B. v. D.B., 639 N.E.2d 725 (Mass. App. Ct. 1994); Monmouth County Div. of Soc. Servs. v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000).

NOTES

64. Caron was jailed for contempt of court in connection with litigation over the continuation of a child support obligation. *See In re* Caron, 744 N.E.2d 787 (Ohio Ct. Com. Pl. 2000); *Case Points Out Judicial System Flaws, supra* note 7, at 11A; *Foe of Child Support Laws Is Jailed for Nonpayment, supra* note 7, at A8; *The O'Reilly Factor, supra* note 7.

65. Act of July 27, 2000, 2000 Ohio Laws 238 (H.B. 242). There are exceptions for adoption and artificial insemination by donor.

66. Odum v. Smith, No. 98-12744-9 (Ga. Super. Ct. May 14, 2001); *see also* http://www.paternityfraud.com.

67. 2002 Ga. Laws 596, § 1 (codified at Ga. Code Ann. § 19-7-54 (2003)).

68. A.B. 2240, 2001–2002 Sess. (Cal. 2002). The legislative declarations from Assembly Bill 2240 are repeated in Senate Bill 1030, introduced on Feb. 21, 2003. Senate Bill 1030 concerns motions to set aside default judgments of paternity.

69. H.B. 735, 2001–2002 Sess. (Vt. 2002). *See also* S.B. 1710, 2003–2004 Sess. (Fla. 2003); H.B. 2267, 2003–2004 Sess. (Ill. 2003); H.B. 5381, 2003–2004 Sess. (R.I. 2003).

70. Unif. Parentage Act § 204 (2000), as last amended or revised in 2002.

71. *Id.* § 607. Although the text of section 607(a) refers to a paternity proceeding brought by a presumed father, the mother, or "another individual," the comment to that section describes the potential challengers as the mother, the presumed father, and "a third party male." There is one clear exception to the time limit: a proceeding to disprove a father-child relationship, if a court determines that the mother and presumed father had no intimate contact during the probable time of conception and the presumed father never openly treated the child as his own. It appears that this exception would not survive a divorce, since the UPA 2000 provides that a final order expressly identifying a child as a "child of the marriage" or providing for support by the husband is an adjudication of parentage and can be used as a defense by a third party in a subsequent proceeding. *See id.* § 637. The comment states the rationale for the exception: "It is inappropriate to assume a presumption known by all those concerned to be untrue." If this is so, what about a case in which, more than two years after the birth of a child, the results of genetic testing exclude a man presumed to be the child's father solely on the basis of marriage plus intimate contact? Confusion seems to persist about whether the marital presumption is a rule of evidence or a rule of substantive law.

72. *See id.* §§ 308(a), 609.

73. *See id.* § 637.

74. *See id.* § 608.

75. *See id.* § 621(c).

76. Unif. Parentage Act § 621 cmt. (Discussion Draft 2000). This language does not appear in the final document.

77. One laboratory explicitly recognizes the possibility of a two-step process in its advertising of home identity testing: "Fairfax Identity Laboratories would like to be clear: if your results do have to be presented in a legal proceeding, then HIT™ may not be suitable for you. It can, however, be used to give a preliminary answer prior to having the sort of test performed that requires the proper chain of custody." Fairfax Identity Laboratories, Home Identity Testing (HIT™), *at* http://www.fairfaxidlab.com/idlab/hitcopy.html (visited Oct. 21, 2003). Where testing is performed at a laboratory, greater control is possible. For example, in its "Answers to the Most Common Questions About Parentage Testing," CBR Laboratories stated that as a matter of policy it required an order for testing from a lawyer, doctor, nurse practitioner, or representative of the court or the Department of Social Services or Revenue, and that the person seeking testing of a child, if not accompanied by the mother, was required to show proof of custodial rights. CBR Laboratories, Paternity Testing FAQs, *at* http://www.cbrlabs-inc.com/paternity-testing-faqs.html (visited Nov. 11, 2002).

Largely in response to mail-order or home testing, the United Kingdom established an ad hoc Group on Genetic Paternity Testing Services to develop a code of conduct for laboratories performing testing. *See* Group on Genetic Paternity Testing Servs., Code of Prac. & Guidance (2001). The code is not itself law, but through other law it is binding on courts in ordering testing, and government agencies and public bodies are also expected to comply. *See* Rosemary Bennett, *Paternity Test Companies to Get Code of Conduct,* Fin. Times (London), Mar. 24, 2001, at 2. In the United States, the standards of accrediting agencies address such matters as informed consent and confidentiality, but accreditation is voluntary. *See, e.g.,* Am. Ass'n of Blood Banks, Standards for Parentage Testing Laboratories (Am. Ass'n of Blood Banks 5th ed. 2001).

NOTES

78. Del. Code Ann., tit. 13, §§ 8-101 (2003); Tex. Fam. Code Ann. § 160 (Vernon 2003); Wash. Rev. Code Ann. § 26.26 (West 2003); Wyo. Stat. Ann. § 14-2-121 (Michie 2003). Only the Wyoming version incorporates the 2002 revisions, which equalized the treatment of marital and nonmarital children by creating a presumption of paternity outside of marriage under certain circumstances, and by extending judicial discretion to limit genetic testing to children with acknowledged as well as presumed fathers. (A bill signed by Governor Perry on June 20, 2003, amends the Texas law to reflect the 2002 revisions.) Of note, Texas substituted a four-year time limit for the UPA 2000's two-year limit. Tex. Fam. Code Ann. § 160.607. Wyoming substituted a five-year time limit for the UPA 2000's two-year limit for proceedings involving children with presumed fathers, while retaining the two-year limit for proceedings involving children with acknowledged or adjudicated fathers. Wyo. Stat. § 14-2-709. In the case of Washington, the new law must be interpreted in light of precedents making the best interest of the child the paramount consideration and applying equitable doctrines rather freely to advance the interests of children.

79. Glennon, *Somebody's Child, supra* note 26, at 569–70.

80. Am. Law Inst. (ALI), Principles of the Law of Family Dissolution: Analysis and Recommendations (Matthew Bender 2002) [hereinafter ALI Principles].

81. ALI Principles § 2.03. The comments to the definitional section include a review of the case law. The drafters conclude that, at present, many courts "decline to apply any equitable theory, even under very compelling circumstances." ALI Principles § 2.03 Reporter's Notes cmt. b.

82. ALI Principles § 3.03. Concerning the interaction between equitable theories and the marital presumption, *see* § 3.03 cmt. d; § 3.03 Reporter's Notes cmt. d.

83. Glennon, *Expendable Children, supra* note 27, at 275.

84. *Id.* at 277.

85. Joe Follick, *Court to Rule on DNA Impact on Child Support,* Tampa Trib., Aug. 30, 2000, at 6 (quoting Justice Major Harding).

86. *In re* Paternity of Cheryl, 746 N.E.2d 488, 495 (Mass. 2001). This approach may also reflect concern that situational factors limit the practical relevance of existing due process protections. For example, some men may decline genetic testing out of embarrassment. *See* Office of the Inspector General, U.S. Dept. of Health & Human Servs., Paternity Establishment: State Use of Genetic Testing 3 (U.S. Dept. of Health & Human Servs. 1999).

87. Glennon, *Expendable Children, supra* note 27, at 281; *see also* Glennon, *Somebody's Child, supra* note 26, at 605.

88. Cauthen v. Yates, 716 So. 2d 1256 (Ala. Civ. App. 1998); *see also* County of El Dorado v. Misura, 38 Cal. Rptr. 2d 908 (Cal. Ct. App. 1995); Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel,* 57 La. L. Rev. 379 (1997).

89. Manning v. Manning, 764 So. 2d 311 (La. Ct. App. 2000).

90. Unif. Parentage Act § 505 & cmt. (2000).

91. *See, e.g., Ex parte* Jenkins, 723 So. 2d 649 (Ala. 1998).

92. *In re* Kates, 761 N.E.2d 153 (Ill. 2001).

93. *In re* Paternity of Cheryl, 746 N.E.2d 488, 500 n.23 (Mass. 2001) (citations omitted).

94. Quest Genetics, *at* http://www.dnatestingusa.com/GrandparentDNAtest.html (visited Oct. 22, 2003).

95. "In addition to concerns for reliability [in the case of unauthorized DNA testing], there are legitimate public policy concerns over privacy interests such as the dangers of unauthorized disclosure of genetic information and possible genetic discrimination by entities such as insurance companies and employers." *In re* T.S.S., 61 S.W.3d 481, 487 n.5 (Tex. Ct. App. 2001).

96. Concerning the due process and equal protection issues that may arise where a statute grants grandparents rights that may conflict with parents' interests, *see* Karl H. Widell, Case Note, *Court of Appeals of Arizona Upholds Grandparent Visitation Under Arizona Statute,* 43 Ariz. L. Rev. 495 (2001).

97. H.J. Sants, *Genealogical Bewilderment in Children With Substitute Parents,* 37 Brit. J. Med. Psychol. 133 (1964).

98. Cal. Fam. Code § 7570(a) (West 1994 & Supp. 2003).

99. Courts often couple medical interests and "truth of origins" interests. *See Ex parte* Snow, 508 So. 2d 266 (Ala. 1987) (child has interest in knowledge of heritage, accurate medical history); Hall v. Lalli, 977 P.2d 776, 781 (Ariz. 1999) (child has interest in family bonds and learning cultural heritage); Russell v. Russell, 682 N.E.2d 513 (Ind. 1997) (citing medical and psychological reasons for

NOTES

identifying biological parent); D.B.S. v. M.S., 903 P.2d 1345 (Kan. 1995) (in best-interest analysis courts "can also consider the child's basic interest in simply knowing his or her biological father"); Raymond v. O'Rourke, 1993 Minn. App. LEXIS 153 (Minn. Ct. App. 1993) (unpublished opinion) (child has interest in having "actual biological father" determined); Cihlar v. Crawford, 39 S.W.3d 172 (Tenn. Ct. App. 2000) (children have interest in ascertaining the identity of their biological parents for medical or other health reasons); State *ex rel.* Roy Allen S. v. Robert B. Stone, 474 S.E.2d 554 (W. Va. 1996) (examples of factors to be considered in both the standing and paternity determinations include "whether ascertaining genetic information might be important for medical treatment or genealogical history"); and R.W.R. v. E.K.B. (State *ex rel.* N.D.B.), 2001 WY 118, 35 P.3d 1224 (2001) (citing Hall v. Lalli with approval). In *In re* Parentage of Calcaterra, 56 P.3d 1003 (Wash. Ct. App. 2002), the court looked approvingly on the quest of a 34-year-old woman for testing of the man she believed to be her natural father, citing her desire for a family medical history.

100. Glennon, *Expendable Children, supra* note 27, at 275.

101. *Id.* at 282.

102. The dissent in *Dawn D.* notes this "potential anomaly." *See* Dawn D. v. Superior Court, 72 Cal. Rptr. 2d 871, 890 (Cal. 1998) (Chin, J., dissenting).

103. For an overview of these and related studies bearing on genetic relationship and child and family welfare, *see* Susan Golombok, Parenting: What Really Counts? (Routledge 2000); *see also* Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households,* 63 J. Marriage & Fam. 840 (2001); A.J. Turner & A. Coyle, *What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counseling and Therapy,* 15 Hum. Reprod. 2041 (2000); Susan Golombok et al., *Social Versus Biological Parenting: Family Functioning and the Socio-Emotional Development of Children Conceived by Egg or Sperm Donation,* 40 J. Child Psychol. & Psychiatry 519 (1999).

104. Michael H. v. Gerald D., 491 U.S. 110, at 118 (1989).

105. *Paternity Test,* Economist, Jan. 30, 1999, at 74. Offspring with two to three males in the father role seem to fare the best. Some judges have sought to normalize such arrangements. For example, a Tennessee court wrote: "In our resolution of this appeal, we have not overlooked the Trial Court's concern that the child would have two legal fathers should the case proceed and DNA prove that Mr. Gibson is in fact the father. While we concede this is a rather anomalous situation, we note where an adoption occurs, the adoptive father is father by virtue of the adoption, while the biological father is in fact also the father." Chance v. Gibson, 2002 Tenn. App. LEXIS 598 (Tenn. Ct. App. 2002). Others observe that such arrangements may be beneficial. *E.g.,* Martin v. Harrell, 2002 Conn. Super. LEXIS 1851 (Conn. Super. Ct. 2002) ("Rather than being confused or damaged by the circumstance of having two fathers, [the child] seems to accept this and even approximates the benefits of double the paternal love").

106. *See* Rubright v. Arnold, 973 P.2d 580 (Alaska 1999).

107. Walter v. Gunter, 788 A.2d 609 (Md. 2002). The Maryland Legislature continued to consider limits to paternity testing orders in 2002. Maryland House Bill 702 would have imposed a three-year limit on orders for testing to support challenges to declarations of paternity, and House Bill 478 would have permitted only prospective relief from support orders in the event of disestablishment of paternity. The House Judiciary Committee delivered unfavorable reports on both bills, which then died.

108. *Id.* at 625 (Wilner, J., dissenting). For a discussion of other concerns, e.g., federal requirements, *see* Paula Roberts, Truth and Consequences Part III: Who Pays When Paternity Is Disestablished? (Ctr. for Law & Soc. Pol'y, Apr. 2003), *at* http://www.clasp.org (visited Oct. 21, 2003).

109. Linda L. Berger, *Lies Between Mommy and Daddy,* 33 Loy. L.A. L. Rev. 449, 490–01 (2000).

110. *Id.* at 501–02.

111. Wis. Stat. Ann. § 767.115(b) (West 2003).

112. Rebecca R. v. David R., 62 Cal. Rptr. 2d 730 (Cal. Ct. App. 1997) (opinion withdrawn from publication).

113. Stitham v. Henderson, 2001 ME 52, 768 A.2d 598, 603–04 (2001).

114. Apparently, some attorneys are counseling clients to avoid all contact with a child in order to enhance their chances for success in court. Gerald Miscovich told a reporter that he wanted to play "some part" in the boy's life but had been advised that to do so would undercut his case. *See* Willing, *supra* note 6, at 1A.

NOTES

115. R.W.R. v. E.K.B. (State *ex rel.* N.D.B.), 2001 WY 118, 35 P.3d 1224, 1228 (2001). This is a prelude to agreement, with the mother, one of the presumed fathers, the guardian ad litem, and the district court, with the proposition that "'the truth' was the best result that could be salvaged."

116. *Id.* at 1232.

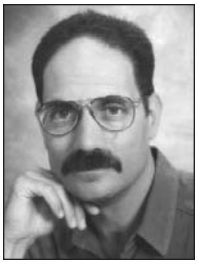
117. Dye v. Geiger, 554 N.W.2d 538, 541 (Iowa 1996).

# Parents With Disabilities

## *Problems in Family Court Practice*

**Megan Kirshbaum, Ph.D.**

*National Resource Center for Parents with Disabilities, Through the Looking Glass*



**Daniel O. Taube, J.D., Ph.D.**

*Alliant International University, California School of Professional Psychology*

**Rosalinda Lasian Baer**

*National Resource Center for Parents with Disabilities, Through the Looking Glass*

This article examines the multilayered obstacles that parents with disabilities face in the family court system. Based on the experience of the National Resource Center for Parents with Disabilities, it describes these statutory, judicial, professional, and systemic barriers and provides examples of each. Four broad areas of improvement are proposed: better-articulated legal and professional

*Continued on page 28*

State statutes, appellate court determinations, rules of court, and professional standards regarding child custody often fail to recognize and address assumptions, beliefs, and practices that discriminate against parents with disabilities. Although the type of a parent's disability (e.g., physical versus psychiatric) may influence the degree to which inaccurate and bias-driven notions about disability and parenting hold sway,[1] the overall approach to parents with disabilities fails to reflect the reality that a person's disability, in itself, provides little or no information about that person's parenting capacities. Absent or poorly articulated statutory and professional criteria for conducting valid assessments, uninformed and disability-insensitive evaluations upon which courts and legislatures rely, the inclusion of statutory categories that permit facially neutral actions to mask prejudicial assumptions, the relative unavailability of legal services, attitudinal and accessibility barriers, and lack of disability awareness, knowledge, and skill in family courts—all give evidence of a legal structure that has not addressed bias against parents with disabilities.

To be sure, states vary considerably in the degree to which they have recognized the rights of parents with disabilities in the context of child custody determinations. Even in those states that affirm such rights, however, actual practice has lagged far behind court rulings and legislative intent. The purpose of this article is to examine the multilayered barriers that parents with disabilities face in child custody cases. Based on our experience in the National Resource Center for Parents with Disabilities (NRC) at Berkeley's Through the Looking Glass (TLG), we delineate the categories of barriers that exist in the family court system. The article concludes with suggestions for improving the functioning of family court to provide realistic, positive options and accommodations for parents with disabilities and their children. In particular, we propose better-articulated legal and professional standards, increased access to legal representation for parents with disabilities, disability training for legal and mental health professionals, and changes in current practice. These changes can improve the ability of family courts to address the rights and needs of parents with disabilities and substantially change the experiences of parents with disabilities in the family court system.

*Continued from page 27*

standards, increased access to legal representation for parents with disabilities, disability training for legal and mental health professionals, and changes in current practice. ■

*Berkeley-based Through the Looking Glass and its National Resource Center for Parents with Disabilities provide technical assistance, training, publications, and information regarding parents with disabilities and their children. For more information, see* www.lookingglass.org.

*Funds for this publication come, in part, from the U.S. Department of Education, National Institute of Disability and Rehabilitation Research (NIDRR) (#H133A98001). The content and opinions do not necessarily represent the policy of NIDRR or the Department of Education.*

## CUSTODY CRITERIA IN STATUTES AND RULES OF COURT

Statutory criteria for the award of custody vary considerably from state to state. Nonetheless, all use the well-known "best-interest-of-the-child" standard.[2] In an effort to clarify the meaning of the best-interest standard, most states have adopted at least some aspects of the model custody language proposed by the Uniform Marriage and Divorce Act.[3] The best-interest standard and the model statute have been extended in a number of jurisdictions to include a wide range of factors that courts are expected to consider when making custody determinations. For example, the Michigan Child Custody Act articulates 12 factors underlying the best-interest standard that courts may address in deciding custody disputes,[4] the Florida statute lists 13 factors,[5] and California's custody statutes include 8 main factors.[6] Some states leave it to the courts to determine the factors that constitute a child's best interest. All jurisdictions, however, permit—and a number explicitly require—consideration of a parent's physical and mental health.[7]

No doubt these attempts to specify factors for judicial consideration do help narrow the field of inquiry.[8] Nevertheless, it has been long recognized that these standards are vague[9] and that, at least as currently conceptualized, they provide less than optimal guidance for judicial efforts to promote standardized, objective, and fair custody determinations.[10] Moreover, it is unusual to find statutory standards or rules of court that address, with any specificity, *how* court-ordered child custody evaluations are to be conducted.[11] This poses no small problem, given the considerable debate over the relevance, reliability, validity, and potentially grave problems of overreaching by mental health professionals in child custody evaluations and reports in general.[12] In those rare cases where rules of court do exist, specific disability-related biases are not addressed. For example, the California Rules of Court provide detailed procedures intended to lessen general bias in the court-ordered custody evaluation process.[13] These rules admonish evaluators to "maintain objectivity . . . and control for bias."[14] They also instruct evaluators to "operate within the limits of [their] training and experience and disclose any limitations or bias that would affect [their] ability to conduct the evaluation."[15] But in the subsection that addresses sensitivity to diversity[16] among participants in custody evaluations, disability is noticeably absent.

The underlying intent of these rules and related statutes is laudable; nevertheless, the NRC's experience has been that courts and evaluators are often unaware that discriminatory bias—either their own or others'—exists with respect to disability.[17] Thus, it becomes difficult, if not impossible, to "control for bias" or to "disclose . . . bias that would affect the ability to conduct the evaluation"[18] when one has not explored one's attitudes and beliefs with respect to such issues. Indeed, our experience leads us to believe that one likely reason for the failure to mention disability in the otherwise exhaustive

court rules addressing bias is the general lack of awareness of a common, implicit belief that disabled people are not as "fit" to parent as nondisabled people. Although there is virtually no research about this type of bias in the legal system, our experiences suggest that those charged with custody decision making and assessment are no less biased in this regard than the general public.[19]

Thus the best-interest standard and the supplementary factors in statutes and court rules attempt to give structure to and ensure fairness in custody disputes but, by failing to provide more explicit direction, may inadvertently permit personal bias to influence case outcomes.[20] As regards parental disability, this potential is made even more problematic because courts and evaluators are directed by statute to consider the "physical and mental health" of the parties. Few statutes or rules of court we could locate[21] included any further guidance regarding when disability should be deemed relevant or how potential bias against disability should be addressed.[22] Yet the crucial issue it is not whether a parent has a disability, but whether a parent has the ability to care for a child's needs. Rather than assuming that the presence of a disability should be used to determine parenting capacity, statutes and rules of court should require that if the disability of a parent is raised in the context of a child custody dispute, a nexus between the disability and parenting capacity must be demonstrable. Statutes and rules should also include consideration of whether reasonable adaptations could address concerns about the individual's parenting capacity.

## PROFESSIONAL GUIDELINES

Given the complexity of child custody cases and the indeterminacy of the best-interest standard, courts may turn to mental health professionals in an attempt to discern the best interest of children in a particular case.[23] But here, too, are substantial difficulties. Scholars have strongly criticized the involvement of mental health professionals in child custody litigation, citing difficulties in researching a standard that is poorly defined,[24] the paucity of methodologically sound, empirically based knowledge about the effects of various custody arrangements on child development,[25] and the likely irrelevance of mental health testimony to the legal questions at hand.[26] Further objections have been raised based upon the absence of valid and reliable measures for evaluators to use,[27] the use of measures that were originally not developed for assessing parenting capacities,[28] the potential for mental health professionals to overstep the bounds of their competence,[29] and the potential for courts to defer to mental health professionals because of their putative expertise and the complex bases of the decisions.[30] There has also been considerable controversy regarding whether mental health professionals should be allowed to make specific recommendations regarding the ultimate legal question of which parent should be awarded custody.[31]

All these shortcomings leave room for the value judgments and biases of mental health professionals to find their way into custody decision-making processes. In particular, the tendency of mental health professionals to view a disabled person's normal behavior as pathological and to give undue weight to signs of pathology in making clinical judgments[32] could have a substantial impact on the assessment of a disabled person's parenting capabilities and, in turn, on the custody decision, if the court relies on the assessment. In response to these and other criticisms, professional organizations have sought to clarify procedures and standards regarding court-ordered child custody evaluations by promulgating a variety of guidelines and practice standards.[33] For example, the American Association of Family and Conciliation Courts developed model standards to guide family courts and evaluators in custody situations.[34] The standards include guidelines for "initiating the process"—minimal educational, training, and knowledge qualifications for custody evaluators. The standards also provide a detailed set of steps through which evaluators are expected to proceed; six general aspects of parent and child functioning and interrelationships that should be evaluated;[35] the style, content, and distribution of the

report; and ethical principles that must be followed. Importantly, the standards require that evaluators take into account "ethnic, cultural, lifestyle, and/or religious factors where relevant,"[36] but nowhere are disability-related concerns addressed. Also, though the model standards mention the need to maintain "neutrality and unbiased objectivity"[37] and admonish evaluators to seek assistance if they encounter situations not within the scope of their competence, there is no mention of the potential for bias regarding parents with disabilities. Moreover, there is no guidance for evaluators in terms of how to conduct an assessment that minimizes such bias. Furthermore, like many statutes, the standards include the psychological health of the parents as a factor that requires consideration—but no caveats regarding the need to identify a nexus between a parent's psychological disability and his or her parenting abilities.[38]

In a similar fashion, the American Academy of Child and Adolescent Psychiatry, as part of its *Practice Parameters for Child Custody Evaluation,*[39] developed standards that detail the means by which referrals should be taken, fees, an evaluation structure, and methods for conducting interviews, writing reports, and testifying. In its discussion of the physical and mental health of parents, the *Practice Parameters* note that health—and mental health—status, including "unhealthy habits," "could have adverse consequence for the child."[40] In an important caveat, the *Practice Parameters* next clarify that diagnosis of a psychiatric disability is not in itself a basis upon which to recommend custody. Rather, the degree to which the disability affects the parent-child relationship is the relevant issue. Interestingly, this point is not made regarding physical, sensory, or cognitive disabilities. And the practice parameter regarding written reports recommends that the physical and mental health of the parents be weighed alongside six other factors. But unlike the other six factors, there is no guidance on how to determine whether physical or other disabilities affect parenting skills and child developmental outcomes.[41]

Among professional pronouncements, only the American Psychological Association *Guidelines for Child Custody Evaluations in Divorce Proceedings*[42] *(APA Guidelines)* acknowledge the possibility of bias against parents with disabilities. In addition to the common language encouraging professionals to maintain a neutral, impartial perspective and urging psychologists to establish a nexus between the information they obtain in an evaluation and the child's best interest, the *APA Guidelines* direct custody evaluators to be "aware of personal and societal biases and engage in nondiscriminatory practice" and to "recognize and strive to overcome" those prejudices or withdraw from the case.[43] Guideline 3 further instructs psychologists to consider "psychopathology … insofar as it has impact on the child or the ability to parent."[44] As with the psychiatric practice parameters discussed previously, these guidelines do not discuss physical or sensory disabilities except to admonish practitioners to avoid personal and societal bias toward disabilities in general. Nonetheless, these admonitions are an important step, for they signal recognition of the potential for discrimination and delineate at least one means by which evaluators might address it (e.g., removing oneself from the case).

Unfortunately, the *APA Guidelines* are not mandatory, and, thus, psychologists and other mental health professionals cannot be held to the standards in an ethical or a legal sense. Moreover, they do not instruct practitioners regarding how one might recognize bias and, in particular, bias against parents with disabilities. Because much bias is unwitting, and because mental health professionals probably do not have any better capacity than laypeople to become aware of prejudices,[45] it is likely insufficient to assume that exhortations to become aware of bias alone will change the manner in which custody evaluations are conducted. Finally, it is not made clear, even if the mental health professional recognizes his or her bias, what steps can and should be taken to overcome it. Again, the lack of guidance with respect to parents with disabilities leaves the professional to his or her own devices—and continues to allow for the operation of discriminatory beliefs and practices vis-à-vis parents with disabilities.[46]

Thus the existing guidelines and practice standards are a step in the right direction, but their shortcomings are considerable. They instruct professionals to evaluate parents' physical and mental health without clarifying the need for a demonstrable connection between possible disabilities and parenting behaviors and capacities that are known to affect children's development. Two of three sampled standards omit any mention of disabilities, and all guidelines fail to address the need for accommodations for people with disabilities. These problems provide fertile ground for biased evaluations of parents with disabilities. So instead of routinely obtaining more balanced and objective perspectives, courts that appoint mental health professionals to evaluate and recommend custody arrangements instead may be adding an additional layer of untested and discriminatory assumptions to the child custody determination process.

## JUDICIAL APPROACHES

The near absence of explicit rules addressing bias in the assessment of parents with disabilities in statutes,[47] rules of court, and professional standards gives few grounds upon which appellate courts can address what we at the NRC have observed to be common problems of bias against parents with disabilities at the pretrial and trial court level.[48] In addition, appellate court cases themselves show signs of bias against parents with disabilities, although they are subtle. Further, one can observe increasingly biased assumptions as the appellate courts move from cases involving obvious physical disabilities (e.g., a person with paraplegia who uses a wheelchair) to those with more subtle or stigmatized disabilities, such as cognitive or psychiatric disabilities. That is, custody cases involving physical disabilities tend to give the impression that appellate courts are giving careful consideration to parenting capacities and the best-interest standard. On the other hand, custody cases involving cognitive or mental disabilities are more suggestive of biased assumptions about the effects of such disabilities on parenting capacities. Thus, the following synopsis of case law provides examples of court approaches to four broad classes of disability: physical, sensory, cognitive, and psychiatric.[49]

### PHYSICAL DISABILITIES

The involvement of a parent with a physical disability in a child custody dispute seems, in one respect, to result in less-biased presumptions and outcomes against such parents. Two early cases provide good examples of this fact. In 1978, the Supreme Court of Alabama held that a custodial father's partial paralysis did not constitute a change in circumstances sufficient to warrant giving the mother custody of a child who had been living with the father for four years.[50] The court affirmed the lower court's refusal to change the custody arrangement, in part because the child was "well adjusted and does not appear to be adversely affected by any of the changes."[51]

A year later, in the landmark case *In re Marriage of Carney,* the California Supreme Court held similarly.[52] In that case, William Carney and Ellen Carney, his wife, separated and agreed that William should have custody of their two children. Some four years later, William had a jeep accident that resulted in quadriplegia. A year later William and Ellen went to court to finalize their divorce, and Ellen sought physical custody of the two children. She admitted that she had had only telephone contact with her boys prior to that, but the court awarded her custody. William appealed, and the California Supreme Court ruled that the order changing custody was an abuse of the trial court's discretion, citing its use of "outdated stereotypes of both the parental role and the ability of the handicapped to fill that role"[53] and society's need "to respect the civil rights of its physically handicapped members."[54]

*Marriage of Carney* articulated a standard vis-à-vis parents with physical disabilities to which a number of other states have hewn.[55] Even in the context of stigmatized illnesses, such as HIV, courts generally have been inclined to rule in favor of custody or visitation, absent proof of some direct risk to the child's well-being. Thus, in *Doe v. Roe,*[56] the maternal

grandparents sought to compel a custodial father of two children to submit to an AIDS test. The court held that "the most stringent test . . . that is, a showing of compelling need . . . must be met before an involuntary test for the HIV antibody may be ordered."[57] The court also noted that "there is no claim, nor could there be on the available medical evidence, that the children would be in danger from living with respondent if he were seropositive."[58]

*Carney* and related cases were important developments in custody law for parents with disabilities. These cases departed from previous, often explicit assumptions that parents with disabilities were "unfit" and recognized the civil rights of parents with disabilities to be coextensive with nondisabled parents. That is not to say, however, that all potentially capable parents with physical disabilities receive custody, nor that all (or even most) appellate cases provide a thoroughgoing analysis of the effects of physical disability on parenting capacities. For example, in *Bethea v. Bethea,*[59] where the mother had experienced a stroke induced by alcohol and drugs, the father, supported by expert recommendations, petitioned for a change of custody. The appeals court never discussed the extent of the mother's disability nor its effect on her parenting behavior and the adjustment of her children. Nevertheless, the court affirmed the change of custody to the father and found that the trial court had not abused its discretion.

Our view is that cases such as *Bethea* that involve physical disability but that do not apply a *Carney* analysis result, in part, from the above-described absence of standards requiring a more thoroughgoing and structured scrutiny of the treatment of disabled parents. Further, as described in the section on systemic barriers, below, we continue to see discrimination against people with physical disabilities operating at the pretrial and trial level, even in states with *Carney*-like rulings where such bias has been ruled as violative of civil rights. It seems, therefore, that it is necessary, but insufficient, to recognize and admonish legal and mental health professionals to avoid bias in such cases: as we detail below in our summary and recommendations, more can and must be done.

### SENSORY DISABILITIES

The few appellate-level custody cases that have involved sensory disabilities such as blindness or deafness seem to indicate an approach similar to the *Carney* line of cases. In *Bednarski v. Bednarski,*[60] the Michigan Court of Appeals reversed and remanded for new trial the decision by the trial court to award custody of two children to the two hearing grandparents. In part, the appeals court based its decision on the fact that there was only one interpreter for the father and none for the mother during the custody trial. The court found that the process did not comport with the state statute's mandates regarding the full participation of deaf parents in custody matters. In addition, the Court of Appeals held that the lower court had abused its discretion by not presuming that the best interest of the children was served by custody with a natural parent.

Another example of this even-handed approach can be found in *Clark v. Madden.*[61] In this case, a father with a visual disability appealed the trial court's decision concerning child support, secondary-education expenses, child custody, and limitations on his visitation rights. The trial court had ordered that a "responsible adult" accompany him when his daughter (nearing age 4 at the time of trial) was with him. The father had been blind since birth. He had lived independently, traveled, completed a degree in computer technology, and founded two successful computer companies of which he was chief executive officer. The appellate court reversed and remanded the case because the trial court made no specific finding that the daughter would be endangered without the restriction in the custody order that had been placed upon the father.[62]

### COGNITIVE DISABILITIES

In contrast to physical and sensory disability cases, when appellate cases involving cognitive disabilities are sampled, the trends bespeak a more ambivalent approach. On one hand, some courts have found that a parent's cognitive limitations (e.g., epilepsy[63]) are not in themselves determinative of whether it

would be in the child's best interest for such a disabled parent to have custody. For example, in *Moye v. Moye,*[64] a mother appealed an award of custody to the father that had been based, in large measure, on the mother's epilepsy. The mother argued that the trial court had overemphasized her disability, thus rendering its decision an abuse of discretion. The Idaho appellate court agreed, although it viewed a parent's disability as a valid consideration in a best-interest analysis. The court did not discuss the need to establish a nexus between the parent's disability and his or her parenting capacity.

A Missouri appellate court was less at ease with granting unsupervised visitation to a father with epilepsy.[65] In *Hankins v. Hankins,* sole custody was awarded to the mother. The father, who because of an aneurysm had experienced seizures that were apparently not fully controlled by medication and also had difficulty with concentration, appealed from the order requiring him to have all visitations supervised and to have his physician provide quarterly written reports, among other things. The record reflected substantial evidence that the "parties . . . had difficulty agreeing on certain decisions regarding the child, including naps, diet, medical treatment, and preschool."[66] The father had also not communicated well with the child's mother regarding his health. The appellate court refused to disturb the trial court's decision on custody and visitation restrictions, although the trial court's opinions were clearly conclusory regarding the nature of the father's threat to the child's best interest.

A more recent North Dakota case demonstrates an even more disturbing lack of basis for limiting a cognitively disabled parent's custody and access to her child. In *Holtz v. Holtz,*[67] the trial court heard evidence and argument regarding the need for changing custody from a custodial mother with a developmental disability, dyslexia, and a learning disability. The father sought primary physical custody, despite admitting that he had had almost no contact with his 7-year-old child prior to the lawsuit. The trial court's stated basis for granting the father custody was that the mother had a "mental incapacity to develop as [the child] grows . . . . Therefore, [she] would not be capable or competent to raise the minor child . . . . "[68] Using a "clearly erroneous" standard of review, the state Supreme Court found that there was no reversible error. The decision was affirmed despite the court's acknowledgment that no expert evidence established the parameters of the mother's disabilities at the time of the divorce (though the parenting aide and guardian ad litem gave evidence). That is, the trial court did not make an explicit connection between the child's best interest and the mother's parenting skills, but the North Dakota Supreme Court upheld the trial court's determination.

### PSYCHIATRIC DISABILITIES

The ambivalence found among decisions involving parents with cognitive disabilities is perhaps more pronounced in cases relating to parents with psychiatric disabilities.[69] At least among the lion's share of cases in which the psychiatric disabilities were minor, were no longer present, or had been successfully controlled through treatment, the courts appear to be more willing to grant custody. For example, in *Weiss v. Weiss,*[70] a Missouri appellate court affirmed that a "transitory depression" following the divorce did not prevent the mother from receiving primary custody, in part because of the testimony of the mother's psychologist that she could care for the children. Similarly, the Court of Appeals in *Burkhart v. Burkhart*[71] refused to disturb the trial court's award of joint physical custody where the mother was hospitalized for 30 days for a "transient situational depression" as a result of her own parents' divorce. And in *Timmons v. Timmons,*[72] a Louisiana appellate court affirmed the custody award of a mother who was in active recovery from substance abuse and had a history (but not current symptoms) of depression and a vaguely defined personality disorder.[73]

Parents with current psychiatric disabilities—whether minor or major—are more likely, however, to have such disabilities considered and used, at least in part, to decide custody in favor of the nondisabled parent. For example, in 1983, a father in Louisiana[74]

appealed a child custody award to the mother, who had been diagnosed with anorexia nervosa. Although trial courts typically have wide discretion in such cases, the appellate court determined that the trial court did not examine the best interest of the child. The court reviewed the testimony regarding the mother's "unstable emotional condition and its life-threatening physical symptoms" and concluded that the trial judge's decision was "erroneous and was influenced by the obsolete 'maternal preference' rule."[75] Furthermore, the court stated that "even if the mother [were] capable of physically caring for her child, which is questionable, her distorted self-image, mental instability, and bizarre habits would certainly have an adverse impact on the psychological development of this child. We have recognized that a child learns by example, and we are satisfied Mr. Spohrer can provide a normal, healthy psychological role model."[76]

Later cases have resulted in similar decisions. In *Schumm v. Schumm,*[77] the trial court awarded custody of the children, aged 9 and 12, to their father. The mother had been the primary caretaker for both children for eight years, and, on that basis, appealed the trial court's decision. The mother had a major mood disorder and vascular headaches that at times interfered with her ability to parent (e.g., falling asleep at inconvenient times and dropping a lit cigarette on the floor). Although she was undergoing psychiatric care for her mood disorder and the trial court noted her improved condition and good prognosis with continued care, the Minnesota Court of Appeals upheld the custody award, finding that the trial court properly considered the mother's disabilities to the extent they were related to the children's best interest. Given the typical weight that courts give to a parent's long history as the primary caretaker, and the usual presumption that such relationships should generally not be disturbed except for compelling reasons, the decision seemed to reflect, at least in part, the trial and appellate courts' response more to the existence of a disability than to a demonstrated need to change custody.

Another example is of a father in New Jersey[78] who had been the primary caretaker, although as a result of his bipolar disorder and an unspecified "additional mental illness" he was unable "to take full responsibility for the children" and had a full-time babysitter to assist him.[79] The appeals court upheld the trial court's determination that the mother should make all "final decisions" regarding all areas of the children's lives despite the joint custody arrangement that the court had settled upon. The evidence of the father's "irresponsibility" seemed to consist primarily of testimony that he had been late to pick up his children "on several occasions"[80] and on another occasion had failed to adequately supervise the children at the beach. A mandated therapist also testified that the father was "not capable of 'meaningful input' on decisions concerning the children,"[81] but no specific evidence of his failure in that regard had apparently been adduced. Here again, despite the father's status as primary physical caretaker, it appears that the court was putting more weight on his diagnosis and need for assistance than the ongoing role he had assumed with the couples' children for some 12 years.

Finally, in a recent case involving an allegation of a change in circumstances, the Supreme Court of North Dakota[82] upheld the trial court's determination that a mother experiencing depression secondary to fibromyalgia and migraine headaches should lose physical custody of her three children to their father. The court so held on the basis of an expert mental health professional's testimony that the oldest child was "becoming destructively parentified" (that is, "assuming adult responsibilities and acting as a care provider for younger siblings") because of the mother's disabilities.[83] This change of custody is unusual, given the typical reticence shown by appellate courts to disturb ongoing custody arrangements absent significant effects on children, and the fact that "parentification" is a theoretical concept of which little, if any, empirical verification exists.[84]

## SYSTEMIC BARRIERS

It might be argued that these judicial opinions (not to mention the statutes and professional standards) involving cognitive and psychiatric disabilities only reflect the complex nature of custody determinations rather than demonstrate prejudice against people with disabilities. It could be further argued that these cases reflect the difficult, albeit typical, process any family court must undertake to weigh the strengths and weaknesses of competing parents to reach the best outcome for children. But our experience at the NRC suggests otherwise. It suggests that the published cases and literature on parents with disabilities in child custody contests mask considerable bias and discrimination and that such attitudes and practices constitute obstacles to fair, child-focused custody determinations. The NRC receives calls from parents with disabilities and their advocates, attorneys, or evaluators, seeking assistance regarding marital custody (and child protection) cases. Usually the NRC is contacted prior to or during trials for which there are no published reports. In some instances TLG staff function as clinicians or expert witnesses reviewing complete records and therefore have in-depth knowledge of the situation and the outcome. The following information is based on a review of more than 150 of these unpublished marital custody cases. Cases are located in jurisdictions throughout the United States, though geographical location and other identifying information have been omitted to maintain the parties' privacy. The NRC often is not apprised of the outcome of cases; however, barriers and apparent discriminatory practice during the family court process are viewed by the NRC as significant, whatever the case outcome. Our intention in this review is to exemplify barriers that parents with disabilities and their advocates identify in the family court system, with a particular focus on pretrial and trial court experience.

### BARRIERS TO LEGAL REPRESENTATION

Obtaining appropriate legal representation is perhaps the first hurdle a parent with a disability faces in child custody cases. This difficulty in finding attorneys with disability-relevant experience and knowledge can result in serious consequences for parents. One example is a father with paraplegia who was seeking custody of his daughter. On the day he called the NRC, he was due to appear in court for a hearing in his custody case and did not have legal representation. He was seeking an attorney who understood disabled parents and the difficulties that he faced trying to visit his daughter, who lived six hours away. His inability to obtain knowledgeable counsel had left him without representation at a crucial point in the custody proceeding. As in many of the cases in which the NRC has been involved, the father related that the attorneys with whom he spoke did not seem to understand the expenses of operating his van on his limited and fixed disability income or the effort and strain that long-distance travel posed as a result of his disability. The attorneys' apparent lack of appreciation for the physical and financial effects of this father's disability reflects, in our experience at the NRC, a pervasive, underlying, and often unquestioned assumption that clients are not in need of reasonable accommodations. In this case, the father was seeking a modification that would have allowed the daughter to fly to visit him in his home for weekend visitations. Because he could not find counsel, he was forced to represent himself.

Even where low-cost representation is offered by legal service agencies, it may be effectively unavailable. In many states legal services agencies will represent only one spouse in a dissolution or child custody dispute, as it is considered a conflict of interest for the agency to represent both parties. It often becomes (as it did in the case mentioned above) a race for representation—especially if spouses live in the same or neighboring counties and only one agency offers services there.

In addition to the paucity of knowledgeable attorneys, parents with disabilities often have limited incomes yet have more expenses than other parents.[85] Many depend on some type of assistance, usually SSI (Supplemental Security Income) or SSDI (Social Security disability insurance), and lack the financial

resources to hire private attorneys. Court costs and filing fees make litigating a case even more challenging. Some attorneys are willing to advance those costs, but if they are unable or unwilling to do so, many clients are hard pressed to pay the fees necessary to initiate a claim. Often, attorneys petition to waive filing fees, but the process may delay cases.

In the absence of financial resources, parents with disabilities seek representation from legal services agencies. But many parents with disabilities are surprised to discover that, throughout the United States, it is rare for disability legal advocacy organizations to become involved in marital custody cases. Further, parents with disabilities are often unable to obtain assistance from local, non-disability-specific legal service agencies because the agencies are restricted in the types of cases for which they can provide representation. In one case, a woman with a mental disability had lost custody and visitation rights to her 6-year-old daughter to the maternal grandparent. The mother was not seeking custody, only to restore her visitation rights. The mother's social worker had called more than 30 agencies seeking legal representation but was told repeatedly that this type of case did not fit within their guidelines. For example, in the large metropolitan area where the mother lived, the primary legal service agency provided representation in custody cases only when they arose from dissolutions involving domestic violence. The paucity of appropriate, low-fee legal services for parents with disabilities seems due, at least in our experience, to specialization in legal clinics and a view that custody and guardianship cases are time-intensive, costly to litigate, and sometimes years in length. At the time of this writing, the mother in the case just noted was still seeking a pro bono attorney willing to take on her cause.

In a similar case, a mother with a terminal condition who was divorced in an eastern state was awarded sole physical custody of her 6-year-old son. She subsequently moved to a western state. She was now preparing a trust and guardianship for him. She planned to have custody go to a friend living in a neighboring state. The son, despite his young age, expressed a preference to live with the friend. The mother's attorney told her that after her death, the friend would have to file for temporary guardianship as well as a restraining order against the father in the neighboring state. But when the friend also sought legal counsel, she found this was not considered the type of case that legal service agencies would take because an unrelated third party was seeking custody against the father. In this case, the legal service agency's policy was that it would provide representation only in custody matters arising from marital dissolution. However, for this parent with a disability, who was attempting to structure custody upon her death, as well as for many of the parents with disabilities with whom we have worked, a legal services agency is the final place to obtain representation. For these agencies to maintain policies excluding cases that do not fit narrow criteria effectively limits many disabled parents' access to justice, as they are not able to obtain counsel.

In such instances, litigants who do not have legal representation often will simply not show up for a court appearance, unaware of the consequences of a failure to appear. They often think that their absence will merely postpone the issue, not that their legal rights may be lost, and do not know that they can appear in court and ask the judge for a continuance while they find an attorney.

Even when a case has been accepted by an agency or assigned by a legal referral service, there may be long waiting periods until the parent actually has legal representation. These long waiting periods can take an unusually high toll on parents with disabilities. One client involved in a custody dispute with her former husband was told she was on a waiting list for the assignment of an attorney, despite an imminent court date. This client was a mother with moderate cerebral palsy, who twice had to arrange for public transportation and pay for child care in order to appear on her own behalf to obtain postponements before an attorney was assigned. She obtained an attorney just before a third court appearance, and she had to make a third trip and again arrange and pay for child care only to have her

new attorney obtain yet another postponement. The expense of child care when one is on a fixed income, the physical strain of travel, and extended periods away from home—all elevate the costs parents with disabilities, as compared to parents without disabilities, must shoulder in custody cases when they wait for legal representation.

### ACCESS BARRIERS

Despite the Americans with Disabilities Act (ADA),[86] physical access to courts is still a problem in many communities. Parents in smaller towns and rural regions report particular difficulties in this regard. For instance, a wheelchair-using father with paraplegia who lived in a rural area was not given access to the courtroom when permanent guardianship of his children was awarded to relatives who had assumed custody after his spinal cord injury. Though the courthouse was equipped with ramps, the courtroom was inaccessible to wheelchairs; he had to wait in a hallway during proceedings.

It is very common for accommodations in communication to be lacking during or regarding court proceedings. In one case, a blind father was always sent material by the court in writing. Delays in obtaining readers led to missed appointments and court dates, for which he was blamed.

Even when parents request accommodations in advance, if they have cognitive or severe information-processing issues they often are not provided with advocates or translators so that they can understand the family court process. For example, a father with severe dyslexia, trying to represent himself, was denied both adaptations and interpreters.

An agency that advocates for deaf women experiencing domestic violence reports the lack of American Sign Language (ASL) interpreters in courts in some locales. Inappropriate or poor-quality interpretation is also a problem. For instance, highly visually oriented clients, such as deaf people who are foreign born or who have cognitive disorders, may not comprehend standard ASL legal interpreters and need a deaf person to do the relaying in visually gestured communication. The agency also reports that mediation for child custody has a particularly poor track record in providing interpreters for deaf mothers. They have been especially concerned about cases in family court in which hearing fathers alleged to be domestic violence perpetrators were used by mediators as interpreters for the mothers. Empowerment of the women by their advocates was necessary in order for them to request that mediation be rescheduled when interpreters were available.[87]

Disability advocates are currently advising that parents request accommodations at the outset of court involvement. In several cases involving parents with physical or vision disabilities, however, attorneys have been hesitant to request accommodations because they anticipate that calling attention to the parent's disability may affect the custody outcome.

Sometimes the parent is hesitant to request adaptations. A blind mother had received no accommodations in the courtroom or in prior or subsequent communications. She was afraid, however, to request them because a judge had already questioned her parenting ability in relation to her blindness. Parents are also concerned that they may antagonize judges by requesting accommodations. In fact, one parent reported being fined by a judge for persisting with requests for ADA accommodations in court.

### ATTITUDINAL BARRIERS

Despite the disability civil rights movement, attitudinal bias regarding disability is still prevalent. As mentioned above, disability tends to be ranked differentially. That is, in general people with physical disabilities are stigmatized less than people with sensory disabilities, and people with psychological and cognitive disabilities are the most stigmatized. Even among people with physical disabilities, however, some disabilities are ranked lower, such as wheelchair use, cerebral palsy, multiple sclerosis, facial disfigurement, and short stature.[88]

Our experience has been that legal, medical, and mental health professionals are not immune to these biases. Negativity and a lack of cultural competence about disability are reflected in language appearing in unpublished court documents and evaluations, such

as "afflicted with dwarfism," "wheelchair bound," "suffers from physical disability."

Cases often reflect underlying personal assumptions that it is not in a child's best interest to have a parent with a disability. They also reflect patterns of more attitudinal bias regarding certain disabilities. Negative speculations about the future are common and often seem to be based on stereotypes rather than on evidence.

For example, in one case both the mother with quadriplegia and her attorney reported that the judge's greatest concern was how the mother's disability would affect the child in the future. His concern was not based on her actual parenting, which had not been evaluated. She had been the primary parent since the child's birth and the father had not been involved. The father was requesting sole custody, based on the mother's disability. After TLG provided information regarding parents with disabilities, the father's attorney withdrew the issue of disability from the custody dispute.

In another instance, a judge maintained that a mother with a physical disability could not parent despite findings of psychological and occupational therapy evaluations documenting her capability. He assumed that the children would function as her attendants, though the mother was independent, there was personal assistance to meet her needs, the home was modified with adaptations, and her children had only the usual household chores. There were concerns about how quickly she could get upstairs in an emergency. When her ability to get upstairs was demonstrated, the next demand was to test her speed with a stopwatch.

In a case involving a mother with short stature, the mother and her attorney reported that there were assumptions about safety problems and, without actual parenting having been observed or evaluated, about her parenting abilities. It was also assumed that the child—of typical height—would have problems because of the parent's difference in appearance.

A number of NRC cases have involved requirements for supervision during visitations that did not seem functionally justified. A lack of familiarity with disability seemed to result in the exaggeration of parental limitations. These visitation requirements placed a financial strain on the parents, who had low incomes. A wheelchair-using father with paraplegia was required to provide supervision during all visitation because of his disability. After he took TLG's research and adaptation data to court, the father reported that the requirement for supervision was dropped and he was allowed more contact with his young child.

Many parents with disabilities have alleged either placement or concerns about placement with nondisabled parents who have committed child abuse or domestic violence. These placements seemed to be a particular concern when mothers had developmental disabilities, as they frequently experience abuse that is not identified or taken seriously by professionals. Individuals with developmental disabilities are particularly stigmatized, and their capacity for parenting is apt to be underestimated in family court. Advocates and community workers can play a crucial role in clarifying the capability of such a parent, ensuring that inappropriate or hazardous custody arrangements are not made on the basis of stigma.

Two of TLG's clinical cases raised this concern regarding parents labeled as developmentally disabled. The mother in the first case had been the primary caregiver for her child since birth. She had been battered by the child's father and had left the relationship and moved into the maternal grandmother's home, where mother and child had flourished with the support of TLG prevention services. The father periodically had made supervised visits, to which he had sometimes come under the influence of drugs and alcohol. The mother and child were afraid of him. When the child was 5, the father tried to gain joint custody, on the basis of the mother's developmental disability. Initially the court appeared to be considering an award of custody to the father. The mother did not have the funds for legal representation but was provided with advocacy by the NRC and the developmental disability system, which called attention to the father's history of violence. The father did not gain custody.

In a second clinical case, a low-income mother with a physical and intellectual disability, on SSI, also had provided good care of her child with the help of TLG's services. The nondisabled father showed no interest until the child was 9 years old and in early puberty. The TLG clinician was concerned about the tone and timing of his visits and his gift of a revealing bikini to the child. This father also tried to get custody on the basis of the mother's disability. He was a middle-class professional who was paying for attorney services. Again, a coordinated advocacy effort may have prevented him from attaining custody and resulted in a requirement for supervision during visits.

A number of parents contacting the NRC have complained that judges treated them with disrespect. For example, a blind mother reported that the judge said she could not be a responsible adult because she could not see.

Parents also stated they felt disrespected when judges questioned whether they actually had disabilities, despite medical evidence to the contrary. A parent on SSI reported that she was accused of faking her disability and urged to go to work. A mother with chronic fatigue and fibromyalgia reported that the court had ignored her doctor's orders and directed her to return to work. In another case, when a court was setting up spousal and child support, it denied a mother's disability and declared that she just did not want to work. Later, though there was no change in her condition, the court claimed that her disability rendered her an unfit mother.

In yet another case, a family court ordered a father to prove that his medical disability was getting better by engaging in either full-time school or work for a year before it would drop its requirement for supervised visitation. This was a great strain on his disability, and he was concerned it was worsening as a result. It seemed to him that he was being held to a different standard because of his disability.

### LACK OF DISABILITY AWARENESS, KNOWLEDGE, AND SKILL IN FAMILY COURTS

The experience of the NRC suggests that many family courts do not recognize or appreciate the implications of disabilities, the obstacles faced by parents with disabilities, and the solutions and resources that support their parenting and daily lives.

In a national survey of approximately 1,200 parents with disabilities, four of five respondents reported transportation as an issue; it was the barrier encountered by the largest group of parents with disabilities.[89] Yet family courts often seem to ignore these obstacles when they determine travel requirements for visitation. Parents in a number of states have reported problems with inadequate transportation options for visits. They have also reported that the impact of traveling on their disabilities is not taken into consideration. In one case a mother with chronic pain was ordered to regularly drive 120 miles so her child could visit the other parent out of state. She reported that the mediator denied that her disability was a factor in these visiting arrangements, though before this another court had determined she had a 100 percent disability.

Courts frequently seem unaware of the role of adaptations or accommodations for people with disabilities. These are neglected in communication during and regarding proceedings and in the mediation and evaluation process. Courts have also demonstrated a lack of awareness about the role of adaptations in parenting and in the daily lives of people with disabilities. Through research and clinical demonstration projects TLG has documented the role of disability adaptation as it naturally evolves in relationships between parents with physical disabilities and their babies. The organization has also demonstrated the profound role of "babycare" adaptations for parents with physical disabilities and cognitive adaptations that professionals use in interventions or evaluations of parents with intellectual disabilities.[90]

The lack of awareness about adaptations is apparent in the many cases where courts assume that supervision is needed during visitations when a parent has a physical disability that does not significantly affect parental caregiving. Court personnel do not appear familiar enough with physical disability in parents to be able to differentiate its varied degrees of impact on child care.

Cases have also reflected a lack of awareness about how parents with severe physical disabilities such as quadriplegia can provide care with the use of baby-care adaptations. It is common for courts to underestimate the potential for parent-child interaction in the presence of significant physical disability. In one case a nondisabled mother did not allow a preschool boy contact with his father during the father's long hospitalization after spinal cord injury. The child had developed a fear of his father (associating him with monsters), so the mother argued that visitation was not in the child's best interest. The father had extremely high-level quadriplegia and was receiving oxygen through a tracheal tube, so he could not speak with his child. A clinician specializing in disability introduced adaptations so the child and father could begin communicating nonverbally through play, first playing a computer game together, using switch-operated toys, then painting pictures together (the father holding the brush in his mouth). The boy's fear of his father's disability equipment was addressed by allowing him to play in a motorized wheelchair. In a few sessions the child's fears had subsided and he had begun to rediscover his father.

In some cases, courts assume that children will provide care to their parents with physical disabilities. Research does not substantiate this concern, finding on the contrary that parents with physical and vision disabilities with school-age children are apt to be so concerned about burdening their children that they require fewer chores than other families.[91] In addition, preliminary findings from a national survey of parents with disabilities and their teens revealed that teens with disabled parents did the same number of chores as teens with nondisabled parents.[92]

In addition, there is a common tendency to overgeneralize about parents with disabilities in the direction of pathology, assuming their children will not do well. In fact this is not the case: research has found positive outcomes for adult children of deaf parents, for adult children of fathers with spinal cord injury, and for school-age children of mothers with physical disabilities.[93]

## TRAINING AND SKILLS OF EXPERT ASSESSORS

The assumptions and biases we have described place pressure on custody evaluators who may be involved in such cases to "catch" issues of diverse disability and articulate them to the court. As noted earlier, however, there is an absence of well-defined standards for assessment of parents with disabilities in the custody evaluation literature.

The NRC has noted other problems with evaluations in family court cases, many of which seem rooted in attitudinal bias. For instance, custody reports frequently include stigma-laden language that signals a lack of familiarity with disability culture ("afflicted with multiple sclerosis," "wheelchair-bound"). More neutral language, emphasizing the person and referring to the disability as an attribute, is preferred—for example, "a mother with multiple sclerosis," "a father who uses a wheelchair." Courts and evaluators often presume that a parent with a disability is unable to cope, without observing his or her actual parenting. It is extremely common to find pathological speculations about future parenting or parent-child issues that are not based on evidence and are not supported by research or clinical data.

Evaluations also reveal a lack of familiarity with the supports that are integral to the lives of many people with disabilities; use of services that support independent functioning is interpreted as indicating incapacity as opposed to appropriate adaptation in support of good parenting. For instance, in one case a parent who used a motorized wheelchair was negatively evaluated regarding her capability because she used a personal assistant or nanny to compensate for her limitations.[94]

In the disability community, adaptations, like personal assistants, are acceptable means of maximizing functioning, whether in work or in parenting. Parents can orchestrate the physical help of assistants while maintaining their central authority and relationship with their children. Personal assistants, like adaptations, do not indicate inability to provide care for a child or to form an appropriate parental relationship with a child. In one case an evaluator maintained

that the father's use of a wheelchair meant he would be unable to keep up with his young son. The evaluator inaccurately described his disability as preventing the lifting and carrying of his child and stated that home health aides (who only did housekeeping and provided no help with the child) were central to personal care and parenting.

Evaluators must gain familiarity with the role of assistive technology, and assessments by occupational therapists must be used when there are questions about physical functioning during parenting. It should be noted that one cannot properly evaluate the capability of a parent with a significant physical disability or the relationship between an infant and such a parent without first providing babycare adaptations.[95]

Similarly, one cannot discern the full potential of parents with cognitive disabilities without first providing adaptations that are individualized to the parent's functioning. Early intervention can be very effective when it is adapted in a respectful and empowering manner to parental learning and processing limitations. Evaluation of parents with cognitive disabilities necessitates considerable adaptation; extensive observation of actual parent-child interaction is crucial, as parental strengths may not be reflected in testing or interviews.[96]

## SUMMARY AND RECOMMENDATIONS

Our experience at the NRC demonstrates a continuing and widespread bias against parents with disabilities in child custody cases. Despite laudable intentions, many statutes, appellate decisions, rules of court, and professional standards fail to provide sufficient guidance to courts and professionals engaged in resolving custody conflicts about how to address these discriminatory assumptions. Even without the overarching concern for the needs of children to have the best arrangements possible in the wake of a divorce, this discrimination would be unacceptable. But in light of the likelihood that children will be harmed as well, addressing the issue becomes imperative.

How might this be accomplished? The NRC and its host organization, TLG, have worked with many parents, attorneys, and courts in an attempt to secure a more evenhanded approach to parental disability in child custody cases. Although by no means have these efforts always been successful, courts, attorneys, and professionals have demonstrated a willingness to consider disability-related knowledge and adaptations in the custody decision-making process on a regular basis. They have further been willing to modify their practices when provided with research, information, and assistance. TLG's success at affecting case outcomes leads to some optimism about the potential for systemic change in these cases.

It is particularly encouraging that the NRC's technical assistance and training informed recently passed Idaho legislation that addresses custody issues of parents with disabilities. The legislation shifted the focus of judicial review of a parent's "mental and physical health" as a relevant factor in custody decisions to a broader determination of the "character and circumstances" of the parties. In conjunction with this shift of emphasis, the statute explicitly prohibits discrimination on the basis of disability. It further empowers parents with disabilities to adduce evidence and information before the court regarding "adaptive equipment or supportive services" that can assist them in carrying out their parenting role. The statute also requires that evaluations of parental fitness take into account the use of adaptive equipment and supportive services and be conducted by individuals with expertise in their use.[97] By including all of these elements the statute expressly addresses disability, reframes the issue as one of parental capability (with appropriate modifications or assistance), and deemphasizes the use of categories such as "mental health" as bases for deciding which parent should receive custody.

We envision four areas in which further change could occur:

First, statutes, rules of court, and professional standards could be amended to address explicitly the bias experienced by parents with disabilities and methods of attenuating this bias. Following the

Idaho example above, statutes could articulate a ban on discrimination against people with disabilities in custody determinations, explicitly empower parents with disabilities to introduce evidence regarding the positive effects of support systems and adaptive equipment, and, in the event the court finds that a parent's disability does affect the child's best interest, require courts to explicate the nexus between the parent's disability, his or her functioning as a parent, and the child's best interest. Another alternative would be to impose a rebuttable presumption in child custody determinations that a parent's disability does not affect that parent's capacity to care for his or her children. The party wishing to overcome this presumption must demonstrate actual, current, and negative behavioral effects of parental disability on the children. Moreover, rules of court could require that custody evaluations involving parents with disabilities include expert behavioral observations of these parents with their children and show a clearly articulated, observed connection between the parenting characteristic under consideration, the parent's child-rearing skills and abilities, and the effects on the child.

Statutes, rules of court, and professional standards could also require evaluators to thoroughly investigate whether they need to modify the evaluation process to provide a more valid, reliable assessment of a parent's capacities.[98] For example, giving a parent with a speech disability more time to respond to timed items on a psychological test may well yield a more accurate assessment of that parent's functioning. A parent with a cognitive/learning disability may need to have questions presented orally. A parent with a significant physical disability may need to have and become accustomed to babycare adaptations prior to evaluation. Such standards could also require adapted naturalistic observations—for instance, in the parent's modified home setting rather than an unfamiliar setting—instead of leaving the venue for observation open to the evaluator's discretion.[99] Professional standards could require explicit behavioral support for statements made about a parent's capacity and prohibit the use of global diagnostic or disability labels as a ground for limiting custody or visitation.

Professional standards could also address the problem of using standardized testing to assess parenting capacity in parents with disabilities. This rule should go beyond the typical cautions issued regarding the use of psychological testing[100] and explicitly allow such testing only when (1) the test has been demonstrated to be valid for use in assessing parenting skills and abilities and (2) the test has been adjusted for parents with the disability in question.

Furthermore, as has been suggested by Stephen Herman,[101] formal rules of court, statutes, and professional standards could put into place a peer review process by professionals knowledgeable about disabilities and parenting. Although the courts would maintain ultimate decision-making power, these professional peer reviewers could provide feedback about particular reports and overall practices as well as the responsiveness and sensitivity of evaluators to disability concerns.

The second area for improvement involves the development of additional legal resources for parents with disabilities. Here, a number of possibilities arise. National disability advocacy organizations could incorporate marital custody cases in their range of acceptable cases. Law schools could seek out internships for law students in which they assist parents with disabilities in navigating the procedural mazes encountered in family law matters. Law school clinics could develop disability-knowledgeable and -sensitive family law–related services, with supervised students providing advocacy and information. Perhaps even upper-level undergraduates could be trained to provide assistance to parents with disabilities to help them accomplish the practical steps involved in getting to court, raise the need for accommodations, and so on. The latter could be modeled on the patient's rights advocacy services programs operating in many states.

A third area of improvement would involve training of family courts, attorneys, and evaluation personnel

to become more sensitive and sophisticated in disability-related concerns. The traditional continuing education requirements for such professionals would be one route through which to initiate this training. For example, family law attorneys and family and conciliation court judges could be required to obtain a minimum of training regarding parents with disabilities and their children. Less traditional approaches, such as providing incentives for attorneys to receive training (e.g., monetary rewards, extra credit toward licensure requirements, and grants to pay for such educational experiences) could also be attempted. For attorneys and evaluators, law and graduate schools could begin the training process by offering coursework and work experience in family law, parenting, and disability.[102]

The fourth and final area of change would involve changes in current practices by family courts, advocates, and custody evaluators. All could begin to apply at least some of the suggested strategies mentioned above. For example, attorneys and advocates could ask whether the client is a parent with disabilities and, if the client is such a parent, raise that issue with the court to permit appropriate adaptations.[103] Courts also could ask all parents with disabilities whether they need adaptations and monitor whether, in the course of communication and evaluation, such adaptations have been employed. Courts could further exclude or limit the weight placed on evaluations where adaptations have not been made. And courts and attorneys in smaller communities (where, in our experience, accommodations are more likely to be absent) could grant requests for adaptations and accommodations[104] for parents with disabilities, so as not to exclude them from meaningful involvement in the custody determination process.

In summary, if adopted, the suggested efforts could go a long way toward ameliorating the injustices done to parents with disabilities who seek thorough, fair, and unprejudiced evaluations of their parenting abilities in the context of marital child custody disputes. They, and their children, deserve no less.

## NOTES

1. Rhoda Olkin, What Psychotherapists Should Know About Disability 70–71 (Guilford Press 1999).

2. *See, e.g.,* Cal. Fam. Code § 3011 (West 1994 & Supp. 2003); Fla. Stat. § 61.13(3) (2003).

3. Unif. Marriage & Divorce Act (1979).

4. Mich. Comp. Laws § 722.23 (2003).

5. Fla. Stat. § 61.13(3) (2003).

6. Cal. Fam. Code §§ 3011, 3020, 3042.

7. *See, e.g.,* Mich. Comp. Laws § 722.23(g) (2003).

8. In addition, some statutes explicitly exclude certain factors from consideration. *See, e.g.,* N.Y. Dom. Rel. Law § 240.1-a (Consol. 2002) (precluding a court from considering a report of child abuse unless an investigation has determined that some credible evidence of abuse exists or if social services has determined that the report is unfounded).

9. Scholars have leveled significant criticism at the best-interest standard and the Uniform Marriage and Divorce Act. For example, in his seminal critique, Mnookin argued that "our society today lacks any clear-cut consensus about the values to be used in determining what is 'best.'" Robert Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy,* 39 Law & Contemp. Probs. 226, 229 (1975). *See also* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law,* 60 Tul. L. Rev. 1165, 1181 (1986) (The best-interest standard's "vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child,* 54 U. Chi. L. Rev. 1, 7 (1987) ("I dispute the principle that custody ought to be decided solely by considering what is in the best interest of the child. I argue that the principle is indeterminate, unjust, self-defeating, and liable to be overridden by more general policy considerations"); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best Interest Standard,* 89 Mich. L. Rev. 2215, 2219 (1991) ("In recent years, . . . the best-interest standard has been widely and vehemently attacked, essentially on the grounds that it is too little a rule and too much an award of discretion"). Krauss and Sales offer a similar critique, arguing that "at best, the current conceptualization of the

NOTES

[best-interest standard] allows for a state-sponsored intrusion into the family structure and an inexact, implicit judicial weighing of parental fitness. At wors[t], the [standard] allows for extralegal judicial biases to mandate a restructuring of the family system through a specific custodial decree." Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases,* 6 Psychol. Pub. Pol'y & L. 843, 873 (2000). That is not to say that the best-interest standard does not have its strengths. As Chambers, another early critic of the best-interest standard, has acknowledged, it has "the important virtues of flexibility and adaptability." David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce,* 83 Mich. L. Rev. 477, 481 (1984). Furthermore, few, if any, better alternatives have been forthcoming. Interestingly, Krauss and Sales have suggested replacing the best-interest standard with a "least detrimental alternative" standard. Krauss & Sales, *supra,* at 872–75. This notion has yet to be adopted, however. Thus, our approach, as described in this article, is to work under the best-interest standard but provide better-delineated guidance to courts and professionals, at least with respect to decision making in regard to parents with disabilities.

10. Krauss & Sales, *supra* note 9, at 870–71.

11. *But see, e.g.,* Colo. Rev. Stat. § 14-10-127 (2003); Mont. Code Ann. § 40-4-215 (2003); Fla. R. Ct. 12.363; Pa. R. Civ. P. 1915.8; Montgomery County, Oh., Dom. Rel. Div. LF 4.30 (2001).

12. Gary B. Melton et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers (Guilford Press 2d ed. 1997).

13. *See* Cal. R. Ct. 5.220.

14. *See id.* 5.220(h)(1).

15. *See id.* 5.220(h)(6).

16. *See id.* 5.220(h)(11) ("Be sensitive to the socioeconomic, gender, race, ethnicity, cultural values, religious, family structures, and developmental characteristics of the parties").

17. *See infra* "Attitudinal Barriers" and "Lack of Disability Awareness, Knowledge, and Skill in Family Courts."

18. Cal. R. Ct. 5.220(h)(1), (h)(6).

19. Research regarding bias against parents with disabilities among legal and mental health professionals is virtually nonexistent. Nonetheless, a study by Olkin and Howson found, at least with respect to physical disabilities, that social services professionals attached similarly high levels of stigma to many physical disabilities as did undergraduate college students. Rhoda Olkin & Leslie J. Howson, *Attitudes Toward and Images of Physical Disability,* 9 J. Soc. Behav. & Pers. 81, 92–93 (1994). Another study assessing the attitudes of school counselors (educational professionals who have regular contact with and would presumably be less biased against children with disabilities) found similar levels of stigma. Rodney K. Goodyear, *Patterns of Counselors' Attitudes Toward Disability Groups,* Rehab. Counseling Bull. 36 (1983). For additional research and commentary on the nature and extent of bias against people with disabilities, see Olkin, *supra* note 1, at 70–71; Attitudes Toward Persons With Disabilities 253–60 (Harold E. Yuker ed., Springer Publ'g 1988); Paul K. Longmore, *Elizabeth Bouvia, Assisted Suicide, and Social Prejudice,* 3 Issues L. & Med. 141 (1987). There is little reason to believe that legal or mental health professionals would differ substantially in their belief systems from the general public or from other, previously studied groups of professionals.

20. *See, e.g.,* Mnookin, *supra*, note 9, at 230 ("Because what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes"); Krauss & Sales, *supra* note 9, at 873.

21. *But see infra* note 97 and accompanying text.

22. A concern over unfettered judicial discretion in custody cases has been prominent in criticisms of the best-interest standard. *See supra* note 9. Although we make no pretense of resolving this controversy here, it is useful to consider that the general tendency of critics has been to argue for the limitation of discretion via more clearly articulated rules. Our proposed solutions point in a similar direction.

23. The lion's share of custody cases is resolved informally, and mental health professionals likely are involved in only a minority. *See* Melton et al., *supra* note 12, at 483; Alan Carlson et al., *Child Custody Decisions: A Survey of Judges,* 23 Fam. L.Q. 75 (1989). Nonetheless, given the frequency of divorce and child custody cases, the absolute numbers of cases involving mental health professionals are not inconsequential. Thus, major mental health professions have developed guidelines to assist practitioners in conducting custody evaluations for the courts. *See infra* notes 30 and 33.

NOTES

24. Krauss & Sales, *supra* note 9, at 844; Melton et al., *supra* note 12, at 483.

25. Krauss & Sales, *supra* note 9, at 849–50; Melton et al., *supra* note 12, at 484.

26. Melton et al., *supra* note 12, at 484.

27. *Id.;* Robert Nicholson, *Forensic Assessment*, *in* Psychology and Law: The State of the Discipline 121–73 (Ronald Roesch et al. eds., Kluwer Academic/Plenum 1999).

28. Marc J. Ackerman & Melissa C. Ackerman, *Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited),* 28 Prof. Psychol.: Res. & Prac. 137 (1997); James N. Bow & Francella A. Quinnell, *Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years After American Psychological Association Guidelines,* 32 Prof. Psychol.: Res. & Prac. 261 (2001); David Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations,* 24 Prof. Psychol.: Res. & Prac. 213 (1993); Melton et al., *supra* note 12, at 484.

29. Melton et al., *supra* note 12, at 484 ("Indeed, there is probably no forensic question on which overreaching by mental health professionals has been so common and so egregious").

30. Martha L.A. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking,* 101 Harv. L. Rev. 727 (1988); Melton et al., *supra* note 12, at 483–84; Am. Psychol. Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings,* 49 Am. Psychol. 677 (1994); Psychology and Child Custody Determinations: Knowledge, Roles, and Expertise (Lois A. Weithorn ed., Univ. of Neb. Press 1987).

31. Melton et al., *supra* note 12, at 483–84.

32. Olkin, *supra* note 1, at 70; *see also* Leonard W. Sushinsky & Richard Wener, *Distorting Judgments of Mental Health: Generality of the Labeling Bias Effect,* 161 J. Nerv. & Ment. Dis. 82 (1975); Gloria J. Berman & Dene S. Berman, *In the Eyes of the Beholder: Effects of Psychiatric Labels and Training on Clinical Judgments,* 6 Acad. Psychiatry Bull. 37 (1984); Yoav Ganzach, *The Weighing of Pathological and Nonpathological Information in Clinical Judgment,* 104 Acta Psychologica 87 (2000).

33. *See, e.g.,* Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation,* 36 J. Am. Acad. Child & Adolescent Psychiatry, Supp. 57S (1997); Am. Psychiatric Ass'n, Child Custody Consultation: A Report of the Task Force on Clinical Assessment in Child Custody (rev. ed. 1988); Model Standards of Practice for Child Custody Evaluations (1994).

34. Model Standards of Practice for Child Custody Evaluations, *supra* note 33.

35. These areas of evaluation include "A. Quality of relationship between parent or caretaker and the child; B. Quality of relationship between the contesting parents or potential caretakers; C. Ability of each parent or caretaker to parent the child; D. Psychological health of each parent or potential caretaker; E. Psychological health of each child; F. Patterns of Domestic Violence." *Id.* at § IV.

36. Model Standards of Practice for Child Custody Evaluations, *supra* note 33.

37. *Id.*

38. As we suggest below, requiring training in the types of discrimination experienced by people with disabilities and the observation and documentation of a specific, observable connection between a disability and parenting capacity would be two potentially significant improvements in professional guidelines, as well as in statutes and rules of court regulating steps in the child custody evaluation process. *See infra* "Summary and Recommendations."

39. Am. Acad. of Child & Adolescent Psychiatry, *supra* note 33.

40. *Id.* at 60S.

41. *See id.* Methodologically sound research literature on developmental outcomes and custody arrangements is very sparse (*see supra* note 25 and accompanying text). However, there is a well-developed and relatively strong literature regarding those parenting behaviors that, in general, are related to positive psychological and behavioral outcomes for children, as well as those parenting behaviors that are related to more negative outcomes. *See, e.g.,* Benjamin M. Schutz et al., Solomon's Sword: A Practical Guide to Conducting Child Custody Evaluations (Jossey-Bass 1989). Requiring assessors to actually engage in observations of child-parent interactions in naturalistic settings, to use the existing literature on parenting and developmental outcomes, and to document observations of the presence or absence of such behavior would be one method by which to reduce the effects of bias on parents with disabilities. Professional standards and guidelines could, in cases where the impact of physical disabilities on parenting is at issue, require assessments with disability-appropriate adaptations or accommodations.

NOTES

42. Am. Psychol. Ass'n, *supra* note 30.

43. *Id.* at 678. Guideline 6 states: "The psychologist engaging in child custody evaluations is aware of how biases regarding age, gender, race, national origin, religion, sexual orientation, *disability,* language, culture, and socioeconomic status may interfere with an objective evaluation and recommendations. The psychologist recognizes and strives to overcome any such biases or withdraws from the evaluation." (Emphasis added.) *See also id.* at 679 (Guideline 14).

44. *Id.* at 678. See *supra* note 41 for a discussion of how assessments might take into account disabilities but reduce the likelihood of bias.

45. Jeanne B. Patterson & Barbara Witten, *Myths Concerning Persons With Disabilities,* 18 J. Applied Rehab. Counseling 42 (1987).

46. *See supra* notes 38 and 41; *see also infra* "Summary and Recommendations" (suggesting alternatives to assist professionals in identifying and overcoming bias, and for improving these guidelines).

47. *But see infra* note 97 and accompanying text.

48. *See infra* "Systemic Barriers" (discussing problems of obtaining legal counsel, physical access barriers, attitudinal barriers, and barriers resulting from lack of awareness, knowledge, and skill at the trial court level).

49. These classifications are open to criticism on a number of levels. First, many in the deaf community do not consider deafness to be a disability. Second, the overlapping nature of disabilities (e.g., the sensory, physical, and cognitive effects of multiple sclerosis) underscores the artificial nature of such distinctions. Third, these categories do not reflect the complexity and multilayered impact of disability and the degree to which limitations are socially constructed and determined. Nevertheless, the use of these distinctions by courts, their employment for research purposes by the Census Bureau, and their use by at least some disability organizations have some justification.

50. Warnick v. Couey, 359 So. 2d 801 (Ala. Civ. App. 1978).

51. *Id.* at 803.

52. *In re* Marriage of Carney, 598 P.2d 36 (Cal. 1979).

53. *Id.* at 37.

54. *Id.*

55. *See, e.g.,* Harper v. Harper, 559 So. 2d 9 (La. Ct. App. 1990) (trial court designated mother with spina bifida the domiciliary parent for the school term, and appeals court affirmed); Matta v. Matta, 693 N.E.2d 1063 (Mass. App. Ct. 1998) (mother with multiple sclerosis and requiring the assistance of a personal assistant awarded custody of child); Hatz v. Hatz, 455 N.Y.S.2d 535 (N.Y. Fam. Ct. 1982) (mother who had acquired paraplegia in an accident had joint custody affirmed).

56. Doe v. Roe, 526 N.Y.S.2d 718 (N.Y. Sup. Ct. 1988). *See also* Claudia G. Catalano, Annotation, *Child Custody and Visitation Rights of Person Infected With AIDS,* 86 A.L.R.4th 211 (2001) (reviewing custody and visitation determinations in the context of AIDS- and HIV-related cases).

57. *Doe,* 526 N.Y.S.2d at 725.

58. *Id.*

59. Bethea v. Bethea, 596 So. 2d 1279 (Fla. Dist. Ct. App. 1992) (per curiam).

60. Bednarski v. Bednarski, 366 N.W.2d 69 (Mich. Ct. App. 1985).

61. Clark v. Madden, 725 N.E.2d 100 (Ind. Ct. App. 2000).

62. *But c.f.,* an earlier Louisiana case, Gill v. Dufrene, 706 So. 2d 518 (La. Ct. App. 1997) (holding against a hearing-impaired mother's physical custody of her infant, but apparently also relying heavily on the mother's drug use and "chaotic lifestyle" as bases for the decision).

63. As cited, *supra* note 49, categorization of disabilities is problematic. Arguably, epilepsy is a "physical disability" that, in some forms, results in temporary cognitive impairment. It is typically classified as a cognitive impairment, however, and will be so categorized here.

64. Moye v. Moye, 627 P.2d 799 (Idaho 1981).

65. Hankins v. Hankins, 920 S.W.2d 182 (Mo. Ct. App. 1996).

66. *Id.* at 185.

67. Holtz v. Holtz, 1999 N.D. 105, 595 N.W.2d 1 (N.D. 1999).

68. *Id.* ¶ 7, 595 N.W.2d at 4.

69. For a comprehensive review of child custody cases in which psychiatric disability has been considered, see Linda A. Francis, Annotation, *Mental Health of Contesting*

NOTES

*Parent as Factor in Award of Child Custody,* 53 A.L.R.5th 375 (2001).

70. Weiss v. Weiss, 954 S.W.2d 456 (Mo. Ct. App. 1997).

71. Burkhart v. Burkhart, 876 S.W.2d 675 (Mo. Ct. App. 1994).

72. Timmons v. Timmons, 605 So. 2d 1162 (La. Ct. App. 1992), *cert. denied,* 608 So. 2d 195 (La. 1992).

73. *See also* Lyckburg v. Lyckburg, 140 So. 2d 487 (La. Ct. App. 1962) (awarding custody to mother who had a history of psychiatric disability but apparently no current symptoms).

74. Spohrer v. Spohrer, 428 So. 2d 1350 (La. Ct. App. 1983).

75. *Id.* at 1353.

76. *Id.* at 1353–54.

77. Schumm v. Schumm, 510 N.W.2d 13 (Minn. Ct. App. 1993).

78. Boardman v. Boardman, 714 A.2d 981 (N.J. Super. Ct. App. Div. 1998).

79. *Id.* at 983.

80. *Id*. at 985.

81. *Id.*

82. Mayo v. Mayo, 2000 N.D. 204, 619 N.W.2d 631 (N.D. 2000).

83. *Id.* ¶ 4, 619 N.W.2d at 634.

84. Olkin, *supra* note 1, at 132; Lisa Cohen, Mothers' Perceptions of the Influence of Their Physical Disabilities on the Developmental Tasks of Children (1998) (unpublished Ph.D. dissertation, California School of Professional Psychology).

85. Olkin, *supra* note 1, at 18; Nat'l Org. on Disability/Louis Harris & Assoc., Inc., 2000 Survey of Americans With Disabilities (2000); Linda Toms Barker & Vida Maralani, *Challenges and Strategies of Disabled Parents: Findings From a National Survey of Parents With Disabilities* (Berkeley Planning Assoc. 1997).

86. 42 U.S.C. § 12,101 (2000).

87. Personal communication with Julie Rems-Smario, Executive Director of Deaf Women Against Violence (Apr. 8, 2002).

88. Olkin, *supra* note 1; *see also* works cited *supra* note 32.

89. Barker & Maralani, *supra* note 85, at 5-1.

90. Megan Kirshbaum, *A Disability Culture Perspective on Early Intervention With Parents With Physical or Cognitive Disabilities and Their Infants,* 13 Infants & Young Child. 9 (2000); Megan Kirshbaum & Rhoda Olkin, *Parents With Physical, Systemic, or Visual Disabilities,* 20 Sexuality & Disability 1 (2001). Examples of parenting adaptations include the following: A parent with poor walking balance or repetitive stress in wrists and arms may need a walker with a baby seat attached in order to move the baby safely from room to room. A parent with back problems may need steps so a heavy toddler can climb into a highchair for feeding. A wheelchair user may need a diapering surface, crib, highchair, and bathing setup adapted at a workable height. Deaf parents may need a baby cry alarm to maximize their responsiveness to their babies. A blind parent may need an adaptive device for measuring a child's medicine, while a parent with a cognitive disability may need an alarm or prompting system to remember to give a child medicine.

91. Cohen, *supra* note 84.

92. Kelley Y. Abrams & Rhoda Olkin, Family Responsibilities of Adolescents With a Disabled Parent (poster presented by Abrams at the Society for Research on Adolescence, New Orleans, Apr. 2002).

93. Frances M. Buck & George W. Hohmann, *Personality, Behavior, Values, and Family Relations of Children of Fathers With Spinal Cord Injury,* 62 Archives Physical Med. & Rehabilitation 432 (1981); Cohen, *supra* note 84, at 210–36; Paul Preston, Mother Father Deaf: Living Between Sound and Silence (Harvard Univ. Press 1994); Diana Rintala et al., *Comparison of Parenting Styles of Persons With and Without Spinal Cord Injury and Their Children's Social Competence and Behavior Problems,* 23 J. Spinal Cord Med. 244 (2000).

94. Note that Stephen Herman has argued, in this regard, that whether a parent has a bipolar disorder or a physical disability or illness, the evaluator should assess "how that parent handles it and cares for him or herself, and whether or not there has been or is likely to be any direct impact upon the child." The focus of assessment should be (and under California law must be [*see* Marriage of Carney, 598 P.2d 36, 41–42]) "the issues of the overall parent-child relationship, attachment, and general ability to care for the child." Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review,* 1 J. Center Children & Cts. 139, 142–43 (1999).

NOTES

95. Megan Kirshbaum, *Parents With Physical Disabilities and Their Babies,* 8 ZERO TO THREE 8 (June 1988); Megan Kirshbaum, *Babycare Assistive Technology for Parents With Physical Disabilities: Relational, Systems, and Cultural Perspectives,* AM. FAM. THERAPY ACAD. NEWSL., Spring 1997, at 20.

96. Kirshbaum, *supra* note 90, at 14.

97. 2003 Idaho Sess. Laws 232; *see* Megan Kirshbaum, *Tales From the Frontlines: A Practitioner's First Experiences in Public Policy Advocacy,* 21 ZERO TO THREE 26 (June/July 2001).

98. For example, in the aforementioned case of the child who had become phobic of his father after the father's long hospitalization for a spinal cord injury, imagine if there had not been substantial work with the child and parent prior to a custody evaluation. The child's reaction to his father likely would have been interpreted to prohibit or restrict visitation, with a tragic loss to the child. This case also underscores the need to permit the child and the parent with a disability to have adequate time with each other before an evaluation (even more time than is typically suggested in evaluation texts). *See, e.g.,* BENJAMIN M. SCHUTZ ET AL., *supra,* note 41. If sufficient preparatory time has not been spent, then this deficiency needs to be considered and the results of observational data not overinterpreted.

99. Appropriate adaptations and naturalistic observation are essential to a valid, unbiased assessment of the parenting capacity of parents with disabilities. An evaluator could conduct a behavioral observation and anchor his or her inferences in such observations, but without necessary adaptations the evaluator could come to wholly erroneous conclusions. Consider, for example, a blind parent who is asked to come for an office visit to undergo a structured play observation session with his or her child. In the office, the parent will not know where things are, so the situation is likely not an adequate test of the parent's skill. A naturalistic observation in the home, where the parent knows where things are placed, is likely to lead to a substantially different set of inferences about that parent's abilities.

100. Am. Acad. of Child & Adolescent Psychiatry, *supra* note 33, at 57S; Am. Psychol. Ass'n, *supra* note 30, at 677.

101. Herman, *supra* note 94, at 140–41.

102. For example, the California School of Professional Psychology, San Francisco Bay Area Campus, offers a course in families, disability, and law.

103. Parents with disabilities and their attorneys are often concerned that raising the issue of disability will result in bias against the parent. Failure to address this issue at the outset, however, potentially could place the parent at a significant disadvantage in terms of how an assessor and the court evaluate his or her parenting capacity. Moreover, it does not preserve the issue for appeal.

104. Maintaining flexibility in regard to such accommodations is also a useful step. For example, where smaller or older courthouses have yet to be made accessible, courts can consider the use of other, accessible structures in the community in which to hold hearings so that parents with disabilities can attend and be heard.

# Effective Intervention With High-Conflict Families

## *How Judges Can Promote and Recognize Competent Treatment in Family Court*


**Lyn R. Greenberg, Ph.D.**

*Private practice, clinical and forensic psychology (Los Angeles)*

**Jonathan W. Gould, Ph.D.**

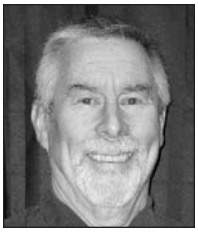
*Private practice, clinical and forensic psychology (Charlotte, North Carolina)*

**Hon. Robert Alan Schnider**

*Superior Court of California, County of Los Angeles*

**Dianna J. Gould-Saltman**

*Gould-Saltman Law Offices, L.L.P. (Los Angeles)*



**David A. Martindale, Ph.D., A.B.P.P.**

*Private practice as forensic psychological consultant (Morristown, New Jersey)*


The emotional and psychological risks to children resulting from conflicted custody disputes and the varied needs of separated families have led to the increased involvement of mental health professionals in child custody cases. The practices of mental health professionals providing court-related treatment may have a substantial impact on the reliability and relevance of their professional opinions, the effectiveness of services provided to children and families, and children's development and adjustment. This impact emphasizes the need for judicial officers and attorneys to understand the ethical and professional standards that support competent treatment and intervention services in the forensic arena.[1]

As the involvement of mental health professionals becomes more common in child custody cases, judicial officers will increasingly be called upon to determine the scope, focus, and adequacy of court-related treatment services. There are important differences among professional roles in the scope of services provided, the limitations on appropriate opinion testimony, and accepted professional practices. Individual practitioners also differ in their professional philosophies and methods. Despite these differences, however, we believe that just as professional organizations have established practice standards that apply to all of their members, it is possible to identify a core set of concepts that characterize high-quality treatment services in child custody cases.

Recent publications[2] argue that the work of child custody evaluators should be consistent with current ethical standards, professional practice guidelines, clinical and scientific research and theory, and the legal standards governing the relevant jurisdiction. Several professional organizations have established guidelines and standards for child custody evaluations, but few such standards exist for treatment in the context of the court. An emerging literature is developing in this area. Greenberg and Gould, as well as Greenberg, Gould, Gould-Saltman, and Stahl,[3] have advanced the position that many of the guidelines and standards applied to custody evaluators are also relevant to the work of other psychologists providing services to court-involved families.



*Continued on page 50*

The emotional and psychological risks to children of high-conflict divorce have led to the increased involvement of treating mental health professionals in child custody cases. A variety of intervention and service models has been developed to assist families in negotiating the family transition successfully and supporting children's needs. Competent mental health professionals may help children learn effective coping skills and help parents reduce conflict and support their children's needs. Conversely, inappropriate mental health practice can foment conflict, undermine children's development, and contaminate the data considered by the child custody evaluator or the court. This article provides a framework that judicial officers and counsel may find useful in structuring orders for court-related treatment and assessing the competency and appropriateness of services provided. ■

## PROBLEMS AND NEEDS

This section contains three subsections describing problems involved in child custody cases. The first subsection briefly reviews the behavioral science literature pertaining to the psychological risks to children involved in contested custody cases. The second subsection discusses the need to teach children coping skills that will enable them to better handle their parents' conflicted divorce and to avoid being caught in the middle. The final subsection briefly discusses the financial barriers to effective treatment in families of divorce.

### RISKS TO CHILDREN OF CONFLICTED CUSTODY DISPUTES

Children who are exposed to conflicted divorce may be at risk for a variety of psychological difficulties, both at the time of the divorce and as they grow older.[4] While the factors influencing children's adjustment are complex, children generally have better outcomes if they (1) are able to develop and maintain quality relationships with both parents, including regular contact; (2) are not exposed to severe emotional disturbance in one or both parents; (3) are not placed in the middle of the parental conflict; and (4) learn to use direct, active coping skills to resolve relationship problems. Children who rely on avoidance or suppression of emotions tend to display less satisfactory adjustment than children who are able to face their problems and emotions and to cope with them.[5] Children who are directly exposed to parental conflict, particularly if they are placed in the middle of that conflict, are particularly vulnerable to both short- and long-term emotional difficulties.[6] Children who do not learn appropriate methods of resolving relationship problems may be at risk for serious emotional difficulties as they grow older.[7]

Conflict, and the child's exposure to that conflict, can be direct and obvious or subtle and covert. Kelly notes that a child caught in the middle of the parents' dispute may witness parental arguments, be asked to carry hostile messages to the other parent, or be asked to spy on the other parent.[8] Examples of subtle and inappropriate parent behavior include (1) responding to most of a child's statements but failing to respond to positive statements about the other parent; (2) showing overt distress when the child takes a toy to the other parent's home; (3) anxiously questioning a child about his or her time with the other parent; and (4) refusing to speak to the other parent when he or she telephones to speak with the child. Such parents expose the child to the parental conflict just as much as those who engage in more overt behaviors. Both subtle and overt parental conflict conveys important messages to the child and may suggest that a parent is unable or unwilling to tolerate the child's relationship with the other parent. In extreme cases, the parent's hostility may be expanded to include extended-family members and friends who do not support the hostile parent's agenda.[9]

Children who are exposed to these behaviors may learn to keep things to themselves and to rely on problematic coping skills such as suppressing their

emotions or developing psychosomatic symptoms, avoidance, and regressive symptoms like throwing tantrums. They may feel compelled to choose between their parents or others they love and may produce statements that they believe will ease the distress of the parent who is unable to tolerate the other parent-child relationship.[10]

While in some respects subtle parental behaviors may cause less distress to a child than being in the middle of a violent argument, in other respects the subtle behavior may be just as distressing. The child who witnesses an adult argument often knows what he saw and why it upset him. A child exposed to parental conflict through more subtle behaviors may demonstrate the anxiety and conflicted feelings that come with involvement in the parental dispute without being as readily able to identify the source of those feelings.

Most children eventually achieve adequate adjustment in the years following their parents' divorce.[11] Even for children who cope effectively, however, the emotional cost is often high.[12] During and following a divorce, both children and parents often experience greater stress, depression, conflict in relationships, changes in familiar routines, and feelings of loneliness. Parents may be more preoccupied with their own emotional issues, less attentive to their children, and less effective and consistent in their parenting.

As a result of the conflict they sense at home, children may feel pressured to assume more family responsibility and may feel responsible for the emotional or physical well-being of parents or siblings. They may experience disruption in their living situations, school placements, and peer relationships and get caught between their independent feelings and conflicting loyalties to their parents. Parents may directly or indirectly encourage children to avoid contact with the other parent rather than resolving issues in the parent-child relationship. Older children may feel pressured to care for one or both parents' emotional needs, in the process subordinating their independent feelings and their developmental need to establish emotional independence. These children may be at particular risk for emotional distress and problems in future relationships.[13] For all these reasons, it may be useful for the court to consider appointing a forensically sophisticated mental health professional to assist the child.[14]

When selecting a court-appointed therapist, judicial officers may wish to consider the treatment focus of the therapist as a critical factor in their decision. Not all treatment approaches are effective in helping children learn to effectively cope with their parents' divorce and subsequent conflict and distress. Recent years have seen an explosion of psychological research on children's adjustment to divorce, their ability to cope with traumatic events, and the coping skills they need for successful adjustment. There has also been increased empirical attention to the efficacy of coping-skills treatment as a focus of appropriate, cost-effective treatment for children at the center of conflicted custody disputes.

## THE IMPORTANCE OF HEALTHY COPING SKILLS

While research is still emerging in many areas, numerous studies have identified essential coping abilities that children need to adjust successfully. Generally, children and adults who learn to use active and direct coping methods (e.g., asking for help, asserting their independent needs, resolving issues directly with their parents) more successfully adapt than those who rely on dysfunctional coping methods such as suppressing emotions or avoiding problem situations.[15] To establish healthy relationships as adolescents and adults, children must learn to (1) rely on their independent experiences to make decisions about relationships; (2) assert their independent feelings; and (3) effectively communicate their needs in a manner that is likely to be recognized and understood by others in their environment. Generally, this requires that children critically examine information that is presented to them and use direct, clear, verbal communication to express their needs and feelings. As described above, children need to develop these skills at a time when parents are often coping less effectively and may be modeling dysfunctional coping mechanisms or

encouraging them in their children. Therapeutic intervention stressing the development of coping skills may be essential in such families for children to achieve successful adjustment.[16]

Some psychotherapists use treatment models that focus only on encouraging the child's self-expression. Such methods can range from encouraging a child to directly talk about his or her feelings to encouraging and interpreting indirect expressions such as drawings or play. Many children's therapists make play materials available to children as part of the therapy process, to help them feel more comfortable talking with the therapist.

The use of play as an "ice breaker" or adjunct to verbal therapy is a well-accepted therapeutic technique and should be differentiated from methods that rely on subjective interpretations of children's play or drawings. The latter techniques present risk even for children in intact families, as they are very vulnerable to suggestion and errors of interpretation by the therapist. The risks of such errors increase exponentially when a child is at the center of a custody conflict, as the child is increasingly likely to be exposed to parents' emotional issues, distorted perceptions, and other external information that may influence the child's perceptions. These effects may or may not be evident to the therapist, who may unwittingly compound the problem by engaging in suggestive questioning or interpretations based on one parent's concerns.

Moreover, techniques such as play therapy are likely to be less effective than other techniques in helping children learn effective coping skills following their parents' divorce. Recent research also suggests that play therapy may be even less effective for traumatized children, particularly those who have significant behavioral problems or troubled relationships.[17] Treatment approaches that focus on direct communication and active coping are more likely to promote these skills than indirect approaches such as play therapy.

### FINANCIAL RESOURCES

Strained financial resources often limit the family's ability to obtain mental health services during and after divorce. Many families suffer economic hardship after divorce.[18] The costs of dividing households, litigation, increased child care, and forensic evaluations often consume family resources. Even families who have insurance for mental health services often encounter severe limitations in choice of provider and scope of service coverage. Some insurance plans disallow coverage for all court-related services, while others deny payment for the many outside-session services (e.g., telephone consultations, faxes, reports, conference calls) that are often requested of therapists in court-involved cases. Many providers share a concern that managed care or other insurance programs will not cover services the court considers necessary. As a result of these issues and reduced reimbursement rates, many of the most qualified therapists have discontinued their participation on insurance panels.

But though treatment services can be expensive, high-quality treatment may be a more cost-effective intervention than continued litigation. Indeed, with proper allocation of resources, high-quality treatment services may be within reach for many families. Many insurance programs offer an out-of-network benefit that provides some coverage for the services of providers who are not on the insurance panel. When a therapist familiar with the court context provides intervention services consistent with available research, this intervention may help parents reduce conflict, support children's needs, and resolve disagreements without resorting to litigation.

Courts can also maximize resources by appointing a forensically sophisticated therapist to fill a child-centered role (e.g., to provide the child's treatment or child-centered conjoint or family therapy) and by allowing the therapist to confer with other therapists about the case. This coordination of treatment may promote more effective intervention and assist less-experienced therapists in understanding the court context and in working to reduce parental conflict. Even when the parental conflict continues, a forensically sophisticated therapist may be able to assist children in learning healthy coping skills and adjusting successfully as they mature. If successful, therapeutic

intervention may be an investment that reduces both the emotional and financial costs of the divorce. As discussed near the end of this article, a judicial officer has the authority to order treatment and make other appropriate orders.

## ASSESSING THE QUALITY OF TREATMENT AND INFORMATION

Among the most critical decisions judicial officers face in adjudicating child custody is the appointment of a therapist for the child and the determination whether ongoing treatment should continue. Although many mental health professionals work with divorcing families, far fewer are familiar with court-related treatment. Less-experienced therapists unfamiliar with the court context also may not follow current research relevant to effective treatment of children at the center of custody disputes. Therefore, this section describes how to assess the quality of treatment for children of conflicted families of divorce.

### CRITICAL EVALUATION OF DECLARATIONS

In many cases, a judicial officer's first exposure to a child's therapist is the declaration prepared by the therapist and attached to legal documents submitted by one of the parties. There is a natural temptation to give the declaration considerable weight for two reasons: first, it has been written by a professional; and, second, it refers to data coming directly from the child. The declaration may not be useful to the court, however.

A declaration is useful to the court when the therapist has sought information from both parents, has explored multiple possibilities regarding a child's behavior, has not inappropriately aligned with one parent over the other, and has supported the child's independent needs over the agenda of either parent. Awareness of a therapist's methods is critically important in evaluating a declaration: the therapist may employ procedures that are likely to introduce bias into treatment or that are inappropriate to court-related treatment or the therapist's role. For example, a therapist who seeks information from only one parent or considers only one parent's concerns in exploring issues with the child and interpreting the child's behavior may well be providing unreliable or distorted information. If judicial officers rely on the opinions of therapists using faulty procedures, serious harm to children and families may result.

Moreover, a biased therapist may undermine a child's progress by basing treatment on the needs of the therapy-involved parent rather than on the child's independent needs. It is essential, therefore, that judicial officers critically evaluate the performance of the therapist, any testimony or documentation provided by the therapist, and the source and nature of the data contributing to the therapist's opinions on causation and treatment. While these issues are often addressed if the court orders a full child custody evaluation, the judicial officer may also need to consider them when deciding how much weight to give to a therapist's opinion or information, whether to order an evaluation, or even whether ongoing treatment should continue. In some circumstances, a judicial officer may determine that treatment is essential, but that the child should be transitioned to a different therapist. These issues are discussed in greater detail later in this article. Below are some criteria that may help judicial officers in determining the appropriateness of treatment services and the value of therapists' declarations or statements.

### APPRECIATION OF THE FORENSIC CONTEXT

Many psychotherapists are unprepared for the impact that ongoing custody litigation may have on treatment. Traditional psychological training often does not include the special issues that must be considered in providing court-related treatment.[19] Historically, training in psychotherapy has focused on the building of an effective alliance with the client (or, by extension, with the parent who brings a child to treatment) and assisting the client in coping better

with daily stresses or emotional issues. Implicit in this process is the assumption that the client will be motivated to provide as much accurate information to the therapist as possible to enhance the therapist's ability to assist the client. A therapist may assume that his or her client has made a voluntary choice to enter treatment and that the existence of the psychotherapist-patient privilege will promote honest sharing of information with the therapist. Many therapists believe that their role is to accept, support, and advocate for their clients' needs. This orientation promotes a supportive atmosphere but may also lead therapists to be reluctant to challenge a client's assumptions, interpretations, or dysfunctional behaviors.

Many of the assumptions that underlie traditional psychotherapy cannot be extended to treatment in a forensic case. In treatment ordered by the court or motivated by the client's involvement in litigation, some or all of the elements of voluntary participation have been removed. In this context the parent may (intentionally or otherwise) alter or distort information presented to his or her personal therapist or to the child's therapist, in the hope of persuading the therapist to support the parent's position in the custody conflict. Parents may hope or expect that the therapist will advocate the parent's position in communications with a child custody evaluator or the court. The parent's participation in treatment, or cooperation with the child's therapist, may in part be contingent on the therapist's willingness to support the parent's position. A therapist who is inexperienced with court cases may uncritically accept information provided by a client or parent, failing to consider potential sources of bias and the degree to which the information may be affected by the dynamics of the custody conflict.

Specifically, when information comes directly from a child, it can appear to be genuine and may be extraordinarily persuasive. Often, however, children's perceptions, feelings, and statements are profoundly influenced by their exposure to the custody conflict. This can occur by means of direct pressure on a child to make specific statements to the therapist, indirect or direct exposure of the child to adult information and concerns, or the child's response to a parent's emotional needs.[20] For example, children's behavior may differ markedly depending on which parent transports the child to treatment and the circumstances preceding the session (e.g., whether the child is transported directly to the therapist's office after a day at school or spends extended time in the company of a parent prior to attending the session).

It should be noted that, while it is important for a therapist to maintain an alliance with his or her client even in the context of court-ordered treatment, both parents and children may be ill served by a therapist who is reluctant to challenge dysfunctional behaviors or one-sided interpretations of another's behavior.[21] A therapist's failure to challenge such behavior in a parent may lead to negative consequences both in terms of the child's development and the parent's custody or visitation if a parent fails to address behavior problems identified by a psychological evaluator or the court.

As most parents know, children must be challenged to use age-appropriate coping skills rather than relying on regressive behavior such as crying, avoidance, or suppression of emotion. Particularly if a parent is failing to set limits with a child's inappropriate behavior, the therapist's role may be critically important in supporting a child's coping abilities.[22]

Therapists providing court-related treatment must, therefore, understand and be able to articulate the manner in which the ongoing litigation may affect the treatment process and the information provided to the therapist by a parent or child. This requires that the therapist be aware of research on children's adjustment to divorce, the impact of high-conflict dynamics on the child, and research regarding children's suggestibility and susceptibility to external influence. It also requires that the therapist maintain professional objectivity and an awareness of potential sources of bias in treatment information.[23]

## BALANCE AND THE SCIENTIFIC MINDSET

One of the hallmarks of competent court-related treatment is the therapist's ability to maintain

professional objectivity and a balanced perspective. Since the information a therapist receives is often biased by the adult client's agenda or the influence of a parent on a child, the therapist must follow appropriate procedures to remain objective. When a child is in treatment, such procedures include soliciting information from both parents, involving both parents in treatment, and actively considering a variety of possible interpretations of the child's problems and needs.

### *Sources of Therapeutic Bias*

*Merriam-Webster's Collegiate Dictionary* defines *bias* as "systematic error introduced into sampling or testing by selecting or encouraging one outcome or answer over others."[24] Most human beings have biases based on their own personal experiences, and these can be particularly powerful (and are often unrecognized) when one is dealing with a child's welfare. The forensically sophisticated child's therapist has an obligation to maintain thought processes and use procedures specifically designed to control (or at least illuminate) potential sources of bias. These processes and procedures would include (1) actively considering a variety of possible interpretations of a child's situation and needs and (2) using procedures, including active attempts to access information consistent with a variety of points of view, specifically designed to explore these various possibilities.

Bias can develop in a variety of ways. As discussed earlier, therapists who, in treating children, involve only one parent risk developing a bias that is shaped by that parent's perspective or by the unseen influence of the therapy-involved parent on the child. Such bias may be difficult to detect, particularly in the face of the (often emphatic) concerns of the therapy-involved parent and the symptomatic behavior of the child.

The development of biases is complex and often involves both personal and professional influences. Personal admiration for a colleague may lead a professional to consult and cite only those materials that support the colleague's position. Personal experiences with one's parents, one's spouse, or one's extended family can create perspectives on family life that evidence in the professional literature cannot alter. A practitioner may inappropriately apply professional knowledge developed through experience in a particular area of practice when he or she becomes involved in a different practice area. Similarly, experience gained in work with a particular patient population may be misapplied to an entirely different patient population, resulting in serious errors.

Certain types of bias are particularly problematic in work with high-conflict families. Some of these are general; others are case-specific. An example of a general bias is the tendency not to question statements made by children and to assume their essential accuracy without considering alternative interpretations. Case-specific biases most often occur when only one parent is involved in a child's treatment. In such situations, the unseen influence of the therapy-involved parent upon the child can affect the child's view of dynamics in the family and, as a result, the information that the child gives to the therapist. Any bias that develops may be strengthened when the therapist meets periodically with the therapy-involved parent without seeking information from the other parent or from others who may be involved with the child. Unfortunately, therapists whose perspectives have been shaped by such dynamics are often unaware that they have failed to obtain all pertinent information before formulating treatment plans. Many of these issues are discussed in greater detail below.

### *Effects of Bias*

Therapeutic bias may have both direct and indirect effects on the child. A therapist who relies on one-sided or distorted information, without exploring alternatives, may unwittingly collude with the therapy-involved parent's agenda by exploring only that parent's concerns and reinforcing avoidance and distorted thinking in the child.[25] It is not uncommon, for example, for a child to express concerns about what occurs during his time with one parent or the other. When only one parent is involved in the child's treatment, the presented concerns often revolve around

the child's time with the non-therapy-involved parent. Such concerns may reflect actual difficulties in the child's relationship with the non-therapy-involved parent, the concerns of the therapy-involved parent, the child's anxiety about being in the middle of the parental conflict, and any number of other issues.

An inexperienced therapist may simply accept the child's statements at face value, assuming that there is difficulty in the child's relationship with the non-therapy-involved parent, without seeking that parent's view of the situation. Bias increases as the therapist asks the child questions based only on the assumption that there is a problem in the relationship with the non-therapy-involved parent, inadvertently solicits information that only supports this hypothesis, approaches the non-therapy-involved parent in a judgmental manner, formulates opinions concerning a parent-child relationship that the therapist has never observed, or reinforces avoidance by suggesting that the child should not be required to spend time with the parent. If the therapist provides such flawed information to the court and the court relies on it, the result may be damaging and long-lasting.

Even if the therapist never communicates to the court, a biased treatment process may cause serious harm to a child and family. This occurs when the therapist reinforces a distorted view of the child's world and each parent's role based on the one-sided view of the therapy-involved parent. Rather than encouraging the child to independently test his own perceptions against those of his parents and resolve issues directly, the therapist reinforces distorted thinking and poor coping skills, such as avoidance and regressive behavior. In the process, the therapist sends a subtle but powerful message that the therapist's theory, rather than the child's independent perceptions, define the child's world, and that it is acceptable for the child to run away from problem situations instead of learning to deal with them. This can seriously undermine a child's ability to cope effectively with his environment and confidently establish independent relationships, even if the therapist never submits a declaration to the court.

### *Containing Bias*

Many sources of bias can be contained, or at least assessed, if a therapist makes active attempts to obtain information from both parents, to consider each parent's concerns, and, ideally, to observe the child after he or she has been in the company of each parent. If a parent is unwilling or unable to participate, a therapist may be able to obtain some "reality check" on the therapy-involved parent's or child's information by periodically conferring with the child's teacher or other professionals involved in the case.[26] The purpose of these contacts should be limited to obtaining information that may assist the therapist in enhancing the child's functioning. This limited scope is in contrast to the breadth of the wide-ranging collateral interviews conducted by the forensic evaluator, which are used to address broad psycholegal issues being considered by the court. Nevertheless, such contacts may be of assistance to the therapist in maintaining professional objectivity and avoiding biased treatment.[27]

The essential characteristic of the scientific mindset is the therapist's ability to articulate and consider several possible interpretations of a child's behavior, as well as a variety of possible causes of the child's difficulties. This "multiple-hypotheses" approach promotes objectivity by encouraging the therapist to actively explore interpretations of the child's behavior and areas of the child's functioning in addition to those that may be presented by the therapy-involved parent.

Although a child's expressed concerns should never be ignored, one of the hypotheses that the therapist must consider is that the child's exposure to the custody conflict has altered his or her perceptions. Consider, for example, the common child-care activity of bathing a young child. While in nonconflict families this may be an event in which both parents normally participate, after a separation a parent may suddenly view it with anxiety. If the parent sees it this way, he or she may convey that to the child, who may then present the event with anxiety to the therapist, or even approach the bath itself with more

anxiety. This may interact with other issues, such as the parent being less adept than the other parent at bathing the child and becoming even clumsier in response to the child's anxiety. A therapist who perceives the anxiety but doesn't consider these factors may assume that something inappropriate happened during the bath. While this certainly could be one possibility, another is that the child's perception of the bath changed, before or after the event, by exposure to the parent's anxiety. An open-minded therapist is more likely to accurately identify the issues involved in such a situation and to assist the child in articulating concerns to the parent involved.

A child's therapist should be able to articulate the attempts that he or she has made to maintain a balanced perspective and promote active coping, as well as identify the potential biases in treatment information that may result if such procedures are not followed. Although a parent's therapist is necessarily biased, even this therapist should be able to articulate (and, it is hoped, explore with the parent) possible interpretations of events that may not be consistent with the parent's expressed view. Otherwise, the therapist is likely to miss issues in his or her own client's functioning that may ultimately have a marked effect on the child and, potentially, on the outcome of the custody conflict.

### KNOWLEDGE OF THE RESEARCH

Related to the issue of the scientific mindset is the need for thorough and balanced understanding of psychological research relevant to treatment. Forensically sophisticated therapists should be thoroughly familiar with research on children's adjustment to divorce, the impact of adult conflict on children, children's suggestibility, domestic violence, child abuse, alienation dynamics, and children's coping and development. This research has taught us much about children's needs and responses when they are at the center of a family conflict. The treating expert[28] must also be able to recognize the limitations of psychological research and to apply the most appropriate research to the case at hand.[29] Few mental health professionals would deny that psychological treatment is as much "art" as science. Competent court-related treatment, however, requires that knowledge of research and theory inform clinical intervention. Clinical judgment cannot stand alone any more than scientific findings can be useful without context.

Professional objectivity also requires a balanced consideration of relevant research. Many of the psychological phenomena related to divorce are complex, and research results may often appear to be conflicting. While studies do sometimes demonstrate inconsistent results, more frequently results that appear inconsistent actually reflect differences in the procedures of the study. For example, some studies on children's suggestibility have employed procedures that emphasize the strengths of children's recollections, while others shed light on their vulnerabilities to suggestive influence. Which of these studies is most relevant to a particular case depends on the conditions to which the child has been exposed. Even a young child may be able to remember and report events accurately if he or she has not been exposed to adult information or suggestive questioning. In contrast, a child who is exposed to negative information about a parent, information about the custody conflict, or repeated questioning about time spent with the other parent may have serious difficulty differentiating between his or her independent experience and externally presented information.[30]

Particularly when there are allegations of child sexual abuse, family violence, or other forms of child maltreatment, or when parent-child relationships are undermined, the therapist's understanding and familiarity with research conducted from a variety of perspectives are critically important. This approach stands in marked contrast to that of therapists who consider only research supporting a single perspective. Biased consideration of the research leaves therapists ill equipped to consider which research is applicable to a given case because they are not considering the full range of studies that may be relevant. These therapists may dismiss research that does not support their own perspectives without objectively considering whether the circumstances of

those studies are applicable to the case at hand. Their preexisting bias may influence both their perceptions of treatment information and the therapeutic issues that they choose to address.

In contrast, the forensically informed therapist acknowledges the limitations of any research upon which he or she relies, as well as any mixed or inconsistent results that are present in the literature. The therapist should be able to describe the research that he or she believes is applicable to the case at hand and to explain why other studies with inconsistent results are less applicable. If the therapist cannot describe research that supports viewpoints other than his or her own, it is likely that a biased consideration of the literature has influenced the therapist's perspective.[31]

### RESPECT FOR ROLE BOUNDARIES AND THE LIMITS OF APPROPRIATE OPINION

The essential characteristic of the treating psychologist's role, as distinguished from that of the child custody evaluator, is that the psychologist's goal is intervention. The child custody evaluator has a time-limited role and considers a broad range of information to address questions posed by the court. The treating psychologist's focus is narrower, more intimate, and more longitudinal than that of the child custody evaluator. The therapist guides interventions in support of the child's developmental needs, using treatment information to confront dysfunctional behavior, make suggestions, provide support, and persuade or exhort parents and children to cope more effectively. The process of therapy provides a depth and richness of information that may be essential to helping a child or family master developmental challenges; it is also an important part of the information considered by the child custody evaluator.

Treating psychologists should be well qualified to render expert clinical opinions on a client's diagnosis, behavior patterns observed in treatment, a child's progress toward developing healthy coping skills, changes in each parent-child relationship that would be supportive to the child, and other issues.[32] In addition, a therapist should be able to articulate the underlying basis for any opinions expressed, with sufficient specificity to allow a child custody evaluator or the court to assess the validity of his or her statements.

Consistent with the scientific mindset described earlier, the therapist should also be able to identify the limitations of opinions expressed and the treatment data underlying those opinions. Treating therapists do not have the appropriate role, focus, or information base to render opinions on psycholegal issues such as parental capacity, custody arrangements, or conclusive opinions on the validity of an abuse allegation. In light of these and other issues, a therapist who expresses a psycholegal opinion may cause harm to a child or family by providing misleading information to the court. For this reason, it is generally considered unethical for a treating therapist to offer these opinions.

### WHEN SHOULD A THERAPIST BE REMOVED?

Another difficult issue arises when a party asks the court to remove a therapist who has been working with a child. This can be a complex issue, in that children at the center of custody disputes often suffer repeated disruptions in significant relationships. Some high-conflict parents have difficulty tolerating the child's relationship with anyone who does not support the parent's agenda, a position that is necessarily inconsistent with that of the child's therapist who supports a child's independent needs. An angry parent may refuse to cooperate with treatment in the hope that the court will remove the child's therapist and replace him or her with someone who is more supportive of the parent's position. Removing a child's therapist in this circumstance may be very damaging to the child, as it may send the message that the parent's anger or manipulation of the system is given greater weight than the child's progress in treatment or working relationship with the therapist. It also undermines the child's security in relationships by conveying the message that when a parent gets angry, the child's independent relationships may disappear.

Conversely, as described earlier, the continuation of biased or inappropriate psychotherapy may cause serious harm to a child and family. Biased treatment may undermine a child's independence, foment conflict, reinforce avoidance or other dysfunctional coping mechanisms, or generate distorted information that may seriously undermine the judicial process. Moreover, the detrimental effects of inappropriate treatment are likely to increase over time as conflict becomes entrenched and biased treatment techniques undermine a child's independent perceptions.

For all these reasons it is often more harmful to continue inappropriate treatment than to allow a therapeutic transition to a more objective therapist who can support a child's independent needs. This transition can usually be accomplished within a few sessions. While such a therapeutic transition is usually better for a child than the continuation of biased or dysfunctional treatment, repeated disruptions in treatment may undermine a child's trust in the therapy process and in the security of his or her independent relationships. We suggest that the decision regarding continuation of a treatment relationship be based on the therapist's performance with respect to the criteria described above and that any change not be undertaken based on a parent's anger alone.

## WHAT'S THE RIGHT INTERVENTION?

Determining the appropriate intervention for a child and family and structuring treatment orders to promote effective treatment requires careful consideration of several issues, discussed below.

### LEGAL AUTHORITY FOR ORDERING TREATMENT

California Family Code section 3190 allows the court to order parties or children into therapy in family law cases if it finds that the custody dispute poses a substantial danger to the child's best interest and that counseling is in the child's best interest.[33] Under Family Code sections 3191 and 3192, the court may order counseling for parties to facilitate communication, reduce conflict, and improve parenting skills, either together or separately, depending upon whether there is a history of child or partner abuse.[34]

Whether the court elects to order the parties to counseling will in part depend on the judicial officer's philosophy of the family court's role. According to one school of thought, the duty of the family law judicial officer is to "answer the question"—that is, when an order to show cause is brought regarding custody, it is the judicial officer's job to determine, based on the facts presented, whether the relief requested should or should not be granted. According to an alternative school of thought, when a family enters the judicial system, it is the obligation of the family law judicial officer to do more than rule on a request. The judicial officer is charged with taking, sua sponte, those steps necessary to protect the best interest of children whether or not a specific request to achieve this goal is made to the judicial officer. This more "proactive" role might include periodic reviews of the then-existing custody arrangement to ensure that it continues to meet the needs of the child or children in question. Models such as judicial case management, family-focused courts, and therapeutic jurisprudence are consistent with the latter approach.[35]

### STRUCTURING TREATMENT ORDERS

The higher the level of conflict in a family, the more important it is to have a carefully structured order for child-centered treatment (i.e., children's treatment or child-centered conjoint therapy). While lower-conflict families may be able to voluntarily consent to treatment and support the therapist's intervention, parents exhibiting a higher level of conflict are often unable or unwilling to follow through with treatment orders and cooperate with interventions to support their children's needs. A highly adversarial parent will often support treatment for only as long as he or she believes that the therapist is supporting that parent's agenda in the custody conflict. The child's treatment or parent-child conjoint therapy may be disrupted by an unhappy parent's unwillingness to cooperate with the intervention, pay for services, or support the child's

participation. Given this possibility, therapists are often reluctant to confront damaging parental behavior out of concern that the child's treatment will be disrupted as a result. The treatment may therefore continue but its effectiveness will be undermined because the therapist has failed to address the parent's maladaptive behavior and its destructive effect on family interactions.

A well-structured treatment order will not always prevent these problems, as a determined parent may find a way to undermine treatment. Often, however, a detailed treatment order establishes a framework for treatment that can be used to support children's progress and hold all parties accountable for cooperating with the process.[36] Stipulations for treatment are usually negotiated between counsel, a process that promotes informed consent regarding the court's order, the therapist's expectations regarding cooperation with treatment, the financial responsibilities of the parties, limitations on privilege, and other issues. In the hands of a skilled therapist, this mechanism of accountability can also be a powerful tool to assist in persuading parents to cooperate. At a minimum, a structured treatment order provides documentation that the parents were aware of the structure of treatment before entering into the stipulation, thus reducing the possibility that they can later successfully claim to have misunderstood the court's order or intentions. While none of these conditions guarantees success in treatment, a structured treatment order often establishes minimal conditions that may make success possible.[37]

An effective treatment order establishes the essential conditions for treatment, while allowing the therapist sufficient flexibility to adjust treatment goals and methods to the needs of the family. At a minimum, an effective treatment order should address the following issues:

***Participants in counseling.*** Most children's treatment and conjoint (family) treatment are more effective if both parents are involved in the process. Even when the established purpose of treatment is to facilitate the relationship between a child and an estranged or alienated parent, the cooperation of the other parent may be necessary for treatment to succeed. Effective treatment orders often allow the therapist discretion to require the involvement of each parent as necessary.

***Scope and goals of intervention.*** A skilled therapist needs some flexibility to establish the structure and conditions of treatment. It is often helpful, however, to have a treatment order that clarifies the court's intent in ordering treatment. Common treatment goals, which can be established in a general check-off format in the treatment order, may include (1) improving parent-child relationships, (2) assisting children in resolving emotional or behavior problems, (3) reducing conflict regarding custody or visitation, (4) assisting parents in improving parenting skills, or (5) addressing specific behavior problems identified in a child custody evaluation or by the court. It should be noted that, while a child's therapist or conjoint therapist may need to meet periodically with each parent to facilitate treatment, such meetings are focused on the primary treatment goals in support of children's needs. To avoid potential conflicts of interest, personal therapy focused on parents' stresses and needs is usually best conducted by another therapist. Treatment is most effective, however, when there is periodic consultation among all therapists on a case.[38]

***Cooperation with treatment.*** Most parents are able to cooperate with treatment in support of their children's needs, but highly adversarial parents are often unable or unwilling to do so without outside intervention. While a determined parent may find a way to sabotage treatment, a court order mandating cooperation with the therapist may induce some parents to comply. Ultimately, the success of a therapeutic intervention may depend on a variety of factors, including the children's resilience, the therapist's ability to persuade parents to alter destructive behavior patterns, the actions of other professionals on the case, and the parties' interest in improving the situation. Initially, however, externally enforced compliance with treatment may be necessary to ensure that parents and children attend sessions and

cooperate with even basic interventions.[39] Such a structure may provide the therapist with an opportunity to conduct initial interventions and persuade the parties to cooperate with the process. With the highest-conflict families, effective treatment may require that judicial officers be willing to back up treatment orders with contempt citations or sanctions on the uncooperative parent. Such sanctions may include financial penalties or enforcement of a court order that makes current custody arrangements conditional upon the parties' cooperation with treatment.[40]

These treatment requirements may be stated in treatment orders or specifically described by the therapist. They should include the expectation that parents exercise parental authority to ensure a basic level of cooperation by children and adolescents. While therapists are accustomed to working with resistant children and encouraging them to explore emotional issues, parents should still be expected to convey that their children exhibit the basic level of cooperation (e.g., attending sessions, answering when they are addressed by an adult) that is required in other settings (e.g., school, extracurricular activities). This expectation may forestall a common method of undermining treatment involving older children, i.e., the subtle message from a parent that demonstrating disrespect or noncompliance with the therapist is acceptable. (This is not dissimilar to the dynamic that occurs when a parent reinforces or tolerates the child's disrespectful behavior.)

Cooperation with treatment may also include requirements imposed on the interaction of a parent with an estranged child, i.e., requiring that the parent listen to the child, avoid denigrating the child's feelings or experiences, and refrain from statements that undermine the child's relationship with other significant adults. Forensically experienced therapists may develop model stipulation or order forms that specify these or other elements considered essential to effective treatment.

***Financial responsibility for treatment.*** Many therapists with forensic experience have retainer agreements specifying fees and the types of services to which the therapist's charges may apply. Highly adversarial parents may, at least initially, be heavy consumers of a therapist's time and may request many services outside of therapy sessions, such as telephone contact, review of documents, or requests that the therapist intervene in parental disputes. Many insurance contracts exclude coverage for these types of services, so the parents' insurance may not cover fees for these services. It should be noted that the high cost of outside-session services may aid the therapeutic intervention by persuading parents to be more judicious in requests for the therapist's time and in the management of conflict.

Treatment orders should specify the parties' responsibility for paying for children's sessions, parent-child conjoint sessions, the therapist's meetings with the parents, and any outside-session services such as telephone calls, review of documents, and consultation with other therapists. To facilitate continuity of treatment and enhance cooperation, many forensically experienced therapists require retainer payments against which future services will be charged. If financial responsibility is a contested issue or the parties do not honor financial responsibilities, the establishment of a trust account for treatment services may be a useful mechanism for ensuring that treatment continues. At a minimum, the order should be specific regarding when and how payments should be made. For example, it might say: "[Father] must pay the therapist's bill in full within 10 days of receiving it. [Mother] must pay back [Father] half that amount within 10 days after [Father] pays the bill."

## BALANCING PRIVACY, ACCOUNTABILITY, AND EFFECTIVENESS

Traditional psychotherapy relies on the psychotherapist-patient privilege to promote disclosure of information, and there is certainly a role for privacy even in court-related treatment. For this reason, a court or the parties' counsel may be tempted to structure orders that completely exclude treatment information from the child custody evaluator's or the court's consideration in the hope of providing a "safe haven"[41] in

which a child or family can discuss concerns. This structure may be effective with low-conflict families; however, in families exhibiting a higher level of conflict, it is often necessary to establish an accountability mechanism to promote the parties' cooperation with treatment. Particularly when families have a history of poor cooperation, it may be unrealistic to expect that parents will cooperate absent a mechanism for reporting treatment progress to the child custody evaluator or the court. Moreover, the exclusion of treatment information may make it difficult to assess the therapist's performance, determine the validity of opinions or therapeutic recommendations offered by the therapist, or determine whether a change in therapists is necessary.

Treatment orders can be structured in a manner that generally maintains privacy in treatment while allowing essential information to be disclosed to other professionals. Some treatment orders allow the therapist to confer with counsel by conference call to resolve issues related to the treatment order or to communicate with counsel or the court in the event that a child is at risk. Other orders allow or require the therapist to release information to a child custody evaluator or confer with counsel by conference call to resolve issues relevant to the treatment order. Treatment orders may also allow or require the therapist to provide a progress report at the direction of the court or upon request of the parties or minor's counsel if a parent pursues further litigation of the custody dispute. When parents employ a special master or coordinator, information from the therapist may be helpful in reaching decisions that will support the child's needs. These orders allow the parties to have privacy in treatment under most circumstances while allowing the therapist to provide essential treatment information to decision-makers. They may also promote cooperation, because the parties are aware that treatment information will remain private as long as they cooperate with the therapist and refrain from initiating further custody litigation.

In cases where some release of treatment information is permitted, the therapist should be required to include at least some of the specific statements or behaviors that form the basis of his or her opinion. It is difficult to imagine how an attorney could effectively cross-examine a therapist who is permitted to express global treatment opinions without any supporting data. Additionally, accountability for the use of biased procedures is removed when therapists are permitted to express opinions without providing the information that supports them. While this degree of disclosure may result in some loss of treatment privacy, the types of orders described above limit disclosure to situations in which further litigation is pursued or in which treatment information is necessary to support the needs of the child. In order to be effective, it may be necessary that the treatment order specify the types of information that may be disclosed and under what conditions.

Therapists may be able to protect some aspects of client privacy by including only information that is directly relevant to the issues being addressed by the court. The therapist may need to address either the child's feelings about the sharing of treatment information or, more often, a parent's distress when the disclosed information or expressed opinion does not conform to what the parent was hoping to hear. Informed consent procedures that explain to the child and parents the conditions under which the therapist may share—or be ordered to share—treatment information may help prepare them for this step. The stipulation and order or consent agreement governing treatment should specify any exceptions to privilege, and parents should have an opportunity to consult with counsel before signing it. Issues related to confidentiality and the release of treatment information should also be discussed with the child, in a manner appropriate to the child's age and abilities. This should occur at both the onset of treatment and as appropriate thereafter.

The therapist should also engage the child in the process of sharing information. Children are often more concerned about the reactions of the adults around them than about the sharing of information per se. In fact, children may be relieved or empowered when the therapist discloses information that the child

has been unable to express, particularly if the child is engaged in the process of identifying information that is important to share with significant adults. Whatever the child's feelings, it is essential that the therapist talk with the child about the pending release of information and assist the child with coping skills for dealing with the adults in his or her environment.[42]

## CONCLUSION

Particularly when a child is in treatment, a therapist may have considerable influence on the progress and outcome of a case. As described above, a therapist may support a child in developing active coping skills or may reinforce avoidance and dysfunctional behavior. The therapist may use balanced techniques that allow the child's independent needs to emerge or may bias treatment to the degree that a child's needs are undermined. A therapist may be able to use his or her influence to persuade parents to put the children's needs first and reduce conflict or may overly align with one parent and become an active participant in the "tribal warfare" of the custody conflict.[43]

As mental health professionals become increasingly frequent providers of court-related services, they are moving to clarify the appropriate standard of practice for court-related treatment. Ultimately, however, much of the protection for consumers may come from attorneys and judges who are sufficiently familiar with these issues to structure appropriate orders and insist that therapists serving court-involved families provide an appropriate level of service.

## NOTES

1. Lyn R. Greenberg & Jonathan W. Gould, *The Treating Expert: A Hybrid Role With Firm Boundaries,* 32 Prof. Psychol.: Res. & Prac. 469 (2001).

2. *See, e.g.,* Jonathan W. Gould, Conducting Scientifically Crafted Child Custody Evaluations (Sage Publ'ns 1998); Jonathan W. Gould & Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Work Product,* 51 Juv. & Fam. Ct. J. 21 (Summer 2000); Jonathan W. Gould & Lyn R. Greenberg, *Merging Paradigms: The Marriage of Clinical Treatment With Forensic Thinking,* Int'l Acad. Fam. Psychol. Newsl., Dec. 2000, at 3–7.

NOTES

3. Greenberg & Gould, *supra* note 1; Lyn R. Greenberg et al., *Is the Child's Therapist Part of the Problem? What Attorneys, Judges, and Mental Health Professionals Need to Know About Court-Related Treatment for Children,* Ass'n Fam. & Conciliation Cts. Cal. Newsl., Winter 2001, at 6–7, 24–29.

4. Robert E. Emery, Marriage, Divorce, and Children's Adjustment xii (Sage Publ'ns 2d ed. 1999); Janet R. Johnston & Vivienne Roseby, In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce xiv (Free Press 1997); Paul R. Amato, *Consequences of Divorce for Adults and Children,* 62 J. Marriage & Fam. 1269 (2000); Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review,* 16 J. Fam. Psychol. 91 (2002); Joan B. Kelly, *Marital Conflict, Divorce, and Children's Adjustment,* 7 Child & Adolescent Psychiatric Clinics N. Am. 259 (1998); Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research,* 39 J. Am. Acad. Child & Adolescent Psychiatry 963 (2000).

5. Mark Chaffin et al., *School-Age Children's Coping With Sexual Abuse: Abuse Stresses and Symptoms Associated With Four Coping Strategies,* 21 Child Abuse & Neglect 227 (1997); M. Lynne Cooper et al., *Attachment Styles, Emotion Regulation, and Adjustment in Adolescence,* 74 J. Personality & Soc. Psychol. 1380 (1998); Laurie Fields & Ronald J. Prinz, *Coping and Adjustment During Childhood and Adolescence,* 17 Clinical Psychol. Rev. 937 (1997); Janet R. Johnston et al., *Therapeutic Work With Alienated Children and Their Families,* 39 Fam. Ct. Rev. 316 (2001); Kelly, *Children's Adjustment, supra* note 4.

6. Carla B. Garrity & Mitchell A. Baris, Caught in the Middle: Protecting the Children of High-Conflict Divorce (Lexington Books 1994); Johnston & Roseby, *supra* note 4; Kelly, *Children's Adjustment, supra* note 4; Vivienne Roseby & Janet R. Johnston, High-Conflict, Violent, and Separating Families: A Group Treatment Manual for School-Age Children (Free Press 1997); Vivienne Roseby & Janet R. Johnston, *Children of Armageddon: Common Developmental Threats*

NOTES

*in High-Conflict Divorcing Families,* 7 Child & Adolescent Psychiatric Clinics N. Am. 295 (1998).

7. Roseby & Johnston, *Children of Armageddon, supra* note 6.

8. Kelly, *Children's Adjustment, supra* note 4.

9. Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome,* 39 Fam. Ct. Rev. 249 (2001); Matthew J. Sullivan & Joan B. Kelly, *Legal and Psychological Management of Cases With an Alienated Child,* 39 Fam. Ct. Rev. 299 (2001).

10. Johnston & Roseby, *supra* note 4; Roseby & Johnston, *Children of Armageddon, supra* note 6.

11. E. Mavis Hetherington & John Kelly, For Better or for Worse: Divorce Reconsidered 7 (W.W. Norton 2002).

12. Robert E. Emery & Mary Jo Coiro, *Some Costs of Coping: Stress and Distress Among Children From Divorced Families, in* Developmental Perspectives on Trauma: Theory, Research, and Intervention 435 (Dante Cicchetti & Sheree L. Toth eds., Univ. of Rochester Press 1998).

13. *Id.;* Hetherington & Kelly, *supra* note 11.

14. A forensically sophisticated therapist is one who understands and appreciates the court context and the particular issues that arise within it.

15. Chaffin et al., *supra* note 5; Josefina M. Contreras et al., *Emotion Regulation as a Mediator of Associations Between Mother-Child Attachment and Peer Relationships in Middle Childhood,* 14 J. Fam. Psychol. 111 (2000); Emery & Coiro, *supra* note 12; Fields & Prinz, *supra* note 5; Johnston et al., *supra* note 5; Marsha G. Runtz & John R. Schallow, *Social Support and Coping Strategies as Mediators of Adult Adjustment Following Childhood Maltreatment,* 21 Child Abuse & Neglect 211 (1997).

16. Johnston & Roseby, *supra* note 4; Johnston et al., *supra* note 5; Kelly & Johnston, *supra* note 9; Sullivan & Kelly, *supra* note 9.

17. Child Physical and Sexual Abuse: Guidelines for Treatment (Final Report: January 15, 2003) (Benjamin E. Saunders et al. eds., Nat'l Crime Victims Res. & Treatment Ctr. 2003), *at* http://www.musc.edu/cvc/guide1.htm.

18. Emery & Coiro, *supra* note 12; Hetherington & Kelly, *supra* note 11.

19. Greenberg & Gould, *supra* note 1; Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles,* 28 Prof. Psychol.: Res. & Prac. 50 (1997).

20. Johnston et al., *supra* note 5.

21. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

22. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

23. Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3; Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

24. Merriam-Webster's Collegiate Dictionary 110 (10th ed. 1993).

25. Mary Lund, *A Therapist's View of Parental Alienation Syndrome,* 33 Fam. & Conciliation Cts. Rev. 308 (1995); Sullivan & Kelly, *supra* note 9.

26. Johnston et al., *supra* note 5.

27. Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3; Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

28. Greenberg & Gould, *supra* note 1; Greenberg & Shuman, *supra* note 19.

29. Gould & Greenberg, *supra* note 2; Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3.

30. Stephen J. Ceci & Maggie Bruck, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony (Am. Psychol. Ass'n 1995); The Recovered Memory/False Memory Debate (Kathy Pezdek & William P. Banks eds., Academic Press 1996); Kathy Pezdek & Chantal Roe, *The Suggestibility of Children's Memory for Being Touched: Planting, Erasing, and Changing Memories,* 21 Law & Human Behav. 95 (1997).

31. Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3.

32. Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3.

33. Section 3190 states:

> (a) The court may require parents or any other party involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental

NOTES

> health or substance abuse services, for not more than one year, provided that the program selected has counseling available for the designated period of time, if the court finds *both* of the following:
>
> (1) The dispute between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody or visitation rights with the child, or between a party seeking custody or visitation rights and the child, poses *a substantial danger to the best interest of the child.*
>
> (2) The *counseling is in the best interest of the child.*
>
> (b) In determining whether a dispute, as described in paragraph (1) of subdivision (a), poses a substantial danger to the best interest of the child, the court shall consider, in addition to any other factors the court determines relevant, any history of domestic violence, as defined in Section 6211, within the past five years between the parents, between the parent or parents and the child, between the parent or parents and another party seeking custody or visitation rights with the child, or between a party seeking custody or visitation rights and the child.
>
> (c) Subject to Section 3192, if the court finds that the financial burden created by the order for counseling does not otherwise jeopardize a party's other financial obligations, the court shall fix the cost and shall order the entire cost of the services to be borne by the parties in the proportions the court deems reasonable.
>
> (d) The court, in its finding, shall set forth reasons why it has found both of the following:
>
> (1) The dispute poses a substantial danger to the *best interest of the child* and the counseling is in the best interest of the child.
>
> (2) The *financial burden* created by the court order for counseling *does not otherwise jeopardize a party's other financial obligations.*
>
> (e) *The court shall not order the parties to return to court upon the completion of counseling.* Any party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling consistent with this chapter.

Cal. Fam. Code § 3190 (West 1994 & Supp. 2003) (emphasis added).

34. Section 3191 states:

> The counseling pursuant to this chapter shall be specifically designed to *facilitate communication* between the parties regarding their minor child's best interest, to *reduce conflict* regarding custody or visitation, and *to improve the quality of parenting skills* of each parent.
>
> Section 3192 states:
>
> In a proceeding in which counseling is ordered pursuant to this chapter, where there has been a history of abuse by either parent against the child or by one parent against the other parent and a protective order as defined in Section 6218 is in effect, the court may order the parties to participate in counseling separately and at separate times. Each party shall bear the cost of his or her own counseling separately, unless good cause is shown for a different apportionment. The costs associated with a minor child participating in counseling shall be apportioned in accordance with Section 4062.

*Id.* §§ 3191, 3192 (emphasis added).

35. Carol R. Flango, *Family-Focused Courts,* 2 J. Ctr. Fam. Child. & Cts. 99 (2000); John Leverette et al., *Judicial Case Management and the Custody and Access Assessment: Melding the Approaches,* 42 Can. J. Psychiatry 649 (1997).

36. Johnston & Roseby, *supra* note 4; Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

37. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9; Richard A. Warshak, Divorce Poison: Protecting the Parent-Child Bond From a Vindictive Ex 258–61 (Regan Books 2002).

38. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9. *See also* Cal. Fam. Code § 3191.

39. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

40. Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

41. Carol Silbergeld, A Clinical Perspective (1997) (unpublished paper presented at the Los Angeles County Bar Association Nineteenth Annual Child Custody Colloquium: "Who Cares About the Children?").

42. Greenberg & Gould, *supra* note 1; Greenberg et al., *supra* note 3.

43. Johnston & Roseby, *supra* note 4; Johnston et al., *supra* note 5; Sullivan & Kelly, *supra* note 9.

# The Invisible Havoc of Prenatal Alcohol Damage

*At a show-cause hearing in Texas not too long ago, the parents of a tiny baby removed from their custody brought in a photo album to document their parenting skills and dedication to the child. The judge took the album, started flipping through the pages, and called the bailiff over. There, on the first page, was a picture of the baby, sitting in a carrier on the kitchen table—nestled amid an assortment of glass pipes, powdery little baggies, and other items not normally associated with exemplary child rearing. As he leafed through the pages of adorable smeary smiles on family outings, another shot caught the judge's eye: Dad apparently swinging the 6-week-old baby by the foot. Asked to explain this behavior, Dad said, "I was holding the baby and reached into the fridge for a beer. I started to drop the beer, so I dropped the baby instead."*

*This baby has since been adopted by a loving family whose first task was to have his several bone fractures (suffered on different occasions) repaired. His birth parents continue to complain bitterly about "Big Brother's" interference in their family life. They give no indication of ever understanding why the baby was removed from their care.*

This story may seem absurd to many of us; tragically, it is true and not totally unfamiliar to those who work in child welfare agencies. In this case, the parents show signs of cognitive malfunctioning that exceeds any current effects of drug use. They may in fact be victims of fetal alcohol spectrum disorders (FASD).[1] Their baby is at high risk to carry on the family tradition of fetal alcohol–related brain damage, as there is good reason to suspect that he was exposed to alcohol in utero.

A foster-care public health nurse in Santa Clara County, California, says that, according to her department's estimate, at least 85 percent of the children removed from their birth parents are affected by substance abuse. Her experience in the field, as well as her personal experience as a foster parent of more than 100 children, tells her that this estimate may be low. According to a study of 1992 birth data,[2] approximately 10 percent of live births in most California counties were "tox positive": the babies had alcohol and/or illegal drugs in their blood at the time of birth.

*Nineteen-year-old Amber is serving a 90-day sentence in the women's detention facility. Her 3-year-old daughter, Jessica, is in the children's shelter. Amber is hoping the staff knows about Jessica's seizures. She has mixed feelings about this situation: she hates being locked up, but she hopes the shelter can make Jessica stop*

**Kathryn Page, Ph.D.**

*Fetal Alcohol and Drug Spectrum Task Force (Santa Clara County, California)*

Only recognized by professionals in the last 30 years, fetal alcohol spectrum disorders (FASD) are difficult to diagnose, persist in families for generations, and, without identification and treatment, almost inevitably result in broken lives. This article begins with a description of FASD: the history, nature, prevalence, causes, and effects of prenatal exposure to alcohol. Some of the unique features of FASD and the complications involved in diagnosing it are discussed. The article next explores the multigenerational roles of FASD in family dysfunction: the mechanisms by which it tears families apart, interferes with good parenting, and contributes to attachment disorders. Finally, the article discusses how the child welfare system has encountered and responded to FASD and proposes some innovative interventions and approaches. ■

*screaming at the slightest thing (like getting her face washed) and can get her to eat (Jessica is very small). And maybe being locked up can help Amber get off drugs. She doesn't want to be like her own mother was—always high or drunk.*

Amber and Jessica are two links in the familial chain of neurological dysfunction caused by exposure to alcohol in utero. Jessica's tactile sensitivity, small size, and inability to self-soothe are telltale signs of some kind of organic dysfunction; Amber has an IQ of 80, a diagnosis of attention deficit/hyperactivity disorder (AD/HD), and very small teeth.

The grandmother of a patient at the FASD Diagnostic Clinic[3] reported five generations of addiction—and five generations of academic failure, early pregnancy, trouble with the law, and unemployment. Although five generations are more than we usually see at our Santa Clara County clinic, most of the children coming through have mothers who themselves were affected by their own mothers' drinking. (Almost all of the 80 children seen so far have come through the foster-care system.) Later in this article we dissect this generational chain of alcohol-related damage to the central nervous system (CNS) to see exactly how it is formed.

Alcohol is the only commonly abused substance known to cause birth defects, including the array of cognitive, physical, regulatory, and emotional dysfunctions referred to as FASD. Stimulants, opiates, and hallucinogens have not been shown to directly cause birth defects, although harm is done indirectly to the growing fetus in the presence of these substances. The effects of drinking on the fetus during pregnancy are not well understood by the average person, and indeed professional communities largely remain ignorant of the problem. People intimately involved in the care of FASD children, on the other hand, are experts on the severe symptoms, peculiar habits and tastes, exhausting behaviors, "moral retardation," and difficulty with learning that are part and parcel of fetal alcohol spectrum disorders. They just don't know what to call it, because, as one foster grandmother put it, "every doctor in the book called it something else and told me to take another damn parenting class!"

## HISTORY

Damage to children from prenatal alcohol has been noted since earliest times. In ancient Carthage, the bridal couple was forbidden to drink wine so they would not conceive a defective child. Aristotle observed that "foolish, drunken, and harebrained women most often bring forth children like unto themselves, morose and languid."[4] And the Bible, in Judges 13:7, commands: "Behold, thou shalt conceive and bear a son: and now drink no wine or strong drinks."

The current understanding of FASD began to unfold in 1968, when Dr. Paul Lemoine and coworkers in Nantes, France, described 127 children born to alcoholic mothers. The pattern these children shared included consistent physical anomalies, small size, and ceaseless agitation.[5] At the same time, during a study of failure-to-thrive infants in Seattle, only one common factor could be found: each of the babies had an alcoholic mother.[6] In 1973 this birth defect gained worldwide attention through an article in *Lancet* that described the constellation of physical features that accompanies fetal alcohol syndrome (FAS): a consistent pattern of widely spaced eyes, small palpebral fissure, flat philtrum, small chin, thin upper lip, and small overall head. By 1978, 245 people with FAS had been identified, the "FAS face" was widely considered to be uniquely alcohol related, and prenatal alcohol exposure was described as the most frequent known cause of mental retardation.[7] Since then, a vast and mushrooming body of scientific evidence has shown beyond a doubt that prenatal alcohol exposure does indeed damage the fetus.[8] Today, brain imaging techniques are being used to pinpoint the most affected areas of the brain, and sophisticated arrays of neuropsychological testing illuminate the resulting deficits in functioning.

In the last decade, the use of advanced technology has made clear that this "face" of FAS is more an artifact of timing (exposure during the third week of

pregnancy) than the sole defining marker of fetal alcohol damage. According to a recent estimate by eight of the principal FASD researchers, victims of FASD who do not display the telltale features outnumber those who do by at least three to four times (these symptoms, without the facial features, are most popularly known as "fetal alcohol effects" [FAE]).[9] Indeed, these researchers believe that their estimate—that one out of a hundred people have alcohol-related brain damage—is conservative.[10]

Despite this plethora of conclusive research, the idea that drinking could harm the fetus has met with considerable controversy, and, despite current and incontrovertible evidence, the controversy persists to this day. Anchoring the extreme end of such denial, the Yale Center of Alcohol Studies published a brochure in 1955 asserting that the "old notions about children of drunken parents being born defective can be cast aside, together with the idea that alcohol can directly irritate and injure the sex glands."[11] This position was not entirely unreasonable at the time, given that it predated the modern "discovery" of FASD by two decades.

The present-day argument against the dangers of consuming alcohol during pregnancy is largely a passive one: fetal alcohol damage is widely ignored. FASD is rarely covered in medical school—in fact, a recent study found that only 17 percent of today's ob-gyn texts recommend abstinence during pregnancy.[12] Physicians argue, "We don't know if this child's problems really stem from alcohol"; "We don't want to label children"; "If we diagnose it, we have to treat it, and we don't have the resources to do that"; "I wouldn't want to shame the mother." Ob-gyns have been heard to tell mothers to have a daily beer to relax.[13] Physicians are not the only professionals who should know about FASD but don't: there is practically no training on the subject in social work, mental health, juvenile justice, and other systems responsible for the care of people at risk.

Understandably, given the paucity of information about FASD, much of the public and private reaction to the behavior of fetal alcohol–affected people is strikingly parallel to the view of addiction prevalent two generations ago: these behavior problems are the result of willful opposition to authority or good sense, and if the person wanted to make a better life he or she would just buckle down and do it. Organic causes are rarely hypothesized by parents, teachers, probation officers, judges, or the public at large—bad behavior is a moral issue, the product of deliberate, premeditated, willful choice.

## CAUSES

In spite of hard evidence of its widespread harmful effects, drinking during pregnancy persists. In part this persistence is due to physicians' advice to pregnant women that a drink or two doesn't hurt; in part it is caused by conditions of living that beg to be softened by a little daily oblivion, in part by cognitive impairment (including not being aware that one is pregnant), and in part by addiction. Uncounted numbers of children have been harmed by their mothers' attempts to self-abort by consuming huge amounts of alcohol and other substances.

How much drinking can cause damage? Research evidence on the cellular level and from some animal studies is unequivocal: exposure to as little as one dose of alcohol has been demonstrated to hamper the ability of migrating brain cells to stick to their destined spot on the cortex.[14] Research conducted on children with low levels of prenatal exposure to alcohol has been contradictory, however. There is actually little solid evidence that one drink or even two a day causes measurable harm in humans,[15] although one study with rhesus monkeys demonstrates a connection between moderate drinking and irritability, hyperactivity, and rigid problem solving.[16] Studies of pregnant mothers who had an average of 14 drinks a week or were engaged in similar "moderate drinking" do show a decrease in memory and learning; these studies did not, however, note whether the weekly quantity was consumed in a couple of sittings. Most research suggests that a high blood alcohol level is the most important factor in fetal alcohol damage and that binge drinkers are the most frequent mothers of FASD children (a binge consists of

four or five drinks in a sitting, depending on the expert cited). In any case, one of the large 40-ounce malt liquors so favored by people without a lot of money to spend on intoxication contains the alcohol of more than four standard drinks—so drinking one "40-ounce" can therefore qualify as a binge and can significantly harm the fetus.

And what exactly happens to the fetal brain to cause this damage? This is still being explored, but there are at least three mechanisms currently documented: abnormal migration patterns of cells on their way out to the cortex, reduced cell adhesion (as noted above) once they reach their destinations, and abnormal cell death all along the way. The cells actually behave a little like drunks, wandering around, sliding off their bar stools, and then passing out.[17] Nothing to take lightly, of course—the result is awful, but the comparison is hard to resist.

Does heavy alcohol exposure always cause brain damage? No one knows yet. There is no evidence that even high doses are universally destructive to the growing brain. Several factors in combination with alcohol appear to make such damage more likely, such as other drugs, tobacco, poor nutrition, stress, and poverty.

## EFFECTS

The primary disabilities of FASD have been described by researchers, clinicians, and caregivers. While a common caveat in FAS/E thinking is that there is no one profile and that every person is different, the core disabilities listed in the table occur with great frequency.

## INTERACTIONS WITH PSYCHOLOGICAL, ENVIRONMENTAL, AND BIOLOGICAL FACTORS

It is rare that FASD exists in a pure state outside the domain of lab rats. Even in rural South Africa, where vineyard workers are paid in the fruit of their labors (wine, called "dop") and few people use drugs, the alcohol exposure is still layered with other influences on behavior and learning. The study that accounts for parental factors such as IQ or disorders of thinking, sensory integration, and emotional regulation

**Core Disabilities of Fetal Alcohol Spectrum Disorders**

**Cognitive**
- Lowered IQ
- Widely varying abilities
- Math disability
- Poor memory
- Fluctuating capacity from day to day
- Poor spatial orientation
- Little self-awareness, reflection
- Inflexibility of thinking

**Executive Functioning**
- Impaired planning
- Bad judgment
- No ability to delay gratification
- Little impulse control
- Future orientation missing
- Disorganization
- Poor focus, concentration

**Emotional**
- Intensity, urgency
- Little ability to recognize feelings
- Little ability to articulate feelings
- Mood disorders
- Rage disorders
- Vulnerability to mental illness

**Interpersonal**
- Inability to read social cues
- No empathy
- Poor bonding
- Inability to distinguish truth from fiction
- Externalization of blame
- Excessive demand for attention

**Medical/Neuromotor**
- Sensory integration disorders
- Poor balance, coordination
- Eating, sleeping problems
- Allergies, asthma, ear infections
- Heart and kidney problems
- Hyperactivity
- Seizures

**Speech/Language**
- Superficial fluency
- Talkativeness
- Parroting of others' speech patterns
- Expressive language better than receptive
- General delay in communication

has not yet been done. Nonetheless there is sufficient knowledge to make some generalizations about what happens to a person when there is inherited vulnerability to mental illness or substance abuse, impoverished environment, poor parenting, trauma, or loss—resting on the very shaky foundation of a nervous system damaged by prenatal exposure to alcohol.

First, the more the CNS is weakened, the more likely it is that inherited vulnerabilities to mental illness and addiction will be exacerbated. The most commonly held theory of mental illness is that in the vast majority of cases, a predisposition to a particular imbalance will remain latent unless the person is exposed to extraordinary stress. FASD causes chronic, severe stress as a result of the person's feeling—and reality—that he or she is different from others and is unable to "do life," combined with the financial, legal, interpersonal, or health disasters that so often ensue. Mental illness and addiction are among the most frequent concomitants of prenatal alcohol damage.

Second, FASD is both worsened by and further perpetuates the financial, legal, interpersonal, and health disasters that often accompany poverty. Children of middle-class parents with plentiful resources for support are more likely to have their needs met. Children with FASD have a great many more needs, difficult for even the most energetic, skillful, and devoted parents to meet; the consequences of not meeting those needs are dramatic and destructive. Parents with less than optimal resources are likely to be caught in snowballing chaos and tension as their FASD children explode, don't obey, don't learn, don't talk, and begin to act "bad." Without therapists, respite care (trained child-care providers available to take over for hours or days at a time), support groups, medical insurance, or good schools, the parent of a child with FASD must contend alone with an incomprehensible and intense source of unpleasantness. These children are eminently "abusable": parents whose own ropes are frayed by the stresses of poverty may be driven to extreme measures in their attempts to control children who constantly disobey, who rarely express love or pleasure, and who scream with frequent and intense upset. Juvenile hall is filled with children like these.

When we add in a prenatally exposed parent to this mix of environmental (poverty) and genetic (inherited vulnerability to mental illness) difficulty, we have a combination of elements that snowball into inescapable disaster without considerable outside help. Take just one element of poverty, unpleasant sensory stimuli (cold, bad smells, noise, dirt). Most of us can cope with such stimuli without unduly throwing tantrums. People with the sensory integration difficulties of FASD, on the other hand, are easily thrown by such sensory triggers into extremes of mood or behavior, occasioning further decrements in their living situation. Poverty brings more than unpleasant stimuli, of course, and the chronic stress, unpredictability, social stigma, and isolation that are found on the margins of society each contribute another profoundly disorganizing layer to the life and functioning of a parent. If, on top of all that, a parent is trying to raise a very difficult child, everybody winds up suffering—parent, child, and society. The child with FASD in such a family will not only receive very few of the supports needed in order to avoid the secondary disabilities of school failure, trouble with the law, chemical dependency, and so on, but the disordered and fragile nervous system of this child also will be further disturbed by the chaotic parenting of the FASD parent.

Third, the psychogenic factors that assault so many of the children who require public services—loss, trauma, violence, abuse, neglect—can cause neurological changes in their own right. Stress hormones can go on permanent "red alert"; the neural fabric involved in giving and receiving love can become impenetrable; central fear-related brain structures can actually get bigger than normal. When these factors pour into a nervous system already jumpy, unable to figure things out, and unable to find comfort even in the best of situations, children can take on a feral quality, stealing and hoarding food, interpreting neutral stimuli as hostile, remaining always on guard and ready to attack or get revenge at a moment's notice. Some girls

under these circumstances may go the other way, especially if their abuse has been sexual, turning to seductiveness as a primary defense.

## FLYING UNDER THE RADAR—HOW FASD STAYS INVISIBLE

If it is true that at least one out of a hundred of us has some measurable degree of brain damage from our prenatal exposure to alcohol,[18] then who are we? How is it possible that all this neurological dysfunction can go unnoticed? Three reasons are postulated: the first (partial diagnoses) is vast and complex, the last (professional awareness) is simple and profoundly important, and the second (a peculiar communication quirk) may be merely interesting.

### PARTIAL DIAGNOSES THAT MASK THE BROADER DYSFUNCTION

Several diagnoses jostle to explain what is actually one tapestry, albeit a wide and varied one, of dysfunction resulting from prenatal alcohol exposure. Attention deficit/hyperactivity disorder is the most common diagnosis given to children with FASD, with oppositional defiant disorder close behind. Bipolar disorder is also frequently diagnosed, as is sensory integration disorder. Attachment disorder is often diagnosed in children with FASD, even those who were adopted at birth. Exhausted and confused parents take their FASD children to clinician after clinician, looking for an explanation that fits their children, seeking treatment that might finally do the trick. An individual child who has been seen by a variety of clinicians can wind up diagnosed with attention deficit/hyperactivity disorder, oppositional defiant disorder, bipolar disorder, sensory integration disorder, and learning disability—and while none of these diagnoses is incorrect, they are all just separate parts of the same puzzle. If these disorders are treated in "silo" fashion, with a separate approach to each one, the child continues to suffer from misunderstanding and misdirected treatment. Treated with the understanding that all these pieces are linked to prenatal alcohol exposure—which colors all of them—the child benefits from a unified and sensitive team approach.

Knowing—or even hypothesizing—the underlying cause of behavior problems to be prenatal alcohol damage gives the family, the clinician, and often the child a sense of relief, as this provides a context for the multitude of peculiar, even unfathomable, behaviors as well as the more categorical ones—the AD/HD and so on. Knowing that the child's problematic behavior stems from a whole network of brain damage and not from deliberate disobedience (or just related to unitary sets of symptoms as described above) releases the family from its relentless and futile attempts to get the child to "just stop it." Given resources that are well versed in brain damage, especially prenatal alcohol-related damage, the family can redirect its efforts toward teaching coping skills, changing the environment, and supporting the areas of strength.

It is impossible to determine how often prenatal alcohol exposure actually is the diagnosis underlying these more formally recognized ones. Until we begin to ask about such exposure in the people being counted and studied for research, we cannot give hard numbers, or even very good estimates. But as evidence from research mounts, it is increasingly logical to assume that prenatal alcohol exposure is indeed the cause in a great many cases of symptoms that manifest and are diagnosed as the conditions mentioned above and described in detail below.

#### *Attention Deficit/Hyperactivity Disorder*

The constellation of FASD behaviors that most commonly comes to the attention of educational, legal, or medical caregivers is the same as the cluster of symptoms characteristic of attention deficit /hyperactivity disorder (AD/HD). These symptoms form the core disabilities of FASD. From the list given in the table we can pick out the chief features of AD/HD: inattention, hyperactivity, and impulsivity; those familiar with this disorder will recognize the many subcategories of AD/HD here as well as some of its more subtle accompanying features. In addition, the broader definitions of AD/HD include

co-morbid disorders that cover most of the features listed in the table: learning disabilities, sensory problems, language delay, general immaturity—even allergies.[19]

It should be noted that while most researchers consider AD/HD to be largely of genetic origin, none of the well-known AD/HD studies includes information about prenatal exposure to alcohol. The genetic theory holds that because AD/HD is more often found in immediate family members than otherwise, it must be inherited. Further "proving" the genetic link is that identical twins are more likely to share AD/HD than fraternal twins. What is not considered is that alcoholism is a family tradition, passed down through the generations. Drinking runs in families at least as much as AD/HD runs in families; AD/HD runs in drinking families; drinking runs in AD/HD families. There is more confluence of FASD in identical twins than fraternal—and the central constellation of FASD characteristics is made up of the symptoms of AD/HD.

### *Oppositional Defiant Disorder and Conduct Disorder*

By far the most common diagnostic category in the juvenile justice system is oppositional defiant disorder (ODD); a scattering of diagnoses of ODD's more dangerous relative, conduct disorder (CD), also exists. A discussion of the general utility of these two diagnoses will have to wait for another time, but their relation to FASD must be explored for a moment: that is, FASD may lead to behavior that manifests as ODD in youth. When a person can't communicate his or her needs very well, can't figure out the cues or feelings of others, doesn't get the "big picture," is often physically uncomfortable, does badly in school and at home, can't organize or even remember tasks or materials—and has everybody yelling at him or her to just try harder—we have a recipe for resistance and defiance. As one of our juvenile hall youth put it, "It's better to be bad than stupid." All 10 of the juvenile offenders seen in the FASD clinic so far have received diagnoses somewhere along the spectrum of FASD, and all arrived with previous diagnoses of CD or ODD. Many more of our offenders with these diagnoses are screening positive for FASD;[20] they just haven't been formally diagnosed.

### *Attachment Disorder*

Attachment disorder is perhaps the most problematic diagnosis in the fields related to child welfare, as it so often portends placement failure and misery for all involved. Difficulties with bonding are usually attributed to negative experiences with the first caregiver. Both neglect and abuse can cause the unprotected heart of the infant to close, walling off vulnerability and tenderness from anyone who threatens to come near.

Attachment difficulties are common among children of substance abusers. Attachment disorders at their most extreme manifest as truly sociopathic behavior: lying, stealing, cruelty to animals, fire setting, deliberately causing a great deal of trouble to others. In general, children with extreme attachment disorders are unmoved by human kindness or approval and seem to get pleasure from hurting others, especially people who love them.[21] The puzzling appearance of attachment disorders in children who were adopted at birth by caring, responsible parents has prompted questions about the neural networks responsible for reciprocal affection and empathy.

While these questions remain largely unanswered, many observers of early-adopted FASD children with attachment problems hypothesize that the combination of organic conditions (very poor memory, lack of cause-and-effect thinking, sensory over- or underreactivity, language delay) and psychological ones (frustration and chronic failure) synergistically produce many of the symptoms of attachment disorder traditionally thought to result from bad parenting. Again, proper diagnosis is needed. For example, one of the most successful treatments for attachment disorder is "holding therapy," which, to a child with the tactile defensiveness often found in children with FASD, would be traumatic rather than therapeutic. If there has been prenatal alcohol exposure, this cluster of symptoms may manifest as attachment disorder, but the roots of

this disorder will be exacerbated by, if not solely a result of, organic brain damage. Without recognition of such organicity, treatment may be less successful or even backfire, as the lack of bonding would be understood to be of purely psychological origins and treated as such, ignoring any alcohol-related aspects as mentioned above—frustrating for all participants in any such therapy.

### *Sensory Integration Disorder*

Sensory integration disorder (SID) is one of the core clusters of disability associated with prenatal alcohol damage (but, like the other disorders outlined in this article, it is the FASD field that recognizes this relationship, not the SID field). Larry Silver describes children with SID in the foreword to *The Out-of-Sync Child* by Carol Kranowitz:

> These children . . . have problems developing the ability to process information received through their senses . . . interpreting sights, sounds, and sensations of touch and movement. They . . . become unusually upset by bright lights or loud noises, or by being touched or moved unexpectedly. They also . . . have problems controlling, orchestrating, and using their muscles effectively. When it is hard for them to coordinate groups of large muscles . . . and/or small muscles . . . , they . . . have trouble mastering running, jumping, hopping, or climbing. This difficulty getting their hands and bodies to do what their head is thinking creates problems with . . . many other essential life skills.[22]

Kranowitz further explains:

> Inefficient sensory intake: When our brains take in too little or too much sensory information, we can't react in a meaningful way. Taking in too much information is called hypersensitivity . . . [To compensate,] we avoid sensory stimuli that excessively arouse us. Taking in too little information is called hyposensitivity . . . [To compensate,] we seek extra stimuli to arouse ourselves. . . . Neurological disorganization: A. The brain may not receive sensory data because of a "disconnect," or B. It may receive sensory messages inconsistently, or C. It may receive sensory messages consistently but not connect them properly with other sensory messages to produce a meaningful response. . . . Inefficient motor, language, or emotional output: The brain is inefficient at processing the sensory messages, thus depriving us of the feedback we must have in order to behave in a purposeful way.[23]

A person with some version of SID will be out of sync with the rest of the world and unable to modulate responses no matter how much he or she might wish to. Some descriptions of children with SID go beyond problems of sensory integration, however, into areas more properly captioned "executive functioning," especially where planning and judgment are impaired (as described in the last paragraph). This extension raises the question of more extensive neurological dysfunction—another example of one perfectly good subcategory of symptoms being mistaken for the more comprehensive set of symptoms associated with FASD.

### *Borderline Personality Disorder*

The diagnostic category most likely to capture the core FASD personality traits is borderline personality disorder. With its intense dysregulation of mood; identity disorder; frequent compulsive disorders like substance abuse, sexual abuse, or gambling; and the difficulty its subjects have in maintaining stable employment or relationships—along with a tendency to manipulate and lie—borderline personality disorder (BPD) is a near-perfect match with FASD. Private conversations with clinicians suggest a pattern of alcohol abuse among mothers of BPD patients. Psychotherapy is known to be difficult with borderlines, perhaps because the "issues" may really stem from brain damage rather than inner conflict or unconscious motivations.

### *Bipolar Disorder*

Another common diagnosis that purports to explain behaviors of people with unrecognized FASD is bipolar disorder. As with AD/HD, bipolar symptoms are certainly part of the package of fetal alcohol damage, especially in adolescence, when the mood tends to swing from depression to rage to irritability,

unfortunately bypassing the euphoria that adults with bipolar often enjoy. Since this mood disorder is seen to affect cognitive, emotional, interpersonal, and executive functioning in normal people, it is natural to give it "primary disability" status in people with a whole raft of otherwise undiagnosed brain damage.

*Summary*

Any of these diagnostic categories is partly accurate; the problem with each is that it does not begin to cover the whole network of dysfunction suffered by people with alcohol-related brain damage. Worse, many clinicians, using these categories, attribute to their patients purposeful control over many of the maladaptive behaviors that make up the diagnosis. Most often, people with FASD end up labeled as "bad"—even if they carry other diagnoses that purport to explain the behaviors—unless their range of symptoms is grouped together as a whole and identified as FASD.

### TALKING THE TALK

In addition to the partial diagnoses that siphon off understanding of the whole, FASD is difficult to recognize for at least two other reasons. A major contributor to the "stealth" quality of this condition is a language feature known as "superficial fluency"—the ability to sound as if one is carrying on a meaningful conversation when in fact very little information is being exchanged. Often the FASD individual has difficulty articulating his or her own real feelings and thoughts, and difficulty grasping the meaning behind others' utterances, but can, with relative ease, produce a reasonable facsimile thereof! So often in the child welfare field we hear a parent swear to "do whatever it takes to get my baby back"—without a clue what that may be, little ability to find out, and even less ability to match actions to the words. If we don't listen carefully and double-check what we hear, we may think the person's cognitive processes are in fine working order . . . and that his or her noncompliance is therefore willful.

### LACK OF PROFESSIONAL AWARENESS

The third reason FAS/E is not recognized is that few clinicians are trained to look for it. The aforementioned diagnoses (except sensory integration disorder) are in the DSM-IV-TR and ICD-9-CM; FASD is not.[24] The closest we find is "personality change due to a medical disorder." Clinical practice lags far behind the rapidly growing body of research on FASD, as can be seen in an ob-gyn's recent comment: "FAS? I didn't think there was much of that around any more." A neonatologist asked, "Don't they outgrow it around two or three?" The charge nurse at the clinic in the women's jail in Santa Clara County insisted on transferring a caller (inquiring about an FASD referral for an inmate) to the ob-gyn, since she thought it had to do with fetal health. And the receptionist at a county clinic thought she heard "fatal alcohol syndrome" and wanted to connect the caller to the infant mortality office.

In addition to—or perhaps as an outgrowth of—the fact that there is almost no teaching about FASD in medical schools, extremely few sources of complete diagnosis exist in the United States. The University of Washington originated a systematic diagnostic approach that has spawned other diagnostic clinics around the state and a few in the northern Midwest.[25] Our clinic in San Jose, California, is modeled after this approach as well and is the only source of fetal alcohol spectrum diagnosis south of Portland. (See "Diagnosis," later in this article, for further discussion of the diagnostic process.) There may be others, but people around the country describe great difficulty in finding anyone who understands, let alone who can diagnose, this fabric of disorders.

## PREDISPOSITION TO NONPRODUCTIVE OR EVEN CRIMINAL BEHAVIOR

The connection between AD/HD and delinquency is well documented and intuitively sensible: poor impulse control, hyperactivity, and distractibility are not found in the personality makeup of solid citizens.

As noted above, a good many of the FASD behaviors fall into the AD/HD realm, with a few added features that make bad behavior that much more likely. These include (sometimes) a lower IQ, (usually) a significantly lower level of adaptive behavior, severely impaired executive functioning, inflexibility of thinking/rigid problem solving, explosive or rage disorders, brain-based difficulty in telling truth from fantasy, and sensory integration difficulties.

*Amber used to take Ritalin. It seemed to help her in school, but her mom ran out of medicine and never got around to getting more—she kept forgetting and didn't know where to go for it anyway. Amber has always had a hard time keeping track of the details of her life. Now as an adult she keeps losing her calendar and forgetting her appointments—and she sometimes gets lost when she sets off for the doctor, counselor, or probation officer the judge tells her to see. She is in jail this time because she got picked up on a bench warrant for not showing up in court. She also loses track of the past and future, living mostly in the present. So she doesn't make arrangements to take care of business until the last minute, and usually that doesn't work out well. When she can't find a ride, she gets really upset and can't think of any other way to get where she needs to go; she usually just gives up because she feels so awful. It doesn't occur to her to call anyone. Whenever the judge or probation officer asks her what happened, she tends to make up some story that she thinks will keep her out of trouble. She tends to be wrong about that, because it's generally a pretty flimsy tale.*

### IQ

Some people with FASD have average or above-average intelligence as measured by IQ tests. More often, prenatal alcohol damage has affected general cognitive functioning (the average IQ of people with FASD is 85.9—in the low-average range).[26] In addition, prenatal alcohol exposure can cause severely impaired cognitive ability and is now considered to be the primary known cause of mental retardation.[27] Probation staff involved in special education referral at the Santa Clara County Juvenile Hall, for example, estimate that three-quarters of their referrals fall into the 65–75 range of IQ, hovering around the cutoff of 70 for mental retardation. They further estimate that upwards of 90 percent of those referrals were exposed to alcohol in utero. With this reduced capacity to reason, remember, solve problems, organize information, or grasp concepts, poor decisions are much more likely. One of the most common categories of these poor decisions among juveniles is related to gang activity: an adolescent with impaired ability to think things through is a good candidate for gang-related tasks that carry the highest risk of either getting caught or getting hurt; gang leaders instinctively know this and use it to great advantage. Such vulnerability carries through to adulthood, especially among males. For adult females, a common category of such ill-informed decision making is relational: hooking up with a destructive male may seem a fine idea at the time if immediate needs for food, shelter, attention, or drugs are met. Thinking of future consequences is out of the question for people with FASD, regardless of IQ.

### ADAPTIVE BEHAVIOR

Prenatal alcohol exposure impairs the ability to "do life"—to use common sense, solve problems, and act appropriately in personal, social, and community situations (known as "adaptive behavior")—even more than it affects IQ. The average score on the Vineland Adaptive Behavior Scales (VABS) done in a study by Streissguth's group on adults[28] was 65.9, with 100 being average (as on IQ tests). This score indicates a severe impairment, an ability to function at a level roughly equivalent to that of a 10-year-old child, and not a particularly mature one at that. Very frequently, we see patients at the FASD clinic whose IQs are in the normal range but whose VABS scores are in the severely impaired range. These are children whose teachers and parents are completely baffled by their inability to meet expectations based on their normal "intelligence" scores. Caregivers assume deliberate defiance when these children cannot live up to their apparent potential. Authorities supervising

FASD adults are quick to assume resistance, manipulation, or sociopathy on the part of their charges when the latter do not display the normal capacities predicted by their IQ test scores.

Postnatal impoverishment of environment, trauma, abuse, or neglect can certainly influence adaptive behavior. Nevertheless, many children with FASD whose postnatal environments have been rich and loving score poorly on the VABS. Adaptive behavior is largely determined by the general category of brain activity known as "executive functioning," discussed below.

### EXECUTIVE FUNCTIONING—THE BIG PICTURE

Executive functioning is said to be that which distinguishes humans from animals and is carried out largely in the frontal lobes or the connections to those lobes. It includes the ability to plan, make good judgments, put off gratification, connect cause and effect, empathize with others, take responsibility for actions, imagine a future, remember the past, and connect the two with the present.

*Amber had agreed with her caseworker that she would come to the center the following Wednesday for supervised visitation with her daughter. The caseworker urged her to get her ride set up that day, and Amber said she would. By the time she got home, she told herself she had almost a whole week to call her ride; hungry and tired, she ate dinner and fell asleep. Wednesday arrived, and Amber was jolted by the phone call from her caseworker reminding her of the appointment—she had thought that she still had lots of time.*

This appointment might as well have been in the next lifetime for all Amber knew. As well-known AD/HD researcher Russell Barkley notes, where normal people can imagine a future of around six to eight weeks, people with AD/HD can imagine a future of about eight hours. This inability to organize into the future is endemic to FASD.[29]

For people with alcohol-related brain damage (and many people with brain damage in general), the inability to imagine a future is consistent with a general inability to see anything that is not right in front of their noses. Time, space, truth, and other people are the most problematic dimensions here—as they are for most of us, but much more dramatically so for people with FASD.[30]

To get the idea of executive functioning (present and absent), imagine, literally, a big picture. There is a lovely sailboat in the sunshine on a calm blue ocean; birds fly above and fishes doubtless swim below. An enormous steamship heads directly for the sailboat. Asked what the picture is about, you might say something like, "A big boat is going to crash into a little boat." Now imagine you are standing one foot away from this picture and you can describe only what is right in front of you. As you step from one spot to the next, your answer to that question will change, depending on the section of the picture you're facing: "It's about a sailboat. . . . It's about some birds. . . . It's about a steamship."

People with FAS/E tend to see only what is right in front of their noses at any given time. This tendency is independent of IQ, upbringing, other talents, or even intention. "Getting the Big Picture" is the general caption for the whole array of executive functioning. If we can see only the little quadrant directly in our line of vision, it is likely that we will

- not imagine a future or remember a past
- not save money or plan for much of anything at all
- nap, eat, drink, or have sex on the job, no matter what our boss thinks we should be doing
- not act thoughtfully toward other people or understand their reactions when offended
- forget what we came into the room for
- drive through the pesky red light if we're in a hurry
- not be able to explain our actions
- not understand that our actions have consequences
- take things that appeal to us even if they belong to others

- leave messes for others to clean up
- not be able to predict what will happen

And least likely of all is that we will make good parents.

Poor executive functioning is probably behind most of what we normally call "irresponsibility" and behind a great deal of what we attribute to deliberate bad choices and weak moral character. It is an inability to understand abstract concepts like responsibilities, good choices, and strong morals. People with FAS/E can only parrot these principles by rote; they cannot apply them meaningfully to their own lives.

### INFLEXIBILITY AND EXPLOSIVENESS

To this far-reaching bundle of big-picture-challenged behaviors FAS/E adds a few features that can push a merely wasted life into a destructive one. The brain-based traits of inflexibility and explosiveness are particularly dangerous and often occur together, igniting an all-too-common response to frustration: "If at first you don't succeed, throw that sucker across the room!" This behavior pattern, identifiable in early childhood, does not lead inevitably to a lifetime of violence, but it certainly makes thoughtful, productive responses less likely. Good parenting in the face of such habitual reactions, especially parenting a frustrating and difficult child, becomes impossible.

### LYING

Another problematic and common side effect of prenatal alcohol-related brain damage is the tendency to lie. "Moral retardation" appears with FASD even where a child has been adopted in infancy and consistently taught the value of honesty. It is one of the most heartbreaking experiences of adoptive families that their children persist in behaving like street urchins in spite of the good parenting they have received. There is speculation that the thinner corpus callosum (the part of the brain responsible for connecting the left hemisphere, or language centers, with the right hemisphere, or action centers) often seen in people with FASD may be at least partly responsible for this compulsive and often crazy lying, as the verbal part of the brain scrambles to come up with some approximation of the "right answer," having only a rickety little bridge across to the lived experience residing in the action, or behavior, part of the brain.

### SENSORY DIFFICULTIES

For most of us, the five senses are calibrated to a level of sensitivity that allows us to enjoy the incoming information they convey and alerts us to danger or need through discomfort. For some people, the level of sensitivity is either too high or too low or both in any or all of the senses. Prenatal alcohol exposure often causes such imbalance: the tags on shirt collars are irritating, only certain foods taste right, one has to keep changing body position, the bell at school sets off a flight reaction—or, in the opposite direction, wounds are not noticed, food is rejected even when needed, sleep is the last thing on a child's agenda, even when he's tired.

An adult with sensory difficulties may not be able to tolerate the bright fluorescent lights in the Alcoholics Anonymous meeting room, for example, and bolt halfway through every meeting without any idea of what is setting off this reaction. Another might be a sensation-seeker, doing risky things just to feel alive. Inmates in prison who have trouble knowing where their bodies are in space may bump into fellow inmates and spark a reaction resulting in bodily harm without any intention of starting a fight.

What turns sensory integration difficulties from private discomfort into troubling behavior has to do with the added effects of other FASD-related features: explosiveness, poor ability to delay impulses, and impaired executive functioning. Chronic discomfort makes it hard for anyone to remain cheerful and productive; people with FASD are quicker than most to get upset, slower to calm down, and the least likely to address basic needs like nutrition, shelter from the elements, or rest, let alone a toothache. To top it all off, drugs and alcohol offer an appealing respite from all the internal and external noise.

So we have a person who is always upset and in constant discomfort without reliable remedy, suffers

from poor impulse control and rage attacks—and is either high, coming down, or looking for the wherewithal to get high again.

### WHAT HAPPENS IN THE ABSENCE OF APPROPRIATE INTERVENTION: SECONDARY DISABILITIES

The primary disabilities of brain damage resulting from prenatal alcohol exposure were listed in the table shown earlier and outlined in detail above. These organic vulnerabilities can lead to "secondary disabilities"—troubling or dangerous behaviors—if they aren't properly identified and treated (for information on appropriate interventions, see the section "Where Are We Now, and What Can We Do?"). In a seminal series of studies spanning over 15 years and still going strong, Ann Streissguth of the University of Washington has followed a group of 500 people with FAS/E,[31] finding that the following secondary disabilities develop in the absence of appropriate intervention:

- *Disrupted school experience,* stemming from attention problems and repeatedly incomplete schoolwork, had plagued 60 percent of the adults and adolescents. Behavior problems in school fell into the categories of not getting along with peers (60 percent) and being repeatedly disruptive in class (55–60 percent).
- Sixty percent of the adolescents and 14 percent of the children had been in *trouble with the law;* shoplifting and theft were the most frequent types of crime.
- Fifty percent of adolescents and adults had been *confined,* either in mental health programs, inpatient drug and alcohol treatment, or jail.
- Forty-nine percent of adolescents and adults and 39 percent of children had displayed *inappropriate sexual behavior.*
- Of people who were at least 21 years old, two additional secondary disabilities were noted: *dependent living* characterized 80 percent of the sample, and 80 percent had *problems with employment.*

Streissguth's explanation for these high levels of secondary disabilities found in people with FAS/E is that the primary disabilities of permanent organic brain damage are hidden, leading schools, families, the justice system, and society at large to expect normal behavior and reasoning from them. Without a low IQ score, obvious mental illness, or physical signs of birth defect, societal protection is lacking, and blame or punishment is all too often the only response.

This research also examined risk and protective factors associated with secondary disabilities. Risk factors were those that were most associated with elevated rates of secondary disabilities; protective factors resulted in lower rates. Protective factors included

- living in a stable and nurturing home
- not having frequent changes of household
- not being a victim of violence
- having received developmental disabilities services
- having been diagnosed before the age of 6
- having a diagnosis of FAS (with facial features) rather than FAE (normal face)
- having an IQ score below 70

The last two factors may seem counterintuitive. The reason that FAE leads to worse outcomes than FAS is that FAE is truly invisible—at least with FAS there is a chance that the facial features will be recognized as a birth defect signaling brain damage, and the resulting behavior will be interpreted accordingly. The advantage of lower IQ is similar—the odd or irresponsible behavior of a mentally retarded person will more likely be met with increased services and support, not punishment and shame.

Streissguth's primary conclusion from this study was a strong recommendation that early diagnosis be made available wherever warranted, so that support services could be mobilized, appropriate educational

and parenting practices could be implemented, and self-image could be enhanced rather than continually eroded.

### IN THE CHILD WELFARE SYSTEM

The protective factors do not exist for most of the clients we serve in child welfare. By definition, few of the children coming through the dependency system have had a stable and nurturing home. Frequent changes of household characterize many, especially those whose troublesome neurology makes for disrupted placements. A high percentage of the children in our clinic have witnessed or been victims of violence. The only children receiving developmental disabilities services are the mentally retarded. Until about a couple of years ago, only a few kids had been diagnosed with FASD in our county—and they were the ones with the FAS face; in most counties, such diagnosis is not available. Finally, the vast majority of people with FASD do not have facial abnormalities, and most have IQs above 70.

The girls' units at Santa Clara County's juvenile hall provide a good example of our systemic failure to respond appropriately to FASD. At any given time, at least 90 percent of the female inmates began their journey through the system with Child Protective Services. Nearly all have dismal academic histories, exhibit terrible impulse control and cause-and-effect thinking, and are substance abusers. How many of these girls actually have brain damage from prenatal alcohol exposure? It is of course impossible to know without formal screenings. But if we do the math (at least 85 percent were exposed to drugs and alcohol in utero, and one out of a hundred people in general has such brain damage), it is logical to conclude that a great many of them are so affected. If we had identified the neurological underpinning of the social, behavioral, and academic problems that appeared early on, appropriate interventions could have been made in many of these girls' cases. Instead, most of them (by their own reports) "feel like an idiot," "just screw up all the time, I can't help it," and (probably accurately) "never will get out of this mess."

The pattern of breaking promises, failing to appear, ignoring clear orders—and then lying about it all—is not atypical of many FASD youth and adults; the ones who wind up in the juvenile justice system are those who have developed secondary disabilities because they were not identified and treated as people with the primary disabilities associated with brain damage. Youth with FASD who do not appear in the system are (mostly) those who have been supported with appropriate interventions. These lucky ones may have similar organic tendencies to fall through on promises, forget where they're going, not grasp the significance of instructions, and even confuse truth with fiction, but they have (by definition) sufficient impulse control to avoid criminal activity and have been successfully guided to a life that includes legal pleasures.

Once in the system, youth with FASD generally keep cycling through for curfew violations, association with the wrong people, drug and alcohol consumption, truancy, shoplifting, or minor sexual offenses (often a matter of accepting the wrong invitation). Normal teens, once they have been caught, want to regain their autonomy. They understand how to curb or hide their impulses long enough to get off probation. People with FASD do not have the ability, for so many reasons outlined in this article, to plan for their future, curb their impulses, or, ultimately, achieve the elusive state of autonomy. And to cement their fate, they haven't been graced with the ability to own up to their mistakes. Youth—who so often began their journey in the system as dependents of the court—graduate into the revolving door of the penal system, creating along the way another wave of drug- and alcohol-affected children.

## WHERE ARE WE NOW, AND WHAT CAN WE DO?

A person with defects in executive functioning needs an outside executive—someone who will exercise judgment and make sure that the affected person's life stays on course. Practitioners in the FAS field frequently use the term *external brain* to refer to such a

support system. Successful early intervention will help a child understand that he or she has some gaps in functioning, that it isn't his or her fault, and that it's important to ask for help. But for the unlucky 99 percent of kids whose disabilities are not identified, a self-image that grows rotten with shame and alienation often creates a crust of "I'm fine; my only problem is you; all I need is freedom . . . ," which is exactly what they do not need. As with many allergies, that which we crave the most is the thing that makes us the sickest. Though these youth crave freedom, they really need external structure. The problem is that until they are able to welcome voluntary structure they will continue to gravitate toward the involuntary kind—winding up incarcerated or on probation.

Ultimately, of course, the very best we can do is early diagnosis and intervention with the child and the family. All is not lost, however, if we have missed this critical early window. Useful responses for people of any age follow the same principles: accurate diagnosis; education of others in the person's life about the nature of the brain damage; medication support; accommodations in school, at work, and in the legal system; sentencing alternatives; and, to whatever degree possible, coaching and mentoring about the details of daily life.

## DIAGNOSIS

As noted above, diagnosis is much harder to come by than it should be, and than it needs to be. The Fetal Alcohol Spectrum Diagnostic Clinic at the county hospital in San Jose began over two years ago and has seen roughly 80 children in its once-a-week sessions, including several youth from juvenile hall. The team is made up of a pediatric neurologist, a speech/language pathologist, a physical or occupational therapist, a psychotherapist, an educational specialist, a public health nurse, and a psychologist. Records are reviewed in advance. On the day of the clinic visit, the patient is tested by the speech/language pathologist (standard testing of learning and memory along with testing using materials developed specifically for FASD evaluation) and the physical or occupational therapist, who checks neuromotor and perceptual functioning. At the same time, the patient's caregivers are interviewed to explore the patient's real-life behaviors and reactions. After the team has met privately to share findings and discuss diagnostic conclusions, it shares that information with the patient and caregivers, along with recommendations, resources, and reading material. The caregivers are then contacted a few weeks later to see if they have additional concerns or questions.

In our clinic the diagnosis is not a black-or-white decision—fetal alcohol syndrome or not—because we recognize that this is a whole spectrum of disorders occurring in varying severities, with or without physical markers and with varying degrees of certainty about the mother's use of alcohol. When the evidence indicates that the symptoms are likely due to factors other than prenatal alcohol exposure, none of the diagnoses along the fetal alcohol spectrum is given. If there are significant delays in at least three areas of functioning connected to organic impairment, facial features typical of fetal alcohol syndrome, growth retardation, and documented history of prenatal exposure, then the diagnosis is FAS. Far more common in the patients we have seen is a diagnosis of static encephalopathy or neurobehavioral disorder; these refer to, respectively, equivalent or more moderate brain damage, without the physical markings indicative of FAS.

## EDUCATION

After diagnosis comes education for caregivers, teachers, probation officer, counselors, physicians, and, to the extent possible, the patient. Aside from specific recommendations for structuring life to minimize meltdowns and maximize productive activity, the main recommendation is to try to view brain damage as an explanation for the irritating (or enraging, or hurtful, or destructive) behaviors of the past. Quite often this will start a ripple of changes that serves both the youth and the system. When Amber's probation officer heard that her charge had FASD, she said, "You mean when she tells me that she forgot the meeting she's actually telling me the

truth?!" Some small changes were made so that Amber's memory didn't have to hold more than it was able to; her behavior on the unit has improved, and she is actually helping with unit activities.

### MEDICATION

Previous diagnoses of AD/HD may have led practitioners to try medicating the FASD sufferer. Stimulants are successful with AD/HD symptoms, although research indicates that the short-acting Ritalin is less likely to work well with FAS-related AD/HD than other stimulants. Other aspects of FASD are medically treatable as well, especially the mood disorders. Parents report remarkable improvement in their children's ability to relate to others, calm down, focus, and stay put. Even parents who are philosophically opposed to medications have found them to be lifesavers with their severely FASD-impaired children. Adults who chronically returned to jail for petty, impulsive acts have managed to stay out when they were given appropriate medical treatment.

### ACCOMMODATIONS IN SCHOOL, AT WORK, AND IN INSTITUTIONS

If we keep in mind that an adult with FASD may have the emotional maturity of a 7-year-old and little or no ability to think in terms of cause and effect—and must cope with sensory issues that cause chronic physiological and nervous system distress—we can realize that expecting this person to "get a clue," "learn some responsibility," "just chill out," learn from consequences or mistakes, or the perennial favorite, "grow up," is a real exercise in futility, and an expensive, destructive one at that. The following suggested accommodations may help in various situations with FASD children and youth. They are not a complete prescription by any means, but enough to give the reader a place to start.

Accommodations for affected children in school range from those usually implemented to mitigate the effects of AD/HD—separation from distraction, greater flexibility around punishment, seating close to the teacher, permission to move when needed—to special, self-contained classes with few students and greater therapeutic/behavioral emphasis, always with an eye toward encouragement and teaching rather than pointless punishment or deprivation. Teaching the skills that other children absorb by osmosis—social, daily living, and community skills—is essential and must be multimodal, repeated, and compelling.

At work, depending on a person's specific profile of strengths and weakness, any of the following may help: a job coach, instructions either written out or illustrated in pictures, education of the supervisor regarding FASD, built-in stress relief such as a quiet refuge or someone to vent to, repetition of instructions, and forgiveness for mistakes and forgetfulness. Minimizing stress is of primary importance. For example, if the person with FASD is successful with stocking and shelving, it's not a good idea to promote this person to cashier. It would be a real disservice to the person with FASD to be bumped from a familiar and happy routine to a job that requires interpersonal savoir-faire and nimble problem solving if he or she has a hard time with these skills (as most people with FASD do). Even though it may signify increased prestige and more money, such a promotion can cause a brain-damaged person to panic, become disorganized, lose normal behavioral controls, and fail at the job altogether. The managerial version of the Golden Rule does not apply in job situations.

In institutional situations such as group homes, jails, or other places where there is 24-hour contact, appropriate accommodations should be similarly calibrated to the profile of the person. For example, if a person's memory is poor and he or she forgets some obligation daily, then instead of taking away privileges, caregivers should find a response that aids memory: have the client wear an alarm watch or get a brief reminder or some other humane prompt. If the client's expressive language is much stronger than his receptive abilities (talks better than listens), caregivers should check understanding by asking the person to repeat what he heard. There should be few opportunities to make bad decisions if these seem to be the only kind a client tends to make; structure

should be a given, and any resulting sense of humiliation should be met with sympathy, an(other) explanation of the reasons for the imposition of structure, and an attempt to get on with life. Given the 80 percent dependent-living rate among adults with FASD, it is unlikely that the client will "internalize responsible decision making."

The common thread through all accommodations and interventions is the "external brain." If a supportive external structure is not in place and accepted, then the imposition of a punitive external structure is inevitable. But even though it is probably useless as a change agent, what normally passes for punishment is not always a negative experience; indeed, it is a common surprise to families whose FASD children wind up incarcerated that they are happier and calmer than they were at home.

## PARENTING THE FASD CHILD

Children with prenatal alcohol exposure are difficult for anyone to raise, as well-prepared adoptive parents attest. A child who is quick to get upset, slow to obey, impossible to calm or console, generally complaining about some discomfort or other, and often sick would be hard enough to tend without the rage disorders, lying, or inability to read social cues, remember yesterday's learning, or express needs. These children rarely reflect back the calm, happy, interactive impression of a well-cared-for child even with the best parenting. This makes it very difficult to keep the bonding cycle going—if indeed it ever began. Otherwise healthy marriages have broken under the strain (each partner accuses the other of causing the child's problems), and siblings suffer from the disproportionate concentration of resources the affected child receives. Well-meaning others offer advice, usually unsolicited and inevitably conflicting: "A little more discipline will fix him right up"; "Don't be so rigid, loosen up"; "Kids need to eat a balanced diet with no additives"; "Don't fight over food, kids usually get what they need"; "Spend more time with your kid"; "You need some time away"; "He'll get used to Gymboree—just keep going even though he screams his head off every time you go"; "Minimize meltdowns—if he doesn't like Gymboree, go somewhere else"; "Don't let him learn to manipulate you."

Adoptive parents raising children diagnosed with FAS/E report significant depression, exhaustion, and anxiety. When these desperate parents seek professional advice, clinicians almost invariably suggest another parenting class or chore charts with gold-star stickers. When the child doesn't respond to the methods that the parenting class swears by (and with which the other parents proudly report such success), a parent who hasn't considered organic causes will turn with the force of gravity to the belief that "something is rotten in Denmark here, and it's either the kid, the spouse, or me." Drinking and drug use have been known to begin or increase under the confusion, pressure, and shame of what looks to all concerned like a simple case of bad parenting.

### NEEDS OF THE CHILD

Some experts believe that early and accurate diagnosis is the single most effective intervention for FASD. On top of this base of knowledge, appropriate services can then be gathered from the school district, county mental health, or medical staff, and parental efforts can be aimed in the right direction. A great many parents, both biological (in recovery) and adoptive, share stories of children who are now reasonably happy and productive, thanks to appropriate diagnosis and intervention. Nevertheless, enormous patience, resourcefulness, humor, and flexibility are required.

"It takes lots of extra time to raise a child like my daughter. It was like raising four children most of the time. . . . When Rosee was five and had been with us only a month or so, we went walking along a tiny creek with both muddy sand and small pebbly gravel. Every step she took ended in the sandy mud and she would let out a scream. I would say, 'Walk on the gravel,' and she would step in the mud and let out another scream. Finally I reached down, showed her the gravel, and told her, 'Walk here and you won't sink.' No more problem. She hadn't been able to

connect the words with the action and couldn't figure out [how] to switch to the gravel on her own."

Even mildly affected kids with FASD who are otherwise doing well can confound their parents with their inability to get the big picture, to see beyond the immediately visible: "We told him we didn't want him shooting BBs into his bedroom wall any more (there were holes everywhere), so after the wall was repaired, he put up a *paper* target and resumed shooting the BBs into the wall. When I found out, he said, of course, that he *wasn't* shooting them into the wall."

Medical problems are legion in these families. A mother reported in her post to the online support network that on one particular day she had to take her 10-year-old to the orthodontist for another tightening that would send her child into (loud) agony for the whole day, and then had to go to the kidney doctor. Meanwhile, the cardiologist called to say he needed to speak to her.

This picture of good-humored, loving—albeit profoundly challenged—family life changes dramatically when the parents themselves are affected by prenatal alcohol exposure.

### IF PARENTS ARE ALSO AFFECTED[32]

Parents with FASD will have some combination of the following: many children and an inability to care for them, the appearance (and often reality) of detachment, denial of problems, or blaming others for problems. They may be verbally compliant but can't carry out recommendations because they are likely to be disorganized, especially with time and money. They have a hard time delaying gratification and have little impulse control. They may be highly verbal, talking a "blue streak," but are easily victimized and gullible; they often have a history of sexual or physical abuse. On top of this unmistakable portrait of dysfunction, they tend to have nothing but positive things to say about their own or their children's behaviors and achievements—in the absence of actual feedback.

FASD parents need diagnosis (or an informed hypothesis) so that their behavior can be interpreted correctly and supports can be put in place. A functional skill assessment can help pinpoint either eligibility for disability services or the appropriate level of employment. A mentor or coach—someone who can offer support, guidance, and advocacy on a frequent basis—should be assigned to the parent. These services must be long-term and structured tightly so that crises can be foreseen and prevented; should a crisis arise, temporary crisis management must be available. Long-term or permanent birth control should be made easily available, and reliable, ongoing provision of food and shelter should be arranged.

The foregoing assumes sobriety on the part of the affected parent. If the parent is actively using alcohol or drugs, then the needs change. At this point, what may have been a workable household with support becomes unworkable, and addiction treatment must be activated. Such treatment needs to be nontraditional, as the usual 12 steps of recovery require some degree of self-reflection and big-picture thinking lacked by those with FASD. An addicted parent with FASD will also need to have some sort of buffer zone between him- or herself and substances, such as a sober living environment with close supervision and frequent drug testing.

The children of FASD parents—if somehow unaffected themselves—will likely take over the parental role and will be deeply anxious. They have been pouring the cereal and putting on the Band-Aids for the family since early toddlerhood. They have been exposed to sex, violence, chaos, homelessness, filth, and illness. These children may manifest symptoms of AD/HD that will resolve in time, stemming as they do from the hypervigilance necessary to combat the anxiety of being in that household. They will make tremendous gains in improved surroundings.

When the children of FASD parents are also affected by prenatal exposure to alcohol, many of their behavioral problems are organically based and will not resolve. They will need to be worked around and treated. A full diagnosis should be done to assess strengths and weaknesses, and a plan of accommodations at home and at school should be mapped

out. The AD/HD symptoms will need to be treated medically. Increased supervision and structure are necessary. In short, these children should live with a family that understands and has the capacity to deal with this particular disability. A management team will be needed to facilitate resources for medical care, speech and occupational therapy, special education, ongoing neuropsychological evaluation, functional skill building, behavior management focused on prevention of maladaptive behaviors—all working together to minimize secondary disabilities.

## SYSTEMIC ISSUES

The *Child Welfare Outcomes 1999: Annual Report* lists the following as "accepted performance objectives for child welfare practice":

- Reduce recurrence of child abuse and/or neglect,
- Reduce the incidence of child abuse and/or neglect in foster care,
- Increase permanency for children in foster care,
- Reduce time child is in foster care prior to reunification without increasing re-entry,
- Reduce time child is in foster care prior to adoption,
- Increase placement stability, and
- Reduce placements of young children in group homes or institutions.[33]

In fact, according to the Adoption and Foster Care Analysis and Reporting System (AFCARS), 18 percent of children in foster care in 1999 were in group homes or institutions and the median age of children in foster care was 10.1; only 59 percent were reunified with their families during that year.[34] According to the Urban Institute, foster care cost at least $9.4 billion in 1999.[35]

We can make at least three judgments in conjunction with these statistics to illustrate the effects of FASD. These judgments may seem speculative, but they will resonate with people working in the trenches of the child welfare system. The first judgment is that many of the 18 percent of foster children who end up in institutions because of their unmanageable behavior or emotions have nervous systems damaged beyond the capacity of regular or even therapeutic foster families to care for them. The second judgment is that many of the 41 percent of foster children who are not reunified with their families spent their early years living with parents so dysfunctional that their needs went unrecognized. This lack of recognition in turn will have often allowed the children's primary organic disabilities—almost never identified or appropriately treated—to develop into secondary, more troubling, behavioral manifestations. This development, and the 10-year median age of foster children, leads to the third judgment: that, as foster children age and their behavior worsens, they will transition to group foster homes, juvenile halls, or even homeless shelters. And—no inference here, just simple math—this system costs every American at least $32.60 per year (as of July 1, 2002).[36]

The composite picture shows many kids coming through foster care and graduating to correctional, substance abuse treatment, homeless aid, or other similar systems because they were not supported early on (if ever) with adequate identification of and intervention for neurological damage. (Of course, FASD is not the only reason, just the one most often overlooked.)

The message to us from the foremost researchers on alcohol-related brain damage—that early identification of FASD is the single most significant protective factor in preventing secondary disabilities—must be put into practice if we are to begin to deal with this expensive, destructive, self-perpetuating avalanche of damaged souls. The adage in the FASD field that the (undiagnosed) "boys get locked up and girls get knocked up" can be countered only if the underlying pattern of neurological impairment caused by FASD is revealed, if families can be supported to adequately manage these difficult children, and if professionals in the legal, medical, educational, social, and mental health fields become aware of the disorder's signs, difficulties, and interventions.

The Annie E. Casey Foundation has recently released a white paper with the following recommendations for successful permanency placement:

- Services and supports should be available to all adoptive families regardless of type of adoption.
- A network of services and supports ranging from prevention and early intervention services to in-home or residential treatment services should be available in communities.
- Services and supports should be available as needed by adoptive families at various times throughout a child's development.
- States should track the entry and re-entry to foster care of children adopted through the public child welfare system and nonpublic agencies.
- Adoptive parents and adopted youth and young adults should be engaged in the design and delivery of postadoption services.[37]

"The foundation does not live in the real world," some readers can be heard to mutter. The inescapable fact remains that too many children become "throwaways"—not for lack of caring, resources, or good intentions, but because their brains don't work right and we don't know how to deal with them. Many children of profoundly dysfunctional homes who have managed to succeed have personalities that allowed them to recruit helpful adults into their lives. The children we're talking about are not those children.

The foundation's recommendations stress the development of an ongoing network of supports and services, designed with the participation of the families themselves. Families raising children with FASD know these supports must begin with diagnosis as the basis for appropriate intervention and accommodation.

## NONMONETARY OBSTACLES TO DIAGNOSIS

A district attorney was heard to say, "We don't want to get these kids diagnosed because nobody will want them if they know how bad off they are." A pediatrician in one county's foster system believes that birth mothers will not voluntarily bring their children for diagnosis, especially if alcohol abuse was not already recognized as a problem, because they are afraid their children may be removed (or reunification prevented) if signs of prenatal alcohol damage are found. Ob-gyns do not ask pregnant women about drinking for various reasons: they aren't sure what to do if a problem is uncovered, they don't believe a little drinking can really hurt the fetus, they don't want to embarrass the woman, or they don't know how to ask.

Fear, shame, denial, and ignorance conspire to keep our communities from recognizing that diagnosing alcohol-related brain damage is as important as diagnosing allergies, autism, or diabetes. In the absence of such diagnosis, however, we stand by helplessly, pouring money and heartache into people who just "don't get it," and we blame them for not trying hard enough, which actually might be the case if they possessed the neural circuitry necessary for the task in the first place. But they don't. And just as we arrange the world to be a more sensible place for mentally retarded people, we need to begin to arrange the world to make sense for people who, while not mentally retarded in the legal and educational sense of the term, are certainly "common-sense" retarded and will not manage even minimally well without structure, guidance, and support.

## SOME PROGRAMS THAT WORK

Sometimes this structure and guidance needs to come from the court, and in fact several court-related programs are in place and inadvertently operating on principles known to foster success with people with FASD as well as non-brain-damaged clients. The only missing element, common to all such programs, is longevity. People with serious impairments in executive functioning will need external structure all their lives; the likelihood of reappearance in the system is high without that structure in place. The following are a few representative programs that work

with people whose executive functioning needs such a boost from the outside.

### DRUG TREATMENT COURT

Drug treatment court is a good example of the "shorter leash" approach that works well with offenders in need of a higher degree of "external brain" than the normal person who just happens to get caught. Drug testing is frequent and random; school or work attendance is checked; in the case of youth, obedience to parents is a condition of probation and is monitored; and appearances before the judge occur weekly during the first phase. In Santa Clara County's version of drug treatment court, there is a whole team of adjunct caregivers in court every time the person appears: a public health nurse, a social worker, an FASD/LD (learning disability)/ADHD consultant (in juvenile treatment court only, so far), a life skills teacher, and community workers, as well as counselors and the defense attorney. The circle is a firm, affectionate, often good-humored one with very few cracks to fall through—much to the chagrin of many at the beginning of the program. By the end of the process (at least a year later), however, the affection is often mutual and palpable. As part of the program, educational, physical health, medical, family, and mental health needs are monitored and met where possible. The emphasis is on celebrating success and growth while maintaining firm limits with (ideally) immediate consequences for infractions.

Santa Clara's family drug court addresses both dependency and treatment issues, tightening the net of monitoring and support. This increased supervision includes regular drug testing, frequent appearances in court, and the involvement of social workers and mental health counselors. Needs related to other life problems such as domestic violence, homelessness, and medical conditions are recognized and addressed as they come up. Encouragement is frequent and heartfelt, coming from all members of the team, particularly the judge. Specific elements of family drug court vary across the country, but as Santa Clara's is a model court, it represents the basic template.

### MENTORING

The Parent-Child Assistance Program (P-CAP) in the state of Washington is an exemplary model of programs that use mentors to serve as an "external brain" for mothers who have the most difficulty staying clean and sober. P-CAP addresses the risks of neurological impairment and compromised home environment that threaten the children of substance-abusing mothers. Its goals are to help mothers build and maintain healthy independent family lives, to ensure that children are in safe and stable homes, and to prevent future births of alcohol- and drug-affected babies. P-CAP uses trained and supervised paraprofessional advocates who each work with 15 clients for three years, assisting them in identifying personal goals; obtaining alcohol and drug treatment; staying in recovery; choosing a family planning method; connecting with community services; arranging transportation to appointments; solving housing, domestic violence, and child custody problems; and resolving service barriers across systems.

### EARLY INTERVENTION AND PARENT EDUCATION

Epiphany Center is a San Francisco program offering short-term residential treatment for drug- and alcohol-exposed infants. The goal is to reunite infants with their birth parents, their extended family, or an adoptive family within six months of placement. The program includes early intervention to promote healthy physical development, positive neurobehavioral organization, positive attachment to significant adults, developmental assessment and follow-up services, case management, well-baby care, substance abuse treatment, parenting classes, life skills training, and in-home services.

### SHARED FAMILY CARE

Shared Family Care (SFC) places an entire family with a host family trained to mentor and support the biological parents. Outcomes range from reunification and prevention of removal to the decision to terminate parental rights. SFC programs exist around the

country: Minnesota has a Whole Family Placement Program; the Crime Prevention Association operates A New Life in Philadelphia; and pilot programs are being evaluated in California and Colorado.

### ALTERNATIVE RESPONSE SERVICES

Alternative Response Services, funded by tobacco tax money in California and run by community-based organizations, addresses the families who have been reported to Child Protective Services but against whom charges have not been filed, although some level of family dysfunction is noted. This quasi-voluntary program assesses the family's needs and goals and finds resources to help meet them. If the family is entirely resistant to this process, the case is reported to the court, which then may tighten supervision.

### MULTISYSTEMIC THERAPY

Multisystemic Therapy makes high-quality, on-call psychological services available to at-risk families at any hour of the day or night, in addition to regular counseling that addresses educational, vocational, or other needs. This collaborative program operates on the premise that advice or counseling must be practical in a real-life context, aimed at concrete needs and problems rather than theoretical "issues," and must stay oriented to the clients' own expressed priorities. It is an intensive wraparound-style approach that requires specific training and monitoring for its providers.

Brain-damaged delinquent youth themselves are not only out of control but also are frequent victims of bullying and exploitation. At least three counties are now considering a separate unit for juvenile offenders with FASD, traumatic brain injury, or other organic disorders to protect them from the general juvenile hall population. Ideally, these separate units could also provide targeted education aimed at improving the youths' self-understanding and acceptance of their limitations as well as developing viable work options, life skills, interpersonal relations, and emotional self-regulation.

## CONCLUSION

If Amber and her mother had been assessed years ago for the brain damage that so clearly generated their assorted symptoms of AD/HD, poor memory, and inability to plan or otherwise understand the implications of their actions—if someone had recognized that the family's tradition of early pregnancy, incarceration, and substance abuse was not entirely volitional—and if the system had somehow put in place a sort of "Big-Sister-with-teeth"—this cycle may have been broken before it repeated itself. As it happens, because a public health nurse on the Santa Clara drug court team recognized the signs of FASD, Amber and her daughter are headed for diagnosis, and supports will be put in place for them. May it be just the first step in breaking this family's cycle of FASD.

## NOTES

1. The term *fetal alcohol spectrum disorders* comprises fetal alcohol syndrome (FAS) and what used to be called "fetal alcohol effects" (FAE). People with FAS are quite small, have characteristic facial abnormalities, central nervous system damage, and a history of prenatal exposure to alcohol. People with FAE have the nervous system damage and the prenatal history. Other terms for FAE are *alcohol-related neurodevelopmental disorder* (ARND); *neurobehavioral disorder, alcohol exposed;* and *static encephalopathy, alcohol exposed.*

2. William A. Vega et al., *Profile of Alcohol and Drug Use During Pregnancy in California, 1992,* Perinatal Substance Exposure Study, Summary of Procedures and Findings (Cal. Dep't of Alcohol & Drug Programs/Univ. of Cal., Berkeley, Sch. of Pub. Health, Sept. 1993).

3. The FASD clinic, housed in the Santa Clara Valley county hospital, was supported by grants from the City of San Jose and the County of Santa Clara as well as a private foundation. It was modeled after the University of Washington's FAS clinic (the Fetal Alcohol Syndrome Diagnostic and Prevention Network), which uses a systematic, multidisciplinary, spectrum-based diagnostic schema. Since the writing of this article, the clinic has ceased operation.

NOTES

4. Henry L. Rosett, *A Clinical Perspective of the Fetal Alcohol Syndrome,* 4 Alcoholism: Clinical & Experimental Res. 118 (1980) (quoting Aristotle, Problems).

5. Paul Lemoine et al., *Les enfants de parents alcooliques* [Children of alcoholic parents], 21 Ouest Medical 476 (1968) (observed anomalies based on 127 cases).

6. Christy N. Ulleland, *The Offspring of Alcoholic Mothers,* 197 Annals N.Y. Acad. Sci. 167 (1972); Christy N. Ulleland et al., *The Offspring of Alcoholic Mothers,* 4 Pediatric Res. 474 (1970).

7. Ann P. Streissguth et al., *Intelligence, Behavior, and Dysmorphogenesis in the Fetal Alcohol Syndrome: A Report on 20 Patients,* 92 J. Pediatrics 363 (1978).

8. Inst. of Medicine, Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment (Kathleen Stratton et al., eds., Nat'l Academy Press 1996).

9. Paul D. Sampson et al., *Incidence of Fetal Alcohol Syndrome and Prevalence of Alcohol-Related Neurodevelopmental Disorder,* 56 Teratology 317 (Nov. 1997).

10. *Id.*

11. Rosett, *supra* note 4.

12. Karen Q. Loop & Mary D. Nettleman, *Obstetrical Textbooks: Recommendations About Drinking During Pregnancy,* 23 Am. J. Preventive Med. 136 (2002).

13. Personal communication with Cindy Thibodeau, foster mother, Santa Clara County, Cal. (Oct. 9, 2002).

14. Damaris Christensen, *Sobering Work: Unraveling Alcohol's Effects on the Developing Brain,* Science News, July 8, 2000, at 28.

15. Ernest L. Abel, Fetal Alcohol Abuse Syndrome (Plenum 1998).

16. Mary L. Schneider et al., *Moderate Alcohol During Pregnancy: Learning and Behavior in Adolescent Rhesus Monkeys,* 25 Alcoholism: Clinical & Experimental Res. 1383 (2001).

17. *See* Inst. of Medicine, *supra* note 8.

18. *See generally* Sampson et al., *supra* note 9.

19. Russell Barkley, Attention Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment (Guilford Press 1990).

20. For an example of a screening tool, *see* Sandi Berg et al., FASNET Assessment Tool (FAS/E Support Network 1995).

21. *See generally* Ken Magid & Carole A. McKelvey, High Risk: Children Without a Conscience (Bantam Books 1988).

22. Larry B. Silver, *Foreword, in* Carol Stock Kranowitz, The Out-of-Sync Child: Recognizing and Coping With Sensory Integration xii (Perigee 1998).

23. Carol Stock Kranowitz, The Out-of-Sync Child: Recognizing and Coping With Sensory Integration 55 (Perigee 1998).

24. Diagnostic and Statistical Manual of Mental Disorders: Text Revision (DSM-IV-TR) (Am. Psychiatric Press 4th ed. 2000); International Classification of Diseases: Clinical Modification (ICD-9-CM) (Am. Med. Ass'n 9th rev. ed. 2001).

25. Susan J. Astley & Sterling K. Clarren, Diagnostic Guide for Fetal Alcohol Syndrome and Related Conditions: The 4-Digit Diagnostic Code (Univ. of Wash. Pub'n Servs. 2d ed. 1999).

26. Ann Streissguth et al., Understanding the Occurrence of Secondary Disabilities in Clients With Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) (Univ. of Wash. 1996) (final report to the Ctrs. for Disease Control & Prevention, Tech. Rep. No. 96-06).

27. Inst. of Medicine, *supra* note 8.

28. The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities (Ann Streissguth & Jonathan Kanter, eds., Univ. of Wash. Press 1997).

29. Barkley, *supra* note 19.

30. Sarah N. Mattson et al., *Executive Functioning in Children With Heavy Prenatal Alcohol Exposure,* 23 Alcoholism: Clinical & Experimental Res. 1808 (1999).

31. Streissguth et al., *supra* note 26.

32. Thanks to Donna deBolt and Mary Berube for sharing their schema for identifying the intergenerational presentation of FASD and how it interweaves with current addiction or sobriety.

33. Children's Bureau, U.S. Dep't of Health & Human Servs., Safety Permanency Well-Being: Child Welfare Outcomes 1999: Annual Report, at I-1 (U.S. Dep't of Health & Human Servs. 2000).

34. Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report 1–3 (U.S. Dep't of Health & Human Servs. 2001) (reporting 1999 data from

NOTES

the Adoption and Foster Care Analysis and Reporting System).

35. Roseana Bess et al., The Cost of Protecting Vulnerable Children II: What Has Changed Since 1996? (Urban Inst. 2001).

36. U.S. Census Bureau, Table ST-EST2002-01—State Population Estimates: April 1, 2000, to July 1, 2002 (Dec. 20, 2002), http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php.

37. Casey Family Services, Strengthening Families and Communities: An Approach to Post-Adoption Services (Annie E. Casey Found. 2002).

# The Santa Clara County Juvenile Domestic and Family Violence Court

**Inger Sagatun-Edwards, Ph.D.**

*San Jose State University*

**Hon. Eugene M. Hyman**

*Superior Court of California, County of Santa Clara*

**Tracy Lafontaine**

*Superior Court of California, County of Santa Clara*

**Erin Nelson-Serrano**

*Juvenile Probation Department, County of Santa Cruz*

Children who abuse their parents or siblings often do so because they have observed interparental violence or have themselves been abused and know no other way to behave. As they reach dating age, they in turn are more likely to engage in partner violence and react to internal family conflicts with violence than are youth who have not been exposed to interparental violence. Instituted in April 1999, the Santa Clara County Juvenile Domestic and Family Violence Court presents a promising approach to the problem of intimate violence among youth.

## THE PREVALENCE OF JUVENILE AND FAMILY VIOLENCE

The 2000 National Violence Against Women Survey estimates that approximately 1.5 million women each year are raped or physically assaulted by an intimate partner.[1] Another national survey has revealed that more than 35 percent of both men and women inflict some kind of physical aggression or sustained violence on their dating partners.[2] In 1997, according to the Federal Bureau of Investigation, almost one-third of all female homicide victims were killed by their husbands or boyfriends.[3]

While adult domestic violence has received much attention both by researchers and the justice system, juvenile domestic violence (i.e., teen relationship violence) was largely ignored until very recently. Some observers now refer to teen dating violence as a social problem of "epidemic proportion"[4] and as a "hidden epidemic."[5] In an important study recently published in the *Journal of the American Medical Association,* one in five female high school students reported physical or sexual abuse by a dating partner.[6] This abuse was associated with high-risk behaviors, such as early onset of sexual activity, early pregnancy, increased risk of substance abuse, unhealthy weight-control behaviors, and suicidality. The authors concluded that "dating violence is extremely prevalent among this population, and . . . . is associated with serious health risk factors."[7] According to a study by the American Association of University Women, more than 80 percent of girls and more than 70 percent of boys reported that they experienced unwelcome and unwanted sexual behavior that interfered with their lives.[8] Juvenile domestic violence appears to begin in the early teen years.[9]

In recent years juvenile domestic and family violence has become a growing problem while state laws and courts have

*Continued on page 92*

*Continued from page 91*

largely ignored the issue. This article describes an innovative court-based intervention program and presents an evaluation of its effectiveness. In 1999 the Superior Court of California, County of Santa Clara established the nation's first juvenile domestic and family violence court characterized by a dedicated court docket and specialized probation caseload, specialized services for offenders and victims, and interagency collaboration.

Both the juvenile and adult records of the youth in the program (the target group) and of a control group were tracked over two years. Almost half of the youth had a history of family violence or child abuse. The offenders in the target group who completed the court-based program (75 percent) had significantly lower recidivism rates than those who did not complete the program and generally lower recidivism rates than the offenders in the control group. The program's results demonstrate the importance of a proactive juvenile court response to the growing problem of juvenile domestic and family violence. ■

*This project is supported by a four-year grant from the Governor's Office of Criminal Justice Planning (OCJP) (JU98011381). Any opinions or views expressed in this article are those of the authors and should not be construed as representing the views of the OCJP. We wish to thank Santa Clara's specialized Juvenile Domestic and Family Violence probation staff for their assistance and cooperation with this project.*

*Correspondence regarding this paper should be directed to the project director: Dr. Inger Sagatun-Edwards, Chair, Administration of Justice Department, San Jose State University, San Jose, CA 95192-0050 (tel.: 408-924-2945; fax: 408-924-2953; e-mail: isagatun@email.sjsu.edu).*

Several research studies have concluded that parental domestic violence and abusive behavior increase the risk that youth will become domestic and family violence offenders. Maura O'Keefe's study of a racially, ethnically, and socioeconomically diverse sample of high school students found that males were more likely to inflict violence against a dating partner when they had witnessed interparental violence and were more likely to believe that male-female dating violence was justifiable when they had witnessed such violence.[10] Other studies have also found that experiencing interparental violence was an important predictor that a youth would commit dating violence[11] or become an adolescent sex offender.[12] Cathy Widom found that victims of childhood sexual abuse were at greater risk than the general population of being arrested for committing crimes, including sex crimes, as adults.[13] All of these studies indicate the importance of early intervention in adolescent dating violence to reduce the risk of repeated domestic violence across generations.

Studies on the impact of ethnic background on juvenile domestic violence have been inconclusive. The recent study by Silverman et al. found that the reports of dating violence showed no clear racial or ethnic differences.[14] Two earlier studies found higher rates of dating violence among African Americans compared with Caucasians;[15] another study found higher rates among Caucasians;[16] and a fourth study by White and Koss reported no racial or ethnic differences.[17]

Family violence (juveniles' violence against parents, siblings, and their own children) has received less attention. Vernon Wiehe has argued that sibling abuse is often an unrecognized form of violence that can leave terrible scars for life.[18] Timothy Brezina has noted that teen violence toward parents is often an adaptation to family strain. Juvenile family violence often is due to lack of parental attachment and can best be explained as having been learned from a model of parental punitiveness.[19] Some researchers have focused on the extreme form of parent abuse, i.e., parricide. According to Paul Mones, most youth who kill their parents have been severely abused by them over a long period.[20] Child abuse is so well recognized as a precursor to parricide that the "abused child syndrome" has been used successfully as a defense in several notable cases involving children who have killed their parents.[21]

## THE SANTA CLARA COUNTY JUVENILE DOMESTIC AND FAMILY VIOLENCE COURT PROGRAM

The Santa Clara County Juvenile Domestic and Family Violence Court is a collaborative response to family and domestic violence in Santa Clara County. The court presently supervises approximately 125 cases. In 1997, two years before the initiation of the specialized court, the Santa Clara County Juvenile Probation Department established its first designated domestic

violence caseload and developed domestic violence protocols. The court is located in Santa Clara County, a large urban county in Northern California with a population of close to 2 million and a major city, San Jose, with a population of almost a million.

## REASONS FOR A SPECIALIZED COURT

The local community has not historically viewed domestic violence committed by juveniles as a serious concern. Yet the Santa Clara County Domestic Violence Council's Death Review Committee, which has periodically reviewed all domestic violence–related deaths in the county since 1993, has found that many of the total domestic violence–related deaths (from 11.7 to 41.6 percent per period) occurred in relationships that started when the victim was underage.[22] Clearly, domestic violence among teens can have very serious outcomes. Moreover, the *JAMA* study referred to above found that physical and sexual abuse by a dating partner was associated with many other high-risk behaviors.[23]

## LEGAL FRAMEWORK OF THE COURT

Recent changes in federal and state law have increasingly added juvenile intimate violence to the statutory framework, thereby allowing the development of the Santa Clara court. Recognition of the problem's scope is, however, relatively recent in both U.S. and state law. In 1994, Congress passed the Violence Against Women Act (VAWA) to improve the criminal justice system's response to violence against women and to provide funding for programs addressing the problems of domestic violence. Although the act applied to females age 12 and older, it otherwise gave very little attention to the problem of juvenile domestic and family violence. Only in 2000, when VAWA was reauthorized, was language specifically added to ensure interstate enforcement of protective orders in juvenile as well as adult courts.[24]

Traditionally, juvenile courts and state laws have ignored the prevalence of adolescent domestic and family violence and the special problems it presents. While the dynamics of teen and adult intimate violence are quite similar, the protections provided by the law are often dramatically different.[25] In his review of the law related to dating violence, Roger Levesque asserted that the legal system has failed to protect juvenile victims of adolescent relationship violence.[26] He argued that the past failure of the courts and related victim-support services to recognize juvenile domestic violence has meant that appropriate services are simply "nonexistent" for adolescent victims.[27] Often adolescents are left without legal resources and without mandated or otherwise available services.

State laws often do not include youth in domestic violence statutes or are written in such a way that youths are specifically excluded. Most criminal domestic violence laws explicitly or effectively define *domestic violence* as abuse against adults and, hence, do not provide protections for teen victims or include provisions for the arrest of juvenile offenders under the domestic violence statutes. In other states, domestic violence codes apply only to persons who live together or have children together. Even teen victims who are co-parents or who were or are cohabitants are denied relief in many states because the domestic violence statutes specifically require majority status or emancipation.[28]

Several states do not include youth dating violence in their definitions of *domestic violence*.[29] For example, California Penal Code section 273.5(a) prohibits violence against a minor victim only if he or she is a spouse, cohabitant, or mother or father of the defendant's child:

> Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony . . . .[30]

Until recently, another important provision, California Penal Code section 13700(b), defined *domestic violence* as "[a]buse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person

with whom the suspect has had a child or is having or has had a dating or engagement relationship."[31] Though this section did include minors who were having or had had a dating relationship with the defendant, it applied only to emancipated minors.

Thus, if the victim was an unemancipated minor and was not cohabiting or did not have a child with the batterer—the condition of most children and youth—he or she was afforded no protection by either section 13700 or 273.5(a).

To rectify this problem, in August 2002 the California Legislature passed Assembly Bill 2826 to amend sections 836 and 13700 of the Penal Code. The amendments took effect January 1, 2003. The bill expanded section 13700(b)'s definition of domestic violence to include "abuse against any minor who is involved in one of those relationships or who previously had one of those relationships with the suspects."[32]

Amended section 13700(b) reads:

> "Domestic violence" means abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.[33]

Most of the minors who come to the attention of the Santa Clara County Juvenile Domestic and Family Violence Court are not emancipated and do not have children or live with the victims. These minors have therefore been arrested and charged under Penal Code section 243(e).[34] The statute does not explicitly include minors; it applies to any "person" in a dating relationship. Section 243(e)(1) states:

> When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiance, or fiancee, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine . . . or by imprisonment . . . .[35]

The code further defines the term *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations."[36] While the Penal Code specifically requires mandated services for adult victims of domestic violence, such services are not mandated for victims of juvenile domestic violence offenders. However, the Santa Clara County Juvenile Domestic and Family Violence Court also orders such services for the victims of juvenile domestic violence offenders, applying the adult code section to the juvenile court as well.[37] Such services are not mandatory for juveniles but are extended to the juvenile victims through the specialized court program.

In addition to the Penal Code, section 6211 of the California Family Code defines *domestic violence* as abuse committed against any of the following: a spouse or former spouse, a cohabitant or former cohabitant, a person with whom the respondent is having or has had a dating or engagement relationship, a person with whom the respondent has had a child, a child of a party, or any other person related by consanguinity or affinity within the second degree.[38] This provision does not impose an age, shared-child, cohabitation, formal-relationship, or emancipation requirement and hence can be applied to minors in a dating relationship with no restrictions.

Although in California a person 12 years of age or older may apply for a protective order without a parent,[39] the exclusion of minors from many domestic violence laws extends to protective orders. Only 17 states have a provision through which minor victims of dating violence may apply for protective orders, and some of those states require the involvement of an adult.[40] In the Santa Clara court, the following definitions are used in determining whether a case is assigned to the specialized calendar:

- *Domestic violence* is physical abuse perpetrated by a juvenile against a person with whom he or she has or has had a dating or an intimate relationship.[41]
- *Family violence* is physical abuse perpetrated by a youth against a parent, sibling, or family member.[42]

## GOALS AND OVERVIEW OF THE COURT

A specialized court helps to dispel the belief that juvenile domestic violence is not important and, through its focused oversight, offers a better chance than is now available for safety, rehabilitation, and prevention. The Santa Clara court's first priority is to protect victims and the community and to hold offenders accountable for their actions; its second goal is to prevent further violence. The court is based on the principle that early intervention combining strict accountability with educational programs and victim services is more effective than any other approach in preventing continued escalation of violent behavior into adulthood. It implements this principle by (1) offering greater advocacy for victims through delivery of necessary services and (2) emphasizing offenders' accountability for their actions and providing rehabilitative services. Extensive investigation and intensive supervision of offenders by probation officers increase the likelihood of an appropriate and speedy response protecting the victim and rehabilitating the batterer.

By imposing appropriate conditions of probation that protect the victim, provide community safety, and help rehabilitate the offender, the court sends a clear message that it will not tolerate violent and abusive behavior. There are immediate sanctions for noncompliance with court orders, and violations of probation quickly appear on the court's docket.

Another key feature of the specialized juvenile court is a structured collaboration of all related agencies to increase the consistency and appropriateness of both court and agency treatment of batterers and victims. Therefore, probation officers, juvenile hall and ranch staff, district attorneys, public defenders, and court personnel receive specialized training to increase their competency and to improve consistency in the overall treatment of domestic and family violence across different agencies. Training on current applicable case law, statutory updates, and best practices for case management help ensure that agencies base their actions on the same, shared knowledge base.

## PROGRAM COMPONENTS

The Santa Clara County Juvenile Domestic and Family Violence Court program consists of these components:

- ***Referral and assessment.*** Domestic violence cases are identified at the intake process by specially trained probation officers who conduct a detailed risk assessment.
- ***Specialized investigative and judicial procedures.*** The court, the district attorney's office, and the public defender's office have established special units and procedures to handle juvenile domestic violence cases.
- ***Probation conditions and offender programs.*** The teen batterer program, a major component of the court-based intervention, is supplemented by substance abuse programs, mental health services, and other counseling as needed.
- ***Victim services and advocacy.*** Victims are offered direct and confidential victim advocacy, referrals to support groups and other community resources, legal assistance, a support person at court, and assistance with restitution claims.
- ***Intensive probation supervision procedures.*** In addition to periodic reviews by the court, batterers are subject to intensive probation supervision that stresses accountability and competency skills.

### *Referral and Assessment*

The Santa Clara County Domestic Violence Protocol for Law Enforcement 2003 requires officers to arrest juvenile offenders, not to cite and release them.[43] Domestic and family violence offenders admitted into juvenile hall are considered high risk and therefore are not released and must appear before the specialized court for a detention hearing. A juvenile-hall screening officer refers all minors arrested for domestic or family violence offenses to the specialized probation caseload. The specialized probation officers assess each case for assignment to their specialized probation caseload if space is

available. If the case qualifies for assignment and no space is available within the specialized caseload, the case is assigned to a regular caseload, but the specialized probation supervision protocols still apply and the case remains in the specialized court.

The screening process first looks at the relationship between the parties—the parent-child relationship or the dating or prior dating relationship—and then examines the criminal charges presented. For example, in the case of a minor charged with vandalism where the victim is a former or present dating partner, the minor may be accepted for supervision in the probation department's domestic violence specialized caseload as the charge qualifies as a domestic violence–related offense under Family Code section 6211. Thus, the court goes beyond specific criminal domestic violence codes when assigning minors to the specialized program. The court has adapted the criminal court requirements set forth in Penal Code section 1203.097(a) for adult offenders to this specialized juvenile court program, even though the law does not require these provisions for juvenile offenders.[44] If the case falls under section 1203.097(a), the district attorney issues a petition and the case is calendared in the specialized court for a detention hearing if the youth is still in custody.

### *Specialized Investigative and Judicial Procedures*

The probation officer reviews all "reported incidents" and "calls for service," including any "information-only" reports that the referring law enforcement agency has on record, for inclusion in the court report. Information on child abuse and neglect, including all relevant history from the Department of Family and Child Services regarding the offender and his or her family, is also collected.

A standing court order permits information exchange among all agencies collaborating in the program. A criminal history check of the offender's parents or guardians and other family members is provided in the court report. A check is also made of the statewide registry for current restraining orders against the offender and members of his or her family.

Both the district attorney's and public defender's offices have specially trained attorneys to handle juvenile domestic violence cases. In addition, the court has established a dedicated docket, in which review, jurisdictional, and dispositional hearings for 20 to 30 cases are heard one afternoon a week in one court with a judge specially trained in domestic and family violence. Detention hearings are held any day; contested trials are set as court time becomes available.

### *Probation Conditions and Offender Programs*

The court typically imposes certain probation conditions on offenders based on provisions in the Penal Code,[45] as well as in the Welfare and Institutions Code, which mandates the safety of victims and rehabilitation of offenders.[46] In addition, the court may order offenders to attend a variety of treatment programs. The typical conditions and programs include

- juvenile delinquency protective orders[47]
- attendance at 26-week batterer intervention programs, developed by a collaborative committee for use with both domestic violence and family violence offenders
- frequent court review of the probationer for compliance with probation during review hearings
- detention in a county facility, such as a juvenile rehabilitation facility (ranch) or juvenile hall, as well as placement services, long-term California Youth Authority alternative placement, or the California Youth Authority to ensure safety and accountability
- Parenting Without Violence classes if the youth has a child
- restitution to the victim for any losses related to the offense
- prohibition against weapons possession or the presence of weapons in the offender's home
- search of the person or place of residence or business of the minor and seizure of any items prohibited

by conditions of probation or the law by law enforcement, probation, or the offender's schoolteachers at any time of the day or night, with or without probable cause, and with or without warrant

- counseling and education if substance abuse issues are present and special education accommodations when necessary
- drug and alcohol testing of the offender at the request of any police officer or probation officer, with or without probable cause, and with or without a warrant
- strict curfew, compliance with protective orders, and school attendance to prevent new law violations
- mandatory school, employment, or vocational training
- fines and fees to hold the offender accountable
- gang orders (if applicable) to help prevent new criminal offenses
- psychological or family counseling

### *Victim Services and Advocacy*

The probation officer first tries to obtain a statement from the victim detailing his or her concerns and fears regarding the offender, the current incident, past abuse, the offender's use of alcohol or drugs, the offender's use and possession of weapons, and the victim's preferred disposition of the case. As the judicial and probation procedures progress, the victim is notified, as required, of the offender's custody status, the "charges," and pending court hearings. The court refers victims to domestic violence advocacy agencies that provide free and confidential support groups, shelter, and crisis intervention. In addition, victims may receive free legal assistance in obtaining protective and restraining orders, paternity determinations, and custody, visitation, and support orders in cases involving children.

After the case is adjudicated, the probation officer plays a central role in the effort to prevent future abuse:

- The officer tries to contact the victim either in person or on the phone to explain the conditions of probation imposed on the offender. The probation officer explains to the victim (either in person or on the phone) both the process and principles of protective orders: Their purpose is to protect the victim, but safety is not guaranteed just because the offender is on probation or an order has been issued. The order does not prohibit any action by the victim, but neither the victim nor the offender —only the court—can modify the order. The probation officer explains that he or she is responsible for enforcing the protective order and for maintaining continuous contact with the victim.
- The officer helps the victim file a victims-of-crime claim with the victim-witness program to collect court-ordered restitution. The probation officer encourages the victim to develop an individualized safety plan and provides a referral to an advocacy agency for additional assistance. The advocacy agency can also obtain a civil restraining order for the victim.
- In addition, the probation officer tries to contact the teen victim's parents regarding the conditions of probation imposed on the offender and refers the parents to free advocacy services. Limited information is given to the collaborating agencies in the court program so that they also may contact the victim and parents to offer services.

### *Intensive Supervision Procedures*

The specialized caseload's supervision procedures are modeled after adult probation provisions. Probation officers strictly enforce protective orders. They review monthly reports from the batterer intervention program and make frequent unannounced visits at the offender's home, school, and work, which may include random searches for weapons and illegal drugs as well as random drug testing. The probation officer refers the batterer to a teen batterer program, a major component of the specialized court's programming, and to appropriate rehabilitative, educational, and

vocational services. The teen batterer intervention program focuses on reeducating the offender regarding the use of violence to dominate or control the victim. The program covers issues such as the dynamics of power and control, socialization, gender roles, the nature of violence, and the effects of violence on children and others. California statute requires these themes to be covered in adult programs;[48] the Juvenile Domestic and Family Violence Court and the probation department mandated the program for underage offenders who are under the juvenile court's jurisdiction.

### INTERAGENCY COLLABORATION

To coordinate the components discussed above and review the court's operation, involved agencies attend monthly meetings in the probation department's conference room. The presiding judge of the Juvenile Domestic and Family Violence Court convenes the meetings. Participants include court administrators and representatives from the probation department, victim advocacy agencies, law enforcement, and the district attorney's and public defender's offices, as well as juvenile hall and ranch supervisors, batterer intervention and mental health providers, the project director, research assistants who are evaluating the program, and community representatives. The purpose of these meetings is to develop intra- and interagency protocols and to discuss and resolve issues and problems. Future plans are to expand the community base to include schools, medical facilities, faith communities, colleges, businesses, and local government.

It is important that all of the program's collaborative partners annually review protocols and program content to ensure that they are consistent with current law and best practices for safety and intervention. To be most effective, the annual review must provide the opportunity for "cross-pollination" among community groups, especially those that rarely work together. Perspectives from different disciplines strengthen policies, procedures, and protocols and provide opportunities for team building and an awareness of the practices of other groups and disciplines.

## EVALUATION OF THE COURT PROGRAM

While there has been a proliferation of research on the effects of adult batterer programs,[49] little research has been conducted on the effects of court-ordered interventions for youth, primarily because few such programs exist. Consequently, there is no substantive body of literature on how the justice system responds to juvenile violence.

The results presented in this article are based on data collected through June 2001, two years after the initiation of the program. The data are based on information contained in juvenile court and probation department records, as well as county and state criminal record registries, to determine recidivism rates. All information was carefully coded according to a coding instrument developed and pretested by the authors. Several modifications were made to the coding instrument as operational definitions were developed and data sources (automated case management systems, paper files, and criminal records) from which to retrieve the information were identified.

The specific research questions were developed based on the central issues discussed in the literature review and were intended to provide a complete profile of both domestic violence and family violence offenders and to evaluate the effectiveness of the court program.

The main issues addressed in the evaluation were the following:

1. What is the demographic and prior delinquency profile of the children in the specialized court program, and does the profile differ for domestic violence and family violence offenders? Are there different risk profiles or predictors for minors who abuse their family members versus minors who abuse their partners?

2. What is the history of parental family violence, abuse, criminality, and substance abuse, and does it differ for the two groups?
3. What is the impact of the intervention program on the above factors, and how do the present interventions differ from those interventions used in the comparison group?
4. What effect did completing the court program have on the recidivism rates for new domestic and family violence offenses as well as on new delinquency or adult crimes and probation violations?
5. What were the recidivism rates for the minors in the court program compared to those of similar offenders in a comparison group?

## EVALUATION DESIGN

We used a quasi-experimental design to evaluate the effectiveness of the specialized court program. Therefore the research design included a historical comparison of cases assigned to the specialized court (the target group) with domestic or family violence cases adjudicated prior to the initiation of the program (the control group). The two groups of cases were matched based on commission of the same domestic violence and family violence offenses, primarily violations of Penal Code sections 273.5 and 243(e), as well as other related offenses. Specifically, the juvenile probation records and adult criminal records of the offenders assigned to the program (the target group, $N = 127$) were compared with those of domestic or family violence offenders in a two-year period prior to the initiation of the program (the control group, $N = 67$). The majority of qualifying offenses were willful infliction of corporal injury or battery;[50] however, there were also domestic or family violence–related threats or assaults with a deadly weapon,[51] as well as a number of other related offense categories that are also used for minors in the current court program.[52] The control group was found through a computer search for minors who had committed violations in the above Penal Code offense categories.

Within the target group, we compared the records of the minors who were domestic violence offenders ($N = 84$) with the minors who were family violence offenders ($N = 43$). We also traced the records of these same offenders when they came under the supervision of the adult probation department's domestic violence unit. In addition to numerically coding the records for the relevant demographic, social-background, intervention, and outcome data, we carefully read and analyzed the qualitative case histories contained in the files to gain a better understanding of the dynamics underlying the violent incidents that brought these minors to court. A court order from the judge presiding over the specialized juvenile court program allowed access to the data. All records were coded on a semiannual basis.

### *Variables*

The evaluation included background variables, intervention variables, and outcome variables. Specifically, we collected data on *background* variables such as the demographic profile of the offenders, their prior delinquency records, their histories of family violence and child abuse, and the criminal and substance abuse histories of their parents. *Intervention* variables included orders to attend the teen batterer program, no-contact orders, numbers of court reviews, and orders to other services, such as substance abuse programs. We also measured completion of batterer intervention programs, compliance with no-contact orders, and incarceration as a result of the initial domestic or family violence offense. *Outcome* variables measuring program effectiveness included the youths' overall successful adjustment as indicated by the probation officers, new probation violations, new juvenile delinquency or adult criminal records, and any new domestic or family violence offenses.

### *Statistical Analysis*

In the statistical analysis we first compared the sociodemographic and family violence backgrounds of the offenders in the target group and the control group to make sure that the two groups were similar in most respects. Second, we compared the domestic

violence (DV) offenders with the family violence (FV) offenders and conducted a multivariate analysis to develop risk profiles for the two groups. The purpose of this analysis was to give us much-needed information about the background of both groups and to determine whether different risk factors could predict whether a minor would be more likely to be a domestic violence offender or a family violence offender. This information would aid the probation officers in their risk/needs assessments during the intake process. Third, we analyzed the relationship between various individual background factors and successful completion of the intervention program to learn whether specific offender factors interacted with the effectiveness of the program. This information would in turn be used to make the program more effective. Finally, we conducted two outcome comparisons: a within-group comparison, between those individuals in the target group who successfully completed the program and those who did not; and a between-group comparison, between youths in the target group and those in the comparison group.

The between-group comparison was done two ways. First, we compared the outcomes of the entire target group with those in the control group. However, this comparison also included in the target group all minors whose cases were still active and who had not yet had time to complete the program, as well as those who had dropped out and had not participated in the entire service delivery. We therefore also compared minors in the target group who had successfully completed the program with the total target group.

At the time of the coding, only 31.6 percent of the total target group (40 cases) were coded as having successfully completed the program. There were 54 closed cases at the time of the coding, so in about 75 percent of the closed cases the youth had successfully completed all court interventions (as indicated by the probation officers in their case records), and 25 percent had "failed" to complete the program. In the second-year group, only 8 had completed the program at the time of the coding.

According to Edward W. Gondolf, who has conducted national evaluation studies of batterer intervention programs for the National Institute of Justice, a valid study of a program's effectiveness must compare only those members of the intervention group who have actually completed the intervention program with the control group.[53] Comparing all the cases assigned to the target group with the control group would not measure the effectiveness of the delivered program. Minors who moved away, never participated in the program, or had not yet completed the intervention services would not have met the conditions of the intervention program or received its full benefit and therefore would skew the comparison.[54]

Although we hope that the program will result in a lower recidivism rate for the target group, in the short run the target group may actually show more new law violations because they are subject to more frequent court reviews and other monitoring.

## RESULTS

The results of the comparisons between the target group and the control group, the background profiles of domestic violence and family violence offenders, the interrelationships between background and interventions, and the outcome comparisons are presented below.

### *Comparisons of Target and Control Groups*

Tables 1a and 1b show that there were no significant differences between the minors in the target and control groups with respect to their demographic and social-background profiles, except that the target group had a higher percentage of DV offenders and their parents were more likely to have criminal histories and substance abuse issues. The higher percentage of DV cases in the target group is probably due to the greater attention given to these cases since the initiation of the specialized court program. Also, these cases are now given a more careful assessment and background check than previously, probably accounting for the greater incidence of parental criminal and substance abuse background in the recent cases. Otherwise, the target group and the control

group samples are very similar for comparison purposes. Almost all the cases in the control group were closed at the time of the evaluation.

**Table 1a. Social Characteristics and Delinquency Background by Comparison Group**

| Variable | Target Group | | Control Group | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Gender** | | | | |
| Male | 95 | 75 | 55 | 82 |
| Female | 32 | 25 | 12 | 18 |
| **Ethnicity** | | | | |
| Hispanic | 72 | 57 | 28 | 42 |
| Caucasian | 28 | 22 | 18 | 27 |
| African American | 8 | 6 | 3 | 4 |
| Asian/Pacific Islander | 8 | 6 | 10 | 15 |
| Multiracial/other | 10 | 9 | 8 | 12 |
| **Probation status of ward** | | | | |
| Active | 70 | 55 | 3 | 5 |
| Closed | 54 | 43 | 57 | 85 |
| Out of state | 3 | 2 | 7 | 10 |
| $\chi^2 = 49.33$*** | | | | |
| **Type of offense** | | | | |
| Domestic violence | 84 | 66 | 29 | 43 |
| Family violence | 43 | 34 | 38 | 57 |
| $\chi^2 = 9.42$** | | | | |
| **Prior juvenile delinquency** | | | | |
| Yes | 76 | 60 | 40 | 60 |
| No | 51 | 40 | 27 | 40 |
| **Age at first 602 offense** | | | | |
| 12 or younger | 22 | 22 | 6 | 13 |
| 13 | 14 | 14 | 6 | 13 |
| 14 | 18 | 18 | 15 | 30 |
| 15 | 18 | 18 | 13 | 27 |
| 16 | 16 | 16 | 6 | 13 |
| 17 or older | 11 | 11 | 2 | 4 |
| **Age at first DV/FV offense** | | | | |
| 15 or younger | 31 | 25 | 25 | 37 |
| 16 | 41 | 32 | 16 | 24 |
| 17 or older | 55 | 43 | 26 | 39 |
| **Age at current DV/FV offense** | | | | |
| 15 or younger | 21 | 17 | 20 | 30 |
| 16 | 42 | 33 | 16 | 24 |
| 17 or older | 64 | 50 | 31 | 46 |

Target-group total: *N* = 127; control-group total: *N* = 67
**$p < .01$; ***$p < .001$ (two-tailed significance)

### *Demographic Profile and Background Variables*

Tables 2 and 3 describe the social-background profiles of the domestic and family violence offenders studied. A multivariate analysis was conducted to determine which of a series of background and family history variables were significantly associated with a risk that a youth would become either a domestic violence or a family violence offender.

The juvenile domestic violence offender was significantly more likely to be male, to be Hispanic, and to have a prior history of delinquency, while family violence offenders were significantly more likely to be female, to be Caucasian, and to have a history of mental illness. With respect to the domestic and child abuse histories of these offenders, there

**Table 1b. Domestic Violence and Child Abuse History by Comparison Group**

| Variable | Target Group | | Control Group | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Offender was abused as child** | | | | |
| Yes | 40 | 32 | 20 | 30 |
| No | 79 | 62 | 42 | 63 |
| N/A | 8 | 6 | 5 | 7 |
| **Offender's parents have DV history** | | | | |
| Yes | 56 | 44 | 24 | 36 |
| No | 71 | 56 | 42 | 63 |
| N/A | 0 | 0 | 1 | 1 |
| **Offender's parents have criminal history** | | | | |
| Yes | 61 | 48 | 13 | 20 |
| No | 60 | 47 | 47 | 70 |
| N/A | 6 | 5 | 7 | 10 |
| $\chi^2 = 16.88$*** | | | | |
| **Offender's parents have substance abuse history** | | | | |
| Yes | 57 | 45 | 21 | 31 |
| No | 62 | 49 | 40 | 60 |
| N/A | 8 | 6 | 6 | 9 |
| $\chi^2 = 7.06$* | | | | |
| **Offender was diagnosed with mental illness** | | | | |
| Yes | 25 | 20 | 20 | 30 |
| No | 102 | 80 | 47 | 70 |

Target-group total: *N* = 127; control-group total: *N* = 67
*$p < .05$; ***$p < .001$ (two-tailed significance)
N/A = Not available

**Table 2. Correlations of Social Characteristics, Delinquency Background, and Offender Group**

| | DV offender | Male | Hispanic | Caucasian | Prior delinquency | Prior referrals | Age at first 602 offense | Mental illness |
|---|---|---|---|---|---|---|---|---|
| **DV offender** | — | | | | | | | |
| ***n*** | | | | | | | | |
| **Male** | .240** | — | | | | | | |
| ***n*** | 194 | | | | | | | |
| **Hispanic** | .251*** | –.030 | — | | | | | |
| ***n*** | 193 | 193 | | | | | | |
| **Caucasian** | –.214** | .014 | –.580*** | — | | | | |
| ***n*** | 193 | 193 | 193 | | | | | |
| **Prior delinquency** | .158* | .183* | .220** | –.258*** | — | | | |
| ***n*** | 194 | 194 | 193 | 193 | | | | |
| **Prior referrals** | .183* | .196** | .241** | –.245** | .979*** | — | | |
| ***n*** | 194 | 194 | 193 | 193 | 194 | | | |
| **Age at first 602 offense** | –.021 | .015 | –.073 | .119 | –.414*** | –.401*** | — | |
| ***n*** | 147 | 147 | 146 | 146 | 147 | 147 | | |
| **Mental illness** | –.352*** | –.023 | –.278*** | .324*** | –.197** | –.209** | .036 | — |
| ***n*** | 194 | 194 | 193 | 193 | 194 | 194 | 147 | |

*N* = 194 (cases excluded pairwise) *$p$ < .05; **$p$ < .01; ***$p$ < .001 (two-tailed significance)

**Table 3. Correlations of Domestic Violence History, Child Abuse History, and Offender Group**

| | Adjudication as DV offender | Offender's parents have DV history | Offender's parents have criminal history | Offender's parents have substance abuse history | Offender was abused as child |
|---|---|---|---|---|---|
| **Adjudication as DV offender** | — | | | | |
| ***n*** | | | | | |
| **Offender's parents have DV history** | .067 | — | | | |
| ***n*** | 193 | | | | |
| **Offender's parents have criminal history** | .011 | .363*** | — | | |
| ***n*** | 181 | 181 | | | |
| **Offender's parents have substance abuse history** | .021 | .422*** | .581*** | — | |
| ***n*** | 180 | 180 | 177 | | |
| **Offender was abused as child** | –.114 | .281*** | .317*** | .211** | — |
| ***n*** | 181 | 181 | 175 | 173 | |

*N* = 194 (cases excluded pairwise) **$p$ < .01; ***$p$ < .001 (two-tailed significance)

were no significant differences between the two groups, although family violence offenders were more likely to have been abused children and domestic violence offenders were more likely to have parents with a history of domestic violence, crime, and substance abuse. Parental history of domestic violence was also significantly correlated with parental criminal history and substance abuse as well as childhood abuse of the minor. The case histories often portrayed in further detail the very harmful ways in which these offenders had been treated throughout childhood.

The actual percentage distributions of social-background factors for domestic and family offenders in the target group are listed in Tables 4 and 5.

Not unexpectedly, there were significantly more male than female offenders in this court program. However, even among the domestic violence offenders, 12 percent were female, a higher percentage of female offenders than is typically reported in the adult population. Their case histories showed that girls often initiated the violence, but in many incidents their violence was a reaction to previous victimization by a partner who was also an offender. In many of the cases, there was an overlap of offender and victim roles, and the violence was repetitive and interactive. Often the two were involved in mutual combat, and both claimed victim and offender status. A frequent precipitating factor of violence was jealousy (often because one partner had talked or spent time with another person).

Significantly more females (46 percent) were family violence offenders than domestic violence offenders. This is not surprising because family violence is less gender-typed. They were also younger than the DV offenders. Family violence offenders were also significantly more likely than DV offenders to have a mental illness background. More than 40 percent of the FV offenders had a history of mental illness, making this a very difficult population to deal with. FV offenders were twice as likely to victimize their parents than their siblings. In many of the case histories, everyday family conflicts seemed to escalate into violent behavior. Witnessing domestic violence

**Table 4. Social Characteristics and Delinquency Background of Target Group by Offender Subgroup**

| Variable | Domestic Violence Offenders | | Family Violence Offenders | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Gender** | | | | |
| Male | 72 | 86 | 23 | 54 |
| Female | 12 | 14 | 20 | 46 |
| $\chi^2$ = 16.67*** | | | | |
| **Ethnicity** | | | | |
| Hispanic | 54 | 64 | 18 | 41 |
| Caucasian | 14 | 17 | 14 | 33 |
| African American | 6 | 7 | 2 | 5 |
| Asian/Pacific Islander | 4 | 5 | 4 | 9 |
| Multiracial/other | 5 | 6 | 5 | 12 |
| **Probation status of ward** | | | | |
| Active | 48 | 57 | 22 | 51 |
| Closed | 35 | 42 | 19 | 44 |
| Out of state | 1 | 1 | 2 | 5 |
| **Prior juvenile delinquency** | | | | |
| Yes | 55 | 66 | 21 | 49 |
| No | 29 | 34 | 22 | 51 |
| **Age at first 602 offense** | | | | |
| 12 or younger | 18 | 21 | 4 | 10 |
| 13 | 8 | 10 | 6 | 14 |
| 14 | 12 | 14 | 6 | 14 |
| 15 | 10 | 12 | 8 | 18 |
| 16 | 12 | 14 | 4 | 9 |
| 17 or older | 9 | 11 | 2 | 5 |
| N/A | 15 | 18 | 13 | 30 |
| **Age at first DV/FV offense** | | | | |
| 14 or younger | 3 | 4 | 10 | 23 |
| 15 | 4 | 5 | 14 | 33 |
| 16 | 29 | 34 | 12 | 28 |
| 17 or older | 48 | 57 | 7 | 16 |
| $\chi^2$ = 40.98*** | | | | |
| **Age at current domestic violence or family violence offense** | | | | |
| 14 or younger | 1 | 1 | 4 | 9 |
| 15 | 3 | 4 | 13 | 30 |
| 16 | 26 | 31 | 16 | 37 |
| 17 or older | 54 | 64 | 10 | 24 |
| $\chi^2$ = 31.32*** | | | | |

Total domestic violence offenders: *N* = 84
Total family violence offenders: *N* = 43
***$p < .001$ (two-tailed significance)
N/A = Not available

in the home, witnessing the parents' drug or alcohol addiction, modeling parental behavior, and the minor's predisposition toward violence all contributed to the minor's volatile behavior.

About one-half of the offenders in this study were Hispanic, about one-fourth were Caucasian, and the remainder were African American, Asian/Pacific Islander, multiracial, or another ethnicity. There were no significant differences in the five-category ethnicity variable between DV and FV offenders, although the majority of both the DV and FV offenders were Hispanic.[55] Domestic violence offenders were more likely to be Hispanic than non-Hispanic. Most (66 percent of the DV offenders, 49 percent of the FV offenders) had prior juvenile delinquency records. Some (about 20 percent) had committed their first delinquent acts by age 12, but most of the DV offenders were 16 or 17 and most of the FV offenders were 15 or 16. Almost half of the FV offenders and about a third of the DV offenders had child abuse histories. Half of the DV minors came from families with histories of family violence and in which the parents had criminal backgrounds and substance abuse issues. The percentages were slightly lower for the FV offenders. The case histories reveal an often-chaotic and -violent family background. Frequently one of the parents was absent or in and out of jail.

**Table 5. Domestic History and Child Abuse History of Target Group by Offender Subgroup**

| Variable | Domestic Violence Offenders | | Family Violence Offenders | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Offender was abused as child** | | | | |
| Yes | 24 | 29 | 16 | 37 |
| No | 54 | 64 | 25 | 58 |
| N/A | 6 | 7 | 2 | 5 |
| **Offender's parents have DV history** | | | | |
| Yes | 40 | 48 | 16 | 37 |
| No | 44 | 52 | 27 | 63 |
| **Offender's parents have criminal history** | | | | |
| Yes | 40 | 48 | 21 | 49 |
| No | 39 | 46 | 21 | 49 |
| N/A | 5 | 6 | 1 | 2 |
| **Offender's parents have substance abuse history** | | | | |
| Yes | 40 | 48 | 17 | 40 |
| No | 39 | 46 | 23 | 53 |
| N/A | 5 | 6 | 3 | 7 |
| **Offender was diagnosed with mental illness** | | | | |
| Yes | 7 | 8 | 18 | 42 |
| No | 77 | 92 | 25 | 58 |
| $\chi^2 = 20.22$*** | | | | |

Total domestic violence offenders: $N = 84$
Total family violence offenders: $N = 43$
***$p < .001$ (two-tailed significance)
N/A = Not available

More than 30 percent of the DV offenders and victims in the court program had children together; some had multiple children with different partners. Often the violence erupted when the offender came to see the child against the victim's wishes. Many victims reported that they had experienced violence while pregnant. Most of the time the victim and her baby were still living with her parents, often in a chaotic family situation where the parents themselves had major problems. Victims with children were all given representation from the Legal Assistance for Children and Youth office in obtaining custody and visitation orders, as well as protective orders in the family court.

### *Interventions*

As seen in Table 6a, the domestic violence offenders in the target group were significantly more likely than the family violence offenders to be ordered into the batterer intervention program and to have no-contact orders issued. There were no differences in the number of court reviews, orders to substance abuse programs, or rates of incarceration for the two groups. The DV offenders were more likely than the family violence offenders to have completed the program.

According to Table 6b, those with prior delinquency were less likely to complete the program; older minors were more likely to complete it. As seen in Table 6c, those minors who came from families with criminal and substance abuse histories or who had been diagnosed with mental illnesses were significantly less likely to complete the court-ordered

**Table 6a. Program Interventions in Target Group by Offender Subgroup**

| Variable | Domestic Violence Offenders | | Family Violence Offenders | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Ordered to batterer intervention** | | | | |
| Yes | 79 | 94 | 26 | 60 |
| No | 4 | 5 | 5 | 12 |
| N/A | 1 | 1 | 12 | 28 |
| $\chi^2$ = 25.60*** | | | | |
| **Attending batterer intervention** | | | | |
| Yes | 55 | 65 | 20 | 46 |
| No | 19 | 23 | 6 | 14 |
| N/A | 10 | 12 | 17 | 40 |
| $\chi^2$ = 14.30** | | | | |
| **Completed batterer intervention** | | | | |
| Yes | 33 | 39 | 7 | 16 |
| No | 46 | 55 | 18 | 42 |
| N/A | 5 | 6 | 18 | 42 |
| $\chi^2$ = 25.97*** | | | | |
| **Substance abuse program ordered** | | | | |
| Yes | 68 | 81 | 31 | 72 |
| No | 16 | 19 | 12 | 28 |
| **Number of court reviews** | | | | |
| 0 | 23 | 27 | 10 | 23 |
| 1–3 | 29 | 35 | 20 | 47 |
| 4 or more | 32 | 38 | 13 | 30 |
| **No-contact order issued** | | | | |
| Yes | 82 | 98 | 30 | 70 |
| No | 2 | 2 | 13 | 30 |
| $\chi^2$ = 12.93*** | | | | |
| **Complied with no-contact order** | | | | |
| Yes | 48 | 57 | 21 | 49 |
| No | 29 | 35 | 8 | 19 |
| N/A | 7 | 8 | 14 | 32 |
| $\chi^2$ = 12.93** | | | | |
| **Incarcerated as a result of a DV/FV offense** | | | | |
| Yes | 76 | 90 | 38 | 88 |
| No | 8 | 10 | 5 | 12 |

Total domestic violence offenders: *N* = 84
Total family violence offenders: *N* = 43
**$p$ < .01; ***$p$ < .001 (two-tailed significance)
N/A = Not available

**Table 6b. Social and Delinquency Background of Target Group by Completion of Batterer Intervention**

| Variable | Intervention Completed | | Intervention Not Completed | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Gender** | | | | |
| Male | 30 | 75 | 52 | 82 |
| Female | 10 | 25 | 12 | 18 |
| **Ethnicity** | | | | |
| Hispanic | 25 | 63 | 40 | 64 |
| Caucasian | 7 | 18 | 9 | 14 |
| African American | 1 | 2 | 7 | 11 |
| Asian/Pacific Islander | 1 | 2 | 5 | 8 |
| Multiracial/other | 6 | 15 | 2 | 3 |
| $\chi^2$ = 28.62** | | | | |
| **Probation status of ward** | | | | |
| Active | 10 | 25 | 52 | 81 |
| Closed | 30 | 75 | 10 | 16 |
| Out of state | 0 | 0 | 2 | 3 |
| $\chi^2$ = 40.36*** | | | | |
| **Type of offense** | | | | |
| DV | 33 | 82 | 46 | 72 |
| FV | 7 | 18 | 18 | 28 |
| $\chi^2$ = 25.97*** | | | | |
| **Prior juvenile delinquency** | | | | |
| Yes | 21 | 52 | 46 | 72 |
| No | 19 | 48 | 18 | 28 |
| $\chi^2$ = 8.86* | | | | |
| **Age at first 602 offense** | | | | |
| 12 or younger | 7 | 23 | 15 | 28 |
| 13 | 4 | 13 | 6 | 11 |
| 14 | 4 | 13 | 11 | 20 |
| 15 | 3 | 10 | 12 | 22 |
| 16 | 7 | 23 | 7 | 13 |
| 17 or older | 5 | 17 | 3 | 6 |
| **Age at first DV/FV offense** | | | | |
| 15 or younger | 5 | 13 | 16 | 25 |
| 16 | 10 | 25 | 25 | 39 |
| 17 or older | 25 | 62 | 23 | 36 |
| $\chi^2$ = 24.62* | | | | |
| **Age at current DV/FV offense** | | | | |
| 15 or younger | 2 | 5 | 10 | 16 |
| 16 | 11 | 28 | 25 | 39 |
| 17 or older | 27 | 67 | 29 | 45 |
| $\chi^2$ = 20.47* | | | | |

Intervention completed: *N* = 40; intervention not completed: *N* = 64
*$p$ < .05; **$p$ < .01; ***$p$ < .001 (two-tailed significance)

**Table 6c. Domestic Violence and Child Abuse History of Target Group by Completion of Batterer Intervention**

| Variable | Intervention Completed | | Intervention Not Completed | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Offender was abused as child** | | | | |
| Yes | 12 | 30 | 17 | 27 |
| No | 23 | 58 | 45 | 70 |
| N/A | 5 | 12 | 2 | 3 |
| **Offender's parents have DV history** | | | | |
| Yes | 18 | 45 | 31 | 48 |
| No | 22 | 55 | 33 | 52 |
| **Offender's parents have criminal history** | | | | |
| Yes | 18 | 45 | 36 | 56 |
| No | 17 | 42 | 28 | 44 |
| N/A | 5 | 13 | 0 | 0 |
| $\chi^2 = 12.54$* | | | | |
| **Offender's parents have substance abuse history** | | | | |
| Yes | 15 | 38 | 34 | 53 |
| No | 20 | 50 | 30 | 47 |
| N/A | 5 | 12 | 0 | 0 |
| $\chi^2 = 10.23$* | | | | |
| **Offender was diagnosed with mental illness** | | | | |
| Yes | 2 | 5 | 15 | 23 |
| No | 38 | 95 | 49 | 77 |
| $\chi^2 = 9.34$** | | | | |

Intervention completed: $N = 40$; intervention not completed: $N = 64$
*$p < .05$; **$p < .01$ (two-tailed significance)
N/A = Not available

**Table 6d. Program Interventions by Comparison Group**

| Variable | Target Group | | Control Group | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Ordered to batterer intervention** | | | | |
| Yes | 105 | 83 | 22 | 33 |
| No | 9 | 7 | 23 | 34 |
| N/A | 13 | 10 | 22 | 33 |
| $\chi^2 = 48.79$*** | | | | |
| **Attending batterer intervention** | | | | |
| Yes | 75 | 60 | 12 | 18 |
| No | 26 | 20 | 4 | 6 |
| N/A | 26 | 20 | 51 | 76 |
| $\chi^2 = 53.90$*** | | | | |
| **Completed batterer intervention** | | | | |
| Yes | 40 | 32 | 6 | 9 |
| No | 64 | 50 | 8 | 12 |
| N/A | 23 | 18 | 53 | 79 |
| $\chi^2 = 66.16$*** | | | | |
| **Substance abuse program ordered** | | | | |
| Yes | 99 | 78 | 39 | 58 |
| No | 28 | 22 | 25 | 37 |
| N/A | 0 | 0 | 3 | 5 |
| $\chi^2 = 6.14$* | | | | |
| **Number of court reviews** | | | | |
| 0 | 33 | 26 | 47 | 70 |
| 1–3 | 49 | 39 | 19 | 28 |
| 4 or more | 45 | 35 | 1 | 2 |
| $\chi^2 = 48.01$*** | | | | |
| **No-contact order issued** | | | | |
| Yes | 111 | 88 | 32 | 48 |
| No | 15 | 12 | 35 | 52 |
| $\chi^2 = 37.69$*** | | | | |
| **Complied with no-contact order** | | | | |
| Yes | 69 | 54 | 22 | 33 |
| No | 37 | 30 | 9 | 13 |
| N/A | 21 | 16 | 36 | 54 |
| $\chi^2 = 28.37$*** | | | | |
| **Incarcerated as a result of a DV/FV offense** | | | | |
| Yes | 114 | 90 | 66 | 98 |
| No | 13 | 10 | 1 | 2 |
| $\chi^2 = 5.01$* | | | | |

Target-group total: $N = 127$; control-group total: $N = 67$
*$p < .05$; ***$p < .001$ (two-tailed significance)
N/A = Not available

programs. Obviously, such disadvantaged backgrounds pose significant obstacles to rehabilitation.

The comparison between the target-group offenders and the control-group offenders in Table 6d shows that the new court program has made a great deal of difference in frequency and type of interventions for the juvenile DV/FV offenders. Minors in the target group were significantly more likely to be ordered into a batterer program, to attend the program, to complete it when ordered, to have substance abuse programs ordered, to have more frequent court reviews, to have no-contact orders issued, and to comply with orders. In the past, the offenders in the control group were significantly more likely simply to have been incarcerated.

### *Effectiveness of the Program and Outcome Variables*

**Within-group comparisons.** There were no differences in outcomes for DV/FV offenders, except that the DV offenders were more likely now to be in adult court (as they were older at the time they committed their offenses). Within the target group, the minors who successfully completed the batterer intervention program were significantly more likely to have fewer new probation violations and new DV/FV offenses, and (of course) their overall adjustment was significantly more likely to be judged successful by their probation officers. Similarly, those who complied with the no-contact orders were significantly less likely to have adult criminal records or to later go into adult court, significantly less likely to have new probation violations, and most important, significantly less likely (at the $p$ = .0001 level) to commit any new DV/FV offenses. These findings strongly indicate that the program is effective for those completing it, at least for a short time period afterward (up to two years). These results are shown in Tables 7a and 7b.

We also compared the outcomes for domestic violence offenders versus family violence offenders, and there were no significant differences.

**Between-group comparisons.** The results of the first comparison between the entire target group and the control group did not look encouraging for the court program. The minors in the target group were actually more likely to have new 602 or adult criminal referrals; and the probation officers described the youths' adjustment as a success more often in the control-group cases. Otherwise there were no significant differences. These results are shown in Table 8.

As discussed earlier in this article, however, it is better to compare only those offenders in the target

**Table 7a. Target-Group Outcomes by Completion of Batterer Intervention**

| Variable | Intervention Completed | | Intervention Not Completed | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Now in adult court** | | | | |
| Yes | 14 | 35 | 22 | 34 |
| No | 26 | 65 | 42 | 66 |
| **New probation violations** | | | | |
| Yes | 19 | 48 | 43 | 67 |
| No | 21 | 52 | 21 | 33 |
| $\chi^2$ = 20.66** | | | | |
| **New 602 or adult criminal referrals** | | | | |
| Yes | 18 | 45 | 40 | 62 |
| No | 22 | 55 | 24 | 38 |
| **New DV/FV offenses** | | | | |
| Yes | 7 | 18 | 24 | 37 |
| No | 33 | 82 | 40 | 63 |
| $\chi^2$ = 16.78* | | | | |
| **Youth's adjustment a success** | | | | |
| Yes | 21 | 53 | 1 | 2 |
| No | 19 | 47 | 63 | 98 |
| $\chi^2$ = 37.34*** | | | | |

Intervention completed: $N$ = 40; intervention not completed: $N$ = 64
*$p$ < .05; **$p$ < .01; ***$p$ < .001 (two-tailed significance)

**Table 7b. Target-Group Outcomes by Compliance With No-Contact Court Order**

| Variable | Complied With Order | | Did Not Comply | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Now in adult court** | | | | |
| Yes | 19 | 28 | 19 | 51 |
| No | 50 | 72 | 18 | 49 |
| $\chi^2$ = 14.48** | | | | |
| **New probation violations** | | | | |
| Yes | 31 | 45 | 32 | 86 |
| No | 38 | 55 | 5 | 14 |
| $\chi^2$ = 26.81** | | | | |
| **New 602 or adult criminal referrals** | | | | |
| Yes | 35 | 51 | 27 | 73 |
| No | 34 | 49 | 10 | 27 |
| **New DV/FV offenses** | | | | |
| Yes | 10 | 15 | 24 | 65 |
| No | 59 | 85 | 13 | 35 |
| $\chi^2$ = 39.40*** | | | | |
| **Youth's adjustment a success** | | | | |
| Yes | 18 | 26 | 5 | 14 |
| No | 51 | 74 | 32 | 86 |

Complied with order: $N$ = 69; did not comply: $N$ = 37
**$p$ < .01; ***$p$ < .001 (two-tailed significance)

group who have successfully completed the program (i.e., met the target conditions) with those in the control group.

In the second comparison, we compared outcomes for those minors in the target group who had successfully completed all of the intervention programs with the outcomes for the entire control group. Although there were no significant differences in recidivism rates between these target-group cases and the control group after the initial case closed, the results pointed in a positive direction. The minors in the target group who successfully completed all programs had fewer new probation violations than the control group. More important, the juveniles who went through the specialized program had fewer new juvenile delinquency or adult criminal referrals and fewer new domestic violence or family violence offenses. The probation department also was more likely to judge the youths' adjustment a success. These results are shown in Table 9.

**Table 8. Outcome Variable Frequencies for Entire Target and Control Groups**

| Variable | Target Group | | Control Group | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Now in adult court** | | | | |
| Yes | 39 | 31 | 23 | 34 |
| No | 88 | 69 | 44 | 66 |
| **New probation violations** | | | | |
| Yes | 70 | 55 | 29 | 43 |
| No | 57 | 45 | 38 | 57 |
| **New 602 or adult criminal referrals** | | | | |
| Yes | 70 | 55 | 34 | 51 |
| No | 57 | 45 | 33 | 49 |
| $\chi^2 = 19.34$* | | | | |
| **New DV/FV offenses** | | | | |
| Yes | 35 | 28 | 18 | 27 |
| No | 92 | 72 | 49 | 73 |
| **Youth's adjustment a success** | | | | |
| Yes | 30 | 24 | 34 | 51 |
| No | 97 | 76 | 29 | 43 |
| N/A | 0 | 0 | 4 | 6 |
| $\chi^2 = 26.22$*** | | | | |

Target-group total: $N = 127$; control-group total: $N = 67$
*$p < .05$; ***$p < .001$ (two-tailed significance)

Finally, we compared only the first-year cases with those of the control group, in order to obtain a more comparable time frame after the initial DV/FV offense in which to study recidivism rates. The trends were the same for this smaller subgroup as for the entire target group.

## LESSONS FROM THE COURT PROGRAM

While agency collaboration and specialized training of agency personnel have proved to be very positive outcomes of the court program, the early results on recidivism rates are somewhat mixed. When the total target group is compared to the control group, the recidivism rates of the two groups are similar, with the target group having even higher recidivism rates in some instances. However, when we consider only those minors in the target group who had successfully completed the program—75 percent of the closed cases—the trends indicated lower recidivism rates for the target group. Within-program comparisons showed that minors who completed the program had significantly lower recidivism rates than those who did not. Before reaching any final conclusions about the success of the program, we need to better ascertain how many of those in the "not-completed" category simply had not yet had time to complete the program, versus those who had "failed" the program or simply moved away. We will need to conduct additional comparisons after members of the entire target group have had time to complete the program, and to fully evaluate the control group we will need to allow a comparable time to pass after the initial offense.

It is also clear that in the short run the increased supervision and attention given to these cases may well increase the number of probation violations as well as arrests for new offenses. This intense scrutiny is intended to improve victim safety and set a higher level of accountability for the offender.

**Table 9. Outcome Variables for Target-Group Individuals Successfully Completing All Programs and the Control Group**

| Variable | Completed All Programs | | Control Group | |
|---|---|---|---|---|
| | *n* | Percentage | *n* | Percentage |
| **Now in adult court** | | | | |
| Yes | 14 | 34 | 23 | 34 |
| No | 28 | 66 | 44 | 66 |
| **New probation violations** | | | | |
| Yes | 15 | 36 | 29 | 43 |
| No | 27 | 64 | 38 | 57 |
| **New 602 or adult criminal referrals** | | | | |
| Yes | 17 | 40 | 34 | 51 |
| No | 25 | 60 | 33 | 49 |
| **New DV/FV offenses** | | | | |
| Yes | 6 | 14 | 18 | 27 |
| No | 36 | 86 | 49 | 73 |
| **Youth's adjustment a success** | | | | |
| Yes | 26 | 62 | 34 | 51 |
| No | 16 | 38 | 29 | 44 |
| N/A | 0 | 0 | 3 | 5 |
| Completed all programs: *N* = 42; control-group total: *N* = 67 | | | | |

From the perspective of safety and accountability, higher rates of rearrests and probation violations can indeed be seen as a positive outcome for the program. It is hoped, however, that in the long run this combination of frequent court review and specialized probation and victim services will serve to end the cycle of violence, improve victim safety, and discourage the offender from committing new offenses.

In addition to the numerical data, the case histories give further insight into the nature and frequency of juvenile domestic and family violence. The histories show that these are very difficult cases to deal with, and that juvenile offenders often come from very difficult, chaotic family backgrounds. Many, if not most, of the juvenile batterers who appear before the court weekly have come from homes where fathers frequently beat their mothers and, in many instances, also beat or terrorized their children. This behavior then became the norm for them as teenagers. The behavior is identical to adult domestic violence, although fortunately the level of violence is less severe and the use of weapons less frequent.

The case histories also indicated a frequent interactive pattern of violence between the young offender and victim. Often one would be the victim in one incident and the offender in the next. Our program evaluation showed that we had a higher percentage of female batterers than is typically reported for adult batterers. The program's increased supervision may simply mean that more girls are arrested than otherwise would be the case. At the same time, it may be that younger women are more likely to be a primary aggressor than their adult counterparts.

Interagency collaboration and improved communication focusing on the issue of juvenile domestic and family violence are major features of Santa Clara County's specialized court program. Representatives from the court and all the participating agencies and organizations continue to meet on a monthly basis to deal with problems as they present themselves and to develop interagency protocols and solutions.[56] While this collaboration is now working smoothly, it has taken several years to develop it, and it continues to be a work in progress.

Currently we are considering how information may be better shared between the juvenile and adult court systems. As a case moves from juvenile court to the adult system, the youth may still be under orders from the juvenile court or on juvenile probation. The adult court, however, may have no system in place to acquire that information from the juvenile court. While felony cases are reasonably easy to trace in the adult system, information on misdemeanor cases is less readily available.

We also would like more programs focused on the special circumstances of teen victims and more opportunities for parental involvement. Victim services could be improved with better notification of services. Initially, the county counsel issued an opinion that names and addresses of victims could not be released to service agencies in order to protect the confidentiality of victims. This, however, meant that service agencies could not contact the victims directly;

victims had to take the initiative to contact services themselves, which proved to be very difficult for them, even when information about services was offered to them. Over time, this problem was resolved through a standing court order giving service agencies limited contact information so they could contact victims.

Another issue is whether parents may apply for restraining orders on behalf of their children. In some cases, parents have wanted to file a restraining order, but the victims have not. In such cases, the court has sided with the victim. We are also seeking to determine whether all domestic and family violence cases should be handled by a traditional delinquency (i.e., criminal model) court, or whether some cases might better be handled in a civil proceeding (as in the adult family court model). Finally, we hope to address whether this DV/FV court should combine both civil and criminal aspects and orders.

Other jurisdictions contemplating a similar court program should be aware of the many issues it involves. First, the program must be court-driven and led by a judge who is committed to the process. A judge is able to convene agency representatives who would not otherwise be in the same room. He or she can also enable communication across agencies by means of court orders and similar measures. The program must be institutionalized so that when a judge or other important participant leaves, the program will continue. The program must secure funding through grants to ensure the availability of appropriate services and the evaluation of the program's effectiveness.

In his book on batterer intervention systems, Gondolf concluded that batterer program outcomes are more likely to be improved with swift and certain court referrals, periodic court review or specialized probation surveillance, and ongoing risk management—in other words, with everyone in the justice system having a role in the prevention of battering and controlling behavior.[57] His study also indicated that the length of the program is itself not determinative of a successful outcome; what determines success is whether a batterer enters a program quickly and is responsible to the program, probation, and the court. Program intensity is more important than program length. Continuing group attendance (aftercare) is critical to a batterer's ongoing efforts to live a life free of violence and controlling behavior. Aftercare must continue even after court proceedings and probation are completed and "the system" can no longer require the batterer's participation. Alcohol and substance abuse issues must be addressed initially as well as on an ongoing basis by all in the system. To avoid the earlier mistakes of adult batterer programs, juvenile programs should follow these guidelines. A coordinated community response incorporating both rehabilitation and accountability is our hope for stopping the violence.

The Santa Clara County Juvenile Domestic and Family Violence Court is the first juvenile domestic violence court program in California and possibly in the United States. It has already inspired other jurisdictions to start their own juvenile domestic and family violence courts, such as in San Francisco County. During its short history, it has produced better services for victims and offenders and has raised the awareness of the important problem of juvenile domestic and family violence. We hope that this program will inspire others and serve as a model for other juvenile courts.

## NOTES

1. Patricia Tjaden & Nancy Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence 5 (U.S. Dep't of Just. 2000).

2. Jacquelyn W. White & Mary P. Koss, *Courtship Violence: Incidence in a National Sample of Higher Education Students,* 6 Violence & Victims 247 (1991).

3. Judith Owens-Manley, *Battered Women and Their Children: A Public Policy Response,* 14 Affilia: J. Women & Soc. Work 439 (Winter 1999).

4. Kathryn E. Suarez, Comment, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation,* 82 Cal. L. Rev. 423 (1994).

NOTES

5. Carole A. Sousa, *Teen Dating Violence: The Hidden Epidemic,* 37 Fam. & Conciliation Cts. Rev. 356 (1999).

6. *See* Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Abuse, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 JAMA 572 (2001).

7. *Id.*

8. Am. Ass'n of Univ. Women Educ. Found., Hostile Hallways: The American Association of University Women Survey on Sexual Harassment in America's Schools (Am. Ass'n of Univ. Women 1993).

9. *See* Teresa M. Bethke & David M. Dejoy, *An Experimental Study of Factors Influencing the Acceptability of Dating Violence,* 8 J. Interpersonal Violence 36 (1993).

10. *See* Maura O'Keefe, *Predictors of Dating Violence Among High School Students,* 12 J. Interpersonal Violence 546 (1997).

11. *See* F. Curtis Breslin et al., *Family Precursors: Expected and Actual Consequences of Dating Aggression,* 5 J. Interpersonal Violence 247 (1990); Louise Foo & Gayla Margolin, *A Multivariate Investigation of Dating Violence,* 10 J. Fam. Violence 351 (1995); Linda L. Marshall & Patricia Rose, *Premarital Violence: The Impact of Family of Origin Violence, Stress, and Reciprocity*, 5 Violence & Victims 51 (1990).

12. *See* Jaana Haapasalo & Tiina Hamalainen, *Childhood Family Problems and Current Psychiatric Problems Among Young Violent and Property Offenders,* 35 J. Amer. Acad. Child & Adolescent Psychiatry 1394 (1996); Dorothy O. Lewis et al., *Juvenile Male Sexual Assaulters: Psychiatric, Neurological, Psychoeducational, and Abuse Factors, in* Vulnerabilities to Delinquency 89 (Dorothy O. Lewis ed., R.B. Luce Publ'g 1981); Steve Spaccarelli et al., *Psychosocial Correlates of Male Sexual Aggression in a Chronic Delinquent Sample,* 24 Crim. Just. & Behav. 71 (1997).

13. *See* Cathy S. Widom, *Victims of Childhood Sexual Abuse: Later Criminal Consequences*, Research in Brief (U.S. Dep't of Just. 1995).

14. *See* Silverman et al., *supra* note 6.

15. *See* James M. Makepeace, *Social Factors and Victim Offender Differences in Courtship Violence,* 36 Fam. Relations 87 (1987); Nona K. O'Keeffe et al., *Teen Dating Violence,* 31 Soc. Work 465 (1986).

16. *See* Katherine E. Lane & Patricia A. Gwartney-Gibbs, *Violence in the Context of Dating and Sex,* 6 J. Fam. Issues 45 (1985).

17. *See* White & Koss, *supra* note 2.

18. *See* Vernon R. Wiehe, Sibling Abuse: Hidden Physical, Emotional, and Sexual Trauma (Sage Publ'ns 2d ed. 1997).

19. *See* Timothy Brezina, *Teenage Violence Toward Parents as an Adaptation to Family Strain: Evidence From a National Study of Male Adolescents,* 30 Youth & Soc'y 416 (1999).

20. *See* Paul A. Mones, When a Child Kills: Abused Children Who Kill Their Parents (Pocket Books 1991).

21. Inger J. Sagatun & Leonard P. Edwards, Child Abuse and the Legal System 247 (Nelson Hall 1995).

22. From 1993 through September 1998, 18 of 71 domestic violence–related deaths were in relationships that started when the victims were under the age of 18. From October 1998 through December 1999, 24 deaths were determined to be related to domestic violence and 10 of the victims were under the age of 18 when they had started their relationship with their murderers. From January 2000 through December 2000, 4 deaths out of a total of 18 occurred in relationships where the murder victim was under 18 when the relationship began. In 2001, 2 deaths out of a total of 17 deaths occurred in such relationships. *See* Family Violence Council, Santa Clara County: Report of the Death Review Committee (2002); interview with Rolanda Pierre-Dixon, District Attorney of Santa Clara County and head of the Death Review Committee (2002).

23. *See generally* Silverman et al., *supra* note 6.

24. Full Faith and Credit Enforcement of Protection Orders, Violence Against Women Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1533 (codified at 8 U.S.C. § 1101 (2000)).

25. *See generally* Suarez, *supra* note 4, at 435–49.

26. Roger J.R. Levesque, *Dating Violence, Adolescents, and the Law,* 4 Va. J. Soc. Pol'y & L. 339, 356–62 (1997).

27. *Id*. at 369.

28. *Id.* at 358–60.

29. *See* Nat'l Ctr. for Victims of Crime, Public Policy Issues: Dating Violence (2002), *at* http://www.ncvc.org/policy/issues/datingviolence (visited Nov. 2, 2003).

NOTES

30. Cal. Penal Code § 273.5(a) (West 1999 & Supp. 2003).

31. *Id.* § 13700(b).

32. A.B. 2826, 2002 Cal. Stat. 534, § 2.

33. Cal. Penal Code § 13700(b) (West 1999 & Supp. 2003).

34. California Penal Code section 243 defines and prohibits battery. Section 243(e) specifically addresses battery in a domestic, family, or dating situation. The potential punishment for section 243(e) battery includes up to one year in jail, double the punishment for ordinary battery. Cal. Penal Code 243(e).

35. *Id.* § 243(e)(1).

36. *Id.* § 243(f)(10).

37. Cal. Penal Code § 1203.097.

38. Cal. Fam. Code § 6211 (West 1994 & Supp. 2003).

39. Cal. Code Civ. Proc. §§ 372(b)(1)(C)–374.2 (West 1973 & Supp. 2003).

40. Nat'l Ctr. for State Courts, Juvenile Domestic Violence: Judicial Processing and the Impact of a Court-Based Intervention Program (2002) (unpublished proposal to the National Institute of Justice).

41. *See* Cal. Penal Code §§ 243(e), 13700; Cal. Fam. Code § 6211.

42. *See* Cal. Fam. Code § 6211(f).

43. All of the county's law enforcement agencies have agreed to this protocol. It is updated annually; the last protocol was updated in March 2003.

44. *See* Cal. Penal Code § 1203.097.

45. *See id.* § 1203.7.

46. Cal. Welf. & Inst. Code § 602 (West 1998 & Supp. 2003).

47. An example of a juvenile delinquency protective order is appended to this article.

48. *See* Cal. Penal Code § 1203.097.

49. *See, e.g.,* Jeffrey L. Edleson & Richard M. Tolman, Intervention for Men Who Batter: An Ecological Approach (Sage Publ'ns 1992); Jeffrey L. Edleson, *Judging the Success of Interventions With Men Who Batter*, *in* Family Violence: Research and Public Policy Issues 130 (Douglas J. Besharov ed., Am. Enter. Inst. Press 1990); Edward W. Gondolf, *Batterer Programs,* 12 J. Interpersonal Violence 83 (1997).

50. Cal. Penal Code §§ 243, 273.5.

51. *Id.* §§ 245, 422.

52. For other DV/FV-related offenses, see Cal. Penal Code §§ 148, 236, 240, 242, 261, 417, 422, 594, 646, 647 (West 1999 & Supp. 2003).

53. Edward W. Gondolf, Batterer Intervention Systems: Issues, Outcomes, and Recommendations (Sage Publ'ns 2002).

54. *Id.*

55. Generally, compared to the county population, there was an overrepresentation of Hispanics in this study. Kids in Common, Silicon Valley Children's Report Card 2000, at 1–62 (2000).

56. Participants: The judge, the district attorney's office, the public defender's office, law enforcement agencies, the probation department, the schools, juvenile hall, ranches, mental health, batterer programs, the Legal Advocacy for Youth program, the Victim Assistance Program, victim support networks, the county Commission on Domestic Violence, and the project evaluation team from San Jose State University.

57. Gondolf, *supra* note 53.

| SUPERIOR COURT OF CALIFORNIA,<br>COUNTY OF SANTA CLARA<br>191 North First St.<br>San Jose, California<br><br>JUVENILE DELINQUENCY DIVISION | FOR COURT USE ONLY |
|---|---|
| IN THE MATTER OF<br><br>MINOR | |
| **PROTECTIVE ORDER - JUVENILE DELINQUENCY** | CASE NUMBER: |

☐ **TEMPORARY** ☐ **PERMANENT** ☐ **MODIFICATION**

**1. GOOD CAUSE APPEARING, THE COURT ORDERS that the above named minor**

| ☐ **Male** ☐ **Female** | **Ht.:** | **Wt.:** | **Hair Color:** | **Eye Color:** | **Race:** | **Age:** | **DOB:** |
|---|---|---|---|---|---|---|---|

☐ a. Shall not annoy, harass, strike, threaten, sexually assault, batter, or otherwise disturb the peace of the protected persons named below.

☐ b. Shall not attempt to or actually prevent or dissuade any victim or witness from attending a hearing, testifying or making a report to any law enforcement agency or person.

☐ c. Shall have no personal, telephonic, electronic or written contact with the protected persons named below.

☐ d. Shall have no contact with the protected persons named below through a third party, except an attorney of record.

☐ e. Shall not come within _____ yards of the protected persons named below.

☐ f. Shall have no contact with the protected person named below without written permission of the Probation Officer.

2. NAMES OF PROTECTED PERSON(S):_____
_____

3. Other orders *(specify):* _____
_____

4a. The restrained person named above as a minor was served on _____.
*(City, Date & Time Served)*

b. The restrained person named above as the minor is present in court and is informed of this order and is personally served with a copy. _____ *(Time Served)*

5. This order continues in effect during the time the minor is under the jurisdiction of the court (including any probationary period). This order will expire on _____ *(Date).*

**Date:**_____ _____
JUDICIAL OFFICER Department _____

**This order is effective when made and enforceable in all 50 states, the District of Columbia, all tribal lands and all U.S. territories by any law enforcement agency that has received the order, is shown a copy of the order, or has verified its existence on the California Law Enforcement Telecommunications System (CLETS). Violation of this order may be a crime punishable both as a contempt of court (Penal Code Sec. 166), as a violation of Penal Code Sec. 273.6 and a violation of probation and, if you travel across state or tribal boundaries with the intent to violate the order, a violation of VAWA, 18 U.S.C. 226(a)(1). If you cause the protected party to cross a state or tribal boundary, you may be convicted of a violation of 18 U.S.C. 2262(a)(2). You also may be prosecuted for purchasing, possessing or transporting a firearm or ammunition [18 U.S.C. 922(g)]. If you have children with the protected person, you should initiate an action in Family Court to establish visitation and custody rights.**

DISTRIBUTION: ORIGINAL - Court File, Minor, Victim, Juvenile Probation

# The Scope of Family Court Intervention

**Steve Baron**

*Superior Court of California, County of Santa Clara*

The family court was not designed or structured to help families contesting child custody and visitation with the serious problems that they frequently present—problems such as substance abuse, child abuse and neglect, and domestic violence—when these problems have not risen to the extremely high threshold demanding juvenile dependency action. Nevertheless, these problems substantively undermine the health, safety, and welfare of children and the safety of other family members. This article takes the position that the family court system has a responsibility to develop a philosophical orientation and structure that reflect an understanding of the nature and complexity of these problems and a willingness to use its authority to help families confront them. ■

Increased societal and legislative attention to child abuse, substance abuse, domestic and relationship violence, child support collection, and other related issues, along with efforts to improve public access to the court system, has had the result that these issues frequently arise in family court. The California Family Code has simultaneously evolved by increasingly emphasizing the safety of children and family members when the family court is making child custody and visitation decisions.[1] Consequently, family court has become an important arena for dealing with these problems when they arise in child custody and visitation proceedings.

But the family court system was not intended or designed to assume this level of responsibility for the safety of children and family members, a function traditionally more suited to the juvenile dependency court and the child welfare department. The family court system does not possess the philosophical orientation or logistical infrastructure necessary to perform this function effectively, and so a family court must implement innovative programs to address abuse and domestic violence. The court's success in addressing these problems depends on judicial interest and leadership, the initiative of Family Court Services, and the court's willingness to collaborate actively with government and community agencies and support services that have the resources to deal with child abuse and neglect, domestic violence, and substance abuse. This judicial interest and action is appropriate and clearly consistent with the intent and spirit of the requirements of the Family Code as they have evolved over time.

In advocating an expanded scope of the family court to deal with family dysfunction, this article first reviews the traditional roles and functions of the family and juvenile dependency courts and discusses how the role of the family court has changed as a function of the changing Family Code. It then takes up the question whether the roles and functions of the two courts continue to be essentially distinct and unique or whether they overlap in cases involving seriously troubled families.

## HISTORICAL DIFFERENCES BETWEEN THE JUVENILE DEPENDENCY AND FAMILY COURT SYSTEMS

Judge Leonard P. Edwards laid a foundation for this discussion in a 1987 *Santa Clara Law Review* article that began exploring the scope of family court intervention within the context of the related legislation and case law in

effect at that time. He explained that, though both resolve family and child custody issues, the family and juvenile courts are fundamentally different.[2]

The family court was created to provide a forum for private litigants to resolve their disputes over their marriages and the custody, care, and control of their children. In family law, parents are presumed to be capable of making decisions regarding their children. When parents do contest custody, the state intervenes only minimally, having established a framework of rules. These guide the court in resolving disputes in the best interest of the child while promoting parental sharing of rights and responsibilities. Family courts do, of course, perform other functions, including making protective orders, but these are ancillary to the court's primary dispute resolution function.[3]

The juvenile court, on the other hand, was created to protect children from abuse and neglect as well as, to the extent possible, to preserve and strengthen the family. Questions about parents' or guardians' ability to make decisions regarding their children are the starting point of juvenile court proceedings. The state aggressively intervenes by taking formal action to modify parents' behavior and even to remove the children from the parents' home and care. The court, too, takes an assertive role, making a variety of orders to protect the child and ensure that other public and private entities provide services to the child and his or her family. Like the family court, the juvenile court also performs ancillary functions such as making child custody and visitation orders.[4]

Judge Edwards noted the preference of the Legislature and courts for parents to decide issues regarding their children without state involvement. Only when parental child care drops below a minimal level does the state intervene in the parents' decision-making process. But if the parents agree about child custody and care for their children satisfactorily, then the state and the family court have limited ability to modify a custody arrangement that is not in the best interest of the child. Because parents come to family court voluntarily and are free to resolve some or all of their disagreements privately, the court may only be able to approve the agreement or try to persuade the parents to change it even if it learns of the agreement during a dissolution proceeding. "In short," wrote Judge Edwards, "the family court is poorly equipped to speak for or protect the child. The presumption of parental fitness means the court need not and should not be concerned with the child. The court assumes the parents will see to the child's needs."[5]

It is important to note here that parents and their attorneys—not the children or the state—drive family court cases. Parents and other adult parties initiate action in the family court system. It is they who speak with the loudest voice. It is they who determine whether they will remain in or exit the family court system. If both parties decline to participate in the family court process, regardless of the severity of the problems affecting the children, and if the local child protection agency is unable or unwilling to intervene by filing a petition in juvenile court or providing services, there is little the family court can do to protect the children. The children, with the exception of those few for whom attorneys have been appointed in family court, do not have legal advocates and therefore have no independent voice to communicate their interests and needs. The family court may attempt to do everything within its power—through parent education, mediation, other alternative dispute resolution mechanisms, and evaluation—to encourage families to focus on the best interest and safety of their children, but in actuality it is left to the parties' discretion whether to maintain that focus.

## THE APPROPRIATE LEVEL OF FAMILY COURT INVOLVEMENT

In addition to the historical factors, there are important practical and philosophical reasons to limit the family court's intervention in child custody and visitation disputes. First and foremost, limited judicial intervention allows the family to maintain its own decision-making authority. Second, protracted involvement with the court system can exacerbate the disagreements that brought the family into

court, drain the family's resources, and cause significant stress for all family members. The effects of all this tension may be deep and lasting for the children. And third, the outcomes may be unexpected and unwanted by one or both parents.

Thus, except in the event of emergencies or safety issues requiring immediate investigation, recommendations, and other critical assistance, the family court should begin with the least intrusive level of involvement to help families resolve their disputes. This usually consists of education about the various needs of children and family members and methods by which parents can resolve their disputes to serve the best interest of their children and ensure family members' safety. The next least intrusive means of assisting parents are confidential, nonrecommending mediation and other minimally intrusive, child-focused alternative dispute resolution mechanisms, such as a combination of properly informed, initial attempts at mediation with the additional step that the mediator moves into an investigating and recommending mode, referred to as "recommending mediation" in California's Family Code.[6]

These services are all that a significant proportion of family court clients require to resolve their disputes and exit the system.[7] However, when serious problems—including child abuse or neglect, domestic and relationship violence, or substance abuse—exist and show no evidence of resolving without the court's active intervention, the family court must pay close attention to them and may appropriately direct the parents and other parties to obtain assistance aimed at effectively addressing their problems and improve their parenting capacity. Indeed, research indicates that it is, in fact, naïve and sometimes dangerous to assume that parental inadequacy is seldom an issue in family court cases.[8]

## THE RESPONSIBILITY ASSIGNED BY THE FAMILY CODE

Significant changes to the Family Code since the 1987 publication of Judge Edwards's article have functioned to clarify the "best-interest" standard as it applies to family court proceedings.[9] The code now places greater responsibility on the family court to ensure the safety of not only the children but also "all family members,"[10] giving more focus and weight to issues related to domestic violence, substance abuse, and child abuse in general and child sexual abuse in particular in the court's determination of the child's "best interest."[11] Given the numerous changes in the Family Code pointing in this direction, one may conclude that evidence of family violence or child abuse is inconsistent with a presumption of parental adequacy.

### WHAT IS THE "BEST INTEREST" OF CHILDREN?

Family Code section 3011 requires the court, in determining a child's best interest, to consider the health, safety, and welfare of the child; any history of abuse by one parent or any other person seeking custody against essentially any child, the other parent, or almost anyone else with whom that person has had a relationship; the nature and amount of contact with both parents except in certain circumstances; and the habitual or continual illegal use of controlled substances or alcohol by either parent.[12]

#### *The General "Health, Safety, and Welfare" Factors*

The child's health, safety, and welfare are the first of section 3011's enumerated factors that the court must consider in its determination of best interest. These terms are far more general than the section's other, more specific factors, which are presumably consistent with health, safety, and welfare considerations. But "health, safety, and welfare," though listed as a single separate factor, are not operationally defined. Other sections of the Family Code, as well as the California Rules of Court, help clarify for the the court or the child custody mediator or evaluator what additional information beyond that discussed in the more specific factors is relevant to the assessment of a child's health, safety, and welfare.

Family Code section 1815 lists the knowledge areas required of conciliation (Family Court Services) counselors: adult psychopathology, the psychology

of families, child development, child abuse, clinical issues relating to children, the effects of divorce and domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.[13] Section 1816 requires counselors to receive continuing education in domestic violence, including child abuse, and further requires thorough training in specified subject areas regarding domestic violence.[14] Rule 5.230 of the California Rules of Court further delineates domestic violence training requirements for court-appointed investigators and evaluators.[15] Rule 5.215 applies these same training requirements to all contract and employee mediators, evaluators, investigators, and counselors who provide services on behalf of Family Court Services.[16] Thus, even before a judicial officer or court staff member addresses section 3011's more specific factors, the knowledge and training requirements for Family Court Services and court-connected custody evaluators, which presumably are intended to prepare them to assess the "health, safety, and welfare of the child," place a heavy emphasis on domestic violence and child abuse, followed by, in no particular order, consideration of the psychological functioning of children and family members, the developmental and mental health needs of children, and the impact of divorce on children within the context of the related child custody research.

Rule 5.225 lists even more specific training requirements for court-appointed investigators and evaluators assigned to make recommendations to the court regarding the best interest of children. These training areas include, but are not limited to, family dynamics, including parent-child relationships, blended families, and extended family relationships; the effects of separation, divorce, domestic violence, child sexual abuse, child physical or emotional abuse or neglect, substance abuse, and interparental conflict on the psychological and developmental needs of children and adults; the assessment of child sexual abuse issues; the significance of culture and religion in the lives of the parties; general mental health, medication use, and learning or physical disabilities; the assessment of parenting capacity; and the construction of effective parenting plans.[17]

Rule 5.220 requires custody evaluators to consider additional factors, including the quality of the child's attachment to each parent and the parents' social environment; the child's reaction to the separation, divorce, or parental conflict; the parents' capacity for setting age-appropriate limits and for understanding and responding to the child's needs; the parents' history of involvement in caring for the child; and the parents' history of psychiatric illness.[18]

All of these various factors, as well as section 3011's other, more specific factors, are, then, legitimate issues to be considered, analyzed, and weighed in considering the "health, safety, and welfare of children." But the weight and priority of these various factors is not entirely up to the judicial officer or court staff member. The Family Code makes clear that some should be weighed more heavily than others.

### *Specially Weighted Factors*

As noted above, Family Code section 3011 singles out three issues for special attention by the court beyond the general consideration of "health, safety, and welfare" in its determination of the child's best interest, and by doing so assigns them increased weight: (1) the nature and amount of contact that the child has had with both parents; (2) either parent's habitual or continual alcohol or illicit drug abuse; and (3) any child abuse and adult relationship violence.

Section 3011(e)(1) goes on to assign even more weight to two of these three issues— substance abuse and child, domestic, or relationship abuse—by placing an added burden on the court: it requires that when these allegations have been made against a parent and the court orders sole or joint custody to that parent, the court must "state its reasons in writing or on the record."[19] Therefore, child, domestic, and/or relationship abuse and substance abuse appear to be weighted more heavily than all other factors. But abuse, in the form of child abuse and domestic violence,[20] is the most heavily weighted of the factors.

### *Abuse—The Most Heavily Weighted Factor*

Section 3041 of the Family Code requires a court, before granting custody to someone other than a child's parent without the consent of the parents, to find that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is necessary in order to serve the child's best interest.[21] In section 3020(a) the Legislature specifically finds that "the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child…."[22] Therefore, because detriment resulting from parental custody must be shown before the court can award custody of a child to a nonparent, and the Family Code defines child abuse or domestic violence in a household where a child resides as detrimental to the child, such abuse is the most heavily weighted factor in determining a child's best interest.

Section 3020(c) clarifies this policy by requiring a court, when facing a conflict between maintaining parental custody or contact and protecting the health, safety, and welfare of the child, to order custody and visitation in a way that ensures the latter as well as the safety of all family members.[23] Finally, section 3044 establishes a rebuttable presumption that an award of custody of a child to a person who has committed domestic violence is detrimental to the best interest of the child as defined in section 3011.[24]

Even within the heavily prioritized area of child abuse, allegations of child sexual abuse receive special attention. The code provides that the court may request a child welfare department investigation if allegations of child sexual abuse arise during a custody proceeding[25] and mandates that the court require an evaluation meeting certain minimum requirements in any contested custody or visitation proceeding in which the court has appointed an evaluator or referred the case for evaluation *and* has determined that there is a serious allegation of child sexual abuse.[26] This is the only situation in which the Family Code mandates that the court require an evaluation. The requirements for both the manner in which this evaluation must be conducted and the training of the evaluator are extraordinarily specific and thorough.[27]

## AUTHORITY AND RESPONSIBILITY OF THE FAMILY COURT BEYOND DETERMINING CUSTODY AND VISITATION

The question then arises whether the family court may consider child abuse, domestic and relationship violence, and substance abuse only for the purpose of determining child custody and visitation or has the authority—if not the responsibility—to help families constructively address those problems. The latter appears to be the case. Section 3190 authorizes the court to require parents and other parties involved in custody or visitation disputes, and the children at issue, to participate in mental health counseling, including substance abuse services, if the custody or visitation dispute poses a substantial danger to the best interest of the child and the court determines that the counseling is in the child's best interest.[28] Section 3191 then lists the purposes of mental health counseling orders, one of which is to improve each parent's parenting skills.[29]

Section 3200 also recognizes the dangers posed by abuse by requiring the Judicial Council to develop standards for supervised visitation providers, including guidelines for cases involving allegations of domestic violence, child abuse, substance abuse, or other special circumstances.[30] The resulting standards are now included in section 26.2 of the California Standards of Judicial Administration, which took effect January 1, 1998.[31]

Section 3203, added in 1999, authorized the family law division of the superior court in each county to establish and administer a supervised visitation and exchange program, educational programs about protecting children during family disruption, and group counseling programs for parents and children.[32]

Clearly, then, the people of California, through their legislators, have acknowledged that certain social problems—specifically family and relationship violence, child abuse, substance abuse, and the related

safety needs of family members—are the most important concerns when a court makes decisions about child custody and visitation. The Family Code, California Rules of Court, and California Standards of Judicial Administration all require courts and the mediators and domestic relations investigators who work for them to pay special attention to these issues and weigh them heavily. The Family Code gives the court the authority to order people into various kinds of educational and counseling programs, as well as to order supervised visitation, to protect the safety of children and other family members and to improve parenting skills. But how often do family courts have to deal with these problems, which juvenile dependency courts and child protection systems are better equipped to address? Are they a rare or frequent occurrence in family courts?

## RESEARCH ON MULTIPROBLEM FAMILIES IN FAMILY COURT

The Judicial Council's Center for Families, Children & the Courts (CFCC) noted the family court's adaptation in response to the serious problems often raised in court-based mediation of contested custody cases in its *Statewide Uniform Statistical Report System (SUSRS) 1996 Client Baseline Study*. *SUSRS 1996* statistics showed that parents raised concerns about physical or sexual child abuse, child neglect or abduction, substance abuse, or domestic violence in over half of all mediation sessions. In 30 percent of all cases, more than one of these matters arose.[33] Substantial proportions of cases in mediation reported current or past restraining orders (55 percent), a past child welfare services investigation (25 percent), problems with alcohol or drug abuse (30 percent), and a child's having witnessed violence between the parents (41 percent).[34]

Effective case disposition for families dealing with multiple problems demands unprecedented expertise from the courts. *Justice in the Balance: 2020,* the 1993 report of the Commission on the Future of the California Courts, pointed out the critical need for services and recommended that the courts advocate for the mobilization of community services for families.[35] Many cases entering family court require referrals or orders to ancillary human services. In addition, parenting plans for families affected by child abuse, domestic violence, or substance abuse may need to include arrangements for supervised visitation. To provide these services, courts and communities need to develop innovative collaborative partnerships.

It is clear, then, that many families in California's family court system are suffering from child abuse and neglect, substance abuse, and domestic violence. The Judicial Council of California recognizes that fact and has provided local jurisdictions with grant funding to develop services such as supervised visitation and drug treatment courts. But does the mere presence of these problems harm or endanger children? Does the evidence warrant the family court's active intervention?

## RESEARCH ON THE IMPACT OF CHILD ABUSE, DOMESTIC VIOLENCE, AND SUBSTANCE ABUSE ON CHILDREN

Emotional, physical, and sexually abusive behavior is frequently alleged in family court cases, and its impact on child development is well documented.[36] Jeffrey L. Edleson recently reviewed 84 studies reporting the effects on children of witnessing domestic violence and identified 31 of those studies as meeting the criteria of rigorous research.[37] These studies documented multiple problems among children that are significantly associated with witnessing assaults of one parent by another in the home, including

- psychological and emotional problems such as aggression, hostility, anxiety, social withdrawal, and depression
- cognitive functioning problems, such as lower verbal and quantitative skills, and the development of attitudes supporting the use of violence
- longer-term developmental problems, such as depression, trauma-related symptoms, and low

self-esteem among women and trauma-related symptoms among men.[38]

Edleson's examination of the research discloses that these problems appear to be moderated by a number of factors, such as the child's age, sex, degree of family support, and perception of his or her relationship to adults in the home.[39] Though he concludes that the studies provide "strong evidence" that children who witness violence at home experience a host of problems, Edleson does caution that significant numbers of children showed no negative developmental problems from witnessing violence and that one must be careful not to assume that witnessing domestic violence automatically leads to negative outcomes for children.[40]

The California courts have generally accepted this research, taking the view that domestic violence harms children. California juvenile dependency case law holds that children who are exposed to violent confrontations between their parents or caretakers may be adjudged dependents of the juvenile court. The California Court of Appeal in *In re Benjamin D.* noted that "[b]oth common sense and expert opinion indicate that spousal abuse is detrimental to children."[41] The appellate court expanded this view in *In re Heather A.,* recognizing that domestic violence poses a risk of both physical and emotional harm to children, as well as leaving them open to long-term psychological harm.[42]

Finally, numerous studies indicate that substance-abusing parents are at increased risk for abusing and neglecting their children.[43] In a 1999 survey of the 50 state child welfare departments, 85 percent of the responding states reported substance abuse as one of the two leading problems exhibited by families reported for child maltreatment.[44] Parental substance abuse has also been linked to child fatalities: substance abuse by parents and other caregivers is associated with up to two-thirds of all cases of child maltreatment fatalities.[45]

Several studies indicate that past, as well as current, parental substance abuse increases the risk of child abuse. Robert Ammerman et al. found a strong linkage between a lifetime history of substance abuse and child abuse potential in both mothers and fathers.[46] These same researchers found no differences in abuse potential between those with a past (but not current) history of substance abuse and those with a current substance abuse disorder. Richard Famularo et al. found that mothers with either a current or past substance abuse history were more likely to abuse their children than non-substance-abusing mothers.[47] These findings go against the commonly held belief that getting substance-abusing parents to get clean and sober is sufficient to reduce the risk of future child maltreatment. At base, this and other research clearly supports the position that child abuse and neglect, substance abuse by parents and caretakers, and domestic violence harm children or place them at serious risk of being harmed compared to children who are not exposed to such problems.

## CONCLUSIONS FROM THE RESEARCH, THE LAW, AND EXPERIENCE

The majority of parents appearing in family court, even though they have differing perspectives on custody and visitation and may have experienced difficulties affecting their parenting capacity at one time or another, are able to focus on the best interest of their children, adequately care for their children, and protect them. A significant minority of parents, however, experience serious difficulties that interfere with their ability to adequately care for and protect their children.[48] In cases involving these parents, the family court needs to step beyond traditional dispute resolution to take a more active role.

## THE APPOINTMENT OF ATTORNEYS FOR CHILDREN IN FAMILY COURT

One way for the court to gain more information about a family's problems and take effective remedial action is to appoint an attorney for the child in a custody case, though this can be costly and sometimes

controversial. The Family Code authorizes a court, if it determines that it would be in the child's best interest, to appoint private counsel to represent the interest of the child in a custody or visitation proceeding.[49] In Santa Clara County, Family Court Services regularly requests appointment of an attorney for the children in cases where both parents appear to have parentally debilitating issues (i.e., serious substance abuse/dependency and/or domestic violence, child abuse, or neglect) and in which the child welfare department declines either to file a petition or to provide services.[50]

The family court, unlike the juvenile dependency court, does not have the authority to order an agency to provide needed services to a family. If a family's problems do not cross the severity threshold required by juvenile dependency court[51] and the family's dispute therefore remains in the family court system, the family court can order only that the adults in the family seek out and obtain services to address the identified problems. The family court and Family Court Services are currently neither authorized nor equipped to closely and actively monitor families suffering from problems that place their children at risk. After ordering parents to engage themselves and their children in services, the court is able only to review the level of compliance and progress made in addressing those issues. This can be an effective measure if the parents comply and appear for court-ordered reviews, but not if they fail to comply or appear.

Attorneys appointed to represent children in family court can provide considerable assistance in high-risk situations. First of all, they can serve as an effective voice for the needs of their clients and actively represent their best interest in the legal arena. A complicating issue, however, is that children's attorneys in custody cases are often asked to serve a function that exceeds their legal expertise and training: to monitor the health, safety, and welfare of their young clients because there is no one else to do it. Some attorneys, by disposition, experience, and training, are well suited to this role and are capable of taking assertive action to see that their clients are receiving the care and assistance they require. Their participation in a case may not only further the interests of the children they represent, but can also serve to support the other family members and reduce the level of conflict in the family. These attorneys make extremely important, and often unappreciated, contributions to preserving the health, safety, and welfare of the children they represent.

The result, however, is not always productive or positive. Some parties may view a minor's attorney who vigorously advocates for his or her client as interfering, as abusive of his or her power, or as exploiting the appointment for financial gain. A parent may view the attorney as nonsupportive of his or her position and, therefore, as an adversary. In addition, some attorneys may be unsuited for this type of appointment. Their involvement can be damaging, either through lack of interest and appropriate involvement, lack of appropriate training in or sensitivity to the issues involved, or a quality of participation that serves to aggravate the problems being experienced by the children they represent.

There are other potential problems associated with the appointment of attorneys for children: it is costly to the parties, the court system, or both, and can add to the stress experienced by already burdened and distressed parents, resulting in an atmosphere of increased hostility and acrimony within the family and in the family's contacts with the court system.

## THE POTENTIAL FOR USING COURT APPOINTED SPECIAL ADVOCATES IN FAMILY COURT CASES

An alternative to appointing an attorney for a child may be to appoint a Court Appointed Special Advocate (CASA), a trained volunteer typically appointed by the juvenile court to help define the best interest of a child in juvenile court dependency and wardship proceedings.[52] A number of jurisdictions around the country have used community volunteer child advocates in divorce proceedings over the years.[53] Santa Clara County Family Court and selected cases benefited from a grant received by Child Advocates of Santa Clara and San Mateo Counties that permitted

the program to provide 50 CASA volunteers to family court families from 1992 to 1996.[54] It is worth noting, however, that the CASA program, after providing family court volunteers for about six months at no cost to the court or to the families, contacted Family Court Services and requested special training for their volunteers because they found family court families far more difficult to deal with than families in the juvenile dependency system for two primary reasons.[55] First, the high level of parental conflict and acrimony that pervaded many of the cases made it particularly difficult for the advocates to get the parents to focus on the child's needs. Second, the parent who had custody of the child often had little motive to cooperate with the advocate, was more likely to view the advocacy as interference, and therefore, on occasion, would actively undermine the advocate's role.

Even so, the experimental program was determined to be generally successful. Interested and motivated volunteers were able to provide the time and support available nowhere else. Examples:

- A retired parole officer supervised visitation for a child who wanted contact with her mother. The mother had been criminally convicted, had a violent history, and was in drug treatment.
- Many CASAs provided frequent monitoring of the children's health, safety, and welfare; supervised parent-child contacts; and submitted reports to the court.
- A husband-and-wife CASA team helped a parent who was the victim of domestic violence obtain a restraining order and support services.
- A CASA helped a parent previously accused of abusing and medically neglecting his children to get the children to their medical appointments.
- A CASA helped a parent obtain job training and subsequent employment.

The use of CASAs appears to be an intervention well suited to the needs of families in cases where children are at high risk, although special training may be required.

## POTENTIAL PROBLEMS OF ACTIVELY ADVOCATING FOR CHILDREN IN FAMILY COURT

Some local jurisdictions across the state have assertively attempted to implement the Family Code's growing emphasis on child safety by appointing attorneys to represent children in high-risk situations or by consistently ordering interventions, including counseling, domestic violence services, chemical dependency treatment, and supervised visitation. But by imposing those interventions, which are, by their very nature, intrusive and costly, courts have increased their visibility and vulnerability to criticism. People do not expect these types of interventions from a family court system designed to resolve disputes between parents who are presumed to be competent and capable of adequately caring for their children. Family court professionals must therefore take a more active role in educating parents, members of the family law community, mental health professionals involved in child custody and visitation work, and agencies and community resources about the family court system and how it works, the frequency and severity of the various problems commonly arising in family court, and the court's responsibility to actively address those problems. These various stakeholders need to understand the court's focus on the best interest of children; the factors the court takes into consideration in determining best interest, including evidence of child abuse and neglect, domestic and relationship violence, and substance abuse; the court's role in preserving the safety of children and family members; and the court's authority and responsibility for exercising the various prerogatives authorized by law.

## FAMILY COURT'S INTERACTION WITH THE CHILD WELFARE DEPARTMENT

Family Court Services frequently must report suspected child abuse or neglect to the local child welfare department, and on many of these occasions Family Court Services staff have viewed the quality

of the agency's response as appropriate. This is not, however, always the case. Family Court Services personnel often have reported incidents of what they consider serious suspected child abuse or neglect but have observed that the agency has often dismissed the reports, responding that it will not take formal action because "this is a family court case," as if this context almost automatically signals a false or exaggerated allegation raised by a disgruntled parent for potential secondary gain in a custody battle. Family court personnel usually take a different view. They frequently face situations in which neither parent appears capable of adequately caring for the child, yet the child welfare department declines to investigate, offer services, or file a juvenile dependency petition.

In Santa Clara County, the family court, juvenile dependency court, Department of Family and Children's Services, Office of County Counsel, and Family Court Services have attempted to address this issue and maximize the appropriateness and effectiveness of the system's response to these cases by collaborating to develop a detailed *Protocol for Family Court and Child Protective Services When Issues of Child Abuse or Neglect Surface in Family Court Proceedings—July 2002.* The protocol has served to clarify each system component's responsibilities and improve the system's responsiveness to families; moreover, the collaboration and communication inherent in developing and implementing the protocol have also served to maximize the effectiveness of ongoing working relationships among system members and increase sensitivity to the assets and limitations of what each system component has to offer.[56]

The changing law and increased community and cultural awareness of family and relationship violence and substance abuse and their impacts on victims and children have resulted in the need for family court at times to assume some of the functions of the juvenile dependency court without the philosophical orientation or logistical infrastructure and resources of the latter court. The following recommendations are intended to address this problem and equip the family court to carry out its expanded responsibilities.

## RECOMMENDATIONS FOR BETTER EQUIPPING FAMILY COURT TO ACCOMPLISH THE TASKS ASSIGNED BY THE FAMILY CODE

***Judicial training.*** Judicial officers expert at implementing the provisions of child custody and visitation law should not be expected to correctly apply that law to issues of child abuse and neglect, substance abuse, and domestic violence without background education and training sufficient to give them a fundamental understanding of the definitions, dynamics, and impact of these issues on families and children. Therefore:

1. Judicial officers, before their appointment to the family court bench, should be required to have training in child abuse and neglect, domestic violence, substance abuse, serious mental health problems, child development and attachment theory, the impact of divorce on children and families, the developmental appropriateness of various custody and time-sharing schedules, and local community resources that is sufficient to allow them to
   a. knowledgeably interpret and weigh the significance of the various allegations and issues raised in child custody cases
   b. respond appropriately and sensitively to parties affected by these issues
   c. accurately appreciate the impact of these issues on the safety and development of children, so that they may shape their orders in the most appropriate manner
   d. objectively and appropriately consider and assess recommendations made by mental health and other family court professionals regarding the custody and visitation of children
   e. order the parties to seek and obtain the most appropriate available services aimed at reducing

the various risks associated with the presenting problems

This background training should not be intended to make judicial officers experts in these various areas; rather, it should be sufficient to prevent decision making that inadvertently endangers children or other family members. The training should also better equip judicial officers to objectively consider and determine the appropriateness of child custody and visitation recommendations made by Family Court Services and other mental health professionals. The provision of this training would help dispel the impression that judicial officers simply "rubber-stamp" custody and visitation recommendations.

***Grant funding.*** The large number of child custody and visitation cases and the size of the court in some locales may present the need and opportunity for creating areas of specialization within the family court system. In addition, courts should actively seek and obtain grant funds that may be available to give the court the support services necessary to make these judicial interventions effective. A number of courts around California are beginning to do so. One such court is the Santa Clara Family Court, which has collaborated with adjacent counties and courts to obtain grants from the Judicial Council of California, Administrative Office of the Courts, and the U.S. Department of Justice, Office on Violence Against Women, to support current supervised visitation programs and develop model supervised visitation programs for domestic violence cases. The Santa Clara court has also obtained California Collaborative Justice Drug Courts Substance Abuse Focus grants, a Health Trust Good Samaritan grant, and a FIRST 5 Santa Clara County grant, all to develop and support a family drug treatment court and related coordinator and family court resource specialist positions.

In another very significant and pioneering move, the Santa Clara Family Court sought, received, and is implementing a substantial multiyear grant from FIRST 5 Santa Clara County, the "Care Management Initiative—Family Court Services." This project's purpose, as stated in the project overview, is to "ensure that children and families within the Family Court system will have the necessary health, developmental, and social underpinnings to assist their success in life." The project aims to coordinate prevention, intervention, and intensive intervention services for young children (prenatal through 5 years old) and their families either when parents voluntarily request services or when the court has ordered them to obtain services. Additional goals of the project include fostering community collaboration to enable the coordination and integration of existing services and infrastructures, identifying and addressing gaps in needed services, and, by accomplishing the other goals, preventing these families from entering juvenile dependency court.

2. Local jurisdictions should, whenever necessary and possible, consider establishing specialized family courts (i.e., family violence courts and drug treatment courts) that provide the monitoring necessary to protect the safety and best interest of children and the safety of all family members. In addition, local courts should actively seek to acquire supportive services and resources to help families address the problems that are jeopardizing the healthy development of their children or the safety of other family members.

***Advocacy.*** Family court currently is limited in its ability to monitor the health, safety, and welfare of children in high-risk situations who are not receiving services from child welfare departments. The court can, however, appoint an attorney to represent a child to seek affirmative relief on behalf of the child; to have access to the child's medical, mental health, health care, and educational records; and to interview care providers.[57] The attorney can also report concerns about child abuse or neglect to the child welfare agency and is legally entitled to reasonable access to the child. Attorneys who have expressed interest in representing children and who have demonstrated their interest by seeking out the education and training of the type suggested for judicial officers should be considered for such service to

children and the court. Some courts that have appointed CASAs for children in high-risk situations have also successfully increased the level of monitoring and service provision for these children.

3a. Family court judicial officers should strongly consider appointing attorneys to represent children in cases in which both parents, or all the parties, are experiencing problems (e.g., child abuse or neglect, substance abuse, domestic violence) of such severity that the children at issue have been harmed or are at significant risk of being harmed; the court is persuaded that no party is capable of adequately caring for or protecting the children; and the family and children are not receiving services or monitoring from the local child welfare agency.

3b. The Judicial Council should establish training requirements for attorneys representing children in family court cases sufficient to allow them to advocate effectively for their safety and best interest. (The training should cover the subject areas listed in recommendation 1.)

4. CASA programs should be authorized and funded to serve family court where children are determined to be at high risk. Specialized training programs should be designed for family court CASA programs.

***Social-work services.*** Interested and motivated CASAs and attorneys appointed to represent children are often asked to provide services usually offered by trained social workers in child protection agencies. When this is the case, it may be more efficient and effective to provide those social-work services directly. Therefore:

5. Consideration should be given to authorizing family courts or Family Court Services to provide high-risk families with social-work services aimed at guarding the health, safety, and welfare of children; improving parenting capacity; and trying to keep children with their families in the community and out of the juvenile dependency system.

***Information exchange.*** It is critical that high-risk families be in the court or court-related forum most appropriate for addressing their needs, and that when families are involved in both family and juvenile court, other courts, and related agencies, mechanisms that promote the timely exchange of information are in place.

6. Every jurisdiction should have efficient and effective protocols providing for the timely and efficient exchange of information between all the court and government systems with which families are involved, and for the efficient and effective collaboration between family courts or Family Court Services and local child protection agencies.

## SUMMARY AND CONCLUSION

Many family court child custody and visitation cases involve child abuse or neglect, domestic violence, or substance abuse. These place children at increased risk of emotional, behavioral, relationship, and cognitive problems. The California Family Code recognizes the seriousness of these social problems by assigning them special weight in its definition of the *best interest* of children and by authorizing the family court to order parents to participate in educational, counseling, and supervision programs.

Family court, by tradition and structure and as currently organized, is not designed to deal effectively with these types of problems, especially when both parents are experiencing difficulties that leave them unable to care for their children. The court system has a responsibility to understand the nature and complexity of these problems and their impact on children and families; to appropriately use the powers and authority given to it to identify and effectively address these problems; to assist families in obtaining needed services; and to monitor and enforce the court-ordered conditions imposed by the need to preserve the health, safety, and welfare of the children and the safety of other family members.

Family court is not juvenile dependency court, but it must deal with similar issues in many of the

cases before it. Family court, when doing this job effectively in serious cases, can help keep children safe and allow them to live with their families in the community, out of the juvenile dependency system. But reaching this goal requires that the family court develop a philosophical orientation and logistical infrastructure and acquire the resources to effectively confront the serious problems occurring in families—particularly child abuse and neglect, domestic and relationship violence, and substance abuse—when these problems have not risen to the level of a juvenile dependency action.

NOTES

1. *See* CAL. FAM. CODE § 3020(c) (West 1994 & Supp. 2003).

2. Leonard P. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 204–08 (1987).

3. *See id.* at 204–06.

4. *See id*.

5. *Id.* at 208.

6. *See* CAL. FAM. CODE § 3183.

7. Santa Clara County Family Court requires all parties entering the family court system with litigated child custody or visitation disputes to attend a three-hour orientation class offered by Family Court Services. The class includes a lecture, an audio-visual presentation, and a video of children of divorce speaking about how the divorce and behavior of their parents have affected them. The class ends with a question-and-answer session. The Child Support Enforcement unit is available to provide information related to child support issues. Orientation booklets and various handouts are given to each client. These handouts include information on the various services located in the family court; domestic violence, its impact on children and family members, the rights of victims in mediation and investigation, and various services; the stages of divorce, loss, and related stressors commonly experienced by family members; the various developmental needs of children and the special needs and rights of children of divorce/separation; the protection of children from exposure to and involvement in destructive parental conflict and suggestions for diminishing conflict; concrete dos and don'ts for parents and caretakers; approaches to parenting after separation or divorce and different parenting styles, i.e., co-parenting vs. parallel parenting; the mediation process from beginning to end; the various types of investigations the court may order if the parents fail to reach an agreement; related logistical, procedural, and financial considerations; and community resources. From 20 to 25 percent of all Santa Clara County cases whose parties attend orientation resolve without the need for further court intervention.

8. *See infra* notes 33–35 and accompanying text.

9. *See* CAL. FAM. CODE § 3011 (enumerating factors to be used to determine the best interest of the child in most family court proceedings).

10. *See id.* §§ 3020, 3031, 3046, 3100.

11. *See id.* §§ 1816, 3011, 3020–3021, 3022.5, 3027, 3027.5, 3030–3031, 3041, 3044–3046, 3064, 3100–3101, 3103, 3110.5–3111, 3113, 3117–3118, 3162, 3170, 3181, 3190, 3200–3201 (First Enacted Section), 3201 (Second Enacted Section), 6210, 6303.

12. *Id.* § 3011.

13. *See id.* § 1815.

14. *See id.* § 1816.

15. *See* CAL. R. CT. 5.230 (2003).

16. *See id.* 5.215.

17. *See id.* 5.225.

18. *See id.* 5.220.

19. CAL. FAM. CODE § 3011(e)(1).

20. Sections 6203 and 6211 of the Family Code effectively define *domestic violence* in California as intentionally or recklessly causing or attempting to cause bodily injury, committing sexual assault, placing a person in reasonable apprehension of imminent serious bodily injury to that person or another, or engaging in any behavior that has been or could be enjoined by an order enjoining a party from assault and harassment, perpetrated against any of the following: a current or former spouse, cohabitant, or partner in a dating relationship; a person with whom the perpetrator has had a child; a child of a party; or any other person related by blood or marriage within the second degree. *See* CAL. FAM. CODE §§ 6203, 6211.

21. *See* CAL. FAM. CODE § 3041.

22. *See id.* § 3020.

NOTES

23. *See id.* § 3020.

24. *See id.* § 3044.

25. *See id.* § 3027.

26. *See id.* § 3118.

27. *See id.* § 3110.5; CAL. R. CT. 5.225 (2003). The code permits but does not require the court to order an evaluation or investigation when allegations of other types of child abuse arise. *See* CAL. FAM. CODE § 3118(a).

28. *See id.* § 3190.

29. *See id.* § 3191.

30. *See id.* § 3200.

31. *See* CAL. STDS. JUD. ADMIN. § 26.2 (2003).

32. *See* CAL. FAM. CODE § 3203.

33. CTR. FOR FAM., CHILDREN & THE COURTS, JUD. COUNCIL OF CAL., PREPARING COURT-BASED CHILD CUSTODY MEDIATION SERVICES FOR THE FUTURE: STATEWIDE UNIFORM STATISTICAL REPORT SYSTEM, THE 1996 CLIENT BASELINE STUDY 6–10 (Sept. 2000). "In 1996, concerns about child neglect were raised in 16 percent … of the mediation sessions. Physical abuse of the child was raised in 7 percent of all sessions. Sexual abuse of the child came up in 3 percent of all mediations. Parental abduction of the child was a concern in 6 percent of all cases…. Parents in 30 percent of all families brought up concerns about domestic violence in their custody deliberations…." *Id.*

34. *Id.*

35. COMM'N ON THE FUTURE OF THE CAL. CTS., JUSTICE IN THE BALANCE: 2020, at 122–26 (Jud. Council of Cal. 1993).

36. JOHN E.B. MYERS ET AL., THE APSAC HANDBOOK ON CHILD MALTREATMENT (Sage Publ'ns 2d ed. 2002).

37. Jeffrey L. Edleson, *Problems Associated With Children's Witnessing of Domestic Violence*, VAWNET APPLIED RESEARCH FORUM 1 (Apr. 1999), *at* www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_witness.pdf.

38. *Id.* at 1–2.

39. *Id.* at 2–3.

40. *Id.* at 4.

41. *In re* Benjamin D., 278 Cal. Rptr. 468, 472 n.5 (Cal. Ct. App. 1991).

42. *In re* Heather A., 60 Cal. Rptr. 2d 315, 321–22 (Cal. Ct. App. 1996). *See also In re* Sylvia R., 64 Cal. Rptr. 2d 93, 94–95 (Cal. Ct. App. 1997).

43. *See* E.M. Bennett & K.J. Kemper, *Is Abuse During Childhood a Risk Factor for Developing Substance Abuse Problems as an Adult?,* 15 J. DEV. & BEHAV. PEDIATRICS 426 (1994); Mark Chaffin et al., *Onset of Physical Abuse and Neglect: Psychiatric, Substance Abuse, and Social Risk Factors From Prospective Community Data*, 20 CHILD ABUSE & NEGLECT 191 (1996); Paula K. Jaudes et al., *Ass'n of Drug Abuse & Child Abuse*, 19 CHILD ABUSE & NEGLECT 1065 (1995); Kelly Kelleher et al., *Alcohol and Drug Disorders Among Physically Abusive and Neglectful Parents in a Community-Based Sample*, 84 AM. J. PUB. HEALTH 1586 (1994); Susan J. Kelley, *Stress and Coping Behaviors of Substance-Abusing Mothers*, 3 J. SOC. PEDIATRIC NURSES 103 (1998); J. Michael Murphy et al., *Substance Abuse and Serious Child Mistreatment: Prevalence, Risk, and Outcome in a Court Sample*, 15 CHILD ABUSE & NEGLECT 197 (1991); Diana R. Wasserman & John M. Leventhal, *Maltreatment of Children Born to Cocaine-Dependent Mothers,* 147 AM. J. DISEASES CHILD. 1324 (1993).

44. NANCY PEDDLE & CHING-TUNG WANG, CURRENT TRENDS IN CHILD ABUSE PREVENTION, REPORTING, AND FATALITIES: THE 1999 FIFTY STATE SURVEY 14 (Prevent Child Abuse America 2001).

45. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., NO SAFE HAVEN: CHILDREN OF SUBSTANCE-ABUSING PARENTS (1999).

46. Robert T. Ammerman et al., *Child Abuse Potential in Parents With Histories of Substance Abuse Disorder*, 23 CHILD ABUSE & NEGLECT 1225 (1999).

47. Richard Famularo et al., *Parental Substance Abuse and the Nature of Child Maltreatment*, 16 CHILD ABUSE & NEGLECT 475 (1992).

48. This is a subset of those cases in which there is or has been a restraining order, the children have witnessed domestic violence, at least one parent has a substance abuse problem, or a history of CPS investigation exists. *See supra* text accompanying note 32.

49. *See* CAL. FAM. CODE § 3150 (West 1994 & Supp. 2003).

50. Santa Clara County Family Court Services requested appointment of a children's attorney in approximately 8 percent of litigated child custody and visitation disputes referred for mediation in 1998.

NOTES

51. For examples of situations justifying dependency court jurisdiction, *see* CAL. WELF. & INST. CODE § 300 (West 1998 & Supp. 2003).

52. *See* CAL. R. CT. 1424 (2003).

53. *See* Barrett J. Foerster, *Children Without a Voice*, 42 JUV. & FAM. CT. J. 9 (Fall 1991).

54. The grant provided a total of approximately 20 volunteer assignments over a period of 24 months. Family Court Services could request that the court order a case assigned to a CASA volunteer. FCS usually made these requests in cases where it had determined that both parents (or all parties) were experiencing serious difficulties that kept them from being able to adequately care for or protect their children; the children were in jeopardy related to issues of child abuse or neglect, substance abuse, domestic violence, or lack of appropriate medical care, or there was extremely low parental functioning; and the child welfare department was not providing services.

55. The author received the request and provided the training.

56. Santa Clara's Juvenile Court, too, has taken steps to ensure communication and cooperation among courts and related agencies handling family matters. For example, the local Juvenile Rules of Court provide: "The Court hereby finds that the best interests of children and victims appearing before the Juvenile, Family, Criminal and Probate Courts, the public interest in avoiding duplication of effort by the Courts and by the investigative and supervisory agencies serving the Juvenile court or court serving agency outweighs the confidentiality interest reflected in Penal Code Sections 11167 and 11167.5, Welfare and Institutions Code Section 827 and 10850, Family Code section 1818, and Probate Code Section 1513, and therefore good cause exists for…" exchanging verbal and written information between Family Court Services, the Juvenile Probation Department, the Department of Family and Children's Services, the Adult Probation Department, and the Probate Court Investigator's staff.

57. *See* CAL. FAM. CODE § 3151 (West 1994 & Supp. 2003).

# Promoting Permanency

## *Family Group Conferencing at the Manhattan Family Treatment Court*

Family drug treatment courts work with drug-addicted parents and guardians charged with abuse or neglect.[1] The goal of family drug courts is twofold: first, to find a permanent and safe home for the children as quickly as possible; second, to link the parent or guardian to drug treatment services, monitor compliance, and achieve long-term sobriety.

The cases are often complicated. Each situation is unique, and the ultimate outcome depends on a host of factors, among them the parent's progress in treatment, the parent's ability to provide for his or her family, interactions between the parent and child, and the availability of family members or friends to serve as supports for the parent or child.

One temptation in these cases is to view the family as the problem. After all, it was the family's dysfunction—in the form of a drug-abusing parent—that drew the attention of the child welfare agency in the first place. And the effects of parental drug abuse are often compounded by other family-related issues: poverty, lack of education, inadequate housing, and domestic violence.

Nonetheless, there has been a significant effort over the last 10 years—by both child welfare practitioners and lawmakers—to emphasize the positive role a family can play in resolving cases of neglect or abuse. Federal legislation now encourages child welfare agencies, when possible, to keep families together[2] and to keep children, if not with parents, in "kinship care."[3] Most state welfare policies also give preference to relatives when placing a child with someone other than his or her parents.[4]

To facilitate this effort, social workers and child welfare agencies have begun experimenting with new ways of tapping into a family's strengths. One technique that has gained increasing currency over the last decade is family group conferencing, which brings family members together for facilitated discussion and allows them to play a role in developing possible solutions.

This article describes how the Manhattan Family Treatment Court has used family group conferencing to support the court's two primary goals: speedy permanency planning and parental sobriety. The Manhattan Family Treatment Court has found that family group conferences enhance permanency planning, help the court identify supports for ongoing sobriety in a parent's life, and, in addition, address the service needs of children, who, because of their parents' addiction, are at greater risk for abusing drugs in the future.

**Robert Victor Wolf**

*Center for Court Innovation*

There has been a significant effort over the last 10 years—by both child welfare practitioners and lawmakers—to emphasize the positive role a family can play in resolving cases of neglect or abuse. To facilitate this effort, social workers and child welfare agencies have begun experimenting with new ways of tapping into a family's strengths. One technique that has gained increasing currency is family group conferencing, which brings family members together for facilitated discussion and allows them to play a role in developing possible solutions.

This article describes how the Manhattan Family Treatment Court has used family group conferencing to support the court's two primary goals: speedy permanency planning and parental sobriety. The Manhattan Family Treatment Court, which works with drug-addicted parents and guardians charged with abuse or neglect, has found that family group conferences enhance permanency planning, help the court identify supports for ongoing sobriety in a parent's life, and, in addition, address the service needs of

*Continued on page 134*

*Continued from page 133*

children, who, because of their parents' addiction, are at greater risk for abusing drugs in the future. ■

*The author is grateful for the assistance and cooperation of the following individuals in the researching and writing of this article: Hon. Gloria Sosa-Lintner, Andrew Baer, Raye Barbieri, Greg Berman, Liza Bowers, Lisa Horlick, Dawn Maletta, Jay Maller, Brad Martin, Dru Orenstein, Beth Ornstein, Valerie Raine, Annette Riley-Richmond, Dalma Riquelme, and Angie B. This article was supported, in part, by a grant awarded to the Center for Court Innovation by the federal Center for Substance Abuse Treatment and administered through Northrop Grumman Information Technology–Health Solutions, Rockville, Maryland.*

The article begins with an overview of family group conferencing, including a discussion of its origins, and then describes how family group conferences are conducted at the Manhattan Family Treatment Court. The next major sections review some key issues that the court has had to resolve to make family group conferencing an effective tool and examine results of the family group conferences. The final sections offer advice for other jurisdictions interested in family group conferencing and observations about the Manhattan court's experience.

## ORIGINS

Family group conferencing was developed in New Zealand in the 1980s as a response to youth crime and family dysfunction. In the case of youth crime, the family group conferences operate as a form of victim-offender mediation, in which an offender meets with the victim to discuss the offense. Family and supporters of both the offender and the victim attend and, guided by a facilitator, draw up a plan of action, which might include a letter of apology or direct compensation to the victim and community service. The model in the juvenile delinquency setting is designed to hold the offender accountable for his or her actions, and also to give the victim or victims a chance "to express the full impact of the crime upon their lives," according to a U.S. Department of Justice overview of the technique.[5]

New Zealanders also use family group conferences to deal with cases of child abuse. In the child welfare setting, the conferences bring together members of an extended family so they can work collectively to stop family violence and make decisions about the welfare of children. The technique is described as "strengths-based," because it tries to identify a family's strengths and harness those strengths for the benefit of the child. The family group conferences represented a marked shift in child welfare practice, which historically had focused more on a family's failings than on its strengths. The technique also takes some of the decision-making power away from the child welfare agency and gives it to the family. Family group conferences, according to a practitioner in the United Kingdom, "are predicated on the belief that, given the right information and resources, families will make better decisions for themselves than professionals. . . . The approach attempts to change the relationships between families and professionals, moving families from passive recipients of 'professional wisdom' to front-line decision makers for their children."[6] In 1989, New Zealand codified the use of family group conferencing into law. Now all juvenile delinquency cases and substantiated cases of child abuse are referred for a family group conference.

From New Zealand the technique traveled to Australia and then to other parts of the world, including the United States. Since the early 1990s, United States child welfare agencies have used family group conferences to prevent the removal of children from their homes, to facilitate family

reunification, and to identify other potential homes for children within the kinship circle. During a typical conference, child welfare professionals update the family on the status of the case; explain any bottom-line requirements that the agency, or the family court, may have regarding the case; and then give the family time by themselves to discuss the situation and develop a proposed solution. Solutions can, of course, take a wide variety of forms—perhaps placing the child temporarily (or permanently) with a caring relative or leaving the child in the home but with frequent monitoring by family members. If the solution satisfies the legal and safety concerns of the welfare agency and the court, it is typically adopted.

Family group conferencing appealed to child welfare experts in the United States for a number of reasons. Perhaps the most important was its focus on repairing families and reducing the placement of children in foster care—goals that reflected the latest thinking in the child welfare community. As in New Zealand, the approach is meant to emphasize a family's strengths, empower the family to solve its own problems, and reduce the adversarial dynamic between the family and the child welfare agency. Child welfare agencies found that plans developed during a family group conference often had a better chance of succeeding, in part because there was more family "buy-in" to the plan right from the start.[7] Family group conferences also offered child welfare agencies a new way to speed permanency planning, which was a key mandate of the Adoption and Safe Families Act (ASFA), passed by Congress in 1997.[8]

## THE MANHATTAN FAMILY TREATMENT COURT

Family group conferencing is a social work tool, one designed to help explore and heal family dysfunction. Therefore it may strike some as unusual that a court—which traditionally deals with black-and-white issues of law and procedure—would sponsor family group conferencing, a practice steeped not in law but in human emotion.

But for the Manhattan Family Treatment Court, family group conferencing is a natural extension of the court's basic mission: to protect children from neglect and expedite their placement into safe and permanent homes. The Manhattan Family Treatment Court was created in 1998 at the behest of New York State Chief Judge Judith S. Kaye, who was looking for a better way to handle the family court's growing caseload. Her specific concerns were the number of children in foster care and the lengthening of the average foster-care stay from 1.81 years in 1985 to 4.5 years by 1997.[9] These concerns were also reflected in ASFA's mandates, implemented in New York State in February 1999. The act, among other things, imposed tight limits on how long a child could remain in foster care.[10]

Because the crack epidemic was largely responsible for the foster-care crisis, the Manhattan Family Treatment Court was designed to work with drug-addicted parents. The court works much like a criminal drug court: it links parents or guardians ("respondents," in the parlance of New York's family court) to drug treatment and then rigorously monitors compliance with court orders. The court requires parents to return to court frequently—as often as once a week at first—for drug testing and case management. The court also provides links to an extensive network of social services, including job training and housing.

The court accepts that relapse is often part of the recovery process. To teach participants that their actions have consequences, the court responds to relapses with graduated sanctions—for example, requiring a respondent to write an essay describing what he or she learned from the relapse or requiring extra court appearances and drug testing. The court also uses rewards—applause in the courtroom, less frequent court appearances—to encourage those who are doing well.

### GOALS OF CONFERENCING

While much of the court's work is focused on helping the parent achieve lasting sobriety, the court's primary goal is to establish a permanency plan for

the child. It was the pursuit of this paramount goal that led planners at the Manhattan Family Treatment Court to take a close look at family group conferencing. Court planners knew that family group conferencing was being used in other child welfare settings, and they hoped that the court, too, could use the technique to deal more effectively with the complex issues facing court participants and their families.

At the Manhattan Family Treatment Court, family group conferences serve a number of purposes, including:

***Educating family members.*** Family group conferences educate the entire family about the court process and the status of the respondent and his or her children. Families often find court procedures confusing. For example, many don't realize that respondents are at risk of losing their parental rights. "One of our first tasks in a conference is to educate everyone about the court process, our policies, and even to offer a basic primer about addiction, relapse, and recovery," says Lisa Horlick, supervisor of family group conferencing at the treatment court. Court staff have found that when families have the process explained to them, relatives are far more likely to offer a helping hand.

***Learning more about a family.*** Family group conferences give court staff more information about a family, which, in turn, helps the court and the child welfare agency develop a better permanency plan. "Sometimes it's really amazing what we find out in a family group conference," Horlick says. "You realize that there are people in the family who really want to help the respondent, people we might never have known about if we hadn't had the conference." Since confidentiality rules limit how much can be revealed outside a conference, Horlick asks participants, when appropriate, to sign release forms. The forms give Horlick permission to share relevant information with appropriate third parties. (See the later section "Challenges" for a discussion of confidentiality issues.)

***Identifying resources.*** Because the court's primary goal is to ensure that children are raised in safe and nurturing homes, staff work to identify the resources families need to function effectively over the long term. Thus, the court uses family group conferences to identify ways that the extended family can support a parent in recovery—by encouraging him or her to attend Twelve-Step meetings, for instance, or by offering regular babysitting or other tangible supports. "Drug treatment can be very overwhelming, and it's difficult for a mother or father to go through it alone. So if we can bring family in to offer support, to help plan, then the respondent may be better able to stay focused on her own recovery," Horlick explains. Family group conferences also highlight the needs of family members, so that court staff can make appropriate referrals for them as well.

***Breaking the cycle of addiction.*** The conferences address the needs of children, with a particular emphasis on preventing their future involvement with drugs. "We wanted to get parents to think about the extent to which substance abuse is intergenerational, and how parents can deliver anti–drug abuse messages starting at very young ages," says Raye Barbieri, former director of the Manhattan Family Treatment Court. "We also wanted to get the parents to know that getting their kid back was just the beginning. That's the message we're trying to get across."

## PREPARING FOR A CONFERENCE

Case managers at the Manhattan Family Treatment Court encourage all their clients to participate in a family group conference, which is held in a conference room at the courthouse. Other court players—including the judge, staff from the Administration for Children's Services (New York City's child welfare agency), the child's law guardian, and the respondent's own attorney—may also urge respondents to participate.

If a respondent wants to learn more about family group conferences (about half of the court's clients ultimately choose to participate in the voluntary

process), they meet with Horlick, who explains the goals of the conferences and how they work. The decision whether to participate is itself empowering, Horlick observes. "We're asking you, 'Do you feel this is something you need? Look at the facts. Is this going to help your family?' Sometimes parents aren't ready to do a conference now, and we tell them, 'You can wait.' And that's what some of them do. They wait until they have their act together more and then they ask for a conference." Notes Judge Gloria Sosa-Lintner, who presides over the court, "You can't force a family group conference on people. It's really only helpful to those who are ready for it."

Parents can elect to hold a family group conference at any time during their involvement with the court. Depending on its timing, a conference will focus on different issues. Early in the process it may focus on finding a safe temporary home for the child or on building familial support for a respondent in the first stages of recovery. Toward the end of the process a conference may deal with issues around family reunification or, if the respondent is not going to assume parenting responsibilities, with finding a permanent alternative for the child within the family.

The underlying issues giving rise to a family group conference are as varied as the clients themselves. Angie B., a 27-year-old mother of three, requested a family group conference because she wanted her mother and sister to know more about the challenges she faced during treatment. "My family didn't understand what was going on," Angie recalls. "They thought it should be done quick, and I should have my kids back in a week or two. They didn't understand the system." Liza Bowers, a lawyer who formerly represented children in Manhattan Family Treatment Court, recalls a case in which the children's disagreements with their foster parent—their grandmother—were the focus of the conference. "The children were having trouble adjusting to the rules in the grandmother's household and the fact that they couldn't see their mother when they wanted to," Bowers says.

When a parent chooses to proceed with a conference, Horlick asks for the names and phone numbers of the family members whom the respondent wants to invite. *Family* in this context is broadly defined. "Family is really anybody the respondent defines as family. Family can be a neighbor, a brother or sister, a partner. Anybody who's going to be involved—or be an obstacle—in planning for the children," Horlick explains. With the respondent's permission, Horlick sometimes invites others to participate, including a court liaison from the Administration for Children's Services who can answer specific questions about child welfare regulations and procedures.

Horlick has the respondent sign a release-of-information form, allowing her to contact family members and tell them about the respondent's participation in family treatment court. Horlick then contacts the family members and tries to schedule a conference: "I try to schedule it as soon as possible, maybe within two weeks, because I feel that the longer it goes on, the less likely it is going to happen." Fortunately, Horlick has found that most families agree to participate. "I've had only two different families where they said, 'No way, I'm not coming in. I don't care. I've tried to help her before, and she doesn't deserve to have a child,'" Horlick says. "Fortunately, most families come in."

## NO PRESET SCRIPT

The conferences themselves have no preset script—but that does not mean they are free-for-alls.[11] Horlick, in consultation with the respondent, sets goals for each conference and then uses her authority as the facilitator to keep each conference on track. Typical goals might be to identify a relative who can take a child either temporarily or permanently; to encourage relatives or friends to provide respite care for the parent, perhaps by babysitting one night a week or taking the children for an occasional weekend; or to reduce family conflict, such as frequent arguments between a teenage daughter and her newly sober mother. The establishment of clear goals is critical to a conference's success. "The model is task oriented," Barbieri says. "It's not therapy."

Horlick spells out the goals of a conference at the outset, but she often has to use all her skills as a certified social worker to keep the group focused. Tempers sometimes flare and voices are sometimes raised. While Horlick does not immediately quash this kind of emotional venting, she tries to keep the outbursts to a minimum. She does this, in part, by reminding participants that only by discussing issues civilly will they be able to reach the best result for the respondent's children.

Horlick also gives participants a primer on the Manhattan Family Treatment Court. Her brief lecture could be called "Family Treatment Court 101," since she tries to give an overview of the entire treatment court process from admission to final permanency plan. She talks about the importance of judicial monitoring and regular drug testing. She explains that the court has divided the process into three phases and that a respondent must achieve a period of sobriety before progressing from one phase to the next. And she talks about the process of recovery from addiction, including the fact that episodes of relapse, for most people, are common. For many family members, this is their first chance to learn about the court—and about the ins and outs of substance abuse treatment.

Horlick then updates the family about the respondent's case, focusing particularly on the current status of the respondent's children and the progress, if any, that's been made toward a permanency plan. "I had one family recently that hadn't realized that the termination process had already started. Fortunately, someone in the family volunteered to take custody. Had we not encouraged them to come in, the kids probably would have been moved to a preadoptive home," Horlick says.

If a representative from the Administration for Children's Services attends, she helps the family understand its options. She might, for instance, explain the difference between custody and adoption. Or she might explain what criteria a family member needs to meet to be approved as a temporary guardian. "We had a situation involving a mother with two kids where one family member wanted to take the boy and another family member would take the girl," Horlick says. "But the representative from the Administration for Children's Services said, 'There's no way we'd approve splitting those kids; they've always been together, and we're not splitting them up.' So then the conference was about how they could work as a family to keep the kids together."

Annette Riley-Richmond, an Administration for Children's Services liaison, has attended several family group conferences. She says that having the respondent and extended family members in one room allows her to make sure everyone has the same information. "Everyone is getting the same message," Riley-Richmond says. "There are always two or three sides to a story, and when you put people together in a room, the story will start out a little crooked, but as time goes on it straightens out. By the end, everyone is clear what their role is, and they know what's at stake."

### ELICITING CONVERSATION

Once Horlick has presented the family with the facts of the case, she opens the floor for discussion. Some participants aren't sure what to say at first, while others are eager to talk. "Sometimes I have to elicit the conversation," Horlick says, "but most of the time the family is really ready to go, especially the respondent. The respondents… usually have specific things they want to say."

Horlick sometimes encourages participants to look at patterns of addiction within the family. Occasionally, she creates a "genogram"—a family tree that highlights the familial history of substance abuse. "Genograms help the family understand that the addiction didn't just start with the respondent," explains Dalma Riquelme, project director of the clinic at the Manhattan Family Treatment Court. "A genogram helps identify substance abuse going back generations, so that family members get a better understanding of why the respondent has an addiction. That's been very eye-opening for some families." Genograms also graphically demonstrate to families that the next generation—the respondent's children—is at risk of inheriting the addictive

behavior. Horlick often uses the genogram to launch a discussion about ways family members can help the respondent's children avoid drugs and stay out of trouble.

Most conferences last about 90 minutes. Outcomes vary widely. For Horlick, the best outcome involves some form of action plan—basically a "to do" list for conference participants. The action plan helps crystallize what was discussed during the conference, offering participants a tangible guide for action. For example, an action plan might spell out the details of a babysitting arrangement between a relative and a respondent. Or it might detail a respondent's job-search strategy. And it often includes tasks for Horlick and other "official" participants; for instance, Horlick might refer the family to a community-based organization for ongoing family therapy, while the representative from the child welfare agency might conduct a background check on a relative who is willing to take custody of the children.

Sometimes a conference produces a written agreement. A formal agreement is particularly helpful for families who are facing the prospect of reunion but are worried about future conflict. Conflict, of course, can arise for any number of reasons. Children may resent the long absence of their parent and act out or may want to test the limits of their parent's renewed commitment to the family. Children who previously knew their parent as a person who never set limits might also find it difficult to live with a parent who is suddenly setting curfews, regulating what they watch on television, and assigning chores. A written agreement can help ease tensions by spelling out expectations and rules of conduct. "A household contract really helps with teenage kids," Horlick says. "They're not used to having a parent around and don't want to be told how to behave. So we help the family work out a set of rules, like chores or curfews—things like 'I promise to be home by 10 every night.'"

At the end of the conference, Horlick asks participants if they found the session helpful and if they want to meet again. Some families feel that one session is enough, but others ask to meet again and again. Horlick has met up to five times with a single family, and she encourages families to continue the conversation on their own. She also makes referrals to family therapy when appropriate. "I give everyone in the room my card with my number. They always have access to me. And I remind them that this is always something they can do without me, that they don't need me in order to sit as a family and have a conversation. That's an important outcome. If they can now start a family conversation on their own, that's better for everyone down the line."

## "WE THOUGHT SHE WAS DOING GREAT"

Each family member brings into a family group conference his or her own knowledge, needs, perceptions, questions, judgments, and resentments. This makes each conference unique—and often extremely complex.

At a family group conference in March 2002, family members gathered to discuss the future of a 10-year-old boy and his 12-year-old sister who were currently in nonkinship foster care.[12] The question for the conference was what was going to happen to the children.

As the conference progressed, it was clear there was no simple answer. The youngsters' mother had been in the treatment court about 14 months but had made no meaningful progress toward recovery. The court was moving toward terminating her parental rights, but family members wanted the court to give the respondent another chance. At the same time, the family members were trying to figure out whether any of them was willing to take custody of the children or adopt them.

A number of factors complicated the discussion. For one thing, the respondent herself did not attend because she couldn't leave her residential treatment program—although the conference was conducted with her consent. This meant that her wishes had to be communicated secondhand. "She told me she knows now she wants her kids back," explained the respondent's great-aunt.

The first task for Horlick and Riley-Richmond, the liaison from the child welfare agency, was to explain the status of the case. While the family was hopeful that the respondent was finally making progress in recovery, Horlick explained that it might already be too late. "The [child welfare] agency is working under legally mandated deadlines, which means the court will soon start the termination process," Horlick said.

At first, the family members talked around this reality. "We're hoping she'll get her life back and get her kids back," a cousin said. Horlick and Riley-Richmond repeated again and again that the prospect of the children's return to their mother was dim. For family members, this news was not only sad, but it didn't reflect their own personal experiences with the respondent. Said the cousin: "We always thought she was doing great because we never saw her high." The respondent, in fact, had given them the impression that everything was going well. "We had no idea it had come to this," remarked the cousin, who added that she would be willing to take permanent custody of the children if the respondent were ultimately to fail.

Horlick then guided the conversation with questions: How would everyone feel if the respondent were to fail again in treatment? Did the cousin have a large enough home to raise the two children? Was the cousin prepared to tell the respondent that she was on the brink of permanently losing custody of her children?

At the end of the conference, it was agreed that the Administration for Children's Services would investigate the cousin and her husband for their suitability as long-term or permanent caretakers of the children. In the meantime, the family would discuss with the respondent the possibility that she would lose her parental rights and that her cousin might become the children's permanent guardian. The family members said they wanted to have at least one more conference and hoped the respondent would attend. One of the relatives seemed to sum up the family's sentiments when she said, "I just hope that however the situation turns out, these kids stay with family."

When it was over, Horlick was pleased. She noted that the conference produced at least two meaningful outcomes: first, the family now had a clearer understanding of the court process and the very real possibility that the respondent could lose her parental rights; and, second, the family offered to help find a home for the children within the family.

## ADAPTING THE MODEL

From the beginning of the conferencing program, one of the main issues for staff was how to adapt family group conferencing to conform to the needs and limits imposed by the treatment court setting.

A number of factors played a role in the design of the conferences. One important factor was the presence of the court just outside the conference room door. While participation is technically voluntary, the court setting is inherently coercive. Respondents are free to decline the offer of a family group conference, and yet there is often unavoidable pressure to participate. Although she never orders a respondent to participate in a family group conference, Judge Gloria Sosa-Lintner sometimes puts a "heavy suggestion" to participate on the record. "If the clinical staff thinks it may be helpful, I'll say, 'You should at least try it,'" says Sosa-Lintner.

No doubt the judge's encouragement sways some clients. In this sense, the decision to participate is not always purely voluntary—that is, some clients may be participating not out of a self-motivated desire to help themselves, but in an effort to please the judge. Because the meetings are confidential, however, participants are reminded that the judge never finds out what transpires during the session (unless participants give their explicit written consent; see the later section "Challenges" for more on this issue). Horlick also emphasizes to each family that even though the conferences are taking place in a courthouse, they are intended to be neutral. "I express to them that even though we're in the courthouse, this is a different

type of meeting. It's not driven by the judge, it's driven by the respondent who requested it."

## ROLE OF THE FACILITATOR

The role of the facilitator is probably one of the key distinguishing features of the Manhattan Family Treatment Court's approach to family group conferencing. In other settings, the leader or facilitator of a family group conference usually lets the family steer the session. In fact, facilitators sometimes leave the room to allow the family to develop a plan of action.

In the Manhattan Family Treatment Court, however, the facilitator is more directive. The facilitator, for instance, never leaves the conference. And she frequently reminds the family to stay focused on the topic at hand. Horlick said she does this for a number of reasons: first, she wants to make sure the session is as productive as possible; second, because the family doesn't have the final say over the outcome of the session—only the court has authority to finalize a permanency plan—the facilitator needs to play an active role, if only to guide participants to a plan that fits within the court's legal guidelines. "Because these clients are already under the court's jurisdiction, it's not so flexible," Horlick says. "The family can't simply say, 'This is what we're going to do,' and I wouldn't want to give a family the impression that they can decide to do whatever they want."

Dalma Riquelme, the project director of the clinic at the Manhattan Family Treatment Court, feels that a strong facilitator and the oversight of the court are important for obtaining a meaningful outcome. "By holding the family group conference ourselves, we're assured that all the important issues—particularly affecting permanency—are discussed. If it takes place off-site and without a facilitator from the court, so many other things come into play that you're not guaranteed that the end result will be permanency," Riquelme says.

## CHALLENGES

As the Manhattan Family Treatment Court has gained more experience with family group conferences, Horlick and the rest of the team have grappled with a number of interesting questions:

**Should children attend conferences? If so, what role should they play, and what limits, if any, should be placed on the conversation?**

With regard to children, the policy of the treatment court clinic is flexible. Of course, the presence of a child can be inhibiting. And yet the clinic has also found that a child's attendance can be invaluable, benefiting the child and the entire family. The facilitator needs to iron out the goals of the meeting with the respondent before determining the appropriateness of a child's attendance. If a parent wants to help her family understand her addiction and plans to discuss her problems in graphic detail, then "there's really no point in the child's being there," Horlick says. But if the parent wants to help her child better understand why he's in foster care, then the family group conference can provide an excellent opportunity to do so.

"A lot of times, the mother or father might say, 'I want my children to be here so they have an understanding of why they're not with me,'" Horlick says. It's crucial, of course, that the discussion be conducted in terms the child can understand. For instance, rather than tell a 5-year-old that her mother is in drug treatment, a parent might say, "Mommy's in school to learn how to be a better mommy." Horlick tries to help the respondents and other family members use age-appropriate language, but she also believes children need to be told as much as their age will allow. "You'd be surprised how much these kids already know. And, at some point, the families need to give these kids some education about drugs. Tiptoeing around the issue isn't a good idea, especially when the kids are older, around 10 and up."

Both children who are named in the court petition and those who are not can benefit from a family group conference. The so-called nonsubject children frequently have questions and concerns that need to be addressed, and a family group conference is an excellent way to engage these youngsters in dialogue.

**What if family members want to hold a family group conference, but the respondent is against the idea or simply unable to attend because he or she is in jail or a residential treatment facility?**

Although it may seem strange to hold a family group conference without the respondent, court staff have done so on a number of occasions. Sometimes court staff have no choice, as when a respondent has disappeared but a deadline regarding permanency is approaching. In such a case, staff will try to bring family members together to see if the child or children can be placed within the family. Staff have also held family group conferences without the parent at the parent's request. "The mother may be in residential treatment, but her kids are in foster care with their grandmother and they're not getting along. So mom decides that the only way she can stay in treatment is if she knows that her family's needs have been addressed. In that case, she might ask us to hold a family group conference without her," Horlick explains. The court's philosophy is that a family group conference can be helpful with or without the respondent. "Even if it's only to give the family information about the case, we think a family group conference is worthwhile," says Horlick.

**Do confidentiality rules place limits on the discussion or prevent the facilitator from being as candid as possible?**

Obviously, there is no legal problem if a client signs a release-of-information form allowing the facilitator to disclose any and all details of the case during the family group conference. Concern arises only when a client has not signed a release. If a client has disappeared but the family requests a group conference, the facilitator is obliged to follow all confidentiality rules and limit disclosures to only what is legally permissible.

This, of course, poses a significant obstacle when the facilitator is trying to educate family members about the treatment court process. The facilitator must use only general statements about the court and how it works, explaining, for example, that the court process is divided into three phases or that the court uses frequent urine tests to monitor sobriety. Horlick explains: "I had a family who said, 'I don't understand why she's not getting her kids back.' And I had to explain to them what our policy is regarding urine screens. I didn't say, 'Your daughter has tested positive every day this month,' but I say, 'Look, this is how it works. She gets screened twice a week, and you get to spend more time with your child the longer you're sober.' So they could conclude that if the mother is getting only one hour of supervised visits at the agency, she's got very little clean time, which was a surprise to them. That's not what the daughter had been telling them." While the facilitator can't reveal what phase the respondent is in or the results of the most recent urine test, she can still discuss the status of the children and the steps that need to be taken to develop a permanency plan.

But even when a client has signed a release-of-information form, Horlick is not always comfortable discussing the details of a case. Although legally able to disclose a client's status, Horlick tries to limit the information she shares when the client is unable to attend the conference. Rather, she encourages family members to ask the parent themselves the next time they see him or her. She takes a similar approach when the client is at the conference—encouraging the client to answer the family's questions about his or her progress in treatment.

**Do confidentiality rules prevent a facilitator from discussing outside the family group conference what occurred or was discussed in the meeting?**

The short answer to this question is yes. At the end of every conference, however, the facilitator at the Manhattan Family Treatment Court asks participants to sign a consent form, allowing her to reveal to the court and appropriate case managers that the family group conference occurred and to offer a brief summary of what transpired. The form allows participants to be as specific as they want. For instance, if a relative is interested in caring for a child, he or she can request on the consent form that the facilitator inform the child welfare agency, which, in turn, will initiate an investigation into the relative's suitability

as a foster parent. Through the use of the consent form, the facilitator is able to ensure that knowledge gained about the family during the group conference is effectively applied toward achieving the court's two main goals: permanency planning and parental sobriety.

**If a family member is part of the problem (for example, a relative is using drugs), what role, if any, can he or she play in a family group conference?**

It may seem counterintuitive to invite an active drug user to a family group conference, but staff at the Manhattan Family Treatment Court do allow it. Because one of the purposes of the family group conference is to anticipate and deal with problems that might arise down the road, it can only help to deal openly and squarely with problematic family members. Further, the family group conference can provide an opportunity to identify needs of family members—like drug treatment—and make appropriate referrals.

## MEASURING RESULTS

From February 2000 to February 2002, court staff have held 138 family group conferences involving 82 different families. How effective were these family group conferences? Because each conference is different—bringing together a unique constellation of family members, problems, and resources—it is impossible to quantify the results. And yet the court reports that, at least anecdotally, its experience with family group conferencing has been positive.

The court has found that family group conferencing has a number of clear advantages. For example, family group conferencing, as the court applies it, is highly flexible. It can help families who are moving toward reunification, and it can help those who are moving in the other direction—toward permanently placing children with family members or freeing them for adoption. It can be used with or without the participation of the respondent. It can also be used at any time during the treatment court process.

Jay Maller, a member of the assigned-counsel panel who represents parents in Manhattan Family Treatment Court, says a family group conference can be "extremely important." A family group conference can help a parent "build a foundation" of support. "I think it's similar to telling a parent, 'Look at your vocational needs, look at your housing needs.' A family group conference is saying that to safeguard sobriety, you also need to restore family relationships."

## POSITIVE FEEDBACK

Court staff have not formally surveyed participants for their reactions to family group conferences, but anecdotally the results are promising. Participants interviewed for this article spoke highly of their experience, as did attorneys representing both adults and children.

Angie B., for example, was in constant conflict with her mother and sister before they participated in a family group conference. "They kept asking me why things weren't moving faster, and I was hurt by their questions. I would get frustrated and curse at them, and they couldn't talk to me. I really felt abandoned," Angie says. The conference was "very intensive . . . everybody was crying," she explains; in the end, it "was like a door opening." At the conclusion of the conference, her mother agreed to babysit the children when they returned to Angie's home, and her sister agreed to offer support if Angie ever felt the urge to use drugs. "Now they come to court with me every time, and we're getting along much better," Angie says.

Liza Bowers, a former law guardian in Manhattan who is now project director of the family treatment court in Queens, New York, finds family group conferences "very helpful. I think it's a very important tool, especially in family court, because the bottom line is that no matter what we do in the brief time their case is open, the family members are always connected to each other, and they need to figure out a way to work together."

Brad Martin, an attorney who represents children, says the family group conference offers a unique opportunity for his clients to have a direct

say in what happens to them. "To the extent that a family group conference involves children in decision making, then it's a good thing and a benefit to them," Martin remarks. Andrew Baer, an attorney for parents, says he thinks family group conferences are a good idea, and he actively urges some clients to participate. "Theory and practice have shown that when people go through drug treatment and alcohol rehabilitation programs, support networks are very, very important," Baer says.

### KEY QUESTIONS

The treatment court hopes eventually to answer some key questions about the efficacy of family group conferencing. Among the questions researchers may eventually explore: Do family group conferences increase the likelihood that a child will remain within the family—that is, either be returned to a parent or placed in kinship foster care? What types of family issues can family group conferencing address most effectively? Do family group conferences spark long-term changes in family dynamics, or do the benefits fade soon after the conferences? Because the goals of family group conferencing are to create stronger supports for a parent's recovery and to address the needs of children, researchers might also explore the following: Do family group conferences have an impact on a parent's long-term sobriety? Do family group conferences play a role in improving long-term outcomes for the respondent's children, specifically by lowering rates of drug abuse?

Based on their anecdotal experience, staff at the Manhattan Family Treatment Court strongly believe that family group conferences are "certainly something worth trying," says Raye Barbieri, who introduced family group conferencing to the Manhattan Family Treatment Court when she served as the court's director. Again and again, staff at the court have seen family group conferences produce tangible results: a permanency plan, a resolution of family conflict, hope for a parent's ongoing sobriety. "It's a way to help respondents rebuild relationships and negotiate their lives," remarks Judge Sosa-Lintner. "So many of our parents have burnt their bridges, and they need all the help they can get."

Sosa-Lintner emphasizes, however, that whether or not a respondent participates in a family group conference does not affect how she handles a case: "It's an additional service that's not going to make or break a case."

And yet a respondent's participation in a family group conference is often interpreted as a sign of the parent's interest in getting his or her life in order. "It leaves a positive impression when a parent is willing to do a family group conference," explains Riley-Richmond, the court liaison from the Administration for Children's Services. "It makes me feel that they're trying harder to reunify their family. Any help they can get is beneficial to the case."

## ISSUES TO CONSIDER

A family treatment court interested in using conferencing as a tool for permanency planning or supporting a respondent's recovery has a number of issues to consider. Those issues can be broken down as follows:

### *Who*

Because the family group conference is built around the needs of the respondent and his or her children, the respondent should help identify the participants. When the respondent is absent, however, the treatment court clinic's staff and the court liaison from the child welfare agency will have to identify those in the life of the child who may be able to offer support. It may also be useful to consult with the respondent's children—that is, if they are old enough to meaningfully contribute—about possible participants. Court staff will also have to decide whether to broaden the list of participants to include lawyers, caseworkers, or other professionals. The Manhattan Family Treatment Court avoids inviting child protective workers into the conferences, largely because of confidentiality concerns. They also do not invite lawyers to the sessions because their presence tends to inhibit free-flowing discussion. Ideally, the conference will include key people in the respondent's

life, including family and friends, who can serve as supports. The conference can also include people who may pose potential obstacles to reunification.

Another important "who" to determine is the conference facilitator. Ideally, the facilitator should have experience working with families and addressing the often-complicated mental and emotional issues that inevitably arise. "A trained facilitator helps move a very task-oriented session along given the limited time," Barbieri explains.

### *What*

A family group conference needs a clear focus. Before the conference begins, court staff should know what topics will be covered; otherwise, the conference risks turning into a free-for-all. The following questions may help the family group conferencing facilitator create an agenda for the conference: What is the status of the case? What does the family know about the case? What are the impediments to creating a permanency plan? What special needs of the respondent, child, or family members have yet to be addressed? The answers to these questions can help the facilitator map out a productive conference agenda.

### *When*

The ideal time to hold a family group conference varies from case to case. The best strategy is probably to introduce the respondent to the idea of a family group conference early in the court process, and then periodically remind him or her that the tool is available. Family group conferences seem to be most helpful at critical points in the treatment process. Such critical points include the following:

- after 90 days of sobriety, when a respondent is mentally and physically able to at least start thinking about long-term plans
- prior to a permanency hearing where decisions are being made about a child's long-term placement
- prior to reunification, when stress on the respondent is high and numerous interpersonal issues usually need to be ironed out
- prior to graduation, when clients are often at greater risk of relapse

### *Where*

The more neutral the location the better. If possible, avoid holding a conference at the child protective agency. Location, however, is not as important as the atmosphere in the session. The key is to make clear to all participants that the process is voluntary and that the conference offers a safe place for participants to talk openly and honestly about their concerns.

### *How*

Family group conferences can be labor-intensive. Staff must set up a meeting with a large group of people, must explain the process beforehand to all the participants, must make sure the consent form has been signed, and must guide the family through the conference itself and also provide follow-up. It is recommended that a jurisdiction start slowly and experiment with a limited number of families. That way, staff can refine and adapt the process to make it as productive and as little taxing as possible on everyone involved. Some jurisdictions have also held focus groups for members of different cultural and ethnic groups to ensure that the family group conferences are carried out in a way that is "culturally relevant" to participants.[13] During the conferences themselves, the best facilitators strike a balance between spontaneity and structure—that is, they give participants the freedom to generate ideas and identify family strengths while also ensuring that the conversation stays focused on the topic at hand.

It is important that the process of planning a conferencing program be inclusive. A facilitator should invite all parties involved in child welfare cases to participate in the planning process. In California's Stanislaus County, for example, child welfare planners invited "clerical staff, line workers, managers, and the [agency] director" to participate in creating a protocol for administering "family decision meetings" countywide.[14]

## CONCLUSION

Drug courts have found a number of techniques that help participants achieve lasting sobriety—such as regular court appearances, frequent urine tests, and a system of graduated sanctions and rewards—but they are always seeking new ways to improve outcomes. It was precisely such a search for better outcomes that led the Manhattan Family Treatment Court to experiment with family group conferencing.

Staff at the Manhattan Family Treatment Court believe family group conferencing can help the court achieve its two most important goals: speedy permanency planning and parental sobriety. The court has found that family group conferences can help achieve a number of other goals as well—for example, informing families about how the court operates and the status of the respondent's children; ironing out conflicts between respondents, their children, and other family members; and educating families about addiction, substance abuse prevention, and ways to halt the familial cycle of addiction.

For other family drug treatment courts grappling with the complex issues that their clients face, the Manhattan Family Treatment Court's experience with family group conferencing offers several lessons. One is, of course, that family group conferences can be successfully adapted to the setting of a family drug court. While other courts may have to customize the model to suit their individual needs, the Manhattan Family Treatment Court's experience can offer courts a solid foundation for getting started.

But whether or not other family drug courts choose to hold family group conferences, there is a broader lesson in the Manhattan experience: that family drug courts don't have to invent new techniques from scratch. Just as they have borrowed approaches from criminal drug courts, family drug courts can also borrow tools, like family group conferencing, from child welfare practitioners and other service providers. While it may seem unusual for a court to get directly involved in nurturing family relationships, the Manhattan Family Treatment Court believes that such work can make a positive difference. In essence, the Manhattan court has shown that a drug court can do more than encourage a client's progress in recovery. It can also play an active role in helping clients set the stage for a return to the real world, which means preparing them to get a job, to find a home and—if they're sober, willing, and able—to assume the challenging responsibilities of parenthood.

## NOTES

1. There are 86 family drug courts currently operating in the United States and 69 more in planning stages. *See* Office of Just. Programs Drug Ct. Clearinghouse & Technical Assistance Project, Summary of Drug Court Activity by State and County: Juvenile and Family Drug Courts 35 (Sept. 15, 2003), http://www.american.edu/justice/publications/juvfamchart.pdf.

2. *See* Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997). Section 101(a) of the act amended section 471(a)(15) of the Social Security Act, 42 U.S.C. § 671(a)(15), to require that "reasonable efforts shall be made to preserve and reunify families … (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home …."

3. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). Section 505(3) of the act amended section 471(a) of the Social Security Act, 42 U.S.C. § 671(a), to provide "that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards."

4. *See* Children's Bureau, U.S. Dep't of Health & Human Servs., Report to the Congress on Kinship Foster Care vi (June 2000), http://aspe.hhs.gov/hsp/kinr2c00/.

5. Mark S. Umbreit, Univ. of Minn., Family Group Conferencing: Implications for Crime Victims (U.S. Dep't of Just. 2000), http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf.

NOTES

6. Paul Nixon, *Building Community Through Family Group Conferences: Some Implications for Policy and Practice, in* 1999 Family Group Decision Making National Roundtable Conference: Summary of Proceedings (Am. Humane Ass'n 2002).

7. Leslie E. Wilmot, manager of the National Center on Family Group Decision Making at the American Humane Association, writes: "When families develop the case plan, they are more likely to agree with recommended treatment services and implement the plan to the best of their ability." *See* Leslie E. Wilmot, *It's Not Too Late: The Use of Family Group Decision Making Processes to Achieve Family Reunification,* 16 Protecting Child. 34 (Winter 2000).

8. *See* Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at scattered sections of 42 U.S.C. (2000)).

9. For background on the Manhattan Family Treatment Court, *see* Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court,* 2 J. Center for Fam. Child. & Cts. 5 (2000).

10. For instance, the act requires child welfare agencies in a large number of cases to file a petition to terminate parental rights if a child has been in foster care for 15 of the last 22 months.

11. Family group conferences tend to be loosely structured. Other, similar techniques follow a tightly scripted agenda. In Oregon, for instance, child welfare agencies use "family unity meetings," which, according to the National Institute of Justice, "follow a prescribed agenda[,] moving from an introduction of all the people present in relation to the child, to a statement of purpose, a statement of concerns (family and agency), family strengths assessment, an enumeration of options, the development of a written list of formal and informal family supports, and concludes with a decision and a time line for implementation." *See* Kerry Murphy Healey, Nat'l Inst. Just., Policies, Practices, and Statutes Relating to Child Abuse and Neglect (U.S. Dep't of Just., Oct. 1997), http://www.ojp.usdoj.gov/nij/childabuse/bg3j.html.

12. The author attended the conference with the family's consent under the condition that their names would not be revealed.

13. *See* Cheryl Waites et al., *Family Group Conferencing: Building Partnerships With African American, Latino/Hispaños, and American Indian Families and Communities, in* 1999 Family Group Decision Making National Roundtable Conference: Summary of Proceedings (Am. Humane Ass'n 2002).

14. Teri Kook et al., Beyond the Rhetoric: Transforming Agency Practice Through Family Decision Meetings (Am. Humane Ass'n 2002). For more ideas on how to conduct a family group conference, *see* Family Group Conferences: Perspectives on Policy and Practice (J. Hudson et al. eds., Willow Tree Press 1996); Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach,* 5 Psychol. Pub. Pol'y & L. 951 (Dec. 1999); Jennifer Michelle Cunha, *Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States,* 13 Emory Int'l L. Rev. 283 (1999); Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases,* 31 U. Mich. J.L. Reform 57 (1997); Lisa Merkel-Holguin, *Putting Families Back Into the Child Protection Partnership: Family Group Decision Making,* 12 Protecting Child. 4 (Fall 1996); Joan Pennell, *Mainstreaming Family Group Conferencing, in* Building Strong Partnerships for Restorative Practices 72 (Ted Wachtel ed., Real Justice 1999); Mark Umbreit & S. Stacey, *Family Group Conferencing Comes to the U.S.: A Comparison With Victim-Offender Mediation,* 47 Juv. & Fam. Ct. J. 29 (Spring 1996); Am. Humane Ass'n, *Family Group Decision Making: A Promising New Approach for Child Welfare,* Child Protection Leader, *passim* (July 1996); Gale Burford et al., Manual for Coordinators and Communities: The Organization and Practice of Family Group Decision Making, (Memorial U. Nfld. Sch. Soc. Work, rev. Feb. 2001), *available at* http://social.chass.ncsu.edu/jpennell/fgdm/manual/index.htm; various publications of the National Center on Family Group Decision Making, *at* http://www.ahafgdm.org.

# *Expected Controversies: Legacies of Divorce*

In September 2001 the Ann Martin Children's Center (Oakland) asked a panel consisting of a child therapist and author, Diane Ehrensaft, Ph.D.; a jurist, Justice Donald King (ret., California Court of Appeal, First Appellate District); and the author to discuss the recent book *The Unexpected Legacy of Divorce: A 25 Year Landmark Study,* by Judith S. Wallerstein and co-authors Julia M. Lewis and Sandra Blakeslee (Hyperion Press 2000). In the book Dr. Wallerstein finds that though children can and do learn to cope with divorce, its greatest impact does not emerge until adulthood. This article is based on the remarks from that panel, specifically directed at policy implications for courts and for mediation resulting from Dr. Wallerstein's book.

Many people have tackled the task of challenging Judith Wallerstein's work on divorce.[1] A high level of controversy has swirled around her presentations of "the children of divorce" and her research methods, and many of her findings have been disputed or replaced by other scholarly work.[2] Nevertheless, something about what she says captures the feelings of her audiences.

Dr. Wallerstein has a finely tuned clinical ear for children's experiences. When she speaks, we hear the pain of the people she has followed for so many years. She is one of the few people who can make a psychological understanding of a child come alive for people in the legal system. She has an uncommon gift for capturing the interior of another's experience and relating it to us in a very personal way, a way that allows us instantly to recognize the emotional landscape within a child, and therefore to be able to sympathize, empathize, understand. Many people feel deeply understood by her approach.

Leaving the controversy to one side for a moment, what is valuable and important about the message of this work? How should parents and professionals understand the message? For professionals, the task is to translate this message to clients in a way that will be helpful to them. For parents, the task is to try to discern what is appropriate to take in on a more personal level.

The question most frequently asked by parents in mediation and co-parent counseling is, What can I do to make this situation better for my child? Parents are crippled with guilt about the effects of their breakup on their children. This guilt keeps them from being able to do for their children exactly what is most relieving about Dr. Wallerstein's work: to listen to their children's pain.

**Mary A. Duryee, Ph.D.**

*Private psychology and mediation practice (Oakland)*

This article reflects on our ambivalent relationship to divorce, to divorcing parents, to our work as professionals in family law, and to the state of our family courts. The heated controversies among professionals about divorce, its benefits, and its harmful effects are not explained solely by differences in research methodology or intellectual perspective. While there have been solid responses from researchers to Judith Wallerstein's recent work *The Unexpected Legacy of Divorce* (most notably *For Better or Worse* by E. Mavis Hetherington), the emotional resonance of parents and children to Wallerstein's work in the popular press demands our attention and explanation. ■

Recently, two parents in mediation described their children at length and in detail as having come through the separation and divorce well. When they were asked what they had done to contribute to this resilience, the first item on their list was, "We listened and still listen to their pain about the divorce." Such a striking first response deserved a follow-up query: when asked what it was like for *them* to listen to their children's pain, one immediately said, "It breaks my heart to have hurt my children." Few parents have the courage to be so directly and simply in touch with remorse.

This is our dilemma: Sometimes the most considered decision, the wisest option for some in the family, causes pain to others in the family. Our desire for congruence would like to make it otherwise—if the children are hurt, the decision to divorce must have been wrong; or, if the decision is correct, then the children must be better off in the long run.[3] Dr. Wallerstein seems to accuse current-day mental health professionals of making the error represented by the latter position. Critics of Dr. Wallerstein accuse her of making the first error.

An important distinction must be made between guilt and remorse. Guilt is a very human, very real emotion. Like anger, it is an important source of information, and a very bad basis for decision or action. Both anger and guilt are powerful calls to action, like an alarm signaling that a fire has broken out. Like the alarm, which itself does not put out the fire, neither guilt nor anger provides resolution. Often, a great deal of psychological work must occur between the experience of the guilt and its transformation into useful information or action.

The guilt that parents feel severely limits their ability to be parents, to make good decisions about their children or themselves. Many of us use whatever means we can find to relieve ourselves from the intolerability of our feelings of guilt. We use various defensive maneuvers: projecting the guilt out in the form of blame; displacing and containing it by adopting rigid stances about "the one and only acceptable custody plan"; inappropriately failing to defend oneself appropriately or to protect one's parental sphere and relationship; and denying that any harm has been done to our children, saying they are "fine, just fine." Guilt, undigested and unresolved, is internally corrosive to one's self-esteem and becomes a handicap that distorts parental ability and the relationship between parent and child.

Remorse, on the other hand, is appropriate. In the family transition of divorce or separation, everybody hurts. The children did not ask for this, nor did they do anything to "earn" this pain. Remorse is like grief: it burns hotly in a purifying fire that does not ultimately injure the mourner or those around him or her and contributes to our ability to respond with compassion to the pain of others. Remorse does not excuse one from assuming responsibility for his or her own actions. On the contrary, remorse supports greater personal responsibility because the continuing injury to self-esteem caused by guilt is not present, and, therefore, there is less need to defend oneself by assigning blame to others. Remorse *is* the capacity to tolerate pain, both one's own and one's children's, without "doing" something with it.

As professionals working with people who are separating, we have a responsibility to be able to experience and tolerate parents' pain so that they in turn are able to tolerate their children's pain in a parallel process. Our task is to model the capacity to listen to pain, without having immediately to "fix it." For those of us (professionals included) who live through our own separations and divorces, the challenge is to feel legitimate remorse, which allows us to hear and bear the pain of our children, and find a way to avoid crippling and neurotic guilt, which ultimately seeks to justify the self and silence the other.

One unintended consequence of Wallerstein's research, especially the tone of its presentation, is to make parents feel scolded for having "failed at marriage." A major function that professionals can serve is to translate this research for parents in a manner that does not increase their burden of guilt. We need to help parents transform their guilt into remorse, a process mirroring Freud's idea of therapy as a process that transforms neurotic misery into ordinary sadness.

What *is* Dr. Wallerstein's main message? She says:

> We have made divorce an acceptable alternative. Mostly that's a good thing, but there is negative fallout from this, and we shouldn't cover that up.
>
> We (collectively) don't protect our children.
>
> We conflate children's needs and parents' needs as if they were one and the same.
>
> Divorce has a "sleeper effect" that shows up in children's identities when they become adults.
>
> Divorce causes a profound change in the relationship between parents and children because the children lose the opportunity to develop internal templates about couples operating together ("usable images" is her phrase for this).
>
> And, finally, the divorce itself acts as a screen memory for the whole parental relationship, so that memories and family histories are rewritten, excising the courtship, love, and togetherness that had once existed.

These findings require context in order to be understood, and there are two contexts that may be most useful. First, we need to see (briefly) how this research fits together with the research on divorce. Second, we need to identify the social context: what was the soup that these "children of divorce" were swimming in when their parents divorced?

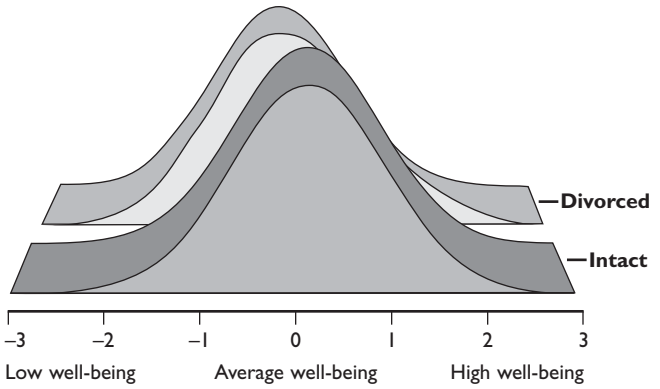
## PUTTING WALLERSTEIN'S RESEARCH IN PERSPECTIVE

Wallerstein's research is qualitative and descriptive, in the oldest tradition of psychological research. Its closest relative is the clinical case study, which is the foundation on which clinical psychology built an understanding of human behavior. By its nature, it is depth-oriented; it provides specificity and great detail in its description of people's experiences. Also, by its nature, the number of people studied is relatively small;

the cross section in time is very narrow, compared with other types of research (though not in comparison with other longitudinal studies).

By itself this is not a problem. We need research of various forms to give us different types of readings, just as we need different types of diagnostic tests that measure different aspects of health or ill health. Our job is to try to put all the measures on the same page and understand how they fit together.

**Figure 1. Typical distribution of well-being scores for children in divorced and intact families**




The other end of the spectrum from qualitative research is a statistical review done by Paul Amato in 1994.[4] His meta-analysis statistically pooled the data of 92 studies involving 13,000 children (preschool to college age) and 37 studies of adult children of divorce involving 80,000 adults. The huge sample lends both a tremendous validity to the findings and a fair stability of the findings across time.

Amato's analysis shows that children suffer as the result of divorce; as a group, they are less well adjusted than children of families with no history of divorce. However, the differences are very small and the overlap between the two groups very large. It is useful to see this visually. (See Figure 1.)

The clinical-case-example form of research tends to emphasize the particular, the specific. In the case of Dr. Wallerstein's work, it emphasized the experience of a specific group of children whose parents divorced in the 1970s, who were in sole custody arrangements, in a specific community. The meta-analysis is a form of analysis on the other end of the spectrum from Dr. Wallerstein's: the findings are general, nonspecific, not bound to either a locale or a point in time. For example, Amato's results are highly generalized; they fail to provide the "feel" of what it is like to go through the experience of divorce. But if we want to speak about the divorce experience for most children, we turn to Amato. If we want to hear about the emotional texture of the experience for *some* children, we turn to Wallerstein.[5] Amato provides the larger view, and when we look at the larger view, we can be encouraged.

## DIVORCE RESEARCH COMES OF AGE: DEALING WITH THE PROBLEM OF CAUSE AND EFFECT

Amato's and others'[6] analyses show the development of single-problem-focused research, research that has focused on single issues, like teenage pregnancy, child abuse, poverty, and divorce. The central question of this research is, What effect does divorce (or poverty, or child abuse) have on children? As the research in all these areas has unfolded over the last 30 years, it has become clear that there is no single straight line between one cause and subsequent effects.

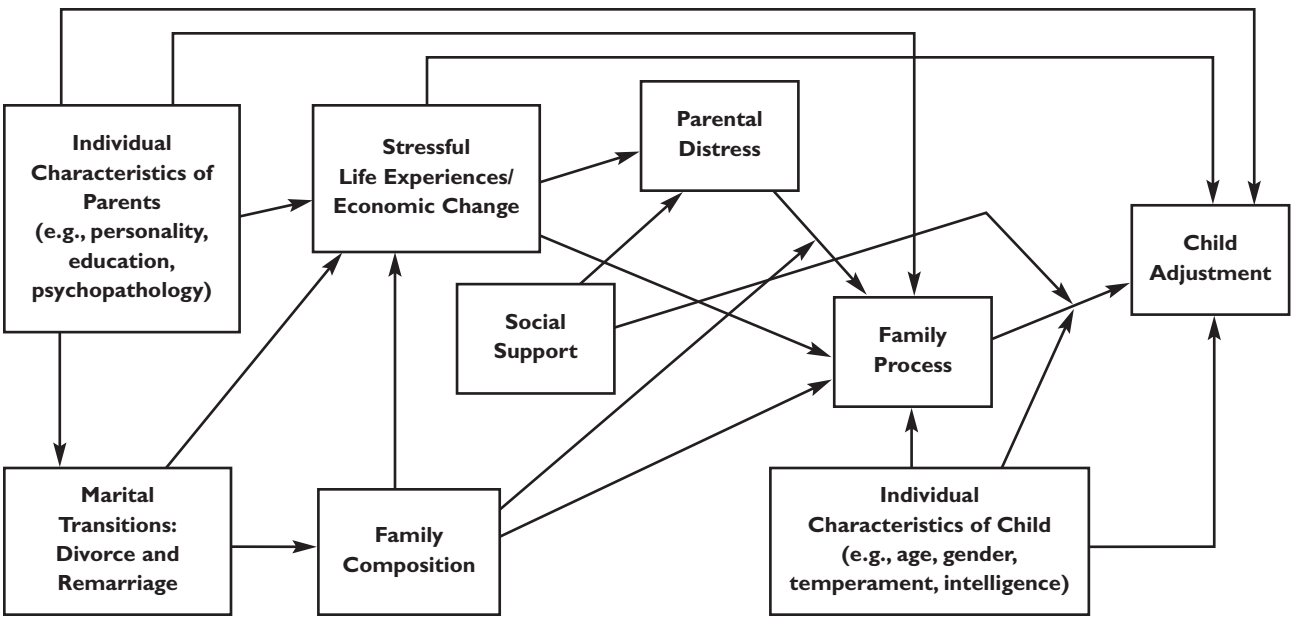
This is easier to see visually. Figure 2 shows the web of relationships between the variables that affect child adjustment. No line of causality exists between marital transitions and child adjustment; in every instance there are intermediate mitigating factors.

This multifactored aspect of the research led researchers to turn the question on its head. Instead of asking, "What are the effects of divorce (or poverty, etc.) on children?" they began to ask, "Why do some children survive and even thrive in adverse circumstances, and why do some children fail to thrive or even survive?" Out of this has developed the concept of *resilience,* which is defined as the quality in children that allows them to survive, and sometimes even to thrive, in the midst of adversity.

Just as risk is multifaceted, adjustment and well-being in children are supported in multilayered ways: it is the redundancy of support, the safety nets in place in the various domains of a child's life (home, school, community) that provides for good adjustment, or resilience. This is analogous to the multiple anchor points used by rock climbers on their safety lines—not just one anchor, not two, but three: if one support fails, the sudden jolt of reliance on the second support must be backed up by a third.[7]

In other words, it isn't just the divorce. It is the combination of predivorce family functioning, the economic stress on the family, the loss of community and friends through a move, the new marriage, the loss of contact with one parent, the loss of functioning of the other parent, added up and compounding one another to create adversity. The support group at school, the solace of a best friend, the coach's help, the success in the baseball league, the new skill learned—all add up to layers of

**Figure 2. Predictors of children's adjustment following divorce and remarriage: a transactional model**



support. It is this multiplicity of adverse events added together in a short period that stretches the parent's or child's capacity to cope beyond his or her limits. Most people with average innate capacities can manage and grow from a moderate, or even severe, single stressor. *Repeated* stress, occurring before one has had a chance to recover from the last, is the injurious circumstance.

We are able to reduce the impact of divorce on children by addressing some of these related, attendant events. One of Amato's interesting findings was that the adjustment of the children in the later years of the research (1990s) was better than the children in the earlier years (1970s), using the same measures of adjustment. He postulates that our efforts to lessen the stigma attached to divorce reduced some of the isolating aspects of the experience for children. And the interventions we have been providing, in the form of education, mediation, helping both parents stay involved, have had an effect. The divorce research and resilience research show us that the supports in the community, school, and home domains matter hugely. When there is stress in one domain, children begin to rely on the other domains; and when there is support there, it makes the critical difference. Social support is crucial.

## WHAT A DIFFERENCE 30 YEARS MAKES

Which leads us into the second contextual component: the social context. In 1970, when the parents in Dr. Wallerstein's research were getting divorced, there was no such thing as joint custody in California law.[8] "Frequent and continuing contact" as a concept did not exist in law. Her children of divorce had a very different experience from today's children of divorce.

Wallerstein found that a major loss for the children she studied was the opportunity to develop "usable images of how an adult man and woman can live together"—also called "templates" of adult relationship. The point she makes so articulately is still a very important one, and an aspect that is rarely addressed. We are, however, worlds different in our conceptualization of co-parenting after divorce from where we were in 1970 and 1975.

The couple referred to earlier provided a good example of our collective effort to develop a concrete model of co-parenting, even from separate households. In addition to listening to their children's pain, they provided a list of things they did to make things better for their children:

Allowing them their feelings of grief.

Frequent and continuing contact.

Occasionally we celebrate joint holidays.

We keep transfers peaceful—we stay well behaved.

Kids can have all the phone contact they want with the other parent.

When sick, they stay where they want to.

We're not doctrinaire about Mom's time and Dad's time, kids sometimes opt to change schedule on a given day.

Five-minute walk between the two homes.

Dad helped kids buy birthday presents for Mom, and vice versa: we honor the other parent with them.

Both of us meet together with them for important things, on the theory that families need to team up in a crisis. (For example, we met together with them the morning of 9/11.)

We create no stress about their belongings.

Rules are somewhat divergent at each house, but not that far apart.

We don't take it personally if kids want to be at the other house.

We don't make them pack their own overnight bag, on the theory that they didn't make this mess, we did, and it's ours to clean up.

Not all the time, but occasionally it's okay for them to change their minds at the last minute about an activity or plan, on the theory that there should be some places where they can feel they have control over their lives.

We cannot eliminate the experience of loss from children's lives, nor should we imagine that we can do so: loss is a fact of all our lives. We must be cautious not to idealize the intact family of "days of yore," as one might be tempted to do reading Dr. Wallerstein. To a much more frequent extent then than now, family life was disrupted by the death of a parent rather than by divorce. A portion of the rise of divorce is a function of our living longer: our ability to lengthen our lives has changed the divorce statistics as much as anything else, and therefore changed the *type* of loss children face.[9] Rather than denying the impact of divorce (against which Wallerstein cautions us) or, on the other hand, overpainting the disaster of divorce for children on the other side (as some accuse Wallerstein of doing), *our task is to teach our children how to deal with loss, how to let it deepen them, and how to let it strengthen them.*

## THE FAMILY JUGGLING ACT

Dr. Wallerstein pursues the image of the child abandoned by both parents: the divorced father and the back-to-work mother. This stands strongly juxtaposed with the image of *married* parents juggling work and home. The need for the two-income household is not only about divorce, but also about real-world economic pressures in both divorced and intact families.

On the one hand, we have created an economic situation in which there is not enough parenting time in intact families. On the other hand, economic stress may be one of the less-appreciated precipitants to relationship breakup. We do not require workplaces to make adjustments for parents, much less provide child-care services

on site. Housing costs are such that parents cannot live close to their work. Two-thirds of families *require* two incomes to survive, creating what Arlie Hochschild and Anne Machung call the unacknowledged, frequently contentious, "second shift."[10]

When the two-income intact family divorces, the strain sometimes becomes unbearable. Some time back I mediated a situation in which the mother commuted from Antioch to Stanford, close to a 100-mile commute, while the father lived in Berkeley. Their question: Where would the child go to school? How will it be possible for this child to develop a community of his own, supported by his parents, much less have the advantages of living in a child's community that is continuous and overlapping with his parents' circle of friends?

Even under the best of circumstances, we do not live in a world in which it is easy to maintain relationships. Children develop relationships through the modern phenomenon called "play dates," because often there is no continuity between the school and the neighborhood. For parents figuring out how to work, commute, go to PTA meetings, clean the house, shop for food, arrange play dates, coach soccer, this is logistically staggering. Where is the time to sit on the front porch and digest the day's events? How do parents find the time for their children or even the time to think about their *own* relationship?

While parents are managing this tremendous logistical dance, they are blaming themselves for not being able to dance faster, not necessarily recognizing that things are structurally different economically and socially than when they were children. One of the reasons we don't factor this in is that it is very difficult to get perspective on our own experience, either across a slice of history (How is "now" different from "back then"? Did the times change or did I?), or to get perspective in a contemporary sense, in relation to the social fabric around us (Is this just my problem, or is it really a societal problem?). The problem is that there is no place to stand, outside of our own perspective.

While Wallerstein's message invites us, both parents and professionals, to feel guilty about our failure to support *children*, a more precise statement would be that we fail to support *families*.

## THE FAILURE OF THE SUPPORTIVE STRUCTURE

It does injury to all of us to conceptualize divorce as either an individual or an interpersonal failure. The word *failure* participates in the language of guilt. Perhaps divorce has come to symbolize social failure, although that may not be precise, either. It may be that going through the experience of divorce and separation exposes us to other problems in our social structure, just as getting critically ill tends to expose one to the problems of health-care delivery. We have experienced a significant deterioration of our standard of living, and we are struggling to maintain the value of enduring

relationships in the face of technological and economic demands that seem to undermine our attempts to stay connected.

This deterioration has affected everything, including our institutions. Family law departments are under severe strain: stresses in families develop into symptoms, and the symptoms develop into family law actions—dissolution, domestic violence, child abuse. Yet, on a continuum of severity, "most acts now defined as violent or abusive are moderate, and stressful life circumstances contribute to their development."[11] Parents who commit moderate maltreatment—maltreatment that does not endanger the children's long-term health and safety, such as educational neglect or moderate physical abuse—are more likely to benefit from interventions that support their efforts to deal with the challenges of parenting than from aggressive, adversarial interventions.[12]

Family law departments are also victims of our neglect in supporting the family. During the last 30 years we have become more aware and knowledgeable about intervention with some problems (e.g., domestic violence); increased the demand for services through the pressure of population increases; dramatically increased the complexity of the work through the explosion of diversity in our population—all the while steadily decreasing our support of the institution we ask to provide those services.[13]

We can see the value we place on families and children by looking at the allocation of resources provided to family law. The percentage of judicial resources allocated to family law compared to other areas is often surprisingly low. Newcomers to the family law arena within courts are struck by the second-class citizenship given to the family law departments of most courts. Many non-family-law judicial officers have little appreciation for the level of technical skill and knowledge required, the immediate and profound impact of daily decisions on children and families, or the size and complexity of the financial matters handled routinely in family law.

This has a cascading effect, because it means that not enough time is provided for tailored, individualized remedies. People notice this. In one week recently, four parents from four different families reported to me their similar experiences in court. One said: "I know what happened [in court]. They have only 'this much time.' I fit a profile, and this is the custody arrangement assigned to the profile I fit."

This sense of being anonymous, deserving only a kind of cookie-cutter justice, is the opposite of the value we would like to place on the enduring relationship between parents and children. It sends an institutional message—"You don't count, and we don't care"—which is actually completely contrary to how the professionals who work in family law actually feel, but who feel individually helpless to make things different.

How to make this better?

How do we say to ourselves, "We need to do this better, differently, this business of supporting families," without running the risk of sounding as if we are scolding

ourselves and falling into the blame game that is already so prevalent in the divorce/separation process? Just as we need to say to parents, "We need to do this better, this business of raising children after divorce," without provoking crushing guilt or blaming the victim?

As professionals working with this issue, we are at risk: the layers of emotion to which we are constantly exposed put us at tremendous risk for cynicism, burnout, and a tendency to pathologize our clients. We distance ourselves into a professional "us versus them" relationship. Perhaps we simplify the world for ourselves occasionally by picking one side of a cause: men versus women, children versus parents, lawyers versus mediators, counselors versus judges. In our relationship to our institution we are vulnerable to the same stresses as are our clients: the trend toward anonymity, the press for efficiency, and the lack of time to work adequately, much less the time for the reflection needed to maintain equanimity and perspective.

And yet our work consists of maintaining equanimity, balance, perspective, even in the midst of tremendous emotional undercurrents. It requires years to acquire the technical skill to do the work and a combination of temperament and skill to survive and even thrive emotionally on the job.

There are things we can do to survive and succeed in this practice. *First, it is important to recognize that we have already taken some steps to mitigate the negative effects of divorce and to appreciate the difference we have made.* Children are less stigmatized by divorce; there is a more humane way for parents to negotiate with each other; we have created positive images of parents working together after divorce/separation. There is, though, plenty more work to be done. In this regard, it is important to understand that we may not actually *see* the effects of our efforts for many years. Our work moves forward on acts of faith, in trusting that if we use our best knowledge to date, it will make a difference. This is, after all, what parents do every day raising their children.

*Second, we must fight our professional and personal isolation and figure out how to stay more connected to one another, as the basis for providing support to families.* This means, as professionals, we work together to get family law specialists in judicial assignments because we are able to articulate the need for the level of technical expertise and training required in family law, and campaign for a more appropriate allocation of court resources. As a community of lawyers and mental health professionals both working in the courts and in the private sector, we need to create forums in which we meet regularly and discuss issues concerning us all.

As members of families, we need to provide more avenues of support for couples, including opportunities for conflict resolution *before* they are separating, and more images of couples working together. We need to create social supports for families: financial assistance for health care and child care, community centers for child activities. We need to tend, essentially, to the *social* infrastructure that we have neglected for far too long.

*Third, we must recognize cynicism for what it is—a repetitive stress injury—and treat it.* As professionals, we understand our cynicism as sign of work weariness and as a sign that something isn't going right, rather than as good information about how to act or what conclusions to draw, especially about our clients. As service receivers, we understand cynicism as undigested grief and disappointment, and sometimes as a reaction to feelings of helplessness and lack of control, rather than the fuel for indicting some whole section of the population—the judges, or the attorneys, or the mental health people.

*Fourth, we must understand the larger social context surrounding our personal problems and avoid inappropriately personalizing all of our dilemmas,* because this keeps us isolated and takes away energy that would be better spent joining together and working toward some of these changes. We need to name the blame game and recognize it as an attempt to simplify a situation in which not all the feelings line up and point in the same direction: there is relief and grief in separation; sometimes divorce is good for children, sometimes it is not (even for the same child, at different times).

*Lastly, we need to figure out how to drop out of the rat race and reorder our time.* The metaphors of the business world applied to family courts take us only so far. They help us deal with the increased diversity of our "customers," streamline some processes, and introduce the value of courtesy in every encounter a customer may have with the "system." The metaphors of the business world do not, however, provide the ethical ballast needed in our judicial system that would help us weigh the inevitable choices that arise between a process that is more efficient or one that is more thorough. Nor will those metaphors provide the less easily quantifiable but more socially vital criteria for success: that people who leave the courtroom have the deep assurance that they have been heard and understood, that time was taken to make the decisions concerning the most important arena of their lives.

We must be careful not to blindly accept the idea that calendar management—moving cases along faster—is the only solution, or even the correct solution. There are human processes that cannot, should not, be rushed: grieving, for example; development in a child, for another; finding the ability to maintain equanimity, for a third. Paradoxically, all these processes are facilitated in the long run when offered some time in the moment. Parents who have taken the time to grieve the end of their marriage are able to make a better adjustment, sooner, to their divorced lives and become better parents as a result. Children who have the time to devote to the tasks of growing (instead of fending off adversity or surviving) become more mature adults, who in the end *give* more to their environments than they *take*. Professionals who are allowed time to digest and reflect on the work they do last longer in their jobs and do more humane work that creates less negative feedback for the institution in the form of complaints, which in turn creates less work for others. True judicial economy takes time, but it is time well spent for families, children, and the courts.

## NOTES

1. *See, e.g.,* Sharon Lazaneo & Jacqueline Karkazis, *Dubious Legacy,* 16 READINGS: J. REVS. & COMMENTARY MENTAL HEALTH 18 (Mar. 2001).

2. E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCE RECONSIDERED (W.W. Norton 2002).

3. It is also true that pain is created by choices that are ill considered and unwise. We could use many more intervention strategies that assist people in sorting out the wise and unwise decision to divorce and make those strategies more readily available.

4. Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce,* 4 FUTURE CHILD. 143 (1994).

5. In this respect, the original research is unsurpassed in its descriptions of the experience of divorce for children and parents. JUDITH WALLERSTEIN & JOAN KELLY, SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (Basic Books 1980).

6. E. Mavis Hetherington et al., *What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment,* 53 AM. PSYCHOLOGIST 167 (1998).

7. For an excellent review of current resilience research, see Ann S. Masten & J. Douglas Coatsworth, *The Development of Competence in Favorable and Unfavorable Environments: Lessons From Research on Successful Children,* 53 AM. PSYCHOLOGIST 205 (1998).

8. The joint custody statute was signed into law in 1979 (Cal. Stat. 915).

9. Margaret Mead, *Anomalies in American Post-Divorce Relationships, in* DIVORCE AND AFTER: AN ANALYSIS OF THE EMOTIONAL AND SOCIAL PROBLEMS OF DIVORCE (Paul Bohannon ed., Doubleday Anchor 1979).

10. ARLIE HOCHSCHILD & ANNE MACHUNG, SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (Viking Press 1989).

11. Robert E. Emery & Lisa Laumann-Billings, *An Overview of the Nature, Causes, and Consequences of Abusive Family Relationships,* 53 AM. PSYCHOLOGIST 121 (1998).

12. *Id.* at 122, 125.

13. In California, the changing pattern of government financing began in 1978 with Proposition 13, which cut property taxes. Over the years since, cuts in programs have reached into the marrow of state and local institutions, decreasing their effectiveness and justifying the public's distrust of governmental institutions—a self-fulfilling cycle. There were few staff increases in family court services during the 1980s and 1990s, so during that 15- to 20-year period, the same number of people were asked to provide a changing array of services to a significantly larger client group.

# PERSPECTIVES

*Essay*

# Don't Go to Court, Everybody Said

Russell Fuller

Don't go to court, everybody said when I realized I must leave my spouse. "That's the last place you'll find justice." They were right, of course. I just never had that choice. I am the father of three young children whom I love more than all the world. Being a dad is at once the most challenging, rewarding, and important thing I do. It's also the easiest. It's what I do best.

Our lives, though, have been repeatedly, dramatically, and permanently altered by the California family court. And not for the better. Despite all my best efforts, and those of others on my behalf, the state of California turned me into an absentee father and gave my ex-wife all the tools she needed to undermine my relationship with our children.

In family court, where our children's familial fate is decided in their name but absent their voices, their best interest should be our first priority. But that has not been the case for us. In this court, broken families should be able to find healing legal clarity on the ills that divide adversarial parents. But that has not been the case for us.

In family court my children and I have experienced the inequities of unequal representation, one-sided court-order enforcement, failed mediation, arbitrary arbitration, an emasculated special-master system, the judicial substitution of computer software for insightful judgment, and myopic interpretation of *In re Burgess* in a case that cried out for unconventional wisdom. In short, during the past decade, my children and I have seen their "best interest" subsumed in the twin insanities of "whatever the custodial parent wants" and "whatever justice one can pay for," regardless of the collective personal cost.

---

In 1984 I met a woman whom I divined would be the mother of my children. We lived on separate coasts. In 1986, knowing each other just a little, we married. These things happen. During eight and a half years of marriage, we had three amazing children. Pretty early on,

however, beneath her smart, shiny surface, my spouse revealed herself to be angry, adolescent, and abusive—qualities that I hoped having a family would change. It didn't.

When the tension in the home became greater for our children than the benefit of my being there, I decided to leave. Don't go to court, everybody said, and I believed them. I bought books that would allow us to do the divorce ourselves, then set up a two-month window so we could enjoy a last Christmas together, talk with the kids, and allow them to process the information.

Instead, my wife imported her mother from Philadelphia for three weeks, refused to discuss our situation with the kids, and plotted. After her mother left, she announced that she was too heartbroken to watch me pack and would be taking the kids to the East Coast on the following day, returning after I'd moved out.

In truth, she'd removed her name from our credit cards and line of credit (after running it up to the max), cleaned out our joint checking account, and arranged to have papers served on me about 18 hours after she'd left. Once in the east, she would make enough ATM trips to extract the whole of my next paycheck before I got to it.

I realized she'd planned never to talk together to our children, intending instead to return home and "discover" that I'd "abandoned" the family. Two hours before they left, I gathered up the kids (ages 5, 3, and 1), took them to the apartment I'd be moving into, and assured them that we'd spend part of every week together and that I'd call them every night. It was best, though, that Mom and I no longer live together. Spencer, our oldest, seemed relieved. Rose tried to understand. Sarah, the baby, just wanted me to hold her.

The morning after my wife took our money and kids across the country, I was served with a motion that asked for a legal separation with primary custody, child support, and attorney fees. It also prohibited either spouse from spending communal monies or taking the kids out of state without permission of the other. I moved, leaving everything in the house except my personal belongings, so our kids wouldn't return to a half-empty home.

The first afternoon I wasted in family court came two weeks before the hearing. I couldn't afford a lawyer, so I left work for the afternoon, drove to the court, and stood in line for two hours to reach the help desk for folks representing themselves pro per. There I was given the address of a store where I could buy a proper set of forms. That was it.

At the hearing (January 15, 1995), there was no judicial recognition of my wife's considerable financial resources (which mostly flowed from her family—with no job, and later with unreported jobs, she always claimed zero income), nor any that I was forced to service our substantial mutual debt alone (or recognition that this debt even existed). My wife had vowed to destroy me, asserting that she'd begun "a war of attrition," one that I could never win. However unwittingly, family court could not have been more complicit.

My wife was awarded the inevitable (at first, temporary) primary physical custody and most of my salary in family support. I was ordered to take 32 tax deductions on withholding, to be made up with the children's exemptions, which would require her to sign a tax form in agreement. (Looking back, I'm still stunned by this ruling, which placed my financial solvency entirely in the hands of someone so adversarial, without any oversight whatsoever; the court should never make such a critical mistake.) After the first year, she simply refused to sign.

She was also awarded attorney fees, though I stood before the court unable to pay for even my own attorney and her paperwork showed a $2,500 retainer put down by her brother. Because I was paying for her, I asked my wife's lawyer if she would help us both communicate enough to work out a permanent settlement. This was the funniest thing she'd ever heard. When she caught her breath, though, she assured me that "primary physical custody" was just a semantic nicety, that "joint legal custody" was what really mattered, and that my wife and I would sit down together to work out a formal parenting plan. Right.

Wrong. I'd just been conned out of asking for court-ordered mediation, and the court didn't suggest it. It would have made a world of difference, because my wife refused to ever co-write a parenting plan or attend any sort of mediation with me until the court ordered it some four and a half years later. Instead, she wielded physical custody like a weapon, manipulating the children and

extorting various behaviors and promises from me to be able to see or talk with our kids. (Eight years later, this behavior continues, refined and unabated.)

I filed for divorce. By then, I'd borrowed enough money to secure some services from an alleged attorney. Too little too late, though. He never filed a motion on my behalf beyond the divorce papers. All my money was spent in responding to opposing counsel's unending requests for paperwork and postponements (I did the work; his assistant typed it up on legal forms). In the summer, he missed a scheduled hearing, was fined by the court, knew I'd run out of funds, and simply fled after one more appearance—in arbitration.

---

Upon entering the family courthouse, before passing through the airport-level security check, one sees a printed sign that lists the weapons and such not allowed in the building—the usual suspects. On return visits, one begins to see handwritten additions such as "scissors." Perhaps "sharpened pencils" is there by now. This building, where ex-lovers seek relief from or revenge on each other, is not a happy place. Ironically, when I was frequenting it, the basement prowled by the wounded, scarred, and crippled of the marriage wars was also where starry-eyed couples applied for marriage licenses. I think the chapel-bound have since been relocated to another, cheerier venue. I hope so.

Part of the worst day of my life took place in that basement, during arbitration, on November 13, 1995. Arbitration assured my financial ruin. In the hearing, I hoped to get credit for half our considerable personal property, have my almost-ex assume half our debt, secure a seek-work order for her, and obtain another by which she would have to commit to a written parenting plan and grievance mediation.

We had an hour. In a small, cold room choked with tension, I sat silently at a plain table with my steaming wife and her attorney. My mute counselor—who'd been slandered and mocked for months by opposing counsel and who planned to bail immediately after the hearing—fairly cowered in a chair he'd backed into a corner. For 15 minutes we sat and gulped the toxic air while our arbitrator hissed into the phone. Then he introduced himself, said we didn't have much time together, and only wanted to hear from the attorneys. My lawyer was unmoved.

Ten minutes later, I caught my wife's attorney in a blatant lie—saying she'd actually seen the home furnishings she described as nearly worthless "thrift-store trash" (including, I guess, the brand-new sofa, washing machine, and VCR/television I'd purchased before moving out). I pointed my finger and heatedly accused her of telling the same sorts of lies as her client. The arbitrator agreed, noting that she'd already said she hadn't been to the house, then threw me out of the hearing for my conduct. I felt nauseated and dizzy with disbelief.

Twenty minutes later I was asked to approve an agreement the others had signed off on, "wouldn't get any better, and wouldn't be on the table long." I felt coerced but believed the arbitrator. Besides, as he'd reminded, our time was up. I signed, then immediately regretted it, realizing I'd forfeited my chance to be heard by a judge, with or without counsel. I never again saw the arbitrator or either lawyer—these people who'd just rammed a nightmare future down my throat.

Tax-deductible family support was changed to alimony and child support (which was itself not reduced), of which only alimony was deductible. This in itself was devastating. I got very little credit ($1,000 for about $10,000 of communal property), and that took the form of a shortened alimony period. My spouse took almost no debt. I had been supporting two households on my salary, a court-ordered tax scheme, and a handful of credit cards. Now that house of cards collapsed.

Not long after my ex refused to follow the court order and sign the form allowing me to claim our kids as tax exemptions, my car was repossessed. Though I'd stopped using credit cards following arbitration, I was hounded daily at home and work by creditors, then collection agencies, then the IRS. I declared bankruptcy, losing the credit I'd worked for 25 years to build, but slipped further into the tax abyss with the state and IRS. Liens were filed.

I had secured an employment-efforts order. My ex was supposed to apply for jobs, go to interviews, perhaps attend classes to sharpen skills, and file reports with the court every other week. She ignored this entirely for almost four years. (When I brought this to the court's attention during her relocation effort in 1999, I was told for the first time, by anyone, that I had been responsible for enforcing this order. Because I had failed to file motions of contempt, the court considered the order irrelevant.) At the very first separation hearing, my paycheck had been immediately garnisheed

for child support, and I learned that if I missed three consecutive payments I could be jailed, among other penalties. The custodial parent, however dishonest, is apparently bound only by the honor system.

---

During the next few years my ex retained another attorney so she wouldn't have to respond to my ongoing requests for a parenting plan, employment-order compliance, and mediation. I had no funds to gather and document evidence on her unreported income, false tax returns, and so on.

I had all the kids every weekend and one weeknight, coached my son's soccer and baseball teams, and attended parent-participation preschool with first one daughter, then the other. My ex, however, regularly used the exchange points to loudly berate me, causing alarm at the preschool, public school, and after-care programs. When she refused mediation on this issue, I withdrew from mid-week visitation. Then, to spare us all, I eventually withdrew from the preschool and canceled the weeknight and morning drop-off at public school. We went along.

---

When the California Supreme Court decided *In Re Marriage of Burgess,* 913 P.2d 473 (Cal. 1996), the coup of the custodial parent was complete.

---

In mid-1998, my ex demanded that I let her move the children to the East Coast, where her family and boyfriend lived. I refused. During all this time, she flew east about six times a year anyway (totaling about three months), both with and without the kids. In addition, her mother, brother, and boyfriend spent various lengths of time visiting California. She said she had a $50,000 bankroll, more where that came from, and the lawyer who "wrote the book" on relocation. Her threat, though, proved empty until the following spring.

In March 1999, I was served with her motion to relocate. She asserted that, because of *Burgess,* I shouldn't waste everyone's time by opposing. The kids were devastated. The idea of leaving their father, friends, schools, teams, and all the places they'd known and loved all their lives was incomprehensible. I could promise only that I'd do everything I could to make their wishes known to the court and try to stop this insanity.

I began to read *Burgess* but threw it down in disgust when I saw that this decision affecting thousands of lives concerned a 40-mile, in-state, job-related move-away! I couldn't believe that this could be sensibly applied to a 3,000-mile move-away, which had nothing to do with employment and would remove our kids from one of the best school systems in the nation.

And for what? This woman who had refused to ever work or move to a cheaper home said she couldn't afford to live in California and wanted to be near her ill mother and family, whom she already visited several times a year. (Actually, she instead moved in with her boyfriend in New Jersey, informing our children two days before the move.)

Family and friends helped me raise enough money to retain a wonderfully wise and empathetic attorney. Except for hearings, we conducted our entire relationship by e-mail to keep costs down. Educators, coaches, relatives (including a sociologist), and longtime friends (including a child psychologist) submitted declarations on the harm that would be done to the children through this extreme relocation.

---

The court ordered us (finally) to attend mediation regarding the move, thus outraging my ex. She then frightened a very experienced mediator, who at first suggested several more sessions but soon surrendered. My ex was so ferociously unsupportive of my relationship with the kids that, when she got me alone, the mediator asked if I had a history of violence against the children and if in fact I'd been arrested for it, and that was why my wife left me. I explained that I was not the angry half of the equation and that it was I who filed for divorce. She sent us back to court.

In the spirit of cooperation, I offered to sponsor an evaluation by a court-appointed psychologist. All five of us were tested and interviewed over a period of a few weeks. The result was an 18-page report to the court, which stressed the overriding value of the children's having regular contact with both parents and recommended that they not be moved. The evaluating psychologist, however, knew the court was unlikely to ask the custodial parent such questions as, "Why won't you get a job?" "Why won't you move to a cheaper house and/or area nearby?" and "Why don't you want the kids'

father to be part of their lives?" Thus, most of the report detailed exactly what the financial and, especially, custodial arrangements should be if the children were relocated.

Before *Burgess,* the custodial parent had to convince the court that moving the children would not significantly harm them. *Burgess* removed that obligation while still recognizing the idea of the children's best interest and shifted the burden to the noncustodial parent to show that harm would indeed occur. In his report (which my attorney called the most extensive she'd ever seen), the evaluating psychologist clearly stated that the contemplated move-away was not in the best interest of the children and was likely to cause them irreparable harm.

Still, the custodial parent no longer needed a reason to move. The only remaining check on her was the court's determination about whether she intended to frustrate the father's visitation and relationship with the children. One would hope that common sense would lead the court to presume that, by definition, a 3,000-mile move-away would certainly frustrate visitation and damage the children's relationship with their dad. That's what one would hope. Instead, the court asked the custodial parent. Case closed.

The decision was rendered on the new worst day of my life—August 10, 1999. Then the kids were packed up like property and hauled away, and an appallingly biased interpretation of the decision was submitted by my ex's attorney for our approval and the court's signature. After some prodding, they agreed to include the appointment (for three years) of a special master to help resolve disagreements that might (ahem) arise. The special master is an officer of the court who can write what amounts to court orders. In our case, we were fortunate to have the evaluating psychologist, who had gotten to know all of us, appointed to the position. Additionally, the language of his report—with respect to finances, custody, and so on—was incorporated into the order. Finally there would be some legitimate check on my ex's flouting of court orders and some remedy available, though his fees were, of course, quite high.

Once in Philadelphia (aka New Jersey), my ex was required to provide timely information on the kids' schools and teachers, teams and coaches, doctors and health insurance, and so on; send copies of school work, pictures, and report cards; start the kids in therapy for a prescribed length of time,

in consultation with the special master; purchase a computer, printer, and webcam so we could communicate with text and pictures over the Internet; set aside times for making and receiving calls; and send the children out to California once every three months, paying for every other trip. She ignored all these requirements.

It took several months of writing letters to my ex (who refused to speak on the phone) and the special master to get any information at all. There were a few sessions with the school counselor. No computer. The kids were seldom allowed to call, then not at all. So I made all the calls, often as many as four a day/night, as she continuously changed the acceptable times, allowed the service to answer (but wouldn't get a machine so the kids could hear my messages), said the kids couldn't come to the phone because they were playing, eating, showering, cleaning, doing homework, watching a video, getting ready for bed, or having a timeout. She gave them little privacy when they did talk and badgered them to get off after a few minutes, often leaving them in tears. Sarah, the youngest, finally just gave up. As for travel, the holidays became unavailable to me. Of six trips that the kids made to the West Coast, my ex paid for one.

The special master wrote several times, reminding my ex of the legal obligations she'd agreed to. When she ignored him, he wrote orders. During this time, however, the court unjudiciously (to me, unthinkably) removed the special master's power to write enforceable orders, that is, orders signed by the presiding judge. He was thus reduced to writing recommendations without the force of law. My ex ignored these, refused to pay him, and admitted she had no intention of facilitating my relationship with our children. Though the special master took a profound interest in our children and fulfilled his three-year appointment with care and compassion, no real benefit accrued to the kids.

After 18 months of this travesty, and still seeking to be the kind of father our children (any children) deserve, I left my home and friends of almost 35 years and moved across the country to a state I'd never even visited, to a town about 12 miles from the kids.

---

Though we all seem to agree that our children literally are the future, our national thinking about divorce, custody, and relocation ranges all over the proverbial map. Few states allow such a dramatic

relocation. Missouri allows no relocation over the legitimate objection of the noncustodial parent. Although this may make almost as little sense as the application of *Burgess* "to infinity and beyond," the extremes indicate the depth of our confusion as well as the spectrum of current opinion, policy, and law. We can and must do better.

For my ex and her succession of high-powered attorneys, the experience of California family court was child's play. For me and our kids, it was altogether different. The short-term consequences of having the fabric of our world violently ripped apart—the tears, heartache, profound anger, and acute depression—were enormous. The kids felt betrayed, bewildered, and tremendously sad. Though even these marrow-deep wounds can heal with time, ugly scars remain. And the long-term consequences of this relocation, and others like it, cannot now be fully imagined nor perhaps ever be truly measured. Across California, across the country, and stretching out into our communal future, there are thousands of parents like me and perhaps tens of thousands of children like mine.

I've now lived in New Jersey for two years, where my ex still mocks the California family court and special master, aggressively undermines my relationship with our kids, and has prevented me from spending any time at all with my youngest daughter. She is also threatening to move again. Thus, whenever I can martial some more money, some more hope, and some sort of rationale, I'll return again pro per to family court. And if it seems pointless to seek a remedy from an institution that to this point has not provided one, well, I simply have no other choice.

*Essay*

# Ten Years in Family Law Court

Pamela Besser Theroux

My name is Pamela Besser Theroux. I am a family law paralegal living in Northern California, and I was the respondent in a Southern California custody dispute that lasted from 1982 to 1992. I was married for seven and a half years. When I was five months pregnant, my husband ordered me to have an abortion. I refused. At the end of my eighth month he served me with divorce papers. One month later my son, Joshua, was born. Mike, his dad, would not hold him or acknowledge him. There was no relationship. When Josh would cry, his dad would yell, "Your kid is crying—go take care of him!"

I was divorced in 1983. My family is in the newspaper publishing business in the Chicago area. After my divorce, with no job, nowhere to live (I had to sell my house for economic reasons), no family or support system within 2,400 miles, and with my ex-husband not exercising any regular visitation and constantly screaming at me, "Take your kid and get out of here—take your kid and go back to Chicago," I decided I would move back to Chicago to finish graduate school and be with a family support system. My son was just a little over a year old.

As soon as I notified my son's father that I was, in fact, going back to Chicago, he did a 360-degree turn and filed for full custody. Had I just left, he probably never would have known, as we rarely saw or heard from him, even though he lived less than two miles away. My attorney told me that proper procedure dictated I let him know, so I sent him a letter. All hell then broke loose. He immediately ran into court and had me stopped from moving by filing for custody (even though 15-month-old Joshua had no idea who he was). This was the beginning of 10 years in court over custody and visitation issues, at least six court-ordered psychological evaluations, and my separate attorney fees and costs that exceeded $160,000.

We spent countless hours in mediation with family court services from 1983 to 1992. We dealt with mediators who were so hardened by what they did every day that they were rude

and threatening. One mediator in particular was on some kind of mission with us. In my first-ever mediation meeting, Mediator #1 very clearly told us that her job was to keep us out of court and reach a settlement. She told us that if we did not come to an agreement, she would make a recommendation to the judge. She also said that the judge followed her recommendations 90 percent of the time.

At this point, Josh's dad and I lived 400 miles apart. As a preschooler, Josh spent three weeks a month with me and one week with his dad. When it was time for Josh to enter kindergarten, I asked his dad to work out a different visitation schedule. He refused and hired a known "father's rights" (vs. children's rights) psychologist who was well placed within the court system there (who since has had his state license yanked) and who testified that Josh would have no trouble academically, socially, or psychologically attending two schools 400 miles apart each month to satisfy the custody arrangement (three weeks in the San Francisco area and one week in Southern California). To our knowledge, Josh was the first child in the United States *ordered* by a court to do this. It was very hard on Josh, but he did it all through kindergarten. I had to have him tutored just to keep up with his class. The superintendent in Southern California was also up in arms, as attending their school only one week per month did not meet the attendance requirement for them to pass him. That meant that no matter what grade Josh would be in in Northern California, he would always be in first grade in Southern California for his one week per month there. After a year of this arrangement not working for Josh, I asked the court to modify the visitation schedule to allow Josh to attend one school. Mediator #2 didn't agree with me and instead decided that I should move back to Southern California, and that I should be given one week to do so or else give up custody of my son.

During this process, Josh was six years old and required by the Southern California court to attend mediation. Mediator #2 took Josh alone behind closed doors, waved a "magic wand" over his head, and asked him which parent he wanted to live with. According to Josh (who is now 21), each time he would tell the mediator what he felt or what he wanted to do, the mediator would ignore him if it wasn't the "right" answer. Josh began having screaming nightmares after sessions with the mediator.

Once again the court upheld the mediator's recommendation and yanked Josh out of everything he knew and loved and that he had been involved in since age 3. Josh and I were given one week to

move back to Southern California or I was to give up custody. The decision was not based on what was best for the child. The decision was based on dad's testimony that he owned a business in Southern California, owned a home in Southern California, and made more money than I did. Our judge, who was not a family law judge, was leaving for a European vacation the next day, and you could tell the guy just was not "in court" on the day of this terribly important hearing. In fact, at times he appeared to be asleep! But Mediator #2 told the judge what his recommendation was and that is exactly what the judge ordered. As the judge recited his order from the bench, my then-attorney turned to me and said, "They just violated your civil rights . . . courts cannot tell you where you can or cannot live." You have no idea how scared I was at that moment!

Interestingly, right after I made the move back to Southern California, I found out that while the court proceeding was going on, dad was in the middle of a bulk transfer sale of his business and he was losing his home because he had filed bankruptcy! No one cared at this point, especially not the mediator! Mediator #2 then took another step and decided that dad and I had to spend hours in his office each month (yes, at the courthouse) talking about how things were working out and how he wanted us to do things (this was the mediator on a mission).

Fortunately, the ACLU, a group of UCLA law professors, and the California Women's Law Center became interested in my case. Although it took almost four years, we appealed the order moving us to Southern California and won. The appellate court ruled that the Southern California court had been guilty of gender bias and abused its discretion in requiring us to move. Josh and I were permitted to return to Northern California, but we were delayed for six more months because Josh's dad filed another custody motion in superior court.

Even this turned out not to be the end. In August 1992 Josh's father failed to return him home at the end of his summer vacation visitation. I appealed to the court and was turned over to Mediator #3, whose opening words were, "What can we do to make it OK with you that Josh stay with his father?" However, for the *first* time, a judge did not agree with the recommending mediator. Instead, this very kind judge asked my son what he wanted to do and where he wanted to live. Josh was allowed to return to his home. Josh was now 10 years old. As a result of the years of turmoil, Josh spent the next nine years in therapy at Dr. Judith Wallerstein's Center for the Family

in Transition. Josh is now finishing his senior year of college. He has not heard from his dad since he was 18 years old. One of the psychologists whom we were involved with early on told me (once) that it was never about the child, but rather that dad was very angry with me. Well, I know now that that was true; it was never about the child, only the court never seemed to get that. Why else would the court send us out for at least six psychological evaluations over a 10-year period and then *each* time ignore the recommendation of the psychologists and decide solely on the recommendation of the mediators?

Sometimes my duties as a family law paralegal have me attending/assisting in court hearings or trials. I vividly remember my first time in court as a paralegal. My eyes welled up with tears, as I could not believe what I was hearing. I was listening to a judge very kindly and very compassionately explaining a particular process to a pro per litigant. It was so different from anything that I had ever experienced in my 10 years in court.