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DISPUTE RESOLUTION OF FAMILY LAW MATTERS

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Journal of the American Academy of
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This issue is devoted to:

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About This Issue

Note from the Issue Editors:

As with other instances in which we have served together as Issue Editors, it has been a pleasure collaborating with each other, with the authors of these excellent articles, with our Executive Editor, Mary Kay Kisthardt and with our Co-Editors in Chief, Steve Peskind and Dana Prescott. We have frequently commented on the parallel between the topics covered in this volume, which reflect the trend toward a modernization of family law dispute resolution (and away from traditional litigation), and the "modernization" our Journal is experiencing in its own right, as we transition from traditional print versions to a hybrid of digital and print delivery of the Journal. These changes have been managed with excellence by our Executive Editor and Co-Editors in Chief. We wish to draw attention to their fine efforts in this regard, as these "modernizing" changes invariably present challenges. The process has gone smoothly due in significant measure to the thoughtful leadership provided by these three committed, intelligent and determined individuals. Andrew Soshnick and David Griffin.

As most family law attorneys know, dispute resolution mechanisms such as arbitration, and mediation are no longer described as "alternative". These types of dispute resolution processes, along with negotiation are now the methods extensively used to resolve family law cases. In this issue we have assembled an impressive set of articles by experts in the field. The articles include a description of skills that attorneys can pass on to clients to help them to shape future co-parenting relationships and address property issues in the dissolution. Other articles focus on negotiation, arbitration, and early dispute resolution. Many states are now requiring continuing legal education that focuses on implicit bias. One of our mediation articles captures some of the key components of that type of training. We also have two additional articles, one on the Hague Convention on Child Abduction and its questionable application to indigenous peoples and also an extensive report on the Uniform Parentage Act of 2017 which was compiled by the AAML Legislative Committee.

Our Issue Editors are David Griffin and Drew Soshnick. Mr. Griffin is a partner at Rutkin, Oldham & Griffin in Westport, CT. He represents clients in divorce, custody, relocation and income and asset distribution cases, including alimony and support issues arising from complicated compensation structures and high net worth families. He has been active in the Academy for many years and was named National Fellow of the Year in 2016. Mr. Soshnick is a partner in the Indianapolis office

of Faegre Drinker Biddle & Reath LLP where he concentrates his practice in complex matrimonial cases. He is a Fellow of both the American Academy and the International Academy of Family Lawyers. He writes and speaks extensively on divorce financial and valuation issues.

Our first article is from the AAML 2023-2024 Legislation Committee and is entitled, A *Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*. The report summarizes the status of the adoption of the UPA by states and highlights the challenging issues raised by determining who has legal rights with respect to children. The committee urges fellows to support state-level efforts to advocate for measures that protect children's relationships with those with whom they have established a bond as required by the UPA. In doing so, the committee hopes to protect children by ensuring stability in their relationships and preventing chronic litigation which harms them.

Next, we feature *Family Law Arbitration—A Guide for Providing Sound Counsel* to Litigants by Amy J. Amundsen and Carolyn Moran Zack. The article discusses what lawyers need to know to propose arbitration to their clients and opposing lawyers, including trends and research in favor of arbitration, the laws applicable to arbitration, the cases or issues that are appropriate for arbitration, and its advantages and disadvantages as well as describing the arbitration process. The essential components of an arbitration agreement are discussed along with the techniques that can be used, including final-offer arbitration, mediation-arbitration, single-issue arbitration, and a panel of arbitrators. It also includes considerations for child-related awards and distinguishes private judging. Finally, the authors advocate for family law-specific legislation or rules to provide more reliability in the process and to protect the interests of family law participants. Amy J. Amundsen of Amundsen Legal Consulting advises lawyers on case strategies and office management and provides alternative dispute resolution services as a trained Collaborative Family Lawyer. She is a certified Family Law Arbitrator and Tennessee Supreme Court Rule 31 Family Law Mediator. She is also a Diplomate in the American College of Family Trial Lawyers, a Fellow in the International Academy of Family Lawyers and the AAML, serving as co-chair of the AAML Arbitration committee and on the CLE, Legislation, Collaborative Law and Mediation committees. Ms. Amundsen received the Justice Joseph W. Henry Award, recognizing the year's most outstanding article published in the Tennessee Bar Journal (2016) and was awarded the Memphis Bar Association's highest honor, the Judge Jerome Turner's Lawyer's Lawyer Award (2018), and also was the recipient of the Marion Griffin-Francis Loring Award (2007) from the Association of Women Attorneys. Ms. Zack is a partner with the law firm of Momjian Anderer, LLC, practicing family law in Philadelphia and the surrounding counties. She is a Fellow of the AAML, co-chair of the Pennsylvania Chapter's Programming Committee, and a member of the national Legislative, Arbitration, and

Test Committees. She serves as the Chair of the Domestic Relations Procedural Rules Committee of the Pennsylvania Supreme Court and is the Second Vice Chair of the Pennsylvania Bar Association Family Law Section, and past-Chair of the Family Law Section of the Philadelphia Bar Association. She is a member of an interdisciplinary group of judges, psychologists and lawyers who meet to discuss ways to improve the resolution of custody issues. She is certified as an arbitrator, mediator, and parenting coordinator. Ms. Zack served for eight years (2009-2016) as a Family Court Hearing Officer in Chester County, as well as Chief Law Clerk for the Honorable Berle M. Schiller in the Pennsylvania Superior Court (1998-1999).

A consideration of the Hague Convention's application to specific groups is the subject of *Did the Hague Convention on the Civil Aspects* of *International Child Abduction Recognize Indigenous Groups and Culture?* and is authored by Timothy Fadgen, Guy Charlton, and Dana E. Prescott. The authors argue that when requiring recourse in and between adversarial systems without explicit recognition of the independent standing of Indigenous populations courts and policymakers should look behind the Convention to determine if privileges and bias which already permeate adversarial systems should be considered when reviewing Convention petitions. The article contains a brief discussion of the Convention and then reviews the demographic and definitional struggles associated with Indigenous populations. It explores the Convention's deployment of judicial systems and implications for epistemic injustice before considering the recent New Zealand opinion, *Mercer v. Mercer,* which considers these principles and suggests that courts are already beginning to consider cultural and human right considerations in determining a child's best interests. Tim Fadgen (PhD, JD) is a Senior Lecturer in Politics and International Relations and Public Policy at the University of Auckland - Waipapa Taumata Rau, and Associate Director of the Public Policy Institute. He is an active member of the Maine (USA) bar and is a past member of the bar of American Samoa, where he was an Assistant Attorney General and of the High Court of (Western) Samoa, where he was a Fulbright Fellow and special assistant to the Attorney General. Guy Charlton, PhD in Law, JD, MA is an Associate Professor - School of Law, University of New England, Sydney, Australia. His research interest includes comparative indigenous law, corporate law, constitutional and human rights law, and property law. Prior to his position at the University of New England he was a Senior Lecturer in Law at AUT, Auckland, New Zealand. He has also worked or taught units at Curtin University Law School in Perth, Western Australia and City University of Hong Kong, Auckland University and National Chengchi University, Taipei, Taiwan. Dana E. Prescott, PhD, LMSW, JD, is a partner at Prescott, Jamieson, & Murphy Law Group in Saco, Maine and is licensed in both Maine and Massachusetts. He is a fellow of both the AAML and IAFL and is the

Co-editor of the Journal. He also serves and an adjunct professor at the Boston College School of Social Work.

Our next article is authored by Barbara Glesner Fines who is the Rubey M. Hulen Professor of Law and Dean Emerita of the University of Missouri - Kansas City School of Law. The article is entitled *Biases and Mediation Practice.* Professor Glesner Fines is an expert on professional ethics, legal education and the professional identity formation of law students. She has authored numerous articles and books on these subjects and is a fellow in the Holloran Center for Ethical Leadership. Most recently she has conducted numerous webinars on the elimination of explicit and implicit bias, diversity, inclusion and cultural competency. The article explores the meaning of bias and the ethical duties of both attorneys and mediators to understand how decisions and judgments are affected by bias, focusing particularly on cognitive biases that are especially significant in the mediation process. It explores the biases that affect perception and valuation that distort decision-making and also how biases affect how individuals judge others including their motivations and intentions. It also addresses biases that impact interpersonal communication and most importantly provides suggestions for recognizing these biases and mitigating their detrimental effects in mediation.

In *Redefining Resolution: How Early Dispute Resolution (EDR) Is Re-Shaping Modern Family Law Practice*, Susan Guthrie critically analyzes the challenges and opportunities for early dispute resolution processes. The article critically examines the transformative role of EDR in modern family law practice, arguing that the adoption of EDR methodologies—notably mediation, collaborative law, and cooperative practice—represents a pivotal shift toward more empathetic, efficient, and client-centered legal processes. She provides practical insights for practitioners hoping to underscore the importance of integrating these approaches to better meet the complex needs of families in dispute. She addresses ethical considerations surrounding EDR implementation, emphasizing the importance of informed consent and appropriate screening. Finally, she focuses on the transformative potential of EDR in reshaping the landscape of family law practice and offers guidance for practitioners seeking to integrate EDR into their work. Ms. Guthrie is the Chair of the ABA Section of Dispute Resolution and a highly respected attorney and mediator specializing in family law. With over 30 years of experience, Susan has built a distinguished practice dedicated to helping families navigate the complexities of divorce and separation with dignity and efficiency. As a leader in the field, she has been at the forefront of integrating Online Dispute Resolution (ODR) into family law, offering innovative solutions for her clients. Recognized for her contributions to the profession, Susan's role as Chair of the ABA Dispute Resolution Section underscores her commitment to advancing best practices in family law mediation and dispute resolution. Susan

is licensed to practice in Connecticut and California and resides in Chicago, Illinois. She works worldwide with legal and dispute resolution professionals to support their practice development and business growth through coaching and strategic planning.

Turning to negotiation, the most frequently used methos of dispute resolution, Kathryn Murphy and Ally Caskey provide practical tips in their article entitled, *Negotiation Strategies and Techniques*. From understanding the psychology of negotiation to leveraging dispute resolution strategies, they explore how lawyers can navigate the delicate balance between advocacy and compromise. The article begins with a discussion of the win-win approach to negotiation, which represents mutual gains for the parties involved. They then highlight the elements that form the basic structure of a negotiation and finally delve into strategies and techniques including whether and when to make the first offer, making concessions and counteroffers, evaluating options, handling impasses, and managing time pressures. Finally, they address the role of emotions and the pivotal question of whether parties should negotiate or go directly to trial. Ms. Murphy is a partner at Goranson Bain Ausley in Dallas, Texas. She was named 2019 "Lawyer of the Year" in Dallas by Best Lawyers in America in family law. In 2021, Kathryn was the recipient of one of the most coveted awards in Texas family law, the Sam Emison Award. Kathryn is Board Certified in Family Law by the Texas Board of Legal Specialization. She is a fellow of the International Academy of Family Lawyers, and the AAML, having served as the president of the Texas chapter. She is a diplomate of the American College of Family Trial Lawyers, a past chair of the Family Law Council of the State Bar of Texas and a past member of the State Bar of Texas Board of Directors. Ms. Caskey also practices at Goranson Bain Ausley. She was named a 2023 "Texas Rising Stars" by Thomson Reuters. She is a graduate of Southern Methodist University's Dedman School of Law, where she served as the President of the Family Law Association and was named to the Dean's List. Her passion for family law was sparked by her work as an attorney ad litem for children in the foster care system at the W.W. Caruth, Jr. Child Advocacy Clinic. Ally's dedication to family law was further honed during her internship with Justice Debra Lehrmann of the Texas Supreme Court.

Our next article also focuses on practical considerations, this time in mediation. It is entitled, *Why Do Mediations Fail? Perspectives, Concerns, and Advice from Mediators* and is authored by Lisa Ann Sharpe and William B. Reingold, Jr. While recognizing the many benefits of mediation to resolve family law matters, the authors acknowledge that many mediations fail. Hoping to glean some insight into why this happens they interviewed various mediators from across the country asking their perspectives on attorneys representing clients in mediation and what strategies or techniques were successful or hindered resolution. This article consolidates these mediators' opinions

and offers advice on how best to represent family law clients in mediation. Lisa Ann Sharpe and William B. Reingold, Jr., are practicing family law attorneys at the law firm Lasher Holzapfel Sperry & Ebberson, PLLC, in Seattle, Washington. Ms. Sharpe has been a fellow of the AAML since 2011 and is currently the President of the AAML Chapter in Washington. She focuses on complex family law cases and representation of high net worth clients. Her clientele spans the globe, including the U.S., Asia, Europe, and Canada, reflecting her extensive expertise and international reach. She is deeply committed to the mediation of divorce cases, advocating it as a preferable alternative to litigation. Over her 33 years of practice, she has successfully mediated hundreds of cases, providing her clients with a less adversarial and more cost-effective means of resolving their disputes. Lisa's dedication to mediation is also evident in her volunteer work as a neutral mediator with the King County Bar Association, where she serves as a volunteer settlement conference attorney. William Reingold received his JD from Wake Forest University in 2019 and clerked at the North Carolina Court of Appeals until 2020 when he joined the firm. In his spare time, Mr. Reingold writes for law journals and serves as a moot court coach at the University of Washington.

Expanding Disagreement Resolution Skills for Attorneys: Helping Shape Future Co-parenting Relationships and Addressing Property, Debt, and Distribution of Future Income is written by Kenneth H. Waldron, Allan R. Koritzinsky and Eileen McCarten. In it, the authors posit that the majority of marriages that end in divorce do so because the spouses lack skills to successfully resolve the disagreements that inevitably arise from differences, but that those skills can be taught at the time of divorce. The authors identify ten disagreement resolution skills that hopefully can be modeled and if possible, taught by attorneys, to facilitate their clients' improved co-parenting relationships. These same skills also can be helpful in assisting parties to reach optimal financial agreements and to prepare them for better future financial decisions they are likely to face if, and when, they have children. Ken Waldron, Ph.D., has had numerous publications. Among them, he has co-authored four books with Allan Koritzinsky: Game Theory and the Transformation of Family Law: Change the Rules- Change the Game, Winning Strategies in Divorce: the Art and Science of Using Game Theory Principles and Skills in Negotiations and Mediation, The Road to a Successful Marriage Is Unpaved: Seven Skills for Making Marriage Work, and Planning a Sensible Divorce: Avoid the Toxic Dance of a Messy Divorce. His forty-year practice was almost exclusively with family law cases, typically in high-conflict co-parenting situations. He has spoken to groups of attorneys, mental health professionals, mediators, judges, and commissioners nationwide, has been appointed as an expert by courts in numerous jurisdictions, and has provided specialty programs for high-conflict parents. Allan Koritzinsky is a retired partner with Foley & Lardner LLP, where he was Chair of the

law firm's Family Law Team. He was a Lecturer at the University of Wisconsin Law School and also the co-author of two additional books, Tax Strategies in Divorce and The Divorce Practice Handbook, as well as the co-author of Wisconsin's Family Law Case Notes & Quotes. He was a Fellow of the American Academy of Matrimonial Lawyers, a Diplomate in the American College of Family Trial Lawyers, a member of the AAML national Board of Governors, the National Chair of the AAML Arbitration Committee, and Past President of the AAML Wisconsin chapter. His nearly 60-year law practice was primarily family law transactional and ADR work. He has spoken on divorce-related and ADR topics to groups of attorneys, mental health professionals, mediators, judges and commissioners nationwide. The Waldron-Koritzinsky website can be found at marriageanddivorce.org. Eileen McCarten, MS, LCPC, is a mediator and certified EFT therapist in private practice and founder of Family Matters-PACT which provides a continuum of quality educational, mediation and counseling services. Eileen has extensive experience providing mediation and co-parenting training in Wisconsin and Illinois and serves as a mental health coach and child specialist in the collaborative law process.

We also feature a book review of Fair Shake: Women & the Fight to Build a Just Economy by Naomi Cahn, June Carbone, and Nancy Levit. It is entitled *Will Women Ever Reach Pay Equity?* The author is Theresa M Beiner, a Professor in Constitutional Law at the University of Arkansas at Little Rock Bowen School of Law. Prof. Beiner was the first permanent female Dean at the Bowen School of Law. During her five years as Dean, she helped find and start the law school's Veterans Legal Services Clinic and Pro Bono Services Center as well as successfully sought approval and funding of the Center for Racial Justice and Criminal Justice Reform at the school. A graduate of the University of Virginia (BA) and the Northwestern University Pritzker School of Law, Professor Beiner teaches and researches in the areas of Employment Discrimination, diversity in the judiciary, Constitutional Law, and Civil Procedure. The Bowen School of Law has awarded Professor Beiner its faculty excellence awards for scholarship and teaching.

We also have two student Comments that focus on dispute resolution of family law matters. The first entitled, *Collaborative Divorce: The Ethical Concerns of Conscious Uncoupling* is authored by Audrey Doering. The other written by Taylor Marshall is entitled *Trauma-Informed Mediation: A Path to Healing and Resolution.*

As usual our issue concludes with an excellent extensive bibliography of articles on dispute resolution of family law matters by Allen Rostron, Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri-Kansas City School of Law.

Mary Kay Kisthardt
Executive Editor
Kansas City, Missouri

A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children

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[1] This paper is the work of the Legislation Committee of the AAML and may not represent the policies or views of the AAML, its membership, or the Journal. The Committee would like to thank Professors Nancy Levit and Mary Kay Kisthardt for their editing and suggestions.

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Introduction

The American Academy of Matrimonial Lawyers (AAML), through its mission to promote excellence and ethical practices in family law, serves an important role of ensuring that policies in the United States adequately support and protect families, particularly the children nurtured within families.[2] A core obligation, within that mission, is providing policy leadership and analysis to the legal community and state judicial systems when legal reforms, laws, and policies need to adapt to evolving scientific, social, and policy changes to family formation. This Report by the AAML's Legislation Committee is intended to provide an outline of policy and case law developments following the enactment of the Uniform Parentage Act (2017).[3]

Over the last several decades, there have been enormous changes to the formation and reformation of family systems as well as the status of legal parentage in the United States. Use of the term *parent* is not just limited to biological or birth parents but may include kinship, adoption, guardianships, de facto parents, state agencies, stepparents, and as a result of surrogacy, and IVF. This means that not just married or nonmarried families with children in preadolescence and adolescence are separating, but even younger ages at which children under age five or in pre-school are living in separated and divorced families.[4] With

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2 *See Mission*, American Academy of Matrimonial Lawyers, https://aaml.org/mission/ (last visited Mar. 22, 2024).

3 *See* Unif. Parentage Act (Unif. L. Comm'n 2017), higherlogicdownload.s3.amazonaws.com; Jamie D. Pedersen *The New Uniform Parentage Act of 2017*, Am. Bar Ass'n (2017), https://www.americanbar.org/groups/family_law/publications/family-advocate/2018/spring/4spring2018-pedersen/.

4 Comprehensive tables and data may be found at *Marriage and Divorce,* U.S. Census Bureau, https://www.census.gov/topics/families/marriage-and-divorce.html (last visited Mar. 22, 2024). For additional readings, see Lydia R. Anderson et al., *Living Arrangements of Children: 2019*, U.S. Census Bureau (Feb. 2022); Alison Aughinbaugh et al., *Marriage and Divorce: Patterns by Gender, Race, and Educational Attainment*, Mo. Labor Rev, U.S. Bureau of Labor Statistics (2013),

recent constitutional protections for LGBTQ families, those family systems also experience marriage and separation, though that demographic data is still evolving. At the same time, advances in medicine and access to fertility healthcare have spurred growth in rates of children born through assisted reproduction with and without surrogacy. Many of these topics have been explored by scholars and practitioners in this Journal over the past decade.[5]

What this translates to, unfortunately, is a higher probability of litigation between parents as family systems form and reform. As the complexity of parenting arrangements within family systems shifts, parenting plans must adjust over the developmental lifespan of a child. Given the societal importance of maintaining healthy parenting arrangements in order to protect the psychological and emotional well-being of children, it is imperative that child custody laws provide consistent security for children no matter how their family is formed.

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https://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.htm; Gøsta Esping-Andersen & Francesco C. Billari, *Re-theorizing Family Demographics*, 41(1) Population & Development Rev. 1 (2015); Natasha V. Pilkauskas & Christina Cross. *Beyond the Nuclear Family: Trends in Children Living in Shared Households*, 55.6 Demography 2283 (2018).

[5] *See* Katharine K. Baker, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood*, 35 J. Am. Acad. Matrim. Law. 1 (2022); Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. Am. Acad. Matrim. Law. 589 (2022); J. Thomas Oldham, *Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent,* 35 J. Am. Acad. Matrim. Law. 299 (2022); Jeffrey A. Parness, *Choosing Parentage Laws in Multistate Conduct Cases,* 35 J. Am. Acad. Matrim. Law. 699 (2022); Dana E. Prescott & Gary A. Debele, *Shifting Ethical and Social Conundrums and Stunningly Anachronistic Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider*, 30 J. Am. Acad. Matrim. Law. 127 (2017); Camille Workman, Comment, *The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family*, 32 J. Am. Acad. Matrim. Law. 233 (2019). The Journal has also published extensive bibliographies in this area of policy and law. *See* Nancy Levit & Allen Rostron, *Assisted Reproductive Technologies: An Annotated Bibliography 2013-2018*, 31 J. Am. Acad. Matrim. Law. 241 (2018); Allen Rostron, *Annotated Bibliography of Selected Issues in Family Law: Addiction, Advance Healthcare Directives, the Uniform Parentage Act, and Self-Represented Litigants*, 32 J. Am. Acad. Matrim. Law. 251 (2019); Allen Rostron, *Constitutional Issues in Family Law: An Annotated Bibliography (Part 1 of 2)*, 35 J. Am. Acad. Matrim. Law. 381 (2022).

At the outset of this report, it is important to address what we mean by the term "legal parentage." Legal parentage is the legal relationship between a parent and a child from which all rights and responsibilities flow. In the United States, legal parentage and its status connects with rights and responsibilities, including inheritance rights, social security survivor and disability benefits, access to other benefits such as TANF and Medicaid, health and dental insurance, child support, educational contributions, custody, parenting time, and decision making. Legal parentage may provide a stable relationship for children and can be foundational to their well-being.[6] For many families, the issue of establishing legal parentage never comes up since legal parentage is clear because of marriage between the parents or genetic connections between the parents and child. Indeed, for many families, the issue of parentage is straightforward, assumed, and uncontested. For those families, such as LGBTQ families, who are formed through adoption, assisted reproduction or surrogacy, legal parentage is a foundational legal and moral issue that may be barred or contested by state policies.

The Uniform Parentage Act (UPA) was first promulgated by the Uniform Law Commission in 1973 to provide guidance to states on the issue of parentage after key U.S. Supreme Court cases concluded that children born to never-married parents must be treated equally to children born to married parents. The UPA has been a successful uniform law and has been widely adopted throughout the country.[7] Over the decades, the UPA has been debated and updated to reflect advances in law, science, and changes in recognition of the formation and definition of families in the Unites States.

In 2017, the Uniform Parentage Act was updated to reflect medical advances in the realm of assisted reproduction and surrogacy and to encompass the constitutional developments

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6 *See* Clare Huntington, *Pragmatic Family Law,* 136 Harv. L. Rev. 1501, 1507 (2023) (arguing that courts' ratification of children's living arrangements provides stability for the children).

7 Matthew P. Clark, *Use It or Lose It: Revising Louisiana's Process to Establish Paternity,* 84 La. L. Rev. 409, 448 (2023) ("A total of 22 states have adopted some version of the UPA, including seven states that have adopted the language of the 2017 revision and 15 states that have adopted the language of previous versions.").

articulated in *Obergefell v. Hodges*[8] and *Pavan v. Smith*[9] to protect LGBTQ families and the children born within those families. Through a deliberative process led by Senator Jamie Pedersen of Washington State and Professor Courtney Joslin of the University of California, numerous stakeholders engaged over months to draft and consider an update to the UPA that advanced the needs of children in a consistent, child-centered manner.[10]

As State Senator and Uniform Act Commissioner Jamie D. Pedersen summarized, UPA 2017 contained five major improvements from earlier versions of the UPA. First, UPA 2017 ensures its provisions apply equally to children born to LGBTQ parents. This is accomplished by, among other things, providing for inclusive language in presumptions of parentage and voluntary acknowledgements of parentage. Second, this version provides a clear and high standard for establishing legal parentage for de facto parents. Third, UPA 2017 includes a provision that precludes the establishment of parentage for children born through sexual assault. Fourth, the Model Act substantially updates surrogacy provisions, echoing laws in Delaware and Maine, to make surrogacy statutes more protective of all parties, to provide guidance for genetic surrogacy, and to reflect modern practice. Fifth, and finally, UPA 2017 contains a new article 9 to address protections for children born through donated gametes, including ensuring access to non-identifying medical information about the gamete donor.[11]

Endorsed by major organizations including the American Bar Association and the National Child Support Enforcement Association, according to the Uniform Law Commission, the 2017 version of the act has already been adopted with (in some cases significant) variations in eight states (California, Colorado, Connecticut, Maine, Massachusetts, Rhode Island, Washington State, and Vermont) and bills remain pending in five states during the 2023 legislation session (Hawai'i, Kansas, New Mexico, and Pennsylvania).[12] On behalf of the legislation committee, we hope this overview of the UPA 2017 is helpful. We believe that UPA

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8 576 U.S. 644 (2015).

9 582 U.S. 563 (2017).

10 *See supra* text at note 3.

11 Jamie D. Pedersen, *The New Uniform Parentage Act of 2017* (2018), https://www.americanbar.org/groups/family_law/resources/family-advocate/archive/new-uniform-parentage-act-2017/.

12 For a map of states that have passed or considering passage of UPA 2017, see Parentage Act - Uniform Law Commission (uniformlaws.org).

2017 provides a positive and important framework for updating parentage laws in each state to protect children's relationships with those parents who have established a bond as required by the UPA.[13] While we urge AAML chapters and fellows to support state-level efforts to pass these parentage equality measures in their home states, we are also mindful of the harm that chronic litigation in family courts may do to children, so that balancing test between protecting the stability and attachments of children and preventing chronic litigation remains ever present.

I. Historical Background and General Trends of the Uniform Parentage Act

The Uniform Law Commission (ULC) originally promulgated the UPA in 1973 in response to U.S. Supreme Court decisions holding that differential treatment of nonmarital children was unconstitutional.[14] To address that concern, the first version removed the legal status of illegitimacy and provided a series of presumptions used to determine a child's legal parentage. It also addressed an early form of alternative insemination. A core principle of the UPA 1973 was to ensure that all children and all parents have equal rights with respect to each other, regardless of the marital status of the parents.

The next major revision to the UPA occurred in 2002 when it was amended to add a nonjudicial acknowledgement of paternity procedure ("Recognition of Parentage" process or "ROP" in most

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13 Naomi Cahn, *The New "ART" of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 2018 U. Ill. L. Rev. 1443; Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J. 589 (2017); Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who Is a Child in a Same-Sex Family—Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: The US Perspective*, 30 J. Am. Acad. Matrim. Law. 55 (2017); Allen Rostron, *Annotated Bibliography of Selected Issues in Family Law: Addiction, Advance Healthcare Directives, the Uniform Parentage Act, and Self-Represented Litigants*, 32 J. Am. Acad. Matrim. Law. 251 (2019); Daniel Schwartz, *Gestational Surrogacy Contracts: Making a Case for Adoption of the Uniform Parentage Act*, 33 Wis. J.L. Gender, & Soc'y 131 (2018); Sydney H. Willmann, *Commercial Surrogacy and the Sale of Children Under the Revised Uniform Parentage Act of 2017*, 49 Cumb. L. Rev. 157 (2018); Camille Workman, *The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family*, 32 J. Am. Acad. Matrim. Law. 233 (2019).

14 *See* Pedersen, *supra* note 11.

states) that would be equivalent to a court adjudication of parentage. This revision also included provisions governing genetic testing and rules for determining the parentage of children conceived with assisted reproductive technologies. The UPA also included a paternity registry and optional provisions authorizing surrogacy agreements.

Between the UPA 2002 being approved by the ULC and the UPA 2017 being approved by the ULC on July 19, 2017, the U.S. Supreme Court decided *Obergefell v. Hodges* (providing for the legalization of same-sex marriage)[15] and *Pavan v. Smith* (addressing the marital presumption of parentage for married same-sex parents).[16] As societal recognition of nontraditional family systems and legal accessibility to marriage expanded, medical science was providing a means for parents to have children through assisted reproduction and surrogacy. As Professor Courtney Joslin summarized:

> First, the UPA (2017) expands the ways in which a nonbiological parent may establish her or his parentage. The Act carries over the holding-out provision, but revises it so that it applies equally to men and women. It also adds a new provision on de facto parents, under which someone who has been acting as a parent can legally establish his or her parentage. Finally, the Act updates the assisted reproductive technology (ART) provisions to permit individuals of any gender to establish their parentage based on proper consent to the ART procedure. All ART provisions of the UPA (2017) apply equally without regard to the sex, sexual orientation, or marital status of the intended parents. Second, by adopting the UPA (2017), states would bring their parentage statutes into compliance with the Supreme Court's decisions in Obergefell v. Hodges, Pavan v. Smith, and Sessions v. Morales-Santana by removing gender-based distinctions. These Supreme Court decisions make clear that family law provisions that discriminate on the basis of gender or sexual orientation may be constitutionally suspect. The UPA (2017) addresses this potential constitutional infirmity by removing most of the gender distinctions in the Act. As a result, most of the provisions in the Act apply without regard to gender or sexual orientation.[17]

Concurrently, state family courts and legislatures were developing legal definitions and tests to determine parentage for a whole host of persons who were acting like parents who lacked

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15 135 S. Ct. 2584 (2015).

16 137 S. Ct. 2017 (2017).

17 Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 Yale L.J. F. 589, 592 (2017-2018).

biological or legal parentage relationships to the children for whom they were providing care and parenting. This included various third parties such as biologically related persons (e.g., grandparents and other kinship relatives), non-biologically related adults (e.g., stepparents and stepsiblings), and many LGBTQ persons in relationships with other parents and their children. All these third-party caregivers were seeking to obtain court-ordered recognition as de facto parents. The constitutional and legal challenges raised complex issues concerning limitation or expansion of the number of legally recognized parents that a child could have through a family court order.

The current version of UPA 2017 has five overarching goals as listed above. The UPA 2017 is organized to address the five goals in ten articles which provide comprehensive guidance for the establishment of parentage. Article 1 contains definitions. Article 2 outlines the pathways to parentage under UPA 2017 as well as presumptions of parentage including the marital and non-marital presumption. Article 3 addresses voluntary acknowledgements of parentage, the simple, voluntary, administrative process the federal government requires states to have to establish parentage as close to birth as possible. Article 4 contains provisions about a paternity registry for termination or adoption cases. Article 5 outlines provisions about genetic testing for parentage through genetic connection. Article 6 consists of provisions regarding the establishment of parentage under the different pathways and includes provisions to address competing claims of parentage and to preclude parentage establishment by a perpetrator of sexual assault resulting in a child. Article 7 comprehensively addresses parentage of children born through assisted reproduction, and Article 8 addresses parentage of children born through gestational and genetic surrogacy. Article 9 provides access to non-identifying medical information for children born with the help of gamete providers. Article 10 is a miscellaneous or catch-all section.

As noted above, eight states thus far have enacted the UPA 2017: California, Connecticut, Colorado, Massachusetts, Maine, Rhode Island, Vermont, and Washington. The process for enactment and the resulting legislation is instructive for practitioners in other states who are interested in the UPA 2017 and how it might be challenged, debated, and possibly enacted.

1. *Connecticut, 2021*

In Connecticut, after a long process of careful consideration of UPA 2017, none of the involved stakeholders ultimately opposed what became the Connecticut Parentage Act.[18] The Family Law Section of the state bar association, the State Department of Public Health, and the family and juvenile courts needed the most persuading, but they eventually came around. Most supportive were the probate courts and attorney generals' offices, perhaps because they saw most directly the negative impact the prior law had on LGBTQ families. The most challenging provisions dealt with de facto parentage and the "holding out" presumption, while the easiest portions to pass were those dealing with assisted reproductive technology (ART). Given that Connecticut never had any equitable parentage provisions, this new law spelled out clearly how this would occur: the new law would treat the person as a legal parent only if they established parentage by signing a voluntary admission of parentage with the birth parent or by being adjudicated a parent.

The de facto parentage and holding out presumptions were included and contained significant protections for survivors of domestic violence so that evidence of abuse could be used to defeat a parentage claim in certain circumstances. Regarding genetic surrogacy, the Connecticut law rejected the post-birth withdrawal of a consent period and instead treated the intended parents as the legal parents provided the agreement had been validated by a probate court. With widespread support, Connecticut adopted the alternative allowing a court to recognize more than two parents for a child if not doing so would be detrimental to the child.

2. *Maine, 2021*

Maine took a very comprehensive approach in its efforts to review and revise its parentage laws; it had rejected significant portions of UPA 2002 regarding ARTs as being unworkable. It assembled a Family Law Advisory Commission with a broad array of stakeholders to revise the state's parentage laws, and by statute, this Commission will exist indefinitely. Maine's new Parentage Act became the model for UPA 2017 rather than Maine adopting the UPA. The 2021 law was simply a small bill to fix a few provisions

18 Conn. Gen. Stat. Ann. §§ 46b–450 to § 46b–599 (2022).

from the larger revisions before 2017, updating Maine law to have expanded access to voluntary acknowledgements of parentage (VAP) as recommended by UPA 2017.

The effort in Maine focused extensively on addressing concerns of gestational carriers and intended parents wanting an orderly process for assisted reproduction and basically made statutory what ARTs attorneys had been doing previously with declaratory judgment petitions and pre-birth parentage determinations. It also focused on the rights and interests of all persons acting as parents to have a process to establish and secure their parental status. Our sources in Maine indicate they had no opposition to their parentage reform efforts, no doubt because of the broad numbers of stakeholders all working together towards the goal of parentage reform.[19]

Maine's eventual recognition of de facto parenting as a potential legal right followed (though not in a linear fashion) from passage of the Grandparent's Visitation Act in 1995 which, in turn, evolved from policy and research arguments that children benefit from maintaining consistent and stable relationships with healthy adult attachments and kinship.[20] The Legislature requested input from advisory committees, scholars, practitioners, stakeholders, and the judiciary who weighed in with extensive discussion of the various sections of the UPA.[21] In a complex case that comingled

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19 Communications of attorneys Chris Berry; Polly Crozier; Kathleen Delisle, with the author.

20 The scope of this section is intended as a summary of the development of Maine law. The topic of third-party rights and responsibilities for children, however, requires sensitive recognition of race, socio-economic status, and culture, as well as systemic social problems like poverty, addiction, homelessness, and the criminalization and imprisonment of a generation of parents. For a selective group of policy and research articles, see Angela R. Ausbrook & Amy Russell, *Gay and Lesbian Family Building: A Strengths Perspective of Transracial Adoption*, 7 J. GLBT Fam. Stud. 201 (2011); L. Reinhard D'Arcy, *Recognition of Non-Biological, Non-Adoptive Parents in Arkansas, Florida, Mississippi, and Utah: A De Facto Parent Doctrine to Protect the Best Interests of the Child*, 13 J. Gender, Race, & Justice 441 (2010); Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 Fam. Advoc. 31 (2017); Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. Am. Acad. Matrim. Law. 157 (2018); Mary O'Leary Wiley, *Adoption Research, Practice, and Societal Trends: Ten Years of Progress*, 72 Am. Psychol. 985 (2017).

21 Maine Family Law Advisory Commission, Report to Maine Legislature Joint Standing Committee on Judiciary on LD 222 "An Act to Update the Maine

the MPA, parentage definitions, DNA testing, judicial estoppel, and parental termination, *In re Child of Nicholas P.*,[22] the court reviewed the breadth of federal and state law now implicated by the MPA, and derivatively, the UPA when states are considering enactment.

> Curiously, and in a way that demonstrates the frailty of his position, the father rests his contention entirely on his analysis of only one of the ways to become a parent pursuant to the MPA— genetic parentage— when in fact the MPA recognizes fifteen different ways to become a parent: (1) by admitting to parentage in a pleading or under oath; (2) by default; (3) by implication; (4) by affording full faith and credit to a determination of parentage from another state, by birth; (6) by adoption; (7) by a recorded acknowledgement of paternity; (8) by presumption; (9) by an adjudication of de facto parentage; (10) by an adjudication of parentage based on genetic testing; (11) as a result of a refusal to submit to genetic testing ordered by the court, through assisted reproduction as to a spouse; (13) through assisted reproduction with a written agreement; (14) through assisted reproduction after a lab error; and (15) through a gestational carrier agreement.[23]

Some of the sections, such as those regarding surrogacy and IVF, and consent to parentage and withdrawal of consent, required more discussion and others, such as de facto parenting, were already part of the legal fabric in Maine. The cases below summarize the development of the law of de facto parents in Maine in a variety of judicial contexts. What is unique about this body of case law is the application of de facto parenting to families beyond just divorce and separation.[24] Petitions and arguments for de facto parenting have arisen in guardianship, adoption, and child protection. Few of these variations were anticipated by the UPA, but are rather predictable, when considering the dramatic changes in

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Parentage Act" (Feb. 12, 2021), https://legislature.maine.gov/doc/5650; Andrew L. Weinstein, *The Crossroads of a Legal Fiction and the Reality of Families*, 61 Maine L. Rev. 317 (2017).

22 218 A. 3d 247 (Me. 2019).

23 *Id*. at 254 n.11 (sources omitted).

24 *See, e.g.,* Gardner v. Greenlaw, 284 A.3d 93, 99 (Me. 2020) ("In summary, because the best interests determinations required in a guardianship proceeding are not identical to those in a proceeding for de facto parentage, issue preclusion does not prevent the court from considering the grandmother's complaints for de facto parentage. For the reasons noted above, however, if the grandmother has standing to pursue de facto parentage, issue preclusion will constrain the parental rights and responsibilities that she may be awarded.").

family formation, and the creativity of lawyers with clients seeking this relief in high-stakes cases.

In *Davis v. McGuire*,[25] the Maine Supreme Judicial Court, referred to historically as the Law Court, summarized the common law development of de facto parenting, as follows:

> In our case law that preceded the 2017 enactment of the MPA, which contains the statutory authority governing de facto parenthood, we discussed what a petitioner is required to prove to be adjudicated as a de facto parent so that the state does not unconstitutionally intrude into the parents' fundamental relationship with his or her child. In those cases, we held that, in order to establish the compelling state interest needed to justify governmental interference with a parent child relationship, the petitioner must prove the existence of "exceptional circumstances."[26]

Under the Maine Parentage Act (MPA), the legislation codified some of the factors for standing[27] but the Law Court made clear that the burden of proof *as to each factor for standing* by a preponderance of the evidence was on the petitioner. Pursuant to section 1891(2)(C) of the MPA, to demonstrate standing, the party claiming de facto parenthood must present "prima facie evidence" of the statutory elements that are necessary to ultimately establish the existence of a de facto parent relationship with the child by: (1) filing an affidavit along with the complaint, stating "specific facts" that track the elements of a de facto parenthood claim; (2) the adverse party may file a responsive affidavit along with a responsive pleading; and then (3) the court reviews the parties' submissions and either makes a determination based on the parties' submissions whether the claimant has demonstrated standing, or, "in its sole discretion, if necessary and on an expedited basis, hold[s] a hearing to determine disputed facts that are necessary

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25 186 A.3d 837 (Me. 2018).

26 *Id*. at 843 n.8.

27 *Id*. at 843 n.7 ("Although those cases predated and therefore were not governed by the MPA, which became effective on July 1, 2016, *see* 19-A M.R.S. § 1891 (2017), *enacted by* P.L. 2015, ch. 296, §§ A-1, D-1, our discussion in these cases regarding the procedure at the standing and plenary hearing stages is relevant to and aligned with 19-A M.R.S. § 1891. Further, the legislative history of the MPA indicates that the de facto parentage section of the MPA is intended to codify the existing common law doctrines that "require an explicit determination of standing as a prerequisite for maintaining an action, [and] recognize the elevated burden of proof that a person claiming such status must satisfy.").

and material to the issue of standing."[28] The statutory test intrinsic in the exchange of affidavits to establish the prima facie evidence means establishing *all* of the following factors:

A. The person has resided with the child for a significant period of time;
B. The person has engaged in consistent caretaking of the child;
C. A bonded and dependent relationship has been established between the child and the person, the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child;
D. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and
E. The continuing relationship between the person and the child is in the best interest of the child.[29]

In *Davis*, however, the trial court found that though Davis had a bonded and dependent relationship with the child and that the mother had fostered that relationship, Danielle did not understand, acknowledge, or accept Davis as a parent even though Danielle accepted Davis's care for her son. The court, therefore, "correctly drew the proper distinction, which can be nuanced and subtle, between the role of a nurturing and involved caregiver and one who acts with and is recognized as being fully equivalent to a parent."[30]

In tracing that history, the court noted that a prior plurality opinion held that, for a de facto parenthood adjudication to be constitutional, the exceptional circumstance must establish harm

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28 *Id.* at 842; *see also* Libby v. Estabrook, 234 A.3d 197, 200 (Me. 2020) ("We conclude that Libby's assertions, if believed, could have led to a finding that he has standing. Most importantly, Libby avers that he and the mother essentially coparented the child for a majority of the child's life and that Estabrook's involvement with the child was "sporadic and inconsistent" for most of this time. If true, these attestations could demonstrate that the mother understood that and behaved as though Libby occupied the parental vacuum that Libby says existed because of Estabrook's lack of engagement with the child for a significant period of the child's life.").

29 *Davis*, 186 A.3d at 846 (quoting 19-A Me. Rev. Stat. § 1891(3)(A)-(E)).

30 *Id*. at 847.

to the child from the loss of the de facto parenting relationship.[31] The statutory elements of proof of de facto parenthood found in 19-A Maine Revised Statutes §1891(3), however, do not explicitly include that factor.[32] Maine case law explained that an "exceptional circumstance" sufficient to overcome constitutional rights, in this context, required evidence that the child's life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role is removed from that role.[33]

In a subsequent case, *In re Child of Philip S.*,[34] involving the interrelationship of child protection cases brought by the state and de facto standing under the MPA, the trial court granted the uncle and aunt's motion to intervene in the child protection matter, denied their motion for placement, and dismissed for a lack of standing their family matter complaint seeking to establish de facto parentage. Analyzing the factors for establishing standing to assert de facto parentage in the family matter under sections 1891(2)(C), (3)(A)-(E), the court found that (A) the child had not resided with the uncle and aunt for a "significant period of time" in the circumstances of the case; (B) the uncle and aunt were not the child's consistent caregivers; (C) the child did not have a bonded and dependent relationship with them of a nature that the father ever accepted as parental; (D) the uncle and aunt had not intended to accept permanent responsibility for the child before the commencement of the child protection matter; and (E)

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31 Pitts v. Moore, 90 A.3d 1169 (Me. 2014). The court adopted the test from Massachusetts:

> We define a "permanent, unequivocal, committed, and responsible parental role" by looking to the elements of de facto parenthood employed in Massachusetts:
>
> A de facto parent is one who has no biological relation to the child [as a parent], but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions.

Id. at 1179 (quoting E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999)).

32 *See* Kilborn v. Carey, 140 A.3d 461 n.1 (Me. 2016) (pointing out that the MPA's formulation of de facto parenthood does not require a showing of harm to the child).

33 Thorndike v. Lisio, 154 A.3d 624, 627 (Me. 2017).

34 223 A.3d 114 (Me. 2020).

changing the child's residence again to live with the uncle and aunt, who are increasingly in conflict with the Department, is not in the best interest of the child given his mental health needs.[35]

In *Young v. King*,[36] the court held that the denial of adoption was a factor for establishing MPA standing.[37] The court reaffirmed that prima facie evidence for standing "requires only some evidence on every element of proof necessary to obtain the desired remedy [or judgment]" and that if the presented evidence "is uncontested, then the court must accept the evidence as true and determine whether the uncontested evidence constitutes prima facie evidence of the statutory elements laid out in § 1891(3) of the MPA."[38] On that basis, the court vacated the dismissal and remanded for an evidentiary hearing. In *In re Adoption by Stefan S.*,[39] the court held that under Maine law, open adoption was barred under Maine's version of the Uniform Probate Code and that the MPA did not alter that policy outcome.

In *Lamkin v. Lamkin*,[40] the court addressed de facto status under MPA and the Grandparent Visitation Act (GVA) and held that any differences were a function of statute, and that such differences meant the following:

> In a GVA proceeding, a court may award the limited rights of visitation or access, but only to the extent that the award does not "significantly interfere with any parent-child relationship or with the parents rightful authority over the child." 19-A M.R.S. § 1803(3). This contrasts with de facto parenthood proceedings, as well as child protection and guardianship cases, where there is the prospect of a much more profound disruption of a parents relationship with his or her child because the full panoply of parental rights and responsibilities can be awarded to third persons, thereby requiring a stronger justification to allow the case to progress to a plenary hearing. Therefore, not only do the elemental standing requirements differ in the two types of proceedings, but the overall principle and nature of standing in a de facto parenthood case must be seen conceptually as more substantial than in GVA cases in order to justify the deeper level of governmental intrusion into a parent's constitutionally protected interests.[41]

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35 *Id*. at 117-18.
36 208 A.3d 762 (Me. 2019).
37 *Id*. at 764.
38 *Id*. at 769.
39 223 A.3d 468 (Me. 2020).
40 186 A.3d 1276 (Me. 2018).
41 *Id*. at 1283.

This distinction between GVA standing and de facto parenting standing may not matter in most states now. Yet, as the dissent aptly pointed out, "our opinions construing the GVA have effectively made it impossible for grandparents to establish standing. Regardless, I believe that the GVA—which has neither been repealed by the Legislature nor held facially unconstitutional by this Court—and its statutory requirements should control our analysis."[42]

In *Doe v. Batie*,[43] the court examined the intersection of the MPA and restraining orders in domestic violence and abuse cases. In this case, the biological father sought a protection from abuse order against the maternal grandmother on behalf of his two minor children. The maternal grandmother argued that the court erred as a matter of fact and law by finding that she committed abuse within the meaning of protection from abuse law and the court vacated the judgment. In that case, the biological mother tried to authorize the maternal grandmother to take or keep the children after her death. The court noted that without a court order pursuant to the Maine Parentage Act,[44] or the Grandparents and Great Grandparents Visitation Act,[45] the grandmother had no such legal rights.

3. *Rhode Island, 2020*

Because Rhode Island has been allowing full de facto parentage since 2001, enacting the portion of the UPA 2017 addressing that topic was not difficult. With regard to the issue of the number of parents that would be permitted, Rhode Island took a middle approach, noting that three-parent adoptions had been happening and that there would be no explicit preclusion of more than two parents in the parentage law being enacted.[46] The most significant impact of the new statute has been the widespread use of voluntary acknowledgments to establish parentage with no adverse consequences.

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42 *Id*. at 1288 (Jabar, J., dissenting); *see* Dorr v. Woodard, 140 A.3d 467, 474-77 (Me. 2016) (Jabar, J., dissenting) (discussing the demise of each possible avenue to establish standing pursuant to the GVA).

43 240 A.3d 62 (Me. 2020).

44 19-A Me. Rev. Stat. §§ 1831-1939 (2020).

45 19-A Me. Rev. Stat. §§ 1801-1806 (2020).

46 15 R.I. Gen. Laws § 15-8.1-501(b) (2021).

4. *California, 2018*

Prior to 2017, California had already made several changes to its parentage laws that aligned it with the UPA (2017). For example, California was the first state to expressly allow a court to find that a child can have more than two legal parents.[47] It adopted that provision in 2013. The UPA 2017 drafting committee modeled the multi-parent provisions on California's existing law. California also updated many, although not all, of its parentage presumptions to apply equally to same-sex couples prior to 2017. In 2018, California enacted AB 2684, which more fully aligned California law with the recently promulgated UPA 2017.

While there was broad support for expanding VAPs to protect children born to same-sex couples, some practitioners were concerned about allowing married women to sign VAPs. Prior to the enactment of the UPA 2017, California did not allow married women to sign VAPs. The compromise solution was to broaden the class of people who could sign VAPs, but to do so in a way that is slightly more limited than what is set forth in the UPA 2017. Specifically, in California, VAPs can be signed either by: (1) an unmarried woman and the person identified as the only possible genetic parent; or (2) the woman who gave birth and the intended parent of a child conceived through assisted reproduction.[48] Once the process was so limited, there was broad support for this change.

As noted above, California had already updated one of its marital presumptions to make it gender neutral: the rebuttable marital presumption included in California Family Code section 7611(d). Initially, there was some resistance from the family bar to updating California's so-called "conclusive marital presumption" to be gender neutral.[49] But after some wordsmithing and discussion, the changes to sections 7540 and 7541 (the rebuttal provision) were widely supported and endorsed.

The family law section, judges, and the child support enforcement community were all key stakeholders. In the end, they all worked very closely together. In substance, the entire UPA 2017 except for Article 4 (the paternity registry) has been enacted in California. Some provisions, however, look different. For example, it might appear that

47 Cal. Fam. Code § 7612(c) (West 2023).

48 Cal. Fam. Code § 7571.

49 Cal. Fam. Code § 7540.

California did not enact the de facto parent provision in section 609 of the UPA 2017, but in substance, California law does embrace de facto parentage. It just does so through its previously existing broad holding out presumption that was retained in the process.[50] California's holding out presumption is based on the UPA 1973. Unlike the holding out presumption in the UPA 2017, the original version of the holding out presumption does not include any time restrictions or requirements. In addition, as noted above, California had already enacted some of what the UPA 2017 includes. Thus, the entire UPA was not included in the 2018 bill.

Expanding the range of families who can establish parentage via the VAP process has been a major advancement for children and families, particularly low-income families for whom going to court and getting court orders of parentage can be an insurmountable hurdle. The California child support community has really led the way in getting this process up and running and are strong advocates of the expansion.

Removing the written consent requirement for intended parents is also an important advancement for children and families created through ART. Prior to the enactment of AB 2684, for an intended parent to be recognized as a legal parent under the assisted reproduction provision, they had to establish that they had consented in writing to the assisted reproduction. But, as the drafters of the UPA 2017 realized, there are cases where the person consented in fact even when there is no written consent. In such cases, rigid application of a rule that requires written consent can produce results that seem "inequitable and harmful to the child."[51] Accordingly, in 2018, the California legislature added language from the UPA 2017 that allows a court to find consent to the assisted reproduction even in the absence of written consent "if the court finds by clear and convincing evidence that, prior to the conception of the child, the woman and the intended parent had an oral agreement that the woman and the intended parent would both be parents of the child."[52]

California, for example, adopted much of UPA 2017, and made certain amendments so that its legislation does not mirror the Uniform Parentage Act. Following UPA section 204(a)(1), the

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50 Cal. Fam. Code § 7611(d).

51 Courtney G. Joslin, *Preface to the UPA (2017)*, 52 Fam. L.Q. 437, 468 (2018).

52 Cal. Fam. Code § 7613(a)(2).

California statute identifies the presumed parent who is or was married to the person who bore the child and the child is born during the marriage, or within 300 days of termination of the marriage or was conceived while the spouses were cohabiting or the parents later marry and list both as parents on the birth certificate.[53] California specified the presumption of parentage when the presumed parent made a voluntary written promise to support or was court-ordered to support the child.[54] The statute includes an exception if the spouse is not a genetic parent of the child and the spouse's parentage of the child is challenged within the first two years of the child's life.[55] But the law extends beyond UPA 2017 section 301 which simply allows voluntary acknowledgment by an alleged genetic father of the child:

> Except as provided in Sections 7575, 7576, and 7577, a completed voluntary declaration of paternity, as described in Section 7574, that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support.[56]

Prior to an unmarried mother leaving the hospital after giving birth, the staff witnesses both parents' signatures on a voluntary declaration of parentage (VDOP), which is forwarded to the Department of Child Support Services. A copy is also given to each parent. Prenatal clinics may also offer a voluntary declaration of parentage to be signed by the parents. Both parents may seek recission of the VDOP within 60 days of execution.[57] Once a father signs a VDOP and it is filed with the child support docket, there is a two-year deadline to rescind the VDOP based on fraud, duress, or mistake of fact. Public policy assumes that if a person has declared parentage and acted as a parent for two years, that person cannot seek a reversal of parental responsibilities even if another biological father is identified. Unlike UPA 2017, there is no declaration procedure for denial of parentage in California after two years.

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53 Cal. Fam. Code §§ 7540, 7611.
54 Cal. Fam. Code § 7611.
55 Cal. Fam. Code § 7541,
56 Cal. Fam. Code § 7530(d).
57 Cal. Fam. Code § 7612(f).

California included optional UPA language that does not preclude a child from having three (or more) parents.[58] While many states have a list of factors to assess the best interests of the child like UPA section 613, California opted to forego best interest factors in this set of circumstances. Under the California UPA, the court will determine whether removing a child from stable placement will cause detriment to the child; it does not require a finding of unfitness by a person with a claim to parentage. Because its parentage legislation allows recognition of more than two parents, a former stepfather and his new spouse who have accepted primary parenting responsibility of a child could both be recognized as additional parents as well as the biological mother and father. A biological father can seek parental status even if there is a presumed father.

In *C.A. v. C.P.*,[59] the wife had an affair with the biological father during her marriage. The wife and husband stayed together and raised the child as their own and allowed the biological father to have an "alternate parenting" role until the child was three. The biological father held the child out as his own and the court found the child was bonded to all three parents. The court concluded after trial that the biological father was a third parent, finding the conclusive presumption in favor of the husband was not an exclusive presumption. Analyzing California's version of the UPA, the appellate court rejected the argument that the three-parent statute was not meant to be applied where a stable marriage exists. The relevant policy allows a three-parent result "in very narrow situations when necessary to prevent detriment to the child" and that if the Legislature wanted to limit the bill's application to cases where no stable marriage existed, it easily could have said so rather than direct courts to consider "all relevant factors."[60]

5. *Vermont, 2018*

Vermont based its statute on the Maine statute which tracks closely but not completely with the UPA 2017.[61] The Legislature did not have any major objections to any of the provisions and it only took a year from when a select legislative committee began work on the bill until it was signed by the governor. The bill reportedly sailed

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58 Cal. Fam. Code § 7601.

59 29 Cal. App. 5th 27 (2018).

60 *Id.* at 29.

61 Vt. Stat. Ann. tit. 15C §§ 101 to 809 (2018).

through committees of both chambers of the legislature and passed almost unanimously. The most significant impact was the ability to get pre-birth orders in ART cases. The bill has also greatly benefitted same-sex couples since they no longer must go through an adoption of their own children, with parentage based simply on pleadings being filed and without a court appearance being necessary. According to one practitioner, the *de facto* parentage section appears to be working well, used by people who would otherwise be divested of a parental relationship with children where they have been living within a parental role, and no floodgates concerns seem to have materialized.

6. *Washington, 2018*

In Washington, by far the most controversial aspects of the UPA 2017 were the ART provisions. Washington enacted nearly all the provisions of UPA 2017 but, while some state left out the sections on ARTs, Washington included those provisions with some modifications that offer protection and set standards for all parties.[62] Concerns raised about regulating agencies involved in facilitating ART procedures were added, as were limits on the numbers of surrogacies that were allowed, all to address some of the questions of conservative legislators and members of the public who testified. After the law passed, the state had a large influx of surrogacy agencies come into the state based on the new business regulations. As reported, no significant issues have emerged regarding the de facto parentage provisions.

7. *Other States*

Other states where there have been active legislative efforts to enact some version of UPA 2017 have included Nevada, Pennsylvania, and Massachusetts. On August 9, 2024, Governor Maura Healy signed the Massachusetts Parentage Act into law.[63]

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62 Wash. Rev. Code § 26.26A.100 (2023).

63 Mass.gov., *Governor Healey Signs Parentage Act, Ensuring Equality for All Families in Massachusetts*, https://www.mass.gov/news/governor-healey-signs-parentage-act-ensuring-equality-for-all-families-in-massachusetts (August 9, 2024). In Massachusetts, the enactment of comprehensive parentage legislation modeled after UPA 2017 stalled due to staunch opposition to the statutory codification of de facto parent recognition. While Massachusetts common law recognizes de facto parent status, coalitions of stake holders, including legal services, bar associations, and LGBTQ advocacy groups, lined up on either side of the debate over whether to codify de facto parent status and how to articulate the status in statutory form. The legislation represented the culmination of years of struggle between these competing groups.

Most other states continue to operate under a version of UPA 2002 and some even operate with the first version from 1973 with local revisions that have occurred over the years. Because of the rapidly changing landscape across the country in terms of family formation and ongoing litigation by persons acting as parents who want to be considered and determined to be legal parents, these legislative efforts to enact some version of UPA 2017 will undoubtedly continue as case law evolves.[64]

II. Holding Out and De Facto Parentage Doctrines

A. *Changes Under the UPA 2017*

After the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July 2017 approved and recommended UPA 2017, writers immediately began analyzing the updated UPA. Some recommended tweaking it. In a 2018 article, Professor Jeffrey A. Parness focused on two sections of the 2017 UPA establishing parentage based on "holding out" and "de facto" doctrines.[65] Professor Gregg Strauss argued in 2019 that de facto parenthood is either redundant or unconstitutional, suggesting that in four circumstances UPA 2017 recommends legislation that is in conflict with existing laws and should not be enacted, specifying: preconception agreements, informal adoption, misrepresentation of parentage, and child abandonment.[66]

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64 *See Enactment History*, Parentage Act - Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?communitykey=c4f37d2d-4d20-4be0-8256-22dd73af068f#LegBillTrackingAnchor; Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. Rev. 307 (2022) ("While the "rule of two" remains in place in many jurisdictions, in recent years statutes and judicial decisions recognizing that a child can have more than two legal parents in certain circumstances have increased significantly. As the discussion below demonstrates, there is a clear trend toward states recognizing multi-parentage. This trend shows no signs of slowing down, and legal recognition of multi-parentage likely will become even more widespread in the coming years.").

65 Parness, *supra* note 20.

66 *See* Gregg Strauss, *What Role Remains for De Facto Parenthood*, 46 Fla. St. U.L. Rev. 909 (2018).

Professors Courtney G. Joslin and Douglass NeJaime examined the practical operation of functional parent doctrines and found that functional parents have been recognized in thirty-four states, whether under UPA legislation, other state laws, or reported appellate decisions.[67] The analysis below highlights examples of states that have expanded physical or legal custodial rights, far short of full parentage status contemplated by UPA 2017. The purpose of this section is to compare these evolving parentage doctrines and whether they indicate a state is trending towards passage of UPA 2017 and whether more states are trending toward consistency across the United States. The constitutional arguments will, however, continue to be raised in various states that debate passage of UPA 2017, especially with the possibility of more dramatic changes in rights of privacy following the U.S. Supreme Court's *Dobbs v. Jackson Women's Health* decision in 2022.[68]

While there are varying criteria, the holding out doctrine was often codified in states whose laws follow the 1973 Uniform Parentage Act, the 2002 Uniform Parentage Act (also referred to as UPA 2000 as amended in 2002), and most recently the UPA 2017. Some states have developed standards for holding out based on common law principles and appellate decisions. The doctrine of de facto parentage, for the purpose of the Joslin and NeJaime article about functional parents includes a psychological parent, *in loco parentis*, equitable parent, and parent by estoppel. Parness argued that UPA 2017 recognized holding out and de facto parentage as "imprecise parentage" because they arise at no distinct time.[69]

Parness contrasted the holding out and de facto doctrines with establishing parentage by clearly marking discrete points in time: birth, marriage to the birth mother, voluntary acknowledgement, and adoption. With the holding out and de facto doctrines, the status is based on a look-back to circumstances to establish a parent child relationship. After comparing the two types of imprecise parentage, Parness argued that UPA 2017 should be amended so de facto parentage is treated similarly to holding out parental

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67 *See* Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. Am. Acad. Matrim. Law. 589 (2022).

68 *See generally* Linda C. McClain & James E. Fleming, *Ordered Liberty after* Dobbs, 35 J. Am. Acad. Matrim. Law. 623 (2022).

69 Parness, *supra* note 20, at 165 (noting precise parentage arises at giving birth, marriage to birth mother, adoption, completion of assisted reproductive technology, and voluntary acknowledgement of parentage).

status. Parness also suggested that the parties' standing to petition to establish de facto parentage should be broadened. He questioned whether states are consistent in considering parentage to include both the custodial "caretaker" rights as well as support responsibilities. To understand the impact of Parness's suggestion, it is helpful to reflect on the origin of holding out legislation and then look at the adjudication of de facto custody rights.

The holding out parentage presumption in UPA 1973 includes, "A man is presumed to be the natural father of the child if: . . . (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."[70] The presumption of paternity could be determined in litigation "at any time" pursued by "any interested party."[71] When the UPA 2002 was issued, holding out parentage was changed to mean: "A man is presumed to be the father of a child if for the first two years of the child's life he resided with in the same household with the child and openly held out the child as his own."[72]

Under UPA 2002 the goal was to recognize parentage outside marriage and the scope was limited to those fathers who lived with the child for the first two years of the child's life. The presumption could be overridden, and parentage disproved if the presumed father never openly held out the child as his own during the first two years. Furthermore, the override adjudication could involve a range of petitioners including the child, the child's mother, and a man whose paternity is to be adjudicated. The father who is the presumed parent was restricted from objecting to his status unless he commenced litigation not later than two years after the birth of the child to avoid the two years hold out presumption. In UPA 2017 a revised presumption provides that "an individual is presumed to be a parent of a child if the individual resided in the same household with the child for the first two years of life of the child, including periods of temporary absence, and openly held out the child as the individual's child."[73]

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70 *Id.* at 158, citing 1973 Unif. Parentage Act § 4(a)(4) [hereafter 1973 UPA].

71 *Id.*, citing 1973 UPA § 6(b).

72 *Id.*, citing Unif. Parentage Act, as amended in 2002, § 204(a)(5).

73 *See* Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support,* 42 Ind. L. Rev. 611 (2009) (The 1973 UPA provides that a man is presumed to be the child's father if he has taken the child into his home and held himself out as the father for two years. Unif. Parentage Act § 4(a)(4) (1973). The 2002 UPA requires that the period of holding out occur

Moreover, UPA 2017 no longer spoke of fatherhood and extended the holding out parentage to any individual residing with the child for two years and holding out the child as one's own. Adjudication to overcome the presumption cannot be sought after the child is two years old, even if the presumed parent was not in the same household or residence, unless the court finds there are already two or more presumed parents. Recognizing that the holding out doctrine originated in support law, to secure a second parent's obligation to pay support, the payor who is holding out would be obligated to pay. The New Mexico Supreme Court ruled in this way in an important interpretation of this provision of the UPA:

> It is inappropriate to deny Chatterjee the opportunity to establish parentage, when denying Chatterjee this opportunity would only serve to harm both Child and the state. In our view, it is against public policy to deny parental rights and responsibilities based solely on the sex of either or both of the parents. The better view is to recognize that the child's best interests are served when intending parents physically, emotionally, and financially support the child from the time the child comes into their lives. This is especially true when both parents are able and willing to care for the child. Therefore, we hold that the Legislature intended that Section 40-11-5(A)(4) be applied to a woman who is seeking to establish a natural parent and child relationship with a child whom she has held out as her natural child from the moment the child came into the lives of both the adoptive mother and the presumptive mother.[74]

Many of the cases that address functional parent doctrines arise when holding out parentage does not apply or when a person seeks caretaker, visitation, or custodial rights as a de facto parent. The analysis here examines a range of states that have developed de facto parentage doctrines based on litigation or legislation. Under UPA 2017, the de facto parent is more than a custodian. UPA 2017

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for the first two years of the child's life and is, therefore, more limited than the 1973 version. Unif. Parentage Act § 204(a)(5) (2002)).

74 Chatterjee v. King, 280 P.3d 283, 293 (N.M. 2012); *see also In re* Guardianship of Madelyn B., 98 A.3d 494, 460-61 (N.H. 2014) ("The policy goals of ensuring legitimacy and support would be thwarted if our interpretation of RSA 168-B:3 failed to recognize that a child's second parent under that statute can be a woman. Without that recognition, a child in a situation similar to Madelyn's could be entitled to support from, and be the legitimate child of, only her birth mother. See RSA 168-B:2, 7. Two adults — Melissa and Susan — intentionally brought Madelyn into the world and held her out as their child; we cannot read RSA 168-B:3 so narrowly as to deny Madelyn the legitimacy of her parentage by, and her entitlement to support from, both of them.") (citation omitted).

extends parentage to the right to inherit, make claims under probate court statutes, and other rights based upon that legal status. In short, the legal impact is broader. The issue of whether there is child support obligation remains a source of debate. Courts may be loath to obligate the de facto parent to also pay child support in addition to another parent who has shared caretaker or custodial rights. That interplay remains for future legislative and state appellate court policy debate.[75]

B. *State Recognition of Functional Parent Doctrines*

Professors Joslin and NeJaime set forth categories of functional parentage doctrines in their Appendix of 34 jurisdictions that recognize "holding out" and the de facto or other equitable categories of parentage.[76] The authors reviewed 669 appellate decisions, in which 47% of the cases were from three states: Kentucky (122), Pennsylvania (108), and California (82). Of these three, only California has passed UPA 2017. The purpose of the study was to address complaints about the pitfalls of recognizing the importance of functional parents. The analysis refuted the argument that the doctrine would be used as a threat by an abusive former partner, a path for a nanny to seek status as a de facto parent, or that a capable biological parent would be forced to co-parent with a third party.[77]

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75 *See e.g.*, Green v. Carter, 2024 N.C. App. LEXIS 229, **36-37 ("Indeed, imposing even secondary liability for child support based solely upon Partner's de facto parental relationship with Alisa and her custodial rights would be contrary to the long-established law applicable to heterosexual couples in the same situation. A parent's romantic partner or a stepparent may have a close and loving relationship with the biological child of her partner and may even have custodial rights under North Carolina General Statute Section 50-13.2, but the romantic partner or stepparent has no secondary child support obligation unless it was voluntarily assumed in writing. *See* N.C. Gen. Stat. § 50-13.4. Ironically, any attempt to treat a same-sex couple differently than a heterosexual couple as to the law to secondary liability for child support would lead to disparate outcomes and end up treating the child of a same-sex relationship differently than the child of a heterosexual relationship under the same circumstances.") (citations omitted).

76 Joslin & NeJaime, *supra* note 67. For several recent articles by the authors discussing other related themes, see Courtney G. Joslin & Douglas NeJaime, *Domestic Violence and Functional Parent Doctrines*, 30 Va. J. Soc. Pol'y & L. 67 (2023); Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 Colum. L. Rev. 319 (2023).

77 The Joslin and NeJaime article is an outstanding example of empirical data-driven research that can assist policy discussions beyond just anecdotal

Joslin and NeJaime note that if a state enacts UPA 2017 or comparable legislation, the abusive former partner will not pass the seven requirements to serve as a de facto parent. The nanny would not qualify because the de facto parent should not have been paid for caretaking services. The study shows that two-thirds of the time functional parents are relatives, and two-thirds of those are grandparents who may also qualify under grandparent legislation. Furthermore, Joslin and NeJaime pointed out that a biological parent who was a primary caretaker would be favored at adjudication over the claim of a functional parent. [78]

Florida

The relevant parentage legislation in Florida has two statutory provisions: Florida Statute § 742.10 regarding children born out of wedlock and Florida Statute § 742.12 regarding scientific testing. Under Florida law, the statute refers to defining a father based upon marriage before birth, as well as marriage after the child is born and an acknowledgment of paternity is signed by both parties. The statute refers to paternity established by court order, without specifying it as describing parentage based on someone holding out oneself as a parent, or any other basis to become a parent based on one's actions. A Florida court has discretion to order or deny genetic testing; however, test results will not preclude a finding that custody and parental rights apply to a non-biological "father."

The presumption of legitimacy is based on the child's interest in legitimacy and the public policy of protecting the welfare of the child.[79] Florida courts do not yet recognize dual fathership and,

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experience. Joslin & NeJaime, *supra* note 67. Care must always be exercised when interpreting case data. These are reported decisions, which is a small percentage of cases which may settle in mediation, or which are not appealed after trial in a state family court. See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. Empirical Legal Stud. 571, 557 (2004) ("We should also be very cautious about translating findings from or (even internally reliable) inferences or conclusions about one jurisdiction to another (other than as a hypothesis to be tested), as also about comparing data from one jurisdiction with those from another (if, that is, the comparison is made in aid of causal inference).").

78 Joslin & NeJaime, *supra* note 67.

79 J.T.J. v. N.H., 84 So. 3d 1176 (Fla. Dist. Ct. App. 2012).

therefore, only one man may be designated the child's legal father with the rights and responsibilities of that role at any given time. If a minor child is born to an intact marriage, paternity is established as a matter of law. The fact that DNA test results may establish another individual as the child's biological father is legally insignificant.[80] Policy and consistency suggest that there should be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy even after the legal father is proven not to be the biological father.[81]

For example, in *R.H.B. v. J.B.W.*, [82] the court held that a child of a married woman has an equal protection right that allows the mother to proceed with a parentage case against a man other than her husband. Nevertheless, this adult right is significantly restricted by the child's countervailing constitutional and legal rights to legitimacy. In another case, the court determined it was error to order DNA testing to establish that another person was the biological father of the child born of an intact marriage where the guardian opined that the child's best interests would not be served by terminating the child's relationship with legal father.[83]

The concerns raised by Strauss are being embraced by other states resisting elevating the status of functional parents who will have standing to seek full parentage rights under the de facto parentage doctrine.[84] There is no indication (yet) that Florida is considering expanding its law to same-sex partners who hold out as a parent, or third parties who argue for some version of de facto type functional parent status, though the law is still evolving through trials and appellate decisions.[85] This line of cases follow from the

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80 *See* C.G. v. J.R. & J.R., 130 So. 3d 776 (Fla. Dist. Ct. App. 2014).

81 Van Weelde v. Van Weelde, 110 So. 3d 918 (Fla. Dist. Ct. App. 2013).

82 826 So. 2d 346 (Fla. Dist. Ct. App. 2002).

83 Callahan v. D.O.R. *ex rel.* Roberts, 800 So. 2d 679 (Fla. Dist. Ct. App. 2001).

84 Strauss, *supra* note 66, at 912.

85 *See, e.g.*, Quiceno v. Bedier, No. 3D23-203, 2023 WL 5419584 *2, *3 (Fla. Dist. Ct. App. Aug. 23, 2023) (reversing the trial court's judgment, that awarded the husband (who acknowledged he is not the biological child of one of the minor children but only raised the child since birth) equal timesharing and shared parental responsibility of the child with the mother/wife, and holding that, "Florida appellate courts have concluded the best interest of the child is insufficient to justify granting timesharing rights to any third party, even a stepparent or psychological parent" and that because the husband neither adopted the child, or otherwise seek to establish paternity the trial court "lacked the discretion to award shared parental responsibility and equal timesharing to a third party"); Stabler v. Spicer,

Florida Supreme Court's holding in *D.M.T. v. T.M.H.*,[86] a decade ago, where the court made clear that even when the non-biological/non-legal parent has assumed parental responsibilities and active care for a child, it is still insufficient to give rise to an inchoate right to be a parent since it is the biological connection between the parent and child that gives rise to this right.[87] Regardless of marital status, Florida law still does permit the non-biological parent in a

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No. 1D21-1826, 2022 WL 16628940 (Fla. Dist. Ct. App. Nov. 22, 2022) (holding that a nonparent, who was in a same-sex relationship with the birth mother during which they agreed to have a child, whereby the nonparent's brother impregnated the birth mother, lacked a legally enforceable visitation right with and child, despite the existence of a mediation agreement between the parties that granted visitation rights to the nonparent, where the nonparent was not married to the birth mother and did not adopt either child of the birth mother); Wakeman v. Dixon, 921 So. 2d 669, 671 (Fla. Dist. Ct. App. 2006) (ruling that a same-sex partner who was not the biological mother—but had been a de facto parent who supported and participated in a child's upbringing pursuant to a written coparenting agreement—had no legally enforceable visitation rights with the child); Springer v. Springer, 277 So. 3d 727 (Fla. Dist. Ct. App. 2019) (holding that a former same-sex partner lacked standing to request recognition of parentage and time-sharing of a child born while the former partner was in a relationship with the child's mother, although the former partner paid for the sperm used to impregnate the mother, and although the parties signed a co-parenting agreement that referred to the child to be born as "our child" and expressed intention for the parties to jointly and equally share parental responsibility; the import to the court was that the former partner had no biological connection to the child); Russell v. Pasik, 178 So. 3d 55, 59 (Fla. Dist. Ct. App. 2015) ("[T]he law is clear: those who claim parentage on some basis other than biology or legal status do not have the same rights, including the right to visitation, as the biological or legal parents."); De Los Milagros Castellat v. Pereira, 225 So. 3d 368, 372 (Fla. Dist. Ct. App. 2017) (Logue, J., concurring) (noting that "the Florida Supreme Court expressly approved *Wakeman*'s holding that the lesbian partner who was the birth mother had parental rights protected by the constitution that prevailed over the claims of a partner who was neither the biological nor legal mother, even though the couple clearly intended to raise the children together"); Enriquez v. Velazquez, 350 So. 3d 147 (Fla. Dist. Ct. App. 2022) (finding that a father, who provided sperm for an at-home artificial insemination process used to conceive a child with the mother, was not a "donor" under a statute providing for relinquishment of parental rights in connection with the provision of biological material during the course of assisted reproductive technology, and thus the father was not precluded from filing a petition to establish paternity and timesharing; the statute did not include at-home artificial insemination as one of the procreative procedures coming within the statutory definition of assisted reproductive technology.).

86 129 So. 3d 320 (Fla. 2013).

87 *Id.* at 338.

same-sex relationship to adopt a child, and that would guarantee the rights of a parent.[88] There are social and statutory changes in Florida that may eventually change (incrementally) some of these policies.[89]

Ohio

Ohio law has not recommended consideration of the UPA 2017 nor has Ohio applied the presumption of parentage to same-sex spouses or unmarried couples. Ohio is vague on its standards for resolving two claims of presumption that conflict. Its current statute provides that "If two or more conflicting presumptions arise under this section, the court shall determine, based upon logic and policy considerations, which presumption controls."[90] The Supreme Court of Ohio did consider the parental claims of a same-sex partner in the case *In re: Bonfield*.[91] In this case, the parties, Teri Bonfield and Shelly Zachritz jointly filed the petition, with the "specific issue" of asking the court to find that "Shelly is a parent for purposes of R.C. 3109.04(A)(2)."[92]

Teri and Shelly lived as partners from 1987; Teri adopted two children in 1993 and 1995; and Teri gave birth to three children in 1996 and 1998. Teri and Shelly agreed that Shelly acted as the

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88 Fla. Stat. § 63.172(1)(c).

89 Fla. Stat. § 744.301(1) was amended effective July 1, 2023, to include the following:

> The mother of a child born out of wedlock and a father who has established paternity under s. 742.011 or s. 742.10 are the natural guardians of the child and are entitled and subject to the rights and responsibilities of parents. If a father has not established paternity under s. 742.011 or s. 742.10(1), the mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.

Florida Statute § 742.011 was amended (effective July 1, 2023) to indicate the proceedings are for determination of paternity, but also for the determination of rights and responsibilities, which added the following statement: "After the birth of the child, a parent may request a determination of parental responsibility and child support and for the creation of a parenting plan and time-sharing schedule pursuant to chapter 61."

90 Ohio Rev. Code § 3111.03.

91 780 N.E.2d 241 (Ohio 2002). The procedural history for this case became complicated when the Supreme Court agreed to reconsideration after it issued its earlier decision.

92 *Id*. at 245.

children's primary caretaker and had come to be seen by the children as their parent in the same way as Teri. The couple applied to the court so Shelly could be considered for second parent adoption, without requiring her partner Teri, to relinquish parental rights. The case was on appeal to review the lower court finding that denied Shelly standing on the basis as she did not qualify as a parent in the context as a parent-child relationship under Ohio law.

The appellants then argued, unsuccessfully, that *in loco parentis* status should apply to the definition of parent, or that Shelly should be considered a psychological or second parent. Ultimately, the court denied all the arguments but in a unique twist pivoted to its juvenile court laws and held that:

> [T]he juvenile court has jurisdiction to determine the custody of any child not a ward of another court, even though the court has not first found the child to be delinquent, neglected, or dependent. *In re Torok (1954)* 161 Ohio St, 585, 53 O.O. 433 120 N.E.307, paragraphs one and two of the syllabus. This exclusive responsibility "to determine the custody of any child not a ward of another court of this state" cannot be avoided merely because the petitioner is not a "parent" under R.C. 3109.04.[93]

While the *Bonfield* decision was cited as a form of functional parenthood, it is limited, for now, to the right to agree to serve as co-custodians.

In 2012, the Ohio Supreme Court in *Rowell v. Smith*,[94] found that juvenile courts handling custodial claims by parties considered nonparents at law (following *In Re Bonfield*), may issue temporary visitation orders in cases involving a parent and non-parent if it is in the child's best interest, reversing the appellate court's decision invalidating a temporary visitation order. The court held that, "Smith's interpretation of the law is illogical. Under her interpretation, the General Assembly granted authority for juvenile courts to determine the custody of a child but cannot determine whether a party to the custody action can visit with the child while the action is pending."[95] Thus, the family court had no jurisdiction under Ohio

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93 *Id*. at 247.

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95 *Id*. at 150-51. The Ohio statute that provides for companionship time for non-parents is Ohio Revised Code § 3109.051. There is a basis for awarding companionship time, but it is typically used when a grandparent (or similar figure) has had a significant role in raising a child and may now be estranged from the parents.

law to consider de facto parentage, but the juvenile court can act even in the absence of a claim of abuse or neglect.

Virginia

The parentage law in Virginia is primarily found in the Parentage Act.[96] Virginia law does refer to acknowledgment of paternity by a man but does not allow for the possibility of holding out or de facto parentage. The Virginia Parentage Act states that in the absence of the required acknowledgement, or if the probability of paternity is less than 98%, a paternal relationship may be established as otherwise provided in Virginia legislation.[97]

Virginia's governing appellate case, *Hawkins v. Grese*,[98] expressly holds that de facto parentage will not be recognized. Unless parentage is secured as a married partner, an order of parentage, second parent or stepparent adoption, a custody claimant cannot establish parentage by holding out or asking for acceptance of de facto claims comparable to other states and the UPA. The non-biological person is like any other third party who may not seek custody without proving (1) parental unfitness, (2) a previous order of divestiture, (3) voluntary relinquishment, and (4) abandonment, i.e. extraordinary circumstances to justify taking a child from a parent.[99] The challenge for establishing de facto parentage is that Virgina law adheres to strictly biological definitions of a parent absent the narrow exceptions above.[100]

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96 Va. Code §§ 20-49.1 to 20-49.10 (2024).

97 Va. Code §§ 20-49.1.

98 809 S.E.2d 441 (Va. Ct. App. 2018).

99 In a different context, a father argued that "any award of the pre-embryo to the wife was a de facto unconstitutional governmental intrusion on his constitutional right to procreational autonomy because the state did not have a compelling interest at stake. *See id.* at 445 (explaining that the Fourteenth Amendment protects individuals from government interference with parental rights absent a compelling state interest). However, in a case involving a contract with the wife and a fertility clinic, the husband agreed that in the event of divorce, "the ownership and/or other rights to the embryo(s)" would be "directed by a court decree and/or settlement agreement." Jessee v. Jessee, 866 S.E.2d 46, 50-51 (Va. Ct. App. 2021).

100 *See* Va. Code § 64.2-103 (Evidence of Paternity).

New Jersey

New Jersey legislation on parentage is found in a section of the New Jersey statutes entitled Presumptions.[101] New Jersey did not specifically adopt UPA 2002 or UPA 2017, however caselaw reflects the evolving acceptance of functional parents. In the case of *V.C. v. M.J.B.*,[102] the New Jersey Supreme Court analyzed the possibility of finding that a same-sex partner should be treated as a psychological parent for custody rights. V.C. claimed she should be considered a psychological parent or a de facto parent so that she could be awarded shared legal custody as well as visitation. The court found that legislative intent indicated someone could be deemed a parent despite no biological connection or adoption. As is true in so many of third-party cases that devolve into child custody litigation, the biological mother, M.J.B., argued V.C. needed to prove M.J.B. was unfit before V.C. could be considered to have standing as a parent. After reviewing the criteria, the court found that V.C. was qualified as a psychological parent; but due to the delay prior to the litigation, V.C. had not been sufficiently involved in the lives of the children to justify shared legal custody. The court, however, finally held that:

> to be sure, prior cases in New Jersey have arisen in the context of a third party taking over the role of an unwilling, absent or incapacitated parent. The question presented here is different; V.C. did not step into M.J.B.'s shoes, but labored alongside her in their family. However, because we view this issue as falling broadly within the contours we have previously described, and because V.C. invokes the "exceptional circumstances" doctrine based on her claim to be a psychological parent to the twins, she has standing to maintain this action separate and apart from the statute.[103]

After analyzing laws from other states, the New Jersey court recognized that de facto parenting could be recognized if the legal parent consents to and fosters the relationship between the third party and the child; the third party lived with the child; the third party performed parental functions for the child to a significant

101 N.J. Stat. Ann. § 9:17-43.

102 748 A.2d 539 (N.J. 2000). In this case, both sides offered expert testimony. Although "they disagreed as to whether the children would suffer any long-term effects if their relationship with V.C. were severed, both agreed that the children enjoyed a bonded relationship with V.C. and that they would benefit from continued contact with her." *Id*. at 541.

103 *Id*. at 550-51.

degree; and "most important, a parent-child bond must be forged as the framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child."[104] New Jersey has not, however, formally amended its statutes; therefore, the presumptions in its parentage law still refer to heterosexual married couples.

Pennsylvania

Pennsylvania's parentage law is scattered over different sections of Pennsylvania's Consolidated Statutes regarding Children and Minors and the Pennsylvania Supreme Court Rules. The determination of paternity provision identifies the circumstances where paternity for a child born out of wedlock is established, including when the parents later marry.[105] Subsection 2 mirrors UPA 2017: If, it is determined "by clear and convincing evidence that the father openly holds out the child to be his, and either receives the child into his home or provides support for the child, then he can be considered a parent."[106] Further, this determination of parentage is mirrored in Title 20, the Decedent Estates Fiduciary Code.[107]

In Pennsylvania the equitable doctrine of estoppel is a significant barrier to ordering the use of blood tests to confirm parentage. The presumption of paternity for a married man was, until recently, irrebuttable. The policy was intended to protect the sanctity of marriage and minimize disruption to the child. For example, in *S.M.C. v. C.A.W.*,[108] estoppel was applied to the "holding out" provision despite the undisputed lack of biological connection between the child and live-in boyfriend where the trial court found holding out and applied best interests of the child.

Other case law also estops a husband from denying paternity, even if duped by his wife claiming the child was his when she knew that child was not the husband's. In *J.L. v. A.L. and K.L.*,[109] the mother acknowledged that the child was conceived while she was separated from her husband and had an affair with J.L. She and J.L held out the child as J.L.'s until she claimed that she and

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104 *Id*. at 552.
105 23 Pa. Cons. Stat. § 5102(b)(1).
106 *Id.* § 5102(b)(2).
107 20 Pa. Cons. Stat § 2107(c)(2).
108 221 A.3d 1214 (Pa. Super. Ct. 2019).
109 205 A.3d 347 (Pa. Super. Ct. 2019).

her husband had an intact marriage to avoid the custody claims by J.L. Despite the historical presumption in favor of a husband, the court allowed blood testing to determine the biological parent. The court found that the presumption in favor of the marriage was based upon a public policy to preserve marriage, but that the mother and her husband's claim of marriage was a façade to prevent J.L.'s involvement in the child's life.[110]

Pennsylvania has long recognized standing to file a custody action for someone who is found to be *in loco parentis.* The grandparent standing provisions were amended in 2018 to extend to grandparents who are not *in loco parentis*, as long as the relationship began with the consent of the parents, the grandparent is willing to assume responsibility, and one of the following conditions are met: the child is determined dependent; the child is at risk due to parental abuse, neglect, drug or alcohol abuse, or incapacity; or for at least twelve consecutive months the child has lived with the grandparent.[111] These amendments, in recognition of the drug and alcohol addiction crisis that left children adrift due to addicted parents, further extended standing by allowing any individual to establish by clear and convincing evidence that the person is willing to assume responsibility, the person has a sincere interest in the welfare of the child, and neither parent has any form of care or control of the child.[112] The newest provision for grandparents and third parties who are willing to accept responsibility when the parents are unable to care expands beyond those who claim to be *in loco parentis* to the child.

In loco parentis status has also been invoked by stepparents and same-sex couples. Notably, Pennsylvania ruled in the case of *Interest of A.M.* that married same-sex couples enjoy the same doctrine of spousal presumption.[113] The application for *in loco parentis* status, however, is not automatic for unmarried partners; therefore, same-sex couples are encouraged to marry so they can have the benefit of the marital presumption. This limitation resulted in the Pennsylvania Supreme Court decision *C.G. v J.H.* [114] The non

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110 *Id.* at 356.

111 *See* Peters v. Costello, 891 A.2d 705 (Pa. 2005); *see also* 23 Pa. Cons. Stat. § 5324(3).

112 23 Pa. Cons. Stat. § 5324(4).

113 223 A.2d 691 (Pa. Super. Ct. 2019).

114 139 A.3d 891 (Pa. Super. Ct. 2018).

biological party, C.G., argued she had participated in the decision to have the baby; however, the parties broke up soon after the child was born. C.G. moved from Pennsylvania and waited four years to file for custody rights. The court found there was no basis to find that C.G. had *in loco parentis* status, and she failed to prove the shared intent of the parties to create a parental relationship.

In a Superior Court case that followed, *R.L. v. M.A.*,[115] the same-sex unmarried parties separated not long after the child was born; however, the non-biological mother enjoyed an informal alternating weekend and eventually a shared physical custody schedule. The biological mother argued that the presumption in favor of the parent had not been overcome by the non-biological mother. The trial court and the appellate court concluded that since the non-biological mother sought equal custody, not primary custody, she did not have to meet that the higher burden of clear and convincing evidence to establish her right to equal custody. In *dicta*, the Superior Court noted that the non-biological mother did not ask to be considered a parent. If the court found her a parent, she would not have to meet the burden of proof. This suggests that with more case-by-case decisions in the offing, predictability in the law for children may be more difficult to assess.[116] The question remains, considering recent precedents, if Pennsylvania adopts UPA legislation, will it be amended to conform with decisions of the appellate courts, including the caselaw on child support responsibilities?[117]

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115 209 A.3d 391 (Pa. Super. Ct. 2019).

116 On May 31, 2024, the Pennsylvania Supreme Court reversed the Superior Court and rejected imposing a support obligation on a non-biological/non-adoptive parent despite a handful of cases, Caldwell v. Jaurigue, 315 A.3d 1258 (Pa. 2024). The Superior Court had handed down a non-precedential decision in which the dispute arose after the mother died. The mother never married the biological father, and her boyfriend, who lived with the mother for over five years from the time the child was sixteen months old until the mother died, sought custody rights after the child was placed with the father. The boyfriend claimed standing under *in loco parentis* as he had enjoyed custody time with the permission of father, sought an award of custody and the boyfriend found himself liable for support. *See* Caldwell v. Jaurigue, 287 A.3d (Pa. Super. Ct. 2022).

117 Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 Am. U.L. Rev. 769, 772 (2017) ("We conclude by urging further examinations of de facto parent and nonparent child support issues, particularly by the American Law Institute (ALI) via its 2016 draft of its Restatement of the Law: Children and the Law ("2016 ALI Restatement draft"), and by the

Michigan

Michigan has not passed the UPA 2002, nor is it likely to pass the UPA 2017 in the foreseeable future. Michigan's Paternity Act and the Acknowledgement of Paternity Act address fatherhood based upon a child born out of wedlock with the latter Act establishing fatherhood through a consent process.[118] Notably, under the Revocation of Paternity Act, a legal but non-biological father (i.e. a husband) may be precluded from revoking his status based on his conduct such as the length of time he was on notice he might not be the father, the facts indicating that he might not be the biological father and his knowledge of them, and the nature of the relationship between the child and the alleged father.[119]

None of Michigan's statutes have been amended after the Supreme Court decisions concerning same-sex marriage. Joslin and NeJaime find that Michigan is an "equitable parent" state, citing *Van v. Zahorik*.[120] Equitable parentage is available to both the husband in a divorce action to preclude the court from using blood tests to reverse his status as a parent and to the wife seeking to require the husband to accept continuing responsibility as a parent. While the court considered the equitable parent doctrine outside of marriage, the *Van v. Zahorik* decision specifically refused to apply it to an unmarried couple.

In the summer of 2023, however, the Michigan Supreme Court held that under the limited circumstances where the non-biological partner can prove by a preponderance of the evidence

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National Conference of Commissioners on Uniform State Laws (NCCUSL) via its recently adopted "2017 Uniform Parentage Act" ("2017 UPA") and "Nonparental Child Custody and Visitation Act" ("NPCCVA"). These august bodies have done much to educate and to spur legal reforms on de facto parent and nonparent childcare; yet, these institutions, and others, have said little about how childcare reforms should impact child support duties.").

118 The Paternity Act, Mich. Comp. Laws § 722.711, was adopted in 1956; The Acknowledgment of Paternity Act, Mich. Comp. Laws § 722.1001 passed in 1996. In 2012 the Revocation of Paternity Act, Mich. Comp. Laws § 722.1431 became law.

119 *See* Rogers v. Wcisel, 877 N.W.2d 169, 177 (Mich. Ct. App. 2015) ("The undisputed fact that a man is not a child's biological father, as proven by clear and convincing evidence through blood, tissue, or DNA, does not establish a mistake of fact. Biological evidence is rather a second and separate factor to be considered in the revocation of an acknowledgment of parentage after the trial court finds the moving party's affidavit sufficient under MCL 722.1437(2).") (footnotes omitted).

120 597 N.W.2d 15 (Mich. 1999).

that the couple would have married but for the unconstitutional laws that prohibited them from doing so, that partner has standing to seek to be recognized as an equitable parent.[121] In a recent appellate decision involving a wrongful-death action the Michigan Court of Appeals summarized these developments, as follows:

> Our decision specifically considers and reflects the changing practices and social norms of what and who constitute a close family relationship. We are mindful of the myriad of cases presented to this Court wherein grandchildren are being raised by their grandparents. And those class of cases are increasing at a seemingly exponential rate. Recently, our Supreme Court enlarged the class of people who may constitute a parent. In Pueblo v Hass, __Mich__, __; __ NW2d __ (2023) (Docket No. 164046); slip op at 1, our Supreme Court held that a former partner who was unconstitutionally denied the right to marry in a same sex relationship may sue for custody of a child with whom the "former parent shares no biological relationship." Accordingly, we reiterate our previous observation that "devising one hard and fast rule for limiting bystander recovery in mental suffering cases would be difficult and complex if not impossible."[122]

The opinion in *Pueblo v. Hass* is very clear that the decision is narrow and the court expressly rejected an expansion of equitable parent to partners who "deliberately eschewed marriage" because it would "undermine the public policy in favor of marriage."[123] If, however, the case fits the status requirements, the three part test for getting equitable parent status remains: (1) the would-be equitable parent and the child acknowledge the parental relationship or the biological or adoptive parent has cultivated the development of a relationship over a period of time; (2) the would-be equitable parent desires to have the rights afforded a parent; and (3) the would-be equitable parent is willing to pay child support.[124] The challenge that emerges from this case law is the same as faced by other states: whether to enact a statutory scheme like the UPA 2017 that at least grounds each family system into the same body

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121 Pueblo v. Hass, 999 N.W.2d 433 (Mich. 2023).

122 Tenhoppen v. Glemboski, No. 361181, 2023 Mich. App. LEXIS 5866 **10-11 (Aug. 17, 2023).

123 *Id*. at slip opinion at 21, n.12.

124 In a distinct factual circumstance, *LeFever v. Matthews*, 971 N.W.2d 672 (Mich. Ct. App. 2021), the court held that the woman who carried the child is a parent, even though she did not share genetic material with the child. The partner who had donated the egg was a biological parent.

of law with the possibility of limiting randomness and the emotional and financial costs of years of litigation.

Texas

Texas adopted the 2002 version of the UPA with provisions that include a path to paternity through the holding out doctrine.[125] Texas has a variation of the UPA's section 204(a)(1)(C) creating a presumption for fathers who marry the mother after birth and (1) the father asserts paternity and (2) one of the following three circumstances apply: (a) the assertion is filed with the Bureau of Vital Statistics, or (b) the father's name is voluntarily added to the child's birth certificate, or (c) the father promises "on a record" to support the child as his own.[126] A presumed father is also a man who, during the first two years of a child's life, continuously lives with the child and holds out the child to others as his.[127]

In Texas, where there is a presumed father, litigation to address parentage can begin any time before the child is four years old. The window for litigation to disallow parentage is extended and can begin anytime if the court finds either (1) the mother and presumed father did not live together or engage in sexual intercourse at the time of conception, or (2) the presumed father was precluded from challenging his status because of a mistaken belief that he was the father due to misrepresentation. If a child has no presumed, acknowledged, or adjudicated father, litigation can begin any time, even after the child becomes an adult.

Since UPA 2002 does not refer to same-sex couples, Texas has not updated its Family Code to recognize *Obergefell*, nor is there a statutory application of the functional parent doctrine to same-sex couples. However, at least one Texas court, in *Treto v. Treto,*[128] has held that the statutory parentage presumptions in Chapter 160 apply to females in same-sex relationships, and another has held that a same-sex spouse who is not biologically related to a child has standing to assert rights to a child born of the marriage.[129]

125 Tex. Fam. Code § 160 (2023).

126 Tex. Fam. Code § 160.204(a)(4).

127 Tex. Fam. Code § 160.204(5).

128 622 S.W.3d 397 (Tex. App. 2020).

129 *In re* Interest of D.A.A.-B., 657 S.W.3d 549 (Tex. App. 27. 2022). A different Texas appellate court previously found that a same-sex partner did not have standing as a parent to assert right to born during the marriage. *In re* Interest of A.E., No. 09-16-00019-CV, 2017 WL 1535101 (Tex. App. Apr. 27, 2017).

In addition to section 160.204, a nonparent may seek conservatorship of a child if the nonparent has standing to bring the suit and can overcome the "fit parent" presumption. Most commonly, a nonparent can achieve standing by having "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition."[130] In the case *In re C.J.C.,*[131] a fiancé sought and won standing under Texas law but failed to be appointed conservator of the child of the deceased mother.[132] In *In Re C.J.C.,* the Texas Supreme Court required the fit parent standard be applied when the fiancé of a deceased mother attempted to be appointed a conservator and sought court-ordered custody. The fiancé had legal standing under Texas' statute that allows someone with actual care, custody, and control of a child for at least six months to file or intervene in a suit.

While recognizing standing, the fiancé was still unable to obtain a court-ordered role due to his failure to show that the surviving father was not fit to make the decision about who should be around his child and when. Justice Lehrmann, who served on the UPA committee, opined in her concurring opinion in *In Re C.J.C.S* that the fit-parent presumption may be overcome by a person who has served in a parenting role historically in the child's life while there is not a specific standard for proving such a case and it was not done in *C.J.C.* [133] In the *Interest of R.W.N.R.*,[134] a Texas appellate court recently summarized the analysis of extending parentage rights, as follows:

> Since the Texas Supreme Court's decision in In re C.J.C., courts have been unable to articulate the degree or quantum of evidence required to overcome the fit-parent presumption. Troxel and subsequent Texas cases do instruct, however, that the fit-parent presumption is not overcome if the nonparent shows that the parent has failed to adequately care for the child. See Troxel, 530 U.S. at 68 (defining "fitness" as providing adequate care); In re C.D.C., 2021 Tex. App. LEXIS 805, 2021 WL 346428, at *6 ("[T]he existence of the fit-parent presumption necessarily requires that some evidence that a parent is not fit must be offered

However, that case was decided pre-*Pavan*'s implicit directive to read statutes "in a gender neutral [sic] fashion to comply with the Fourteenth Amendment and the constitutional guarantee of equal protection." *Treto*, 622 S.W.3d at 403, n.2.

130 Tex. Fam. Code § 102.003(a)(9).

131 603 S.W.3d 804 (Tex. 2020).

132 *Id.* at 820.

133 *Id*. at 820 (Lehrmann, J., concurring).

134 No. 08-23-00087-CV, 2023 Tex. App. LEXIS 8105.

to rebut it."); Interest of A.V., 2022 Tex. App. LEXIS 4890, 2022 WL 2763355, at *5 ("To prove Mother unfit here, Grandparents had the burden to prove that Mother cannot adequately care for A.V.").[135]

Delaware

Delaware is an example of a UPA 2002 state which changed its laws after case law prompted legislation to update parentage principles to cover current family dynamics. In *Titus v. Rayne,*[136] a non-biological parent had previously held himself out as a parent. In a case of first impression under the Delaware Uniform Parentage Act at the time, the Delaware Family Court reinstated the doctrine of equitable estoppel under the Delaware UPA after finding that the strict code of the Delaware UPA conforming solely to genetic parentage by DNA testing was not the only arbiter of parentage; and that a party's prior legal confessions of parentage operated to limit the genetic override of the Delaware UPA. Thereafter, the Delaware legislature amended its statute to adopt equitable estoppel as a basis for parent identification.[137]

In *In Re Hart,*[138] the Delaware Family Court established a five-part test for determination that a non-biological parent could be the legal parent of a child under the *de facto* parent doctrine.[139] Then, in *L.M.S. v. C.M.G.,*[140] the Delaware Family Court expanded the *de facto* parent doctrine to apply to same-sex couples, and not parents formerly recognized solely within the sphere of the

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135 *Id*. at **12-15 (citations omitted).

136 No. CN91-6133, 1992 WL 437586 (Del. Fam. Ct. Nov. 19, 1992).

137 74 Del. Laws c.136, § 1; 13 Del. Code §§ 8-606, 8-608.

138 806 A.2d 1179 (Del. Fam. Ct. 2001).

139 *Id*. at 1187 (A "*de facto*" parent/stepparent: Has the support and consent of the parent who has fostered the formation and establishment of a parent-like relationship with the child; Has assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development -- including the child's support, without the expectation of financial compensation; Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship that is parental in nature; Has helped to shape the child's daily routine by addressing developmental needs, disciplining the child, providing for the child's education and medical care and serving as a moral guide; Has on a day to day basis, through interaction, companionship, interplay, and mutuality, fulfilled the child's needs for a psychological adult who helped fulfill the child's needs to be loved, valued, appreciated and received as an essential person by the adult who cares for him.").

140 No. CN04-08601, 2006 WL 5668820 (Del. Fam. Ct. June 27, 2006).

Delaware UPA. When *L.M.S. v C.M.G.* was decided, Delaware did not recognize the marriage of same-sex couples. That case recognized the *de facto* parentage of another woman who was involved in the adoption and raising of her partner's adopted daughter even though at the time both parents could not legally adopt a child. As before, the Delaware legislation followed suit and amended the Delaware UPA to conform to case law.[141] Even though the Delaware legislature has not adopted the 2017 Act, its case law and amending legislation is advancing the rights of more parties including the possibility of three parents for a child, despite criticism of the Delaware legislation.[142]

III. Impact of De Facto Parentage Under The UPA 2017

UPA 2017 allows a person who has been participating in a child's life as a parent, with the consent of at least one parent, and holds him or herself out accepting full responsibility as a parent, to be adjudicated a de facto parent of a child. The provisions of the UPA 2017 provide distinct alternatives to state legislatures in determining parentage involving a de facto parent becoming the second or the third parent. If states adopted the version of the UPA that permits only two parents, then the stepparent may seek parentage if the child only has one living parent prior to the petition. The law certainly recognizes that even a deceased parent is a legal parent for other purposes. Potentially, the two-parent limitation may still apply when one legal parent is deceased.

If a state passes the version that allows for more than two parents, the person asserting de facto parentage in a situation of a child with two living and legally acknowledged parents, the de facto parent will have to establish first that they have standing and

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141 *See* 77 Del. Law. c. 97, §§ 1-3; 13 Del. Code § 8-201.

142 *See* William Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. Legis. 263, 264 (2010) ("The Delaware legislation might seem insignificant because its radical experiment is currently confined to that single state. In what it portends for children and families and for state power, however, its implications could not be more momentous. One state's creation of a legal fiction for parenthood is a small step in U.S. law but it is a fateful one and given the probable costs, one that ought to be reversed and certainly not followed by any other state.").

second that the child would be harmed if they were not recognized as a parent. As Professor Jeffrey Parness has written:

> An October 2016 draft of what became the 2017 Uniform Parentage Act added a new form of parentage. It says: (a) An individual is presumed to be the parent of a child if: . . . (6) the individual:
>
> (i) resided with the child for a significant period of time;
> (ii) engaged in consistent caretaking of the child;
> (iii) accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and
> (iv) Established a bonded and dependent relationship with the child, and the other parent understood, acknowledged, or accepted the formation of that relationship or behaved as though the individual is a parent of the child.[143]

The UPA would only allow a person who claims to be a de facto parent to petition to be a parent. This was intended, as a policy matter, to prevent a situation where someone such as a stepparent could be compelled by a legal parent to become a parent with personal and financial obligations. Additionally, de facto parentage is limited to individuals who hold themselves out and behaved as if they were the child's parent. This provision is intended to mean that someone, like a grandparent, who fits every other criterion but never claims to be an actual parent (although they may be the only active parenting figure in the child's life), could not petition the court to be named a parent regardless of having a relationship that is in every other way a parenting relationship with the child.

While thirty-four states have arguably recognized some form of "equitable" parentage, only seven states have adopted UPA 2017.[144] The UPA recognition of more than two parents including a de facto parent may be viewed as an insignificant departure from many of the states' recognition of the actual role of third parties in a child's life where they have been acting as a parent, either with one or both legal parents or when the legal parents are not serving in a parenting or caretaking role in their child's life. Nevertheless, Professor Struss suggests, and state courts have found, that fundamental constitutional rights are implicated in a way that constrains courts from interfering with parental rights absent proof of harm such as abuse or neglect.

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143 *See* Parness, *supra* note 20, at 160.
144 *See* Strauss, *supra* note 66, at 915.

Some scholars and policy makers argue that the passage of the UPA could significantly increase litigation with suits being filed by stepparents and others. In states that pass the 2017 version of the UPA that allows a child to have more than two legal parents, these cases have the potential of naming a third parent who shares parenting with a parent who did not choose to put the de facto parent in a position of being able to be adjudicated as a third parent.[145] One of the parents might have encouraged the role in the child's life and the holding out, while the other parent may not have been aware and might have objected to the holding out. Nevertheless, the objecting parent might find themselves sharing parenting with their former spouse or partner and *that* person's former spouse or partner. These cases could also involve situations where one or both parents have allowed others to care for and serve in the role of parents of a child. In these situations, the de facto parent would have to prove that not recognizing them as a de facto parent would be detrimental to the child usually based on factors for the best interests of the child. Under the UPA, the burden of proof for the de facto parent is clear and convincing evidence.[146]

Same-sex couples often have children when each child is the biological or adopted child of one parent. With assisted reproductions, these children, and children of heterosexual couples with donated gametes, might have other biological parents. The functional parent may be involved in the child's entire life and there may be no other legal parent, but in many states, that person would not have standing to pursue legal parentage unless the person adopts. The de facto parenting provisions of UPA 2017 would be a tool to allow same-sex partners to preserve their role in a child's life when they are not a biological or adoptive parent of the child, including where the parties separate or the biological parent is deceased.

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145 *See* Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 Fordham L. Rev. 2561 (2021).

146 *See* In the Interest of M.T., No. 05-20-00450-CV, No. 05-20-00451-CV, 2020 WL 5887086 *2 (Tex. App. Oct. 5, 2020) ("Because the fundamental liberty interest of parents in the care, custody, and control of their children is of constitutional dimensions, involuntary parental terminations must be strictly scrutinized. Troxel v. Granville, 530 U.S. 57, 65-66; In re K.M.L., 443 S.W.3d 101, 112 (Tex. 2014). In such cases, due process requires the petitioner to justify termination by clear and convincing evidence. FAM. § 161.001(b); In re E.N.C., 384 S.W.3d 796, 802 (Tex. 2012).").

The UPA 2017 allows states to address the situation where two parents separate and then re-partner with others and the new partners are involved in parenting the child. One parent may re-partner multiple times and those new partners might become functional parents. One parent might facilitate their partner becoming a de facto parent while the other parent objects to that role, which could lead to litigation. Thus, among various next questions is whether the de facto parent's custodial time comes from the parent who facilitated the de facto parent role or from both other parents' time, for example?[147] After all, there are 365 days in a year for the government in the form of courts to divide in these situations. This is a complex mixture of legal policy and empirically based research as to the benefits and risks of such a policy for children over a lifespan, if state legislatures and courts intend to recognize the legal status of de facto parents by passing the UPA 2017 into law.

Conclusion

Arguments based on functional parent doctrines will continue to emerge in states that have not adopted UPA 2017. More states may pass UPA 2017 legislation, and most are expected to allow de facto parentage status. The path to acceptance of functional or de facto parents by the courts in states that hesitate to embrace UPA 2017, will continue to vary. Overall, the prospect of uniformity is dim as individual litigants, trial judges, and appellate courts resist or accommodate changing family configurations. And underlying much of this debate these days, are complex political and social considerations

147 This possibility is not new as it was anticipated by the Uniform Commissioners when adopting Chapter Two of the ALI's Principles of the Law of Family Dissolution. *See* American Law Institute, Principles of the law of Family Dissolution, Analysis and Recommendations ch. 2 (2002); *see also* Dana E. Prescott, *The AAML and a New Paradigm for Thinking about Child Custody Litigation: The Next Half Century*, 24 J. Am. Acad. Matrim. Law. 107, 129 (2011) ("Moreover, if the commentators really mean for the approximation rule to conform to historical truth(s) then judges should, as a matter of accuracy, allocate non-parenting time to third parties. For example, if P(A) was parenting 63 percent of the time than 37 percent of non-parenting time is allocated to P(B). Of course, the dilemma is that P(B) actually parents 37 percent of the time while P(A) allocates 40 percent of her 63 percent to grandparents (GPs) or daycare, then 25.2 percent of actual parenting time should be allocated to P(A) and 37.8 percent to GPs.").

about the rights and needs of children which have morphed into attacks between groups in the public square and across state legislatures.

The "functional parentage doctrine" has long been recognized based on holding oneself out as the parent of a child. Historically the doctrine led men to find themselves obligated to pay child support.[148] This concept was codified and outlined in the first Uniform Parentage Act in 1973. Holding out is a type of imprecise determination of functional parentage because proof often depends on the facts presented by the petitioner. The doctrine developed in child support cases, and the petitioner (including the government paying welfare benefits) argued that the respondent be named a support obligor if he openly held out the child as his natural child. UPA 1973, UPA 2002, and UPA 2017 each changed the requirements to find "holding out" had occurred. When support statutes did not address the parental bond or attachment that arose, attorneys filed custody cases, with and without experts, seeking recognition as support obligors, de facto parents, and functional parents.[149] Arguably,

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148 A variation is the debate about the BIC and functional parenting capacity in terms of the framework for determining rights and responsibilities to children. *See* Dana E. Prescott, *The AAML and a New Paradigm for Thinking About Child Custody Litigation: The Next Half Century*, 24 J. Am. Acad. Matrim. Law. 107, 145 (2011) ("The birth of a child is an event with infinite outcomes. The child may have resiliencies, disabilities, or unique capacities of body, mind, or spirit. The parents possess strengths and weaknesses that may bend, break, or evolve during the parenting relationship. What is true is that function and context at the time of family dislocation are the measure, not fractions. A child's life is a fluid, dynamic process of growth and attachment, not a linear equation but a series of complex adaptions to persons and environments.").

149 Care must be exercised when extrapolating social science literature and research to policy related to children, and sibling didactics, being raised in multiple homes with multiple caregivers. *See* Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20(1) Psychol., Pub. Pol'y, & L. 46, 46 (2014) ("Social science provides a growing and sophisticated fund of knowledge about the needs of young children, the circumstances that best promote their optimal development, and the individual differences among children regarding their adaptability to different circumstances, stress, and change. Consequently, research focused on children whose parents never married, or whose parents separated or divorced, should inform guidelines to advance the welfare and define the best interests of those children; indeed, policymakers and practitioners in family law look to that research for such information. But the road from laboratories to legislatures and family law courtrooms is hazardous—fraught with potential for misunderstandings, skewed interpretations, logical errors, even outright misrepresentations. The hazards can be traced, in large

the holding out doctrine in many support statutes was not based on the best interests of the child who had bonded to the obligor. Nonetheless it should be expected that more holding out parents will also seek caretaking, custody, and visitation rights.

Holding out and functional parent developments continue to vary widely and may create problems if a child born to one of the partners moves to another state. Since less than half of the states have adopted UPA 2017 or UPA 2002, the case law in many states does not conform to the requirement of residing in the same household for the child's first two years of life, among other elements under the UPA. States may or may not provide the opportunity to rebut the presumption of parentage within the first two years. The functional parent doctrine based on de facto parentage and other equitable principles to recognize a non-genetic parent may be brought by the person seeking parentage. The review of the states that do not rely on UPA 2017 demonstrates the wide range of results when de facto or other types of equitable parentage are raised. These are the range of takeaway observations about functional parentage beyond the "holding out" cases:

- In the two 2002 UPA states, Texas appears to be loosening the heterosexual parent model on a case-by-case basis, while the Delaware judiciary has decided to extend interpretation of parentage to same-sex couples followed by legislative amendments.[150]
- States with no twenty-first century UPA legislation may resist changes to extend functional parentage as seen in Florida, Ohio, and Virginia. The argument has been considered and rejected in Florida and Ohio.[151] Litigants will knock at the door; however, to date change is not happening based on caselaw or new legislation.
- Michigan cases recently outlined a narrow exception and a three-part test to establish equitable parent status, as well as granting a partner who acted as gestational carrier for the partner's fertilized egg to term recognition as a parent.

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measure, to differences between science and advocacy. Scientific approaches to a literature review aim for a balanced, accurate account of established knowledge and of unresolved issues that require further investigation.").

150 *See supra* discussion in text at notes 128-129, 140-141.

151 *See supra* discussion in text at notes 86-87, 91-93.

- While Virginia and Texas recognize non-biological, non-adoptive parental relationships in probate court, it is not clear this will lead to establishing parentage in custody court.[152]
- Both Pennsylvania and New Jersey courts, without passage of UPA 2017, have recognized functional parenting rights when litigants seek parentage or custodial status. Pennsylvania has updated its standing options for third parties to allow functional parent custody rights in at least three categories, without granting legal parentage.[153]
- While the de facto and other forms of functional parent doctrines have led to states awarding physical custody or only caretaker rights, this is not the recognition of all privileges of being treated as a legal parent. De facto parentage in UPA 2017 with states like California and Delaware will recognize three parents.[154] The litigants who seek recognition as parents who do not have a genetic, adoption or contractual claim may find themselves a source of support for the child when they argue their custodial rights are important to the child's sense of belonging. Whether change is by statute or litigation, functional parents will seek their parental status. Among the states adopting a form of UPA 2017 variations will continue and each parent must be wary if the child or the family move to a different jurisdiction. The prospect of uniformity is dim, but not dark.

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152 *See supra* discussion in text at notes 98-100, 125-135.

153 *See supra* discussion in text at notes 105-117, 101-104.

154 *See supra* discussion in text at notes 47, 58-60, 142. There are limitations of this application decided in California. *See supra* note 47.

Family Law Arbitration—A Guide for Providing Sound Counsel to Litigants

by
Amy J. Amundsen* and Carolyn Moran Zack**

Introduction

In the 1989 classic film "Field of Dreams," Iowa corn farmer Ray Kinsella envisions a baseball diamond in his cornfield with baseball legend "Shoeless" Joe Jackson standing in the middle and then hears a voice whispering, "If you build it, he will come." After Ray and his wife Annie plow under their corn crop to build a baseball field, they risk financial hardship, but with the support of some imaginary and real-life characters, they persevere. In addition to reconnecting with his father, Ray finds economic success and personal fulfillment as hundreds of people arrive and pay to watch the National Pastime.

The phrase "If you build it …" has become a metaphor for the law of attraction, which suggests that using long-term goals to make specific, concrete changes in the present will help you to achieve those goals. Achieving resolution of family law disputes privately, more quickly, more cheaply, and with less adversarial posturing, are goals shared by family lawyers and their clients. Family law arbitration, which is the process by which parties voluntarily submit their claims for adjudication to a third-party neutral, allows parties to effectuate these goals.[1] By recognizing the benefits of family law arbitration and encouraging clients to use this process routinely, family lawyers can shift away from the litigation forum into a trend-setting confidential forum of arbitration. With more family lawyers striving to reap the myriad benefits resulting from family law arbitration, trying it out in their cases, and

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1 *See, e.g.,* Linda D. Elrod, *Arbitration of Child-Related Issues and the Uniform Family Law Arbitration Act*, 46 Fam. Advoc. 14, 14-15 (Fall 2023).

working together to improve the applicable laws and rules, this method of resolving disputes may become the new field of dreams.

This article will help family lawyers guide clients who are trying to decide whether arbitration is appropriate for their case. Part I discusses what lawyers need to know to propose arbitration to their clients and opposing lawyers, including trends and research in favor of arbitration, the laws applicable to arbitration, the cases or issues that are appropriate for arbitration, and its advantages and disadvantages. Part II addresses the essential components of an arbitration agreement, including considerations for child-related awards, and distinguishes private judging. Part III gives an overview of the arbitration process. Part IV discusses techniques that can be used, including final-offer arbitration, mediation-arbitration, single-issue arbitration, and a panel of arbitrators. Finally, Part V argues in favor of the need for family law-specific legislation or rules to provide more reliability in the process and to protect the interests of family law participants.

I. Introduce Family Law Arbitration to Clients and Opposing Counsel

A. *Trends and Research Favoring Arbitration over Traditional Litigation*

According to the American Arbitration Association ("AAA"), arbitration use in the commercial realm in the United States has increased overall in the past several years. The total number of commercial cases submitted for arbitration to the International Centre for Dispute Resolution, AAA's international arm, gradually increased from 9,737 in 2019[2] to 10,273 in 2022,[3] with the number of financial services cases alone reflecting a 65% increase.[4]

Although no similar statistics are available for family law arbitration in the United States, anecdotal evidence suggests that the

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2 *2019 AAA-ICDR B2B Case Statistics,* Am. Arbitration Ass'n, https://www.adr.org/sites/default/files/document_repository/AAA261_2019_B2B_Infographic_0.pdf (last visited Jan. 24, 2024).

3 *2022 AAA-ICDR B2B Case Statistics,* Am. Arbitration Ass'n, https://www.adr.org/sites/default/files/document_repository/AAA423_2022_B2B_Infographic.pdf (last visited Jan. 24, 2024).

4 *See id*.

use of alternative dispute resolution methods has increased over the past decade, as parties and their counsel have shifted away from high-conflict litigation in court.[5] There is a growing awareness of the negative consequences of high conflict between divorcing or separating parties on their children and a greater focus on restructuring the family to minimize this impact.[6] Client priorities have also changed, with clients looking for representation to protect their well-being along with their legal interests.[7]

Family law arbitration gives clients an alternative to negotiation, litigation, collaborative law, mediation, or court-sponsored dispute resolution methods.[8] In arbitration, the parties agree to submit one or more issues arising from the dissolution of their relationship to an arbitrator—a neutral third party—for resolution.[9] The arbitrator makes a decision, called an award, based on the facts and evidence presented.[10] Unlike litigation, where the decision-maker is randomly assigned and paid by public funds, the parties choose and pay the decision-maker.[11] Arbitration offers an alternative for those who want an experienced decision-maker in a potentially faster, more confidential, and less adversarial proceeding.[12]

Among the alternate dispute resolution ("ADR") options, arbitration enables family law litigants to achieve an expedient and final resolution with a professional of their choosing, without the risks and costs associated with a court adjudication and possible appeal. The private resolution of family law claims permits the

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5 Diana Shepherd, *The Past, Present, and Future of Family Law*, Fam. Law. Mag. (May 20, 2022), https://familylawyermagazine.com/articles/past-present-future-family-law/.

6 *See, e.g.*, Robin M. Deutch et al., *Parenting Coordination: An Emerging Role to Assist High Conflict Families, in* Innovations in Interventions in High Conflict Families 187, 213 (Linda B. Fieldstone & Christine A. Coates eds., Ass'n of Family and Conciliation Courts 2008) ("Research is clear that children who are exposed to ongoing conflict between their parents are at risk for short-term and long-term emotional and behavioral problems").

7 Lewis Irwin Landerholm, *What's Changed in Family Law in the Last 10 Years?*, Fam. Law. Mag. (Apr. 5, 2023), https://familylawyermagazine.com/articles/whats-changed-in-family-law-in-the-last-10-years/.

8 Unif. Family Law Arbitration Act prefatory note (Unif. Law Comm'n 2016).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

parties to engage in a healthy reorganization of their family and reduces conflicts that the adversarial process may exacerbate.[13] This reduced tension between parents helps to protect their children from the negative impact of an acrimonious divorce,[14] and to promote their own long-term physical and mental health.[15]

Family law arbitration has gained respect among family court judges and family lawyers in the last thirty years. In 2017, the Conference of Chief Justices, the Conference of State Court Administrators, and the National Center for State Courts launched the Family Justice Initiative ("FJI") project to evaluate and improve how courts handle domestic relations cases.[16] In 2018, the FJI published the first comprehensive examination of how family court cases are litigated in state courts.[17] The FJI reviewed caseload data between July 1, 2016, and June 30, 2017, across eleven large, urban courts and found that the great majority of cases (72%) involve at least one self-represented party, and the amount of time that it takes to litigate cases enhances the public perception that the legal system takes too long to achieve a meaningful resolution.[18] The FJI identified thirteen Principles for Family Justice Reform to guide courts in improving how they process domestic relations cases.[19]

One of these Principles was that courts should encourage parties to reach resolutions themselves, with careful attention to the safety of the parties, rather than to undergo a full adversarial proceeding and receive a determination by a judge.[20] The FJI

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13 *Landscape of Domestic Relations Cases in State Courts*, Nat'l Ctr. St. Cts. (2018), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf (stating that adversarial processes inflame tensions and divide spouses and parents when they need to be making good decisions about children, assets, and future events).

14 *Id*.

15 *How Stress Affects Your Health*, Am. Psychol. Ass'n (Oct. 31, 2022), https://www.apa.org/topics/stress/health.

16 *In Support of the Family Justice Initiative Principles*, Conference of Chief Justices (2019), https://ccj.ncsc.org/__data/assets/pdf_file/0024/23478/02132019-family-justice-initiative-principals.pdf.

17 *Id.*

18 *Id*.

19 *Family Justice Initiative Principles for Family Justice Reform*, Nat'l Ctr. St. Cts. 1, 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0021/19173/family_justice_initiative_principles_final.pdf.

20 *Id.* at 2 (citing *Call to Action: Achieving Civil Justice for All*, Nat'l Ctr. St. Cts. 1, 16 (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf).

recognized that "self-determined resolutions are more likely than a court-imposed decision to address both the substantive and underlying interests of the parties; therefore, parties are more likely to comply with and support agreements they reach on their own."[21] The Principles also included a "tailored services pathway" to provide families with access to information on alternative dispute resolution and other services that can help parties reach an agreement in appropriate cases.[22] The Conference of Chief Justices adopted a Resolution in support of these Principles on February 13, 2019.[23] While arbitration proceedings themselves are not self-determined, since the arbitrator makes a decision, arbitration involves self-determination, including the choice of the arbitrator and the rules applicable to the proceeding.[24]

The American Academy of Matrimonial Lawyers ("AAML") endorsed the concept of arbitration in domestic relations matters in 1990;[25] adopted Rules for Arbitration of Financial Issues that same year;[26] and then published the Model Family Law Arbitration Act in 2005, based on the Revised Uniform Arbitration Act.[27] The AAML encourages ADR in general, including arbitration, in its Bounds of Advocacy published in 2000,[28] which recognized that

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21 *Id*.

22 *Id*. at 13.

23 *In Support of the Family Justice Initiative Principles*, *supra* note 16; *see also* Audrey J. Beeson, *Arbitration: A Promising Avenue for Resolving Family Law Cases?*, 18 Pepp. Disp. Resol. L.J. 211, 234-35 (2018) (summarizing results of a survey of twenty family court judges of Nevada's Eighth Judicial District Court and concluding that the judges, overall, support family law arbitration and that 46% supported arbitration of child custody-related issues).

24 *See*, *e.g.*, Michael J. Broyde, Ira Bedzow, & Shlomo C. Pill, *The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience,* 30 Harv. J. Racial & Ethnic Just. 33, 53 (2014) ("because jurisdiction to arbitrate is premised on the voluntary agreement of the parties to arbitrate, arbitral tribunals must accept the contractual choice of the parties as to the substantive and procedural rules that will govern the arbitration").

25 Joan F. Kessler et al., *Why Arbitrate Family Matters?*, 14 J. Am. Acad. Matrim. Law. 333, 333 (1997).

26 Unif. Family Law Arbitration Act, *supra* note 8, prefatory note.

27 *Id*.

28 *See* Am. Acad. of Matrimonial Lawyers, Bounds of Advocacy Goals for Family Lawyers 4-5 (2012). Goal 1.4 states "An attorney should be knowledgeable about different ways to resolve marital disputes, including negotiations, mediation, arbitration, and litigation." *Id.* at 4. Goal 1.5 states "An attorney should

the matrimonial lawyer serves many functions, including the role of a skilled litigator to help clients achieve their goals in "court or in arbitration."[29] The family lawyer's job includes discussing with the client the personal and financial decisions that must be made and may consist of serving as a mediator or arbitrator or representing a client in arbitration.[30] The family lawyer should act as an arbitrator only if competent to do so.[31] The AAML provides high-level training for arbitrators, including the AAML Arbitration Institute and webinars by experienced arbitrators, to provide attorneys with the necessary knowledge and skills to act as arbitrators and to represent parties in a family law arbitration.[32]

On March 14, 2024, the Board of Governors unanimously adopted a Resolution Supporting Divorce and Family Law Arbitration.[33] The Resolution reinforced the AAML's decision to support the use of arbitration of divorce and family law issues, endorsed the adoption of family law-specific legislation to address the unique needs of vulnerable family law participants and, if a state does not have in place a family law-specific arbitration statute or rule, encouraged the state's AAML chapter to work with their legislature to introduce the Uniform Family Law Arbitration Act, with modifications as appropriate to codify or incorporate any established family law arbitration caselaw, statutes, policies or procedures, with the goal of helping family law litigants resolve their matters expeditiously, competently, cost-efficiently, and confidentially in this alternative dispute forum. The Resolution further encouraged AAML lawyers to similarly support and encourage the use "of arbitration of divorce and family law issues to the extent permitted by the laws of each state, recognizing that a goal of our judiciary is to help family law litigants resolve their matters expeditiously, competently, and cost-efficiently."[34]

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attempt to resolve matrimonial disputes by agreement and should consider alternative means of achieving resolution." *Id.* at 5.

29 *Id.* at iv.

30 *Id*.

31 *See id.* at 65 (Goal 9.1).

32 *See Upcoming Events, Seminars and Webinars,* Am. Acad. Matrim. Law., aaml.org/events/ (last visited Feb. 20, 2024).

33 *See Resolution in Support of Divorce and Family Law Arbitration,* Am. Acad. Matrim. Law. (Mar. 14, 2024), https://aaml.org/wp-content/uploads/AAML-Arbitration-Resolution_FNL_3.14.2024.pdf.

34 *Id.* at 4.

Family law arbitration is also well-regarded by the financial experts who assist parties in these cases. The authors polled several financial professionals who reported participating in this process more frequently over the past ten years. One expert listed several reasons she prefers arbitration over litigation:

> The case is presented in a more organized fashion, with parties exchanging comprehensive pre-hearing submissions.
> The hearing is less formal, with the arbitrator having the discretion to follow the rules of evidence.[35]
> Parties often stipulate as to specific assumptions in valuations, such as unreported income, perquisites, etc.
> The process is more conversational, and the atmosphere is less intense.
> The process is more consistent, as evidence is presented in one or two days rather than over days or weeks at a time.
> Retired judges or experienced family lawyers typically hear the cases.
> The matter usually proceeds more quickly from start to finish, with a final award and judgment often entered within one year.
> The environment is more relaxed and friendlier, with a comfortable space, food, drink, and breakout spaces.
> Arbitrators can intervene more quickly on discovery issues and requests for temporary relief, such as attorney fees.[36]

Another expert noted that the parties can choose an arbitrator experienced with complex financial issues, and they can achieve closure without endless litigation and appeals.[37] Further, arbitration allows for flexibility in that arbitrators can hire their own financial expert in complex cases, and the parties may choose a mediation-arbitration model if they want to resolve their issues directly.[38]

Other experts observed that the arbitration process is typically more expedient because the arbitrator controls the proceedings with deadlines and procedures and schedules hearings over consecutive days, and, depending on the case, the proceedings can be more efficient and less costly for the parties than would be a lengthy trial.[39]

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35 The parties can also agree to follow the rules of evidence; it is not totally up to the arbitrator.

36 Telephone Interview with Carleen J. Gaskin, CPA, ABV, CFF, Withum (Dec. 12, 2023).

37 Email from Catherine Stoddard, CPA, ABV, CVA, CFE, MAFF, Forvis Mazars (Nov. 28, 2023).

38 *Id.*

39 Email from Karolina Calhoun, CPA, ABV, CFF, Mercer Capital (Nov. 28, 2023); email from Justin Cherfoli, CPA, ABV, CFF, Stout (Nov. 28, 2023).

B. *Laws Applicable to Family Law Arbitration*

Despite the growing interest in family law arbitration, most states do not have legislation or rules in place to govern the process. North Carolina adopted family law arbitration legislation in 1999,[40] and since then, several other states have enacted family law-specific arbitration legislation, including Connecticut, Florida, Georgia, Indiana, Michigan, New Hampshire, New Mexico, Texas, Utah, and Wisconsin, or rules, including Delaware, New Jersey, New York, and Ohio.[41]

The Uniform Law Commission Executive Committee appointed the Family Law Arbitration Study Committee in April 2012. After careful consideration, the Study Committee unanimously recommended developing an act on family law arbitration that would include terms essential for family law arbitration that are not typically contained in commercial arbitration statutes to supplement, rather than replace, the state's existing commercial arbitration statutes.[42] The Uniform Family Law Arbitration Act ("UFLAA") was recommended by the Uniform Law Commission for enactment in all the states at its meeting in July 2016; the American Bar Association Section of Family Law Council voted to support the UFLAA on October 19, 2016, and the ABA House of Delegates approved it on February 6, 2017.[43]

The "UFLAA provides needed guidelines to ensure that the process is fair and efficient for the participants in family law disputes and protects the interests of vulnerable family members."[44] The UFLAA also incorporates by reference a state's existing arbitration law—whether it is the RUAA or the UAA—for many

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40 N.C. Gen. Stat. Ann. §§ 50-41 to -62; N.C. Gen. Stat. Ann. §§ 1-569.1 to -569.31.

41 *See* Carolyn Moran Zack, *State Laws Applicable to Family Law Arbitration*, 46 Fam. Advoc. 21 (Fall 2023). District of Columbia, Washington, and Pennsylvania have since adopted the UFLAA. *See* D.C. Code § 16-5601 (effective Mar. 10, 2023); Wash. Rev. Code § 26.14 (effective Jan. 1, 2024); and 42 Pa. Cons. Stat. §§ 7371-7398 (effective July 8, 2024).

42 Unif. Family Law Arbitration Act, *supra* note 8, prefatory note.

43 *See id*.; ABA FLS Council Minutes from the Oct. 19, 2016; House of Delegates Approves Policies on Array of Issues Important to the Rule of Law, Am. Bar Ass'n (Feb. 28, 2017), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/february2017/midyear2017/?login.

44 Unif. Family Law Arbitration Act, *supra* note 8, prefatory note .

steps in the arbitration process,[45] and can incorporate the state's pre-existing family law arbitration procedures and any policies. It has been enacted in six states, including Arizona and Hawaii, Montana, North Dakota, Pennsylvania, Washington, and in the District of Columbia. It was introduced as of February 2024 in Kansas.[46] These states are not clustered in one geographic area and reflect a widespread interest in uniform legislation with needed guidelines.

All other states, except for West Virginia, allow family law arbitration under their commercial arbitration statutes and case law.[47] In the absence of family law-specific legislation or rules, family lawyers must know the law and options available for family law arbitration in their jurisdiction,[48] and to the extent that the law does not address their family-specific issues, address those issues in their agreement to arbitrate, as discussed in more detail below.

C. *Cases or Issues That Are Appropriate for Arbitration*

When deciding which cases to submit to arbitration, the family lawyer should identify the issues for adjudication. The UFLAA would prohibit an arbitrator from making a status determination, such as an award of legal separation, divorce, or annulment.[49] Instead, the arbitrator can issue awards on the economic claims of the parties related to the divorce or separation, including distribution of property, support, alimony, counsel fees, and expert fees. Depending on the jurisdiction, the parties then request the entry of the decree or submit the award for confirmation by the court and an entry of judgment on the

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45 *Id.*

46 *Legislative Bill Tracking*, Unif. Law Comm'n, https://www.uniformlaws.org/committees/community-home?communitykey=ddf1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed#LegBillTrackingAnchor (last accessed Aug. 8, 2024).

47 Carolyn Moran Zack, *Family Law Arbitration: An Underutilized ADR Option*, 46 Fam. Advoc. 18, 21-25 (Fall 2023).

48 For example, several states expressly provide for parties to choose binding or non-binding family law arbitration, some states permit arbitration of child-related matters, while others expressly prohibit it, and some states permit substantive review of family law arbitration awards by agreement, while most do not. *See id.* at 18-20.

49 *See* Carolyn Moran Zack, Family Law Arbitration Practice, Procedure, and Forms 9 (A.B.A. 2020) (citing Unif. Family Law Arbitration Act § 3 (Unif. Law Comm'n 2016)).

award.[50] If the client seeks a valuation determination, interpretation of a prenuptial or postnuptial agreement, or resolution of discovery issues, the client may agree to arbitrate these issues to help move the case forward to resolution.[51] The arbitrator can issue sanctions, such as a fine or attorney's fees, for a party's misconduct during the arbitration proceeding, including failing to comply with the arbitrator's directives, but cannot hold a party in contempt.[52] Instead, a party seeking this status determination would request the court to enforce the arbitrator's directive, if necessary.

In a jurisdiction where the arbitrator may issue an award on child-related issues, such as child support or child custody, the family lawyer should consider whether the client will want to preserve the right to appellate review of the issues, which would only be available if the case were litigated in court unless the state law expressly provides for substantive review of the arbitrator's award.[53] The client may want to preserve this right of appeal in situations where there are competing claims for primary custody, a request for relocation, or serious mental health or abuse issues. Preserving the right to appellate review is also a consideration if a case presents a novel financial issue that is not well addressed by a state's appellate case law. In addition, the attorney should not recommend that a party participate in the arbitration if the party cannot participate in the arbitration safely and effectively or when a child who is the subject of the arbitration is being abused or neglected.[54] If a party is covered by a protective order, the attorney may recommend arbitration but should first seek confirmation from the court that the party's consent is informed and voluntary, the arbitration process is not in violation of the protective order, and that there are procedures in place to protect the party from harm, harassment, or intimidation.[55]

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50 *Id.*

51 *Id.* at 189-90.

52 *Id.* at 197-98.

53 *Id.* at 241.

54 Zack, *supra* note 49, at 10 (citing Unif. Family Law Arbitration Act § 12 (Unif. Law Comm'n 2016)).

55 *Id.* at 187-88.

D. *Discussing Arbitration with Clients*

The family lawyer will want to review the advantages and disadvantages of the proposed arbitration with the client in writing. One scholar noted that perhaps the most significant benefit is that arbitration tends to be far less formal than traditional litigation, with relaxed rules of evidence and procedures.[56] The parties have greater rights of self-determination in choosing limited rights of review and appeal.[57] They may also choose an arbitrator who is an expert in the field with experience in controlling conduct that antagonizes the parties.[58] The parties' lawyers may advocate for them effectively using their same litigation skills.[59] Thus, the result may be more predictable or reasonable with family lawyers presenting their cases to an experienced family lawyer or retired family court judge, rather than to a randomly assigned or inexperienced judge or hearing officer.

Other advantages include that the adjudication will be faster since the parties determine the scope of the arbitration, and the arbitrator can schedule the hearing on consecutive dates when the parties and their experts are available.[60] While the parties have to pay for the arbitrator's time, the arbitration will be more cost-efficient since they will not have to pay their attorneys and experts to attend fragmented proceedings (e.g., support and property distribution), pursue different steps in the court process (i.e., conferences, hearings, and arguments), or prepare for multiple dates over weeks or months when the court is available.[61] The arbitration will take place in an office or other private setting.[62] The arbitration provides closure since the award cannot be challenged, except in rare cases due to fraud or misconduct, unless otherwise provided by applicable law.[63] Finally, the decision is expedient, since the decision often will be rendered within thirty days of the hearing.[64]

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56 Kessler et al., *supra* note 25, at 337.

57 *Id.* at 337-38.

58 *Id.* at 338.

59 *Id*.

60 *See* Zack, *supra* note 49, at 165-67.

61 *Id.*

62 *Id.*

63 *Id.*

64 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.20 (providing that an award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court).

Some of these advantages can also be perceived as disadvantages. For example, while most arbitrators will follow the substantive law of their jurisdiction, in the absence of a specific statute or rule or the parties' agreement to the contrary, the arbitrator is not obligated to follow formal rules of evidence or state the reasons for their award in writing.[65] Arbitrators may tend to "split the difference" between the parties to preserve the parties' relationship, encourage repeat business from the parties, or enhance the arbitrator's reputation as a moderate decision-maker.[66] The parties waive their right to appeal except for due process violations or misconduct of the arbitrator, unless they have agreed to an expansive review of the arbitrator's decision, in a jurisdiction where such expansive review is permitted.[67] On the other hand, there is also a risk of achieving a compromise outcome in court, and appealing a trial court award is an expensive and often uphill battle. The risks of arbitration are balanced by the arbitrator's desire to achieve the correct result to protect their reputation as a reliable, neutral decision-maker. Choosing the neutrals for their experience and reputation for excellence is, therefore, a vital part of the process.

E. *Proposing Arbitration to the Other Side*

Once a lawyer has decided that the case is appropriate for arbitration and the client has agreed to arbitrate the case, the next step is to confer with counsel for the opposing party. While there is no prohibition against arbitrating a case with an unrepresented party, there are special considerations in that situation. For example, the lawyer-arbitrator has a duty to inform unrepresented parties that the arbitrator is not representing them, and when the arbitrator knows or reasonably should know that a party does not understand the arbitrator's role in the matter, the arbitrator must explain the difference between a lawyer's role as a third-party neutral and as one who represents a client.[68]

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65 Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Ind. L.J. 425, 439 (1988).

66 *Id.* at 450.

67 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.24 (specifying the limited bases for vacating an award).

68 *See, e.g.*, Pa. Rules Pro. Conduct 2.4(b); Model Rules of Pro. Conduct r. 2.4(b) (Am. Bar Ass'n 1983).

Depending on the dynamics between the parties, the public courtroom setting, with its security, formalities, and rules, may also be preferable to the less formal arbitration setting in this instance.

The discussion with opposing counsel should begin with the concept of arbitration before getting to the arbitrator's selection. If the parties can agree on the concept of arbitration, they will likely be able to agree on an arbitrator or a method for selecting the arbitrator. The parties can select anyone they choose to arbitrate, but in most instances, they will want to choose a family lawyer, a retired judge, or hearing officer. There are specific attributes a party should consider when selecting an arbitrator. Parties may choose an arbitrator with specialized training by the American Arbitration Association or the AAML.[69] Arbitrators must be smart, understand the nature of the dispute, be fair and considerate to both sides and all witnesses, be able to manage the process and the players from the initial preliminary hearing to the award, and be willing to listen and dig deep into the case to decide it correctly and expediently.[70] In addition, in those jurisdictions where the UFLAA has been enacted, the arbitrator should be trained in identifying domestic violence and child abuse.[71] Further, the arbitrator should be experienced in the subject area and be able to act with diligence and promptness in arbitrating the matter.[72]

In the absence of state law to the contrary, the parties may also choose a non-lawyer to be their arbitrator.[73] This selection may be appropriate when the arbitrator has expertise in the subject matter of the arbitration, such as the value of real estate or the tracing of financial contributions to the marital estate. An alternative to this

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69 The AAML conducts regular trainings to certify attorneys as experienced arbitrators. *See, e.g.*, *2023 and 2024 Arbitration Training Seminar*, Am. Acad. Matrim. Law., https://aaml.org/event/arbitration-training-seminar/ (last visited Aug. 8, 2024).

70 David W. Ichel, *Arbitrator Selection Is a Key Component of the Arbitration Process*, N.Y. Law J., Aug. 17, 2023, https://www.fedarb.com/wp-content/uploads/2023/08/NY_Law_Journal_Arbitrator_selection.pdf.

71 Unif. Family Law Arbitration Act, *supra* note 8, § 8(a)(2).

72 *See* Code of Ethics for Arbitrators in Commercial Disputes, Canon I (Am. Arbitration Ass'n 2004) (an arbitrator should accept an appointment only if fully satisfied that he or she is competent to serve and is available to devote the time and attention reasonably expected).

73 *See* Unif. Family Law Arbitration Act, *supra* note 8, § 8 cmt.

approach is for the lawyer-arbitrator to hire an expert to advise about these issues at the parties' expense.[74] Before selecting an arbitrator, the attorneys should jointly contact the candidates they have identified, confirm their ability to serve promptly and competently for the specified issues, and exchange information about potential conflicts between participants and witnesses to ensure the integrity of the process.

II. Essential Components of an Arbitration Agreement

Arbitration requires a written agreement between the parties. A court cannot compel parties to arbitrate without an agreement.[75] The first meeting of counsel and any unrepresented party with the arbitrator should be to discuss the essential terms of the proposed agreement to arbitrate. Before the meeting, counsel should review the law applicable to family law arbitration in their jurisdiction, including the mandatory and optional terms for an agreement to arbitrate, and decide which of the optional terms they want to include in their draft agreement. Most agreements to arbitrate will include the following essential terms:

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[74] *Id.* § 13(c)(6). The retention of a religious leader to apply religious law in the arbitration may also be permitted, but the considerations to be applied in that situation are outside the scope of this article. *See, e.g.*, Lang v. Levi, 16 A.3d 980 (Md. Ct. Spec. App. 2011) (affirming the circuit court's refusal to vacate an award by a Jewish arbitration panel, the Beth Din, and holding that this panel appropriately exercised its authority, as agreed to by the parties, in accordance with Jewish law (Halakhah) and/or general principles of arbitration and equity (Pesharah) customarily employed by rabbinical tribunals); *but see* Kovacs v. Kovacs, 633 A.2d 425 (Md. Ct. Spec. App. 1993) (finding that the chancellor erred in not exercising independent judgment to ensure custody and child support award by the Beth Din was in the best interest of the children; however, alimony and property award of Beth Din was upheld as parties expressly waived application of Maryland law and the procedural aspects of the Maryland Arbitration Act when they agreed to arbitration under Jewish substantive and procedural law).

[75] Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: Arbitration and Med/Arb in Family Law Cases,* 58(1) Fam. Ct. Rev. 26, 28 (2020).

A. *Disclosures by the Arbitrator*

One of the most essential qualities of an arbitrator is neutrality. The UFLAA requires that the arbitrator make specific disclosures before agreeing to serve: the individual shall,

> after making reasonable inquiry, disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator in the arbitration, including bias; a financial or personal interest in the outcome of the arbitration; or an existing or past relationship with a party, attorney representing a party or a witness; or the arbitrator's ability to make a timely award.[76]

This disclosure requirement is echoed in the International Institute for Conflict Prevention and Resolution's ("CPR") proposed Model Rule for the Lawyer as Third-Party Neutral ("Proposed Model Rule") published in 2002.[77] The proposed model rules require that the lawyer-arbitrator disclose to the parties all circumstances reasonably known to the lawyer why he or she may not be perceived as impartial. Such circumstances include:

> (a) any financial or personal interest in the outcome; (b) any existing or past financial, business, professional, family, or social relationship with any of the parties, including, but not limited to, any prior representation of any of the parties, their counsel and witnesses, or service as an ADR neutral for any of the parties; (c) any other source of bias or prejudice concerning a person or institution which is likely to affect impartiality, or which might reasonably create an appearance of partiality or bias; and (d) any other disclosures required by law or contract.[78]

These disclosures extend to the interests or relationships of lawyer-arbitrators, their immediate family members, current employers, partners, or business associates.[79]

Arbitrators should, therefore, disclose in writing any potential conflicts, and they should also confirm that these disclosures have been made in the proposed agreement to arbitrate. Some states, including New Jersey, may also have specific forms to be

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76 Unif. Family Law Arbitration Act § 9(a)(1)-(2), *supra* note 8. This disclosure requirement is ongoing throughout the duration of the arbitration process. *Id.* at § 9 cmt.

77 *Model Rule for the Lawyer as Third-Party Neutral*, CPR-Georgetown Commission on Ethics and Standards in ADR (2002), https://static.cpradr.org/docs/Third-Party-netural-create-new-cover-page-2012.pdf.

78 *Id., citing* Proposed Model Rule 4.5.3(b)(1).

79 *Id., citing* Proposed Model Rule 4.5.3(c).

completed by the arbitrator and the parties, which help to confirm full disclosure has been made, and this disclosure may not be waived.[80]

B. *Provisions of the Arbitration Agreement*

1. *Venue and mode of conference or hearing*

The proposed agreement should state whether the hearing and any pre-arbitration conferences will be in person or virtual and, if in person, where the proceedings will occur. In the absence of an agreement or applicable law to the contrary, arbitrators have the discretion to hold hearings in a manner they consider appropriate for a fair and expeditious disposition of disputes, including whether to record hearings.[81] If child-related issues are being arbitrated, the arbitrator will have an obligation to make a record, which may be a verbatim recording of the hearing, to permit judicial review of the award under the UFLAA.[82] The proposed agreement should also specify whether a recording of the arbitration hearing will be made and, if so, how that recording will be made (e.g., by video or audio or both).

2. *Scope of arbitration*

The proposed agreement should specify the issues being submitted to the arbitrator, as this will define the scope of the arbitrator's authority. The proposed agreement may refer to specific claims raised by the parties or refer to pleadings they have filed raising these claims. In jurisdictions allowing for the arbitration of child-related awards, the proposed agreement should also provide that these awards are not binding until confirmed by a court. The proposed agreement should provide that the court will review these awards to ensure they are consistent with the child's best interest, unless the state directs a higher or different standard for review of such awards, and that such awards are modifiable under applicable law.[83]

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80 *See* N.J. Ct. R. 5:1-5(a).

81 Unif. Family Law Arbitration Act, *supra* note 8, §14.

82 *Id.* § 14. The parties may wish to preserve de novo review of child-related arbitration awards by agreeing to non-binding arbitration of these issues.

83 *Id.* § 16; *see* Fawzy v. Fawzy, 973 A.2d 347, 361 (N.J. 2009) (holding that review of the arbitration award must take place within the confines of the arbitration statute, unless there is a claim of adverse impact on the child).

3. *Substantive law and rules applicable to proceeding*

Unless the state has family law-specific legislation or a rule expressly providing that the jurisdiction's substantive law and rules of evidence or procedure shall be applied, the arbitrator has discretion about how and whether to apply this law and these rules to the proceeding.[84] Therefore, the proposed agreement to arbitrate may require that the jurisdiction's substantive law and procedural rules be applied and incorporate any other policies the arbitrator must follow, including whether the arbitrator must issue a reasoned award. These rules may include the rules of civil procedure (such as the provisions requiring financial disclosure and sanctions that may be imposed for failure to do so) and the rules of evidence, or may allow for more flexibility, depending on the needs of the parties and particularities of the case.

4. *Process for reconsideration*

The proposed agreement should provide a procedure for reconsideration by the arbitrator of any portion of the award. For example, the reconsideration provision may permit either party to submit such a request in writing (with a copy to the other party) within twenty days of the award. The responding party may submit a written response (with a copy to the other party) within the next twenty days, after which the arbitrator may, in his or her sole discretion, determine whether to conduct further hearing or argument by telephone conference call or otherwise, to decide the reconsideration request. This reconsideration provision (i.e., allowing for reconsideration for any reason) would supplement the provisions of most arbitration statutes, allowing the arbitrator to correct or modify an award on request of a party for specified reasons only.[85]

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[84] The UFLAA would require that the arbitrator follow the law of the state, including its choice of law rules. Unif. Family Law Arbitration Act, *supra* note 8, § 4.

[85] *See, e.g.*, 42 Pa. Cons. Stat. § 7321.21 (the arbitrator may modify or correct an award for an evident mistake, if the award is imperfect in form not affecting the merits, they made an award on a claim not submitted, have not made a final and definite award on a claim submitted, or to clarify the award).

5. *Privacy of the proceeding*

The proposed agreement may confirm that the parties desire to maintain the privacy of the arbitration proceeding and may provide for the protection of sensitive information to be exchanged or discussed in the process. For example, the parties may agree to execute a confidentiality agreement to be signed by the parties, their counsel, the arbitrator, and any experts or other third-party witnesses.

6. *Fees and costs*

The agreement to arbitrate must set forth the basis for the arbitrator's fee (which is generally based on an hourly rate), the services and costs to be charged to the parties, the amount of any retainer, and the up-front allocation of these fees. The agreement to arbitrate should also confirm that the fees may be reallocated in the arbitration award at the arbitrator's discretion.[86]

7. *Non-waivable terms*

Most commercial statutes provide that the agreement to arbitrate may waive or vary the requirements of the law, except as expressly provided in the statute.[87] In jurisdictions that have adopted the UFLAA, the arbitration agreement must be in a "record signed by the parties, identify the arbitrator, an arbitration organization, or the method of selecting an arbitrator, and identify the family law dispute the parties intend to arbitrate."[88] Further, the UFLAA provides that, except for child-related disputes, the parties may agree to arbitrate a dispute that arises "after the agreement is made, and the agreement is valid and enforceable as any other

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86 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.22(b) ("An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration if the award is authorized by law in a civil action involving the same claim, by the agreement of the parties to the arbitration proceeding or by the terms of an agreement subject to arbitration."); Unif. Family Law Arbitration Act, *supra* note 8, § 13(c)(14) (unless the parties agree otherwise in writing, the arbitrator may allocate arbitration fees, attorney's fees, expert witness fees, and costs to the parties).

87 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.5 (differentiating between grounds waivable after the controversy arises and grounds not waivable under any circumstances).

88 Unif. Family Law Arbitration Act, *supra* note 8, § 5(a).

contract."[89] The exception to this rule is an agreement to arbitrate a future child related dispute, which is not enforceable unless the parties affirm the agreement in writing after the dispute arises, or the agreement was entered during a family law proceeding and the court approved and incorporated the agreement in an order.[90]

C. *Following the Arbitration*

1. *Post-award confirmation*

Unless otherwise provided by law, an arbitrator's award is not enforceable as a judgment until the court confirms it.[91] Thus, the proposed agreement should provide for the submission of the award to the court following the reconsideration period and entry of judgment on the award. In the absence of family law-specific legislation providing for the confidentiality of the award, the parties may also agree that the court may order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award, to the extent permitted under the law of the state.[92]

If the arbitration includes the resolution of a child-related dispute, the proposed agreement should reiterate the standard of review to be employed by the court before confirming the award.[93] In most states where arbitration of child-related issues is permitted, the court may not confirm the award unless it finds that the award complies with state law and is in the child's best interest.[94] The court's duty to ensure the child's best interest rests on the state's *parens patriae* responsibility, and subjects the arbitrator's award to a standard of review similar to that given to a parenting agreement achieved through negotiation or mediation.[95] In some states, the law requires a judge to make findings about best interest

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89 *Id.* § 5(b).

90 *Id.* § 5(c).

91 *See, e.g.*, 42 Pa. Cons. Stat § 7321.23; Unif. Family Law Arbitration Act, *supra* note 8, § 21.

92 Unif. Family Law Arbitration Act, *supra* note 8, § 21.

93 *Id.* § 15.

94 *See* Miller v. Miller, 620 A.2d 1161 (Pa. Super. Ct. 1993) (arbitration of custody disputes is permitted, but subject to close scrutiny by the court); Knorr v. Knorr, 588 A.2d 503 (Pa. 1991) (parties may also arbitrate child support but may not agree to less child support than is required for the best interests of the child).

95 Unif. Family Law Arbitration Act, *supra* note 8, § 16 cmt.

factors specified in a state statute; if no factors are listed, the judge cannot confirm the award.[96] In addition, federal law mandates that all states use child support guidelines. If there is no child support worksheet as required by state law and the amount of child support is not the guideline amount of support, the judge may not confirm the award.[97] On confirmation, the award is enforceable as a judgment.[98]

2. *Right of appeal or judicial review*

Most commercial arbitration statutes permit appeals from an order confirming an award or from a final judgment entered on confirmation of an arbitration award; however, the scope of review of the award is limited.[99] Because arbitrators are the final judges of both law and fact, an arbitration award is not subject to reversal for a mistake of either.[100] Courts may vacate an award for reasons relating to due process or the fairness of the proceedings, including that: the award was procured by corruption, fraud, or other undue means; there was evident partiality or corruption by the arbitrator, or misconduct by the arbitrator prejudicing the rights of a party to the proceeding; the arbitrator failed to give notice of a hearing, postpone a hearing, or refused to consider evidence material to the controversy; the arbitrator exceeded his or her powers; or there was no agreement to arbitrate.[101] The appellate court will reverse a trial court's decision on whether to vacate an arbitration award only for an abuse of discretion or error of law.[102]

A few states, including California, North Carolina, and New Jersey, allow the parties expressly to agree to substantive judicial

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96 *Id*. (citing Zupan v. Zupan, 230 P.3d 329 (Wyo. 2010)).

97 *Id.*

98 *Id.* § 16(d).

99 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.29 (permitting an appeal to be taken from an order confirming or denying confirmation of an award and from a final judgment entered on an arbitration award issued under the Revised Uniform Arbitration Act).

100 *See* PennEnergy Res., LLC v. Winfield Res., LLC, 301 A.3d 439 (Pa. Super. Ct. 2023) (stating that judicial review of arbitration awards is extremely deferential and, in light of a strong public policy in favor of commercial arbitration, courts begin with the presumption that the award is enforceable).

101 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.24.

102 *PennEnergy Res., LLC*, 301 A.3d at 452 n.17.

review of the arbitration award itself.[103] If the state's law permits such an expansive review of the arbitration award, this right to review should be confirmed in the proposed agreement to arbitrate. The agreement to arbitrate should specify whether the court may review the award for errors of law, substantial evidence, abuse of discretion, or such other standard to which the parties agree, and state whether a court or a new arbitrator or panel of arbitrators will make that review in the first instance.[104] Where this expansive review is available, the parties may waive their right of appeal in their arbitration agreement, so long as the intention and agreement to waive this right is clear.[105]

In those states where the UFLAA has been enacted and child-related issues are arbitrable, the court will vacate an unconfirmed award for child support or child custody if the moving party establishes that the arbitrator did not provide reasons for the award according to the family law of the state, the award is contrary to the best interests of the child, or the record of the hearing or the statement of reasons in the award is inadequate for the court to review the award.[106] A party may take an appeal from an order vacating the award.[107]

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103 N.C. Gen. Stat. § 50-60(b) ("Unless the parties contract in an arbitration agreement for judicial review of errors of law. . . a party may not appeal on the basis that the arbitrator failed to apply correctly the law"); N.J. Stat. Ann. § 2A:23B-4(c) ("nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record."); *see also* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008) (holding that the parties may expressly agree to accept a broader scope of review in their agreement to arbitrate and should provide for any judicial review on the merits explicitly and unambiguously).

104 *See* Hous. Auth. of City of Calexico v. Multi-Housing Tax Credit Partners XXIX, L.P., 312 Cal. Rptr. 3d 792 (Cal. Ct. App. 2023) (where parties agree to expansive judicial review of an arbitration award, this review must be made by the state trial court in the first instance); Appendix XXIX-B-Agreement to Arbitrate Pursuant to the Unif. Arbitration Act, N.J. Stat. Ann. §23B-1 (stating that the parties may agree to appeal a final award to a panel of one or more private appellate arbitrators).

105 Van Duran v. Rzasa-Ormes, 926 A.2d 372, 377-78 (N.J. Super. Ct. App. Div. 2007). *But see* South, Inc. v. Reel Precision Mfg. Corp., 331 Fed. Apps. 925, 2009 U.S. App. LEXIS 12762.

106 Unif. Family Law Arbitration Act, *supra* note 8, § 16(d).

107 *Id.* § 24(a)(5).

III. The Arbitration Process

A. *Overview*

A party may initiate arbitration by giving notice to the other party as provided in the arbitration agreement or, in the absence of a specified manner, under the law and procedural rules of the state governing contractual arbitration.[108] If the parties have recently agreed to arbitrate, they typically begin the process without providing a formal notice since they have already agreed to proceed with the arbitration. Notice would be needed, for example, if the parties had included an agreement to arbitrate in a premarital agreement, and one of them desired to move forward with that agreement. The notice would ensure that a party actually informed, and should be served to the person's place of residence, place of business, or other place the person has held out as a place of delivery for such communications.[109] Under most commercial arbitration statutes, unless a party objects to lack or insufficiency of notice not later than at the beginning of the arbitration hearing, the person waives any objection to lack or insufficiency of notice by appearing at the hearing.[110]

The arbitrator has broad discretion about how to conduct the arbitration process, except as limited in the agreement to arbitrate or as proscribed by law. The arbitrator's duty is to conduct the arbitration in a manner appropriate for a fair and expeditious disposition of the proceeding.[111] The authority conferred upon the arbitrator includes the power to hold conferences with the parties before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.[112] The arbitrator must give the parties notice of any hearing, and allow a party the right to be heard, present evidence material to the

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108 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.10 (stating that, unless the parties otherwise agree, notice of the arbitration is made by original process as in a civil action).

109 Unif. Family Law Arbitration Act, *supra* note 8, § 6 cmt.

110 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.10(b).

111 *See, e.g.*, *id.* § 7321.16(a).

112 *Id.*

controversy, and cross-examine witnesses appearing at the hearing.[113] An attorney may represent a party.[114]

In jurisdictions where the UFLAA has been enacted, a party or representative of a party may not communicate *ex parte* with the arbitrator except to the extent allowed in a family law proceeding for communication with a judge.[115] In addition, under the UFLAA, a party has an absolute right to be accompanied by an individual who will neither be called as a witness nor act as an advocate, to ensure that a support person may accompany a victim of domestic violence during the arbitration.[116]

The arbitrator has the authority to issue temporary awards (or "directives"), like a judge in a civil proceeding. For example, under most commercial arbitration statutes, the arbitrator may:

> Issue subpoenas for the attendance of a witness and for production of records and other evidence at a hearing and may administer oaths.
> Permit a deposition of a witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or cannot attend a hearing, and determine the conditions under which the deposition is taken.
> Permit discovery as the arbitrator deems appropriate.
> Order a party to comply with the arbitrator's discovery-related orders and sanction a noncomplying party to the extent a court could in a civil action.
> Issue protective orders to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could in a civil action.[117]

The arbitrator has the authority to compel a person under subpoena to testify and to allocate fees related to discovery as though the matter were litigated in court.[118] If necessary, a party may seek enforcement of a subpoena or discovery-related order by the court.[119] The arbitrator also has the authority to issue interim awards as necessary to protect the effectiveness of the

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113 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.16(d); Unif. Family Law Arbitration Act, *supra* note 8, § 13(b).

114 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.17; Unif. Family Law Arbitration Act, *supra* note 8, § 10(a)(1).

115 Unif. Family law Arbitration Act, *supra* note 8, § 10(b).

116 *Id.* § 10(a)(2).

117 *See, e.g.*, 42 Pa. Cons. Stat. § 7321.18.

118 *Id*.

119 *Id.*

arbitration proceeding and promote a fair and expeditious resolution.[120] Therefore, the arbitrator's power to control the process is broad and is buttressed by a party's ability to seek enforcement of any interim directive by the court.[121]

Following the arbitration hearing, the arbitrator must make a record of the award, which is signed or otherwise authenticated by the arbitrator, and give notice of the award to each party to the proceeding.[122] The award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court.[123] A party waives an objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.[124] Except for awards determining a child-related dispute, where detailed findings and reasoned awards are typically required, the parties can agree that the award is not a reasoned award.[125] A party must make a motion to the court for an order confirming the award, and the court will issue a confirming order unless the award is modified, corrected, or vacated as provided by applicable law.[126]

B. *Special Considerations for Awards on Child-Related Issues*

An increasing number of states permit arbitration of child-related disputes, so long as courts retain their essential role in overseeing awards affecting children.[127] Further, the New Jersey Supreme Court has held that parents have a constitutional right to resolve their custody disputes by arbitration.[128] There are,

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120 *Id.* § 7321.9(b)

121 *Id.* § 7321.19.

122 *See, e.g.*, *id.* § 7321.20(a).

123 *See, e.g.*, *id.* § 7321.20(b).

124 *Id*.

125 *See, e.g.*, *id.* § 7321.16(b).

126 *See, e.g.*, *id.* § 7321.23.

127 Unif. Family Law Arbitration Act, *supra* note 8, § 3 cmt. (citing Vanderborgh v. Krauth, 370 P.3d 661 (Colo. App. 2016); Brazzel v. Brazzel, 789 S.E.2d 626 (Ga. Ct. App. 2016); *In re* Marriage of Golden and Friedman, 974 N.E.2d 927 (Ill. App. Ct. 2012); Harvey v. Harvey, 680 N.W.2d 835 (Mich. 2004); Vanderheiden v. Marandola, 994 A.2d 74 (R.I. 2010)).

128 *Fawzy*, 973 A.2d 347 ; *see also* GA. Code Ann. § 19-9-1.1 (Georgia law expressly permits the parties to agree to binding arbitration of custody decisions, unless the judge makes specific findings that the award is not in the best interest of the children).

however, a minority of states that exclude child-related disputes from arbitration altogether.[129] In jurisdictions where child-related issues are arbitrable, the family lawyer should know any additional or special requirements for such awards.

In states where the UFLAA is enacted, an arbitrator must request that a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.[130] This recording could be done by video (e.g., by Zoom, Webex, or other virtual platform) or audio (e.g., by a cell phone, tablet, or other digital recording device), at significantly less expense than the parties would pay for a transcript in a court trial. The award determining a child-related dispute must state the reasons on which it is based as required by the state's substantive law.[131] After reviewing the record, if necessary, the court may confirm that the award complies with state substantive law and is in the child's best interest.[132]

The family lawyer should know the law and any procedures applicable to child custody or could support arbitrations in their state. For example, Pennsylvania has adopted a best-interest test for judicial review of an arbitrated custody award, allowing the court to substitute its judgment for the arbitrator's.[133] New Jersey has adopted a higher standard, which prevents the court from infringing on the parent's choice to be bound by the arbitrator's decision if no harm to the child is threatened.[134] To permit this judicial review, the family lawyer should ensure that an appropriate record is made of any arbitration proceedings involving child custody issues.[135] The family lawyer should also ensure that the arbitrator makes findings as required by law to substantiate a child support decision if the court permits judicial review of child

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129 Unif. Family Law Arbitration Act, *supra* note 8, § 3 cmt. (citing Goldberg v. Goldberg, 1 N.Y.S.3d 360 (N.Y. App. Div. 2015), and Conn. Gen. Stat. Ann. § 46b-66(c)).

130 Unif. Family Law Arbitration Act, *supra* note 8, § 14(b).

131 *Id.* § 15(c).

132 *Id.* § 16(c).

133 *See Miller*, 620 A.2d at 1165 (arbitration of custody disputes is permitted but it is subject to close scrutiny by the court).

134 *Fawzy*, 973 A.2d at 361.

135 *Id.* (requiring that in child custody and parenting time decisions, a verbatim record and documentary evidence must be retained).

support awards in the child's best interest.[136] For example, if the state statute requires a finding on each factor, then the arbitrator's award should include such a finding.

C. *Private Judging Distinguished*

In some jurisdictions, parties can agree to appoint a private judicial officer and to pay for their services.[137] The private judicial officer has the same rights and responsibilities as a judge, and the parties follow the procedural and evidentiary rules applicable to court proceedings.[138] The private judge holds a record hearing, and the decision is appealable as is any judicial ruling.[139] Thus, the parties select their decision-maker and have more privacy for their proceeding, which may be held outside the public forum.[140] As with arbitration, it is essential for the family lawyer to obtain full disclosure of the private judge's potential conflicts with the parties, counsel, and any witnesses, and to choose an individual with a reputation for fairness and integrity.[141]

IV. Techniques in Family Law Arbitration

Even if attorneys understand arbitration, they may wonder why change using litigation as the go-to practice? The answer is in this baseball analogy: the team is in the middle of the season, and its performance is lackluster. The manager has been using a veteran pitcher throwing his standard array of predictable pitches and giving up too many runs. The manager decides to try the rookie pitcher, who displays a variety of new pitches, and she helps to turn the season around.

The prior sections already discussed the drawbacks of litigation in court. There are limitations to mediation or collaborative law as well. Clients who fail to resolve their case through mediation or the collaborative law process may settle for less than

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136 *See, e.g.*, Knorr v. Knorr, 588 A.2d 503 (Pa. 1991) (parties may also arbitrate child support but may not agree to less child support than is required for the best interests of the child).

137 Jennifer R. Morra, *Going Private: Appointing a Judge Pro Tem*, 46 Fam. Advoc. 26, 27 (Oct. 2023).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.* at 29.

is reasonable to avoid litigation or because they have run out of money to fund further efforts at resolution. They may prefer an ADR process that is streamlined, offers privacy, flexibility in scheduling, savings in time and money, and closure for the litigation.[142] Family law arbitration may be the answer, but lawyers and clients need to be open and willing to adapt—to call up that rookie pitcher to turn the game around. After all, it is often said that "intelligence is the ability to adapt to change."[143]

This section discusses how the legal community can take small steps to shift toward a mindset oriented toward arbitrating family law disputes by engaging in techniques including: (1) "final offer" arbitration (FOA); (2) mediation-arbitration; (3) single issue arbitration; or (4) a panel of arbitrators. These approaches to resolving issues related to divorce or separation may provide the closure clients need when other ADR processes fail, while still maintaining the privacy, flexibility, and control clients want.

A. *Final Offer Arbitration (FOA)*

"Final Offer Arbitration" is a dispute resolution method in which both parties submit a "final offer," and an arbitrator or panel of arbitrators chooses *one* of the offers, instead of finding a compromise between the two. [144] "The theory is that FOA will encourage good faith bargaining between parties and that each side's fear of losing to a more reasonable offer will facilitate settlements or, at the very least, induce reasonableness."[145] This approach incentivizes the parties at the beginning of negotiations to exchange reasonable offers, saving time and money.[146] In mediation, the parties engage in a "dance," usually starting at opposite extremes. One party moves a few steps. The other moves a few steps. The mediator wants to speed up the "music." Yet, there may

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142 *See* Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them,* 14 J. Am. Acad. Matrim. Law. 353, 377-78 (1997) (examining attorneys' perceptions about mediation and arbitration, including disadvantages and advantages).

143 *See, e.g.,* Thomas W. Faranda, Uncommon Sense: Leadership Principles to Grow Your Business Profitably 41 (1991).

144 Rachel Schwartzman, Student Article, *Utilizing Final-Offer Arbitration to Settle Divorces: A Proposal and Analysis*, 53 Fam. L.Q. 3, 4 (Spring 2019).

145 *Id.*

146 *Id.* at 14.

be little incentive to compromise, perhaps because of the unreasonableness of one party or a power differential where one spouse has more bargaining power and endurance, thereby placing the other spouse at a disadvantage with no recourse but to return to mediation several times to try to resolve the case, to settle for less than a reasonable amount, or to prosecute the case.[147]

Litigants may choose from two approaches to FOA, depending on the type and number of disputed issues. One type of FOA is where the arbitrator decides independently of the parties' offers and then selects as the final award whichever offer is more like the arbitrator's decision.[148] Usually, this format lends itself to quantifiable disputes, such as the owner's income or the value of an asset. The second type of FOA is typically used when multiple disputed issues fall into economic and non-economic categories. Both parties submit to the arbitrator their final offers, either issue-by-issue or as a total package, and the arbitrator chooses the more reasonable offer.[149] This approach gives the arbitrator a choice between two offers on each disputed issue or total package. It alleviates the litigants' concern that "the arbitrator will impose a resolution neither party is happy with" or that the arbitrator may "split the difference" between the parties' offers.[150]

Major League Baseball arbitrates the players' salaries using the FOA technique.[151] Under the Collective Bargaining Agreement, there are no appeals by either side, and the arbitrator's decision is final.[152] Given the players' continued relationships with the owners, the need to cooperate, and the speed at which the decision needs to be made, the FOA works best for professional baseball.

Family law cases could benefit from the FOA approach. The divorcing parties would voluntarily agree to submit their disputed financial issues to the arbitrator for a binding decision. They could submit the entire case, including the values of and distribution of the assets, amount, and term of alimony, etc., or they could submit specific issues, including the value and distribution of the marital home, the family business, or the personal property. The parties

147 *Id.* at 7-8.
148 *Id.* at 11.
149 *Id.*
150 Schwartzman, *supra* note 144, at 8.
151 *Id.* at 14.
152 *Id.* at 16.

might also agree they have a "grace period" to exchange and adjust their offers until the arbitration hearing. Once the parties submit their final offer to the arbitrator before the arbitrator's decision, they may continue negotiating and settling the issues.[153] If the parties do not resolve the issues, the arbitrator must choose from one of the offers submitted. Thus, the FOA promotes good faith negotiations, better working relationships, and quick, cost -effective resolution by eliminating the mediation "dance," avoiding the animosity between the parties and wasting resources used in litigation.

B. *Mediation/Arbitration (Med-Arb or Arb-Med)*

Med-Arb is short for a two-step alternate dispute resolution process involving mediation and arbitration.[154] The notion of submitting family law issues to mediation is not novel.[155] Still, when only one or two disputed issues remain, presenting them to an arbitrator may benefit the client instead of preparing for a courtroom battle that might be long, expensive, and emotionally taxing. Clients who want privacy and closure may agree, either before engaging in mediation or during mediation, to submit their disputed issues to the same neutral or change the neutral after mediation and before the arbitration hearing.[156] If the former, the clients may save money and time by not having to identify, appoint, and educate another neutral. There are significant risks, however, in using the same neutral approach, including that the neutral may use confidential information learned in the mediation to decide the arbitration case.[157]

Options to avoid the risk of actual or inadvertent misuse of confidential information include excluding individual caucuses

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153 *Id.* at 25.

154 Ned I. Price, *Binding Arbitration, Voluntary Trial Resolution, and Med-Arb Proceedings in Family Law,* 86 Fla. B. J. 48, 50 (Nov. 2012).

155 Kisthardt, *supra* note 142 (analyzing the results of 123 surveys from members of the American Academy of Matrimonial Lawyers in the Fall of 1996, to ascertain attorneys' perceptions of the advantages and disadvantages of mediation and arbitration, and identifying the similarities and differences among mediation programs or services as well as the advantages and disadvantages of mediation).

156 Elrod, *supra* note 75, at 34.

157 *Id.* at 35.

during the mediation phase, requiring the mediator-arbitrator to disregard information learned during the mediation, and allowing the parties to decide whether to change the neutral after the mediation fails.[158] To lessen the risk of the arbitrator's award being challenged, lawyers should require written consent by the clients acknowledging the waiver of their rights and acceptance of the risks associated with the same neutral engaged in both the mediation and arbitration process.[159] The consent should also include a clear definition of the mediation and arbitration processes; whether the arbitrator can rely on communication received during mediation; and, if so, whether the neutral is required to disclose the information learned in confidence during the mediation process; and finally, include language to allow the parties the ability to change the neutral should the mediation fail.[160] Even with written consent, some states' ethical rules and codes for mediators and arbitrators disapprove of a single neutral serving as both mediator and arbitrator in the same case.[161]

Another concern of the med-arb approach is the question of judicial review.[162] A court may vacate the arbitration award based on statutes or rules.[163] Since courts use contract law to evaluate the enforceability of a mediated settlement, the mediated settlement does not have statutory constraints and is usually enforced despite challenges based on common law defenses.[164] Thus, it is essential when combining the mediation and arbitration processes to ensure the parties' voluntary written consent and acknowledgment of the risks and waivers of their rights and clearly define each process and standard of review, especially if the parties desire to use the same neutral as mediator and arbitrator.[165]

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158 *Id.* at 36.

159 Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Review*, 5 Y.B. Arb. & Mediation 219, 247-48 (2013).

160 *Id.*

161 *Id.* at 227-28.

162 *Id.* at 225.

163 *Id.* at 230-31.

164 Deason, *supra* note 159, at 231-32 (citing Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract,* 81 St. John's L. Rev. 99, 104 (2007) ("The bottom line is that awards are rarely vacated by courts on any grounds.")).

165 *Id.* at 247-49.

Some clients prefer the arbitration-mediation approach, where the parties present their case to the arbitrator, the arbitrator's award is sealed in an envelope, and the parties mediate the case. If the parties settle in mediation, the sealed award is not opened. If the parties do not settle, the arbitrator's award is unsealed and becomes binding.[166]

C. *One Issue Arbitration*

"Arbitration is very effective for limited issues, time-sensitive issues, or post-judgment (after the divorce) matters that linger because courts don't have the time to hear these matters."[167] The parties have agreed in theory that the house will be sold, or they will equitably divide the personal property in the home. To obtain a final divorce decree, they state in their property settlement agreement that if there is a future dispute over the sale of the home or division of the personal property, the parties shall submit those issues to a named arbitrator who will decide and whose award will be binding on the parties, subject to the grounds enumerated in the state's arbitration law. Another option is for the parties to submit the Gordian knot—the value of the real estate or the business—to arbitration, and then mediate the balance of the dispute. This arbitration process to resolve one or two issues is practical and efficient. The clients get divorced and have already agreed upon a streamlined process should they be unable to resolve those issues.

D. *Streamlined Three Panel Arbitration*

A streamlined approach with a three-panel arbitrator may be appropriate when a high-dollar divorce involves complex issues. Both parties select a neutral, and the two neutrals select a third arbitrator as the Chief. The Chief Arbitrator presides over the preliminary hearing, discovery disputes, and dispositive motions while the other two arbitrators wait in the wings for the evidentiary hearing. This streamlined approach saves the parties time and money but allows them to request the full panel to hear disputed issues at

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166 Elrod, *supra* note 75, at 37.

167 Carolyn Daly, *Getting Divorced Despite the System: How to Move Your Case Forward While the Courts Are Backlogged,* Legal Intelligencer, July 9, 2023, at 2.

any time.[168] Some divorces involve highly technical industries, and parties need an expert in that industry to listen to the evidence, along with experienced, trained family law arbitrators. The panel of arbitrators could be helpful, for example, when the case involves a business valuation, such as a car dealership, and the panel would include an experienced attorney and a business valuator or a car dealership owner.[169]

Joan Kessler and co-authors have observed that "confidence in the trier of facts can go a long way towards reducing anger and frustration of the participants, as well as fostering a certain respect for a decision ultimately made to resolve the matter."[170] If the parties knew that one of the three-panel arbitrators is an expert within the industry for the asset that is being valued and distributed, they will likely have more confidence in the process, while being able to minimize public exposure and maintain the confidentiality of sensitive or proprietary information.

V. Moving Forward: Ways to Improve Family Law Arbitration

A. *The Need for Family Law-Specific Arbitration Legislation*

The recent Utah case of *Taylor v. Taylor*[171] illustrates the benefits of having a family law-specific arbitration statute and rules. In that case, after litigating their divorce for a year, David Taylor asked his estranged wife, Jill Taylor, to arbitrate their economic issues. After considering the parties' positions and submissions, the arbitrator issued an award calculating alimony, setting the amount of child support, and dividing the parties' assets. David then asked the district court to invalidate the award, arguing that his proposed arbitration agreement was invalid because it was contrary

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168 *Streamlined Three Arbitrator Panel Option for Large Complex Cases,* Am. Arbitration Ass'n, https://go.adr.org/Streamlined_Panel_Option.html (last visited Jan. 26, 2024).

169 Audrey J. Beeson, *Arbitration. A Promising Avenue for Resolving Family Law Cases?*, 18 Pepp. Disp. Resol. L.J. 211, 237 (2018).

170 Kessler et al., *supra* note 25, at 337.

171 Taylor v. Taylor, 517 P.3d 380 (Utah 2022).

to public policy to arbitrate divorce actions or, alternatively, that the arbitrator had manifestly disregarded the law.[172]

The district court denied David's motion, and the Utah Supreme Court affirmed. In so ruling, the court rejected David's argument that the agreement to arbitrate the parties' divorce claims was not eligible for arbitration and that the agreement was invalid under the Utah Uniform Arbitration Act ("UUAA").[173] The court also found that David's disagreement with the award did not equate to the arbitrator's manifest disregard of the law.[174]

David claimed that Utah's family law imposed a nondelegable duty on the district courts to make and modify final decisions regarding alimony, property division, child support, and custody, and this nondelegable duty was not compatible with the UUAA, which renders arbitrated decisions on these issues final and nonmodifiable.[175] The court held that the UUAA does not expressly exempt any action or issue, including those related to divorce, and, thus, under the express provisions of the UUAA, the parties could enter a binding agreement to arbitrate these issues.[176] On the other hand, the court recognized that neither Utah case law nor the family code specifically addressed the arbitrability of divorce issues. Utah family law seemed to conflict with the provisions of the UUAA providing for vacatur and modification.[177]

The court recognized the strong state policies underlying arbitration law and family law, and determined that, in the absence of an express statutory prohibition, the strong policies allowing the parties to choose to arbitrate their disputes trumped the policies favoring more robust judicial review.[178] The court also concluded that the Utah family code does not prevent parties from agreeing to arbitrate their property and alimony disputes under the UUAA,

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172 *Id*.

173 Utah Code Ann. § 78B-11-107(1) (stating that an agreement to arbitrate is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract).

174 *Taylor,* 517 P.3d at 398.

175 *Id.* at 388.

176 *Id.*

177 *Id.* at 389.

178 *Id.* at 390 (distinguishing the court's obligation to maintain independent authority over issues involving children).

nor does it conflict with the parties' agreement to limit judicial review of these awards to those grounds under the UUAA.[179]

The court noted that even though the family code and arbitration code do "not talk directly to each other," the state legislature could fill the gap by enacting legislation such as the UFLAA.[180] The UFLAA specifically defines the family law disputes that may be submitted to binding arbitration, confirms the grounds on which the awards may be modified or vacated, and allows an award to be modified after it is confirmed as provided in the arbitration agreement or under state law.[181] With such family law-specific arbitration legislation, specific guidelines are in place to address concerns about arbitrating unique family law issues.

The nonbinding memorandum decision of the Indiana Court of Appeals in *Ashley v. Ashley*,[182] highlights the effectiveness of family law-specific arbitration legislation. Indiana has enacted a unique Family Law Arbitration Act, which requires the arbitrator to follow statutory guidelines for property division and comply with substantive law.[183] In the *Ashley* case, the parties separated in 2016 after thirty years of marriage and resolved their financial issues in a marital settlement agreement, including provisions for the deferred sale of properties and distribution of proceeds. The parties agreed to be bound by the Family Law Arbitration Act and to submit any disputes to the arbitrator.[184] Disagreements arose regarding the sharing of expenses and distribution of proceeds from the sale of the properties, and the wife moved to arbitrate the dispute. The arbitrator ultimately entered an award for the distribution of the sale proceeds after the hearing, and the wife appealed.

Among other things, the wife argued that the arbitrator exceeded the scope of her authority by giving the husband credit for certain expenses and considering other issues related to the properties. The court concluded that the Family Law Arbitration Act allowed a broad range of issues to be submitted to arbitration, and

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179 *Id.* at 388-89.

180 *Id.* at 396.

181 *Id.*

182 Ashley v. Ashley, No. 23A-DR-667, 2023 WL 8462545 (Ind. Ct. App. Dec. 7, 2023).

183 Ind. Code Ann. §§ 34-57-5-1 to 34-57-5-13.

184 *Ashley,* 2023 WL 8462545, at *1.

in their settlement agreement, the parties expressly agreed that the arbitrator would decide these issues.[185] The court did find an error in the arbitrator's distribution of the proceeds and remanded the case to the trial court to correct that error.[186] The court declined to disturb the arbitrator's findings on the balance of the wife's issues.

In *Ashley*, neutral party argued that family law arbitration was against the state's public policy since the legislation explicitly provided for such arbitration. The parties were not relegated to stretching the confines of the commercial arbitration statute to find a basis for appeal since the arbitration statute itself provided for the arbitrator to follow the substantive law in making her award and allowed the judgment on the award to be appealed as though from a civil order.[187] With specific family law arbitration or rules in place, counsel can more effectively advise their clients about the process, and the clients can more reasonably anticipate that the arbitration will bring closure rather than open-ended litigation.

B. *The Uniform Family Law Arbitration Act*

In those states that do not have family law arbitration legislation or rules, family lawyers should consider pressing their legislature to adopt the Uniform Family Arbitration Act ("UFLAA"). The UFLAA fills in the gaps left by the commercial arbitration statutes and addresses the unique needs of family law participants.[188] The UFLAA recognizes that the state has a "*parens patriae* duty to protect children and vulnerable family members and an interest in ensuring that the arbitration process is fair to the participants."[189] The UFLAA supplements the state's commercial arbitration law to address the unique family law concerns.

To that end, the UFLAA expressly defines the claims that may be submitted for binding arbitration, and requires that, in determining the merits of a family law dispute, an arbitrator must

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185 *Id*. at *4.

186 *Id*. at *8.

187 *See* Ind. Code Ann. § 34-57-5-11 (an appeal from entry of judgment on an arbitration award may be taken as if in a civil action).

188 Barbara A. Atwood, *The New UFLAA: Providing Needed Standards for Efficiency and Fairness*, 39 Fam. Advoc. 38, 39 (Spring 2017); *see also* Linda D. Elrod, *The Case for Arbitration in Family Cases—and for the Uniform Act*, 23 Disp. Resol. Mag. 18, 18-19 (Winter 2017).

189 Atwood, *supra* note 188, at 39.

apply the law of the state, including its choice of law rules.[190] The uniform law renders an agreement to arbitrate a child-related dispute unenforceable unless the parties affirm the agreement after the dispute arises or the court approves the agreement.[191] The uniform law protects the confidentiality of the proceedings by allowing the court to order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award.[192] The uniform law expressly provides for the modifiability of an award based on a fact occurring after the award is confirmed.[193]

The UFLAA bolsters a state's ability to protect children and victims of domestic violence. First, if a state opts to allow for the arbitration of child-related issues, an arbitrator must have a record created during the arbitration when child-related disputes are discussed.[194] When an award determines a child-related issue during or as a result of an arbitration, the award must explain the facts that were discussed to lead to the finding of the award.[195] The award can be vacated if the arbitrator does not consider the best interest of the child in making the award.[196] Additionally, arbitrators are allowed to meet with or interview a child who is the subject of a child-related dispute; therefore, children can be exposed to a decision-maker in a more comfortable setting than a courthouse.[197]

Unless the parties otherwise agree, the arbitrator must be trained in identifying domestic violence and child abuse.[198] If the arbitrator suspects that a party's safety or ability to participate effectively in arbitration is at risk, the arbitrator must stay the arbitration and refer the parties to court.[199] If an arbitrator determines that there is a reasonable basis to believe that a child who is the subject of a child-related dispute is abused or neglected, the arbitrator must terminate the arbitration of the child-related dispute and report the abuse or neglect to the state child protection

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190 Unif. Family Law Arbitration Act, *supra* note 8, § 4.
191 *Id.* § 5.
192 *Id.* § 21.
193 *Id.* § 22.
194 *Id.* § 14.
195 *Id.* § 15(c).
196 *Id.* § 19(b).
197 *Id.* § 13 cmt.
198 *Id.* § 8.
199 *Id.* § 12.

authority. The arbitrator may make a temporary award to protect a party or child from harm, harassment, or intimidation.[200]

Without the protections of the uniform law in place, courts are divided about whether arbitrators can arbitrate on child -related issues, making the enforceability and reliability of these awards unpredictable.[201] The UFLAA would protect the courts' *parens patriae* authority by expressly providing that the arbitrator must state the reasons on which the award is based as required by the substantive law of the state, and by requiring that the court ensure that the award is in the child's best interest before it confirms the award.[202] The UFLAA provides the added benefit of allowing the parties to receive an expedited award by an experienced and knowledgeable decision-maker that they select, in a cost-efficient manner.[203] The key difference between binding arbitration and litigation in court is that the parties exercise their autonomy to litigate their family law claims privately and efficiently. With the UFLAA in place, the court and the arbitration participants can expect child-related decisions to be made in compliance with due process and pursuant to applicable law.

Conclusion

How family claims are resolved can have important consequences not only for the claimants and their children but also for society at large.[204] Resolutions reached outside the court leading to greater party satisfaction arguably promote the public interest because children grow up happier with parents who are more content with the outcome than they might have been with traditional

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200 *Id.* § 12*; see e.g.*, H.B. 917, 2023 Leg., Reg. Sess. (Pa. 2023).

201 *See, e.g.,* Kosciusko v. Parham, 836 S.E.2d 362 (S.C. Ct. App. 2019) (determining that South Carolina's ADR rules prohibit arbitration of children's issues because Rule 4(d) expressly includes arbitration of property and alimony); Singh v. Singh, 837 S.E.2d 651 (S.C. Ct. App. 2019) (holding based on the *parens patriae* doctrine, child-related issues cannot be subject to binding arbitration with no right of judicial review); Patin v. Patin, 45 Va. Cir. 519, 520 (Va. Cir. Ct. 1998) (noting that an arbitrator's award of child custody without judicial review is helpful and important, yet it cannot fully be used to decide the child's best interest).

202 Elrod, *supra* note 1, at 14, 15.

203 *Id.*

204 Leo Kanowitz, *Alternate Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 Hastings L.J. 239, 249 (1987).

litigation.[205] Supreme Court Chief Justice Warren Burger opined more than forty years ago that "arbitration may serve an important place in the area of family law."[206] Change in the form of private litigation of family law disputes is necessary for the health and welfare of litigants and their children. It may also help attorneys in the area to achieve a more successful and rewarding family law practice. To effect this change, family lawyers need to start incorporating arbitration in their practice.

> If counsel for each party does not endorse arbitration, it will not happen (except, perhaps, in the rare case where the client knows about arbitration, has a strong preference for it, and also has the ability to stand up to the lawyer). On the other hand, if counsel supports the concept of arbitration, the client will likely consider and elect that alternative.[207]

The future success of family law arbitration also depends on the consistency, predictability, and reliability of the process. Attorneys can help to build this field of dreams to bring closure to client's family law claims in a more private, expedient, and cost-efficient manner by consciously recommending arbitration to clients and colleagues, by carefully drafting agreements to arbitrate that include essential terms, and by supporting the adoption of family law-specific legislation that promotes best practices and protects the needs of family law participants.

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205 *Id*.

206 Interview with Warren E. Burger, *Unclogging the Courts—Chief Justice Speaks Out*, U.S. News & World Rep., Feb. 22, 1982, at 36.

207 Frank L. McGuane, Jr., *Model Marital Arbitration Act: A Proposal*, 14 J. Am. Acad. Matrim. Law 393, 396 (1997).

Did the Hague Convention on the Civil Aspects of International Child Abduction Recognize Indigenous Groups and Culture?

by
Timothy Fadgen,* Guy Charlton,** & Dana E. Prescott***

Abstract: Among the profound challenges related to family law and child custody conflict has been the impact of globalization on the consequences to children from marriage and divorce, and nonmarried parental separation. Most nations implemented family justice courts decades ago where one judge, within an adversarial fact-finding system, applied that nation's variation on the "best interests of the child" factors to parents who resided in that country with their child. As child custody conflict and removal of a child without consent from both parents became more transnational in the 1970s, the Hague Convention on the Civil Aspects of International Child Abduction (Convention) was developed and eventually adopted by 1980. By treaty, signatory nations consent to a process which utilizes each nation's family justice courts as the means for the return of children to their "habitual residence." This article, however, argues that the Convention may not have originally bound Indigenous groups, with their own treaties and contracts, within nation-states. Even if the Convention was binding on Indigenous populations within nation-states, the Convention should protect fundamental and human rights established by the signatory nation, including protecting culture and language. For purposes of this analysis, this paper examines the 2022 New Zealand trial court opinion, *Mercer v. Mercer*.

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Introduction

In 1980, The Hague Convention on the Civil Aspects of Child Abduction ("Convention")[1] was concluded and entered into between signatories in 1983 and implemented in the United States by the International Child Abduction Remedies Act, ("ICARA").[2] The Convention is a multilateral treaty which provides (in theory and intention) an expeditious[3] protocol for the return of a child unilaterally removed by a parent from one Convention member country to another Convention member.[4] Article 3 of the Convention requires signatory countries to promptly return children to the country of their habitual residence when they are wrongfully removed or retained in another country and in breach of the custody rights of a parent.[5]

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1 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention].

2 22 U.S.C. §§ 9001; *see* Tereshchenko v. Karimi, __ F.4d __, __ No. 23cv2006 (DLC), 2024 WL 80427 *6 (S.D.N.Y., Jan. 8, 2024) ("The grave risk of harm must be particular to the child, not just a general undesirable condition.").

3 *Cf.* Andrew A. Zashin, et al., *The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Conve*ntion, 28 J. Am. Acad. Matrim. Law. 249, 263 (2015) ("It is no secret to practitioners that the American judicial system is overburdened and plagued with inefficiencies, and horror stories abound of matters taking years upon years. The Hague stresses expediency. However, 'fast' in an American court may differ from 'fast' in other jurisdictions.").

4 Use of the term "parent" is complex today since it is not limited to biological or birth parents but may include kinship, adoption, guardianships, de facto parents, state agencies, stepparents, surrogacy, and IVF. For purposes of this article, "parent" is intended to mean any person who has legal rights recognized by a signatory to the Convention statute or court order. *See* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 Fam. L.Q. 9, 17 (1994) ("Article 5 of the Convention defines rights of custody as 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.' Additional elaboration of the term custody rights is set forth in an Explanatory Report accompanying the Convention to aid in judicial interpretation. The result is to create an autonomous treaty definition of custody rights quite apart from domestic law.").

5 *See generally* Ninad Shah, *International Parental Abduction, A Study of Foreign & Domestic Laws with Judicial Decisions on Cross Border Child*, *Disputes*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814644 (Apr. 13, 2021); Molshree A. Sharma, *International Child Custody & the Hague Convention,* Fam. Law. Mag. (Dec. 6, 2021), https://familylawyermagazine.com/articles/international-child-custody-hague-convention/.

Whether the Convention was originally intended to include natural disasters, COVID-19, or war within the "grave risk exception" under Article 13(b)[6] is a source of considerable debate in courts throughout the world.[7] Even with recent health and environmental upheavals, child abduction, by itself, remains a profound social and political morass internationally as family systems separate and reform across the globe.[8] Although the Convention is a remarkable accomplishment, given the complexity of family law policy and the history and relationships between many signatory nations, the Convention's designers had to specify a government agency in each country with authority to receive a petition and decide a dispute.

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6 Hague Abduction Convention, *supra* note 1, art. 13(b).

7 *See* Frank F. Bates, *War and Disorder: The Hague Child Abduction Convention–Australian Law in Context*, 18 Asia Pacific L. Rev. 133, 142 (2010) ("Accordingly, [the judge] found that the mother had failed to establish, by clear and convincing evidence, that the child was in grave risk of physical injury because of the unrest in Israel or that Israel was a zone of war. It would seem, to this writer, unnecessarily and, possibly, unfairly, limiting to confine zones in such topographical terms. Quite apart from anything else, bringing up children in such circumstances cannot, or ought not to be, regarded as optimal or, indeed, minimal for their appropriate psychological development, to which specific reference is made in Art 13 (b)."); Robert G. Spector & Melissa A. Kucinski, *The Effect of COVID-19 on International Child Abduction Cases*, 54 Fam. L.Q. 268, 277 (2020) ("An important consideration when reviewing the Article 13(b) exception is an examination of the protective measures available in the child's country of habitual residence. COVID-19 is a global pandemic, and, therefore, generally speaking, a child may be no more at risk in one country than another. But COVID-19 has impacted the resources available to its citizens differently depending on the country and the region within the country. For example, if the child would be at risk of abuse or neglect upon return, but the habitual residence has in place adequate measures such as foster care, domestic violence shelters, and access to courts to secure civil or criminal protection orders, then it may be appropriate for the child to be returned to his or her country of habitual residence.").

8 *See* Emily Gossmann, et al., *The Impact of Abduction and Hostage-Taking on the Mental Health of Children and Adolescents: A Scoping Review*, Eur. Child & Adolescent Psychiatry 1, 2 (2024) ("On a global scale, child abductions by a parent appear to be the most frequent type of child abductions, while in only a small number of cases, grandparents and other relatives, institutions, or others were the acting persons. In 2022, parental abduction remained the second most prevalent reason of the new missing children cases that were registered via the "Missing children Europe" hotlines. The most prevalent reason was children who run away, with criminal abductions accounting for only 1% of reported missing children cases.").

In theory, this policy solution could have required executive branches to communicate, through diplomatic channels only, for example, with limited court jurisdiction to act beyond a narrow enforcement role.[9] Another international alternative, found in treaties involving disputes between nations and their corporate or individual citizens, is a specialized international adjudicatory body for private arbitration or dispute resolution such as in the commercial or human rights arenas.[10] Instead, the collective decision was to embed children and their married and nonmarried parents in a private party adversarial dispute resolution *between nation-courts* with markedly different structures, laws, values, and political autonomy.

In this manner, the Convention primarily addresses matters of jurisdiction and "punts" on issues particular to the child or the contending parents, such as functional parenting capacity, domestic violence, neglect, or cultural or language matters. As such, the Convention standards for child custody are seen as not determinative.[11] Yet selecting a nation's state court system as the theatre for adversarial proceedings, even if only procedural, has troubling implications as to how and for whom national and global norms deeply riven for centuries with explicit and implicit biases may regard emerging parentage and child custody issues.[12]

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9 *See* John T. Parry, *The Lost History of International Extradition Litigation*, 43 Va. J. Int'l. 93, 96 (2002) ("If the evidence is sufficient and the offense is within the relevant extradition treaty, the judge certifies to the Secretary of State that the person is extraditable. There is no appeal from the judge's decision." Moreover, if a magistrate presides at the extradition hearing, the district court has no direct control over or review of the decision.' Instead, the State Department reviews the certification and usually executes a warrant for surrender of the accused. The Secretary of State is 'the ultimate decisionmaker' and has discretion to refuse surrender. In practice, however, the Secretary rarely exercises discretion, perhaps because the needs of diplomacy outweigh the concerns of individuals who may have committed crimes.").

10 *See* Barbara Koremenos & Timm Betz, Interdisciplinary Perspectives on International Law and International Relations: The State of the Art (2013); Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l. L. 579 (2005); Sean D. Murphy, *International Judicial Bodies for Resolving Disputes Between States*, *in* Oxford Handbook on International Adjudication 1 (2013).

11 *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 Ariz. J. Int'l & Comp. L. 791 (1998).

12 The literature on this point is vast, but see Awi Mona, *International Perspective on the Constitutionality of Indigenous Peoples' Rights*, 3 Taiwan Int'l Stud. Q. 85, 119 (2007) ("As a result, in the context of colonial international law,

By way of exploring this argument, this article argues that the Convention did not explicitly consider the implications for Indigenous populations living within a nation state with their own treaties and legal status.[13] That status, often a function of decades of negotiation and activism, protects, at least juridically, recognition of an explicit right to exist with the traditions and sovereignty forcibly stripped or denied for generations.[14] The irony is that the oppression of Indigenous people, particularly the elimination of civil rights and the taking of property rights without due process or compensation (or more precisely by violence and force), occurred with the complicity of organized judicial systems in many nations.[15]

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the sovereign status of indigenous peoples were denied by a process of legal rationalization that is underpinned by the assumption that indigenous peoples were inferior and incapable of legal entitlements.").

13 This point is not a surprise given the nature and purposes of international treaties. *See* Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 Vand. J. Transnat' l. 703, 706 (1990) ("International law developed as 'a system of rules governing the conduct of inter-state relations,' and traditionally did not concern itself with matters falling within the domestic jurisdiction of individual states, such as the way states treated their own nationals and others living within their borders.").

14 *Id*. at 707-08 ("As a group, indigenous peoples have no special rights under current international law. Individually, they have the rights available to all individuals and minorities. Many of these rights, such as the rights of nondiscrimination, religious freedom, freedom to speak one's native language, and maintaining one's cultural traditions are relevant directly to the situation of indigenous peoples. These general human rights, however, offer little help to indigenous peoples who consider land rights and the right to make choices about their own future as crucial to their survival as distinct peoples."); *see also* Harriet Ketley, *Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples*, 8 Int'l J. on Minority & Group Rights 331, 335 (2001) ("This collective nature of indigenous objectives is at odds with the traditional focus on the individual in international human rights law and the dichotomy of the individual versus the state promoted by the post-Westphalian concept of the law of nations. With the development of positivism in the 19th century indigenous peoples who did not qualify as states were excluded from shaping international law.").

15 *See* Gregory Ablavsky, et al., We the (Native) People?, 123 Colum. L. Rev. 243, 313 (2023) ("Over time, however, the federal government abandoned this fig leaf of Native consent. "Conquest gives a title which the Courts of the conqueror cannot deny," Chief Justice Marshall baldly proclaimed in 1823 in Johnson v. M'Intosh—effectively asserting that U.S. sovereignty provided its own justification.").

By requiring recourse *in and between* adversarial systems without explicit recognition of the independent standing of Indigenous populations when considering Convention petitions, recent research, policy study, and policymakers should look behind the Convention to determine if privileges and bias, which already permeate adversarial systems, introduced additional normative, factual, and legal considerations (either by the courts or by the participants).[16] This article argues that the Convention may not have originally bound Indigenous groups, with their own treaties and contracts, within and externally to other nation-states. Even if the Convention was binding on Indigenous populations by virtue of the nation-state "owning those rights," the Convention should protect human rights established by the signatory nations, including parenting and kinship relationships, culture, and language.

Part I begins with a brief discussion of the Convention. Part II then reviews the demographic and definitional struggles associated with Indigenous populations. Part III will then explore the Convention's deployment of judicial systems and implications for epistemic injustice before considering in Part IV the recent New Zealand opinion, *Mercer v. Mercer*[17] which examines these principles and suggests that courts are already beginning to factor cultural and human right considerations in determining a child's best interests.

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16 *See* Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 Int'l. J. Const. L. 211, 227 (2007) ("Yet despite some notable advances, the quality of ordinary justice remained extremely poor and highly likely to exclude indigenous people. The majority continue to lack access to the official justice system in their own language. Very few judges or lawyers are Mayan or speak indigenous languages. Litigation is not permitted in indigenous languages, and the numbers of interpreters employed in the justice system is nowhere near sufficient to meet demand."); Valentina Shaknes, et al., *Women's Rights and Child Abductions Under the Hague Convention*, 20 Int'l J. Applied Psychoanalytic Stud. 495, 504 (2023) (Progress is often slow, certainly when it involves addressing long-standing prejudices. The mental health professional community has been instrumental in educating and informing the legal community, but developmental science is not the wheelhouse of federal judges, some of whom continue to deny the near-lethal nature of the kind of abuse of women, that is common in Hague cases. Despite expert evaluation of the parents and children in these cases, it remains true that there is a societal tendency to disbelieve the "taking" parent (usually a woman).").

17 [2022] NZFC 5478.

I. A Brief Summary of the Convention

The Hague Convention only applies if the minor child is aged sixteen or younger; the minor child was habitually residing in a contracting state prior to the time of removal; and the petitioning parent was exercising his or her custody rights at the time of the child's removal or retention.[18] The Convention, however, as with any type of international treaty, captures the historical and implicit biases imposed on Indigenous populations. Wealthy litigants can and do move globally for adoption and assisted reproduction, for example. Those without resources must, under the Convention, litigate in multiple courts in multiple countries often simultaneously and without experts or specialized private counsel.

Primarily, the Convention aimed to construct a cohesive and efficient system of cooperation between signatory countries to ensure the rapid resolution of any claimed abduction and return of children abducted by a parent. It is based on the notion that "in principle" it is in the best interests of the child to be returned to their State of habitual residence, as expeditiously as possible, "save for the limited exceptions provided for in Articles 12, 13 and 20 of the 1980 Child Abduction Convention."[19] The purpose of the Convention is to return a minor child who has been wrongfully removed or retained to his or her country of habitual residence as swiftly as possible, and without regard for wealth or poverty of the parents. Nevertheless, it is an instrument to determine *jurisdictional authority for a court to act* (federal or state as there is concurrent jurisdiction), not child custody. As one of its authors summarized:

> Notwithstanding the reference to "Abduction" in its title, the Convention covers violations of custody rights more generally, encompassing

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18 *See* Andrew Zashin, *Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13 (b) Grave Risk of Harm Cases Post* Monasky. 33 J. Am. Acad. Matrim. Law. 571 (2020).

19 Conclusions & Recommendations (C&R) The Eighth Meeting of the Special Commission (SC) on the practical operation of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (1980 Child Abduction Convention) and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996 Child Protection Convention) met from 10 to 17 October 2023, ¶ 14, https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf

> wrongful removals or wrongful retentions of children up to the age of 16. The Convention takes a somewhat unique approach to the problem of international parental abduction. Rather than address the issue through jurisdictional rules and the recognition of judgments — which is the approach of the Uniform Child Custody Jurisdiction Act ("UCCJA") and the more recent Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), as well as that of the new 1996 Protection of Children Convention — the 2003 Abduction Convention simply requires the "return" of a child who has been wrongfully removed or retained in another Contracting State. If a child (up to the age of 16) habitually resident in a Convention country is wrongfully taken or retained in another Convention country, the authorities of the country to which the child is taken are required to return the child to the country of their habitual residence. With respect to a child who is brought to the United States, this is done by filing a Hague application for return in the state or federal court of the State where the child is located.[20]

The Convention, therefore, does not, explicitly, apply a "best interest" of the child, a well-well-worn mantra in adversarial family justice courts. Instead, the court determines which country is the appropriate forum to determine the child's best interests, which is in principle considered to be in the child's best interests to make a custody arrangement, to reduce the risk of harm to children wrongfully retained or removed. Applying this jurisdictional and expeditious framework as a policy value within an adversarial system to Indigenous populations is complex. As is often true in the arena of

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[20] Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 4, 5 (2004). The history and relationship between the federal government and its treatment of Native American Tribes in the United States has been the source of much scholarship. *See* Ann Laquer Estin, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law,* 35 J. Am. Acad. Matrim. Law. 201, 231-32 (2022) ("There are clear parallels to international family law, another area in which important national interests have led Congress to ratify treaties with other governments and enact implementing legislation that is binding on states under the Supremacy Clause. Adoptions in state courts must follow the rules of the Intercountry Adoption Act, and private custody disputes may be subject to the International Child Abduction Remedies Act. The intersection of tribal and state authority in family law is complicated. State courts and legislatures have had to grapple with a third source of sovereignty, predating the Constitution, with similarities both to states and foreign nations. The puzzle is more difficult because conflict of laws principles are premised on a territorial definition of jurisdiction, and the territorial model has become increasingly difficult to apply to Native nations in the United States.").

child custody, the case law may not accurately reflect the number of such cases exploiting historically powerless populations.[21]

Lawyers, trials, and appeals are very expensive, and few can afford to play in that system. Moreover, the argument that any treaty can alter hundreds of years of colonialism and dominance of legal systems is naive at best. And that becomes especially complex when courts are the chosen forum for adjudicating claims between parents from different nation-states, and those same nations are trying to manage reconciliation with a past that used courts to permanently separate and intentionally eliminate Indigenous populations.[22] The Convention itself does not embed any legislative or adjudicative preference, for an Indigenous child being placed with an Indigenous family.[23] This gap in policy, even if unintentionally

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21 *See generally* Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 Child. & Youth Serv. Rev. 1667 (2012); Stellina Jolly & Aaditya V. Sharma, *Domestic Violence and Inter-Country Child Abduction: An Indian Judicial and Legislative Exploration*. 17 J. Private Int'l L. 114 (2021).

22 *See* Nicole Watson & Heather Douglas, *Introduction*, *in* Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making (Nicole Watson & Heather Douglas, eds.) 1 (2021) ("Indigenous people have been objects of rather than voices in judicial narratives and decisions"); *see also* Peter Choate, et al., *Sustaining Cultural Genocide—A Look at Indigenous Children in Non-Indigenous Placement and the Place of Judicial Decision Making—A Canadian Example*, 10 Laws 59, 62 (2021) ("Within racism, there are underlying structural assumptions. For example, the definitions of family and good enough parenting are drawn from Euro-centric belief systems. This is linked to the historical belief that Indigenous parenting systems, within collectivistic child rearing practices rooted in culture, were sub-standard. If that assumption is taken away and the true capacity of Indigenous caring systems is examined, then a child can be raised very effectively within culturally based caregiving. Furthermore, as the TRC (2015a) points out, Indigenous parenting has been deprived of support through colonial policies and programs where the elimination of the Indigenous cultures was the goal.").

23 *Cf.* In the matter of a Reference to the Court of Appeal for Quebec concerning the constitutionality of the Act respecting First Nations, Inuit and Métis children, youth and families, S.C. 2019, c. 24, 2024 SCC 5 (Can. 2024) ("Parliament embarked on a process of legislative reconciliation by means of an innovative statute. Under this statute, Indigenous governing bodies and the Government of Canada will work together to remedy the harms of the past and create a solid foundation for a renewed nation-to-nation relationship in the area of child and family services, binding the Crown in its dealings with the country's Indigenous peoples. In this way, Parliament not only immediately meets the commitment made by Canada to implement the Declaration and respond to the call to action of the Truth and Reconciliation Commission of Canada, but also avoids

designed, can normalize explicit or implicit biases as a means to privilege one political and judicial system over another.[24]

Implicit bias within an adversarial system can also undermine the processes of judicialization that have militated against Indigenous families' and children's interests. For example, the Convention could be mis-applied to seek the removal of Indigenous children from tribal lands and curtail rights when there is independent or residual sovereignty or where Treaty or national law Indigenous groups are afforded certain rights over culture and family arrangements. In such cases, we might question whether the test for return of an abducted child to the "country" from which the child was abducted would still focus on the exception written in Article 13(b), known widely as "grave risk of harm," which means "if the person, institution, or other body which opposes its return establishes a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." [25]

Similar concerns might be raised within the context of race, culture, poverty, and political hegemony. After all, a decade ago, a "map of the world showing Convention signatory nations as of the end of the first decade of the twenty-first century would portray

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the uncertainties of constitutional negotiations, the slowness of treaty settlements and the inevitable conflicts associated with court settlements.").

24 *See, e.g.*, Ferreira da Costa v. Albefaro de Lima, 94 F.4th 174, 178 (1st Cir. 2024) ("Some problems are endemic in modern life, and this appeal — like so many before it — requires us to encounter the repercussions of divorce in a global society. After their marriage ended in Brazil, petitioner-appellant Heitor Ferreira da Costa (da Costa) accused respondent-appellee Jessica Camila Albefaro de Lima (de Lima) of absconding with their minor child to the United States where, unbeknownst to da Costa for about a year, the mother and child settled into a new life on Martha's Vineyard. Although both parents are Brazilian nationals, they have turned to the American courts to determine the appropriate forum for their competing custodial claims under the international law of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention). In this phase of their battle, da Costa now complains that the district court failed to credit his allegations of a hasty flight that resulted in a turbulent landing for the child."); Galaviz v. Reyes, 95 F.4th 246, 274-75 (5th Cir. 2024) ("While we are sympathetic to the sensitive issues presented, "[a] court that receives a petition under the Hague Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child." In the present case, we leave the question of custody to the Mexican courts.") (footnotes omitted).

25 Zashin, *supra* note 18, at 572.

a very 'Western' treaty regime.'"[26] As mentioned above, Article 13(b) allows the court to deny return if it poses a "grave risk" to the child. And Article 20 notes that, "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[27] Convention provisions, like most treaties, should be interpreted considering other treaty law, soft law, or fundamental constitutional rights (as defined by each nation).[28] Some rights that may fall within these concepts of "soft" law may be found in The United Nations Convention on the Rights of the Child or the UN Declaration of the Rights of Indigenous Peoples.[29]

As a scholar recently argued,

> "With the adoption of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) in the UN General Assembly on September 13, 2007, a new era was ushered in for Indigenous populations across the globe with the shared history of resisting genocide, colonization, and forced removal. In the UN Declaration, collective rights were recognized for Indigenous peoples as a group entitled to protections, self-governance, and minimum human rights."[30]

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26 Colin P.A. Jones, *Towards an "Asian" Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention*, Singapore: ASLI (Asian Law Institute), National University of Singapore, Working Paper Series 031, at 3 (2013).

27 Hague Abduction Convention, *supra* note 1, art. 20.

28 *See* John D. Smelcer, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in US and Australian Domestic Courts*, 15 Pac. Rim L. & Pol'y J. 301, 330 (2006) ("In fact, sustained use by indigenous peoples of international legal precedent derived from the emerging international indigenous rights' norms not only serves to secure rights for indigenous peoples in the United States and Australia on a case by case basis; it also serves to accelerate and further crystallize emerging customary law and the creation of an international comprehensive and binding treaty governing the rights of indigenous peoples worldwide.").

29 *Id*. at 325 ("In this way, 'soft enforcement is able to realize most of the benefits of direct enforcement in the actual lives of indigenous peoples on-the-ground. It also allows for the use of indigenous rights norms before domestic courts that have not fully congealed into customary law, thereby expanding the amount of favorable precedent available to indigenous rights litigators.").

30 Angelique EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the UN Declaration on the Rights of Indigenous Peoples*, 3 Am. Indian L.J. 424, 447 (2015).

These international policies and treaties raise the potential, within the adversarial system, that various educational, cultural, and language concerns can fall within the ambit of a family justice court charged with returning a child to a home country under the Convention. The challenge to unbiased judicial decision making is deeply embedded in what "Chief Justice Marshall of the US Supreme Court coined" as the "courts of the conqueror," which means that courts "were powerless to interfere in the subjugation of Indian nations to the United States."[31] Two centuries later this struggle within judicial systems as part of a political system continues.

II. Indigenous Families and the Convention

According to the United Nations, there are approximately 476 million Indigenous people in the world.[32] This population resides in 90 countries where they are often marginalized with lower incomes, access to the formal economy, justice system, and political decision-making processes.[33] Yet, these populations possess rich cultural and linguistic traditions, distinct from settler populations. A working definition of Indigenous peoples was offered by Martínez Cobo as Special Rapporteur for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are

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31 Lisa Strelein, *The Courts of the Conqueror: The Judicial System and the Assertion of Indigenous Peoples' Rights*, 5 Austl. Indigenous L. Rep. 1, 17 (2000) (quoting Johnson v. M'Intosh, 21 US (8 Wheat) 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny."); *see also* Amy Alberton & Kevin M. Gorey, *Structural Violence Perpetrated against Indigenous Peoples in Canadian Criminal Courts: Meta-Analytic Evidence of Longstanding Sentencing Inequities*, 22 Critical Soc. Work 2, 5 (2021) ("No doubt, the thought that justice is blind does not mean impartiality and objectivity when it comes to dealing with and the sentencing of Indigenous peoples. It is biased, punitive, and racialized.").

32 *Indigenous Peoples: Respect not Dehumanization*, United Nations, https://bit.ly/3vlfmb0 (last visited Mar. 21, 2023).

33 *Indigenous Peoples,* The World Bank (2023), https://www.worldbank.org/en/topic/indigenouspeoples.

> determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. . . .
>
> c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, lifestyle, etc.);
>
> d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language).[34]

This definition has had its detractors since its publication in 1980. Its legalistic formulation has been criticized for being both over and under inclusive. Nevertheless, for purposes of the Convention it was published when the Convention was developed and then adopted between 1980 and 1983. As Brianna Theobald summarized, "The marginalization of Native reproductive histories reflects continuing patterns of Indigenous erasure in the context of U.S. settler colonialism and derives from the specificity of tribal nationhood, sovereignty, and Native nations' trust relationship with the U.S. government, all of which defy tidy integration into the field's existing narratives."[35] In every way that marginalization may perpetuate biases by governmental authorities, courts have been and remain a crucial part of a structural alliance that prevents Indigenous "outsiders" from challenging a hegemony that they never had the chance, in more modern parlance, to sit "in the room where it happen[ed]."[36]

The "transnational formation" of family systems cannot begin to capture the suffering through intentionally designed government policies to eradicate or assimilate Indigenous peoples.[37]

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34 *Martínez Cobo Study,* Division for Social Policy on Indigenous Issues 2 (2004), https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/

35 Brianna Theobald, Dobbs *in Historical Context: The View from Indian Country*, 97 Bull. Hist. Med. 39, 39 (2023).

36 *See* Hamilton: The Musical, The Room Where It Happens Lyrics (2015), (allmusicals.com).

37 *See* Elisa Novic, The Concept of Cultural Genocide: An International Law Perspective (1997); Tony Barta, *Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide*, 10 J. Genocide Res. 201 (2008); Frank Edwards, Theresa R. Beardall & Hannah Curtis, *American Indian and Alaska Native Overexposure to Foster Care and Family Surveillance in the US: A Quantitative Overview of Contemporary System Contact*, 149 Children & Youth

Indeed, family court systems in the United States, and other countries as well, have played an active role in the subjugation of Indigenous people for generations.[38] Of no small matter, the historical homogeneity and elite socio-economic status from which the judiciary was drawn has contributed to the lack of institutional accountability and change.[39] The implications in Canada, for example, are summarized as follows:

> An essential consideration is whether, in a racialized, socio-political milieu, the "best interests of the child" can be determined fairly and equitably by non-Indigenous people. If stereotypes and negative social constructions of Indigenous people are normative, and racism is deeply and unconsciously rooted in the collective Canadian psyche, can a white judge who is tasked to determine a child's best interest be objective and judicially neutral? More than likely, "best interests of the child" determinations favouring the Euro-Canadian, white, nuclear family as the one most "fit" to raise a child will naturally dominate.[40]

In the United States, a similar pathway for bias may be found in the Indian Child Welfare Act of 1978 (ICWA), and the scope of the planning, design, and role of family courts.[41] Courts have long served to validate government programs intended to remove and oppress groups deemed "unworthy" of being equal members of a society. ICWA's goal was to be achieved "by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement

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Serv. Rev. 106915 (2023); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899 (2018).

38 Charisa Smith, *A Post*-Dobbs *Future: Bailing Water Downstream to Center Democracy's Children*, 54 Seton Hall L. Rev. 747, 776 (2024) ("Since their origin in the late nineteenth century, United States family courts and child service agencies have disrupted and surveilled families of African American, Native American, immigrant, and sometimes Caucasian descent (who were not recent immigrants) if they were experiencing poverty.").

39 *See* Richard Devlin, et al., *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a Triple P Judiciary*. 38 Alta. L. Rev. 734 (2000); Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 Vand. L. Rev. 1887 (2017); *see also* Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-level Judicial Demographics*. 34 J. Legal Stud. 57 (2005).

40 Raven Sinclair, *The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias*, 11 First Peoples Child & Fam. Rev. 13, 13 (2016).

41 *See* Ann Laquer Estin, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law*, 35 J. Am. Acad. Matrim. Law. 201 (2022).

with [an] Indian family.'"[42] Such determinations had been made by State courts that were (and are) dominated by white males adjudicating cases the rights of parents and children within an ecosphere that favored parental "fitness" as defined by white nuclear family structures generally more "fit" to raise children. This judicial bias then covered up the existence of addiction, domestic violence, child abuse and neglect, and other forms of cruelty that children, biological and adopted, suffered at the hands of non-Indigenous families and foster care removals.[43] These rulings also did not adequately "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."'[44]

What emerges is that the evolution of the "rights" of Indigenous populations is never protected from encroachment by family court systems. The scope of such rights, including freedoms elucidated by the United Nations Charters and Declarations, are subject to much more than treaties and charters: "international law-making is a complex and dynamic process characterized by the use of different instruments, including non-binding ones, and the participation of diverse actors, including non-State actors."[45] This point has application to family justice courts and the Convention because litigation is started by a lawsuit between private parties with the intranational role of government located in each nation's court of lawful jurisdiction.

Maura Barelli characterizes this intersectional pattern of choices as "soft law" and as an alternative to "hard law."[46] In the context of Indigenous peoples' rights, soft law has three main aspects. First, a soft law document is to be preferred to no document

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42 Cynthia Hawkins DeBose, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 Brandeis J. Fam. L. 201, 203 (1998).

43 *See* Dawn M. Bourque, *"Reconstructing" The Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada*, 10 Can. J. L. & Soc'y/La Revue Canadienne Droit et Société 1 (1995); B. A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in* Nicholson v. Williams, 73 U. Cin. L. Rev. 1131 (2004).

44 DeBose, *supra* note 42, at 203.

45 Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 Int'l & Comp. L.Q. 964, 964 (2009).

46 *Id*.

at all, and, similarly, a "soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions."[47] Second, an important advantage from the use of soft law is that it normally allows for more active participation of non-State actors. By contrast, "if the treaty form is agreed, non-State actors are likely to be 'excluded from crucial stages of negotiations and the conclusion of the text."[48] Third, soft law may provide more immediate evidence of international support and consensus than a treaty because a treaty must await the necessary number of ratifications before being legally effective (and even if it is legally in effect, it may be ignored in practice).[49]

This openness, he argues, was particularly valuable in the context of Indigenous rights. For Indigenous peoples, it was crucial that, after more than twenty years of negotiations, the final instrument could be an instantly effective protection of their rights. Moreover, the possibility of governments preserving reservations on fundamental provisions of a treaty may weaken international support, a crucial factor in the context of Indigenous rights. But that analysis may not adequately account for the role and power of private non-State actors (parents and agencies, for example) in litigation rituals, or the explicit and implicit biases and homogeny of family court justice historically.

III. The Deployment of Nation-State Adversarial Systems

Among the more complex international challenges for nation-states over the past fifty years is the separation and reformation of family systems by married and nonmarried parents. As a result of a constellation of demographic, organizational violence, environmental, and economic changes throughout the world, fewer children are raised to adulthood in the same household with the

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47 *Id.*

48 *Id*. at 965.

49 This pattern of non-cooperation or slow walking the return of a child to a parent is not new. *See* Jan Rewers McMillan, *Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. Am. Acad. Matrim. Law. 99 (1997).

same parents present daily.[50] The impact of these trends, and the consequences to children, has worsened with natural disasters, environmental and technological disparities, and intractable internal and international warfare.[51] The complexity of family separation was further exacerbated by the effects of the COVID-19 pandemic.[52] Each of these challenges continues to be studied in the

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50 *See* Andrew J. Cherlin, *Introduction to the Special Collection on Separation, Divorce, Repartnering, and Remarriage Around the World*, 37 Demographic Res. 1275, 1283 (2017) ("One can no longer, however, restrict attention to dissolution and repartnering in marital unions. Cohabiting unions have become much more common in many countries, particularly in Europe, North America, and Latin America, but also in other nations such as Japan. Studies of Europe and the United States suggest that cohabiting couples have a substantially higher risk of dissolution than do married, either because cohabiters tend to have different characteristics than people who enter directly into marriage or because of the nature of cohabitation itself."); R. Kelly Raley & Megan M. Sweeney, *Divorce, Repartnering, and Stepfamilies: A Decade in Review*, 82 J. Marriage & Fam. 81, 86 (2020) ("Looking beyond the United States, where studies tend to investigate repartnering broadly to include marriage or cohabitation, a large body of work indicates that mothers in multiple countries have lower rates of repartnering than fathers. However, some evidence indicates that parenthood is only associated with reduced repartnering when parents live with their children.").

51 *See* Rebecca J. Allen & Alex Nakonechnyi, *Orphans, Displaced, and Institutionalized Children: Causes of Children Growing Without Parents and a Sampling of Global Responses*, *in* The Palgrave Handbook of Global Social Problems 1 (2022); Allan K. Chrisman & Joseph G. Dougherty, *Mass Trauma: Disasters, Terrorism, and War*, 23 Child & Adolescent Psychiatric Clinics 257 (2014); Timothy P. Fadgen, et al., *Protecting Children in Foster Care During Natural Disasters: A Comparison of the United States, Aotearoa New Zealand, and Japan*, 30 Children, Youth & Environments 1 (2020).

52 *See* Jagoda Grzejszczak, et al., *Are Children Harmed by Being Locked Up at Home? The Impact of Isolation During the COVID-19 Pandemic on the Phenomenon of Domestic Violence*, 19 Int'l. J. Envtl. Res. & Pub. Health 13958, at 9 (2022) ("While violence against children seems to be a thoroughly and holistically researched aspect, violence in the context of the COVID-19 pandemic is a new phenomenon. We are not able to estimate the full extent of the long-term effects of the pandemic crisis. While social isolation during the rapid spread of the coronavirus around the world seems to be the right decision for epidemiological reasons, it is not the optimal solution for mental health. The abrupt withdrawal from school, social life, and outdoor activities greatly impacted children and adolescents."); Craig McEwen & Dana E. Prescott, *Adverse Childhood Experiences and COVID-19: Implications for Family Courts and Legal Professionals*, 34. J. Am. Acad. Matrim. Law. 409, 428 (2022) ("The COVID-19 epidemic has certainly contributed to stressed households and childhood adversity and diminished positive supports for children's resilience in ways that are not yet fully understood.").

social science and legal literature.[53] As Professor Andrew Cherlin aptly noted, "The forms of complexity [social and demographic] that are present today pose a challenge not only for demographers, but also for the legal system."[54]

Courts have been and are a practical repository by history and structure to address conflicts between parents when child abuse or neglect, or child custody is at stake. The form and efficacy of dispute resolution through judicial systems remains a work in progress.[55] Given the visibility of parental abductions in the 1970s, and the increased globalization of political and private economies, it is unsurprising that the notion of an internationally neutral process with existing national court systems became the framework for litigating custody cases.[56] Some process is, after all, required to ameliorate self-help and potential violence or aggression between parents. Whatever the substantive and procedural differences, "courts" were embedded within governmental structures and are

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53 A seminal article is Richard Williams, *The Psychosocial Consequences for Children of Mass Violence, Terrorism and Disasters*, 19 Int'l. Rev. Psychiatry 263 (2007).

54 Andrew J. Cherlin, *Introduction to the Special Collection on Separation, Divorce, Repartnering, and Remarriage Around the World*, 37 Demographic Res. 1275, 1289 (2017).

55 *See* Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. Little Rock L. Rev. 395, 400 (1999) ("To me, as will be described, the transformation in the judicial role from fault finder to conflict manager is based on a policy judgment shared by legislators and the judiciary that children's best interests generally are promoted by parental conflict reduction and continuing relationships with both parents after family reorganization. A more cynical person might, however, view the transformation as a necessity for judicial survival-an adaptation to cope with an exponentially increased workload in a time of limited resources rather than a philosophical shift.").

56 A.B. Bass, *Judicial Independence in International Cases: Judicial Discretion in Child Custody Legislation*, 7 Int'l Legal Prac. 27, 29 (1982) ("As a consequence, the family law courts of many western jurisdictions have been beset by a high incidence of extra-territorial custody disputes, accompanied by an attendant increase in the number of what are colloquially known as "civil kidnappings", wherein one of the parents (whether custodial or not) in contravention of an existing custody order extant in any given jurisdiction, removes the child from that particular jurisdiction and spirits said child or children to another or "foreign" jurisdiction. The emotional anguish and inordinate legal expense incurred by any of the disputants to such extra-territorial disputed custody proceedings is incalculable. During the year 1970, the writer, as chairman of a subsection of the Canadian Bar Association, first addressed him.").

tasked with dispute resolution so there was sufficient commonality for advocates of the Convention to seek refuge there when there is a claimed abduction.

Yet such a reliance on courts in common law adversarial systems comes with a cost. While executive action, with little fact-finding and a ministerial non-discretionary decision-making process may create or uphold injustice, the use of the courts in an adversarial contest, whatever the international differences, is a test of fact and finding and truth telling when parents have economic and psychological incentive to "win" custody. For example, approximately three-quarters of all cases filed under the Convention in Australia are against mothers, most of whom have been subject to domestic violence or are seeking to protect their children from abuse.[57] Although Article 13 provides that removal should not be ordered if there is a "grave risk of harm," some courts have ignored this limiting provision because they may view the convention as "an international law about jurisdiction, not a law about child welfare."[58] Indeed, particularly in the context of international child custody and abduction issues, the task of adjudicating facts and rendering judgments in expeditious fashion becomes difficult where lawyers line up to drain truth from testimony and parse documents in the interest of one or another party. Moreover, by their nature, adversarial systems are financially expensive even in the most mundane of child custody disputes, let alone those brought between parents in two nation states.

What this really means is that the Convention, however wisely drafted to meet multi-layered political and social demands, placed families in private child custody conflict with all the attendant epistemic injustice which generates barriers to access to justice: legal costs, expert costs, and the explicit and implicit biases that exist externally and internally in all political and judicial systems. Professor Miranda Fricker developed the concept she coined as "epistemic injustices,"[59] which, at base, are injustices that may "dehumanize

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57 Grant.Wyeth, *What Australia's New Law Means for Hague Convention Parental Child Abduction Cases*, Diplomat, Dec. 14, 2022, https://thediplomat.com/2022/12/what-australias-new-law-means-for-hague-convention-parental-child-abduction-cases/.

58 *Id.*

59 *See* Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing (2007); *see also* Gloria Origgi, *Epistemic Injustice and Epistemic Trust*, 26 Soc. Epistemology 221, 233 (2012) ("Trust is an epistemic commodity. The

certain individuals and groups as knowers and exclude them from processes of knowledge production."[60] In this context, the phrase *epistemic injustice* means the treatment of minority or oppressed groups by imposing an inequitable allocation of resources that impedes access to even the pathway to justice—the courtroom—as designed by the Convention.[61]

This reality could substitute any number of demographics to make the same point when some groups of parents, who have a history of suffering historical oppression and violence, are seen as less credible by lawyers, judges, therapists, forensic evaluators, parent coordinators, or mediators.[62] Much of this challenge can negatively implicate "trust" between social and legal structures.[63] Other authors have argued, concerning health care disparities, that the participatory prejudices experienced by all persons are grounded in a much broader tendency within the history of Western culture and philosophy to locate epistemic authority in persons who are white, healthy, and wealthy.[64]

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dose of trust and distrust that makes us cognitively fit to our societies is a nuanced mixture of sound and unsound heuristics we should be more aware of.").

60 Ronald David & Anne Newman, *Ethical and Epistemic Dilemmas in Knowledge Production: Addressing Their Intersection in Collaborative, Community-Based Research*, 13 Theory & Res. in Educ. 23, 23 (2015).

61 For an interesting discussion concerning the role of supreme courts, see Federica Liveriero & Daniele Santoro, *Proceduralism and the Epistemic Dilemma of Supreme Courts,* 31 Soc. Epistemology 310 (2017). The international literature is robust for comparing forms of epistemic injustice in American family courts. *See* Dipika Jain & Kimberly M. Rhoten. *Epistemic Injustice and Judicial Discourse on Transgender Rights in India: Uncovering Temporal Pluralism*, 26 J. Hum. Values 30, 30 (2020) ("A court's inability to fully see and hear a litigant may (and often does) have significant effects on the successfulness of their claim. Further, to be legible as subject-citizens, and to receive remedy from the legal system, individuals must state a claim cognizable by the State. Legal legibility is, thus, essential to a complainant's claim; without the words to speak into being a recognized grievance, the court is a silent room.").

62 For insightful literature expanding this point, see José Medina, The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination (2013); Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. Pa. L. Rev. 399 (2018).

63 *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 478 (1986).

64 Ian James Kidd & Havi Carel, *Epistemic Injustice and Illness*, 34 J. Applied Philosophy 172, 182 (2017).

The public's acceptance of judicial decision-making by ideologically neutral "umpires" protecting freedom and liberties from government encroachment is a "myth of the robe" hundreds of years in the making.[65] The nature of the law and the decisional process must at the very least maintain an appearance of impartiality if the process of state consolidation of power and authority is to proceed. "If a law is evidentially partial and unjust," historian E.P. Thompson stated, then "it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just."[66] This is so because no structural reform, however well intended, can eliminate heuristics and biases.[67]

After all, trial courts apply the scientific, social, religious, racial, economic, normative, and political biases of each era coupled with arcane (and sometimes) punitive laws about married and nonmarried parents, and the rights of women and children.[68] Stated

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65 For two scholarly approaches to this argument, see Paul A. Freund, *Umpiring the Federal System*. 54 Colum. L. Rev. 561 (1954); Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907 (2016). Another approach to the same argument may be found in Shane A. Gleason, et al., *The Role of Gender Norms in Judicial Decision-Making at the US Supreme Court: The Case of Male and Female Justices*, 47 Am. Pol. Res. 494 (2019); Dana E. Prescott, *Forensic Experts and Family Courts: Science or Privilege-by-License*, 28 J. Am. Acad. Matrim. Law. 521 (2015).

66 Edward P. Thompson, Whigs and Hunters: The Origin of the Black Act 263 (1975).

67 Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*. 55 Fam. Ct. Rev. (2017).

68 There is substantial literature on this point; but see, for example, Harry D. Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 488 (1967) ("Although money is involved, the illegitimate's claim goes much further, for it centers on his second-class status in our society-a society in which illegitimacy is a 'psychic catastrophe' and in which recovery in tort is granted for a false allegation of illegitimacy. Indeed, the psychological effect of the stigma of bastardy upon its victim seems quite comparable to the damaging psychological effects upon the victims of racial dis- crimination, which effects were successfully exploited in the battle over school segregation."); Suzanne D. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. Hist. 195, 215-16 (1977) ("Protection also required the maintenance of a legal system (or as the South Carolina case suggests, lack of system) that was more complicated and less certain than either the comm law or the abrogation of the common law. And the more complex the law, the more inhibitions were placed on the mobilization of goods and services. The alternative, of course, was to abandon legal protection and let

another way, the judicial system, and the Convention's location within that system, continues to privilege existing structures of social, economic, and political power.[69] The next section explores these policy and human rights tensions for Indigenous populations through a recent Convention case from a family court in New Zealand.

IV. Aotearoa New Zealand

A nascent example of the impact of the adversarial system and the process of judicialization is evident in recent New Zealand case law under the Convention. Unlike the United States, Aotearoa New Zealand, is a unitary Pacific Island state. It does not possess an entrenched, codified constitution, but like its former colonial ruler, the United Kingdom, relies upon convention, tradition, and other historical documents as forming part of its constitution. Given the parliamentary form of government and the absence of a formal, entrenched constitution, New Zealand follows the doctrine of parliamentary supremacy, meaning that the branches of government are not co-equal; a "final" decision about the meaning of a law can always be "overturned" by an Act of Parliament.

A major foundational document is *te Tiriti o Waitangi* (the Treaty of Waitangi). The Treaty, which has both English and *te reo* Māori (the Māori language) versions, is often cited as the foundational document of Aotearoa New Zealand. The fundamental point of difference between the two versions is what Māori exchanged with the British Crown when the treaty was agreed to in 1840. In the English language "Treaty of Waitangi," the Crown was granted sovereignty while in the *te reo* version, *te Tiriti o Waitangi*, which was signed by a far greater number of Māori chiefs, the *te reo* wording denotes that the Māori signatories ceded only "governance" [not sovereignty] over the territory.

Most Māori scholars and political leaders reject the notion that Māori ceded sovereignty to the British Crown and that "the power conferred was not an absolute unqualified right to displace

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women fend for themselves."); Martin Strous, *International Relocation Disputes and the Risk of Cultural Bias in Family Law Matters: A South African Perspective*, 31 Int'l J. Children's Rts. 268, 268 (2023) ("This paper discusses how judges and forensic experts can reach culturally biased decisions in family relocation matters, potentially compromising the best interests of children involved.").

69 *See* Abbe R. Gluck, *Our [National] Federalism*, 123 Yale L.J. 1996 (2013).

Māori authority in the powers of public administration."[70] While contested in the political arena, this view has gained traction in both academia and within some political parties, with important implications for distinct areas of policy administration. Thus, the Crown is obliged to protect and affirm Māori culture, traditional governance, and other formal and informal (soft) structures, including possession and use of ancestral lands and belongings.

A. *Family Law in Aotearoa New Zealand*

The New Zealand government maintains its supremacy in matters affecting family relations, but the protection of Māori culture within the statutes impacting children and family relations and the willingness of courts to affirm these rights endures.[71] Domestic family law matters involving children are handled by the Family Court with substantive provisions set up through the Care of Children Act 2004 (CoCA). The law mandates in section 4(1) that "welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration," but it does not provide a comprehensive definition of what constitutes the "best interests of a child" as a matter of standards or factors for the court to consider.[72] Rather it provides a non-exhaustive list of principles to help guide the Family Court in determining where these best interests lie.

Beyond the basic requirements of safety and protection (CoCA section 5(a)) and that the primary responsibility to

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70 Heather Came, et al., *Critical Tiriti Analysis: A Prospective Policy Making Tool from Aotearoa New Zealand*, Ethnicities. 1, 3 (2023).

71 For a discussion of family formation and policy in New Zealand, see Anita Gibbs & Rhoda Scherman, *Pathways to Parenting in New Zealand: Issues in Law, Policy and Practice*, 8 Kotuitui: New Zealand J. Soc. Sci. Online 13, 13 (2013) ("New Zealand's alternative parenting arrangements have changed dramatically over the past 150 years. Before Europeans arrived, the Maori people (New Zealand's Indigenous population) had their own system of caring for children called wha꞉ ngai.").

72 *See* Dina Imam Supaat, *Establishing the Best Interests of the Child Rule as an International Custom*, 5 Int'l J. Bus., Econ. & L. 109, 114 (2014) ("As a customary rule developed from a treaty provision, the principle can only impose duties as imposed by Article 3 of the UNCRC. The duty that arises is the duty to make the best interests of the child a primary consideration in the conduct of all the state's organs in all areas affecting children. The authorities are bound to ensure that a child's interests are evaluated together with other competing interests in matters affecting a child or group of children.").

provide this should rest with the parents (section 5(b)), the law also identifies elements of the child's identity (i.e. culture, language, and religious denomination and practice) and the protection and affirmation of this identity as being in the child's best interests (section 5(f)). The Family Court is directed to both preserve and strengthen the child's identity, which includes culture (section 5(f)), and a new law, the Family Court (Supporting Children in Court) Legislation Act 2021. This law amended the existing act to mandate that the "child must be given reasonable opportunities to participate in any decision affecting them" (section 5(g)). In that context, the Family Court is required to consider the best interests of the child as paramount (CoCA 2004, section 4).

The CoCA recognizes the role of parents and guardians to determine important matters impacting the child, including culture (CoCA, section 16). The Act empowers the Family Court to call for expert testimony concerning cultural matters (CoCA section 136). In Aotearoa New Zealand, Indigenous cultural issues in courts will most often involve Māori culture. Issues related to children within Māori culture might be best understood through the concept of *mana tamaiti (tamariki)*. This idea is defined in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, as "the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person (s. 7(1))."

Among the most central aspects of Māori identity and relevant to family are a child's whakapapa (genealogy) and membership within a particular to a whanau (family), hapū (larger social unit, a clan), iwi (extended political unit), and issues related to tikanga Māori (customary values and practices). Also implicated are whanaungatanga (kinship obligations that seek to secure identity, and social and cultural connections), all of which are factual matters that could be considered by a court.

B. *The Convention in Aotearoa New Zealand and Mercer v. Mercer*

Aotearoa New Zealand is a signatory to the Hague Convention with its provisions codified in Care of Child Act 2004 sections

94-124.[73] Aotearoa New Zealand's courts have been liberal in interpreting the Convention's requirements. The Act sets out several grounds to refuse the return of a child under the Convention. These grounds include whether the child was present in Aotearoa New Zealand for one year (known locally as "well-settled") or more, or if there is any risk of harm because of the return or another breach of a basic right or if an older child objects to a return (section 106(a)-(e)).

In June 2022, the New Zealand Family Court decided a child custody case between Sharon and Piripi Mercer.[74] The application was originally brought pursuant to the provisions in the Care of Children Act 2004 (the Act) that incorporates into "New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction."[75] The parents had two teenage daughters, one 13-years-old, the other 15-years-old, both Australian citizens. Sharon resided in Queensland, Australia, and Piripi, a Māori, resided in Waikato, Aotearoa New Zealand. The children normally resided under the terms of a previous custodial arrangement with Sharon in Australia. In 2021, the children visited their father for a school holiday and did not return to Australia as required under the Australian custody order. Sharon made an application to the New Zealand Family Court under CoCA section 105. Both parties agreed that the jurisdictional terms were met, meaning that Piripi conceded that the daughters were in Aotearoa New Zealand and (a) they were removed in breach of the mother's rights; (b) the mother was actively exercising her parenting rights at the time the daughters came to Aotearoa New Zealand; and (c) prior to their stay in New Zealand, the daughters habitually resided in Australia with their mother.[76]

Piripi nonetheless opposed the application, alleging that Sharon consented or later acquiesced to the newer New Zealand home arrangement and that even if she had not, the daughters

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73 Care of Children Act 2004, 2004 S.N.Z. No. 90. *See* Jorge Contesse & Jeanmarie Fenrich, *It's not OK: New Zealand's Efforts to Eliminate Violence Against Women*, 32 Fordham Int'l L.J. 1170, 1787 (2008) ("The Care of Children Act 2004 ("CCA 2004"), which replaced the Guardianship Act 1968, promotes child welfare particularly as it relates to protection from abuse, parental guardianship, and access.").

74 Mercer v. Mercer, [2022] NZFC 5478.

75 *Id*. at ¶ 3.

76 *Id*. at ¶ 4.

objected to the return to Australia.[77] Given the children's ages, the Family Court determined that it would consider the daughters' objections. The court found that Piripi and the girls notified Sharon shortly before they were scheduled to return to Australia from the school holiday that the girls "would not be returning to Australia because they wished to live with him, [and] learn their Māori whakapapa and culture."[78] This led to discussion between the family with Sharon acquiescing to the children staying in New Zealand so long as the daughters remained satisfied with the arrangement. When, as will occur, one of them did not, and after failed mediation, Sharon began court proceedings for the children's return to Australia.[79]

During these proceedings, the daughters expressed their desire to remain in Aotearoa New Zealand. They were comfortable there with schooling, whanau (family), and friends. One daughter noted her enjoyment in "learning te reo at her full Māori immersion school and learning her whakapapa from her father."[80] Ultimately, Sharon sought to respect the girls' wishes while seeking a parenting order that would allow her to remain in regular contact with their children.

The trial court was persuaded by the children's objection to the application for return. This determination was based on a consideration of the children's ages, their maturity level, level of care in New Zealand, and their desire "to continue their te reo and tikanga journey. Exploring their whakapapa and heritage as Māori tamariki suggested that they have not and cannot do that in Australia."[81] There were considerations other than culture, including the girls' own objection to their return, their ages, and the stability they were enjoying in Aoteraora New Zealand. Local media, however, portrayed the case as one of the girls' choosing "Māoritanga

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77 *Id*. at ¶ 6.

78 *Id*. at ¶ 11.

79 The use of mediation in cross-border cases under the Hague is garnering much attention in the literature. *See generally* Sybille Kiesewetter & Christoph C. Paul, *Family Mediation in an International Context*, *in* Cross-Border Family Mediation, International Parental Child Abduction, Custody and Access Cases (2023); Melissa Kucinski, *Mediation in International Childrens Cases*, *in* The Elgar Companion to the Hague Conference on Private International Law (2020).

80 *Mercer*, [2022] NZFC 5478 at ¶ 18.

81 *Id*. at ¶ 25.

over Australian birthplace."[82] Despite this public framing of the case, the Family Court judge made little of the preference for exploring whakapapa and te reo language from either a larger New Zealand law and public policy context or from the Convention's potential recognition of culture as an important feature. Instead, as noted above, the court based its decision on more settled Hague Convention principles including the children's maturity and stated preference to remain in Aotearoa, rather than basing the decision explicitly on the children's cultural status. It remains to be seen, however, whether a New Zealand court would note these factors in the record in a matter involving a younger child.

In sum, the decision is remarkable for highlighting culture as a unique and important element of a child's identity and wellbeing. Connections to one's Indigenous culture are not possible everywhere. When a child reaches a certain level of maturity and can articulate a clear desire or preference for engaging in their culture within its natural context, this could provide the basis of a sustainable objection to an application for the child's return under the convention. In essence, the presumption of protecting the integrity of a foreign state's custody and visitation arrangement might be overcome when these facts can be sustained.

Conclusion

In its simplest terms, "an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what."[83] The deeply embedded rationale for this system is that a form of "combat-by-trial" protects basic rights of due process and thereby protects the dignity and autonomy of the individual. Nevertheless, the process itself deeply distorts the dignity and autonomy of *family systems* as dynamic and evolving. Complex interpersonal relationships are reduced and essentialized, witnesses are badgered

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82 *See* Ric Stevens, *Teen Girls Choose Māoritanga over Australian Birthplace in Transtasman Court Case*, New Zealand Herald (Jan. 30, 2023), https://www.nzherald.co.nz/nz/teen-girls-choose-maoritanga-over-australian-birthplace-in-trans-tasman-court-case/HQMWZ5V4DJHOTPELY3JLCJL7ME/#:~:text=Two%20Australian%2Dborn%20girls%20involved,when%20the%20girls%20were%20small.

83 Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 Chap. L. Rev. 57, 57 (1998).

and ridiculed in cross examination, and a court's decisions may turn on idiosyncratic legal and factual determinations that leave the parties frustrated and personal relationships harmed.[84]

Western judicial systems do, however, share a common rooted myth: all lawyers and judges are equally skilled, and evidence is reliable, respectful, dignified, and transparent. This premise includes the assumption that parties have equal economic resources to gather and translate evidence, that judges have the same resources and time for family law matters that corporations and wealthy litigants receive in other federal and state judicial systems, and that experts apply a uniform understanding of social science. The premise also holds that a judge can discern the truth about a particular domestic or family arrangement or dispute based upon these rationales and that each case affords equitably available adversarial efforts. Since the 1940s, this privileging and legitimizing of judicial decision-making has been called "judicialization":

> One of the main consequences of this transformation has been the judicialization of politics—the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. Armed with these newly acquired judicial-review procedures, national high courts worldwide are frequently asked to resolve a range of issues including the scope of freedom of expression and religion, the rights of privacy and equality, and public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection.[85]

These forms of judicialization, however, have particularized consequences for Indigenous peoples forced into family justice courts under the Convention. Analyzing the efficacy and biases of a system designed to conduct one case event at a time likely randomizes outcomes and misses the impact on individuals who cannot afford advocates or experts and then become even more marginalized in such a system.[86] Case-by-case litigation places those with

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84 Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. Sch. Rev. 911 (2011).

85 Ran Hirschl, *The Judicialization of Mega-politics and the Rise of Political Courts*, 11 Ann. Rev. Pol. Sci. 93, 94 (2008).

86 For a variation on this theme, see Ben Strang, Mother Who Won Significant Ruling in Hague Convention Case Continues Legal Fight, Radio New Zealand, RNZ (Oct. 25, 2022 11:19 AM), https://bit.ly/3IITBVB:

> "Every six months or so, [he] files more legal action against me in the Family Court," Jane said.

limited resources in a system designed for speed and volume which leaves litigants in opposition to the other parent and sometimes the nation-state where the child custody case is residing.[87]

The development of an international abduction procedure within the intranational family court adversarial system, premised on the myth of equal knowledge, privilege, power, and finances, was illusory from the start. And no trial lawyer or trial judge really believed that judicial systems were equitable or accessible to many peoples subject to historical oppression and denied social justice for generations.[88] As an author wrote recently concerning the U.S. Supreme Court, but relevant on this point for the Convention, this "jurisprudence of exclusion makes clear that only some history matters. As the dissent in *Dobbs* emphasized, at the time of the ratification of the Fourteenth Amendment, people of color were broadly disenfranchised, and women could not vote or practice law."[89] Or, as aptly summarized in the context of Māori family group conferencing and restorative justice reforms, in "settler colonial contexts, Indigenous peoples are regularly represented in political,

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"This is being paid for by the New Zealand government under the Hague Convention, instigated by the New Zealand Central Authority, who work for our Ministry of Justice.

"I have to pay for my lawyer. New Zealand pays for his. He doesn't comply with any court orders, he often waits until one of two days before his application is going to be struck out.

"He's doing this as a form of coercive control. He's using the legal system to keep me under his power and control."

87 For a broader examination beyond conventional child custody disputes, see Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. 453 (2002); Sharlee Cranston-Reimer, *Reproducing Which Nation?: White Pro-Natalism and Ontario's Recent Fertility Treatment Try Program*, 40 TOPIA: Can. J. Cultural Stud. 66 (2019); Karen S. Rotabi & Nicole F. Bromfield, *The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns*, 27 Affilia: Feminist Inquiry in Soc. Work 129 (2012).

88 *See generally* Gillian R. Chadwick, *The Noncitizen Parent Trap: How Abuse Victims Become Stuck Between Family Court and Immigration Law*, 71 U. Kan. L. Rev. 621 (2022); Rachel Johnson-Farias, *Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States*, 14 Harv. L. & Pol'y Rev. 531 (2019); Rhona Schuz, *The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes*, 12 J.L. & Fam. Stud. 453 (2010).

89 Mary Ziegler, Dobbs *and the Jurisprudence of Exclusion*, 55 Polity 419, 420 (2023).

media, and academic discourse as a problem population that requires significant, and at times invasive, social intervention."[90]

Thus, child custody conflict still occurs in a very rule and outcome-based environment, not a laboratory or classroom, and certainly, despite some good intentions, in a collaborative and non-blame/shame environment. Trials are designed for and encourage combat from the lawyers on behalf of clients. For decades, the adversarial system, by intentional design, is where family law cases lived, with disclosure of intimate detail in a public forum, and in an environment that may aggravate preexisting emotional, economic, and environmental vulnerabilities. As demographic and familial relationships globalize, increasing numbers of parents and children have been caught up in this "sticky-web" of adversarial forums.[91]

Because of the privileged position and authority of government agents (judges) on the ground (and as portal gatekeepers of rights to children), formal and informal rules are applied in practice, making the face-to-face official the "ultimate policy-makers."[92] These practices are overlaid and re-enforced by the judicial conceptions of rights and the source of those rights. As evidenced by *Mercer*, legal reasoning and history used by judges to delimit the Convention may be co-extensive with the historical negation of cultural autonomy and human rights. Indigenous populations who achieved long and bitterly opposed legal rights of self-determination and cultural autonomy, should not have those rights negated by having to litigate under a Convention created by various nation-states when child abduction occurs.

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90 Paora Moyle & Juan Tauri, *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*, 11 Victims & Offenders 87, 87 (2016).

91 Theunis Roux, *American Ideas Abroad: Comparative Implications of US Supreme Court Decision-Making Models*, 13 Int'l J. Const. L. 90, 98 (2015) ("The comparative implications of this conception of the constraining capacity of law are clear: if fidelity to law is to have any purchase as an explanation for constitutional court decision-making, the court under examination would need to be operating in a relatively mature legal tradition in which institutionalized norms of legal reasoning have had time to develop, and where multiple decisions over numerous years have created a sticky web of shared legal-cultural values.").

92 Émilie Biland & Hélène Steinmetz, *Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts*, 42 L. & Soc. Inquiry 298, 299 (2017).

Biases & Mediation Practice

by
Barbara Glesner Fines[1]

I. Introduction

Despite the central value of impartiality in mediation,[2] bias is an unavoidable aspect of the process. Attorneys and mediators alike need to be aware of how bias distorts decision-making and can lead to unfair judgments about others. The core ethical duties of these professions require that they work to counter these tendencies.

Model standards define impartiality as "freedom from favoritism, bias or prejudice."[3] So fundamental to mediation is this concept of impartiality that another term for a mediator is a "neutral."[4] While mediators may approach the role with different

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[1] Dean Emerita and Ruby M. Hulen Professor of Law, University of Missouri – Kansas City. Thank you to my colleagues Mary Kay Kisthardt and Nancy Levit, and my research assistant Matthew Champagne.

[2] This article acknowledges, but is not intended to address, the larger debate over the role of impartiality or the tensions in mediation standards. Mary B. Culbert, *Proposal: A New Unified Canon of Mediator Ethics*, 39 Ohio St. J. on Disp. Resol. 1, 7 (2023)(reviewing tensions and gaps in mediator ethics codes).

[3] American Arbitration Association et al., Model Standards of Conduct for Mediators, Standard II(A) (2005)("AAA Model Standards"), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf. The Model Standards for Mediators have been adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution. Likewise, the Model Standards of Practice for Family and Divorce Mediation define impartiality as "freedom from favoritism or bias in word, action or appearance, and include[] a commitment to assist all participants as opposed to any one individual." Model Standards of Practice for Family and Divorce Mediation, Standard IV(A) (2000), https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf.. The Model Standards were drafted over a two-year period by representatives from the Academy of Family Mediators (AFM), Association of Family Courts and Community Professionals (AFCC), American Bar Association (ABA) Family Section, and other national, state and regional organizations.

[4] Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 Wash. U. J.L. & Pol'y 71, 74-85 (2010)(describing the central role of neutrality in

philosophies regarding the balance between directive and elicitive,[5] a suggestion that mediators (or attorneys for that matter) are biased would clash with either of these principles. These professionals, who pride themselves on being logical, fair, and caring, may react to such suggestions with a stress response: fight, flight, or freeze.[6] However, suggesting that professionals must consider the existence and impact of bias is not meant to induce feelings of shame or guilt. Indeed, this article adopts the premise that bias is simply part of what it means to be a human.

Mediation is a common, some might say predominant, feature of the dispute resolution process in family law. "[T]he process of resolving legal family disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room."[7] Increasingly, experienced matrimonial attorneys serve as mediators as part or the entirety of their practice.[8] Accordingly, matrimonial attorneys must understand the operation of bias in mediation.

This article will explore the meaning of bias and the ethical duties of both attorneys and mediators to understand how our decisions and judgments are affected by bias. In particular, the article will focus on cognitive biases that are especially significant in the mediation process. In section II, Part A explores the biases that affect perception and valuation and so distort decision-making. Part B explores biases that affect how we judge people, in particular their motivations and intentions. Part C explores those biases that especially impact interpersonal communication. Throughout, the article provides suggestions for recognizing these biases and mitigating their detrimental effects in mediation.

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definitions of mediations). Once again, the viewpoints on the finer details of neutrality are beyond the scope of this article. Paul Bailey, *Neutrality in Mediation: An Ambiguous Ethical Value*, 1 J. Mediation & Applied Conflict Analysis 53, 53-55 (2014) (discussing numerous scholars' viewpoints on neutrality).

5 Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System,* 79 Notre Dame L. Rev. 1, 30-34(2003).

6 Jessica Nordell, The End of Bias: A Beginning: The Science and Practice of Overcoming Unconscious Bias 140-41 (2021).

7 Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 Fam. Ct. Rev. 513, 516 (2006).

8 Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 Marq. L. Rev. 887, 889 (2012).

II. The Meanings of Bias

We begin with the bias that many people think of first when we discuss bias – that is explicit bias. This is what we often think of when we think of bias – bigotry, prejudice, invidious discrimination, hateful words and conduct directed toward an individual or a group of people simply because of that individual or group's appearance, history, or social identity. If this were the only type of bias this article was to address, it would be a very short article indeed.

Intentional invidious discrimination has no place in the legal profession. Standards of Professional Conduct for mediators and attorneys alike reinforce this idea. For mediators, the Model Standards of Conduct for Mediators provide that a mediator "should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason."[9] Attorneys likewise have an obligation to avoid this type of explicit, intentional bias. For example, American Bar Association Model Rule 4.4(a) Respect for Rights of Third Persons provides, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…." Engaging in conduct that exhibits or is intended to appeal to or engender bias against a person on account of some aspect of that person's identity is conduct that fall squarely within this rule. Demeaning or threatening someone, playing on negative stereotypes, using epithets or slurs – all of these embarrass and burden others.

Especially in the context of family law, this intentional discrimination undermines the unique role the legal system must play in resolving family disputes. Unlike other legal disputes, family law conflicts must look to the future as well as the past and must assess people and relationships not merely transactions and occurrences.[10] Increasingly, the legal system has recognized the flaws of the adversarial mindset in family law cases. "Using the legal system to assign fault for divorce or to resolve child access disputes using indeterminate standards like "best interests of the child" often

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9 AAA Model Standards, *supra* note 3, at Standard II(B)(1).

10 Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney,* 75 UMKC L. Rev. 965, 968–69 (2007).

results in flawed decisions that take too much time and, if they can afford lawyers and other litigation expenses, cost families too much money."[11] Accordingly, especially when children are involved, family law attorneys are urged to minimize rather than exacerbate animosities and help clients to build cooperative relationships after divorce. Standard 1.3 of the AAML Bounds of Advocacy provides, "An attorney should refuse to assist in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect."[12] With these goals in mind, there is no room for introducing intentional, invidious stereotypes or explicit bigotries in the family law context.[13]

An attorney might suggest that there is, nonetheless, a substantial purpose for this biased behavior apart from hurting someone. That is, this behavior has the substantial purpose of winning or securing an advantage for one's client. However, courts have stated plainly that all is not fair in love, war, and litigation. "While strategy and tactics are part of litigation, and throwing your adversary off-balance may well be a legitimate tactic, it is not legitimate to do so by the use of gender-based insults."[14]

Likewise, Rule 8.4 defines misconduct to include conduct that is "prejudicial to the administration of justice."[15] This rule also has provided grounds for discipline for bigotry or harassment.[16] This rule, which existed even in the predecessor Model Code,[17] has withstood numerous constitutional challenges based on vagueness and overbreadth.[18] Most courts interpret this rule to apply to any

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11 Jane C. Murphy, *Revitalizing the Adversary System in Family Law,* 78 U. Cin. L. Rev. 891, 896 (2010).

12 Am. Acad. Matrim. Law., The Bounds of Advocacy (2009) [https://perma.cc/BT8D-3MNF].

13 *See, e.g., In re* Thomsen, 837 N.E.2d 1011 (Ind. 2005).

14 People v. Abrams, 459 P.3d 1228 (Colo. 2020).

15 Model Rules of Pro. Conduct r. 8.4(d) (Am. Bar Ass'n 2024).

16 *See, e.g.,* Att'y Grievance Comm'n v. Vasiliades, 257 A.3d 1061 (Md. 2021) (holding attorney's public racist, homophobic, and sexist posts on social media account used to advertise his law practice violated Rule 8.4(d)*). In re* Charges of Unprof'l Conduct Contained in Panel File 98-26, 597 N.W.2d 564 (Minn. 1999) (holding that a prosecutor violated Rule 8.4(d) by filing a motion in limine to prohibit a public defender from selecting "a person of color as co-counsel for the sole purpose of playing upon the emotions of the jury").

17 Model Code of Pro. Resp. DR 1-102(A)(5) (Am. Bar Ass'n 1980).

18 *In re* Comfort, 159 P.3d 1011, 1024 (Kan. 2007) ("'prejudicial' is universally found throughout the legal … system…. It cannot be seriously contended

conduct that the attorney knew or should have known was likely to prejudice the administration of justice.[19] The standard has been applied to a range of bigoted conduct by attorneys in family law matters.[20] Thus, for example, an attorney representing the father in a custody dispute was disciplined after repeatedly emphasized that the mother, who was White, was dating a Black man, suggesting that this interracial relationship was a basis for denying custody.[21] The court noted that the references to race were not relevant to the dissolution and that the attorney's comments "only serve to fester wounds caused by past discrimination and encourage future intolerance."[22] The court concluded that discipline was appropriate because "[i]nterjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole."[23]

For both mediators and attorneys alike, then, the need to identify and interrupt explicit bias is critical to "promote public confidence in the system, and to ensure effective administration of justice"[24] as well as to protect clients from discrimination and harassment.

On the other end of the spectrum, one could define bias as any kind of preference. Some discussions of bias in mediation

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that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney"); *In re* Crossen, 880 N.E.2d 352 86 (Mass. 2008) (holding that the rule is not unconstitutionally vague; stating that the lawyer "should have known" that attempt to intimidate judge's former law clerk into making sworn statement damaging to judge was prejudicial to administration of justice); Chief Disciplinary Counsel v. Zelotes, 98 A.3d 852 (Conn. App. Ct. 2014); *In re* Haderlie, 885 N.W.2d (N.D. 2016).

19 *In re* Alexander, 300 P.3d 536 (Ariz. 2013)(applying a negligence standard); *In re* Kennedy, 864 N.W.2d 342 (Minn. 2015)(holding that intent is not required).

20 *See, e.g., In re* Kratz, 851 N.W.2d 219 (Wis. 2014)(involving a DA texting a victim of domestic violence with sexual invitations); *In re* Barker, 993 N.E.2d 1138 (Ind. 2013) (suspending an attorney for accusing a mother in a dissolution action of being in the country illegally).

21 *Thomsen*, 837 N.E.2d at 1012.

22 *Id.*

23 *Id.*

24 *In re* Abrams, 488 P.3d 1043, 1053 (Colo. 2021)(upholding as constitutional Colorado's rule of professional conduct defining as misconduct "conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status").

have focused on these broadly-defined preferences. These preferences might include, for example, a preference for adversarial processes rather than mediation.[25] Mediators and the parties engaged in mediation might prefer a particular style or philosophy of mediation. Professor Leonard Stricklin has explored these standard philosophical maps, distinguishing among mediator approaches to a range of issues, such as how broadly or narrowly to define a problem, the degree to which the mediator directs or facilitates process or outcomes, the relevant dimensions of the conflict, such as cognitive, emotional, and behavioral, and "the extent to which the process would focus on settling the dispute, resolving the dispute, or transforming the parties."[26]

Likewise the law governing family law matters presents multiple preferences for certain types of evidence or certain post-divorce arrangements. For example, the "best interests of the child" standard governs custody determinations in all states, but different states have differing preferences and presumptions that impact how that standard is to be measured.[27] These preferences are often controversial and increasingly linked to broader political, philosophical, or religious viewpoints.[28]

As important as these express biases and preferences are in family law, this article focuses on yet a third type of bias that is equally significant and even more challenging to manage. This is implicit or unconscious bias. Implicit biases are the shortcuts, patterns, heuristics, and stereotypes our brains use to take in, process, respond to, and store information. We cannot simply eliminate this bias because it is hard-wired into the way our brain functions.[29] All of us.

This is not to suggest that we are free to simply ignore the phenomenon when these mental shortcuts are harmful.[30] Our

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25 *See* Mark B. Baer, *The Amplification of Bias in Family Law and Its Impact*, 32 J. Am. Acad. Matrim. Law. 305, 327 (2020)(discussing dispute resolution preferences of attorneys, judges, clients, and mediators).

26 Riskin, *supra* note 5, at 46–47.

27 *See generally* Child Welfare Info. Gateway, Determining The Best Interests of the Child 5-38 (2023), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=4&view=Full-text%20excerpts%C20of%C20State%201aws.

28 Naomi Cahn & June Carbone, Red Families v. Blue Families: Legal Polarization and the Creation of Culture (2010).

29 Daniel Kahneman, Thinking, Fast and Slow (2013).

30 One of the dangers of training programs that focus on implicit bias is that they may send the opposite message than is intended. "Sending the

unconscious brain prizes speed over accuracy and simplicity over complexity. As a result, these unconscious processes can result in unfair or harmful assumptions and actions. While we cannot change the fact that our brain needs biases to operate, we can, with conscious and regular work, change the habits of our mind and learn to uncover and interrupt our mental biases that are unfair or harmful. Indeed, the core values of fairness and respect for the dignity of participants in the legal system demand that both mediators and attorneys give attention to these biases. "In an adversarial system which exercises power and authority over so many vulnerable populations, the legal profession is required to give explicit recognition to bias and its role in recycling systemic injustice."[31]

What is implicit bias? Consider how our brain functions: our brains process 11 million bits of information every second.[32] But we can only consciously process 16 to 40 bits.[33] That means the rest must be managed through unconscious processes. Nobel Prize Laureate Dr. Daniel Kahneman, Professor of Psychology and Public Affairs at Princeton, spent decades researching this difference between unconscious processes (System 1 or "fast thinking") and conscious processes (System 2 "slow thinking").[34]

Fast thinking includes all of the ways in which our brain operates to make judgments and decisions automatically without even "thinking" about it. For example, when you see your best friend on the street and you instantly recognize them, that's your automatic, intuitive system at work. Fast thinking is automatic, impulsive, and subconscious. It is built on associations and categories, values speed more than accuracy, and focuses on existing evidence

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message that biases are involuntary and widespread—beyond our control, in other words—can make people feel they're unavoidable and lead to more discrimination, not less." Francesca Gino & Katherine Coffman, *Unconscious Bias Training That Works*, Harv. Bus. Rev. (Sept.–Oct. 2021), https://hbr.org/2021/09/unconscious-bias-training-that-works.

31 Dana E. Prescott, *Book Review: Jennifer Eberhardt, Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do (New York: Viking, 2019)*, 32 J. Am. Acad. Matrim. Law. 413, 432 (2020).

32 Ap Dijksterhuis, Henk Aarts, & Pamela K. Smith, *The Power of the Subliminal: On Subliminal Persuasion and Other Potential Applications, in* The New Unconscious 77 (R. Hassin, J. Uleman, & J.A. Bargh, eds.)(2005).

33 Kahneman, *supra* note 29.

34 *Id.* at 13-14, 19-30, 127-28.

rather than searching for absent evidence.[35] When you see your friend and it instantly brings a smile to your face, that's another example of fast thinking. You don't have to do anything to recognize them or experience that moment of happiness. Our emotions are grounded in fast thinking and, indeed, emotions can play a critical role in our decision-making.[36]

In sum, our fast-thinking brain generates automatic impressions, feelings, and inclinations. When we incorporate these intuitions into our decision-making and actions, they become beliefs, attitudes, and intentions.

In contrast, slow thinking is deliberative and logical. While fast thinking is involuntary and unconscious, slow thinking requires conscious effort. Whereas fast thinking is biased to prefer certainty over ambiguity and belief over doubt, slow thinking is critical and can weigh multiple conflicting ideas.[37] Slow thinking is far less prone to error than fast thinking. Attorneys are trained to use their slow-thinking analytical processes in their work. Mediators are trained to slow down decision processes in order to permit perspective taking and reframing. However, slow thinking takes energy. Indeed, so demanding is slow thinking that our brain will conserve that energy by turning hard questions into easier ones[38] or by prefering the status quo rather than engage in planning and work to change.[39] Accordingly, our unconscious, fast-thinking, error-prone brain is in the driver's seat most of the time.

No matter how much we are trained in the careful analytical thought process of the slow-thinking brain, we cannot use that process for the vast majority of the mental work we need to do from

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35 Kahneman refers to this as the phenomenon of WYSIATI ("What you see is all there is"). *Id.* at 86.

36 Antoine Bechara, Hanna Damasio & Antonio R. Damasio, *Emotion, Decision Making and the Orbitofrontal Cortex,* 10:3 Cerebral Cortex. 295, 306 (2000) doi: 10.1093/cercor/10.3.295 ("individuals make judgements not only by assessing the severity of outcomes and their probability of occurrence, but also and primarily in terms of their emotional quality.").

37 Kahneman, *supra* note 29, at 81.

38 *Id.* at 45 ("many people are overconfident, prone to place too much faith in their intuitions. They apparently find cognitive effort at least mildly unpleasant and avoid it as much as possible.").

39 *See id.* at 287-88, 346-49. Personality differences can affect this status-quo bias, as some individuals are more likely to view change as improvement. *Id.* at 340.

second to second. The barrage of information our brains receive present four basic problems that all require fast-thinking.[40] First, our brain has to take in massive amounts of information. We need shortcuts and rules for filtering out the barrage of information we are constantly receiving.[41] Second, that information comes in as raw data – our brains have to have some way of assigning meaning, even when meaning is vague or missing.[42] Third, we need to act on all this data often instantaneously.[43] To which of the information will we give priority in determining our response? Our brain has shortcuts and rules – biases – for this problem too. Fourth, our brains have to encode all this data into memory. Imagine if your computer did not have a system of files or folders or search algorithms but was simply one gigantic data file. Our brain needs some structure for memory just like our computers. So, our brain simplifies, condenses, generalizes, and organizes that data. And the structures and stories and generalizations we use to store information then affect how we take in new information. [44]

For each one of these challenges our unconscious brain must manage, it uses shortcuts. These shortcuts are commonly referred to as cognitive biases or heuristics.[45] There are hundreds of these shortcuts, and attorneys and mediators should seek to broaden their understanding of them.[46] This article introduces just a few of the cognitive biases that are especially relevant to mediation

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40 Buster Benson, Why Are We Yelling?: The Art of Productive Disagreement 92 (2019).

41 *Id.* at 94-95.

42 *Id*. at 97-99.

43 *Id.* at 100-03.

44 Garvin Brod, Markus Werkle-Bergner, & Yee Lee Shing, *The Influence of Prior Knowledge on Memory: A Developmental Cognitive Neuroscience Perspective*. 7 Frontiers in Behav. Neurosci. 139 (Oct. 8, 2013), doi: 10.3389/fnbeh.2013.00139.

45 There is technically a difference between these related but distinct concepts in the field of psychology and decision-making. Both are mental shortcuts. A cognitive bias is a systematic error in thinking that occurs when people process and interpret information in an inaccurate way. A heuristic is "a simple procedure that helps find adequate, though often imperfect, answers to difficult questions." Kahneman, *supra* note 29, at 98.

46 For an extremely accessible visual reference, see the Cognitive Bias Codex, designed by John Manoogian III, at https://upload.wikimedia.org/wikipedia/commons/6/65/Cognitive_bias_codex_en.svg (last visited July 9, 2024).

practice to the extent they influence decision-making, judgments about people, and communication styles.

A. *Biases in Perception and Valuation Affect Decision-Making*

Mediation is a process of facilitated negotiation or problem-solving.[47] Accordingly, understanding how individuals make decisions and the short-cuts that affect that process is important. Two biases in particular can affect the decision-making process during mediation: the tendency to perceive or accept only that information that confirms existing judgments and the influence of framing and anchoring on valuation.

1. *Confirmation Biases Affect Perception and Reasoning*

The first set of biases are those that reinforce our fast-thinking decisions or beliefs. These cognitive biases are often referred to under the term "confirmation bias."[48] We arrive at judgments about the meaning and value of information automatically through our fast-thinking brain, based on a storehouse of experiences and learning from our lifetime.[49] This process of judgment is immediate and unconscious. We might recognize it as our intuition or our gut reaction.

But those judgments then affect how we receive information and evaluate information. We look for and pay attention to evidence that supports these judgments. This "selective perception" means that we may not even notice some information that is right in front of us if that information is not consistent with our

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47 Scholars and standards disagree on the particulars of this process, particularly the relative values of impartiality, neutrality, and fairness. *See, e.g.,* Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. Disp. Resol. 387, 416 (noting confusion in existing standards); *See also* Mary B. Culbert, *Proposal: A New Unified Canon of Mediator Ethics*, 39 Ohio St. J. on Disp. Resol. 1, 4 (2023)(same). *See generally* Sarah R. Cole, et. al., 1 Mediation: Law, Policy and Practice § 2 *Dilemmas Presented by Institutionalization of Mediation* (Jan. 2024)(detailing tensions in fundamental values in mediation). One's viewpoint on these tensions may impact how one uses knowledge of biases that impact decision-making. This article does not enter into that fray.

48 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2:2 Rev. Gen. Psychol. 175 (1998), doi:10.1037/1089-2680.2.2.175.

49 Kahneman *supra* note 29, at 89-93.

judgments or purpose.[50] A popular example of this phenomenon is the Invisible Gorilla video, in which observers are instructed to count how many times six people in the video pass a basketball between themselves; all the while, unexpectedly, a person in a gorilla suit walks through the video, turns to the camera, and thumps her chest, then exits the screen. In studies of perception, nearly half of viewers did not see the gorilla.[51] Likewise, if our clients have concluded that their spouse or partner is untruthful, or greedy, or uncaring, they are unlikely to even notice the evidence that undermines these conclusions. Even if we notice information that is inconsistent with our attitudes, opinions, or beliefs, the phenomenon of motivated reasoning leads us to ignore, distort, or discount that information.[52] In poetic terms, "A man hears what he wants to hear and disregards the rest."[53] These biases are largely unconscious and so takes slow thinking and conscious effort to combat. Mediators likely often see situations in which these confirmation biases and overconfidence (itself a cognitive bias)[54] combine to blind a participant in mediation to the vulnerabilities of their position.

While mediators may recognize the operation of confirmation bias in clients, they are less likely to notice the bias in themselves. Likewise for attorneys, since their role as an advocate can engage the same confirmation bias that they would observe in their clients.[55] Underlying beliefs about conflict or mediation, for example, can cause mediators or attorneys to discount certain information. If a mediator proceeds from an assumption that all conflicts are the product of equal contribution from both parties to the conflict,[56]

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50 Nickerson, *supra* note 48, at 177-180.

51 Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 Mich. St. L. Rev. 757, 771. The video can be viewed at https://www.youtube.com/watch?v=UtKt8YF7dgQ.

52 *Id*.

53 Paul Simon, *The Boxer*, on Simon and Garfunkel, Bridge over Troubled Water (1970).

54 Kahneman, *supra* note 29, at 87.

55 Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 Ind. L.J. 1639, 1657 (2015)(describing how "partisanship may jeopardize a lawyer's ability to perceive a client's situation accurately, give sound advice, and provide ethically permissible representation.")

56 Douglas Patton, Bruce M. Patton, & Shiela Heen, Difficult Conversations: How to Discuss What Matters Most 75-100 (3d ed. 2023)(the authors suggest that difficult conversations are best conducted if participants

that underlying belief might cause a mediator to overlook an asymmetrical pattern of aggression or negative engagement.[57]

One of the most challenging aspects of cognitive biases like these is that you cannot eliminate these blind spots simply by knowing that confirmation bias exists.[58] In other words, knowing that you have biases does not solve the problem. It's rather like the famous Müller-Lyer optical illusion in which two lines of equal length are framed by either closed or open fins.[59] It doesn't matter that you *know* the lines are the same length, most people's fast-thinking brains will still perceive two different lengths.

How then can one counteract confirmation bias in mediation? There is evidence that simply asking an individual to consider reasons why their assumptions may not be true can help to counteract confirmation bias.[60] Perhaps the most powerful way in which mediators deploy this technique is through a staple of the mediator's toolbox: perspective taking.[61] Perspective taking is, simply put, the ability to see an issue or question from another person's viewpoint.[62] Perspective taking is closely related to empathy, which emphasizes the ability to understand another's feelings.[63]

Mediators engage in perspective taking in a variety of ways as they engage in active (reflective) listening. "Where needed, they

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"abandon blame" and instead "map the contribution" of each party to the conflict.).

57 Philip M. Stahl, *Bias: Critical Elements to Consider in Forensic Consulting and Expert Testifying*, (Dec. 1, 2015), https://www.afcc-ca.org/bias-critical-elements-to-consider-in-forensic-consulting-and-expert-testifying/.

58 Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43:4 J. Experimental Psych. 565 (July 2007), doi:10.1016/j.jesp.2006.05.011. ISSN 0022-1031.

59 Max Witynski, *What Size Is an Object? Your Description Might Depend on Your Intentions*, UChicago News (July 9, 2021), https://news.uchicago.edu/story/size-object-description-gesturing-intentions-muller-lyer-illusion-psychology.

60 Nickerson, *supra* note 48, at 211.

61 Roger Fisher, William Ury & Bruce Patton, Getting To Yes: Negotiating Agreement Without Giving In 42-47 (2011).

62 Adam Galinsky, et al., *Why It Pays to Get Inside the Head of Your Opponent: The Differential Effects of Perspective Taking and Empathy in Negotiations*, 19:4 Psychol. Sci. 378 (2008), https://doi.org/10.1111/j.1467-9280.2008.02096.x.

63 C. Daniel, Batson, Shannon Early, & Giovanni Salvarani, *Perspective Taking: Imagining How Another Feels Versus Imaging How You Would Feel*, 23:7 Personality & Soc. Psychol. Bull. 75 (July 2, 2016), doi:10.1177/0146167297237008. S2CID 145333456.

may, without distorting meaning, reframe toxic statements into less destructive forms, or provide alternative interpretations of statements or motives to enable parties to see their opponents in a different, more intelligible light."[64] Mediators invite perspective taking by asking participants to imagine the needs, interests, perspectives, or emotions of another person. These questions can be framed as "what would they say/think/feel?" or as "what do you think you would say/think/feel if you were in their position?" The prior question evokes cognitive perspective taking, whereas the latter question will more readily engage both cognitive and emotional responses.[65]

Perspective-taking questions may be more effective than more direct methods of presenting contrary viewpoints. "Efforts by attorneys to educate clients about the validity of opposing positions and engage them in viewing their issues from more than one perspective are often regarded as siding with the opposition, causing clients to wonder whose side their attorneys support."[66] Similarly, if participants in mediation perceive the mediator as taking sides, this will undermine trust and the effectiveness of mediation.

Posing perspective-taking questions in the presence of the other person not only permits the listener to correct misunderstandings but also can help develop interpersonal rapport. "The development of interpersonal rapport between disputants reduces tensions and facilitates the construction of mutual understanding—the feeling of being understood and understanding the other party—and interpersonal trust—the feeling of being trusted and trusting the other."[67] While the effectiveness of particular perspective-taking interventions is the subject of continuing research, encouraging participants in mediation to consider the views of others is as much art as science. In particular, mediators must be able to not only ask questions that encourage perspective-taking but use active and reflective listening to understand the import of the answers to those questions. Timing of these questions is equally

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64 Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 21 Harv. Negotiation L. Rev. 1, 43–44 (2015).

65 *Id.*

66 Graham Ward, *Conflict Management by Managing Cognitive Biases*, Mich. B.J., Feb. 2019, at 32, 33.

67 Debbie Damen, et al., *The Effect of Perspective-Taking on Trust and Understanding in Online and Face-to-Face Mediations*. 29 Group Decision & Negotiation 1121, 1126 (2020), https://doi.org/10.1007/s10726-020-09698-8

essential.[68] Asking a disputant to take the other side's point of view too early in the process may generate a response, but not a true understanding. If the listener perceives these responses as forced or insincere, the intervention can actually undermine trust.[69]

In some ways, the adversarial system itself requires judges to engage in a form of perspective taking. This process can provide an important check on confirmation bias, by slowing down the decision-making process, emphasizing the consideration of opposing positions and evidence, and requiring justifications for decisions in light of these. At the same time, however, the public and family law attorneys may themselves have a "bias in favor of adversarial dispute resolution."[70] Mediators must counter that expectation of adversarial framing lest all statements or actions be presented or received as "arguments." Accordingly, mediators and attorneys representing their clients in mediation must find ways to address expectations of blame and fault and move parties to a cooperative framework to generate agreement. Interventions such as perspective-taking can help to build trust and open up these avenues for more cooperative problem solving.

2. *How We Receive Information Affects Judgment and Decision-Making*

Among the many shortcuts our brain uses to make decisions, several cause us to weigh certain information more heavily than other information. Our fast-thinking brains prefer information that is easier to access. Accordingly, we are more heavily influenced by information that is readily at hand or information that is presented at the beginning of a process. Recognizing the effect of these biases in mediation can help to break through impasses and generate agreement.

The "availability heuristic" leads us to base our decisions on that information that is most readily available. "The availability heuristic, like other heuristics of judgment, substitutes one question for another: you wish to estimate the size of a category or the frequency of an event, but you report an impression of the ease with which instances come to mind. Substitution of questions

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68 *Id.*

69 *Id.*

70 Baer, *supra* note 25, at 307-09.

inevitably produces systematic errors."[71] If our attention is drawn to information about a behavior or circumstance because of its emotional content, vivid description, or repetition, we are likely to overestimate the frequency that event occurs. Accordingly, we are more likely to overestimate the risk of a police officer dying from a gunshot than we are a construction worker dying from a fall, even though the latter group have a higher occupational mortality risk.[72]

There are several ways that some information comes to mind more readily than other information and is then given greater weight in our decision-making. For example, we hold recent information in short-term memory and can most easily access it. Likewise, information that we first received about a subject tends to gain an outsized influence on our decision-making. The maxim that "first impressions count" captures some of our understanding of this primacy bias. Primacy operates not only to make this initial information more accessible but also to influence how we view subsequent information.

The "halo effect" describes one way in which primacy of information influences how one takes in subsequent information.[73] The impact can be positive or negative.[74] A particularly memorable application of this effect is a study in which subjects were presented with two different descriptions of a person. The first person was described as "smart, diligent, critical, impulsive, and jealous" and the second as "jealous, impulsive, critical, diligent, and smart." Even though the two descriptions contained the same information, subjects judged the first person more favorably than the second.[75]

For financial decisions, in particular, yet another impact of the primacy effect can be seen in the concept of anchoring.[76] Anchoring explains how a decision can be primed by setting a numerical benchmark. Anchoring research suggests that the first

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71 Kahneman, *supra* note 29, at 129-32.

72 Bureau of Labor Statistics. National Census of Fatal Occupational Injuries in 2021, https://www.bls.gov/news.release/pdf/cfoi.pdf.

73 Kahneman, *supra* note 29, at 82-84, 121-27.

74 Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1379-87 (2009) (revealing a defendant's past criminal record creates a negative halo effect).

75 Kahneman, *supra* note 29, at 82.

76 *Id.* at 119.

side to make an offer can frame the other side's valuation, pushing the results closer to that initial offer.[77] Even numbers that have nothing to do with the valuation can "anchor" subsequent decisions. In one study of sentencing, judges were asked to sentence a woman convicted of shoplifting by first rolling dice (which have been rigged to either turn to a three or a nine) and then setting their sentence. Judges who rolled a nine produced a sentence of eight months compared to the five-month sentence that resulted when judges rolled a three.[78]

Some effective measures that can counter these valuation biases require "re-setting" the reference point. For example, if faced with an extraordinarily high initial demand, an attorney might advise the client to suggest that the demand is an indication of bad-faith bargaining and suggest that the negotiations should end. This sets an opposite anchor of zero and can weaken the anchoring effect, though it can just as easily "devolve into anchor and counter-anchor gamesmanship rather than resolution."[79]

Negotiators and mediators must take these biases into account when considering when and in what order to address issues and present offers. The AAML Bounds of Advocacy provide that "An attorney should not permit a client to contest child custody, contact, or access for either financial leverage or vindictiveness."[80] When the order in which one considers issues in mediation might result in these improper tradeoffs,[81] mediators must pay particular attention to these ordering decisions[82] and the impact of cognitive biases in warping decisions.

These are just a few examples of how the order in which one considers questions in mediation can affect the answers that result. How one asks these questions can also affect decisions. Law students learn early on the importance of "framing the issue." Behavioral psychology explains how that framing impacts

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77 Ralph A. Weber, *Understanding Anchoring*, 95 Wis. Law. 16, 18 (May 2022).

78 Kahneman, *supra* note 29, at 125-26.

79 Laura Frase, *Refining Our Thinking About Thinking: Battling the Sway of Cognitive Biases in Negotiation*, 51 Cumb. L. Rev. 347, 363 (2021).

80 Am. Acad. Matrim. Law., *supra* note 12, at Standard 6.2.

81 Michael Abramowicz & Sarah Abramowicz, *Bifurcating Settlements,* 86 Geo. Wash. L. Rev. 376, 391-92 (2018).

82 Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1340-42 (1995).

decision-making. Framing is especially important when making risk assessments. Most people are loss averse, meaning we will take more risks to avoid a loss than achieve a gain.[83] Combined with loss aversion, framing can readily shape decisions in family mediation. For example, in one study of custody decision-making, two parents were presented to decision-makers. The first could be considered an average parent on all relevant characteristics, while the second parent presented a combination of strongly positive and strongly negative characteristics. When the question of custody was framed positively – as "who should be granted custody" – the second parent was favored because the decision-makers focused on the positive characteristics that parent displayed. When the question was framed as denying custody, the decision makers focused on the second parent's negatives and chose the first parent.[84]

What is the lesson to be drawn for family mediation from these biases that cause individuals to give greater or lesser significance to certain information? Mediators and attorneys representing clients in family law mediations must take care to monitor for the impact of when and how questions are asked or information is presented. These biases can be exceedingly difficult to counteract. As with other cognitive biases, one cannot easily eliminate its impact by simply educating clients about the effect or instructing decision-makers to ignore or discount certain evidence.[85]

Since cognitive biases are a result of our fast-thinking unconscious processes, the best way to counter these is to be aware of the circumstances in which they may be affecting decision making[86] and turn to slow thinking regarding these decisions. Slow thinking

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83 Kahneman, *supra* note 29, at 368-69.

84 Colleen Roller, *How Anchoring, Ordering, Framing, and Loss Aversion Affect Decision Making,* UX Matters (Mar. 7, 2011) http://www.uxmatters.com/mt/archives/2011/03/how-anchoring-ordering-framing-and-loss-aversion-affect-decision-making.php.

85 *See, e.g.,* Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 Yale L.J. 1912, 1935 (2012) ("[S]tudies have demonstrated that jury instructions do not provide a satisfactory remedy when improper character evidence is presented to the jury. That fact strongly suggests that the halo effect cannot be cured by informing people that they are likely to use character proof wrongly.").

86 Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 Mich. St. L. Rev. 757, 799.

might mean simply slowing down the decision-making process. When we are "forced to make quick decisions using subjective criteria, the potential for bias is great."[87]

Time is especially important in dissolutions actions, as parties move through the "emotional, legal, economic, co-parental, community, and psychic divorce" processes. [88] An initiating spouse may be further along in the emotional divorce than a responding spouse. Perceived power imbalances are felt more strongly early on in the process than later.[89] Taking these issues of timing into account in family law scheduling mediations can impact the ways in which parties frame issues and receive offers.[90]

Mediators can help parties to switch to "slow-thinking" mode by addressing the emotional content of the dispute. Fast thinking operates most strongly when individuals are under stress. Accordingly, not only does lowering the personal animosity and emotional tenor of the dispute permit more positive post-divorce interactions, the attention to emotions can also help to manage bias. Mediators can engage slow-thinking decision processes by helping parties to look for more objective measures[91] or deliberately searching for evidence to re-evaluate the framing or anchoring.[92] In these ways, mediators can help parties to achieve agreements that will be more stable and satisfying in the long run than those arrived at under the influence of fast-thinking biases.

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87 Jennifer Eberhardt, Biased: Uncovering The Hidden Prejudice That Shapes What We See, Think, and Do 285 (2019).

88 Naomi Cahn & Jana Singer, *Divorce American Style Splitopia: Dispatches from Today's Good Divorce and How to Part Well by Wendy Paris*, 50 Fam. L.Q. 139, 140 (2016)(noting that this description of the divorce process was first proposed by Paul Bohannan, *The Six Stations of Divorce*, *in* Divorce and After 29, 30-31 (Paul Bohannan ed. 1970)).

89 Marian A. J. van Dijk, Sven Zebel, & Ellen Giebels, *Power Asymmetry and Early Intervention in Divorce*, 29 Psychol., Pub. Pol'y & L. 383, 394-95 (2023).

90 *Id.*

91 Russell B. Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. on Disp. Resol. 281, 314-15 (2006). *See also* William Ury, Getting Past No: Negotiating Your Way from Confrontation to Cooperation 183 (1993)(suggesting that negotiators "go to the balcony"—that is, take the stance of a neutral observer to the conflict).

92 Kahneman, *supra* note 29, at 126.

B. *Biases Affect Judgments About People*

As we have seen, the fast-thinking shortcuts we use to manage the volume of information we receive are not always accurate. Some can be exceedingly harmful and unfair, especially when it comes to making judgments about people. Two of the most fundamental biases we exercise in judging people are: first, we notice flaws in others more easily than we do in ourselves, and second, we fill in characteristics from generalities, stereotypes, and prior histories.[93]

Judgments about the reasons for another's behavior are especially prone to biased thinking. Fundamental attribution error refers to the phenomenon in which we are more likely to attribute another person's bad behavior to their personality, character, or ability, while attributing our own bad behavior to situational or external factors. [94] Consider, for example, the situation in which someone cuts you off in traffic. If you are like most people, you would be quick to conclude that the other person is a "bad person" or, at least, a "bad driver." However, if you are the one who cuts another driver off in traffic, you are more likely to attribute your behavior to chance, accident, or circumstance.

The fundamental attribution bias can be a significant roadblock for dispute resolution. The adversarial system's focus on fault and responsibility further amplifies this bias.[95] A victim will assign fault to the perpetrator rather than the situation. The perpetrator will view the victim's blame as unwarranted and respond by deflecting or diminishing their response. This will, in turn, generate even more anger and blame,[96] rather than each side thinking about all of the variables that might be playing a role. From there, the spiral continues with little common ground for problem solving.

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93 Cognitive Bias Codex, *supra* note 46.

94 Robert H. Mnookin, Scott R. Peppet, & Andrew S. Tulumello, Beyond Winning: Negotiating to Create Value in Deals and Disputes 49 (2000). A closely related concept, correspondence bias, focuses on the tendency to assume correspondence between acts and dispositions. Zachariah S. Sharek, Samuel A. Swift, & Don A. Moore, *On the Robustness and Generality of the Correspondence Bias* (June 22, 2010), https://ssrn.com/abstract=2305876.

95 Ward, *supra* note 66, at 33.

96 Korobkin, *supra* note 91, at 299-302.

It is possible to break this cycle of attribution. Research indicates that educating individuals on the attribution bias may have a positive effect, as can perspective taking.[97] However, both these approaches are unlikely to be effective if the victim is already angry and entrenched in their view of the perpetrator as blame-worthy. Indeed, an explanation from the perpetrator of situational constraints can only aggravate the victim. Mediators would do well to first address the emotion, by acknowledging the anger[98] and by eliciting some form of apology from the perpetrator. At that point, a victim may be more open to suggestions that external factors could provide plausible explanations for the perpetrator's behavior.[99]

Attribution bias is simply one way in which our fast-thinking brain makes judgments about people. When we make judgments about people, our cognitive biases lead us to fill in the blanks of our understanding with subconscious associations we have developed between concepts (e.g., black people, old people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). No matter how strong our explicit commitments to impartiality might be, we all carry assumptions and stereotypes that our fast-thinking brain uses to judge people.

These implicit biases that we have developed over our lifetime may not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.[100] For example, in the 1960's some of the most popular television series were premised on southern/hillbilly stereotypes that today many would find cringeworthy.[101] Most people who grew up on these television series would recognize as a gross stereotype that poor rural white

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97 Nic Hooper, et al., *Perspective Taking Reduces the Fundamental Attribution Error*, 4:2 J. Contextual Behav. Sci. 69 (2015), https://doi.org/10.1016/j.jcbs.2015.02.002.

98 Patton, Patton, & Heen, *supra* note 56, at 107-35 ("Have your feelings (or they will have you)").

99 Korobkin, *supra* note 91, at 304-08.

100 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 951 (2006).

101 One could watch hours of television episodes weekly that provided comedic portrayals of poor whites from rural areas. Shows with this rural theme included The Beverly Hillbillies (CBS, 1962–71), Petticoat Junction (CBS, 1963–70), Green Acres (CBS, 1965–71), Hee-Haw (CBS, 1969–71), The Andy Griffith Show (CBS, 1960–68), Gomer Pyle, U.S.M.C. (CBS, 1964–69) and Mayberry R.F.D. (CBS, 1968–71).

folks are virtuous but ignorant and simple. Yet, hours of television programming reinforced those stereotypes. Likewise, we continually develop implicit stereotypes about men and women, people of color, people with disabilities, young and old, gay and straight, or people with different faiths.[102]

Confirmation bias reinforces these stereotypes as we more readily notice circumstances in which our experience reinforces implicit stereotypes. Consider the study in which sixty law firm partners were given identical memoranda written by "Thomas Meyer." The partners were also provided an identical resume for Thomas, a third-year associate who went to NYU Law School. Half the partners were told that Thomas was White; the other half that he was Black. The partners who believed that Thomas was White rated the memo 4.1 out of 5, characterized Thomas as a good writer with "good analytical skills," and found an average of 2.9 out of 7 spelling and grammar errors. Partners who read the identical memo believing its author was Black rated the memo 3.2 out of 5; characterized the writer as "average at best," and found an average of 5.8 of the 7 spelling and grammar errors.[103]

Consider how these same types of confirmation biases based on stereotypical judgments about individuals in family mediation could cause similar asymmetrical judgments from similar evidence. For example, one research study found that if a mediator operated from a preconceived judgment that pro se litigants have less meritorious cases, that preconceived judgment caused the mediator to undervalue the positions advanced by these litigants.[104] Similar biases based on gender, sexual orientation, race, and many

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102 Kate A. Ratliff & Colin Tucker Smith, *Lessons from Two Decades of Project Implicit 15* (2021), http://www.kateratliff.com/uploads/2/2/8/7/22879336/project_implicit_history.pdf. ("On average, people hold more positive implicit and explicit attitudes toward and stereotypes about those groups that are more culturally dominant or societally valued (e.g., men, White people, straight people, thin people) compared to those that are less culturally-dominant or societally-valued (e.g., women, Black or Asian people, gay people, fat people.").

103 Rachel D. Godsil, *Promoting Fairness? Examining the Efficacy of Implicit Bias Training in the Criminal Justice System*, *in* Bias in the Law 189, 197 (Joseph Avery & Joel Cooper eds.).

104 Kathryn M. Kroeper, et al., *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 Psychol., Pub. Pol'y & L. 198, 206–07 (2020)("Across two experiments with samples of judges and attorney-mediators, we found that these legal officials systematically appraised the cases of pro se parties as less meritorious than the cases of counseled parties.")

other social categories salient to judgments about parenting could impact custody decisions.

Not only may one's stereotypes cause one to more readily notice evidence that conforms with the stereotype, but these implicit biases can influence how we interact with others, which can itself impact the person being judged, creating a self-fulfilling prophecy.[105] When clients who are often subject to negative stereotypes become concerned that they are being judged by that negative stereotype, this "stereotype threat" can undermine communication and lead the clients to discount feedback or recommendations.[106]

Some circumstances exacerbate the risk of bias. For example, these biases may be especially pronounced when individuals believe themselves to be objective because the self-confidence bias reduces our inclination to question our own objectivity.[107] "Lawyers, forensic experts, and all those involved in the family justice universe have the potential for thinking they are not susceptible to these frailties. No human with power and privilege is immune."[108] Other factors that increase the risk of implicit stereotyping are ones that are common in family law disputes: time-pressured decision-making, intensified emotional states, stressful environments, and open-textured decision-making standards. [109]

Individuals whose identity does not fit the stereotypical identity in a particular setting often find themselves facing similar patterns of bias. Women employed in male-dominated fields for example often find themselves trying to balance between being seen as too feminine to be competent, and too masculine to be likable. Professor Joan C. Williams, a Distinguished Professor of Law at the University of California-Hastings and expert on social inequality refers to this as "The Tightrope."[110] When some aspect

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105 Jennifer K. Elek & Andrea L. Miller, The Evolving Science on Implicit Bias 8 (Mar. 2021).

106 Godsil, *supra* note 103, at 195-96.

107 Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 Organizational Behav. & Hum. Decision Processes 207, 210–11 (2007).

108 Dana E. Prescott, *Bending the Light of Social Science in Family Court: Epistemic Injustice and Epistemic Exceptionalism Matter*, 33 J. Am. Acad. Matrim. Law. 99, 116 (2020).

109 Elek & Miller, *supra* note 105, at 7-8.

110 Sky Mihaylo & Joan C. Williams, *Interrupting Bias: Inside and Outside the Courtroom*, 32 J. Am. Acad. Matrim. Law. 365, 370 (2020).

of our identity clashes with the behaviors required by our circumstances, we are forced to walk a tightrope, constantly checking and balancing our behaviors. Moreover, Professor William's research and the caselaw in employment discrimination cases reveals that these women often find that they must prove themselves over and over again, a phenomenon Professor Williams terms the "Prove it Again" bias.[111] Any person whose identity doesn't fit the dominant culture of their workplace may face these biases.

One can easily extrapolate these examples from workplace discrimination to the family law mediation setting. Gender stereotypes that associate men more readily with work and women with the home can be especially powerful biases. In family law disputes, these stereotypes can work in favor of or against a client's position, depending on whether their behaviors conform with the stereotype.[112]

We cannot change the fact that our brain needs biases to operate. How does one counter these unfair implicit stereotypes? Our brains are incredibly complex, and the implicit associations that we have formed can be unlearned or interrupted through a variety of debiasing techniques.[113]

Understanding our own implicit biases begins with identifying them. Of course, understanding that you have a negative or positive implicit bias doesn't necessarily predict your behavior in all circumstances nor does it mean you can't work to de-bias your shortcuts, but it is a thought-provoking and useful starting point. There are a variety of tools one can use to uncover bias and reduce the tendency toward unfair and inaccurate judgments. One set of tools is the Harvard Implicit Association Test.[114] These are on-line tests that are designed to measure implicit associations in about 28 different categories. Since 1998, more 20 million people have taken the Implicit Association Test (IAT).

The data from these studies point to the presence of implicit biases in society as a whole. For example, 75% of people who have

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111 "In-group members are seen as a better fit in the workplace, are stereotyped as more competent, and benefit from the ingroup favoritism majority group members enjoy. These factors mean that out-group members often have to prove themselves repeatedly in the workplace." *Id.* at 368.

112 Jeffrey J. Rachlinski & Andrew J. Wistrich, *Benevolent Sexism in Judges*, 58 San Diego L. Rev. 101, 110-16 (2021).

113 *Id*. at 115.

114 Project Implicit, https://implicit.harvard.edu/implicit/takeatest.html (last visited Sept. 8, 2024).

completed the IAT associate men more strongly with work roles and women more strongly with home and family roles.[115] The research also confirms that implicit biases can change over time. In a study of IAT test data between 2006 and 2013 regarding preferences for straight or gay people, researchers found that implicit preferences for straight people fell by more than 13% during that same time period.[116]

Three approaches to de-biasing are possible. One is to attempt to change the stereotypes themselves. One important strategy is individuation—recognizing and replacing stereotyped assumptions with specific information about the individuals involved.[117] As with the other biases previously discussed, perspective taking can also counter negative implicit stereotypes.[118] Current research indicates that these change techniques can reduce the strength of negative implicit associations but, unless consciously employed over time, these reductions do not typically continue.[119]

A second set of interventions focus not on changing the negative implicit stereotypes or associations but on interrupting their expression. Blinding procedures, for example auditions in which the listener cannot see the performer or blind peer review of research or scholarship, block information that would trigger stereotypes. These techniques have been shown to be effective in interrupting implicit bias.[120] The procedures are largely impractical for mediation of family law disputes however.

A third approach simply focuses on increasing the decision-maker's intrinsic motivation to avoid prejudice and treat

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115 Scott Sleek, *The Bias Beneath: Two Decades of Measuring Implicit Associations*, 31:2 The Observer 12 (Feb. 2018), https://www.psychologicalscience.org/observer/the-bias-beneath-two-decades-of-measuring-implicit-associations.

116 *Id*. at 13.

117 Jillian K. Swencionis & Susan T. Fiske, *More Human: Individuation in the 21st Century, in* Humanness and Dehumanization 276 (Paul G. Bain, Jeroen Vaes, & Jacques Philippe Leyens, ed., 2013).

118 Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78:4 J. Personality & Soc. Psychol. 708 (2000); Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. Personality & Soc. Psychol. 1027 (2011), http://dx.doi.org/10.1037/0022-3514.78.4.708.

119 Elek & Miller, *supra* note 105, at 15-16.

120 *Id.* at 17.

persons fairly.[121] Research indicates that "well-intentioned actors can overcome implicit bias when they are made aware of stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so."[122] Combined with regular reinforcement of the intention to reduce one's biased responses, this approach can cause individuals to interrupt their fast-thinking responses and use more slow-thinking, objective, and individualized approaches to making judgments about others. To this extent, programs that reinforce the values of mediation as grounded in impartiality and fairness can have a positive effect on reducing implicit bias.

C. *False Consensus Bias and Communication Preferences*

One of the most powerful of biases is our human tendency to assume that the way we see and interact with the world is how most people do.[123] This "false consensus effect" is a cognitive bias that can create significant misunderstandings. Researchers point to a number of factors that reinforce the false consensus bias. First, most people today tend to spend time with people who are like them. [124] We need to be especially aware of this tendency today, as more people live, work, and communicate in communities of cultural, political, age, race, and class isolation.[125] Second, our self-esteem is enhanced when we believe that our opinions and behavior are common or within the norm rather than exceptional.[126] Third, we are more familiar with our own attitudes and behaviors.

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121 *Id*. at 16-17.

122 Godsil, *supra* note 103, at 201.

123 Lee Ross, David Greene, & Pamela House, *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes,* 13 J. Experimental Soc. Psychol. 279 (1977), https://doi.org/10.1016/0022-1031(77)90049-X.

124 Zoe Leviston, Iain Walker, & Sarah Morwinski, *Your Opinion on Climate Change Might Not Be as Common as You Think,* 3 Nature Climate Change 334 (2013), doi:10.1038/nclimate1743.

125 *See, e.g.,* Bill Bishop, The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart (2008)(political and ideological segregation); Tanner Colby, Some of My Best Friends Are Black: The Strange Story of Integration in America (2013)(racial segregation); Marc Freedman & Trent Stamp, *The U.S. Isn't Just Getting Older. It's Getting More Segregated by Age,* Harv. Bus. Rev. (June 6, 2018), https://hbr.org/2018/06/the-u-s-isnt-just-getting-older-its-getting-more-segregated-by-age.

126 Leviston et al., *supra* note 124.

Thus, as we have seen regarding the "availability heuristic" previously discussed,[127] we tend to notice and recognize these attitudes and behaviors more readily in others. Finally, the false consensus effect tends to be stronger in situations in which we are especially confident of our opinion or believe very strongly that we are correct.[128]

This false consensus effect is very important in mediation. Communication is at the heart of mediation. However, communication styles differ significantly from person to person and are heavily influenced by culture, language, gender, and personality, among other factors. It is far too easy to misread stylistic preferences and draw inaccurate conclusions from these differences, aggravating rather than resolving conflict. We can draw inaccurate judgments about personality, meaning, and intent from the many cultural and individual variables in communication style such as formality, eye contact, nonverbal expressions, or emotional expressiveness.

Individuals vary in the preferred degree of formality or distance. Moreover, an individual's level of preferred formality can vary depending on the expectations one brings to a communication. For example, assume a conversation between Barbara and Robert. Suppose that Barbara has frequently experienced disrespectful treatment because of her gender, minoritized identity, or life experiences. She will be highly attuned to indicia of Robert's respect or disrespect in the conversation. In contrast, Robert assumes that others will respect him because that has been his experience. He takes the respect as a given and, because of the bias to assume that others are like him, he assumes that Barbara too proceeds from this position. Robert, then, may be more concerned about establishing rapport or "likeability." He may adopt a more casual or overly-friendly affect in speaking with Barbara, which she may then take as the feared signal of disrespect rather than a desire for connection.[129] The result of this mis-match of expectations and resulting communication signals is that neither Barbara nor Robert will leave the conversation satisfied.

Mediators must be highly attuned to the possible expectations parties may bring to mediation, monitor their own expectations, and help to translate signals. The wisest default position may

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127 *See supra* discussion in text at notes 71-73.

128 Leviston, *supra* note 124, at 334.

129 Godsil, *supra* note 103, at 195.

be to begin communications in mediation with more formality and move toward more informality, as moving in the other direction is more difficult.

Nonverbal communications are a critical aspect of mediation. The classic research regarding non-verbal communication was conducted by UCLA Psychology Professor Albert Mehrabian, who found that only seven percent of the meaning of communication is conveyed by words.[130] The rest is nonverbal. Tone of voice is a part of nonverbal communication. Dr. Mehrabian's research concluded that tone of voice conveyed 38% of meaning, especially when words convey one message and nonverbal expressions convey another. [131] Yet individuals may vary the volume, rate, and tonal variety of their speech. The degree to which pauses and silence are comfortable or uncomfortable varies among individuals as well. If participants in mediation do not share the same default speaking style, they can easily draw mistaken assumptions about the speaker or misunderstand the meaning of what they are saying.[132]

Consider for example an individual who is nodding as another person is speaking. What does that nonverbal behavior mean? Sociolinguist Deborah Tannen's popular research investigating gender differences in communication suggested that when men nod as others are speaking, they are far more likely to be conveying their agreement with the speaker, whereas women are more often simply encouraging the speaker to continue speaking.[133] What a dramatic difference that is: "I agree" versus "I'm listening, continue." Of course, one cannot even conclude from head nodding that the listener is actually listening. Head nodding as others speak can simply be a reflexive habit and the listener's mind could be somewhere else entirely. This simple example demonstrates how easily one can misunderstand nonverbal communication in mediation, yet how important it is to attend to it.

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130 Albert Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes 75 (2d ed. 1981).

131 *Id.* at 76.

132 U.S. Dept. Health & Human Services, Think Cultural Health, https://thinkculturalhealth.hhs.gov/assets/pdfs/resource-library/communication-styles.pdf (last visited Apr. 9, 2024).

133 Deborah Tannen, You Just Don't Understand: Women and Men in Conversation (2007).

One might assume that divorcing spouses would be well aware of the meaning of each other's nonverbal communications. However, communication difficulties are often part of the very reason a relationship dissolves. Attorneys and mediators must be attuned to the assumed meanings they and the parties in mediation are making based on nonverbal communication. Questions to uncover these hidden assumptions are at the heart of the mediator's skill set.

Eye contact is another important part of non-verbal communication. Research shows that when a speaker maintains eye contact with a listener, the listener is more likely to perceive the speaker as confident and intelligent, more likely to have positive feelings about the speaker, and is more likely to remember and believe what the speaker has said.[134] However, eye contact, like so many other aspects of nonverbal communication, is highly contextual. For some neurodiverse individuals, for example, eye contact during face-to-face conversations can make it difficult to hear and process information and can even be physically and psychologically painful.[135] Likewise, in some cultures, eye contact either while speaking or while listening may be viewed as rude, aggressive, or a sign of dishonesty.[136] Here again, inquiry rather than assumption, is the best route to understanding meanings.

Yet another communication style difference is the degree of expressiveness; that is, how openly people convey their inner thoughts and feelings, either through facial expression or speech. Similar to expressiveness, individuals and cultures vary in the degree to which self-disclosure (talking about difficult personal situations) is considered appropriate. These differences often reflect

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134 *See generally* Laurence Conty, Nathalie George, & Jari K. Hietanen, *Watching Eyes Effects: When Others Meet the Self,* 45 Consciousness & Cognition 184 (2016), https://doi.org/10.1016/j.concog.2016.08.016 (noting five categories of effects of direct gaze: increasing attention, enhancing self-awareness, increasing memory, activating pro-social behaviors, and inducing favorable evaluations of others).

135 Dominic A. Trevisan, et. al., *How Do Adults and Teens with Self-Declared Autism Spectrum Disorder Experience Eye Contact? A Qualitative Analysis of First-hand Accounts*, 12:11 PLoS One (Nov. 28, 2017), doi: 10.1371/journal.pone.0188446. PMID: 29182643; PMCID: PMC5705114.

136 Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 Clinical L. Rev. 373, 394 (2002).

one's culture,[137] gender,[138] and personality.[139] Even in cultures that value high expressiveness or self-disclosure, the appropriateness of sharing emotions or problems may depend on the relationship between speaker and listener.

One cannot ignore this difference in family law mediations, where so many judgments of emotion and intent are critical to being able to craft resolutions. Suppose for example that Cameron and Dakota are divorcing. Cameron's facial expressions, gestures, and speech are often emotive and spontaneous, sometimes even exaggerated to make a point. Cameron freely shares emotions. Dakota minimizes the expression of emotions both non-verbally and in speech. While Cameron may think of herself as open and authentic, Dakota may conclude that she is immature and volatile. Conversely, Dakota may consider himself as cool and rational but Cameron may consider him cold or indifferent. Breaking through these conversational style differences to the underlying interests of Dakota and Cameron can present a significant challenge in mediation.

The lesson for mediators and attorneys representing clients in mediation is simply that, while attending to nonverbal cues is a critical part of communication, these signals are just that: cues. Nonverbal communication and communication styles can point to the need to explore more deeply the attitudes, emotions, or interests of the parties in mediation. Relying on these signals alone, however, can lead to significant miscommunication. Because of the false consensus affect, one must take particular care to question the assumptions of agreement or alignment from nonverbal communication alone.

III. Conclusion

Bias is a critical consideration in the mediation of family law disputes. Attorneys and mediators alike must combat the impact

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137 Itziar Fernández, et al., *Differences Between Cultures in Emotional Verbal and Non-verbal Reactions*, 12 Psicothema 83, 84 (2000) https://www.redalyc.org/pdf/727/72796009.pdf ("displays rules are socially learned norms that regulate the communication of emotions within a cultural context.").

138 Ann M. Kring & Albert H. Gordon, *Sex Differences in Emotion: Expression, Experience, and Physiology*, 74:3 J. Personality & Soc. Psychol. 686 (1998), https://doi.org/10.1037/0022-3514.74.3.686.

139 Heidi R. Riggio & Ronald E. Riggio, *Emotional Expressiveness, Extraversion, and Neuroticism: A Meta-Analysis*, 26:4 J. Nonverbal Behavior 194, 199-200 (Winter 2002).

of invidious discrimination and bigotry. They must be aware of the legal system's explicit policy choices, in the shadow of which negotiations occur.[140]

However, the most pervasive biases are neither express prejudice nor policy preferences, but are the automatic predilections that humans use to manage the barrage of information they must process from second to second. These implicit biases look for ways to avoid cognitive dissonance, so that we search for, notice, and accept information that confirms our pre-existing unconscious judgments – judgments that have been built up from a lifetime of experiences and exposures. These biases lead us to favor the immediate, accessible, information – simplifying complexity and short-circuiting more analytical decision-making. Our brains store information in patterns and stories that can result in unfair assumptions and associations. Our tendency to assume that others are like us, can lead to misunderstandings, not only regarding communications from those who are different but also those who are like us.

All of these unconscious biases can lead to false assumptions, poor decisions, unfair judgments, and failed agreements. Accordingly, mediators must learn how to recognize and combat these biases. Fortunately, the standard mediator's toolkit has a number of tools that are especially helpful to combating implicit biases. These include paying careful attention to timing and process, to create environments in which automatic assumptions can be replaced by more careful and deliberate examination of meanings. The mediator's use of active and reflective listening and perspective taking provide the best antidotes to the faulty conclusions that can flow from implicit biases. Attorneys representing their clients in mediation can assist in the facilitation process by bringing these same tools to bear in preparing their clients for mediation. By attending to bias reduction in mediation, family law professionals can increase the quality of communication and decision-making and thereby the health and stability of families as they re-form their relationships.

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140 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

Redefining Resolution: How Early Dispute Resolution (EDR) Is Re-Shaping Modern Family Law Practice

by
Susan Guthrie*

In the evolving landscape of family law, the traditional litigation mechanisms are being reexamined under the lens of innovation and client-centered approaches. The advent of Early Dispute Resolution (EDR) into legal practice is at the forefront of this transformation, heralding a new era where client self-determination, empathy, and accessibility define the resolution of family disputes. This exploration delves into the nuanced interplay between EDR and technological advancements, examining their impact on the dynamics of family law proceedings, the experiences of litigants, and the broader implications for practitioners and the legal system. By critically analyzing the challenges and opportunities these innovations present, this article aims to provide a comprehensive understanding of their potential to foster a more just and effective resolution process while also highlighting the ethical considerations and practical adaptations required of family law practitioners in this changing landscape. This article critically examines the transformative role of EDR in modern family law practice, arguing that the adoption of EDR methodologies—notably mediation, collaborative law, and cooperative practice—represents a pivotal shift toward more empathetic, efficient, and client-centered legal processes. By exploring the unique benefits and inherent challenges of EDR, alongside practical insights for practitioners, the article seeks to underscore the importance of integrating these approaches to better meet the complex needs of families in dispute. In Part I, this article examines the traditional litigation framework that family law cases have followed for decades. Part II explores the drawbacks of the traditional litigation model and the need for a more client-centered approach. Part III introduces EDR as a viable alternative to traditional litigation, highlighting

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its benefits and various methodologies. Part IV delves into ethical considerations surrounding EDR implementation, emphasizing the importance of informed consent and appropriateness screening. Finally, Part V concludes by addressing the transformative potential of EDR in reshaping the landscape of family law practice and offers guidance for practitioners seeking to integrate EDR into their work.

I. The Traditional Litigation Framework in Family Law

Litigation is a crucial mechanism for addressing highly personal and complex issues affecting families. Through the legal process, individuals can navigate the difficult terrain of marital dissolution, custody disputes, and the division of assets with the guidance of impartial judiciary figures. This framework not only facilitates the resolution of deeply personal conflicts but also ensures that all parties' rights and interests, especially children's, are protected and prioritized.[1] By providing a structured avenue for dispute resolution, family law litigation encourages parties to engage in meaningful negotiations, often leading to settlements that reflect the best interests of the family unit, without necessitating a full trial.[2] Furthermore, it upholds the principle of legal accountability, deterring individuals from actions that could harm family relationships or financial stability. Through its contribution to the evolution of family law doctrine, litigation in this field offers redress for immediate familial disputes and shapes broader societal norms and expectations regarding family responsibilities and rights, reinforcing the social fabric.[3]

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1 Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9(1) U.C. Davis J. Juv. L. & Pol'y 57 (2005).

2 Karine Poitras, Rachel Birnbaum, Michael Saini, Nicholas Bala, & Francine Cyr, *Family Dispute Resolution: Characteristics of Cases Resolved by Trial*, 123 Children & Youth Serv. Rev. 105832 (Apr. 2021), https://doi.org/10.1016/j.childyouth.2020.105832.

3 Daniel Martin Katz, Corinna Coupette, Janis Beckedorf, & Dirk Hartung, *Complex Societies and the Growth of the Law*, 10 Sci. Rep. 18737 (Oct. 30, 2020), https://www.nature.com/articles/s41598-020-73623-x.

A. *Challenges and Drawbacks of Litigation*

Litigation in the context of family and divorce law is not without its drawbacks, however, in the ways it impacts participants, families, children, society, and even the practitioners themselves. The adversarial nature of litigation can exacerbate existing tensions between parties, leading to increased emotional distress and animosity.[4] This is particularly detrimental in cases involving children, who may be caught in the crossfire of parental conflict, potentially leading to long-term psychological impacts and strained parent-child relationships.[5]

Moreover, the litigation process can be time-consuming and financially draining for the parties involved, consuming resources that could otherwise be used for the family's benefit or individual healing. The protracted nature of legal battles may delay the emotional closure and healing process for individuals, prolonging the period of uncertainty and instability, especially for children who require stable environments to thrive.[6]

For society, the adversarial approach to resolving family disputes may reinforce a culture of litigation over mediation and cooperation, undermining community ties and social cohesion.[7] It may also significantly burden the legal system, diverting resources from other areas of public interest.

Practitioners in the field of family and divorce law are not immune to the challenges posed by litigation. The emotionally charged nature of family law cases can lead to burnout and ethical dilemmas,[8] as attorneys navigate the delicate balance between

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4 Honjian Cao, Mark A. Fine, & Nan Zhou, *The Divorce Process and Child Adaptation Trajectory Typology (DPCATT) Model: The Shaping Role of Predivorce and Postdivorce Interparental Conflict*, 25(3) Clin. Child & Fam. Psychol. Rev. 500 (2022), https://doi.org/10.1007/s10567-022-00379-3.

5 Karey L. O'Hara, C. Aubrey Rhodes, Sharlene A. Wolchik, Irwin N. Sandler, & Jenn Yun-Tein, *Longitudinal Effects of Postdivorce Interparental Conflict on Children's Mental Health Problems Through Fear of Abandonment: Does Parenting Quality Play a Buffering Role?*, 92(4) Child Dev. 1217 (Jan. 2021), https://doi.org/10.1111/cdev.13539.

6 *Id.* at 1477.

7 Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes,* 9(4) Behav. Sci. & L. 387 (Fall 1991), https://doi.org/10.1002/BSL.2370090404.

8 Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 UMKC L. Rev. 965, 984-85 (2007).

advocating for their client's interests and mitigating the adversarial impact on the family unit. The high stakes and emotional intensity of these cases can also contribute to stress and professional dissatisfaction, impacting the well-being of legal professionals.[9]

So, while litigation in family and divorce law provides a necessary mechanism for dispute resolution, its negative aspects underscore the importance of seeking alternative dispute resolution methods, when possible, to mitigate the emotional, financial, and societal costs associated with legal battles over family matters.

B. *The Discovery Process in Family Law Litigation*

As an example of the challenges inherent in the litigation approach for both litigants and attorneys, consider the process of navigating the complexities of the discovery process in family law. This phase, aimed at uncovering relevant facts and financial details, can inadvertently fuel the fire of conflict and animosity between parties. The necessity to be thorough and diligent, as dictated by ethical standards, often results in a meticulous and extensive exploration of personal and financial lives. This exhaustive scrutiny can not only increase the adversarial tension but also significantly escalate the costs associated with litigation.[10]

Anecdotally, as time progresses and situations evolve, previously gathered information may become outdated, necessitating further discovery to ensure decisions are made on the most current basis. This cyclical nature of discovery can prolong the litigation process, leading to fatigue and frustration among the parties involved. The requirement for court intervention to resolve disputes over the scope of discovery or to compel the production of documents adds another layer of complexity and delay, further straining the emotional and financial resources of the litigants.

Moreover, the outcomes of the discovery process may present a disproportionate cost-benefit analysis. Significant expenses and emotional tolls may yield information with limited impact on the

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9 Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10(1) J. Addiction Med. 46 (Jan./Feb. 2016), https://doi.org/10.1097/ADM.0000000000000182.

10 David S. Dolowitz & Jamila Abou-Bakr, *Attorney-Client Relations in Divorce Cases: The Intersection of Ethics and Malpractice in Family Law,* 31 J. Am. Acad. Matrim. Law. 345, 365-366 (2019).

final settlement or resolution, questioning the efficiency and efficacy of the process. This realization can lead to dissatisfaction with the legal system and a sense of injustice or imbalance, as parties grapple with the fallout of an exhaustive and invasive process that may not significantly alter the course of their case's outcome.[11]

The impact of these challenges is not confined to the litigants alone. Family law attorneys navigating these treacherous waters face the daunting task of balancing the ethical obligation to zealously represent their clients with the practical need to manage costs and emotional strain.[12] This balancing act can strain the attorney-client relationship, as clients may struggle to understand the necessity of certain actions or become frustrated with the pace and cost of the process. In fact, a recent survey in the United Kingdom noted that the most common client complaints in law firms were related to delays, failure to advise, and excessive costs.[13] Although based in the UK, this study echoes anecdotal evidence and experiential conclusions observed in the United States, underscoring a universal challenge within the legal profession. The implications of these findings suggest a pressing need for legal practitioners to adopt more alternative dispute resolution (ADR) strategies, with a particular emphasis on Early Dispute Resolution (EDR). EDR represents a proactive approach, seeking to address and resolve disputes at the earliest stage possible, thereby significantly reducing the financial and emotional toll on the parties involved.

While the discovery process serves an essential function in ensuring informed decision-making, its adversarial nature and potential to escalate conflict within family law litigation underscore the need to explore alternative pathways to resolution. Recognizing the drawbacks of traditional litigation models, including increased costs, emotional distress, and dissatisfaction with the legal system, many legal professionals and scholars have advocated for the broader adoption of more collaborative and cost-effective dispute resolution methods. These alternative approaches may offer a more constructive and humane means of resolving family law

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11 Andrew S. Grossman, *Avoiding Legal Malpractice in Family Law Cases: The Dangers of Not Engaging in Financial Discovery,* 33 Fam. L.Q. 361, 374 (1999).

12 Model Rules of Prof'l Conduct r. 1.3 (Am. Bar Ass'n 1983).

13 Alvin Chen, *Addressing Client Dissatisfaction – A Primer for Law Practices*, Singapore L. Gazette, Mar. 2021, https://lawgazette.com.sg/practice/compass/addressing-client-dissatisfaction-a-primer-for-law-practices/.

disputes, benefiting litigants, their families, and the legal system with Early Dispute Resolution at the forefront.

II. Early Dispute Resolution (EDR) as an Alternative

Early Dispute Resolution (EDR) presents a viable alternative to the challenges posed by the traditional litigation process in family law. This approach encompasses a range of methodologies designed to facilitate the resolution of disputes at an early stage, thereby minimizing the emotional and financial toll on the parties involved. By emphasizing communication, negotiation, and cooperation from the outset, EDR aims to resolve conflicts before they escalate into protracted legal battles. The essence of this approach lies in its focus on early intervention, which can prevent disputes from developing into full-blown litigation. This approach conserves resources and spares clients from the adversarial and often public nature of court proceedings. By identifying potential issues early and employing strategies such as negotiation, mediation, or cooperation, EDR facilitates a more amicable and collaborative environment for dispute resolution.[14] This, in turn, can lead to more satisfactory outcomes for all parties, often preserving relationships in a way that traditional litigation cannot.

The growing acceptance and trend toward adopting EDR methodologies in legal disputes is exemplified by the recent unanimous approval and adoption by the American Bar Association House of Delegates of Resolution 500, urging the increased use of Early Dispute Resolution. Resolution 500 reads:

> RESOLVED, that the American Bar Association urges lawyers and all interested parties to increase the informed and voluntary use of Early Dispute Resolution: party-directed, non-adjudicative approaches to resolve disputes in a time-efficient and cost-effective manner, including, but not limited to, direct negotiation, mediation, and ombuds.[15]

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[14] John Lande, *Dispute Prevention and Early Dispute Resolution Framework*, Indisputably (Apr. 9, 2020), http://indisputably.org/2020/04/dispute-prevention-and-early-dispute-resolution-framework/.

[15] Am. Bar Ass'n, Section of Dispute Resolution, Report to the House of Delegates, Feb. 2024, https://www.americanbar.org/content/dam/aba/administrative/news/2024/mym-hod-resolutions/500.pdf.

The field of EDR encompasses a variety of early dispute resolution movements in the courts and private dispute resolution ranging from relatively informal to quite structured and refined as identified by Professor John Lande.[16] The early dispute resolution (EDR) processes identified by Lande include Lawyering with Planned Early Negotiation, Pre-Suit Mediation, Cooperative Practice, Planned Early Two-Stage Mediation, Planned Early Multi-Stage Mediation, Collaborative Practice, Guided Choice, Planned Early Dispute Resolution Systems, and Early Dispute Resolution Institute Process. This article focuses on Cooperative Practice, Collaborative Practice, and Planned Early Multi-Stage Mediation, since all are effective early dispute resolution processes that offer a range of structured to flexible negotiation and mediation options and each allows a robust role for the family law advocate to ensure clients are adequately represented in reaching agreement.

The following is a descriptive chart of these EDR modalities with simplified statements of the pros and cons of each approach for both the parties and attorneys included.

EDR Process	Pros for Clients	Cons for Clients	Pros for Attorneys	Cons for Attorneys
Cooperative Practice	More structure than informal negotiation. Flexibility without disqualification agreement. Encourages collaboration and preservation of relationships.	Might not be as effective in highly contentious disputes. Less formal than collaborative practice.	Encourages creative problem-solving. Can build a cooperative network of professionals.	Potentially less control over the process. Requires buy-in and commitment from both sides. Discovery may not be exhaustive

16 John Lande, *Survey of Early Dispute Resolution Movements and Possible Next Steps* (Apr. 22, 2021), University of Missouri School of Law Legal Studies Research Paper No. 2021-06, https://ssrn.com/abstract=3832282.

EDR Process	Pros for Clients	Cons for Clients	Pros for Attorneys	Cons for Attorneys
Planned Early Multi-Stage Mediation	Comprehensive approach for complex disputes. Scheduling promotes preparedness and thoroughness. Facilitates detailed exploration of issues.	Time-consuming and potentially more expensive. Can be emotionally draining over multiple sessions.	Enables deep engagement with the case. Facilitates thorough exploration of legal and emotional issues.	Significant time investment. Requires skill in managing prolonged mediation processes.
Collaborative Practice	Specifically designed for family law disputes. Encourages amicable resolutions and preserves relationships. Binding agreement motivates genuine negotiation.	If negotiations fail, must hire new attorneys for litigation, increasing costs. Not suitable for all types of disputes.	Specialized practice area that can enhance reputation. Promotes long-term client satisfaction.	Cannot represent client in court if collaborative process fails. Requires specific training and commitment to collaborative principles.

Incorporating these EDR modalities into family law disputes offers several compelling advantages. First and foremost, it significantly reduces the need for extensive discovery by encouraging transparency and voluntary exchange of information between parties.[17] This not only curtails the time and expense associated with litigation but also lowers the emotional intensity often exacerbated by the invasive nature of traditional discovery processes. By fostering a spirit of collaboration, EDR helps maintain a focus on the mutual interests of the parties, particularly when children are involved, thus promoting outcomes that are in the best interest of the family unit as a whole.

Moreover, EDR mechanisms, such as mediation and collaborative law, provide a more personalized and flexible approach to dispute resolution. Parties are empowered to craft their agreements,

17 Grossman, *supra* note 11, at 365.

taking into account their unique circumstances and priorities, which can lead to more satisfactory and enduring solutions. This level of autonomy and control is often lacking in the conventional litigation model, where outcomes are determined by the court and may not align with the specific needs or desires of the family.

For family law practitioners, EDR represents an opportunity to fulfill their ethical obligations to their clients in a manner that is both effective and compassionate. By advocating for EDR approaches, attorneys can guide their clients through a process that is more constructive and less adversarial, thereby preserving relationships and promoting healing. This shift also aligns with a growing professional recognition of the importance of holistic legal practices that address the emotional, psychological, and financial well-being of clients.

The integration of EDR into family law has the potential to transform litigants' experiences and alleviate the burden on the legal system. It has long been recognized that by resolving disputes early and efficiently, EDR can reduce the backlog of cases and free up judicial resources for matters that require formal adjudication.[18] This contributes to a more efficient and effective justice system that better serves society's needs.

III. Cooperative Practice: A Formalized Approach to Early Negotiated Settlement Process

In the realm of family law, Cooperative Practice stands out as a particularly relevant and effective Early Dispute Resolution (EDR) method, which may sound familiar to many practitioners. Cooperative Practice is based upon an agreement to negotiate and communicate cooperatively but does not require a disqualification from litigation as necessitated in collaborative law. The familiarity with this approach for family law attorneys is underpinned by the statistical reality that many family law cases conclude with some form of agreement rather than proceeding to trial. The high settlement rate in family law cases, reportedly only three percent to five percent of cases go to trial[19], underscores the premise that

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18 Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 Fordham L. Rev. 1, 9 (1990), https://ir.lawnet.fordham.edu/flr/vol59/iss1/1.

19 Pauline H. Tesler, *Collaborative Family Law*, 4 Pepp. Disp. Resol. L.J. 323 (2004), https://digitalcommons.pepperdine.edu/drlj/vol4/iss3/2.

most family law cases are resolved through negotiated settlement. Where common practice and cooperative practice may diverge for some professionals, however, is the timing of that settlement and the more formalized process. For most practitioners and their clients, a negotiated settlement is the product of a long time frame that often includes a thorough, even exhaustive, discovery process and then a protracted negotiation process that may be complicated or impacted by the adversarial nature of the discovery as discussed above. So, while the clients certainly benefit from concluding their matter with an agreement, rather than entering into the even more costly and difficult trial process, they do not receive many, if any, of the benefits of an early resolution. Indeed, in the classic case of the "settlement on the courthouse steps," parties are often in a very similar emotional and financial state to where they would be if they tried the case but with a last-minute agreement rather than an adjudicated judgment.

In contrast, cooperative practice as an EDR modality, is designed to promote early and productive negotiation intended to benefit both parties.

> Cooperative practice generally involves an explicit process agreement at the outset, based on principles of: (1) acting civilly, (2) responding promptly to reasonable requests for information, (3) disclosing all relevant financial information, (4) obtaining joint expert opinions before obtaining individual expert opinions, (5) obtaining expert input before requesting a custody study or appointment of a guardian ad litem, and (5) good-faith negotiation sessions, including four-way sessions where appropriate, to reach fair compromises based on valid information.[20]

According to the cooperative practitioners interviewed by John Lande,[21] the mindset in cooperative cases differs markedly from litigation-oriented cases because, from the outset, there is an agreement to negotiate, not litigate, and because clients are more involved in the process. There is less coercive motion practice and more cooperative interplay to reach interim agreements, quantify the estate and issues, and negotiate final terms, and it all flows from an initial written agreement to engage in the cooperative model.

This high rate of settlement underscores the natural alignment between the cooperative practice's ethos and the practical outcomes observed in family law disputes. Cooperative practice,

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20 John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*. 2008 J. Disp. Resol. 203.

21 *Id.*

by design, facilitates a more structured approach to negotiation than informal talks, yet it remains less rigid than other forms of dispute resolution, such as Collaborative Law. It emphasizes the importance of open communication, mutual respect, and a willingness to work together towards a shared resolution, without the necessity of a disqualification agreement that mandates the withdrawal of attorneys if the process transitions to litigation. This method strikes a delicate balance, offering a pathway that encourages parties to actively engage in crafting their agreements, while fostering an environment where the preservation of relationships, especially when children are involved, is deemed as important as the legal outcomes. The widespread prevalence of agreements in family law matters attests to the efficacy of cooperative practices and their resonance with the objectives and needs of those navigating these often complex personal and legal challenges.

IV. The Widespread Acceptance of Collaborative Law into Family Law Practice

Another important evolution in the alternative dispute resolution (ADR) landscape and EDR, particularly relevant to family law, is the collaborative law model. This model has garnered significant attention and endorsement, most notably through the recent approval of the Uniform Collaborative Law Act (UCLA)[22] by the American Bar Association (ABA). This recognition marks a critical milestone in formalizing the collaborative process, highlighting its efficacy and the legal profession's commitment to fostering non-adversarial dispute resolutions. As with the EDR Resolution 500 discussed above, the UCLA Resolution 703 was unanimously approved by the ABA Board of Governors as follows:

> RESOLVED, that the American Bar Association approves the Uniform Collaborative Law Rules and Uniform Collaborative Law Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2010, as appropriate Rules or an appropriate Act for those states desiring to adopt the specific substantive law suggested therein. [23]

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[22] Unif. Collaborative Law Rules (Unif. Law Comm'n 2010), https://www.uniformlaws.org/viewdocument/final-act-101210?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf.

[23] American Bar Ass'n, Resolution 500 (adopted by the House of Delegates, 2024 Midyear Meeting, Louisville, Ky., Feb. 5, 2024), https://www.americanbar.org/content/dam/aba/administrative/news/2024/mym-hod-resolutions/500.pdf.

In commenting on the ABA's support for the UCLA,[24] Professor David Hoffman notes that collaborative law is distinguished by its unique approach to resolving family disputes. Central to this model are the principles of voluntary participation and transparency among all parties. Unlike traditional litigation, which often escalates conflict and complicates the discovery process, collaborative law encourages open communication and a problem-solving mindset. This model operates on the premise that parties, with the support of their attorneys and other professionals, can achieve mutually beneficial outcomes without resorting to court intervention.

A key feature of the collaborative law model is its limited scope engagement, which serves as a safeguard for the discovery issue commonly encountered in family law matters. By agreeing to share information freely and work constructively towards a settlement, parties minimize the need for a protracted and often contentious discovery process. This approach not only saves time and resources but also mitigates the emotional toll on all involved.

Moreover, the collaborative process includes a provision which provides that, should the process fail to result in a settlement and litigation is pursued, the originally retained attorneys must withdraw from the case.[25] This requirement underscores the committed and non-adversarial stance of collaborative law, encouraging both parties and their legal representatives to invest fully in the process.

The requirement for lawyers to withdraw if a dispute cannot be resolved outside of court has sparked debate. Critics argue this pressure to settle may compromise client interests due to the lawyer's need to avoid withdrawal. Additionally, concerns arise over the potential for one lawyer to effectively force another's withdrawal from a case. Leading family law attorney, Forrest S. Mosten, however, defends the use of the "disqualification" clause, arguing that it aligns with lawyers' traditional duties to their clients. He clarifies this position by analyzing how this approach fits within the ethical framework of legal practice, addressing both the pressure to settle and the issue of forced withdrawal.

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24 David A. Hoffman, *The Time Has Come for the Uniform Collaborative Law Act*, Mass. Law. Wkly., Mar. 2, 2024, https://masslawyersweekly.com/2024/03/02/the-time-has-come-for-the-uniform-collaborative-law-act/.

25 Unif. Collaborative Law Act § 9 (2010).

> If you serve as a lawyer for a client who decides to use collaborative divorce, your client is entitled to the same professional obligations of competence and loyalty to which you would [be] obligated in any other lawyer arrangement. In concrete terms, this means that you have a duty to pursue the client's objectives, protect your client from financial harm and legal exposure, inform your client of legal rights, produce competent work, keep all attorney-client communications confidential, avoid conflicts of interest, and ensure that your fees are fair and that clients understand them. Although your approach may differ from the traditional model, you are still a lawyer.[26]

As noted, representing a client in a collaborative divorce does not absolve a lawyer from any professional obligations, including competence, loyalty, protection from financial harm and legal exposure, informing about legal rights, confidentiality, avoiding conflicts of interest, and fairness in fees.[27] This ethical framework remains steadfast, irrespective of the chosen dispute resolution model, reinforcing the role of the lawyer as an advocate and advisor, even within the collaborative law paradigm.

It is important for family law attorneys to be aware that despite practitioners' initial hesitation, clients have increasingly embraced collaborative divorce, and those who choose this approach are overwhelmingly satisfied with their choice. In research by the International Academy of Collaborative Professionals (IACP) on about 1,000 collaborative divorce cases, only nine percent of clients with successful outcomes were dissatisfied, and a mere eight percent would not recommend the process to others.[28] This high level of client satisfaction is just one of the reasons that since its inception in 1990, Collaborative Divorce Practice has become widespread and increasingly well-known and requested by the divorcing public. In fact, in the United States, twenty-three states have adopted the UCLA, and there are currently four additional states with pending legislation for approval.[29] In addition, the practice of collaborative law has grown rapidly, and the American

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26 Forrest S. Mosten, Collaborative Divorce Handbook: Effectively Helping Divorcing Families Without Going to Court 45, 46 (2009).

27 William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 Pepp. Disp. Resol. L.J. 351, 363-67 (2004).

28 Linda Wray, *IACP Research Regarding Collaborative Practice (Basic Findings)*, 12(1) Collaborative Rev. 6 (2012).

29 Collaborative Law Act, Legislative Bill Tracking, https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf#LegBillTrackingAnchor (last visited Apr. 22, 2024).

Bar Association Sections of Family Law and Section of Dispute Resolution, the International Academy of Matrimonial Lawyers (IAML), and the American Academy of Matrimonial Lawyers (AAML) all have collaborative committees.

Incorporating collaborative law into family law practice offers a robust mechanism for addressing the inherent challenges of litigation, especially the often long and tortuous process of discovery. By advocating for and engaging in collaborative practices, family law practitioners can provide their clients with a more humane, efficient, and effective path to resolving disputes. This shift towards collaborative law not only reflects an evolution in dispute resolution strategies but also aligns with the broader legal community's recognition of the need for more client-centered and therapeutic legal processes.

A. *Planned Early Multi-Stage Mediation: The Neutral Factor*

The final EDR modality to focus on is Planned Early Multi-Stage Mediation. While many family law practitioners may be familiar with a mediation format comprised of half-day or full-day, marathon sessions, often late in the litigation process as a last chance to settle the outstanding issues before a looming trial date, the process of planned early multi-stage mediation is quite different. Planned Early Multi-Stage Mediation (PEMSM) is a structured approach to dispute resolution that involves engaging in mediation at predetermined stages throughout the lifecycle of a conflict or legal case.[30] Unlike traditional mediation, which typically occurs as a one-time effort to settle a dispute, PEMSM strategically schedules multiple mediation sessions at critical points during a dispute. This approach allows for the early identification and resolution of issues, potentially avoiding the escalation of conflicts and the need for litigation, or at least reducing the scope of litigation.

Here is a more specific breakdown of its key characteristics:

1. *Early Engagement:*

PEMSM emphasizes starting the mediation process early in the dispute cycle. This early intervention aims to address and resolve conflicts before they become deeply entrenched, reducing the time and resources required for resolution.

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[30] John Lande, *The Evolution to Planned Early Multi-Stage Mediation*, Kluwer Mediation Blog (Aug. 28, 2020), https://bit.ly/3EqMRrk.

2. *Multi-Stage Process:*

It recognizes that complex disputes may not be resolved in a single mediation session. Instead, it plans for multiple sessions that correspond with the evolving nature of the dispute and the needs of the parties involved. Each session aims to resolve aspects of the dispute or to build agreements that serve as stepping stones toward a final resolution.

3. *Flexibility and Adaptability:*

The process is designed to be flexible, allowing adjustments based on the dispute's dynamics and the parties' evolving positions. This adaptability is crucial for addressing underlying issues that may not be apparent at the outset.

4. *Collaboration and Participation:*

PEMSM encourages active participation from all parties and promotes a collaborative approach to problem-solving. This collaboration can lead to more sustainable and mutually beneficial outcomes.

5. *Facilitated by Neutral Mediators:*

The process is facilitated by neutral mediators who guide the parties through each stage, helping them to communicate effectively, understand each other's perspectives, and work towards a resolution.

PEMSM can be particularly effective in complex disputes where issues may unfold over time or where ongoing relationships between parties need to be preserved such as with divorces among co-parents. In this way, PEMSM is extremely well-suited to the restructuring of the family that takes place in divorce and family matters. This approach aligns with the principles of Early Dispute Resolution (EDR) by prioritizing early intervention, efficiency, and the preservation of relationships. Agreeing to mediate from the outset, or in the early stages of the litigation, allows all involved to curate a process that meets the needs of the parties while fostering a cooperative and transparent approach to disclosure and negotiation with the support of a neutral facilitator and before the rigors of the litigation process have an opportunity to accelerate and

amplify the discord, pushing agreement and accord further and further away.

Incorporating Planned Early Multi-Stage Mediation (PEMSM) into family law practices offers a transformative approach, circumventing the adversarial nature of traditional litigation. This method's emphasis on early engagement and iterative problem-solving through neutral mediation fosters a more amicable, transparent, and cooperative process. By addressing issues progressively, PEMSM not only facilitates a more harmonious resolution but also significantly mitigates the emotional and financial strain typically associated with divorce proceedings. Its adaptability and focus on preserving relationships make it an ideal choice for family law matters, offering a path toward constructive and equitable outcomes while maintaining the dignity and respect of all parties involved.

B. *The Ethical Gateway: Screening for Appropriateness and Informed Consent*

A key factor with all methods of EDR is that cooperative practice, collaborative practice, and PEMSM are opt-in processes. In other words, both clients and attorneys must agree to participate in accordance with the practice agreement for the process. Unlike litigation, which operates under the specter of court intervention and coercive motion practice to compel participation, EDR requires full agreement on participation, and that fact alone sets a transformative tone for the evolution of the process. It is, in many cases, the first agreement of the parties and one that generally will lead to many more agreements.

When considering the ethical obligations of an attorney to a client it must be highlighted that attorneys are required to inform clients about all available process options for divorce, including litigation, mediation, collaborative law, and other alternative dispute resolution (ADR) methods.[31] This duty is part of the broader ethical requirement for lawyers to provide competent representation, which involves advising clients on the legal, financial, and emotional implications of each option. By ensuring clients are fully informed of their choices, attorneys empower them to make decisions that best align with their interests, goals, and circumstances. This is a critical obligation and a hallmark of ethical practice for attorneys.

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31 Model Rules of Prof'l Conduct r. 1.4 (Am. Bar Ass'n 1983).

In addition to ensuring that clients can make informed consent, attorneys also must screen for appropriateness of participation in EDR modalities. John Lande and Forrest S. Mosten extensively analyzed this screening process and thoroughly explored the responsibilities of collaborative lawyers to ensure the collaborative law process is suitable for their clients' specific circumstances.[32] They highlighted the necessity for lawyers to engage in a detailed screening process to determine whether the collaborative process is an appropriate method for resolving a client's dispute and to secure informed consent from the client for engaging in collaborative divorce or any alternative dispute resolution process.

The ethical obligations surrounding EDR, as discussed by Lande and Mosten, highlight the importance of attorneys ensuring clients are well-informed about all divorce process options, including screening for the appropriateness of participation in all EDR modalities. This not only involves a commitment to competent representation but also emphasizes the need for obtaining informed consent. Strict adherence to these ethical obligations when it comes to EDR is the antidote to attorney concerns regarding the adoption of EDR into practice. When clients are properly informed and prepared to make agreements regarding their participation in EDR modalities, including the benefits and limitations of each, attorneys are operating within their ethical obligations which extend far beyond just "zealous advocacy." The key is that properly informed clients are entitled to choose their path, and their self-determination is integral to the EDR modalities and, ultimately, their satisfaction with their process.

In navigating the ethical considerations inherent in EDR methodologies, attorneys must first commit to a thorough appropriateness screening process. This involves evaluating the suitability of EDR for the client's specific circumstances, considering factors such as the complexity of the case, the parties' willingness to cooperate, and the potential for achieving a fair and equitable outcome through alternative resolution methods.[33] To conduct

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32 John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 Ohio St. J. on Disp. Resol. 347 (2010).

33 *See, e.g.,* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280 (2004).

these screenings effectively, practitioners should develop a standardized checklist that covers both legal and emotional considerations, ensuring a comprehensive assessment of each case's suitability for EDR.

Moreover, securing informed consent goes beyond merely informing clients about the available options. It requires attorneys to provide a detailed explanation of the potential benefits and limitations of each EDR method, tailored to the client's unique situation. This includes discussing the likely outcomes, the process involved, and any possible risks or downsides. Attorneys should also address any client questions or concerns in a clear, understandable manner, ensuring that the decision to proceed with a particular EDR method is made with full awareness and understanding.

To facilitate this process, practitioners might consider utilizing informed consent forms that outline the key aspects of the chosen EDR method, accompanied by a detailed verbal discussion to walk clients through the information provided. These discussions should be documented in the client's file, along with a signed acknowledgment of understanding and consent.

Attorneys should also be prepared to revisit the issue of consent and appropriateness at various stages throughout the EDR process. As the case evolves, new information may emerge that affects the suitability of the chosen method or the client's willingness to continue. Regular check-ins with the client to reassess consent and appropriateness ensure that the EDR process remains aligned with the client's best interests and goals.

Incorporating these practices into the EDR process not only fulfills the attorney's ethical obligations but also strengthens the attorney-client relationship, building trust and confidence. By prioritizing transparency, informed decision-making, and client welfare, attorneys can navigate the ethical landscape of EDR with integrity and professionalism.

V. Client Satisfaction with EDR: The Cure for the Recovering Litigator

As a former family law attorney who practiced as a traditional litigator for the first two decades of my career, I know firsthand the difficulty that the adversarial approach to divorce wreaks not only on the clients but on the practitioner, too. As discussed earlier,

practitioners often struggle with the harsh demands of the stringent litigation process as well as rampant client dissatisfaction with the process and outcome, but many practitioners are unaware of the alternatives or are concerned about the application of those alternatives through the strict ethical lens of the profession.

As my career path has evolved, first to mediator and then to mediation and collaborative law trainer, I have often interacted with colleagues who are at the end of their rope with the rigors and adversarial nature of a litigation practice and who are in search of a better way to support their clients through the divorce process. Invariably, as they learn more about EDR modalities and begin to work with clients in a more cooperative and respectful process, they report increased career satisfaction and a client base with better results and more positive feedback.

These anecdotal conclusions align with the growing recognition within the legal community of the value of EDR as a means to facilitate more amicable, collaborative, and sustainable outcomes for all parties involved. The public has embraced both mediation and collaborative divorce, and cooperative practice is a growing alternative reflecting the desire for mediation and other EDR methods to become integral to family law; attorneys are discovering the profound impact these approaches can have on both their practice and their clients' lives. This evolution marks a significant departure from the contention and stress of conventional litigation, moving towards a more holistic and client-focused approach. The shift is not merely a change in method but a redefinition of the attorney's role—from a combatant in a legal battle to a facilitator of resolution and healing.

This transition reflects a deeper understanding within the legal community that the adversarial process, while necessary in certain cases, is not always the best path for families in transition. The embrace of EDR signifies a commitment to preserving dignity, relationships, and the well-being of all involved, especially children who are often the unseen victims of contentious divorces.

The positive feedback from clients who have experienced EDR firsthand reinforces the value of these methods. They report not just satisfaction with the outcomes, but also with the process itself—a process that respects their voice, minimizes conflict, and focuses on the future rather than dwelling on past grievances. This client feedback is the best testament to the efficacy of EDR,

serving as a powerful motivator for lawyers to pursue training and certification in these approaches.

The evidence of client satisfaction with EDR processes is not just anecdotal. As discussed above, the IACP survey found overwhelmingly that clients were satisfied with the process and very few would not recommend it to others.[34] There is additional widespread research and scholarly writing on the topic of the positive client response to these modalities. John Lande reviewed seven separate empirical studies on collaborative law in an effort to consolidate the conclusions and found that the vast majority of collaborative clients reported being satisfied with the outcome of their case.[35] Robert E. Emery, David Sbarra, and Tara Grover concurred, concluding that "[m]ediation generally results in higher satisfaction levels compared to adversarial court proceedings for both adults and children."[36]

The shift toward EDR in family law is a reflection of a broader societal movement toward empathy, understanding, and resolution. As more practitioners adopt these methods, the legal profession as a whole stands to transform the experience of divorce from one of adversity to one of mutual respect and cooperation. For attorneys considering a transition to EDR, the journey promises not just a more satisfying career path but also the opportunity to make a real difference in the lives of those they serve. By championing EDR, lawyers become not just advocates for their clients' legal rights, but also guardians of their clients' well-being and their families' futures.

It is appropriate to conclude with some final thoughts from colleagues Forrest Mosten and Lara Traum who had the following words of wisdom for family law attorneys: "Attorneys, members of the judiciary, and legislators alike are now exploring a deeper mindset shift as mediation takes hold around the country. Attorneys trained solely in zealous advocacy can now expand beyond their warrior identities that they have maintained and embrace their peacemaking roles through training and balanced practice." [37]

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34 Wray, *supra* note 28, at 6.

35 John Lande, *An Empirical Analysis of Collaborative Practice*, 49 Fam. Ct. Rev. 257 (2011).

36 Robert E. Emery, David Sbarra, & Tara Grover, *Divorce Mediation: Research and Reflections*, 11(1) Psychol., Pub. Pol'y, & L. 22 (2005).

37 Forrest S. Mosten & Lara Traum, *Mediation as the Default Approach for Family Dispute Resolution*, 46 Fam. Advoc. 9 (Fall 2023).

Employing alternative dispute resolution (ADR) modalities in family law matters empowers attorneys to facilitate peaceful resolutions and support clients in achieving a less adversarial and more constructive familial restructuring. In many instances, it is advantageous to prioritize amicable solutions over contentious litigation.

Conclusion: The Future of Family Law Practice

The landscape of family law is experiencing a profound transformation, characterized by the growing integration of Early Dispute Resolution (EDR) practices. This shift is reflective of a broader understanding of the unique challenges and emotional complexities present in family law disputes, emphasizing the need for more compassionate, efficient, and effective solutions. For legal practitioners within this domain, this evolution not only presents new opportunities but also sets forth new standards for the practice of family law.

The embrace of EDR in family law underscores the necessity for attorneys to continually educate themselves, not only about the legalities of these methods but also about the emotional and psychological dynamics at play in family disputes. This comprehensive understanding is crucial as the practice of family law becomes more intertwined with holistic and client-centered approaches.

The shift towards EDR in family law compels practitioners to balance zealous advocacy with the pursuit of solutions that genuinely serve the best interests of the family unit. As the demand for legal services that are both effective and empathetic grows, lawyers must adapt to these changing expectations, providing solutions that are considerate of the long-term impacts on the family.

In conclusion, the future of family law practice demands that lawyers evolve beyond their traditional roles, embodying the qualities of resolution facilitators and agents of change. The widespread adoption of EDR practices offers a promising avenue for this evolution, requiring legal professionals to innovate, adapt, and remain steadfast in their commitment to the well-being of families and the broader community. In doing so, they navigate the complex terrain of family disputes with expertise, empathy, and a forward-looking vision.

In light of the compelling advantages EDR offers, both practitioners and clients stand at the threshold of a new era in family law—an era that promises not only more amicable resolutions but also processes that reflect the complex, nuanced nature of family relationships. As we navigate this transformative landscape, the imperative for legal practitioners to adapt and embrace EDR methodologies becomes increasingly clear. To this end, the following steps and considerations are offered as a guide for integrating EDR into family law practice:

Education and Training: Commit to ongoing education about alternative dispute resolution (ADR) methods.

Case Evaluation: Develop a protocol for assessing the suitability of ADR for each new client or case.

Collaborative Culture: Foster a practice culture that values and promotes collaboration, empathy, and open communication.

Interdisciplinary Collaboration: Build relationships with professionals from other disciplines involved in the ADR process.

Client Education and Empowerment: Ensure that clients are fully informed about their options for dispute resolution from the outset.

Advocacy for ADR: Become an advocate for ADR within the legal community.

By taking these steps, family law practitioners can play a pivotal role in reshaping the landscape of dispute resolution. Integrating EDR into one's practice is not merely a professional adjustment—it's a commitment to fostering resolutions that honor the dignity, well-being, and long-term interests of families in transition. Let us embrace this opportunity to redefine resolution in family law, making a lasting, positive impact on the lives of those we serve.

Negotiation Strategies and Techniques

by
Kathryn J. Murphy* and Ally Caskey**

I. Introduction

Divorce negotiations can be unpredictable, challenging, and emotionally charged. Since most divorce cases settle out of court, effective negotiation skills in achieving favorable outcomes for divorcing clients are critically important. In complex and high-stakes situations, the expertise of a skilled negotiator can ensure a great settlement while preserving the dignity and privacy of the parties involved.

In this article, we delve into the strategies and nuanced techniques that can transform contentious divorce negotiations into effective problem-solving sessions. From understanding the psychology of negotiation to leveraging dispute resolution strategies, we explore how lawyers can navigate the delicate balance between advocacy and compromise.

This article discusses techniques and strategies for negotiations adopted by leading experts and provides a framework for family lawyers to successfully resolve family law matters. By mastering these negotiation strategies, legal practitioners can not only enhance their effectiveness but also help clients transition to the next chapter of their lives with a sense of closure and fairness.

The article begins in Section II with a discussion of the win-win approach to negotiation, which represents mutual gains for the parties involved. Section III addresses preparing to negotiate and the elements that form the basic structure of a negotiation, which includes identifying the parties' interests, gathering information, assessing one's best alternative to a negotiated agreement (BATNA), and emotionally preparing for a negotiation. Strategies

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and techniques relating to the actual negotiation process are discussed in Section IV, including whether/when to make the first offer, making concessions and counteroffers, evaluating options, handling impasses, and managing time pressures.

Section V offers analysis on dealing with emotions in the negotiation process – using positive emotions to help reach wise agreements and addressing strong negative emotions. Finally, the last section of the article addresses the question as to whether parties should negotiate or go directly to trial.

II. Win-Win Negotiation

The most respected method of negotiation is the win-win approach, which is advocated by leading experts in the field of negotiation. The win-win approach (also known as interest-based negotiation) is a creative way that both parties can walk away from the negotiating table feeling as though they have won.

In his book *Secrets of Power Negotiating*, negotiation expert Roger Dawson explains that the objective of negotiation is to create a win-win solution.[1] Several negotiation experts believe that effective negotiators should leave the other party thinking they have won.[2] A negotiation is a win-win if each party feels they won, even if each party feels the other lost.[3]

On the other hand, win-lose negotiations happen when one party makes all the concessions, and the other party makes excessive demands. Harvard law school professor and renowned negotiation expert, Roger Fisher, illustrates in his book, *Getting to Yes*, that one who makes all the concessions is known as the "soft" negotiator and wants to avoid personal conflict but often feels exploited, whereas the "hard" negotiator makes excessive demands and holds out longer but often ruins the relationship.[4] Win-lose negotiations create problems in situations involving long-term relationships because parties often want to get even or hold a grudge.[5]

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1 Roger Dawson, Secrets of Power Negotiating 329 (25th anniversary ed. 2021).

2 *Id.*

3 *Id.*

4 Roger Fisher & William Ury, Getting to Yes 9 (3d ed. 2011).

5 *Id.*

In family law matters, parties will often have interests that they share as well as competing interests. There will have to be some compromise. Developing and understanding the goals, interests, and concerns of both parties can often lead to a creative win-win agreement – or at least a settlement that each party will find to be acceptable, given the reality of the situation.

For example, negotiation experts frequently talk about the two people who only have one orange, but both want it, and both are willing to fight for it. They agree to compromise and cut the orange in half. However, win-win negotiators would discuss their underlying needs in the negotiation and would find that one wants the orange to make juice and the other needs it for the rind to bake a cake.[6] Win-win negotiators would find the simple solution where one would get the whole peel and the other all the juice.[7] The other negotiators could have had an easy win-win, but instead they had a lose-lose because they made demands and stated their hard positions but failed to communicate their interests.[8] If they had been willing to share their goals, interests, and concerns, they might have discovered the win-win solution.

Experts advise that negotiators must recognize that often both sides want the same thing and there will not be a magical win-win.[9] It is naïve to assume that a win-win is *always* possible and the pie can always be expanded so that the goals of both sides are accomplished.[10] However, negotiators should identify the differences in the parties' interests.[11] Successful negotiating is not just a matter of what a party wants, but also being concerned about the other party getting what they want.[12] When a party gives the other party what they want, the goal is that there will be reciprocity.

There are effective strategies to use in a win-win negotiation and counterproductive strategies that should be avoided, which will be discussed further throughout this article.

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6 Dawson, *supra* note 1, at 10.
7 *See id*.
8 *Id*.
9 *Id*.
10 Robert Mnookin, Bargaining with the Devil 19 (2010).
11 *Id*.
12 *Id.*

III. Preparing to Negotiate and the Elements of Negotiation

A. *Basic Structure*

The Harvard Negotiation Project has identified seven elements that form the basic structure of a negotiation, which have been analyzed and adopted by negotiation experts around the world. These elements include relationship, communication, interests, brainstorming options, legitimacy, best alternative to a negotiated agreement (BATNA), and commitments.[13] Every negotiation is different, but the basic elements of a negotiation are the same.[14]

1. *Relationships*

A negotiation produces a better outcome if the parties can work together. Successful negotiators remember the simple fact that they are not dealing with abstract representatives of the "other side," but with human beings.[15] Behaviors determine working relationships. Trusting, relationship-building strategies in negotiation increase the probability that the other party will respond in a constructive and trusting fashion.[16] If attorneys behave in an aggressive manner, their working relationships will almost always be adversarial, and any future negotiations will be compromised.[17]

In divorce situations, a good working relationship might be difficult when betrayal or irresponsible behavior caused the divorce. However, personally knowing the other party in a negotiation puts an attorney in a better position to negotiate with something more than the "other side" if there is a separation of the emotional aspects from the substantive issues.[18] It is possible to establish trust

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13 *Id*.

14 Fisher & Ury, *supra* note 4; María Elisa Zavala Achurra, *Making Sense of the Obligation to Negotiate in International Law Through the Lens of Principled Negotiation*, 36 Ohio St. J. on Disp. Resol. 455, 465 (2020); Jonathan G. Odom, *A Modern-Day Pentagon Paper in a Post-Pentagon Papers World: A Case Study of Negotiations Between the Washington Post and the U.S. Government Regarding Publication of the* 2009 *Afghanistan Assessment*, 23 Harv. Negot. L. Rev. 215, 239 (2018).

15 Fisher & Ury, *supra* note 4, at 20.

16 *Id*.

17 *Id*.

18 *Id*. at 39.

in the negotiation process by demonstrating reliability, transparency, and sincerity in the process.

Successful negotiators are hard on the problem, and soft on the people.[19] This means that pushing hard on interests and the substantive issues of the negotiation increases the pressure for an effective solution, and giving support to the other side improves the relationship, resulting in an effective negotiation.[20]

2. *Communication*

Efficient negotiation requires effective two-way communication. Each party should express themselves in a way that encourages others to listen, and listen in a way that encourages others to speak. Some people believe they can behave aggressively in a negotiation, because they think that if they use force, they can intimidate and weaken the other party. However, failing to deal with others sensitively as human beings will often lead to a disastrous negotiation.[21]

3. *Interests*

Prior to negotiating, the interests of the negotiator should be identified, and it should be clear what interests would be satisfied if the negotiator received what they wanted. When people are in a dispute, they often think in terms of a "position" – what they want or demand.[22] Interests are the fundamental needs and concerns that lie underneath those positions (e.g., security, reputation, control, and financial stability).[23] In other words, a position is what is decided upon and interests are what cause the negotiator to decide.[24] The other person's goals, interests, and needs that would be satisfied if the other person were to receive what they want should be considered.[25]

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19 *Id*. at 55.

20 *Id*. at 57.

21 *Id*. at 21; Martin Schweinsberg et al., *Negotiation Impasses: Types, Causes, and Resolutions*, 48(1) J. Mgmnt. 49 (2022), https://journals.sagepub.com/doi/full/10.1177/01492063211021657.

22 Leigh Thompson, The Truth About Negotiations 24 (2d ed. 2013),

23 Fisher & Ury, *supra* note 4, at 43.

24 *Id.* at 50.

25 *Id.* at 45.

In family law disputes, it is even more important to address the interests and concerns of the other party and the children to get a party's own interests and concerns addressed, rather than focusing only on a position. The best way to do this is to ask why such positions are being taken by both parties. If the parties are looking backward and thinking about who said what, who did what, or who promised what, they are not focused on interests.[26] If a party stays focused on interests, the other party is likely to stay focused on their interests as well.[27]

For example, when discussing the amount of alimony a spouse is to receive, much more can be involved than economic well-being.[28] The spouse may want a specific amount of alimony to feel psychologically secure or to feel treated fairly and as equal, and might even be receptive to less if their need for security and recognition are met in other ways.[29]

In a divorce case, instead of arguing over who gets the house, the spouses can discuss their needs for stability, a sense of home, and financial security. They can seek to find mutually beneficial solutions that meet both parties' interests, such as one spouse staying in the house until the children finish high school, while the other receives a larger share of retirement savings. This approach fosters understanding, empathy, and creative problem-solving, ultimately leading to more sustainable and satisfactory outcomes for both parties.

Every negotiator wants to reach an agreement that satisfies their substantive interests; therefore, interests should be revealed to the other party.[30] Positional negotiating and failing to reveal information about interests can lead to lose-lose agreements, as in the case of the two people with the orange discussed above. Studies show that negotiators who provide information to the other party about their interests improve their chance of a successful negotiation.[31] Attorneys can be firm about their interests but flexible on how to achieve them.[32]

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26 Victoria H. Medvec, Negotiate Without Fear 61 (2021).

27 *Id.*

28 Fisher & Ury, *supra* note 4, at 50.

29 *Id.* at 51.

30 *Id.* at 52.

31 Medvec, *supra* note 26, at 115; Fisher & Ury, *supra* note 4, at 52.

32 Tim Castle, The Art of Negotiation 74 (I_AM Self-Publishing 2018).

When negotiators bargain solely over their positions, they tend to lock themselves into those positions, which leads to an unsuccessful negotiation.[33] Negotiators who move past positions to focus on their interests usually achieve their goals.[34]

4. *Brainstorming Options*

In preparing to negotiate, attorneys should brainstorm possible ways of meeting the legitimate interests of both parties. In other words, invent options for mutual gain.[35] For example, in a divorce deciding between who gets the house and who gets the kids is a choice between winning or losing and neither party will agree to lose.[36] Parties should explore the full range of possible solutions on which they and the other party might reach an agreement versus considering it a win or lose.[37] With regard to litigation, the best and worst possible outcomes should be considered. In brainstorming all the options, it is recommended to suspend initial judgment on a possible outcome and simply list all the options that come to mind.[38] Judgment and evaluation of whether these options are good or realistic should be reserved until later.

5. *Legitimacy*

The best agreements are those that both parties perceive as "fair." Negotiators want to persuade the other party that what they agree to is fair and reasonable. One way to determine fairness is to use objective standards to bring legitimacy to a particular option that will be persuasive to both parties, such as legal precedent, third party appraisals, expert opinions, research findings, and market values.[39] The other party is more likely to accept a solution that is objectively fair and vice versa.[40] In preparing to negotiate, attorneys should make sure that all disputed issues are researched, the experts have expressed their opinions, and any valuations have been obtained.

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33 Fisher & Ury, *supra* note 4, at 4.
34 *Id*. at 43.
35 *Id*. at 58.
36 *Id*.
37 *Id*. at 67.
38 *Id*. at 62.
39 *Id*. at 84.
40 *Id*.

6. *BATNA – Best Alternative to a Negotiated Agreement*

A party's best alternative to a negotiated agreement ("BATNA") should be the standard by which an agreement should be measured.[41] Before negotiating, it is essential to know the possible outcome if an agreement is not reached, which includes going to court.

a. *BATNA Should Be the Reference Point*

A negotiating rule of thumb is that negotiators should not accept any agreement that is worse than their BATNA. A party's BATNA may not be a great alternative, but it should be the best alternative to a negotiated agreement.[42] In negotiations, a BATNA will be an important reference point for evaluating any deal that is on the table. The BATNA of a party is their biggest source of power.[43] The better the BATNA, the better the alternatives away from the table and the more bargaining power a party has at the table.[44] The same is true for the other party.[45]

When considering BATNA, the costs involved if an agreement is not reached should be considered. In family law cases, this is going to court. Although the negotiation process will involve costs regardless of whether an agreement is reached, the costs when determining BATNA beyond the negotiation should be considered.[46] These costs include transaction costs in terms of time, money, and other resources, as well as the cost of reputation or establishing precedent in future dealings with other parties.[47] Generally the legal warfare of a divorce is financially and emotionally costly, and usually hurts everyone involved.[48]

If attorneys are looking at the options based on what might happen at the courthouse, they should consider whether the likely result from the judge or jury would be worse or better, the financial costs, including attorneys' fees, expert fees and costs in time lost from work, the emotional costs of going to court, the effects on

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41 *Id*. at 102.
42 Mnookin, *supra* note 10, at 30.
43 Medvec, *supra* note 26.
44 Mnookin, *supra* note 10.
45 *Id*.
46 *Id*.
47 *Id*.
48 *Id*. at 213.

the client, the other party, and the children if there was a trial, and whether the client is willing to take a risk not knowing the outcome of the case. Confidentiality is another advantage of settling a case out of court. Generally, the result from a negotiated agreement is better than the result that would be obtained by going to court.

b. *Research the Other Party's BATNA*

In addition to assessing a party's own BATNA, they should research the other party's BATNA in order to fully understand the implications of their negotiation strategy.[49] The more a party knows about the other party's BATNA, the more accurately they can estimate their reservation value or bottom line.[50] If the potential deal doesn't meet the other party's interests better than their BATNA, why should they agree to it?[51]

c. *Revealing BATNA*

Although parties should reveal their interests to the other party, several experts say that it is not a good idea to reveal their BATNA. Professor Leigh Thompson argues that once a party reveals their BATNA, the other party has no incentive to offer more.[52] Negotiators do not want the other party to simply meet their BATNA, they want them to think it is more attractive than it really is so they will make a better offer.[53] However, there are two situations where it may be advisable for a party to reveal their BATNA. In one case, they may have been negotiating all day and things are at a standstill.[54] Before they leave the negotiation, they might consider revealing their BATNA in hopes of the other party meeting it or even doing better. Another situation would be if a party has a fantastic BATNA and they would be happy simply to have the other party match or improve upon it.[55] But if a party reveals their BATNA, they will probably not get an offer significantly more attractive from any rational other party.[56]

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49 Thompson, *supra* note 22, at 54.
50 Medvec, *supra* note 26, at 3.
51 Mnookin, *supra* note 10, at 30.
52 Thompson, *supra* note 22, at 42.
53 *Id*.
54 *Id*.
55 *Id*.
56 *Id*.

d. *Reservation Point*

Several experts agree that a party's BATNA also determines their reservation value or reservation point. The reservation value is the worst outcome that a party would be willing to accept, and it should reflect a party's BATNA.[57] The reservation value has nothing to do with what a party hopes to settle for, what they "should" settle for, or what is "fair" in the negotiation, but it simply reflects the point at which they are creating value *in* the deal versus *away* from the table in their best alternative to a deal.[58] Knowing the reservation point provides clarity in determining whether a deal is worse than walking away.[59] If the reservation value is unknown, a party may agree to a deal that is worse than if they just walked away.[60] In family law matters, a party's reservation point should generally not be the outcome of their worst day in court.

e. *Zone of Possible Agreement*

Leading negotiation expert Guhan Subramanian addresses another basic concept in negotiation analysis called ZOPA, which stands for "zone of possible agreement."[61] The bargaining zone is established by the range between the parties' reservation points.[62] Given a party's assessment of their own BATNA and their reservation value, and (equally important) the other side's BATNA and reservation value, a party can determine whether a ZOPA exists.[63] In some cases, one or both parties have very attractive BATNAs and no ZOPA, and in other cases, the question of whether a ZOPA exists is unclear, and the initial challenge in the negotiation process is to figure out whether it does exist.[64] It is recommended to negotiate across the entire bargaining zone, including negotiating not just immediately around the party's reservation point, but also the other party's estimated reservation

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57 Medvec, *supra* note 26, at 63; Guhan Subramanian, Negotiauctions: New Dealmaking Strategies for a Competitive Marketplace 8 (2010).

58 Subramanian, *supra* note 57.

59 Medvec, *supra* note 26.

60 *Id*.

61 Subramanian, *supra* note 57, at 9.

62 Medvec, *supra* note 26 at 81.

63 Subramanian, *supra* note 57 at 9.

64 *Id.*

point.[65] Negotiating around a party's goals is advisable, rather than what they will settle with.

7. *Terms of the Agreement*

Preparation for the negotiation should include identification of all the implementation issues to be included in the agreement to ensure there are no post-agreement surprises. It is important to prepare an opening offer in writing even if the decision is made not to present it to the other party first. The opening offer should clearly articulate interests and goals, and attorneys should refer to it throughout the negotiation discussions. For example, it is often a good idea to prepare an initial draft of the mediated settlement agreement, with the proposed terms, prior to mediation so that the client's objectives are clear, the client has an opportunity to carefully consider the terms, and the draft can be compared to the final agreement to make sure that all issues and terms have been included.

B. *Gathering Information*

Good information gathering is essential to successful negotiating and a good outcome. To better prepare and organize for the negotiation process, it is important to have all the information needed to negotiate an agreement. This includes all financial, legal, and other information necessary to make informed choices.

In a divorce case, attorneys should have a spreadsheet listing assets and debts, budget statements documenting monthly expenses and income if relevant, and copies of all necessary financial documents, such as bank statements, tax returns, and business documents. Prior to the negotiation, attorneys should have accomplished all necessary discovery, such as exchanging sworn asset summaries and reviewing all relevant documents. The collected information should reflect the value of all property, including closely held business interests, real estate, and employee benefits, as well as the character of the assets and copies of documents to support the character of assets. Attorneys should know all debts and liabilities as well as the tax liabilities or tax ramifications of the division of assets and should have researched any applicable legal issues.

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65 Medvec, *supra* note 26 at 81.

Attorneys should not only gather information and research their own case, but also the other party's case. In *Beyond Reason*, Roger Fisher and Daniel Shapiro told the story of a senior attorney who told his younger associates that the firm had just been hired by the plaintiff in a big case.[66] He asked them to take a week in the library, study the precedents, and outline the arguments that he could make on behalf of the plaintiff.[67] The following week, the young lawyers optimistically went to the senior attorney and told him it was a great case, the plaintiff had strong arguments, and they would surely win.[68] After the senior attorney heard the strong arguments on behalf of the plaintiff, he told the younger lawyers the truth – the firm was actually hired by the defendant.[69] The young lawyers screamed in disbelief, protesting that the defendant had a terrible case.[70] The senior attorney told them not to worry because they would soon talk themselves into believing that the defendant had a wonderful case, but he wanted them first to understand the strength of the plaintiff's case.[71] With that understanding, the young lawyers went to work on the defendant's side of the case eventually leading the defendant to win the case, because the arguments for the defendant were enhanced by their knowledge and full understanding of the strengths of the plaintiff's case.[72]

C. *Emotional Preparation*

As part of the preparation for the negotiation, attorneys should emotionally prepare themselves and their clients for the negotiation. With careful emotional preparation, attorneys can stimulate positive emotions that will enhance the effectiveness of the negotiation.[73] Being well prepared on the substantive issues that will be addressed in a negotiation and on the process of dealing with them will do a great deal to reduce emotional anxiety during the negotiation. Being emotionally prepared is what sets great negotiators apart from good negotiators.

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66 Roger Fisher & Daniel Shapiro, Beyond Reason – Using Emotions as You Negotiate 173 (2006).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 174.

Emotional preparation involves thinking about how to face one's own emotions, preparing to deal with the emotions of the other party, and taking steps to calm one's concerns and anxiety. To emotionally prepare for the negotiation, attorneys should have a clear understanding of the substantive issues, each party's interests, and how to satisfy them. Attorneys should feel calm and confident enough to maintain a clear focus during the negotiation.

The success of the negotiation will be impaired if a party's anxiety, fears, frustrations, or other strong emotions overwhelm their ability to think clearly and focus on their interests and goals.[74] Immediately before a negotiation, parties should recognize if they have strong emotions and take steps to come into the negotiation calmer and more confident.[75] During the negotiation, attorneys can model a calm, confident mood – by sitting up in their chair, talking with confidence, and fully participating in the negotiation process. How to handle the emotions and relationship issues that come up during the negotiation process is addressed more fully in Section V below.

IV. At the Negotiation Table

A. *Making the First Offer*

Although some negotiation experts believe attorneys should *never* make a first offer,[76] research has shown that negotiators who make the first offer uniformly do better than those who do not. Many studies support the wisdom of making the first offer since it acts as a powerful psychological "anchor" in negotiation.[77] In *Negotiate Without Fear*, Kellogg professor of management and organization Victoria Medvec explains that people get anchored on numbers and ideas and insufficiently adjust from the initial starting point.[78] Making the first offer also allows a party to define the issues that are being discussed ensuring that all issues are on the table and avoiding the other party coming in with just one

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74 *Id.* at 176.
75 *Id.*
76 *See infra* text at notes 100 – 103.
77 *See* Medvec, *supra* note 26, at 105.
78 *Id.*

contentious issue.[79] Finally, the side making the first offer is in a relationship-enhancing position that requires the other party to respond to say what they do not like about this offer.[80]

Harvard law school professor Guhan Subramanian believes that if one has a good sense of the ZOPA, they should be the one to make the first offer to favorably anchor the negotiation.[81] Anchoring works by influencing perceptions of where the ZOPA lies. Subramanian provides a simple example of a sale/purchase situation – assume a buyer thinks the ZOPA is between $30 and $60 (their reservation point).[82] But when the seller makes a first offer of $75, the buyer shifts their expectations without even realizing it and wonder if the seller's bottom line isn't really $50, and the buyer feels fortunate when they get a deal at $55.[83] Subramanian adds a caveat about the anchoring effect – it works best when the other party is uncertain about where the ZOPA is.[84] If the other party knows the bargaining range with certainty, then one's first offer is less likely to influence the other party's perception of it.[85]

Subramanian says there are two risks in making a first offer.[86] One risk is that the opening offer is drastically outside the ZOPA and it loses its anchoring power.[87] This may cause a chilling effect in the other party, and they may even make an equally ridiculous counteroffer.[88] It is generally not realistic to believe that one can make an outrageous offer and expect the other party to accept it. Rather, the first offer should be ambitious, not outrageous.[89] The other risk is if the first offer is too conservative, one might unknowingly give away a substantial piece of the ZOPA in the first move.[90] To avoid these risks, it is important to analyze the weakness of the

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79 *Id.*
80 *Id.*
81 Subramanian, *supra* note 57, at 17.
82 *Id.* at 16.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 Medvec, *supra* note 26, at 4.
90 Subramanian, *supra* note 57.

other party's BATNA and establish ambitious goals and specific interests before making the first offer.[91]

If the attorney does not know the bargaining range, it is best to listen, learn more, and maybe even let the other party make a first offer. Parties should resist the tendency to change their perception of the ZOPA unless the other side's first offer contains real information.[92] If a party wants to make a first offer, they might consider making a "soft" anchor by saying they are thinking about a certain offer.[93] Although they have not actually made the offer, they floated an option that may be agreeable if it is in the ZOPA or close to it.[94]

If a party thinks they should make a first offer after going through the analysis, Subramanian believes that their offer should be the highest (or lowest) they can justify or "tell a story" around.[95] The ideal offer should be close to the other party's barely acceptable terms so that they are in the area of the other party's acceptability range.[96] If there is a belief that the opening offer will not be well-received by the other party, it can be presented in such a way that is not demanding by letting them know that the offer contains terms that are acceptable to the party making the offer and meets their interests, but it is understood that the other party may have different ideas that there is an openness to hearing.[97]

Medvec provides another strategy to mitigate the chances that the opening offer will not be well-received and that is to make multiple offers simultaneously, rather than making a single offer.[98] This choice of options can pull the other party into the discussion by giving them a say in the conversation and it can appear to be a cooperative and flexible first move. Additionally, providing multiple offers still allows one to anchor an attractive starting point, but makes the first offer seem more reasonable.[99]

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91 Medvec, *supra* note 26.
92 Subramanian, *supra* note 57, at 17.
93 *Id*.
94 *Id*.
95 *Id.* at 19.
96 *Id*.
97 *Id.*; Thompson, *supra* note 22, at 66.
98 Medvec, *supra* note 26, at 133.
99 *Id*.

Advocating the opposing view, Roger Dawson advises that one should never make the first offer and always get the other party to make the opening offer.[100] He asserts that the opening offer from the other party may be better than expected, it gives information before one has to say anything, and it enables one to bracket their proposal.[101]

Under this view, if a party does make the first offer, they must ask the other party for more than they expect to get, because it gives them negotiating room and a chance they might just get it.[102] He believes this strategy further increases the perceived value of what the party is offering, prevents the negotiation from deadlocking, and creates a climate in which the other party feels they won.[103] However, experts warn that an outrageous offer can provoke an extreme reaction from the other party making it more likely to result in an impasse and cause a loss of credibility and trust.[104] As discussed earlier, it is important to maintain a trustworthy and respectful relationship in family law negotiations.

B. *Reacting to the First Offer*

Some believe that a party should never say yes to the first offer or counteroffer from the other side, because the other party will believe something is wrong and they could have asked for more.[105] Although this seems manipulative, the belief is that the appropriate reaction should be shock and surprise at the other side's proposal and then a follow up with a concession.[106] The other party may not expect to get what they are asking for, however, if they do not show surprise, they are communicating it is a possibility.[107] Remember to not let the other party's offer anchor the negotiation table.

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100 Dawson, *supra* note 1, at 26.
101 *Id.*
102 *Id.* at 16.
103 *Id.* at 18-19.
104 Medvec, *supra* note 26, at 4.
105 *Id*.
106 *Id*.
107 *Id*.

C. *Concessions, Counteroffers, and Managing Patterns of Concessions*

1. *Plan Concessions*

Negotiators should approach the negotiation with a plan to concede and create a plan on how they will do so.[108] Few negotiations end after round one – the parties participate in back and forth with one another making offers and counteroffers to see if they can bridge the gap. Sometimes people get carried away by the momentum of the negotiation and fail to think about the pattern of concessions. Negotiation experts assert that it is a mistake to make concessions too quickly, which gives up all bargaining ground, or make concessions that are too large.[109] It is also a mistake to make concessions when the other party is not moving.[110]

As a general principle, negotiators should make concessions on issues that are the least important to them. Concessions should be announced – reminding the other party of the opening offer, drawing attention to their willingness to make a concession on that issue, document the new offer, and invite the other party to respond. Making concessions makes a party look flexible and increases the likelihood an agreement will be reached.[111] Further concessions should not be made until the other party has made a concession. The best negotiation practice is for a party to offer the other party something valuable to them in exchange for something valuable to the offering party, then go back and forth until either an agreement or impasse is reached.

The way concessions are made can create a pattern of expectations in the other person's mind.[112] Parties should generally not make equal-sized concessions because the other party will keep pushing.[113] Win-win negotiating does not mean that both parties need to concede equally, nor does it mean that both parties will gain equally.[114] The concessions should taper toward the end to communicate that the other party is getting the best possible deal,

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108 *Id*. at 192.
109 Thompson, *supra* note 22, at 70.
110 *Id*.
111 Medvec, *supra* note 26.
112 Dawson, *supra* note 1, at 93.
113 *Id*.
114 *Id*.

and one is nearing their reservation point.[115] Smaller and smaller concessions will indicate that one side is reaching its limit.[116]

It is important to keep a detailed record of the negotiations so that one can point out concessions, keep track of the proposals, and avoid miscommunication.

2. *Searching for Value-Creating Moves*

The challenge in negotiations is to identify *value-creating moves* – things that are easy for one side to give up, but valuable for the other party.[117] To make mutually beneficial trade-offs, parties in a negotiation must identify more than one issue under negotiation, have different preferences concerning the issues, and be able to look at different alternatives for each issue.[118] Parties should be firm about the issues most important to them but flexible on things that are not as important.[119] If the other party has different preferences and values, this will give negotiations more potential for win-win outcomes.

In general, differences in expectations about the future often create value in negotiations because they align the incentives of the parties, allow the parties to diagnose the honesty of the other side, and enable the parties to share the risk.[120] However, a party should watch for situations where the other party is not bargaining in good faith by not expressing their true interests.[121] For example, the other party may declare an issue as important, but they may be creating a decoy that they will try to trade off later for something they really care about.[122] In the event this happens, parties should stay focused on their true interests and the issues at hand.

3. *Never Offer to Split the Difference*

It is almost inevitable in negotiations that one party will suggest "splitting the difference" to close the gap.[123] The emotional

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115 *Id* at 95.
116 *Id*.
117 Thompson, *supra* note 22, at 86.
118 *Id*.
119 *Id*.
120 Subramanian, *supra* note 57, at 23.
121 Dawson, *supra* note 1, at 105.
122 *Id.* at 107.
123 Thompson, *supra* note 22, at 75.

appeal of this is attractive to most negotiators, to the point that it is hard to refuse. For example, in a rush to wrap up negotiations and show good faith, one party may make concessions that are too steep and quick, and then the other party suggests splitting the difference as if the past never occurred.[124] The "soft" negotiator is more likely to offer to split the difference to maintain the relationship.

Sometimes splitting the difference can be a trap because it is not necessarily fair. It depends on the opening negotiating positions that each side took.[125] Such simple-minded strategy could leave everyone worse off than necessary.[126] Simply put, it can be a lose-lose negotiation. Some experts say that one should never offer to split the difference, but they should encourage the other person to offer to split the difference.[127] If the other party offers to split the difference, they will be in the position of suggesting the compromise and then the party can "reluctantly" agree to their proposal making them feel they have won.[128]

D. *Negotiate Issues Simultaneously, Not Sequentially*

Research has shown that it is generally better to discuss issues as packages and combine them. Negotiating each issue independently is not only time-consuming, but it increases the likelihood of lose-lose agreements.[129] Negotiators are more likely to adopt a demanding, positional approach on each issue and lose perspective about what is ultimately the most important issue.[130] Handling several parts of the deal at the same time has several advantages because it prevents negotiators from being completely positional, it forces them to prioritize their values and preferences across several issues, and it may trigger considering packages or combinations of agreement terms.[131] Additionally, narrowing the negotiation to one issue creates a situation where one party wins, and the other party has to lose.[132]

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124 *Id*.
125 Dawson, *supra* note 1, at 64.
126 Richard Shell, Bargaining for Advantage 190 (1999).
127 Dawson, *supra* note 1, at 65.
128 *Id.* at 66.
129 Thompson, *supra* note 22, at 82.
130 *Id*.
131 *Id*.
132 Dawson, *supra* note 1, at 330.

However, sometimes a party may want to get their most important issue and package the rest of the issues in the negotiation if they are absolutely confident that they can get their most important issue from the other party.[133] If this high-risk, high-reward strategy works, parties get what they want on their most important issue.[134] However, they risk being left in a difficult position trying to bundle the issues together if it does not work.[135]

E. *Evaluating Options*

Negotiators should evaluate the expected outcomes of choosing each possible option from emotional, financial, and legal perspectives. During the negotiation, they should reevaluate their BATNA and whether it is best to proceed to litigation. If the matter is not settled through negotiations, the best-case scenario and the worst-case scenario in the courtroom should be reconsidered. Whether or not to assess choices based on what might or might not happen in court, it is necessary to evaluate all choices from the viewpoint of whether the option is realistic, whether a party will be satisfied or have regrets based on the choices made, and whether it will affect their relationships.

F. *Time Frames and Time Pressures*

Negotiating and reaching complete agreements in a family law case takes time. Frequently, one or both of the parties want to get the case over at the beginning. However, as discussed above, to negotiate effectively, all information must be gathered, the character of assets should be determined, assets should be valued, and experts should be consulted. Additionally, family law disputes often take longer to resolve than other kinds of lawsuits because emotions run high, and several issues are at stake. The process often takes longer than one person wants, and it may go too quickly for the other.

When parties are negotiating, they should never reveal they have a deadline, because if the other party knows there is a time pressure, they could push the negotiations until the last possible

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133 Medvec, *supra* note 26, at 196.

134 *Id*.

135 *Id*.

minute.[136] The longer one can keep the other party involved in the negotiation, the more likely the other party is to move to their point of view.[137] This also works both ways – the longer a party spends in a negotiation, the more likely they are to make concessions.[138]

Additionally, if time is a factor in the negotiation process, a party should make sure it is a factor for the other side so they do not lose power.[139] If time is an issue, Victoria Medvec advises to include some element of the offer to the other party that is time bound, which would neutralize the time pressure by making it matter to the other party as well.[140] Additionally, if the other party's BATNA would improve over time, one would want to have a shorter negotiation process, and if the other party's BATNA would become weaker over time they should aim for a longer negotiation.[141]

G. *Take It or Leave It*

Take-it-or-leave it attitudes should be avoided in negotiations. Parties should only use ultimatums when they are prepared to do what has been threatened because most people who issue ultimatums are essentially bluffing.[142] Once a take-it-or-leave-if-offer is made, it is difficult for these negotiators to return to the negotiating table.[143] To continue the negotiation, one can respond to an ultimatum of the other party by calling their bluff and find a face-saving way for them to continue.[144]

For example, one spouse may threaten to take the case to court to gain leverage. The other spouse could acknowledge the seriousness of the situation while expressing a willingness to explore alternative solutions collaboratively. A new issue that has not yet been discussed can also be offered to try to add to the negotiation.[145]

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136 *Id*.
137 *Id*.
138 *Id*.
139 *Id*. at 61.
140 *Id*.
141 *Id*.
142 Thompson, *supra* note 22, at 21.
143 *Id*.
144 *Id*.
145 Medvec, *supra* note 26, at 196.

On the other hand, another theory is that one should always project that they are prepared to walk away.[146] If a party projects they will not walk away, they are indicating that they have no options and they have lost their power.[147] The objective is not to walk away but to get concessions from the other party because they think the negotiation may end.[148]

H. *Handling Impasses*

An impasse can be handled by setting aside the major problem issues and talking about some of the smaller issues to gain momentum.[149] Momentum can be created by resolving minor issues first, but negotiators should avoid narrowing the negotiation down to only one issue – with only one issue there will have to be a winner and a loser.[150]

The dynamics of the negotiation can also be changed to create momentum, such as changing the people in the negotiating team, changing the venue, removing a member who may be an obstacle to resolution, finding ways to ease the tension, exploring the possibility of changing or restructuring the deal, and changing the style of the negotiation – either from a low-key approach with an emphasis on win-win to becoming more competitive, or the reverse.[151] However, it is important to remember that sometimes an impasse is the right answer.[152]

Another way to create momentum is engaging in the "one small step" approach. One side needs to make a very small, visible move in the other party's direction, then wait for reciprocation.[153] If the other party responds, the parties can repeat the cycle until a settlement is reached.[154] If one is in a position where their BATNA is worse than what's on the table, they need to make a move.

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146 Dawson, *supra* note 1, at 198.
147 *Id*.
148 *Id*.
149 Castle, *supra* note 32, at 21.
150 Dawson, *supra* note 1, at 168.
151 *Id.* at 169.
152 Shell, s*upra* note 126, at 192.
153 *Id*.
154 *Id*.

I. *Commitments and Binding Agreement*

The goal of all negotiations is not merely agreement, but to secure commitment and binding agreements.[155] An agreement to do something merely signals that a person is willing to do something as promised, for the moment at least.[156] A commitment goes one step further than the agreement, making it costly for the promisors to back out.[157] The negotiation is not over until the parties have secured commitments to perform.[158] In family law matters, agreements should be memorialized in the form of a binding mediated settlement agreement or final agreed order. The form of the agreement should be legally enforceable in the event one party does not comply in the future.

As mentioned above, parties should keep precise notes during the negotiation to make sure to include everything in the final agreement. The agreement should be carefully reviewed to make sure nothing is left out and all terms are clearly and accurately reflected.[159]

V. Emotions in Negotiation

A. *Emotions Have an Impact on Negotiations*

Emotions almost always have an impact on negotiations – they affect a person's body, thinking and behavior, and they can be distracting, painful, or cause the negotiation to fail. Emotions can be positive or negative. In *Beyond Reason*, Roger Fisher and Daniel Shapiro discuss strategies on dealing with emotions and relationship issues in negotiations.[160] They discuss how to use positive emotions to help reach wise agreements and deal with negative emotions so that negotiations are more comfortable and effective.[161]

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155 *Id*. at 196.
156 *Id*.
157 *Id*.
158 *Id*.
159 Dawson, *supra* note 1, at 131.
160 Fisher & Shapiro, *supra* note 66, at 4.
161 *Id*. at 176.

In a negotiation, a positive emotion toward the other person is likely to build rapport and a feeling of being on the same page.[162] Strong, negative emotions can be obstacles to negotiation in several ways – they divert attention from substantive matters, they can overshadow thinking, they can damage relationships, and they can be used to the advantage of the other party.[163]

B. *Positive Emotions Can Be a Great Asset*

Although emotions are often thought of as obstacles to a negotiation, positive emotions can be a great asset and help achieve goals. Positive emotions feel personally uplifting, and they can make it easier to meet interests. With positive emotions, parties are more open to listening and more open to learning about the other party's interests, making it possible for a win-win outcome. Positive emotions can also enhance a relationship and parties can talk comfortably without the fear of getting sidetracked by a personal attack.[164]

C. *Suggestions for Stimulating Positive Emotions*

Fisher and Shapiro suggest ways to stimulate positive emotions, one of which is to show appreciation.[165] If people feel understood, valued, and appreciated, they feel important and are more open to listening and more likely to reach agreements.[166] People can appreciate others by understanding their point of view, finding merit in their acts and thoughts, and communicating these understandings through words or action.[167] To appreciate does not mean to give in or agree with the other party's point of view, but one can still let the other party know that their viewpoint has been heard and understood.

D. *Strong Negative Emotions*

Strong negative emotions such as anger, fear, or frustration may affect one's behavior and drive the behavior of others. If

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162 *Id*. at 4.
163 Castle, *supra* note 32, at 144.
164 Fisher & Shapiro, *supra* note 66, at 8.
165 *Id*. at 27.
166 Castle, *supra* note 32, at 84.
167 Fisher & Shapiro, *supra* note 66, at 28.

the emotions are unaddressed, it is likely that they will escalate and prevent a successful negotiation. Further, negative emotions may cause others to stop listening or terminate the negotiation. Emotions feed off one another, and displayed anger can stimulate the other party's anger.

Strong negative emotions can cause a party's focus to be so narrowed that all attention is focused on strong emotions.[168] As a result, the ability to think clearly and creatively gets sidetracked and there is a risk of acting in ways that will be regretted.[169] Strong negative emotions can also make one vulnerable to the point that emotions take control of their behavior, causing the inability to think about the consequences of their behavior.[170] Whatever the source of strong emotions, negotiators should be aware of them and be prepared to deal with them to avoid escalation. Preparation involves having a plan before negative emotions arise.

Emotions are usually contagious. Even if emotions change from anger and frustration to active interest, the other person is likely to still be reacting to prior negative behavior.[171] The impact of a negative emotion can linger long after it has passed.[172]

E. *Responding to Temper Tantrums*

If someone is unable to deal with their emotions effectively, childish behavior may surface. The person may lash out, make demands, and throw temper tantrums. Those who have temper tantrums are generally not very effective negotiators. Many temper tantrums are not genuine – they are carefully planned displays of emotion designed to evoke a response in the other party.

If the other party is throwing a temper tantrum, whether staged or authentic, one can employ strategies to avoid damaging the negotiations.[173] Taking a break may be helpful, especially if there is a feeling something will be said that is regretted. Parties can empathize with the emotions of the other party by acknowledging the significance of the matter and expressing understanding.[174] Finally,

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168 *Id*. at 146.
169 *Id*. at 147.
170 *Id*.
171 *Id*. at 13.
172 *Id*.
173 Thompson, *supra* note 22, at 127.
174 *Id*.

rather than responding in kind, it may be helpful for parties to write down their thoughts and review and summarize their negotiation points to create a point of focus.[175]

F. *Negotiating with Someone You Hate*

The last section of this article discusses whether one should even go to the negotiation table with someone they hate and perceive as evil. A framework is provided as to how this decision should be made. People will almost certainly have to negotiate with those who have true personality disorders or cause anxiety for a variety of reasons, and one must find a way to deal with them. If a party becomes consumed by feelings of hate for the other party, they will lose sight of the issues at hand and not be able to effectively negotiate. If one decides to negotiate with the person they hate, one way to deal with this is to change their own behavior in dealing with the other party, but not their feelings about them. They can also take more responsibility for their feelings and focus on their true interests and the terms of the negotiations rather than the other party. Successful negotiators separate the people from the problem and attack the problem together versus attacking each other.[176]

G. *Repairing Trust – Venting and Apologizing*

When trust is broken in a relationship, negotiations are more difficult. Parties should consider letting the other party vent to get rid of strong emotions. Letting them vent does not mean they must agree with them; they just need to listen.

Fisher and Shapiro assert that there may be some purposes for parties to express strong negative emotions – to get the emotions off their chest; to let the other party know about the impact of their behavior in hopes that they will appreciate the emotional experience of the party; and to influence the other person by expressing the importance of the party's interests.[177] Caution should be exercised because venting can sometimes make a bad situation worse. Venting can be helpful if someone is there to moderate the

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175 *Id*.

176 Fisher & Ury, *supra* note 4, at 19.

177 Fisher & Shapiro, *supra* note 66, at 156.

conversation and the communications are on topic without the venting party going on extensively with a list of past grievances.[178]

Additionally, when a negotiation seems to be hitting an impasse, sometimes an apology may be enough to get the parties back on track.[179]

VI. Whether to Negotiate or Fight

A. *Bargaining with the Devil*

In *Bargaining with the Devil*, Robert Mnookin poses the question whether one should negotiate with the "Devil" or have a fight.[180] He describes the "Devil" as someone who has deeply harmed a person and poses a serious threat to their well-being – someone one may even see as evil.[181] An act is evil when it involves the "repeated intentional infliction of grievous harm on another human being in circumstances where there is no adequate justification."[182] Often, people want to proceed directly to litigation or have the fight with someone they perceive as evil so that person is not rewarded for their bad behavior. It is important to note that a party involved in a conflict may have a subjective view that the other party is "evil," whereas a detached observer might disagree.[183] These types of conflicts are challenging and feeling this way about someone can get in the way of clear thinking and successful negotiations.

For example, shortly after the September 11, 2011 attacks in New York, President Bush issued an ultimatum to the Taliban government in Afghanistan to shut down Al-Qaeda's training camps and turn over Osama bin Laden and his lieutenants or the United States will invade.[184] The Taliban responded by inviting President Bush to negotiate, but he refused.[185] The Taliban refused to turn over bin Laden and did not agree to shut down the training

178 *Id*. at 159.
179 Shell, s*upra* note 126, at 193.
180 Mnookin, *supra* note 10, at 1.
181 *Id*. at 15.
182 *Id*.
183 *Id*. at 1.
184 *Id*. at 2.
185 *Id*.

camps.[186] After receiving both congressional and U.N. authorization, President Bush launched war in Afghanistan.

As another example, Winston Churchill refused to negotiate with Adolf Hitler, even though Nazi forces had overrun Europe and were about to attack a weakened Britain.[187] On the other hand, Nelson Mandela chose to initiate negotiations with a white government that had erected a racist regime.[188] How did Churchill and Mandela decide whether to negotiate or not when the issues were unfolding? As history reveals, it is a challenging answer whether one should negotiate with the "Devil" or not.

In family law cases, the issues generally involve money and relationships where the consequences are significantly different than those in the international cases mentioned above. However, there is a framework that can assist in deciding whether to negotiate or fight, which involves making a wise decision not based solely on emotion.[189]

B. *Assess the Pragmatic Negotiation Framework*

A negotiator should use the framework discussed above when deciding whether to negotiate with the "Devil" or fight.[190] A negotiator should determine (1) the interests of both parties, (2), the BATNA of both parties, (3) the likely potential negotiated outcomes that would meet the interests of both parties, (4) the costs of choosing to negotiate, and (5) whether the alternative is legitimate and morally justifiable.[191]

After using this framework, Mnookin concluded that President Bush's decision to not negotiate with the Taliban in 2001 was correct.[192] However, Roger Fisher took the position that President Bush was wrong to issue an ultimatum, and the United States should have accepted the Taliban's invitation to negotiate.[193] Instead of walking through the pragmatic negotiation analysis, Fisher supports the categorical notion that parties should *always*

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186 *Id*. at 6.
187 *Id*.
188 *Id*.
189 *Id*. at 5.
190 *Id*. at 6.
191 *Id*.
192 Fisher & Shapiro, *supra* note 66, at 163.
193 *Id.* at 166.

be willing to negotiate and resolve the problem based on the interests of the parties, even if they are negotiating with someone such as a terrorist.[194] To negotiate does not mean a party must give up all that is important to them, but it only requires that they be willing to sit down with their adversary and see whether they can make a deal that serves their interests better than their best alternative.[195] Fisher's approach would be ignored by negotiators who want to use their moral judgment to avoid negotiating, which is discussed below.

C. *Avoid Common Traps*

Negative and positive traps that lead to a knee-jerk decision can stand in the way of wise decision making.[196] The common negative traps encourage people to exaggerate the costs of negotiation and underestimate the benefits, and the positive traps may tempt people to negotiate when maybe they shouldn't.[197] To avoid these traps, a critical first step is to recognize them and be aware of strong emotions.[198]

Demonization is a negative trap, and it is the tendency to view the other party as evil – not just guilty of bad acts, but fundamentally bad to the core.[199] The opposite extreme is the positive trap – contextual rationalization and forgiveness – the behavior of the other party is the product of external pressures and thus can be easily forgiven.[200]

Moralism and self-righteousness are other negative traps and create a tendency to see the other party as entirely at fault and one's own side as innocent and worthy.[201] The opposite trap is the tendency to assume **fault on all sides** in every conflict and the burden of responsibility should be shared.[202]

The **zero-sum** trap is a negative trap that involves seeing the world in terms of a competition – what one side wins, the other

194 Mnookin, *supra* note 10, at 2.
195 *Id*. at 3.
196 *Id*. at 6.
197 *Id*. at 21.
198 *Id*.
199 *Id*. at 19.
200 *Id*.
201 *Id*.
202 *Id*.

side must lose.[203] In family disputes, spouses often argue over the division of property or time spent with the kids, as if more for one spouse cannot possibly be good for the other. The opposite trap is the naive assumption that **win-win** is *always* possible, and the pie can always be expanded so that the goals of both sides are accomplished.[204]

D. *Considering Moral Compass*

In deciding whether to negotiate, although a pragmatic assessment of negotiation supports negotiating, sometimes a person's moral compass suggests that negotiating with the "Devil" would be wrong.[205] Moral judgments may be traps if they are used as an excuse for not going through the basic negotiation framework in analyzing the situation.[206] Moral values should be factored into the decision-making process but should not be masked as an excuse to not negotiate.[207]

For example, Mnookin's moral intuition agreed with President Bush in not negotiating with the Taliban, because the Taliban should be punished and further attacks should be deterred.[208] However, Mnookin continued to analyze the negotiation framework in deciding whether he agreed with President Bush's decision or not. In this case, Mnookin's moral intuition and pragmatic analysis led to the same conclusion of "no negotiation."[209]

Mnookin further provides an example of a divorce case where the wife refused to negotiate with her husband and demanded to go directly to trial where the outcome was worse for her than any negotiated settlement would have been.[210] Although she thought her husband's motives were "evil" – threatening a custody fight to force her to accept less than what she thought was a fair division of the marital estate – the decision to go to court when her attorney advised her to participate in negotiations was not a good

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203 *Id*.
204 *Id*.
205 *Id*. at 6.
206 *Id*. at 35.
207 *Id*. at 36.
208 *Id*. at 7.
209 *Id*.
210 *Id.* at 229.

decision.[211] By choosing to negotiate, the wife would not have had to agree or compromise her core interests.[212] Although she may have received a better deal in court from a financial perspective, the trial ruling was worse from the perspective of the children.[213] In this situation, if the wife would have assessed the pragmatic framework, she may have decided to negotiate with the "Devil," her husband.

VII. Summary and Conclusion

Most cases contain potential for win-win negotiation, and several key points have been presented in this article for a successful negotiation. These include looking for ways and using effective strategies for a win-win negotiation, identifying goals and interests, and preparing for the negotiation by making sure all financial, legal, and necessary information is obtained.

In conclusion, being a successful negotiator requires preparation, skill, and practice. By developing the skills necessary to negotiate with confidence, achieving a favorable outcome at the negotiation table will be significantly enhanced.

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211 *Id.* at 230.
212 *Id.*
213 *Id.*

Why Do Mediations Fail? Perspectives, Concerns, and Advice from Mediators

by
Lisa Ann Sharpe & William B. Reingold, Jr.*

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Abstract

Commentators largely acknowledge that the benefits of mediation can carry great weight in the field of family law. In this emotionally volatile field, mediation offers a cost-effective means to avoid preparing for and taking a case to trial, a cost generally magnified by the generally slow pace of litigation—"the law's delay," as lamented by Hamlet. Yet every family law attorney will eventually participate in a mediation that can only be described as an

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unmitigated disaster. This article contains the results of interviews with various mediators from across the country, many of whom are AAML members, to inquire about what they see from attorneys, what works, what does not, and their personal preferences for how to best prepare for mediation. This article is meant to consolidate these mediators' opinions and offer strategies to help attorneys put their best foot forward at mediation.

Introduction

Hope for the best and be prepared for the worst is an apt phrase for family law mediations. These negotiations often take place in the midst of "a volatile and emotional atmosphere."[1] It makes sense, then, that there is a literature speaking to the efficacy of these mediations and how to approach them.[2] Commentators largely acknowledge that the benefits of mediation can carry great weight in the field of family law.[3] The *family*, and more specifically the enterprise of marriage, is a cornerstone of American society

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1 Bounds of Advocacy: American Academy of Matrimonial Lawyers Goals for Family Lawyers iii (2012) [hereinafter Bounds of Advocacy].

2 *See, e.g.*, John M. Haynes, The Fundamentals of Family Mediation (1994); Lynn E. MacBeth, The Art of Family Mediation: Theory and Practice (2d ed. 2014); Eric R. Galton, *Mediating with Children: Two Lawyers' Views*, 3 Disp. Resol. Mag. 5 (1996); Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 Nova L. Rev. 479 (1995); Tanya M. Marcum et al., *Reframing the Mediation Lens: The Call for a Situational Style of Mediation*, 36 S. Ill. L.J. 317 (2012); Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 Fam. L.Q. 53 (2005); Margaret Ryznar, *Mediating Divorces*, 89 Miss. L.J. 85 (2019).

3 *See* Ulrich Boettger, *Efficiency Versus Party Empowerment - Against a Good-Faith Requirement in Mandatory Mediation*, 23 Rev. Litig. 1, 7 (2004) Bill Ezzell, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 Law & Psychol. Rev. 119, 127–28 (2011); Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 Nova L. Rev. 479, 480 (1995); Jennifer A. Kolbusz, *Alternative Dispute Resolution*, 23 J. Am. Acad. Matrim. Law. 403, 403 (2011); Ryznar, *supra* note 2, at 90; Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 Drake L. Rev. 367, 378 (2001); *see also* Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Law Conflicts: What Lawyers Think About Them*, 14 J. Am. Acad. Matrim. Law. 353, 371 (1997) ("Respondents saw the ability to more adequately address the emotional aspects of dissolution as mediation's greatest strength.").

that legislators have always sought to preserve.[4] The demise of a marriage often reverberates in ways that seriously and adversely affect not only the spouses (and their children, if they have any), but also their community and others in their orbit.[5] "Few human problems are as emotional, complicated or seem so important as those problems people bring to matrimonial lawyers."[6] Although today the prospect of divorce is more accepted than in generations past,[7] this does not make the situation any less scary or easier to process.

Acceptance of mediation across all civil fields has been on the rise since the 1970s.[8] Courts saddled with back-breaking dockets naturally welcomed the emergence of mediation to lighten their load, and many litigants relished having an escape hatch to avoid trial.[9] Mediation offers a cost-effective means to avoid preparing for and taking a case to trial,[10] a cost generally magnified by the generally slow pace of litigation—"the law's delay," as lamented by Hamlet.[11] And, perhaps above all else, the parties in mediation are more focused on resolution as opposed to *winning*.[12] Such a shift in mentality is particularly good for family law matters, which

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4 *See, e.g.*, Gray v. Gray, 782–83 (Ala. 1849); *In re* Marriage of Dawley, 551 P.2d 323, 333 (Cal. 1976); Van v. Zahorik, 575 N.W.2d 566, 570 (Mich. Ct. App. 1997); Neilson v. Neilson, 780 P.2d 1264, 1269 (Utah Ct. App. 1989); Fricke v. Fricke, 42 N.W.2d 500, 503 (Wis. 1950) (Brown, J., dissenting).

5 *See* Bounds of Advocacy, *supra* note 1, at iii–iv; *see also* Walter E. Oberer, *Trial by Ambush or Avalanche? The Discovery Debacle*, 1987 J. Disp. Resol. 1, 2 (discussing the impact of the litigation on other family members and "lasting bitterness" of it all).

6 *See* Bounds of Advocacy, *supra* note 1, at iv.

7 Christopher Lasch, *Divorce and the Family in America*, Atlantic (Nov. 1966), https://www.theatlantic.com/past/docs/politics/family/divorce.htm ("The fact that divorce is no longer novel or shocking merely testifies further, presumably, to the decay of the old order, the attitudes and institutions of an earlier time, which now evoke mingled nostalgia and contempt.").

8 Harold Baer, Jr., *Mediation—Now Is the Time*, 21 Litig. 5 (1995); Boettger, *supra* note 3, at 5-6.

9 *See* Baer, Jr., *supra* note 8, at 6 ("Even in the hard-to-crack world of commercial litigation, mediation is on the rise.").

10 Howard J. Aibel, *Mediation Works . . . Opting for Interest-Based Solutions to a Range of Business Needs*, 51 Disp. Resol. J. 24, 26 (1996).

11 William Shakespeare, Hamlet, Prince of Denmark, act 3, sc.1.

12 *See* 57 Am. Jur. 2d *Trials* § 555, *Mediations as a Trial Alternative: Effective Use of the ADR Rules*.

are so emotion-laden, fact-intensive,[13] and discretionary[14] that predicting the outcome of trial is a fool's errand. Mediation therefore reduces cost, time spent litigating, and the risk of going to trial, and offers the parties the ability to find creative solutions to their disputes.[15]

But there is a seamy underbelly to divorce mediation.[16] Commentators have long raised concerns over power imbalances spilling over into settlement negotiations, with the economically and socially advantaged spouse (usually the husband) exerting influence over the other in ways that render the mediation process pointless: "[d]ivorce mediation's seductive marketing rhetoric masks a political agenda: entrenchment."[17] Any history of domestic violence between the spouses only exacerbates these issues, especially if they are still living under the same roof at the time of mediation.[18] Pro se spouses need mediators to be vigilant in staving off inequitable outcomes,[19] though practically there is only so much the mediator can do.[20] And it is important to remember that mediation only has a chance of success if *both* parties are willing to proceed in good faith and sincerely settle their disputes.[21]

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13 *See* Smith v. Jones, 868 N.E.2d 629, 632 (Mass. Ct. App. 2007) (observing that family law matters "are highly fact specific and reflect the inevitable and infinite complexities of family formation, maintenance, and dissolution.").

14 *See In re* Marriage of Featherston, 675 S.W.3d 330, 334 (Tex. App. 2023).

15 *See* Smith v. Sprint Commc'ns Co. L.P., No. 99 C 3844, 2003 WL 103010, at *1 (N.D. Ill., Jan. 10, 2003) ("A settlement can include relief that would not flow from a judgment after trial."); *cf.* Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 Cornell L. Rev. 311, 312 (2018) (observing how "settlements and private arbitration proceedings can save costs, and so long as they are reached in the shadow of the law, they can accomplish most of what law aims to do").

16 *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441 (1992); Steven T. Knuppel, Comment, *Promise and Problems in Divorce Mediation*, 1991 J. Disp. Resol. 127.

17 *See* Bryan, *supra*, note 16, at 441, 453 n.37, 454.

18 Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D.L. Rev. 425, 428 (2003).

19 Knuppel, *supra* note 16, at 131.

20 Saccuzzo, *supra* note 18, at 435.

21 *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1549–50 (1991) ("[M]andatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody . . . .").

Mediation has its perks, though it is neither blemish-free nor a palliative for everyone.[22] So, with all that in mind, there are steps attorneys can take to increase their chances for success at mediation. The authors spoke with various mediators across the country to gather insight into what they see about attorneys' practices in mediation, what practices are successful and which are not, and their personal preferences for how to best prepare for mediation. Distilling these interviews into pieces of advice was quite challenging—the mediators interviewed offered a wide range of opinions and practices tips. Some matters were pretty much universally agreed upon; others not so much. The following analysis summarizes the primary points from these discussions.

I. Selecting the Right Mediator

While it may seem like an obvious point, selection of an appropriate mediator is critically important. Not all mediators are created equal, partly because mediators require substantive knowledge of an array of topics in order to competently scrutinize family law disputes. Any practicing attorney in this arena knows all too well how divorce and other domestic matters bleed into other fields of law.[23] Taxes, estate planning, business and corporate matters, real estate, immigration, reproductive rights, constitutional liberty interests, addiction and counseling—all of these things are fair game.[24] The AAML Bounds of Advocacy alludes to this when it provides that "[n]o lawyer should act as

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22 It does not help that the general public is still unfamiliar with the mechanics of mediation or what it entails for their case—as are some attorneys, for that matter. *See* Teresa V. Carey, *Credentialing for Mediators – To Be or Not to Be?*, 30 U.S.F. L. Rev. 635, 636 (1996).

23 *See* Barbara Glesner Fines & Cathy Madsen, *Caring too Little, Caring too Much: Competence and the Family Law Attorney*, 75 UMKC L. Rev. 965, 968 (2006) ("[B]ecause family status impacts so many rights and responsibilities in society (e.g., taxation, bankruptcy, tort liability), the attorney representing families must be well versed in a broad range of law."); Martha Minow, "*Forming Underneath Everything that Grows": Toward a History of Family Law*, 1985 Wis. L. Rev. 819, 819 (noting that family law is "'underneath' other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state.").

24 *See* Fines & Madsen, *supra* note 23, at 969.

the mediator of marital disputes without adequate education, training or experience."[25] So, because "[f]amily attorneys must be interdisciplinary,"[26] it makes sense to find an interdisciplinary mediator as well, one who can both comprehend sprawling issues *and* offer appropriate commentary that propels the mediation forward.[27]

A mediator's training can be a pivotal part of what makes them successful. Some jurisdictions do not require any formal training to be a mediator,[28] allowing anyone to be a mediator, including religious leaders, psychologists, and even teachers.[29] That is not ideal. Multiple mediators we interviewed on the West Coast specifically endorsed The Conflict Lab, a forty-hour mediation training hosted by Selena Schultz.[30] Others were well aware of the AAML Bounds of Advocacy's chapter on mediation and its contents. Whatever training they have received, these mediators balance their role as a mediator with their personal and professional experiences. Like judges, mediators are not a *tabula rasa*.[31] Knowing these mediators' background, reputation, and training can make all the difference.

Some lawyers prefer mediators they think they can outsmart; after all, if the lawyer is overzealous in their position, why retain a mediator who can intelligibly push back?[32] Retired judges with family law experience can be invaluable—"[d]ivorce, separation, and parental responsibility cases often . . . require[e] a family court judge to have familiarity with theories and research in disciplines

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25 Bounds of Advocacy, *supra* note 1, at 59.

26 *Id.*

27 *See* MacBeth, *supra* note 2, at 69; *see also* Bounds of Advocacy, *supra* note 1, at 60 ("A matrimonial lawyer may be a better mediator because the lawyer may be in the best position to understand the likely outcome of litigation and is best able to ensure the understanding and validity of a mediated agreement.").

28 *See* Catherine M. Venzon, *Dangerous Trends in Matrimonial and Family Law*, Aspatore, 2013 WL 941377, at *3 (Apr. 2013).

29 *See, e.g.*, Carey, *supra* note 22, at 635.

30 The Conflict Lab, https://www.theconflictlab.com/ (last visited Mar. 28, 2024).

31 Bryan, *supra*, note 16, at 503 n.259 ("Strict neutrality is a human impossibility. . . . Mediators inevitably bring with them their social class, ethnicity and ideologies.").

32 Interview with Michael Schilawski, mediator in Raleigh, North Carolina, via Zoom (Jan. 10, 2024) (notes on file with authors).

such as social work, psychology, and dispute resolution"[33]—but not necessary. There is always the risk that the retired judge will act less like a neutral facilitator and more like someone still donning their robe.[34] Lawyers should not presume that a former judge will necessarily be better than an attorney without experience on the bench. Above all else, it is important to select a mediator who is proactive and good at directing the mediation.

II. A Good Mediation Letter

A mediation letter can serve as a truncated trial brief. It outlines points of disagreement, provides relevant background material, explains the requested relief, and in some instances advances legal analysis. The letter may—but need not—veer into argumentation. At a minimum it frames the issues: "the more clearly the mediator distinguishes between the problem and the process, the easier it is for her to manage the negotiations."[35] Exhibits to the mediation letter may include financial statements, appraisals, prior court orders and motions filed, and other pertinent documents that give the mediator a sense of the litigation to date.

Not a lot has been written on mediation letters,[36] probably because they are not a standard requirement. Many mediators do not request a mediation letter, let alone a lengthy one.[37] Some counties (or even cities within the same county) have a shared belief that a mediation letter is unnecessary, choosing instead to

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33 Natalie Anne Knowlton, *The Modern Family Court Judge: Knowledge, Qualities & Skills for Success*, Institute for the Advancement of the American Legal System (Oct. 21, 2014), https://iaals.du.edu/publications/modern-family-court-judge-knowledge-qualities-skills-success.

34 *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L.J. 73, 109 n.188 (2017).

35 Haynes, *supra* note 2, at 173 ("[The mediator] controls the process, thereby neutralizing how the problem is defined and resolved.").

36 Passing references appear with little, if any, elaboration. *See, e.g.*, Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 Pepp. Disp. Resol. L.J. 161, 204 (2005) ("Mediation letters were sometimes being used to "bluff" the opponents about their intentions and this was producing tactical responses.").

37 One mediator we spoke with, Michael Schilawski, does not typically request materials beforehand because he "likes to have the client see the look on [his] face when they tell [him] their stories." Schilawski interview, *supra* note 32.

enter the mediation without sharing any information with the mediator or the other side. We believe, however, that it is good practice to write a letter for several reasons. The letters allow attorneys to make their case for the very first time and see how a neutral, third-party observer will react to the requested relief. And in some ways a mediation letter is more beneficial to the client than it is for the mediator. Compared to mediators who are presumably well-versed in the law, helpful letters inform the client of what their case looks like on paper. Two common reasons why mediations fail include the client being unprepared for mediation, or the case simply not being ready for mediation.[38] An exchange of mediations letters can inform clients about the strengths and—maybe more importantly—weaknesses of their case. To that end, a client who doesn't understand their case's weaknesses may have an overinflated sense of righteousness which, in turn, means they will be less inclined to move from their position; why would they move if they believe their stance is completely on the mark?

By the same token, both parties submitting a mediation letter allows attorneys to see how their case stacks up against the other side's evidence and presentation. This is where the parties' risk tolerance comes into play. In other civil matters, a settlement often arises when a risk of liability becomes so great that the defendant is unwilling to bear the risk of an adverse judgment, regardless of how small the probability.[39] That is not the case in family law, a field filled with nebulous concepts like equity and the "best interests" standard for children. Given the wide discretion courts are afforded in ruling on these concepts, identifying one's chances at trial is extremely difficult. However, family law also contains more concrete principles like tracing analyses and disputes over the validity of prenuptial agreements (subject to and governed by contract principles) that are ripe for fluid negotiations. Generally, as parties to a mediation continue to process their case over the course of the mediation day, their tolerance for risk diminishes—for many, this will be the longest they have maintained focus on their case, meaning that, conversely, it is the longest they have thought about the other side's case. To that end, an exchange of good mediation letters plants a seed for future negotiations.

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38 *See infra* note 62 and accompanying text.

39 *Cf.* Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014) (discussing settlements in class actions).

Submitting a mediation letter also makes the day more efficient. When parties enter mediation without providing any information beforehand, the first back-and-forths between the mediator and each room are largely spent trying to figure out what everyone wants or what the core disagreements are. In other words, everyone is spending a lot of money just trying to get to square one. That said, a mediation letter does not need to be an extremely comprehensive document. Mediators we spoke with indicated that a solid letter need not be more than three to five pages in length excluding exhibits. A rendition of the bare-bones facts (e.g., date of separation) and then an emphasis on disputed issues (e.g., are there competing appraisals?) are the primary points of interest for the mediator, because focusing on these items allows the mediator to address the crux of the case early in the day and, accordingly, begin managing expectations. However, many of the mediators volunteered that they will always read all the materials provided, no matter the length. If that means someone feels that they need twenty-three pages to make sure the mediator is cognizant of everything important, then it seems like most mediators will read all of the submitted material.

So while a mediation letter is a net positive, there are some things attorneys should avoid. To begin, there is no need to dig into every wrong or slight that occurred during the marriage, nor is there reason to depict the other party as Attila the Hun incarnate. Taking a flamethrower into the mediation raises the risk of torching any possible common ground, especially if the mediation letter is hyper-aggressive and the other side thinks one is taking below-the-belt punches.[40] Likewise, the mediators interviewed suggested to avoid making the narrative overly emotional to gain sympathy with the mediator. Mediators serve as objective neutrals, so parties are not going to "win" the mediation by attacking the other side from the jump. Unless this is a truly exceptional case, the mediator (and eventually the judge, if mediation proves unsuccessful) does not want either spouse's voluminous recounting of every detail of the marriage. Ordinarily, relevant facts are those closest to the present.

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40 *See* Haynes, *supra* note 2, at 11 ("Participants in a dispute usually frame the problem in a way that blames the other and denies personal responsibility for the problem.").

III. Developing Connections with the Mediator and Parties

It is hard for a mediation letter to truly capture the dynamics of the marriage. That is, the mediator cannot get a real sense of what the parties are like as individuals just looking at pre-mediation materials. And this is especially so when these parties are represented by good attorneys who, through their mediation letter, present their client in a positive light and sidestep any ugliness on their client's part. So while the mediation letter can introduce the mediator to the case, the heart of any mediation centers upon a mediator speaking with the party directly.[41] More specifically, the mediator needs to be able to *listen* to the party and hear them speak for themselves.[42]

Developing a rapport with the mediator is vital and can take time. Consider how slow mediation can feel. The thought *what is taking so long in the other room* is one that pervades most mediations. And those early sessions with the mediator can seem painfully long. Some mediators will take a long time with each party upon their first interaction, getting the client's thoughts and trying to understand the way they are mentally working through the idea of a settlement.[43] These mediators, though conscious of time being spent in the room with just one person, want that spouse to feel heard. "In order for the mediator to be in sync with the parties and to be present in the mediation, the mediator must be listening and attentive to every single sound in the room."[44] The reality is that the mediator is going to have a better understanding of the case and the parties (after just a couple hours) than the trial judge who reads hundreds of pages of briefs every day, and reviewed the mediation brief just before the trial.

That initial encounter is critical for two intertwined reasons: first, it acts as something of a substitute for the notion that they

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41 *See* Nina R. Meierding, *Managing the Communication Process in Mediation*, *in* Divorce and Family Mediation: Models, Techniques, and Applications 225 (Jay Folberg et al. eds., 2004).

42 *See infra* discussion in text at notes 46-48.

43 Haynes, *supra* note 2, at 174 (explaining how mediators must identify whether the client is approaching the case inductively or deductively).

44 Macbeth, *supra* note 2, at 69.

want their day in court;[45] and second, it builds trust between the mediator and the spouse.[46] If the spouse does not believe they are being heard, confidence wanes.[47] Generally people who have spoken their mind and feel that they have been heard are more willing to move toward the middle. Thus, after explaining the nuts-and-bolts of mediation and forecasting how the day is going to go, mediators tend to let the spouse talk about whatever they want to talk about for a reasonable length of time. They allow this even if much of what the spouse says is not very helpful or relevant. As a retired judge who serves as a mediator said during an interview: "If I jump in after a few moments and say, 'well that's not a relevant issue,' or 'there's nothing I can do about that, so let's talk about something we can work on,' then I know I'm going to lose this person and not have their confidence."[48] When the client truly feels that the mediator cares and understands their situation, things tend to fall into place.

Try not to get in the way of the client who needs to speak their mind. Strong, smart litigators who are used to advocating on their clients' behalf may be tempted to jump in quickly and often to help facilitate the negotiations.[49] Sometimes there is merit to this: some clients simply have unrealistic demands, and others do not have the language or ability to express what they want in terms of a legal outcome.[50] But, on the whole, it is best for attorneys to resist the urge to step in until the mediator asks something of them.[51] Some attorneys are exceptionally good at letting their

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45 *See* 1 Barbara Ashley Phillips, Alternative Dispute Resolution Practice Guide § 24:5 (2023) ("Clients often experience mediation . . . as having their day in court."); *cf. In re* Smith, 524 B.R. 689, 704 (S.D. Tex. Bankr. 2015) (noting that some "parties are opposed to mediation because they want their day in court as soon as possible").

46 Macbeth, *supra* note 2, at 400; Lydia Nussbaum, *Mediator Burnout*, 34 Ohio St. J. on Disp. Resol. 171, 192–93 (2019).

47 Meierding, *supra* note 41, at 225 ("Some divorce mediators believe that effective communication occurs when parties are able to fully express their hurt, anger, frustrations, and other feelings to one another in a safe environment . . . .").

48 Interview with Hon. Steve Rosen (Retired), mediator in Seattle, Washington, via Zoom (Dec. 17, 2023) (notes on file with authors).

49 *See* Meierding, *supra* note 41, at 237.

50 Haynes, *supra* note 2, at 176 ("Clients tend to articulate what they *don't* want easier than they state unequivocally what they *do* want.").

51 We say "on the whole" because a few of the mediators with whom we spoke see no problem with the attorney doing the talking; one even prefers it.

client drive the discussion, and these attorneys listen very acutely not just to what the other room is offering, but also to how their client is reacting.[52] This in turn allows the mediator to get to the heart of what is important to the client. "To feel comfortable, the parties must feel that the mediator cares about their concerns."[53] In short, less argumentation and more listening are key to successful mediations.

We also asked mediators about parties having other people in the room with them except their attorney. Some people need a support system with them, like a friend or family member. Sometimes they even have a financial advisor with them. The consensus seems to be that this is not conducive to settlement. Although some people may really need some support, as in the case of a domestic violence victim who is terrified of the other spouse,[54] one mediator remarked on how a party needing additional people in the room does not bode well for serious negotiation because it signifies that this spouse struggles to make important decisions. The mediator therefore has to build a rapport with not just the party, but also that party's entourage.

The attorney needs to determine whether having someone else in the room will help settle the case, or if it will just get in the way. Financial experts, for example, may be of great benefit in helping the party understand the logistics of their expenses, but they become a nuisance when they step over the lawyer and give opinions on what their client should agree to. Moreover, it is important not to have a situation where third parties come and go throughout the day—e.g., don't wait until 3 p.m. for Uncle Angus to show up and offer his opinion. Those people (usually cocksure parents or grandparents) who come out of the woodwork have not been present throughout day and cannot understand all the emotions and thought processes that led to this point. Their two cents will normally be unhelpful and probably cause the client to backslide. (This not to say that these other family members' opinions

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52 *Cf.* Meierding, *supra* note 41, at 235 ("While parties are apparently listening to each other, they may also be planning their own response or rebuttal and therefore listening only in a peripheral wasy.").

53 Coye Conner, Jr., *Trust Building in Mediation*, 2019 Advanced Fam. L. 71.

54 *See* Thomas Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence*, 28 J. Am. Acad. Matrim. Law. 455, 461 (2016).

are silly or unimportant, just that they are likely not grounded in any relevant legal points of view and their advice is often based on incomplete information.) If someone else is going to be there with your client, they should be there from the beginning; and if they have to leave, then they should not come back.

IV. Make a Reasonable First Offer

Pretty much every mediator rolls their eyes at the outlandish first offers people make. It is true that, "[d]espite the conciliatory tone of mediation, the relationship[ ] between parties to a dispute remain[s] adversarial until the dispute is resolved."[55] Still, these cases are already emotionally charged, so why pour kerosene on the flame? The whole point of coming to mediation is to at least try to settle the case. Absurdly one-sided offers—offers that the offering party knows will fall flat, but merely give them room to move toward the middle—only serve to shock and alienate the other party.[56] The fact of the matter is "[m]ost mediation clients have a sense of what they can expect to gain in court and, if the expectation is realistic, are unlikely to settle for less in mediation."[57] Like an inflammatory mediation letter, unrealistic first offers can affect the rest of the day's negotiations. Indeed, one study out of the Norwegian School of Economics found that "[t]he number of rounds that a negotiation takes to complete in the experiment is significantly correlated with the first offer."[58]

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55 Eileen A. Scallen, *Relational & Informational Privileges & the Case of the Mysterious Mediation Privilege*, 38 Loy. L.A. L. Rev. 537, 590 (2004).

56 *See* Joel Levine, *The Seven Deadly Sins of Mediation*, 42 Litig. 36, 40 (Winter 2016).

57 Haynes, *supra* note 2, at 157.

58 Sigbjørn Birkeland, *Negotiation Under Possible Third-Party Resolution*, 56 J.L. & Econ. 281, 291 (2013). For this experiment, business school students were tasked with bargaining for a division "of a sum of money created through individually produced output." *Id.* at 282. "The game studied is based on the alternating-offer bargaining protocol extended to include the outside option of using a third party to make a final decision." *Id.* The researchers gleaned that the first offer signals the level of aggressiveness being employed, and "could therefore have a strong impact on the efficiency of negotiations." *Id.* at 291. Perhaps more important for purposes of this article is the observation that "[t]he introduction of a third party induces the parties to make first offers that are more strongly related to their relative production," suggesting "that there are more first offers closer to an offer based on the proportionality principle in this treatment."

Remember that these are not settlement demands akin to personal injury cases or tort actions. A simple monetary figure to make someone whole is rarely a possibility in family law disputes. An initial offer should be thoughtful and predicated on the goals and objectives the client has not only in the immediate aftermath of the divorce, but also in the years to come. Of course, the offer should not be the *final* offer, but it should probably be at the far end of the bargaining range—i.e., this is the ideal proposal within the range of outcomes the client can live with. The client needs to know the attorney is advocating for them, so it is important for the attorney to leave room to move toward the middle.

Another obvious point is this: make a first offer. It does not do any good to show up without advancing some type of proposal. Sending the mediator and opposing party a proposal gives everyone something to work from and prepare for. This is true even if it is an outlandish offer, because "the first offer locks in the maximum or minimum settlement" proposals from each side.[59] At the very least, it gives the mediator a sense of how the client is viewing settlement talks.

V. Know the Facts of Your Case—*All* of Them

Mediation is like jazz, in that it welcomes creative and improvisational ideas during the performance; but even jazz musicians need to rehearse and study and do the necessary legwork before the gig. To that end, lack of attorney preparedness is probably the most cited reason as to why mediations fail. "It's quickly and easily apparent when [an attorney] is not prepared for mediation."[60] Either in the mediation letter or in the first meeting, each attorney should furnish the mediator with basic case facts—e.g., the relative size of the estate, each party's net monthly income, what are the specific issues that need to be addressed, etc. This may seem like common sense, but apparently it is not. According to the

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Id. (The so-called "proportionality principle" is identified in the experiment as one of three "salient fairness principles," allocating the joint production according to the individuals' relative production. *Id.* at 285.)

59 Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, 59(3) Disp. Resol. J. 56, 58 (2004).

60 Interview with David Hazel, mediator in Yakima, Washington, via Zoom (Jan. 4, 2024) (notes on file with authors).

mediators we interviewed, it was surprising how many attorneys arrive at mediation thinking they could wing it and get the case settled.[61] Similarly, mediators sometimes deal with attorneys who do not know the applicable law. This puts the mediator in a bind, not wanting to embarrass the attorney, but not wanting to turn a blind eye to the attorney's nescience.

Another glaring problem mediators regularly come across is a lack of documentation to substantiate each party's position. Missing or poorly assembled documentation—such as income records, appraisals, a financial declaration, or an asset spreadsheet—hamper discussions and make the mediator's job all the harder. An asset spreadsheet in particular is a vital component to a divorce mediation. It does not need to be fancy, just *something* from which the mediator can work. Similarly, it also helps to come into the mediation with drafts of proposed settlement agreements. Having a drafted custody order or property settlement agreement saves time and also makes clear to the mediator and other side the attorney's exact starting position.

All this ties in with another point: to be certain the case is ready for mediation. Obviously if there is still discovery that needs to be done, then it is not yet the time to be scheduling costly alternative dispute resolution. *Why would you come in without an appraisal if the home value is disputed?*, asked one mediator with whom we spoke.[62] Or if there are significant discrepancies in each side's spreadsheets, then the attorneys might still need to sort out certain details. That said, mediation should not be a means to conducting back-door discovery, asking the other side for documentation they should already have and understand. That kind of conduct borders on bad faith and implies some ulterior motive aside from settlement. Some of the mediators with whom we spoke say that they see this conduct of discovery in the guise of mediation regularly. We get the sense that mediators find this particularly irksome. It is a huge waste of time that contributes to

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61 *See, e.g.*, Spradlin v. Richard, 572 Fed. Appx. 420, 428–29 (6th Cir. 2014); Corp. for Character v. Fed. Trade Comm'n, No. 2:11-cv-00419, 2018 WL 3539830, at *7 (D. Utah July 23, 2018); Attorney Grievance Comm'n of Md. v. Steinberg, 910 A.2d 429, 435 (Md. Ct. App. 2006).

62 Interview with Richard West, mediator in Orlando, Florida, via Zoom (Jan. 4, 2024) (notes on file with authors).

unconscionable first offers.[63] One mediator is comfortable with multi-day mediations, because that way the first day can be effectively set aside for the parties to exchange financial documents, and the next day(s) can actually focus on settlement talks.[64]

To be clear, not all cases can be mediated. Multiple mediators noted that relocation cases are practically dead on arrival—*what is the middle ground (both figuratively and literally) when mom is moving to Texas and dad is staying in Iowa?* It would be naïve to think that every embattled spouse is eager to break bread and cede ground on important aspects of their divorce.[65] Likewise, even the most informed and rational client can always walk away from a mediation without resolution, no questions asked. But to effectively give advice on whether to avoid mediation or pursue it, the attorney needs to have a firm handle on the case. Litigators need to weigh the global aspects of the case; and, in doing so, they must convey to their client the pros and cons of mediation as it relates to the unique facts of their situation.

VI. Being Flexible Is a Sign of Good Faith

Good faith is a hard thing to define in the family mediation setting.[66] "[P]ersonal attendance by parties with authorization to settle, preparation and exchange of requested documents, engaging in discussions, making no misrepresentations, and remaining at the mediation for a reasonable time are minimal participation obligations" for those engaging in a good faith mediation.[67] But the personal nature of domestic law complicates things. Can we say that a mother's treacly positions on a custody arrangement are made in bad faith simply because of her history with the children?

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63 Haynes, *supra* note 2, at 160 ("Clear data make it more difficult for either party to open with unreasonable positions, since the parameters of the bargaining are established in the data gathering and setting stage of the negotiations.").

64 Schilawski interview, *supra* note 32.

65 Fines & Madsen, *supra* note 23, at 968 ("The 'stakes' in family disputes may be economic, but the economics are imbued with fundamental psychological layers. . . .").

66 Hazel interview, *supra* note 60 ("Ask ten lawyers to define good faith and you'll get ten different answers.").

67 Maureen A. Westin, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality*, 76 Ind. L.J. 591, 628 (2001).

Or what about a spouse who wants to hold onto a home, regardless of whether they fully grasp how exactly to pay the mortgage? Maybe one spouse's financial acumen is far and away superior to the other's, and the complexity of the estate makes it hard for either party to even conceive of a pragmatic offer; is that bad faith? One cannot simply look at the offer being made in a vacuum.

Fortunately, all of the mediators with whom we talked said they rarely see bad faith on anyone's part. It's hard to go through a divorce. It's hard to go through the litigation process. Some people may want a pound of flesh, but even they probably just want to be done.[68] Mediation gives them a guaranteed result. Trial does not.

So when people make (what they perceive to be) a perfectly reasonable offer at mediation, only for the other side to counter with something totally different, it is easy to think the other side is operating in bad faith—that is in all likelihood perception becoming reality. These parties are trying to make decisions and compromise with someone they no longer trust, often after years of dejection and struggle. Naturally, they are going against their instincts, which have been honed over time, *not* to trust the other. Attorneys cannot force their clients to have confidence in one another, nor can they convince clients that the other side is taking a good faith position. All that, however, can be minimized with an air of openness and preparation: "Give me two spouses who can't stand each other and two lawyers who can't stand each other and, if the two lawyers diligently prepared their case and diligently prepared their clients, the odds are overwhelming the mediation will result in a perfectly reasonable [settlement] agreement."[69] The interviews with mediators revealed two signs of bad faith: (1) when one person is unprepared to seriously discuss the merits of the

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68 *See* Gregory M. Bistram, *Steps to Constructing a Litigation Policy*, Aspatore, at *14 (2009) ("Almost all clients hate litigation. It is a process they cannot control, it is expensive, and hoped for 'wins,' even if attained, must usually be reduced by the cost of 'achieving the victory.'"); *see also* 1 Robert J. Caldwell, Handling Business Tort Cases § 1:1 (noting that, at least in the business litigation setting, most clients dread litigation and do not relish participation in court proceedings).

69 Hazel interview, *supra* note 60; *see also id.* ("Successful mediation is entirely dependent upon thorough preparation by all, including the mediator.").

case or dig into the issues;[70] and, relatedly (2) when one party outright refuses to discuss an important aspect of the case.

The larger point here is that, bereft of bad faith stifling a potential settlement, both the attorney and their client need to trudge forward with the mediation even when resolution seems bleak. One of the biggest mistakes is stopping negotiations when it seems like frustrations are boiling over. This is where to the attorneys need to trust that the mediator is making progress in each room. It takes time for parties to work through the expectations of the other room. So when one side digs their heels in on something, this is where a good mediator—a mediator carefully selected, as discussed above—gently tries to level out the playing field, usually by providing more information about what could happen at trial. If Spouse A says, *the court is no doubt going to rule my way*, the mediator might see this as the perfect opportunity to say, *well, actually, a judge could also do X, or Y, or Z*. Attorneys can also ask the mediator what they think their chances are at trial of receiving a particular outcome, and seasoned mediators will help provide evaluative input to help everyone reach an informed decision.

It is important for attorneys to manage expectations beforehand to prepare clients to keep an open mind. The Buddha might as well have been a mediator when he taught that "the root of suffering is attachment," because everyone will need to adjust their mindset as information comes in throughout the day. It is also important for attorneys to not be rigid or afraid to deviate from their initial positions. If the mediator asks, *is that a position you think a court is going to take at trial?* and the attorney and their client both say yes, the mediation is probably not going to go well if that position is utterly unreasonable. Refusing to budge from an initial position at mediation will only get the attorney so far. The attorney is not there to convince the mediator that their side's position is correct; on the contrary, the mediator is paid a lot of money to remain neutral and help the parties adjust their expectations.[71]

VII. The Importance of Collegiality

Many of the preceding sections overlap with one another in straightforward ways. Be candid, be open and flexible, be efficient,

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70 *See supra* Section V.

71 *See* HAYNES, *supra* note 2, at 7.

be knowledgeable, etc. But, to some extent, those attributes are contingent upon there being collegiality between the attorneys and spouses. Litigators inhabit an adversarial system, and family law in particular can bring out the parties' more unsavory attributes.[72] Those hard feelings do not disappear just because they agree to mediate.[73] It follows that when one side's mediation materials cast a pall over the proceedings by attacking the other side, the mediator then has to deal with the substance of the dispute *and* play peacemaker. Really looking to settle means setting aside those character attacks to the extent possible. Yes, that is easier said than done, but doing so augurs well for the clients' relationship post-divorce.[74]

Focusing on points of agreement—rather than sharply arguing why the other's positions are fatuous or ill-advised—pays dividends down the road. It is true that there is an initial intensity to divorce, one in which anger and sadness can be driving factors for people at the outset. After enough time passes, most people eventually become (at least a little) sympathetic to their spouse's future. Commonalities brought these spouses together in the first place, after all. (Even with challenging custody disputes, pretty much every parent agrees on wanting what is best for their children.[75]) The prospect of leaving the other spouse in dire straits is far less appealing than a more equitable outcome.[76]

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72 *See* Minich v. Cnty. of Jefferson, 919 A.2d 356, 359 (Pa. Commw. Ct. 2007) ("Divorce brings out the worst in every individual; anxiety, emotion, anger, and revenge run rampant."); Hernandez v. Alonso, No. 70675, 2017 WL 6055429, at *4 (Nev. Ct. App. Nov. 16, 2017) (Tao, J., concurring) ("Divorce and custody negotiations can be amicable and smooth. But they can also devolve into contentious, bitter, petty, emotionally and financially draining, exhausting, prolonged wars of attrition . . . .").

73 *See* Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. Disp. Resol. 367, 367–68.

74 Gregg Hermann, *ADR and Family Law*, 14 Disp. Resol. Mag. 37, 37 (Summer 2008) ("In family law, unlike most other areas of law, when the guns stop firing and the smoke settles, frequently the warring parties still have to live with each other—not literally, but metaphorically.").

75 Karen Bonnell, The Co-Parenting Handbook 31 (2017).

76 *Cf.* Haynes, *supra* note 2, at 13 ("When talking about the future there are no complaints or recriminations. We can complain about yesterday's weather, be we can't complain about tomorrow's.").

Remember also the familiar statistic about how something like 98% of civil cases settle.[77] The actual number is hard to pinpoint,[78] but the point is this: if the vast majority of these cases settle, there is no need to be nasty, at least not in this setting. This is especially so because many of the most respected mediators in your area have earned a positive reputation because they are good at what they do. There is usually a trickle-down effect in which the lawyer's combative demeanor impacts their client's attitude toward the process. With that in mind, we close with the AAML Bounds of Advocacy, which lays out the shifting outlook professionals have toward more collaborative practices:

> The traditional view of the matrimonial lawyer (a view still held by many practitioners) is of the "zealous advocate" whose only job is to win. However, the emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Public opinion (both within and outside the AAML) has increasingly supported other models of lawyering and goals of conflict resolution in appropriate cases. A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family is one model . . . .
>
> Matrimonial lawyers should recognize the effect that their words and actions have on their clients' attitudes about the justice system, not just on the "legal outcome" of their cases. . . . Clients look to attorneys' words and deeds for how they should behave while involved in the legal system. Even when involved in a highly contested matter, divorce attorneys should strive to promote civility and good behavior by the client towards the parties, other lawyers and the court.[79]

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77 *See* Jessica Feinberg, *Multi-Parent Custody*, 108 Minn. L. Rev. 1489, 1526 (2024) ("Whether through mediation or other methods, settlement is reached in over ninety percent of child custody cases.").

78 Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1339–40 (1994) (caveating the oft-cited statistics about cases settling).

79 *See* Bounds of Advocacy, *supra* note 1, at v–vi.

Expanding Disagreement Resolution Skills for Attorneys: Helping Shape Future Co-parenting Relationships and Addressing Property, Debt, and Distribution of Future Income*

by
Kenneth H. Waldron** Allan R. Koritzinsky***
and Eileen McCarten****

***Abstract**: Ken Waldron and Eileen McCarten designed and conducted a study to test the hypothesis that, in the vast majority of divorce cases, the causes of co-parenting conflict are skill deficiencies and not mental health issues. The skills regarding the inevitable tasks of resolving differences and disagreements post-divorce is critical. A functional co-parenting relationship requires much more than following a court-ordered custody schedule and the suppression of conflict. The healthy resolution of disagreements requires our Five Tasks to be performed in order for parents to facilitate and enjoy a functional and amicable co-parenting relationship.*

The Waldron-McCarten study reflected a high correlation between our Ten Disagreement Resolution Skills and the level of co-parenting conflict. Prior research on some of those skills confirmed that those skills can be taught. Therefore, assessing skill deficiencies at the time of a divorce and teaching those skills can lead to a much improved co-parenting relationship. In addition, attorneys can model and facilitate these steps at the time of a divorce, and thereby broaden services provided to their clients. This

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* We intentionally use the term "disagreement," rather than the more common term "dispute," for accuracy. Parents have disagreements. When disagreements are unresolved, they become disputes. When disputes are unresolved, they morph into "conflict." Marital partners and divorcing spouses begin with normative disagreements. Our hypothesis is that weaknesses in disagreement resolution skills are the key ingredient in the escalation to disputes and conflict.

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can potentially prevent (or at least reduce) co-parenting conflict and facilitate functional and healthy co-parenting relationships with better outcomes for their children.

Introduction

Much of what we currently think about co-parenting conflict might be wrong. Mental health problems, especially personality disorders, might not be the common cause of the majority of co-parenting conflict. Many current approaches to treatment for co-parenting conflict, at best, reduce overt conflict but do not result in healthy co-parenting relationships. This article posits an explanation for co-parenting conflict that includes a solution. Finally, we believe that family law attorneys can play key roles in shaping co-parenting relationships following divorce.

Psychologist Mary Whiteside, in an extensive review of the literature, found that about 20% of divorced parents conduct amicable, healthy co-parenting, about 20% conduct high conflict co-parenting, and about 60% have moderately high to relatively low overt conflict, some of which includes cold war co-parenting relationships.[1] The high conflict group likely represents mental health problems, especially personality and conduct disorders, since about 20% of the population exhibits these difficulties, independent of divorce.

The message of this literature search is that post-divorce co-parenting conflict is common but not inevitable. The history of marriage indicates that managing differences and resolving disagreements was pre-determined by socially dictated roles, which generally involved the suppression of women (wives) and the dominance of men (husbands). The history of divorce is the reverse, where mothers were dominant and fathers became largely irrelevant, except in the role of paying child support.

Only since the social revolution in the 1960's and 1970's has marriage become more egalitarian, at least in some parts of the world.[2] This created a new evolutionary paradigm shift: marital partners were required to manage differences and resolve disagreements when neither gender has the final say. Likewise, the increased role of divorced fathers in the lives of children has also

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1 Mary F. Whiteside, *The Parental Alliance Following Divorce: An Overview*, 24(1) J. Marital & Fam. Therapy 3 (1998).

2 *See generally* Stephanie Coonts, The Way We Never Were: American Families and the Nostalgia Trap (1990).

required that inevitable differences and disagreements be resolved without a designated final decision-maker. In both cases, spouses and parents need new disagreement resolution skills.

This article proposes to expand dispute resolution skills for family law attorneys and rename them "disagreement resolution skills," to facilitate functional and amicable co-parenting relationships. Part I introduces our Skill Building Model and the link between lagging or lacking skills and co-parenting conflict. Part II introduces the Co-parenting Conflict Assessment Tool (CCAT) and offers additional information for the technically minded based on the research. Part III presents five research-based tasks facing separated parents, which is a roadmap for parents to facilitate a functional and amicable co-parenting relationship. Part IV describes Ten Disagreement Resolution Skills and provides suggestions to family lawyers for modeling and, to the extent possible, teaching the skills to clients. Family law attorneys are in a unique position to help clients make a healthy adjustment to divorce, particularly in the negotiation and settlement phases of a case. Part V applies these concepts to the distribution of property, debt, and future income.

Expanding legal services for divorcing clients can accomplish two important objectives:

First, the fears and insecurities of divorcing parents about the impact of divorce on family life and outcomes for their children can diminish dramatically as they learn the modest tasks facing them. They can also learn the skills that can diminish future conflict between them. Second, the same skills can be applied to the fluctuating financial futures of the clients, when adjustments to their financial situations might be necessary to reach financial goals for their children and for themselves.

I. Skill Building Model

Skills for resolving inevitable disagreements are required to have a healthy marriage, and when divorced, to have a functional co-parenting relationship and a healthy family. Taking inspiration from the *Lagging Skills Model* in education,[3] Eileen McCarten

[3] Ross Green, Lost at School: Why Our Kids with Behavior Challenges Are Falling Through the Cracks and How We Can Help Them (2008). Dr. Greene originated the empirically supported and evidence-based model of care Collaborative and Proactive Solutions (CPS) based on the premise that challenging behavior occurs when the demands and expectations being placed on a

and Ken Waldron hypothesized that, at least for the 60% group of divorcing parents who have moderately high to relatively low overt conflict, the causes of marital conflict that end the marriage persist into the divorce, in the form of co-parenting conflict. The family law system exacerbates the problem, although inadvertently, by turning parenting into the zero sum games of legal custody and a parenting schedule. This creates the impossible illusion that successful parenting can be conducted in two homes with little communication and cooperation. The ingredients of a functional co-parenting relationship and the necessary skills for resolving disagreements could and should be addressed in the typical divorce, and this is where and when attorneys can help.

Research on marriage reveals that lagging (or lacking) disagreement resolution skills differentiate between successful marriages and failed marriages. John Gottman, Bill Banaka, Judy Wallerstein, and others have studied the role of skills in marriage. John Gottman and his colleagues studied marriages for almost twenty-five years and produced a breakthrough book.[4] Bill Banaka identifies the phase in marriage that involves control as the make-or-break issue, depending on the control strategies of the spouses.[5] Other books, such as Judith Wallerstein's *The Good Marriage,* deliver more information about skills that lead to a successful marriage.[6]

A reasonable hypothesis is that the majority of marriages that end in divorce do so because the spouses lag or lack skills to resolve the disagreements that inevitably arise from differences successfully. As Gottman points out, when differences and disagreements remain unresolved, marriages begin to go through predictable stages, culminating in apathy and often divorce.[7] Based on a thorough literature search and the experience of the study's

child exceed the child's capacity to respond adaptively and that some children are lacking the *skills* to handle certain demands and expectations.

4 John Gottman, Why Marriages Succeed or Fail: And How To Make Yours Last (1995).

5 William Banaka, Relationships: A Developmental Approach (1972). This book is unfortunately out of print. Dr. Banaka was one of Ken's graduate school professors, which is when Ken read his book.

6 Judith S. Wallerstein & Sandra Blakeslee, The Good Marriage: How and Why Love Lasts (1996).

7 Ellie Lisitsa, *The Four Horsemen: Criticism, Contempt, Defensiveness, and Stonewalling*, The Gottman Institute, https://www.gottman.com/blog/the-four-horsemen-recognizing-criticism-contempt-defensiveness-and-stonewalling/ (last visited Jan. 24, 2024).

authors, Ken Waldron and Eileen McCarten identified a list of Ten Disagreement Resolution Skills.[8]

Ken and Eileen created an assessment tool to measure skill levels, and a rating system to measure the level of co-parenting conflict. A pilot study was conducted with 20 subjects to test the validity of the Co-parenting Conflict Assessment Tool (CCAT).[9] The rating of the level of conflict was conducted by four experienced mental health professionals. The results showed a very high correlation between scores on the CCAT and four independent professional ratings of the level of co-parenting conflict. This suggested that the assessment tool is valid and that there is a correlation between the ten disagreement resolution skills and the level of co-parenting conflict. Ultimately, the study expanded to include 50 additional subjects drawn from legally required co-parenting education classes nationwide.[10] The results of the expanded study also found a very high correlation between individual skills and total of skill levels and the level of co-parenting conflict. Because it is highly unlikely that the level of conflict causes skill weaknesses, and because it is very likely that skill levels cause the level of conflict, the study concluded that disagreement resolution skill levels predict and cause the level of co-parenting conflict. These findings therefore define the problem of co-parenting conflict as having a solution: teach disagreement resolution skills to vulnerable parties.

II. Co-Parenting Conflict Assessment Tool (CCAT) Research Method and Findings

Ken and Eileen developed a Co-parenting Conflict Assessment Tool (CCAT). Sixty items (six items for each skill), which are answered on a Likert scale (i.e., Strongly Disagree; Disagree; Neutral; Agree; Strongly Agree). Level of conflict was judged by four experts on a Likert scale (Low Conflict; Moderately Low Conflict; Moderate Conflict; Moderately High Conflict; High Conflict). Seventy enrollees in a required parent education classes in Illinois and on-line co-parenting classes elsewhere. Findings

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8 *See infra* Part IV.

9 The 20 subjects were divorcing parties entering the required parent education program administered by Eileen McCarten in Rock County Illinois.

10 The 50 additional subjects were drawn primarily from the on-line co-parenting education participants at the High Conflict Institute of Bill Eddy.

strongly confirmed the validity of the CCAT, showing a very high correlation between subject scores and level of conflict. As an incentive to participate, subjects were offered a report on the findings of their answers on the CCAT. The responses came close to a normal curve distribution, suggesting that the study was valid.[11]

Research Findings

Skill[12]	1	2	3	4	5	6	7	8	9	10	Total	S-R	E-R
1	1.00												
2	.496	1.00											
3	.539	.695	1.00										
4	.616	.433	.567	1.00									
5	.564	.644	.732	.420	1.00								
6	.441	.631	.723	.304	.807	1.00							
7	.583	.619	.746	.440	.783	.813	1.00						
8	.620	.574	.616	.457	.674	.605	.568	1.00					
9	.639	.644	.721	.498	.739	.698	.672	.684	1.00				
10	.395	.611	.657	.285	.669	.758	.585	.495	.779	1.00			
Total	.729	.785	.856	.596	.874	.848	.837	.793	.871	.799	1.00		
Self-Rating	.487	.413	.460	.237	.500	.456	.677	.491	.488	.385	.567	1.00	
Expert Rating	.686	.710	.781	.520	.760	.750	.816	.762	.790	.649	.894	.426	1.00

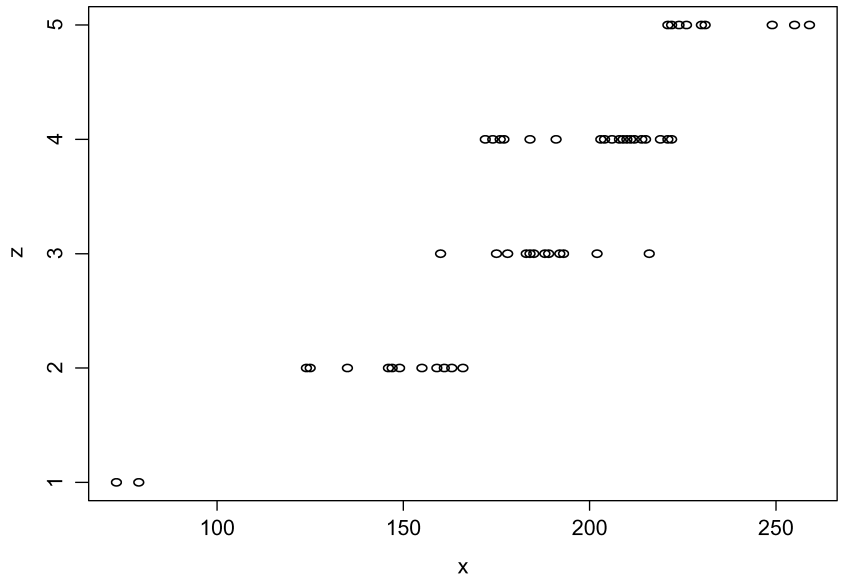
All ten disagreement resolution skills correlate highly with level of conflict, in both directions of low and high conflict, as measured by ratings, with some variance. Self-rating for level of conflict correlates well with Expert Rating (.426), but is noticeably lower than other correlations. In every case, expert ratings correlate better with each skill and with total skill scores than self-rating. It appears that a substantial minority of co-parents do not experience or perceive the same level of conflict that experts observe. A detailed examination of individual subjects suggested that the majority of co-parents are fairly objective, although a smaller, but substantial number of subjects have very subjective views regarding the level of conflict in their co-parenting relationship.

The following is the scatter graph of the results of the study. **Z** represents the level of conflict as judged by four experts (i.e., 1=low

11 The distribution was slightly skewed in the direction of higher conflict.

12 The numbered skills in the table correspond to the numbered skills in Part IV of this article.

conflict to 5=high conflict), and **X** represents the total scores of the subjects on the CCAT. The clear directions of scores (small ovals) shows the near linear relationship between conflict and skills.



Our Hypothesis and Conclusion

Our study strongly supports the hypothesis that the causes of co-parenting conflict for the bulk of divorcing parents are lagging disagreement resolution skills.[13]

III. Five Tasks to Facilitate Functional and Amicable Co-Parenting Relationships

Research on functional and amicable co-parenting relationships identifies five specific accomplished tasks[14] in the following domains:

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13 Dr. Waldron has written a *Co-Parenting Training Workbook* for parents to address these five tasks of a functional co-parenting relationship. Workbooks can be obtained at: www.unhookedmedia.com (the publisher).

14 Connie Ahrons, The Good Divorce: We're Still a Family (2004); Sanford Braver et al., *The Content of Divorce Education Programs: Results of a Survey,* 34 Fam. & Conciliation Cts. Rev. 41 (1996); Sharlene A. Wolchik et al., *The Children of Divorce Parenting Intervention: Outcome Evaluation of an Empirically Based Program.* 21 Am. J. Community Psychol. 293 (1993).

Sharing information. In organizational terms, sharing information creates an *open information system,* in which the people involved in making decisions have the same body of information. In a co-parenting relationship, the implication is that both parents share all of the information they each have that the other parent might not have. This includes: general information about the children when at the home of each parent (e.g., school information; social information; behavior in each home; routines, rules and expectations in each home) similar to a business team meeting; emergency information (e.g., illness, changes in schedules, events that affect a child such as a problem at school); paperwork received (e.g., sports schedules; school notices); and transition information (e.g., information that accompanies a child going from one home to the other that allows the receiving parent to take appropriate action, when needed, such as, "*Lucy didn't sleep well last night and has been cranky today. She might be coming down with something*.").

Designing child-friendly transitions. Parents must design transitions to reduce logistic difficulties (e.g., getting sports equipment back and forth) and avoid problematic conflict (e.g., allowing a parent to come into the other home at the transition). These include allowing the child to separate from the parent being left and greeting the receiving parent in healthy ways.

Developing a flexible schedule. Parents must agree to rules and procedures for making temporary changes in the custody schedule to meet the needs and interests of the children, to take advantage of opportunities for the parents, to cooperate in emergencies, and so on.

Coordinating parenting in the two homes. Parents in amicable relationships make the rules, routines, chores, expectations, responsibilities, and discipline as similar as possible in both homes. This creates a unified effort to teach important life lessons.

Creating plans and rules regarding joint decision-making and problem-solving. Problems inevitably arise in the lives of children. Children will benefit most when both parents are involved in the solutions (e.g., a child struggling with academics). Parents often face new developments that will be best met with a coordinated effort by both parents (e.g., introducing children to a potential step-parent, a new opportunity at school, a new sport or extra-curricular interest, and so on).

Successful co-parents must set up rules and procedures for each of these tasks. Successfully addressing these tasks requires certain skills involved in resolving the inevitable differences and disagreements that arise. What follows are our Ten Skills that can strongly promote both parents' participation in the above Five Tasks.

IV. Ten Skills for Effective Co-Parenting

Lawyers can be very helpful to divorcing parents by introducing them to the five tasks above and by addressing the importance of being able to resolve disagreements if and when they arise. Informing clients that resolving disagreements involves the following modest skills can make the goal of having an amicable co-parenting relationship seem achievable. Our skills are organized into three categories: 1. Right mindset; 2. Managing feelings and emotions; and 3. Problem-solving and decision-making.

1. Right Mindset

Skill #1. Overcoming Personal Bias

This skill sounds a little complicated, but it is not. Humans developed natural tendencies that were important to survival early in our species' history, but which can also interfere in relationships in more modern times.[15] These natural tendencies are: the Overconfidence Bias, the Us-Them Tribal Warfare Bias, and the Judgment Bias.

Overconfidence Bias is just what it sounds like. People tend to think of themselves as better than they objectively are. People have a very difficult time seeing themselves objectively. When people disagree with another person, they tend to think that they are "right" and that the other person, therefore, must be wrong. Because people are overconfident, if they have a problem in a relationship, they tend to think that it is the other person causing it, which leads to defensive emotions of anger and blame. In addition, because the other person is also likely overconfident, he or

15 Scott Plous, The Psychology of Judgment and Decision Making (1993); Robert M. Sopolsky, Behave: The Biology of Humans at Our Best and Worst (2017).

she does the same thing and ends up angrily blaming in return. Both people think that they are the one trying to cooperate and the problem is the other person. This leads to a cycle of blame and increasingly entrenched overconfidence.

Us-Them Tribal Warfare was key to surviving when resources were scarce. Early humans were not only competing with other species for those resources, they were competing with other groups of humans. Usually organized into families and tribes, one group would attempt to get the resources, sometimes warring with other tribes in the same area. Whole versions of our predecessors went extinct as a result of this thinking. For example, one hypothesis is that homo sapiens killed off Neanderthals, or at least crowded them out of areas with resources. In parts of the modern world where resources are not scarce, people channel Us-Them Tribal Warfare into less destructive activities, such as sports, lawsuits, and divorce. Most divorces start out with a competition for resources: property, future income, and time with children. A once loved spouse becomes "them," along with those on "the other side," such as his or her attorney and any friends or extended family members who took the ex's side. The gravitational pull leads to litigation that feels like warfare, often lasting well beyond the divorce itself. As in tribal warfare, the "other side" becomes increasingly negatively characterized.[16]

Judgment Bias is subtler. People judge others by their actions, but judge themselves by their intentions.[17] Because of this, a parent might judge his or her ex for an action negatively, but judge themselves positively for the same action because they had "good intentions." For example, a mother thinks she is being "honest" with the children and that the father is "badmouthing" her, but they are both doing the same thing.

Overcoming personal bias is accomplished by seeing through these natural tendencies and being objective about oneself and the co-parent. Most people are ordinary and not superior to others. When people have problems in their relationships, they are

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16 *See, e.g.,* Marilynn B. Brewer, *The Psychology of Prejudice" Ingroup Love and Outgroup Hate*, 55 J. Soc. Issues 429 (1999).

17 Emily Pronin, *How We See Ourselves and How We See Others*, 320 Science 1177 (May 30, 2008).

usually part of the cause.[18] When they blame, even if they are at least partially right, it does not solve the problem. Respectful cooperation solves problems. Even though people are tempted to take an "Us-Them" perspective, they can step back and remember that they probably share similar long-term goals with their co-parent, goals that can only be reached through cooperation. Destructive actions are destructive, no matter what the intention is. People should judge themselves by their actions, not their intentions.

Overcoming personal bias is no easy task, but doing so simply means learning and practicing the necessary skills mentioned in the above paragraphs. Even when the co-parent fails to develop these skills, people can learn and use them to prevent or escape destructive conflict. If the co-parent angrily says that she or he is helping with homework and that the other parent had better do the same, a parent can respond that they both want their child to do well in school and should talk about how they can accomplish that. To be humble, avoid tribal warfare, and judge actions, not intentions, might seem challenging, but is healthy and effective in reducing co-parenting conflict.

An attorney can be a great help in addressing these biases with his or her client, although handling the perceptions of a client can be tricky. The client might be seeking support for the biases. An attorney friend of the authors once told a story of a woman who came to see him. When asked what she was hoping for, she replied that she wanted the attorney to "*bury the bastard.*" The attorney told her that he could do that with a number of legal maneuvers, but that would delay the divorce and cost a lot of money. Then he told her that, unfortunately, doing so would also likely bury her. Most experienced attorneys understand this. Effective negotiators understand that the optimal outcome for one's client is usually also an optimal outcome for the other party.[19]

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18 In a case in Richland County, Wisconsin, in which Ken Waldron was to testify, the father was on the stand badmouthing the mother. The judge, whose name he forgets, turned to the father and said, "*Be careful, in my experience, a 10 does not marry a 1*."

19 The authors understand that in more extreme cases, this perspective might not be true. *See also* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negotiation L. Rev. 143 (2002).

Skill #2. Coping with Different Realities

This skill involves bridging the gap between two different worlds and is closely related to Skill #3 (Getting Perspective). People live in their own world, which differs dramatically from the world where others live. This is because people all have experiences not shared by others, ways of interpreting their experiences that are different from others with the same experiences and even have unique differences in what they pay attention to and what they value. When people see that another person is living in a different world, they sometimes judge them by not understanding what is "*really going on*" or even lying. People have a hard time accepting that what is going on in the other person's world can be true, even especially when it differs from what is going on in their world (which can also be true). Inevitably, they say things like, "*That is not what happened*," instead of recognizing that it really did happen in the other person's world.

People are able to bridge the gap between two different worlds with effective communication and rules. In effective relationships, there is usually a little of effective communication and applicable rules. Good communication involves listening and asking questions, so that two people can understand each other's world and get a whole picture. However, sometimes it takes a rule.

For example, one spouse might have come from a family in which teasing includes swearing, but the other spouse might react very negatively and feel denigrated as a person. These parents might never understand each other's world and might simply need to make a rule that there is no swearing when communicating with each other. Why are rules so effective? If everyone knows the rules, people can have high functioning relationships, even when they do not understand the other person. Think of a card game. If everyone knows the rules, they can play without understanding anything about or even knowing the other person.

Effective communication, even with rules, takes a good deal of patience and a genuine interest in listening and learning what is being said, both of which might be in short supply during or shortly after a divorce. However, when there are children involved, learning to listen, ask questions, and when necessary, making rules is a must.

For example, one parent might react very poorly to any disrespectful behavior (e.g., rolling the eyes), and the other parent

might not understand why the co-parenting partner gets so upset. Thinking the other parent is "wrong" for getting so upset is an example of personal bias (see Skill #1- Personal Bias). A rule to be respectful of one another, including not rolling eyes, solves the problem.

Attorneys again can be of great help with this skill. It might come down to simple modeling. For example, a client tells a story, and the attorney says, "*You are probably right, but I want to check into what your wife says about it. I will contact her attorney*."

Skill #3. Getting Perspective – Looking at a Situation from Another Person's Point of View

This sounds like Skill #2 (Different Realities), but takes it one step further. The challenge of this skill is the use of imagination. Even when they agree on reality, people have very different points of view because of their histories, personalities, values, differing information, and even what they pay attention to and what they don't.

To be effective in relationships, people have to have the skill called perspective-taking, that is, looking at a situation from another person's point of view. Research shows that this skill can be learned. For example, in 1990, Howard Zehr introduced *restorative justice* in the United States.[20] Beginning with delinquent criminals, the delinquent child meets with the victim of the crime, with a mediator, and often with others who were affected, such as family members. The mediator solicits the perspectives of both the victim and the delinquent, and others present who were affected by the crime, and they work out reparations (e.g., the delinquent might mow the victim's lawn at no charge ten times). Actual outcomes have included the following:

1. The victims were able to see the perspective of the delinquent, and the delinquent was able to see the perspective of the victim.
2. Both the victim and the delinquent developed empathy for one another.
3. Victims reported that the process resolved the bad feelings.

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20 Howard Zehr, Changing Lens: A New Focus for Crime and Justice (1990). Restorative justice had been practiced in other cultures for a long time, such as among the Maori in New Zealand.

4. Delinquents were much less likely to re-offend in the future because they learned to see the perspective of victims.

This is a true win-win. These findings led to research on teaching perspective-taking simply by presenting situations (e.g., a photograph of a person in some situation) and asking subjects to report what they think people in the situations might be thinking and feeling.[21] Clumsy at first, subjects became increasingly better at perspective-taking. Perspective taking can be learned, but it takes practice.

The Right Mindset (covered in the first three Skills) undergirds all of the remaining six skills. In fact, it also turns the tables on conflict. Assume one parent accuses the other parent of something. Rather than getting defensive, by asking a few questions, the accused parent can say something like, "*I can see from your point of view that what you are saying makes sense*." The accused person might add something like, "*But you are missing some information from my perspective*." This approach will, in most situations, deflate the anger and make problem-solving possible and, if they are humble, resist the temptation to engage in tribal warfare and judge themselves by actions, not intentions. Most people facing differences try to get their point of view across, but do not really listen to the other person. To get the other person's perspective means asking something like, "*I want to understand your point of view about X, but I need a little more information.*" Then, really listening.

2. Managing Feelings and Emotions

Skill #4. Identifying and Processing Core Feelings, Including the Ability to Have Mixed Feelings and Ambivalence

It is so simple to blame another person for one's suffering, to be angry at them and even hate them. This is because anger, blame, and hate are defensive emotions. These are emotions people would rather feel when compared to the core feelings under the surface that should be addressed (meaning identified and processed).[22] The dominant core feelings involved in a divorce are

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[21] Robert L. Selman (1975, 1980, 1990, 2003) developed the model of perspective taking and demonstrated that this cognitive task could be learned.

[22] Leslie S. Greenberg, *Emotion-focused Therapy: A Clinical Synthesis*, 8 Focus 1 (Winter, 2010); Leslie S. Greenberg, *Emotion-Focused Therapy: A Synopsis*, 36(2) J. Contemporary Psychotherapy 80 (Jan. 2006). Emotion-Focused

sadness, guilt, shame, fear, and insecurity, which are difficult emotions on which to focus. As a result, so many divorcing spouses jump to blaming and anger instead. Anger and blame can feel so real, but they are cover-ups for the core feelings.

When a meaningful relationship ends, it is sad. The longer people had that relationship, the sadder it is. A divorce might include at least the hope for, relief from pain, but a divorce means giving up each other and giving up the hopes and dreams people had of a life together. They lose the family experience that they wanted for their children. They lose some friends and often loved extended family members of their spouse. The sadness can be too overwhelming to handle initially, and spouses often turn to anger and blame to cope.[23]

A divorce ignites people's fears. They are unsure how money will work out, how raising children as separated parents will work out, and whether their children will be "*scarred for life.*" They wonder if they will want another relationship, and if they do, whether they will find one that works. Going on the "dating market" raises fears and insecurities. Although people might blame their spouse, most people know that they also played a part in what feels like a failure. Here, the core feeling is guilt. People are often ashamed of having a "failed marriage," which they also try to cover-up by blaming the ex-spouse, attempting to portray themselves as innocent victims.

When people fail to resolve these core emotions, they stay on guard and are quick to blame their ex-spouse. Unfortunately, core emotions become so distorted that a perfectly nice parent might take great comfort, or even joy, when the ex-spouse suffers or is even hated by a child. The core emotions must be identified and processed.

The key is to work on the sadness, guilt, shame, fears, and insecurities. This means going back to painful experiences and asking questions: "*What were our hopes when we decided to have children*?" "*What am I afraid of?" "What have I lost?" "What are my insecurities about my future?"* and so on. The goal is to resolve those core feelings and leave behind the anger and the blame.

- Sadness is resolved by going through grief.

Therapy is an evidence-based mode of treatment that focuses on core emotions and secondary (defensive) emotions.

[23] *See* Greenberg, *A Clinical Synthesis, supra* note 22; Greenberg, *A Synopsis*, *supra* note 22.

- Guilt is resolved by forgiving oneself and asking forgiveness from the ex-spouse.
- Shame is resolved by being open and taking some responsibility for the failure.
- Fear is resolved by developing a plan for going forward.
- Insecurities are resolved by being humble and open with people.

Most divorcing spouses have mixed feelings about each other. However, the good feelings are hard to handle when losing someone once loved. By being aware of the mixed feelings, good and bad, people can maintain a healthy balance. When a person can say they have mixed feelings about their co-parenting partner, got stuck in the marriage, and did the best they could do at the time, a person can let go of the shackles of a nasty divorce.

The best question to ask a parent complaining about the co-parent is not why the co-parent acted as he or she did, but rather why the parent reacted as he or she did to what the co-parent said or did.

Ken learned to start every mediation by focusing on sadness. A short "*We are here to mediate, but I want you to know that I understand how sad this is for you. I am sure it is not where you hoped you would be in your marriage.*" The usual response was the clatter of weapons falling to the floor and often tears. Another good question to ask, before getting deeply into a case is, "*I want a good outcome for you? Can you tell me some of your fears about getting a divorce*?"

A lawyer can be most effective when he or she models this type of identification and processing of core emotions, avoiding the temptation to get caught up in the defensive emotions of anger and blame. The opening question might be: "*Tell me how you met. I want to understand how you got to where you are*." This can open the door for steering clients in the direction of managing core emotions. To an attorney, this might sound a little like therapy, but it is not. Expert negotiators strongly support the use of genuine empathic connection with both sides of a disagreement to facilitate meaningful solutions.[24]

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[24] *E.g.,* Andrea Kupfer Schneider & Noam Ebner, *Social Intuition, in* I The Negotiator's Desk Reference 127 (Chris Honeyman & Andrea Kupfer Schneider, eds. 2017); Paul Taylor & William Donahue, *Lessons from the Extreme: What Business Negotiators Can Learn from Hostage Negotiations*, *in* II

Skill #5. Developing the Ability to Be Vulnerable in Relationships

This skill is quite simple, and yet is probably the most emotionally difficult skill to practice and learn. To understand this skill, we must look at the issues of insecurity versus confidence. Insecurity in relationships comes when people fear losing control of a situation because they do not know what will happen. For example, imagine that you are at the end of a first date with someone you like and to whom you are attracted. Do you ask for a kiss? Do you ask for a second date? When you do ask, you are out of control and do not know what will happen. If you get a "yes," you are happy and relieved, but what if you get a "no"?

Most people grow up with insecurities but develop ways to avoid experiencing the fear undergirding those insecurities. People develop ways of creating a social image that they think will get people to like them, take them seriously, or be attracted to them. People rehearse conversations with potential employers or memorize a speech. People might learn to make excuses for behavior or failures and give "spin" to stories to try to convince other people that they did not really make a mistake or do something wrong. If people age in a healthy way, they learn that being rigorously honest with others, being who they really are, saying what they are actually thinking, being open about mistakes, admitting to wrong-doing and apologizing and taking responsibility are the best practices. This reduces insecurities and develops confidence. As people slowly move into adulthood, they feel more confident and less insecure. When mistakes are pointed out, they can admit to them and laugh at themselves. They do not blame other people, make excuses, or lie for wrong-doing or failures.

However, not everyone learns that taking responsibility and being rigorously honest resolves insecurities. Many people maintain defense mechanisms to avoid being vulnerable in relationships. As they do, they continue to be insecure and afraid of losing control.

The solution to those insecurities is to practice being vulnerable in relationships. The practice involves being rigorously honest, in a respectful manner, taking responsibility for oneself, and being humble. Being humble simply means acknowledging that

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The Negotiator's Desk Reference 311 (Chris Honeyman & Andrea Kupfer Schneider, eds. 2017).

one is a flawed person who makes mistakes, being selfish when one shouldn't be, saying and doing things one shouldn't, not looking perfect, and so on. The reason this resolves insecurity is twofold: First, people find out that bad things do not happen often when they are forthright. In fact, people will generally find others refreshing and attractive. Second, people find out it is not so bad when bad things do happen. In other words, people become confident.

In cases of divorce conflict, both co-parents generally have difficulty being vulnerable with one another. During the marriage, both have experienced real pain with each other and fear more pain. Yet, the path out of this quagmire is by practicing being vulnerable. The lawyer can be helpful regarding this skill by modeling and practicing this exercise with his or her client in real time situations.

Skill #6. Hearing Criticism in a Healthy Way

Criticism comes in many flavors. Sometimes a criticism is very direct ("*You are such an a**hole*"), sometimes it is a bit subtler ("*If you loved the kids, you would be on time*"), and sometimes there are no words involved at all (just a sneer and rolling of the eyes). Some criticisms are implied, but not directly communicated, such as when a parent greets the other parent and the other parent ignores the gesture. In divorce conflict, these criticisms often provoke angry responses, like the defensive behavior of angry criticisms of the other person. The root of all these inappropriate responses is in taking criticisms personally. The skill is in not taking criticisms personally.

Generally, criticisms really are not personal. There is no rational connection between loving children and being on time. A sneer and a rolling of the eyes is an ineffective way of dealing with hurt or anger. Criticisms say something about the person making the criticism, not the person being criticized, and therefore, they are not personal. In addition, most criticisms are a poor way of identifying a problem because they do not suggest a solution.

It takes practice to get used to not taking criticisms personally, but when accomplished, people find that they escape the negative reactions to them. For example, in response to the "*You are such an a**hole*" comment, a person might respond: "*I am truly sorry that you think that.*"

However, some criticisms have some useful information, so it is worth listening, even though they should not be taken personally. Here is a twist. For example, "*If you loved the children, you wouldn't be late. The children were really upset*." Here, the co-parent is criticizing, but the other parent would not take the criticism personally. However, there is useful information about the children. The parent might respond, "*Thank you for telling me this. I will talk with the children about it*." In another example, "*You are such an a**hole for telling your sister that I am a liar*." If it is true, this is useful information. The response might be, "*You are right. Neither one of us should be saying bad things about each other to other people. I am sorry and will try to correct this with my sister*." Here, the response is related to the useful information only, because the name-calling was not taken personally.

The task of managing feelings and emotions is a required skill for resolving inevitable differences and disagreements. In addition, a useful skill to avoid or escape divorce conflict is not to take criticisms personally, but to listen carefully and respectfully to the criticism in case it contains useful information. It can take time to get good at this skill, but is well worth it. An attorney can help a client learn this skill, through modeling and even encouraging the client to learn this skill. Telling a client that a criticism made by the co-parent not only tells something about the co-parent but also includes useful information. "*Let's respond only to the useful information*" can be very helpful. Again, the lawyer can be helpful regarding this skill by practicing this exercise with his or her client in real time situations.

3. Problem-solving and Decision-making

Once a person has the right mindset (Skills 1-3) and learns to manage feelings and emotions well (Skills 4-6), there remains the task of problem-solving and decision-making. The following three skills discussed below are applying our Disagreement Resolution Skills.

Skill #7. Defining a Problem in a Way That Can Lead to a Solution

This skill is critical. When a problem comes up that a person would like to solve, it helps (in fact generally requires) the

parties to define the problem in a way that leads to solutions. Lawyers generally have this skill set, and it should be easy to apply it throughout the attorney-client relationship, modeling the skill to clients. However, it might help teach this skill by adding the following advice and counsel: e.g., "*We are likely to get more cooperation if we define the problem that you are bringing up in a way that can be solved. Telling your spouse to stop being a jerk is not likely to get very far, and it is not a solution. Making rules for behavior when you are together in front of the children might have a better chance of success.*" While this sounds simple, in human relationships, people often identify and define a problem in a way that leads to conflict, rather than solutions. Assuming that solutions are better than conflict, being skilled in defining problems makes a good deal of sense. For example, compare the following:

Initial Statement: *"You fought so hard to get your precious daily calls, but your telephone call last night really upset Sally. I told you it was a bad idea. That is the end to those calls."*

Reframe: *"Sally was very upset by your call last night. She cried and kept saying that she missed you. We should try to come up with a way that she does not miss us so much when she is at the other house."*

In the first example, the problem is identified, but not in a way that leads to a solution for the actual problem. Sally is not going to miss her mother less just because her mother does not call. The second example can lead to a solution because the problem is identified in a way that can be solved. The first example leads to more conflict, while the second example (reframe) promotes cooperation on a problem that both parents likely care about.

Another example is below.

Initial Statement: *"You kept the good jeans that I bought and sent him back in your crappy old clothes. I expect him to come back with the clothes that I send."*

Reframe: *"I can see that the logistics of clothing going back and forth is complicated. We need a system for getting the right clothes at the right house at the right time. We will probably need a system like that for sporting equipment, school work, and who knows what else. Let's come up with something."*

In the first version, the person is demanding his or her solution, which is unlikely to work and puts the burden on the child to

wear the exact same clothes back and forth. Anger and blame are trumping common sense. In the second version (reframe), the person took time to identify the underlying problem and defined it in a way that can lead to a solution. They can find a way to deal with the logistical problems of the child spending time in two homes.

The skill is to step back from impulsive emotional reactions and really think about the underlying problem. Then, the problem needs to be defined in a way that leads to solutions. One more example may particularly illuminate the process of applying this skill.

Parent A is thirty minutes late and has a habit of being late. Parent B had plans and has been scrambling to change plans because the child is late. Parent B gets upset. Rather than saying anything when Parent A arrives, Parent B decides to think about the problem and come up with a plan.

A couple of days later, Parent B sends an email:

"When you are late bringing the children, any plans that I have are disrupted, as happened a couple of days ago. No one can be on time all of the time, and some people have more difficulty with that than others, but we need to come up with a way that plans are not disrupted by the other parent being late. Can you put some thought into what you could do to avoid disrupting plans, and I will put some thought into what I could do, and then maybe we could talk?"

This changes the definition of the problem from one parent being late to framing the transitions from one parent to the other so as not to disrupt plans. That definition leads to solutions.

The point is a simple one: rather than reacting based on emotions when a problem comes up, it is important to take time to come up with a definition of a problem that has solutions. Attorneys during a divorce are generally the first audience to a situation in which a client is having an emotional reaction and defining a problem in a way that cannot be solved. Therefore, the attorney is in the unique position of teaching the client to define the problem in a way that leads to solutions.

Skill #8. Resolving a Disagreement When Both People Are "Right"

This Skill is also challenging, but not for emotional reasons. The challenge here is about assumptions embedded in life. Most

people assume that there is only one "right." Thus, if they disagree with someone, and believe that they are "right," they try to prove the other person "wrong." If the other person believes that he or she is "right," that person (of course) does the same thing. This can be a healthy first step, because sometimes, one person is "right" and can prove the other person is "wrong." If the other person is healthy, he or she can be vulnerable and admit being wrong.

However, often in relationships, after attempts to prove who is "right" fail, people are tempted to escalate the argument. This can lead to very destructive conflict. Instead of discussing a topic, people start personal attacks on each other ("*you are so damn controlling*"), develop increasing hostility, and create emotional distance. They might even run to their attorney and try to get a judge to agree with them.

The challenge is to resolve a disagreement when both people are "right." This is not the traditional dismissive response, "*Let's agree to disagree*," where the person secretly still thinks that he or she is "right" and the other person is "wrong." That is a stand-off, not a resolution. People must really accept that both people can be "right." The difference is the result of different goals and values, what people focus on, differing histories, new but different information, and just plain old human nature.

To resolve these disagreements, the first step is for people to stop trying to prove that they are "right" and that the other person is "wrong." The next step is to discuss the differences that led to their opinions, including the values that affect the topic, histories, what is considered important and unimportant, and the differences in the information that people have. They come to an understanding of the larger picture and the differences undergirding the disagreement. If they need to make a decision, and the disagreement is about what will be decided, people have to step back and consider options that accomplish as much as possible of what both people feel is important and what best fits both people's values.

When resolving a disagreement when both people are "right," what follows are some practicable Rules and Guidelines:

Rules and Guidelines for Resolving Disputes When Both People Are "Right"

1. **Focus on goals and list more options.** There are usually many possible options to consider when people get stuck on two

options about which they are arguing. They can step back from the argument and brainstorm other options that accomplish more of what is important to both of them. Real "winning" in an argument is when both people feel that what is important to them was included in the solution, or at least considered, even if they do not get everything they want.

2. **Assess different levels of matters' importance**. Some arguments do not have a third option. When this occurs, it is helpful to measure and evaluate the differences between the two options. For example, Judy wants to abort a pregnancy, and Bob disagrees. They first argue about who is "right," but after a while, they realize that both are "right," given their different goals. They then discuss the values, points of focus, histories, and information that they each have. This is an intense discussion but does not resolve the question. They decide to measure the level of importance on a scale of 0 to 10. Judy says that she is an 8, because of the disruptions to her life having a child will bring. It is very important to her. Bob says he is a 10 and could not live with himself, which would likely mean ending his relationship with Judy. They do not abort the baby.[25]

3. **Understand that pace is important**. If two people want to run together, they have to run at the pace of the slower runner. For example, Jim wants their two-year-old to start daycare, but Sally does not. She wants to stay home with the child for at least one more year before starting daycare and going back to work. They can stop arguing about who is right, sharing information, histories, values, etc. However, it just comes down to Sally not being ready leave the baby and return to work. Jim has to accept that if they are going to work together (and have a good co-parenting relationship and possibly to stay married), he has to operate at Sally's pace. They hold off on daycare and remain amicable (and married).

4. **Practice the art of giving-in**. When at a true point of conflict, and when there is only one solution, to do it one parent's way or the other parent's way, one of the parents must give in. The successful art of giving-in is getting something of equal or better value. Parent A wants to have the children for their family of origin's Thanksgiving Day celebration every year. Parent B wants at least one-half of future Thanksgiving Days. Both are "right" that

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25 *The Importance Of Integrity*, https://www.gottman.com/blog/importance-of-integrity/ (last visited August 27, 2024). (The Gottman Institute)

their plan is good for the children, but both cannot get their way. Both attorneys ask their clients, "*What could you get in return that would make giving in possible?*" Parent B says, "*If I got the first half of the summer every year*." Parent A agrees to that proposal.

The Skill here involves what to do next when both people continue to believe they are "right." If people believe there is only one "right," arguments escalate and become increasingly destructive. If they believe that there can be more than one "right," the disagreement can change direction and move toward generation of a solution. If a decision must be made, they can find one that works for both people as well as possible.

The Skill here is one of mindset (that there can be two "rights") and a little technique of asking the right questions: what is the other person trying to accomplish (and then coming up with ways to accomplish what both people think is important)? Again, the attorney applying this skill can reframe the issue into a win-win for both parties. The attorney can also model how to "give in" in a constructive way.

Skill #9. Making Decisions that Accomplish Both People's Goals and Six Steps for Making Co-parenting Decisions

The focus of this skill is on making joint decisions. Cooperative and collaborative decision-making, that is, how decisions are made when more than one person is involved, has been heavily studied. Much of that research discovered flaws in the way that people made decisions. However, some of that research uncovered the secret to successful decision-making.[26]

Separated parents must make many collaborative decisions, well beyond what is dictated by law. If separated parents have difficulty collaborating on decisions, they often put the burden on the shoulders of their children by each making unilateral decisions in their separate homes. For example, teaching good work habits involves establishing good routines with rules, so that the child just does tasks out of habit. What happens if the routines are different in the two homes? Instead of learning good work habits, the child tries to learn how to adapt to the two settings. This can get even crazier when one parent works hard to establish a routine and the other parent leaves it up to the child to get work done. This child

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[26] See the field of Organizational Psychology. For example, "5 Decision-Making Models if You're Stuck. Atllassion.com"

grows up knowing he or she should be getting some things done but cannot seem to force him or herself to do it.

Of course, the solution is that parents should coordinate their routines, but this involves making decisions together. Coordinating routines is just one set of hundreds of decisions that work best if collaborative. Deciding how much say-so to give the child in the selection of extracurricular activities and how much time each week can be spent in those activities are two more practical examples. The following section explores the Six Steps for making collaborative decisions in more detail:

Six Steps for Making Collaborative Decisions

1. Make an appointment to begin the process for making a decision.
2. At the appointment, share information and decide what additional information is needed and how to get it. Set up another appointment after all the information is received.
3. Meet again and share the information. List the options, as well as the pros and cons of each option.
4. Choose an option. If it is unclear which option is the best, just choose one and agree to evaluate the choice when there is more information.
5. If disagreement persists on the options, discuss each parent's goals and what they are trying to accomplish and come up with another option that accomplishes as much of what both parents want to accomplish.
6. Develop an action plan – how the option will be put into effect.

Rules Regarding the Six Steps for Making Collaborative Decisions

Some parents might read the above and say, "*I wish*" or "*If we could talk like that, we'd still be married.*" It might be true that if they had this skill, they might still be married. However, intimacy is much more complicated than a business-like co-parenting relationship. The solution is to agree on rules for this process and the meetings together. One rule might be to discuss only one decision at a time. Another might be to stay on topic and to have a way to get back on topic if the discussion goes off topic. Another might be to be courteous and respectful by listening to each other, not interrupting, not making denigrating comments, and so on. Parents

must always have the goal of accomplishing as much for both parents as possible, rather than trying to be "right" about something.

Attorneys can introduce and model this skill in the divorce negotiations. A selling point is that parents learning this skill can teach their child this skill by modeling it, so that their child can take the skill into adulthood. As previously stated, the attorney can apply skills already known and used in other settings to counsel his or her client appropriately.

4. Recovering from Destructive Conflict Quickly

Skill #10. Keeping It Short and Clean, Resolving the Disagreement, and Repairing the Relationship Damage

John Gottman's research uncovered some surprises about relationship conflict.[27] One surprise is that people in successful relationships have as many gut-wrenching differences and disagreements as do people in unsuccessful relationships. However, people in successful relationships keep the discussions short, keep it fairly clean by not regressing to personal attacks and bullying, resolve the disagreement, and repair the relationship. While simple in theory, in practice, this skill involves all of the other nine skills– especially looking at the other person's point of view and having healthy reactions to criticism and blame by the other.

The first point is to recognize that disagreements are unavoidable. All substantial relationships have disagreements, whether that is with a friend, business partner, an extended family member, an ex-spouse or even children. A cold war between co-parents creates a disturbing family for children. Instead of modeling how to handle disagreements well and get to solutions, it models avoidance. It is little wonder that children with separated parents who handle their co-parenting relationship poorly are twice as likely to divorce when they are adults, when compared to children whose parents had a functional co-parenting relationship.[28]

The reason this is so important is very practical. If people in a relationship spend only about 10% of their time in conflict, this

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27 *See supra* text at note 4.

28 Motti Haimi & Aaron Lerner, *The Impact of Separation and Divorce on the Health Status of Children and the Ways to Improve it*, 4 J. of Clinical and Medical Gen. 1 (2016).

frees them up to spend 90% of their time conflict free with one another. If they spend 90% of their time in conflict, there is far too little good time left to absorb the pain and frustration of conflict. It is when conflict absorbs more and more time in a marriage that people begin to think about divorce. For a co-parenting relationship, limiting conflict time by recovering quickly opens the door to enjoy raising children together, both being at activities and happy to see one another.

When co-parents have a disagreement, they have to cool down, look at the situation from the other person's point of view, be honest with themselves about their part in it, pledge to work on improving their part in the co-parenting relationship, and acknowledge this to each other, including with an apology, if warranted. Attorneys can provide this advice to their clients and model this skill in the divorce negotiations. Additionally, being vulnerable, coming to solutions for problems, and developing resolutions for disagreements all create a positive family atmosphere that children of divorce crave.

Expanding disagreement resolution skills is a win-win for everyone. Enhancing co-parenting relationships is a win for parents if they: learn the Five Tasks to facilitate amicable co-parenting relationships, develop the Ten Skills for effective co-parenting, and follow the Six Steps for making Collaborative Decisions.[29]

Effective lawyers already have some of these skills and can model them for their clients.[30] However, enhancing co-parenting relationships is an additional win for lawyers. They can add extraordinary value and provide additional services by taking the extra step and describing the applicable skills to a client and how those skills can be effective. Attorneys can also point out the necessity for these skills in order to have an amicable and effective co-parenting relationship. The lawyer, by contrasting a conflict-filled co-parenting relationship with an amicable one, especially one that includes anger and blame, might create an attractive incentive for the parent. Most divorcing parents have similar goals for their children, which can only be reached by having a collaborative co-parenting relationship, especially when guided and counseled by an attorney.

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29 In Part V, we apply this model to negotiating property, debt, and future income.

30 Schneider, *supra* note 19.

V. Addressing Property, Debt, and Distribution of Future Income

The focus in this article thus far has been on divorces with children. We posited that attorney modelling and teaching effective decision-making skills to divorcing parents might greatly improve the quality of clients' post-divorce co-parenting relationships. Those same skills can be demonstrated and taught by attorneys when addressing financial matters in the divorce.

However, there is a difference here. Financial matters are generally addressed within the framework of the law and expected rulings by a court.[31] This Part of the article proposes addressing financial matters within a different framework: the framework of the long-term financial goals of the parties, through goal-based planning, and not necessarily through the lens of a legal framework. In this proposed context, disagreement resolution skills can be helpful, not only for reaching optimal agreements, but also in preparing parties for better future financial decisions they are likely to face if and when they have children.

A. *Cooperative Non-Zero Sum Thinking*

Most experienced attorneys know and understand that seeking optimal outcomes for one party to a divorce usually is best achieved by seeking optimal outcomes for both parties. On the opposite end of that spectrum was the client described in Part I who wanted to bury her soon-to-be-ex-spouse. Andrea Kupfer Schneider makes the same point.[32]

Negotiations are often (perhaps more accurately are usually) constrained by the belief that the agreements to be made should lie within the range of what is prescribed by law and by expected rulings of a court. However, this limits choices, and as we have written elsewhere, traps people into making less than optimal agreements, and at times, even self-defeating agreements. Focusing on the distribution demands of the law can trap parties into making poor choices. [33]

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31 Credit to Robert H. Mnookin's famous article, *Bargaining in the Shadow of the Law: The Case of Divorce,* 88 Yale L.J. 950 (1979).

32 Schneider, *supra* note 19.

33 Kenneth Waldron & Allan Kortizinsky, Winning Strategies in Divorce: The Art And Science of Using Game Therapy Principles and Skills in Negotiations and Mediations (2017).

This approach creates a zero sum game of distribution out of a non-zero sum game of financial planning. Game theory research demonstrates that zero sum games promote selfish competitive strategies, whereas non-zero sum games promote communication and cooperation to reach optimal outcomes for both players.[34] This finding has been measured mathematically.

In competitive zero sum games, there is 100% of the pie to distribute. In cooperative non-zero sum games, the pie can grow to 146%. This sounds like magic, but is not. This is the concept that John Nash developed, which led to his receiving a Nobel Prize.[35] It is as simple as introducing the first phase of bargaining as a cooperative effort to grow the pie, that is, planning to maximize long-term outcomes for both parties. Only when the cooperative effort has reached its limit do parties then begin to compete and compromise.

The first phase of both competitive and cooperative negotiations is legal discovery and discovery of both party's goals; however there are differences:

1. In the competitive model, 100% of the pie is to be distributed. Most lawyers and parties cooperate to the extent of naming the pieces of the pie. The second step is to compete for the parts of the distribution (i.e., the pie) that are disputed. The law often dictates, or at least presumes, that the distribution should be at least equitable, if not equal.
2. In the cooperative model, discovery simply establishes the starting point of a plan – the current situation. The second step is to establish the long-term financial goals of the parties. This introduces a new variable into the bargaining: the subjective values of the parties, which, again in game theory research, will likely dominate the bargaining process. [36]

An example will highlight the differences between the two bargaining models. Assume that the parties own a residence. Assume that the assessed value of the residence is $400,000. However, both the husband and wife value the residence, and both want it in the bargaining. In traditional competitive bargaining, one or the

34 *Id*.

35 Sylvia Nasar, A Beautiful Mind: The Life of Mathematical Genius and Nobel Laureate John Nash (2011).

36 Waldron & Kortizinsky, *supra* note 32.

other might get the house at a value of $400,000. In cooperative bargaining, the lawyers might establish an "auction price" for the house, only to learn that the subjective value to the wife makes the house worth $450,000, while only $420,000 to the husband. The pie grew because of the subjective values involved. The offset in value might also allow the husband to reach another of his goals, that is, to own a comparable residence.

This example, however, still focuses on short-term goals. However, if both parties are interested in having valuable real estate property available as a resource for their retirements, this might put the deal on the house in a difference light. If the assessed value is $400,000 and the area has about a 5% annual appreciation in real estate value, neither party might want the house at either of their subjective numbers, depending on how many years each has to retirement. To reach that retirement goal, selling the house might be the best strategy.

The take-away here is that there is not only a starting point in the bargaining, facilitated by good discovery practices, but also there are the end points for the long-term goals of the parties. In the cooperative model, the bargaining task is to plan the steps to get to the end goals from the starting point, including a consideration of obstacles that might arise. Probable court rulings (i.e., state divorce law) might be considered but are not binding or even determinative in this model. Agreements might well be out of the expected range of court rulings, but are most likely relevant to help the parties reach their long-term goals. Of course, all of this assumes that the lawyers advised their clients regarding the applicable law.

Example 1. Assume that the current total value of an estate plus the current income of the parties is insufficient to reach both of the parties' long-term goals. In the cooperative model, they might focus on one additional step — i.e., discussing and likely acknowledging that the parties need to produce more income, so both of them can reach their goals. Sharing future income in the cooperative model is now seen in a very different light. How much total income is needed to reach both parties' goals, rather than how much has to be paid by one party to the other party?

Example 2. Assume that a court is likely to award spousal support at a predictable amount for a predictable term of years. In the cooperative model, the spousal support might be less or more,

depending on what will help both parties meet long-term goals. Likewise, child support levels in the cooperative model might be based on the goals of the parents for their children, not a schedule based on overnights, where an overnight involves minimal additional cost incurred by the parent who has the additional overnight time.

Example 3. Assume the starting point (based on a real case) included a husband earning substantially more money than the wife. Both parties had the long-term goals of not wanting any financial connection to one another in the long term, but also protecting the children's lifestyles in both homes in a shared custody arrangement. During the bargaining, they discussed steps to reach these goals. It was clear that the wife would need more income to reach their goals. This led to a discussion of a possible career change, to include a period of training and then time to build her private business. They then agreed to an amount of support for an expected period of time to reach a sufficient income level. Suspecting the presence of an important obstacle, namely under-estimating the time needed for the wife to reach that sufficient income level, they made another agreement. They agreed to a presumed point when the support would stop, but if the wife had not reached the agreed-upon income goal, and the husband was convinced that she had continued to make a good-faith effort, the deadline for the support could be re-negotiated. In fact, the agreement was re-negotiated, and when she reached the income goal, the support was terminated.

B. *Unrealistic Expectations?*

Whether the bargaining model is competitive or cooperative, there will be disagreements. In Part I of this article, we presented our research-based Ten Skills for Effective Co-parenting (also called Ten Skills for Resolution of Disputes). There are skills that attorneys can model and teach, in order to pave the way for a functional co-parenting relationship. A caveat is that this approach might not be helpful and might even escalate conflict in a case if one or both of the parties have serious mental health problems, especially personality disorders. As a reminder, about 20% of people have personality disorders, which correlates to the number of high conflict divorces.[37]

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37 Whiteside, *supra* note 1, at 2.

When the parties to the divorce have children, they will almost certainly have an ongoing financial relationship, at least with regard to their children. Both parents will also have a vested interest in the other party being able to provide a stable residence for the children. Issues such as educational needs or extra-curricular activities might also arise that require planning on behalf of the children. Parents might want to help adult children with education or even house ownership. Wedding planning might work best if the parents cooperate with one another on costs. Any of these situations might involve financial disagreements between the parties.

The skills outlined in Part IV can be modeled and taught during the bargaining process, whether the issues relate to the children or the financial aspects of the divorce. For example, a party might be having a great deal of difficulty focusing on some financial issue in a goal-based bargaining process. Very likely, that party is dealing with a core emotion that prevents him or her from going forward. His or her attorney can address this with the client, by simply asking, "*It seems like you are having difficulty with this issue. Are you having some strong feelings about it? Are you afraid? If you can tell me what is holding you up on this, we can probably find a way to get that resolved*." Problem solving and decision making skills are particularly relevant to financial issues, but core emotions can be a major obstacle to applying those skills.

C. *The Intersection of Family Law and Psychology*

"*I am a psychologist, not a lawyer,"* says Ken Waldron, but spending forty years working in the family law arena required him to learn a great deal about family law. Ken also adds that the best family law attorneys accept that they are working in the world of humans struggling with the inevitable psychological dilemmas faced by divorcing spouses and parents. Almost all divorces are settled in bargaining. To reach optimal agreements requires a knowledge of law and of at least some psychology.

"*I am a lawyer, not a psychologist*" says Allan Koritzinsky, but after spending more than fifty years working in the family law arena, he confirms the necessity of understanding psychology and law. In fact, he often refers to Ken as "Dr. PsychoPal," which is why they worked together as a team while in private practice and continue as team members, co-authors, and great friends.

As Andrea Kupfer Schneider found,[38] the most effective negotiators were cooperative problem solvers, not "fighters." Modeling and teaching disagreement resolution skills not only increases the chances of a better co-parenting relationship, but also increases the chances of better financial plans for the parties, and for better financial interactions in the future when those occur.

This Part V has focused on addressing property, debt, and the distribution of future income. Attorneys can, and perhaps should, explain the disagreement resolution skills during negotiations and how they effectively can be applied to specific disagreements in the negotiations. Doing so can help set the stage for a better post-divorce outcome for both parties.

When there are minor children, attorneys can (and should) point out the necessity of these skills to enhance the likelihood of enjoying an amicable and effective co-parenting relationship, especially because the parents are likely to interact financially in the future. Effective financial planning is critical.

Conclusion

Relationships can dramatically improve by applying our Ten Skills for Resolution of Disagreements (also called Ten Skills for Effective Co-parenting). Effective goal-based bargaining undergirds these skills and these skills are necessary to produce optimal parenting and financial plans for parties to reach long-term financial goals.

We hope this article will move the needle and improve the lives of those who divorce.

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38 Schneider, *supra* note 19.

Will Women Ever Reach Pay Equity? Book Review: Naomi Cahn, June Carbone, & Nancy Levit, Fair Shake: Women & the Fight to Build a Just Economy (New York: Simon & Schuster 2024)

by
Theresa M. Beiner[1]

I. Introduction

In their book, *Fair Shake: Women & the Fight to Build a Just Economy*, law professors Naomi Cahn, June Carbone, and Nancy Levit examine the persistence of the gender wage gap in the United States through the lens of women's employment discrimination lawsuits.[2] Using the stories of individual women as a starting point, the authors engage in a thoughtful analysis of how each particular industry examined treats its workers and how this fits into what the authors call the "winner take all" (or "WTA") economy. The WTA economy, according to the authors, "reserves a disproportionate share of institutional power and rewards for those at the top."[3] The authors attribute much of the wage gap faced by working women to the shift in these workplaces, which often pay the best salaries, to the WTA economy. The WTA economy, they posit, fosters competition (rather than collaboration and cooperation) among co-workers that leads to working environments in which women are at a distinct disadvantage for a variety of reasons.

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[1] Professor in Constitutional Law, University of Arkansas at Little Rock, William H. Bowen School of Law. This review was funded with a research grant from the University of Arkansas at Little Rock Bowen School of Law.

[2] Naomi Cahn, June Carbone, & Nancy Levit, Fair Shake: Women & the Fight to Build a Just Economy 3-4 (2024). I'm using the term "gender" throughout this review as the book authors also use this term to refer to the gender wage gap. *See, e.g., id*. at 4.

[3] *Id*. at 2.

After considering more common explanations for why women consistently earn less than men, Cahn et al. argue that women are in a triple-bind. First, "when women don't compete on the same terms as men, they lose."[4] Second, "if women do try to compete on the same terms as the men, they lose because they are disproportionately punished for their sharp elbows or perceived misdeeds."[5] Finally, "when women see that they can't win on the same terms as men, they take themselves out of the game – if they haven't been pushed out already."[6] This triple bind results in fewer women occupying the most lucrative positions in finance, tech, and banking. Indeed, rather than lessening, the gender wage gap between men and women actually increased between 2019 and 2022.[7] And, as they posit, "if *present trends continue*, women would *never* catch up."[8] The book considers not only the situation of women in the more wage lucrative industries, but also looks at women working in the middle and lower tiers of the economy – as public school teachers and at Wal-Mart. After identifying and examining the nature of these three different binds through the women who have brought lawsuits or challenged these practices in other ways, the authors propose solutions.

Several themes emerge over the course of the book. The persistence of sexual harassment and sex discrimination in highly competitive workplaces as well as retaliation for complaining about either discrimination or unethical workplace practices cuts across many of the cases examined. In addition, who is given grace for misdeeds on the job reveals further sex discrimination in these workplaces. The impact of politics – including deregulation and the undermining of labor unions – plays a role in the story of the gender wage gap. Finally, the lack of good and affordable childcare contributes to the lack of lucrative employment opportunities for women.

This book review examines each of the three binds and how the authors use case law and women's stories to identify and describe the binds. It then evaluates the authors' assessment of these binds as well as proposed solutions, which include raising

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4 *Id.* at 14.
5 *Id.* at 15.
6 *Id.*
7 *See id.* at 4.
8 *Id.* (emphasis in original).

consciousness about the impact of the WTA economy on women and, ultimately, on American businesses, public shaming, increasing the efficacy of union organizing, and increasing laws' reach to get at some of the continued inequities that lead to pay disparities between men and women in the American workplace. *Fair Shake* is written for a general audience – not one with specialized knowledge of employment discrimination law, politics, or economics. Thus, it is accessible to a wide audience, who will hopefully come to understand these binds and participate in the solutions.

II. When Women Don't Compete on the Same Terms as Men, They Lose

Part 1 of *Fair Shake* uses three different lawsuits and the women who brought them to examine the first gender bind: "When women don't compete on the same terms as men, they lose."[9] Beginning with a look at the facts surrounding *Wal-Mart Stores, Inc. v. Dukes*,[10] a case that made it to the U.S. Supreme Court and resulted in a 5-4 decision in favor of Walmart, the authors move on to *Schaefer v. General Electric*[11] and *Messina v. Bank of America Corp.*[12] Thematically, these employers and the lawsuits against them provide examples of the WTA workplace, with Walmart providing an early example of corporate and executive greed taking advantage of a low-level mostly female workforce.

A. Case Study 1: *Wal-Mart Stores, Inc. v. Dukes*

The authors describe the workplace at Walmart through the experiences of Betty Dukes, a woman who started out as a cashier at a Walmart in California with the hopes of working her way up the corporate ladder.[13] Dukes worked her way up somewhat – becoming a customer-services manager (still an hourly wage position); however, when she asked her supervisors to consider her for management roles, she was told "'People like you don't get

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9 *Id.* at 17.

10 564 U.S. 338 (2011).

11 No. 3:07–cv–858 (PCD), 2008 WL 2001244 (D. Conn. May 8, 2008) (ruling on a motion to dismiss).

12 *See* CAHN ET AL., *supra* note 2, at 63.

13 *Id.* at 21.

promoted.'"[14] Dukes, a Black woman, assumed this was racially motivated, because her supervisor described himself as a "redneck."[15] After complaining, she was reprimanded and eventually demoted to cashier.[16] Retaliation is a common theme in the cases covered in *Fair Shake*. Women who complain about discriminatory behavior often pay a price for their complaints.

While Dukes initially filed a claim for race discrimination, she eventually joined a lawsuit based on sex discrimination brought by a team of lawyers who had success bringing a variety of high-profile lawsuits.[17] There was a pattern of pay and promotion differentials at Walmart that favored men over women.[18] Cahn et al. identify the use of low cost female workers as essential to Walmart's business model: keeping prices down by lowering the costs of running stores.[19] This entailed Walmart's Bentonville, Arkansas headquarters carefully managing its supply chain, store expansions, and even going so far as to require temperature settings in company-owned refrigerators.[20] Walmart did the opposite with labor; instead of micromanaging, it gave individual store managers discretion with respect to personnel decisions.[21] And it provided incentives for managers to keep their labor costs low. Walmart used the carrot of increased bonuses for managers who kept their labor costs down, while also using the stick of the risk of demotion should they not perform well on this metric.[22] They also moved managers around, often hundreds of miles away, which Sam Walton himself agreed discouraged women from applying for these positions.[23] This meant that managers didn't get too close to the employees they supervised. These incentives created numerous wage and hour violations as managers sought to gain advantage. Indeed, one report

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14 *Id.* at 22 (quoting Nicholas Copeland & Christine Labuski, The World of Wal-Mart: Discounting the American Dream 58 (2013)).

15 *Id.* at 22.

16 *Id.* Walmart allegedly reprimanded Dukes for ringing up a one cent transaction to make change. This was not a uncommon practice at the store.

17 *See id.* at 23.

18 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 370 (2011) (Ginsburg, J. concurring in part and dissenting in part).

19 Cahn et al., *supra* note 2, at 24-25.

20 *Id.* at 26.

21 *Id.*

22 *Id.*

23 *Id.* at 26-27.

identified Walmart as "the number one company in the country for the fines and settlements it had paid out for wage theft."[24] What this meant for Dukes, who was concerned about her customers and community, was that she did not have the ruthlessness that it took to compete as a successful manager at Walmart – what Cahn et al. identify as one of the "unwritten rules."[25]

The discretionary personnel system at Walmart led to the company not promoting women into management roles and having lower incomes for its hourly female workforce. With respect to management positions, while 65% of Walmart's hourly personnel were women, only 33% of the supervisor positions and 14% of store manager positions were held by women.[26] In addition, female hourly employees earned $1,150 less per year than comparable male workers.[27] Even women managers experienced a wage gap. "[F]emale store managers earned on average $16,400 less than men."[28] As is typical in employment discrimination class action practice in systemic disparate treatment cases,[29] this data was accompanied by anecdotes revealing individual instances of discriminatory treatment.[30] Walmart was aware of the gender differences in promotions, but did nothing about it.[31]

The confluence of circumstances that provided Walmart with the ability to engage in these practices involves two themes that pervade the book: Reagan administration policies (often involving deregulation) and the ability to thwart unionization of employees. Yet, unions have been key to creating better wages and working conditions for employees, and, as the authors point out, the wage gap is lowest in workplaces that are unionized.[32] Indeed, unions likely would have forced Walmart to regularly obey wage and

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24 *Id.* at 28 (citing Philip Mattera, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers' Wages*, Corporate Research Project 8, https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/wagetheft_report_revised.pdf). Walmart paid the most in settlement and fines for violations at $1.4 billion. Mattera, *supra*, at 4.

25 Cahn et al., *supra* note 2, at 29.

26 *See Dukes*, 564 U.S. at 370; Cahn et al., *supra* note 2, at 29.

27 Cahn et al., *supra* note 2, at 31.

28 *Id.*

29 *See* Teamsters v. United States, 431 U.S. 324 (1977).

30 *See* Cahn et al, *supra* note 2, at 31-32.

31 *See id.* at 32.

32 *Id.* at 33.

hour laws, resulting in a decrease in the wage gap. Walmart considered unions a threat, with one executive complaining that "[l]abor unions are nothing but blood-sucking parasites living off the productive labor of people who work for a living."[33] Politics comes into play here as well after Ronald Reagan was elected president. He supported an anti-union, pro-business political agenda.[34] A coalition of business leaders successfully created anti-union legislation in many states (often known – somewhat ironically – as "right to work" laws) and worked to have pro-business justices appointed to the Supreme Court.[35] Thus, there was a shift from the pro-worker New Deal era to a pro-business (not so helpful to workers) era in corporate America that hurt working women.[36]

In a 5-4 decision, the Supreme Court ultimately held that Dukes and the women she represented could not form a class action to address the gender inequities in Walmart's pay and promotion practices.[37] This decision is problematic in many ways, but particularly ironic given that the comments on Federal Rule of Civil Procedure 23, which governs class action practice, specifically mention employment discrimination suits as appropriate for class treatment.[38] Historically, plaintiffs have used class actions effectively to address widespread sex discrimination.[39] Cahn et al. provide as an example the Abercrombie & Fitch case that led to damages and a shift in hiring, promotion, and marketing materials to address race and sex discrimination at the company.[40] While Walmart has increased its entry-level wages and slowly increased the number of female managers, it has not changed the system that created these disparities.[41] This first case study provides insight

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33 *Id.* (quoting John Tate, an attorney for Walmart).

34 *Id.* at 34.

35 *Id.* at 34-35.

36 *Id.* at 35.

37 *Dukes*, 564 U.S. 338.

38 *See* Fed. R. Civ. P. 23 Notes of Advisory Committee on Rules – 1966 Amendment.

39 *See, e.g.,* Int'l Union, United Auto., Aeropace & Agric. Implement Workers of America, UAS, v. Johnson Controls, Inc., 499 U.S. 187 (1991); Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Stender v. Lucky Stores, 803 F. Supp. 295 (N.D. Cal. 1992).

40 Cahn et al., *supra* note 2, at 37. *See* Steven Greenhouse, *Abercrombie & Fitch Bias Case Settled*, N.Y. Times (Nov. 17, 2004), https://www.nytimes.com/2004/11/17/us/abercrombie-fitch-bias-case-is-settled.html.

41 Cahn et al., *supra* note 2, at 38-39.

into the causes of barriers women face in entry-level retail jobs that require less skill. The story of skilled workers provides even greater insight into how the WTA culture limits women's opportunities and thereby their incomes.

B. Case Study 2: *Schaefer v. General Electric*

This chapter explores the case of Lorene Schaefer, who worked for an employer who truly adopted the WTA economy approach to its business model. Schaefer rose in the ranks at General Electric ("GE") to become the General Counsel of GE Transportation.[42] Under the reign of CEO Jack Welch, GE transformed from a company that fostered a sense of community, collaboration, and conscientiousness among its mostly male employees in the 1950s and 1960s to a company that emphasized short-term profits that increased the price of stock shares.[43] This included a system of bonus pay that disadvantaged women and resulted in what the authors called a "masculinity context culture" at GE.[44] Under a "rank and yank" management model, those who performed best in this system earned more, and those who didn't were let go for inadequate performance if they didn't improve.[45] This is reflected generally in the CEO to worker pay ratio, which was 20 to 1 in the 1950s and 1960s, and today is 344 to 1.[46] The authors argue that the WTA approach to business led to competition between employees that made pay disparities for women worse. It also created a system that encouraged in-group bonding between men and distrust of others – including women.[47] As Cahn et al. note, "[b]onding among men may account for more than a third of the gender gap in promotions."[48] And bonus pay actually increases gender disparities, with bonuses accounting for "93% of the gender disparities in executive pay."[49]

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42 *Id.* at 42.

43 *Id*. at 47-48.

44 *Id.* at 48, 50, 55.

45 *Id.* at 49.

46 Josh Bivens & Jori Kandra, *CEO Pay Slightly Declined in 2022*, Econ. Pol'y Inst. (Sept. 21, 2023), https://www.epi.org/publication/ceo-pay-in-2022/.

47 Cahn et al., *supra* note 2, at 57.

48 *Id.* at 58.

49 *Id.* at 55.

So how does Schaefer's story fit into the authors' account of the WTA economy? After Schaefer took the position of General Counsel at GE Transportation, a new CEO, John Dineen, took over that part of the company. He recruited a new General Counsel, resulting in Schaefer's demotion, even though Schaefer was successful in the position.[50] Cahn et al. opine that Dineen saw an upcoming battle with the SEC over securities fraud allegations requiring a "better corporate in-fighter" – not a better lawyer.[51] As Schaefer took a closer look at GE's management, she found "no women in the company's top thirty-one corporate officer positions" in addition to only one woman in the ranks of the other six divisional general counsels.[52] To add insult to injury, GE paid all the male general counsels more than the women.[53] This led Schaefer to file a sex discrimination suit against GE, targeting disparities based on sex in both executive employee and attorney positions. Schaefer's suit eventually settled.[54]

Why are women, like Schaefer, unable to compete on the same terms as men? The authors acknowledge the part played by the fairly traditional account of women's priorities:

> Women are at a greater disadvantage in the WTA environment for three reasons: they are less likely to put maximizing their next bonus over their families, their co-workers, and simple decency; they are more likely to be repelled by those who thrive in such environments; and they are more likely to find, as Schaefer did, that in tournament-like environments that in group favoritism increases.[55]

The traits that make employees successful in competitive work environments like that of GE "are traits that describe a distinct subset of the general populations that is also more likely to be male."[56] Women are also perceived as more ethical than men and therefore, the argument goes, women are more likely to be penalized for engaging in unethical conduct because they are acting atypically compared to behavior that is expected of them.[57]

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50 *Id.* at 51.
51 *Id.* at 54.
52 *Id.* at 51.
53 *Id.*
54 *Id.* at 53.
55 *Id.* at 55.
56 *Id.* at 57.
57 *Id.* at 58.

Generalizations about women's behavior and what they prefer in the workplace should make us uncomfortable. Such accounts suggest that women are, in some way, responsible for their own oppression and lack of success in these competitive environments. To the authors' credit, Part Two of the book examines women who adapt to and enjoy (at least initially) working in these environments. So, there are women who attempt to succeed but also encounter obstacles. In addition, these hyper-competitive environments are likely not the types of workplaces that most men would gravitate toward either. And, as the authors point out, it doesn't mean that women are not successful as CEOs or in other high-level corporate executive positions. Indeed, Cahn et al. note that from 2013-2023, the 41 female CEOs of Fortune 500 companies outperformed their male counterparts, with returns of 384 percent compared to 261 percent for companies run by men.[58] So, why does this inequity persist? The authors note that there is some change going on in corporate America. Diversity has become an increasing emphasis in management reform, because diversity leads to better management.[59] While the authors doubt that simply increasing diversity will reform these practices, they suggest it is a step in the right direction and, if it does lead to long-term corporate growth, a step that more companies are likely to adopt. It also signals a change in corporate culture.

C. Case Study 3: *Messina v. Bank of American Corp.*

The third chapter of the book shifts to banking and the case of Megan Messina, a single mother and primary caregiver of three children, who had experience in the financial services industry at several different investment banking firms before joining Bank of America.[60] She eventually rose in the company to become co-ahead of Global Structured Credit Products and Credit Asset Financing at the bank.[61] But, according to her complaint, things became difficult when she was the only woman who reported to her boss, who didn't appear to respect her.[62] A system of exclusion began in which Messina was left out of after work dinners, meetings,

58 *Id.* at 59.
59 *Id.* at 61.
60 *Id.* at 63.
61 *Id.* at 64.
62 *See id.* at 64-65.

and other gatherings[63] – what I have termed in an earlier article as "reindeer games."[64] In comparison to Messina, the male co-head of her department was treated very well, including receiving a bonus that was nearly $4 million more than hers.[65]

The authors explain that Messina was not alone among women on Wall Street in experiencing a pay gap[66] and demeaning behavior in Wall Street banking. Entire books have been written about sexual harassment experienced by women working on Wall Street.[67] Cahn et al. describe the prevalence of sexual harassment in investment banking and how it interferes with women's ability to succeed in these workplaces.[68]

Messina's story harkens to another theme running throughout many of the women's cases highlighted in the book. Messina's complaint identified unethical practices – in her case accusations directed at her co-head.[69] Eventually, Messina reported the misconduct, but Bank of America allegedly refused to investigate it, and instead placed her on administrative leave.[70] Thus, Messina's complaint presents allegations of unethical conduct, reporting it, and the company retaliating against her. This is a familiar scenario for other women described in this book.

Unsurprisingly, given the experience of women like Messina at Bank of America, the percentage of women in finance has fallen.[71] This adds to the gender wage gap, because finance jobs are some of the most lucrative in the United States.[72] In addition, within finance, consistent with the experience of Messina, there is a gender wage gap.[73] Yet, women still take jobs in finance. As Cahn et al. noted, in 2021, women filled 52% of the entry-level positions in financial services. Their representation declines in the

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63 *Id.* at 65.

64 *See* Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII*, 37 B.C. L. Rev. 643 (1995-1996).

65 Cahn et al., *supra* note 2, at 66.

66 *Id.* at 65.

67 *See, e.g.*, Susan Antilla, Tales from the Boom-Boom Room: Women vs. Wall Street (2002); Cahn et al., *supra* note 2, at 69-70.

68 Cahn et al., *supra* note 2, at 69-70.

69 *See id*. at 67.

70 *Id.* at 68.

71 *Id.* at 71.

72 *Id.*

73 *Id.*

upper levels and does so especially steeply for women of color.[74] So, the question for the authors of the book is: why don't women stay in finance?

The authors assert the answer to this question lies in part in relaxed regulations in the industry that permit banks to engage in investment banking – something that was forbidden for post-Depression banks.[75] While investment advisors created new and risky securities for clients to purchase, Messina took a different tack, creating "new securities for customers who paid her fees for doing so."[76] Her approach was safer for the bank and depended on her clients being happy with the results.[77] Yet, it was not what the bank most valued.

Instead, Bank of America's approach to its business and employees once again reflected the WTA economy, in which managers favored those taking risks. These workplace environments "'are likely to promote exclusion and harassment toward historically disadvantaged groups.'"[78] Women, even competent women like Schaefer, lose here, as posited by the authors' first explanation for the wage gap: "when women don't compete on the same terms as men, they lose." While the typical explanation for why women don't thrive in these environments is that they do not take the same risks as men, Cahn et al. point out that evidence suggests that women are actually very good (or a bit better) than men at managing risks. Schaefer's experience overseeing less risky portfolios during the 2008 financial crisis provides an example of this.[79] Men, instead, seem to be overconfident, taking risks that are more likely to result in poor outcomes.[80] The authors explain that the regulations of the New Deal era worked well to lower risks and protect the economy as a whole. A return to these policies would not only benefit the U.S. economy, but also the women who try to labor within the field of finance.[81]

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74 *Id.* at 72.

75 *Id.* at 73-76.

76 *Id.* at 77.

77 *Id.*

78 *Id.* at 78 (quoting Shannon L. Rawski & Angela Workman-Stark, *Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions*, 74 J. Soc. Issues 607 (2018)).

79 *Id.* at 79.

80 *Id.* at 79-80.

81 *Id.* at 81.

III. Part 2: When Women Play by the Same Rules as Men, They Lose

The second part of the book looks at women who wanted to go toe-to-toe with men in competitive environments. Turns out, the results for these women are little better than for women who will not engage in the "sharp elbow" workplace tactics that create success for men. Once again, this phenomenon is told through the stories of lawsuits brought by two women in different sectors of the economy. First is the story of Ellen Pao, a woman who should have thrived in the competitive and lucrative field of venture capital. The second tale comes from the banking industry through the experiences of Misha Patel Terrazas, who allegedly became a scapegoat for the unethical practices of Wells Fargo. These women, who were willing to at least ostensibly play by the rules of their workplaces, are used as examples of how even women willing to play the game fail. Because of the lucrative nature of these businesses, women's lack of success at the top of these industries provides another explanation for the continuing wage gap.

A. Case Study 1: *Pao v. Kleiner Perkins*

Ellen Pao, a smart and well-educated woman (she had a PhD in Computer Science from the University of Pennsylvania, as well as a BA from Princeton, and a JD and MBA from Harvard), began her career in tech by working for several different start-ups. Eventually she landed a job at Kleiner Perkins Canfield and Byers ("Kleiner"), a powerful venture capital firm in Silicon Valley.[82] Like the authors have shown in other areas of the WTA economy, venture capital firms pit partners against each other in seeking funding for potential start-ups.[83] Pao experienced much of the same conduct the authors examined in part one of the book. Men were permitted to engage in "sharp elbow" tactics to outstrip their colleagues, and Pao was paid less than her male peers.[84] She was also excluded from the boys' club at Kleiner.[85] The story here, however, diverges from that of the women in part one, because Pao was willing to use her

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82 *Id.* at 85.
83 *Id.* at 87
84 *Id.* at 88.
85 *Id.* at 93.

own sharp elbows to succeed. She asserted that she was treated differently when she behaved the same as the men.

Despite being heavily recruited by Kleiner because of her unique set of qualifications for the position (which included fluency in Mandarin), Pao eventually hit a point where she could no longer advance at Kleiner and could not find support for the start-ups she scouted.[86] For example, her pitch to support Twitter as an investment was put to the side when, three and a half years later, a male partner's suggestion that Kleiner support the business was approved.[87] Because of the limited pool of money to invest, Pao was pitted against her colleagues for support for her investment suggestions – a classic feature of the WTA workplace.[88] According to Pao, however, the competitive behavior needed to succeed in this environment was only appropriate for some – the men. Pao recounted that her performance reviews included criticisms that she was not collaborative and too territorial.[89] Other employees didn't trust her, and she wasn't considered a team player.[90] Yet, Pao claimed that the same behaviors were considered appropriate when engaged in by men.[91]

Like other industries that the authors examine, Silicon Valley looked to replicate a certain type of individual who was willing to take risks. The creation of this "bros" culture involved a "'volatile mix of entitlement, hubris and risk-taking.'"[92] This bro culture expanded, according to Pao, after the successful IPO for Facebook, which generated over a hundred billion dollars and was led by 28-year-old Mark Zuckerberg.[93] The people who came into these workplaces were self-replicating, white, and male.[94] This included, once again, excluding women from network-building "extracurricular" activities – the reindeer games.[95]

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86 *Id.* at 86-87.

87 *Id.* at 87.

88 *Id.* at 87-88.

89 *Id.* at 88.

90 *Id.*

91 *Id.*

92 *Id.* at 91 (quoting Emily Chang, Brotopia: Breaking Up the Boys' Club of Silicon Valley 37 (2019)).

93 Cahn et al., *supra* note 2, at 92.

94 *Id.* at 93.

95 *See, e.g., id.* at 94 (describing the exclusion of women from an all-male ski trip); Beiner, *supra* note 64.

Pao's story also involved another form of sexual harassment – retaliation for a failed consensual relationship. Pao had engaged in a consensual relationship with a colleague who allegedly told her that he was getting a divorce. When that turned out to be untrue, she ended the relationship.[96] Once the relationship ended, her former paramour began to retaliate, including becoming hostile, leaving her out of meetings and emails, and "blocking her work."[97] When he was promoted to senior partner – a position that provided him with power over Pao – he began to give her negative reviews.[98] Eventually she complained to no avail. She later found out that he had made overtures to another women, prompting them both to complain about his behavior.[99] Although he left the firm during Pao's time there, it was with a generous severance package.[100] While Kleiner also asked Pao what it would take for her to quietly leave, they did not provide her with the same package as her former paramour – which is what she requested.[101] Instead, Pao filed a sex discrimination suit against Kleiner and was asked to leave the company.[102]

Ellen Pao, like several of the women highlighted by Cahn et al., lost her case. The jury held in favor of Kleiner despite the evidence in her favor.[103] It seems that Pao's experiences were, on the one hand, all too common for women in the workplace and, on the other hand, not quite extreme enough to warrant a jury verdict in her favor.[104] It also may be emblematic of the difficulty employment discrimination plaintiffs have in the court system.[105] In Silicon Valley, as the authors point out, her experiences are not uncommon. Eighty-four percent of women surveyed in a 2015 report responded that they were told they were "too aggressive," while

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96 Cahn et al., *supra* note 2, at 94.

97 *Id.* at 95.

98 *Id.*

99 *Id.* at 96.

100 *Id.*

101 *Id.*

102 *Id.* at 96-97.

103 *See id.* at 100.

104 *Id.*

105 *See, e.g.,* Sandra F. Sperino & Suja A. Thomas, Unequal: How America's Courts Undermine Discrimination Law (2017); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (2009).

64% reported that they were excluded from important events based on sex.[106] Finally, 60% reported experiencing unwanted sexual attention at work.[107] The attention that Pao's case received, despite the results, created some change in Silicon Valley. Women are increasing in number in Venture Capital firms, although the number was only at 15% as of 2021.[108] The progress is slow, but it has begun.

B. Case Study 2: *Terrazas v. Wells Fargo*

Misha Patel Terrazas provides the story of a "woman as scapegoat" while trying to do the right thing. A manager at Wells Fargo, Terrazas became caught up in the scandal involving Wells Fargo employees opening up accounts that its customers did not request and often didn't even know about.[109] Terrazas stood out among her colleagues. She often was the only woman manager in meetings and the only woman of color, being of East Indian descent.[110] While women are less likely to commit misconduct, Cahn et al. assert that they are more likely to be penalized when they do.[111] And that is what happened (kind of) to Terrazas.

Wells Fargo had created an environment in which employees were under continually increasing pressure to have customers agree to as many products as possible. The business model of Wells Fargo shifted to a selling mentality.[112] Meanwhile, managers, also under pressure to increase the volume of products, looked the other way when their employees engaged in shady practices, including creating accounts that no client requested.[113] This created a scenario in which managers could engage in "plausible deniability," because they had no actual knowledge of their underlings'

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106 CAHN ET AL., *supra* note 2, at 101 (citing Trae Vassallo et al., Elephant in the Valley, https: www.elephantinthevalley.com/).

107 *See id.*

108 *See id.* at 102.

109 *Id.* at 105.

110 *Id.*

111 *Id.* at 107.

112 *Id.* at 108-09.

113 *Id.* at 108, 110.

wrongdoing.[114] At the same time, these tactics made the bank appear successful, increasing managers' bonuses.[115]

Consistent with the propensity of women not to engage in misconduct (or at least to do so less often), Terrazas actually trained her employees to help customers open accounts that would be helpful to them.[116] Indeed, Terrazas asserted that it was her manager who had designed the shady approach to opening unrequested accounts.[117] Despite this, when it came to consequences for these actions, Terrazas was fired because her name showed up in media accounts discussing the wrongdoing. This happened even though she alleged other managers who committed worse misconduct were not let go.[118] This picks up on another theme that runs through some of the cases: when women engage in misconduct, they suffer worse consequences than similarly situated men. The authors back up this theory with a study by Mark Egan, a professor at Harvard's business school, and his colleagues.[119] Egan et al. found that women are more likely to be penalized than men for misconduct, speculating that this might result from the gap in tolerance for mistakes and misconduct by managers for members of their own group when compared to members that are not of the same ethnicity and/or gender.[120] The statistics of who left employment at Wells Fargo bear this out. Seventy-two percent of women separated, whereas only 42% of men with similar records of misconduct separated from the bank.[121]

Cahn et al. are a bit equivocal on the reasons for this difference in treatment. They note that the traditional account suggests that women are less likely to commit misconduct, so when they do, they are treated more harshly.[122] They suggest that, in this instance, it may be more about managers protecting men with whom

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114 *Id.* at 107.

115 *Id.* at 113.

116 *Id.* Indeed, she reported that her employees complained when she was fired, "You were the one teaching us the right way to do this." *Id.*

117 *Id.* at 106.

118 *See id.* at 114.

119 *Id.* at 114-15 (describing Mark Egan, Gregor Matvos, & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct*, 130 J. Pol. Economy 1184 (2022)).

120 *See id.* at 115.

121 *Id.* at 115.

122 *Id.* at 116.

they identify than about punishing women.[123] Or, as I have noted elsewhere, it may be about who gets cut slack when mistakes are made.[124] Regardless of the explanation for these differences in treatment, the pattern still puts women at a disadvantage in the workplace.

This chapter ends with some suggestions for improvement, although this subject is taken up more specifically in the final section of the book. In particular, Cahn et al. suggest that women will compete better in an environment where there are rules and the rules apply to everyone.[125] The authors also are encouraged by instances of consequences for bad corporate behavior, including the rise of clawback provisions that require CEOs found to be engaging in misconduct to give back some of their compensation.[126] This actually happened to Wells Fargo's CEO, who had to return $28 million in compensation to the company, although he still ended up a wealthy man.[127] Significant economic consequences like this may help dismantle the culture of plausible deniability that created the situation at Wells Fargo. In the case of Wells Fargo, the misconduct eventually came to light through the efforts of employees who complained, governmental enforcement personnel, and journalists.[128] Cahn et al. later explain that this type of public shaming is a good way to attack these problematic corporate practices.

IV. Part 3: When Women See What the New Rules Are, They Refuse to Play the Game

The third part of the book looks at women who refuse to engage in these highly competitive and mostly masculine workplaces. In three chapters, Cahn et al. tell the stories of women who encountered similar problems in three different industries. The first is the story of Ingrid Avendaño, who suffered through sexual harassment and retaliation at Uber. The second is that of Lauren Martinez, who parted with her employer due to employer rigidity when she experienced failures of child care during the

123 *Id.* at 117.
124 Beiner, *supra* note 64, at 646-47.
125 Cahn et al., *supra* note 2, at 118.
126 *Id.* at 119.
127 *Id.*
128 *Id.* at 120-21.

Covid pandemic. Finally, chapter 8 takes a look at the gig economy, profiling the experiences of Patti Cris, a gig home cleaner who experienced sexual harassment. Many of the same themes that were explored in other chapters – the persistence of sexual harassment, discrepancies in wages for men versus women, etc. – appear in these chapters. The difference is that these women chose not to play the games required to succeed in these work environments.

A. Case Study 1: *Women v. Uber*

Ingrid Avendaño, a Venezuelan native, was excited to begin a career in coding at Uber, at the time a five-year-old up and coming company.[129] Like so many companies enamored by the WTA approach to running a business, Uber fostered competition between its employees.[130] According to Avendaño, her efforts to increase her pay resulted in a threat to rescind Uber's offer of employment.[131] Cahn et al. note that this is common in tech, where women receive lower salary offers than men for the same work 63% of the time.[132] To avoid pay comparisons, Uber forbade employee discussion of salaries.[133]

Along with wage differentials and competition, sexual harassment was rampant at Uber. Uber's CEO, Travis Kalanick, was one of the instigators.[134] Studies of sexual harassment show that when those in charge tolerate, encourage, or engage in sexual harassment, it's more likely that sexual harassment will become common in a workplace.[135] On the other hand, when managers take sexual harassment seriously and there are consequences for such behavior, sexual harassment decreases.[136] Thus, it's no surprise that

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129 *Id.* at 126-27.

130 *Id.* at 127.

131 *Id.*

132 *See id.* (citing Connie Loizos, *In Tech, The Wage Gender Gaps Worsen for Women over Time, and It's Worst for Black Women*, TechCrunch.com (Apr. 4, 2017), https://techcrunch.com/2017/04/04/in-tech-the-wage-gender-gap-worsens-for-women-over-time-and-its-worst-for-black-women/#:~:text=Indeed%2C%20over%20time%20and%20across,peers%20for%20the%20same%20work).

133 Cahn et al., *supra* note 2, at 127.

134 *Id.* at 128.

135 Theresa M. Beiner, Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law 128-31 (2005).

136 *See id*.

sexual harassment was a significant issue at Uber. Avendaño, like other women profiled, complained about the sexual harassment, only to have Uber retaliate in response, including denials of promotions and pay increases and being subjected to 24-hour shifts.[137] Avendaño eventually resigned, becoming one of the women unwilling to continue working in a toxic environment.[138]

The authors assert that the work environment at Uber is emblematic of the WTA tech workplace. According to the authors, women, like Avendaño, leave tech at twice the rate as men.[139] And they do not appear to leave for family reasons. Instead, most cite the nature of the workplace environment and "feeling stalled" in their careers.[140] That women leave tech is not costless for the industry; it's estimated that the tech industry loses $16 billion a year based on women exiting.[141] Cahn et al. describe a transition in tech from a "nerds" environment to the "bros" environment that prevailed at Uber, while at the same time men received far more computer science degrees than women in this industry, which pays high salaries.[142]

Uber was a difficult place for women to work. Travis Kalanick, who founded Uber, ignored laws to start the company.[143] Uber, with little in the way of a human resources department and a company whose founders didn't like to follow rules, did not have a system in place for women who, like Avendaño, experienced sexual harassment or other discriminatory behavior.[144] Kalanick, like others who start innovative businesses, hired people like himself, creating a tournament-like atmosphere.[145] As Cahn et al. explain, "[a]ll this creates the kind of self-reinforcing WTA culture that overwhelming selects for leaders with what are known as the 'dark triad' personality traits – narcissism, psychopathy, and Machiavellianism – and whose leaders then select managers in their image, who go

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137 Cahn et al., *supra* note 2, at 131.

138 *Id.* at 130.

139 *Id.* at 132.

140 *See id.* (quoting Liza Mundy, *Why Is Silicon Valley so Awful to Women?*, Atlantic (Apr. 2017), https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/).

141 *See* Cahn et al., *supra* note 2, at 132.

142 *Id.* at 133-35.

143 *Id.* at 136, 138-39.

144 *Id.* at 137.

145 *Id.* at 138.

on to create highly toxic workplaces."[146] This includes workplaces where sexual harassment and bullying become the norm, and women, unsurprisingly, don't want to stay.[147] This is consistent with what is known about hypermasculine workplaces. Sexual harassment is more likely to exist, and those not fitting the macho norms of the workplace are more likely to be the targets.[148]

In a rare instance in the saga of women highlighted in this book, the women of Uber won. Kalanick was forced to resign, and the new management of Uber paid women damages as well as reformed its employee policies, including how compensation and bonuses were assessed.[149] Yet, women still are disproportionately affected when tech has bad years – as it did in 2022. Women were 65% more likely to be laid off than men.[150] Some women have started their own companies to avoid the problems associated with being employed in tech, giving the authors of the book some hope for women's future in tech.[151]

B. Case Study 2: *Martinez v. Aspen Dental*

The story of Lauren Martinez is a familiar one for women with children: the failure of childcare exacerbating the difficulties of balancing work and family. Martinez worked for a dental office and was asked to return to work during the pandemic, even though her two children, one an infant, remained at home.[152] Martinez asked to work remotely and was told she would be fired if she did not return to work.[153] Ultimately, she was fired for staying home with her sick children.[154] This chapter focuses on the impact of the failure to provide "working parents with adequate and affordable childcare."[155] Such failures to invest in what the authors call the "collective good" is typical of the WTA economy, which instead fosters a system in which a "small group extracts immediate

146 *Id.* at 139.
147 *Id.*
148 Beiner, *supra* note 135, at 116-17.
149 *See* Cahn et al., *supra* note 2, at 140.
150 *Id.* at 140-41.
151 *Id.* at 141.
152 *Id.* at 142.
153 *Id.* at 143.
154 *Id.* at 143.
155 *Id.* at 146.

gains, leaving everyone to fend for themselves in a negative-sum contest."[156] Martinez's situation is typical of women during the pandemic, 5.4 million of whom lost jobs compared to 4.4 million men who lost positions.[157] Working class women were particularly affected by the pandemic.[158] The pandemic hit working mothers hard, with "[e]mployment for mothers with children under the age of 13 plummet[ing] compared to fathers with similar-aged children."[159]

How does Martinez's dental office fit within the WTA economy? While the dental industry became increasingly open to women and people of color, since the mid-2010s, private equity firms increased investments in medical practices, including dental practices. The practices of private equity transformed these work environments from looking after the needs of medical care providers and their patients to WTA economy-type business entities aimed at reducing costs, boosting earnings, and selling for a profit.[160] Cahn et al. chart this phenomenon not only in dental practices, but across other medical industries, including nursing homes.[161]

An interesting part of this chapter is its review of the history of publicly supported childcare in the United States. During World War II, publicly supported childcare centers opened so that women could work in the war effort.[162] In the 1970s, Congress enacted the Comprehensive Child Development Act, which would have created a national network of childcare centers. This network never came to fruition thanks to the veto of then President Richard Nixon.[163] Cahn et al. explain that Nixon's veto harkened the advent of the free-market ideals advocated by the American right, who were motivated to undo the regulations and restrictions on business that resulted from the New Deal.[164] The cry for such reform was taken up by billionaires such as the Koch brothers, who pushed for less government regulation.[165] Thus, childcare remains

156 *Id.* at 147.
157 *See id.*
158 *Id.*
159 *Id.*
160 *Id.* at 144.
161 *Id.* at 145.
162 *Id.* at 148.
163 *Id.* at 148-49.
164 *Id.* at 149.
165 *Id.* at 149-50.

largely a private responsibility that individuals must solve themselves without government support.

The need for quality, affordable childcare has increased as more women have entered the workforce and has contributed to economic inequality in the United States. Cahn et al. refer to the "motherhood penalty" – children affect women's earnings in ways that don't impact men.[166] Indeed, fathers actually earn more than men without children at home.[167] This gender gap includes salaries that are tied to time at the workplace, diminished flexibility on the job, and the notion that women who have children are less committed to their jobs.[168] It's little wonder that women drop out of workplaces given the pressures of access to childcare and the difficulties advancing and being paid fairly in the workplace.[169] Access to affordable childcare is even more difficult for working class women.[170]

At this point, the authors take a digression – although not entirely unrelated – into the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the case that made it legal for states to prohibit abortions.[171] As Cahn et al. explain, restrictions and bans on abortions will no doubt have an impact on women's ability to work.[172] Studies indicate that access to abortion has a significant effect on women's wages and education – with the strongest impact on Black women.[173] Protections already afforded working women, such as the Family and Medical Leave Act, don't cover all working Americans and often require them to take leave without pay – something many workers can't afford to do.[174]

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166 *Id.* at 153.

167 *See* Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, Pew Research Center (Mar. 1, 2023), www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/.

168 Cahn et al., *supra* note 2, at 153. I experienced this first hand as an associate in a law firm. When I returned from maternity leave, the partner with whom I shared an administrative assistant told my administrative assistant, "Let's see how long she lasts." I lasted for another two and a half years.

169 *Id*. at 153.

170 *Id.* at 154.

171 597 U.S. 215 (2022).

172 Cahn et al., *supra* note 2, at 155.

173 *Id.*

174 *Id.*

Meanwhile Martinez, like many women highlighted in this book, lost her lawsuit because, according to the court, her children's illnesses were not covered under the FMLA and she did not specifically tell her employer that she believed her children had Covid.[175] The difficulties posed by the lack of adequate and affordable childcare in the United States were revealed during the pandemic for many women like Martinez. Despite the politically powerful still limiting the types of benefits that would help women like Martinez flourish rather than leave their careers, Cahn et al. believe that there is an increasing awareness of the need for a comprehensive childcare infrastructure as a job creator.[176] Recent legislation such as the Providing Urgent Maternal Protections for Nursing Mothers Act and the Pregnant Worker Fairness Act give them hope.[177] It remains to be seen whether this post-pandemic momentum will continue.

C. Case Study 3: *Gig Workers v. Handy*

In chapter 8, Cahn et al. take on the gig economy. When most people think of gig workers, they tend to think of Uber – a company that was already discussed by Cahn et al. in a different context. Yet, the gig economy covers a variety of fields. Cahn et al. define gig work as "any job that is not permanent and does not accrue benefits."[178] It's estimated that 30% of the U.S. population engages in gig work.[179] While such positions provide workers with flexibility that can be helpful,[180] they also offer workers fewer legal protections. For example, gig work does not provide health benefits or retirement plans, and, importantly for women workers, is not covered by antidiscrimination laws.[181] This leaves gig workers vulnerable. While both male and female gig workers experience this vulnerability, female gig workers are twice as likely as male

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175 *Id.* at 157.

176 *Id.*

177 *See id.* 158. PUMP Act, 29 U.S.C. § 218d; PWFA, 42 U.S.C. §§ 2000gg-1 to 2000gg-6; *but see* Texas v. Garland, -- F. Supp. 3d --, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024) (holding that the PWFA violated the Quorum Clause and enjoining enforcement).

178 Cahn et al., *supra* note 2, at 160.

179 *See id.* at 160.

180 *Id.* at 159.

181 *Id.* at 160.

workers to have wages that are below minimum wage.[182] Even in gig work, the discrepancies in pay between men and women persist.

The authors look at gig work through the story of Patti Cris, a thirty-four-year-old who ran her gig work through Handy's online marketplace[183] (now part of Angi Services).[184] Cris, who provided cleaning services through Handy, found a customer waiting for her completely naked.[185] When she reported it to the company, nothing was done and instead she was fined $15 for not finishing her assigned job.[186] The area of temporary work has a long history as female terrain. The authors mention Kelly girls, an early agency that provided temporary female workers in corporate America.[187] Workers in these positions, like those in retail, domestic, and farm work, were not initially covered by the Fair Labor Standards Act, the main federal law providing minimum wage and maximum hour protections as well as overtime.[188] While today such workers are covered, those participating in the gig economy are not.

A lot of the gig positions exist in tech.[189] While the flexibility of such gig work might seem attractive, most gig workers – 52% of them – take gig work out of economic necessity.[190] Political and corporate forces, according to Cahn et al., leave these workers with little legal protection, representing yet another area in which there has been a shift from corporate and government responsibility for worker prosperity to making working Americans take on these responsibilities themselves.[191] It is also another area of work in which, as the authors have noted before, harassment flourishes. Between twenty and thirty percent of gig workers report unwanted sexual advances or harassment, although it could well be

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182 *Id.* at 160-61.

183 *Id.* at 161.

184 *See Be a Professional with Angi Services*, HANDY.COM https://www.handy.com/apply (last visited Aug. 16, 2024); Olsin & Umang, *Handy + HomeAdvisor + Angie's List*, HANDY.COM (Jan. 11, 2024), https://www.handy.com/blog/handylife/handy-homeadvisor-angies-list.

185 CAHN ET AL., *supra* note 2, at 161.

186 *Id.* at 162.

187 *Id.* at 163.

188 *Id.* a 164.

189 *Id.* at 166.

190 *See id.*

191 *Id.* at 167.

more because there is not a good way to gather this data.[192] And, the wage gap persists in gig jobs as well, with men charging more than women for their gig work.[193]

Gig workers in many ways epitomize the WTA economy. It is truly an "every man for himself" workplace.[194] In addition, these workers have difficulty organizing because their ability to engage with each other is limited and their status as independent contractors leaves them unprotected by labor laws that permit employees to organize.[195] In the case of Handy, workers, including Cris, have begun to fight back, including challenging workers' status as independent contractors.[196] Handy settled a worker class action for wage and hour violations brought in California.[197] While union organizing may still be unavailable for most gig workers, other organizations are popping up to support these workers.[198] Because the WTA economy benefits from the isolated nature and nonexistent benefits of gig employees, Cahn et al. suggest that there needs to be more federal action directed at helping and protecting these workers.[199] Otherwise, the Handy companies of this world will continue to exploit them.

V. Part 4: Taming the WTA Economy

To their credit, Cahn et al. not only identify problems with the current WTA economy and how it exacerbates the gender wage gap, but also provide suggestions for change. In the last two chapters, they suggest a variety of approaches to "taming the WTA economy."[200] Solutions, as the authors point out, transcend the economic sphere and enter the political sphere.[201] Women, they explain, are angry and less willing to be silenced, and the authors liken this to the consciousness raising days of the early feminist

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192 *Id.* at 168.
193 *Id.* at 168-69.
194 *Id.* at 171.
195 *Id.* at 170.
196 *See id.* at 171-72.
197 *Id.* at 172.
198 *Id.* at 173.
199 *Id.* at 174.
200 *Id*. at 175.
201 *Id* at 176.

movement.[202] Women have found a commonality in their stories that harkens to systemic problems that are about more than their individual grievances.[203] Unions and organizing are part of the solution as is, perhaps, public outcry like that of the #MeToo movement.[204] Still the authors recognize that "raw assertion[s] of political power," such as the nomination and confirmation of Supreme Court Justice Brett Kavanaugh – despite the accusations of Christine Blasey Ford – suggest a Court that will continue to undermine women's rights.[205] Once again, the authors use women's stories, but this time to provide examples of methods for potential change.

A. Chapter 9: Fighting Back

Cahn et al. provide the story of Melissa Tomlinson, a New Jersey public school teacher, as an example of women fighting back. Tomlinson is perhaps best known for her public confrontation of then New Jersey governor Chris Christie during his reelection campaign.[206] Upset by Christie's attacks on teachers in New Jersey, Tomlinson believed that parents and students were beginning to reflect Christie's disrespect for teachers.[207] While Christie claimed he was only attacking unions, Tomlinson felt that the crowd at a Christie rally she attended "echoed that disrespect" for teachers.[208] Christie cut funding for public schools, resulting in fewer programs and less funding for teachers' benefits.[209] While Christie was reelected, he left office "as the most unpopular governor in New Jersey history."[210]

Cahn et al. see Tomlinson's situation and that of the teachers for whom she was advocating as involving three factors: the

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202 *Id.* at 178.

203 *Id.*

204 *Id.* at 179.

205 *Id.*

206 *Id.* at 181. The photos of this confrontation were well covered by the Press. *See* David Weigel, *Behind that Photo of Chris Christie Wagging His Finger at a Teacher*, Slate.com (Nov. 4, 2013), https://slate.com/news-and-politics/2013/11/melissa-tomlinson-behind-that-photo-of-chris-christie-wagging-his-finger-at-a-teacher.html.

207 Cahn et al., *supra* note 2, at 183.

208 *Id.* at 183.

209 *Id.*

210 *Id.* at 184.

values underlying the WTA economy; a battle involving the status of women in the economy; and the politics surrounding race, taxes, and public school funding.[211] In this clash, Tomlinson and teachers like her represent communal values that are at odds with the WTA economy, which emphasizes the individual winner. Christie's tactic of targeting teachers and schools appealed to wealthy taxpayers who opposed additional taxation (a voter base he needed for his presidential run), while ignoring the educational needs of the state's school children.[212]

Teachers have had a particularly tough time. As Cahn et al. point out, while other college educated individuals saw increases in pay in the late 1990s, teachers' pay actually decreased.[213] Today, public school teachers are experiencing the highest wage penalty in history, earning 23.5% less than people with similar degrees.[214] While the number of male teachers increased early in the 1990s, public school teaching has once again become a female occupation, with 77% of teachers being women.[215] While it is obvious that the occupation one chooses has an impact on how much one earns, women's choices, according to economists, account for 51% of the gender wage gap.[216] One might ask, well why don't women choose more lucrative occupations? The authors do an interesting comparison here between jobs that appear in some manner to be comparable, but dominated by either men and women, while comparing the wages in these occupations. For example, they compare skincare specialists' wages (99% of whom are women) to wages of brick masons (99% of whom are men). Skincare specialists' annual wages are $24,706, whereas bricklayers earn $39,391.[217] The authors really don't examine why women persist in going into fields where their work is valued less. Of course, there are obvious reasons why K-12 teaching is attractive to women – especially for those who have young children. The ability to have summers off while their children are out of school makes this a realistic career option for working mothers. And, given that most American

211 *Id.*
212 *Id.* at 185.
213 *Id.* at 186.
214 *Id.*
215 *Id.* These are the statistics in 2019.
216 *See id.* at 187.
217 *Id.*

women will have children[218] and the persistence of traditional gender roles when it comes to responsibility for child rearing,[219] this is a reasonable career choice.

Cahn et al. account for the difficulties in increasing teacher wages as a conflux of politics, race, and taxes, which come into play in public school funding.[220] New Jersey essentially becomes their case study on lower funding for public schools, especially in poorer areas where there are higher percentages of people of color, due to the lack of political will to increase taxes to fund schools properly. The WTA economy plays a role here as well. New Jersey's governors underfunded teacher pension plans and got away with it.[221] Christie, in particular, supported attempts at privatization, shifting responsibility to educate children from the government to voucher-supported private schools and charter schools.[222] Tomlinson saw this as an attack on both women and teachers.[223] Her fighting back, along with others who confronted Christie on his anti-public school rhetoric, ultimately paid off. Christie's poll numbers fell.[224] A new governor was elected who was more supportive of teachers, with aid increasing to underfunded school districts.[225]

This isn't the end of the story, however. The authors place the experience of Tomlinson in the larger context of public sector

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218 Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade Ago*, Pew Research Center (Jan. 18, 2018), https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/.

219 *See, e.g.,* Julia Haines, *Gender Reveals: Data Shows Disparities in Child Care Roles*, US News & World Rep. (May 11, 2023), https://www.usnews.com/news/health-news/articles/2023-05-11/gender-reveals-data-shows-disparities-in-child-care-roles; Shruti Jolly, et al., *Ad Gender Differences in Time Spent on Parenting and Domestic Responsibilities by High-Achieving Young Physician-Researchers*, 160 Ann. Intern. Med. 344 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4131769/ (reporting a study of doctors showing that women spent more time on domestic work and were more likely to take time off when there was a disruption in child care).

220 Cahn et al. *supra* note 2, at 187-90.

221 *Id.* at 191.

222 *Id.* at 192, 194.

223 *Id.* at 192.

224 *Id.* at 193.

225 *Id.* at 195.

unions and their workers, who are mostly women.[226] Because unions fight for vulnerable workers, including increased worker protections, Cahn et al. argue, corporate America and the politicians it supports have targeted unions.[227] This targeting has taken many forms, including allegations about what teachers teach about race and sexuality in school,[228] and Supreme Court cases attacking union membership.[229] Unions recently have promoted gender equity, with helpful results for their female members.[230] As the authors point out, women in public sector unions earn 23% more than public sector employees who don't have the benefits of a union, and the wage gap is less among these workers.[231] Thus, it makes sense that Cahn et al. suggest union organizing could lessen the gender wage gap.

B. Chapter 10: #MeToo

The second "taming" chapter recounts the successes of the #MeToo movement and the potential for consciousness raising and public shaming to have an impact on the prevalence of sexual harassment, which occurred in many of the cases Cahn et al. recount. Starting with the disturbing sexual harassment experienced by farm worker Marlyn Perez, the authors run through the crescendo of female voices that began to speak out about the prevalence of sexual harassment, including sexual assault, in a variety of industries and the impact of the telling of these stories.[232] Finally, there are starting to be consequences as a result of #MeToo. Perez received close to a million dollars in damages; Harvey Weinstein received a 23-year prison sentence in

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226 *Id.*

227 *Id.* at 195.

228 *Id.* at 196.

229 *Id.* at 196-97. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878 (2018), a 5-4 decision explaining that public employees need not pay union dues based on the First Amendment to the unions representing them.

230 Cahn et al., *supra* note 2, at 198.

231 *Id.*

232 *Id.* at 201-03.

New York;[233] Charlie Rose was fired from CBS;[234] and New York's governor, Andrew Cuomo, resigned.[235] These are just some examples of the more than 200 men who the *New York Times* documented as being seriously affected by this movement.[236] In addition, millions of women (and some men) used the hashtag to out their harassers and tell their stories, lending heft to the gravity and veracity of their accounts.[237]

The authors situate the movement in the larger landscape of the development of sexual harassment law and its continued persistence in the American workplace.[238] Importantly, they link sexual harassment to the WTA workplace. These highly competitive environments attract the type of people who are likely to sexually harass since bullying and harassment are "built into the fabric of the WTA economy every bit as much as traditional sexism was built into the gender-segregated workplaces of the industrial era."[239] Thus, as the authors point out, "[s]exual harassment is . . . both a symptom and consequence of a WTA economy."[240]

Yet, sadly, sexual harassment law has been notoriously ineffective in stopping this toxic workplace practice.[241] The legal standards for what constitutes harassment require outrageous behavior before it becomes actionable,[242] and, even when an employer is found liable, damage caps in these cases make the consequences for

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233 *Id.* at 203. *But see Harvey Weinstein's New York Conviction Is Overturned*, N.Y. Times (May 23, 2024), https://www.nytimes.com/live/2024/04/25/nyregion/harvey-weinstein-appeal (noting that although Weinstein's New York conviction was overturned because the trial judge admitted testimony from other alleged victims when those crimes had not been charged, his California conviction of sixteen years still stands).

234 Cahn et al., *supra* note 2, at 205.

235 *Id.*

236 *See id.* at 206; Audrey Carlsen et al., #*MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. Times (Oct. 23, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

237 Cahn et al., *supra* note 2, at 204-05.

238 *Id.* at 207-09.

239 *Id.* at 209.

240 *Id.*

241 *Id.* at 210.

242 *See, e.g.,* Theresa M. Beiner, *The Trouble with* Torgerson*: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 Nev. L.J. 673 (2014).

employers relatively insignificant.[243] Because of this and the risk of retaliation for reporting, many instances of sexual harassment go unreported.[244] This is where, according to the authors, the #MeToo movement provides some hope. As a result of it, they assert that prosecutors and jurors now understand the patterns of sexual harassment and are more willing to find offenders guilty or liable.[245] They provide the cases brought by E. Jean Carroll against Donald Trump[246] and Lauren Bonner against Point72 Asset Management, a New York hedge fund, as examples of the impact of #MeToo.[247] The authors describe the #MeToo tactics of "focusing on unsavory practices, generating publicity, and tying together different kinds of misconduct" as providing "new weapons in the fight against discriminatory workplaces."[248]

The authors identify three steps that they believe will help women in these workplaces. The #MeToo movement has already started the first step: the public needs to see the problem, and people as well as companies must be held accountable.[249] The second step is to change the laws that permit the enforcement of mandatory arbitration and nondisclosure agreements that mask repeated instances of harassment and protect serial offenders.[250] Finally, there must be a change to the WTA culture in which sexual harassment continues to be prevalent.[251] This is a bigger challenge, and the authors suggest a multi-front attack. Using McDonald's as an example, they argue for consequences for those at the top of the food chain – including CEOs – who engage in this behavior or tolerate it. In the case of McDonald's CEO Stephen Easterbrook, the company's board clawed back more than $100 million in compensation from him.[252] The Board also went after the human resources director, suing him for ignoring an atmosphere that would likely encourage sexual harassment and for engaging in it himself.[253]

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243 Cahn et al., *supra* note 2, at 210-11.
244 *See id.* at 211.
245 *Id.* at 212.
246 *See id.* at 212-13
247 *See id.* at 214-17.
248 *Id.* at 217.
249 *Id.* at 218.
250 *Id.* at 219.
251 *Id.* at 221.
252 *Id.*
253 *Id.*

Interestingly, a Delaware court ruled that sexual harassment of this sort can be actionable as a "breach of the duty of loyalty," allowing for individual accountability[254] – something not available under Title VII.[255] These cases also are not subject to the damages caps under Title VII.[256] Along with these board actions, individual employees brought their own claims, and the EEOC brought an action as well against one franchise.[257]

The authors explain that individual employee cases do not have the same impact as making the elimination of sexual harassment a corporate responsibility. What is needed is reform of corporate cultures.[258] Unions and employee organizing can help in this effort, but companies like McDonald's have fought unionization. Instead, like other members of the WTA economy, McDonald's makes money while ignoring the plight of its employees – limiting corporate responsibility and instead leaving it with individual stores.[259] While the #MeToo movement had an immediate impact, the authors are more sanguine about its continued success. Still, "if the ability to confront attackers unites women and connects them to a larger constituency for reform,"[260] change is possible.

IV. The Conclusion

In the conclusion to the book, Cahn et al. revisit the triple bind and what can be done to unwind it. Looking at WTA economy's big winners like Elon Musk and the political landscape that allows it to thrive,[261] they ask, "How can we harness the values of a women's coalition – which combines women's leadership and their ballot power, together with the support of their allies – in the

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254 *Id.* at 222. *In re* McDonald's Corp. S'holder Derivative Litig., 290 A.3d 343 (Del. Ch. 2023).

255 *See, e.g.,* Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 184 (3d Cir.1997) (citing Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996) (en banc); Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir.1996)); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993).

256 CAHN ET AL., *supra* note 2, at 222.

257 *See id.*

258 *Id.* at 223.

259 *See id.*

260 *Id.*

261 *Id.* at 225-30.

broader fight against the excesses of the WTA economy?"[262] They set out a three step process that includes: (1) "making visible the injustices of the WTA economy;"[263] (2) "showing the links between sex discrimination and WTA practices that are counterproductive to society;"[264] and (3) "empowering women's voices."[265]

They acknowledge that this is not an easily won battle and includes a Supreme Court that is not very sympathetic to employment discrimination claims.[266] They recommend using publicity, lawsuits, and the ballot box to make changes in five areas.[267] These changes include "[c]apping the accumulation of power at the top,"[268] and making it difficult to turn an increased profit by breaking rules as well as reining in executive pay.[269] It means a return to corporations that are run based on collective values – not the winner take all approach described in earlier chapters of the book.[270] They also propose "[r]eset[ting] labor markets and reform[ing] management practices."[271] Cooperative management styles are part of this, but these reforms also include support for workers so they can say no to sub-standard pay. This would create a scenario in which corporations would have an incentive to invest more in worker training and retention.[272] It also is a solution to a critique found in earlier chapters – a shift to companies becoming more concerned with long-term growth and less with the next quarter's earnings.[273] Cahn et al. advocate for increasing the minimum wage, arguing to "[r]aise the floor."[274] "Invest[ment] in individuals, children and communities" is the fourth pillar of their proposal.[275] This includes greater public support for childcare, pre-K, "paid family leave, and family-friendly workplaces."[276]

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262 *Id.* at 230.
263 *Id.* at 231.
264 *Id.* at 232.
265 *Id.* at 233.
266 *Id.* at 234.
267 *Id.* at 235.
268 *Id.*
269 *Id.* at 235-36.
270 *Id.* at 236.
271 *Id.* at 237.
272 *Id.*
273 *Id.*
274 *Id.* at 238.
275 *Id.* at 239.
276 *Id.*

Finally, they assert that there needs to be a "[s]trengthen[ing] of the rule of law."[277] The stories discussed in this book are rife with instances of law breakers not only getting away with it, but also benefitting from it. The reforms needed here are big – they require acts of Congress, changes in Supreme Court outcomes, voting, and public outrage.[278] These reforms, they assert, would make meaningful change for working women, and, hopefully, render the gender wage gap a thing of the past.

VII. So, What Does It All Amount to?

There's a ton of interesting information in *Fair Shake*, and Cahn, Carbone, and Levit make a compelling case that the WTA economy is harming women not only in terms of wages, but also with respect to employment opportunities generally. Two things struck me about the book. First, as someone who has studied and taught employment discrimination law, the prevalence of sex discrimination in the stories of these women was disheartening and, unfortunately, not surprising. Title VII, the main antidiscrimination law addressing sex discrimination (including sexual harassment) in the workplace, has not provided sufficient relief for those experiencing discrimination or much incentive for employers to curb discriminatory practices as one might have hoped. Second, while the authors blame the WTA workplace for the stagnant nature of the gender wage gap, there are other potential explanations. The WTA workplace might be part of it, but other aspects of life likely play a significant role in curtailing gender wage equity.

A. The Persistence of Sexual Harassment and Sex Discrimination in the Workplace

As someone who has been researching and writing about workplace sexual harassment for twenty-five years,[279] the persistence of this pernicious workplace practice and its negative impact on working women (and some men) continues to perplex me. That sexual harassment factored into so many of these women's

277 *Id.* at 240.

278 *Id.* at 241.

279 The first article I wrote on the subject was published in 1999. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 Wake Forest L. Rev. 71 (1999).

stories despite the Supreme Court's recognition of this claim under Title VII in 1986[280] is disturbing. Cahn et al. see hope in the aftermath of the #MeToo movement.[281] Yet, I am more skeptical, having seen consciousness raised about sexual harassment in the past, and yet it persists in the workplace. Without a significant change in the manner in which courts approach these cases in many jurisdictions and/or congressional action addressing harassment, it's unclear whether much progress will be made. However, there are some signs of hope.

During Supreme Court Justice Clarence Thomas's confirmation hearings in 1990, then law professor Anita Hill[282] testified to the sexual harassment she experienced while working for Thomas during his time with the Department of Education and (ironically) as head of the Equal Employment Opportunity Commission.[283] The hearings spurred awareness about the workplace sexual harassment women experienced and led to a 150% increase in sexual harassment charges filed with the EEOC.[284] Indeed, Marcia Greenberger, founder and co-president emerita of the National Women's Law Center, explained that Professor Hill "sparked conversations among women that they had never had before about experiences they realized were shared by so many others."[285] As Greenberger noted, phones "began ringing off the hook" at her organization as women who had experienced sexual harassment

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280 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

281 Cahn et al., *supra* note 2, at 217-20, 233.

282 Professor Hill is now a Professor of Social Policy, Law, and Women's Gender and Sexuality Studies at Brandeis University. *See Anita Hill, Scholarship and Biography*, ScholarWorks, scholarworks.brandeis.edu/esploro/profile/anita_hill/overview (last visited Aug. 16, 2024).

283 *See, e.g.*, Don DeMaio, *Sexual Harassment Complaints Are Increasing in Rhode Island*, Providence Bus. News, Apr. 10, 1995, at 15; M.A. Stapleton, *Sexual Harassment Filings on Rise as Awareness Increases, Seminar Told*, Chi. Daily L. Bull., Dec. 8, 1994, at 1 (recounting the increase in sexual harassment suits after the hearings); Phil Willon, *EEOC Chief Faces Long Haul: America Mired in Decade of Anger, Confusion over Equal Rights*, Richmond Times-Dispatch, Dec. 24, 1995, at A1.

284 *See* Beiner, *supra* note 279, at 72 n.6 (noting that there was a 150% increase in charges filed over the four years following the hearings and citing sources).

285 Sarah Pruitt, *How Anita Hill's Testimony Made America Cringe – And Change*, History (Feb. 9, 2021), https://www.history.com/news/anita-hill-confirmation-hearings-impact.

sought legal advice.[286] The hearings influenced Congress to pass the Civil Rights Act of 1991, which provided compensatory and punitive damages in Title VII cases, although there were caps on these damages.[287] In addition, a record number of women were elected to Congress following the hearings.[288] Yet, nearly twenty-five years later, women and some men still experience harassment in the workplace at unacceptable rates[289] – especially in the workplaces highlighted in *Fair Shake*. This begs the question of why. The authors note that the damage caps imposed under Title VII for compensatory and punitive damages awards are part of the problem.[290] The most an employer can be liable for in compensatory and punitive damages is $300,000.[291] This does not provide much incentive for an employer to stem sexual harassment. If juries could award millions of dollars, perhaps employers would take more notice.[292]

A significant problem is the courts and the complex legal rules they have established for plaintiffs to be successful with these claims. Many sexual harassment law scholars have noted that plaintiffs in these cases have a difficult time in court.[293] Along

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286 *Id*.

287 *Id*.; 42 U.S.C. § 1981a(b)(3).

288 Pruitt, *supra* note 285.

289 *See, e.g.,* Cahn et al., *supra* note 2, at 21, 101.

290 Cahn et al., *supra* note 2, at 210-11.

291 42 U.S.C. § 1981a(b)(3). This is the cap for the largest employers – those who employ 500 or more employees. These caps were set in the Civil Rights Act of 1991 and have not been adjusted in the thirty-plus years since the law was enacted.

292 While punitive damages are designed to punish and deter, their efficacy and deterrent value is controversial. *See, e.g.,* Beiner, *supra* note 135, at 191-200; Paige Griffith, *Why Don't Punitive Damages Punish or Deter? Beyond the Constitution Toward an Economic Solution*, 77 Mont. L. Rev. 327 (2016); Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 St. John's J. Legal Comment 237 (2005); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998).

293 *See, e.g.,* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. Cal. L. Rev. 791 (2002); Beiner, *supra* note 279; Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 Stan. L. Rev. 691 (1997); L. Camille Herbert, *How Sexual Harassment Law Failed Its Feminist Roots*, 22 Geo. J. Gender & L. 57 (2021); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1033.

with scholars who have studied the problematic use of procedural rules to dismiss employment discrimination cases,[294] law professors Kevin Clermont and Stewart Schwab found a lack of success for employment discrimination plaintiffs in federal courts generally.[295] In a study of federal employment discrimination cases decided from 1979 to 2006, they found that overall plaintiff win rates were much better before juries than judges, and among plaintiffs receiving bench trials, employment discrimination plaintiffs lost far more often than other civil litigants.[296] These low bench trial win rates, Clermont and Schwab argue, might explain why plaintiffs also lose in pretrial adjudications, because judges "lean" against plaintiffs in these case in a way that is different than other civil plaintiffs.[297] They also document an anti-plaintiff bias in the federal circuit courts, in which plaintiffs fare far worse on appeal than defendants.[298]

Cahn et al. suggest that movements such as #MeToo might have an influence on case outcomes in sexual harassment cases.[299] The #MeToo movement has spurred legislative change, including the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,[300] the Speak Out Act,[301] limits on federal tax deductions for settlements of sexual harassment and

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294 *See, e.g.,* Sperino & Thomas, *supra* note 105, at 15-29; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 105 (2007); Seiner, *supra* note 293, at 1033.

295 Clermont & Schwab, *supra* note 105, at 130.

296 *Id*. Plaintiffs were successful at jury trials 37.63% of the time, and only successful in bench trials 19.62% of the time. *See id*. The general civil win rate for plaintiffs in bench trials was 45.53%—much higher than the win rate for employment discrimination plaintiffs. *Id*.

297 *Id*. at 131.

298 *Id*. at 111-12. Reversal rates on appeal for defendants from plaintiff pretrial wins is 30% compared to a 11% reversal rate for plaintiffs who appeal defendant pretrial wins. The reversal rate from trial wins is 41% for defendants on appeal compared to plaintiff appeal wins of 9% when the defendant wins at trial. Clermont and Schwab note that the 41% to 9% spread in reversal rates is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases. *Id.*

299 Cahn et al., *supra* note 2, at 205-06.

300 Pub. L. No. 117-90, 136 Stat. 2 (2022). This law is not without its detractors. *See* Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 Nw. J. L. & Soc. Pol'y 1 (2023).

301 42 U.S.C. §§ 19401-19404 (2022) (prohibiting enforcement of pre-dispute nondisclosure and disparagement clauses with respect to sexual harassment or sexual assault).

abuse cases that include nondisclosure agreements,[302] and state legislation.[303] Could the influence of #MeToo extend to how courts decide these cases?

There is some support for the influence of the #MeToo movement on judicial decisionmaking, but the studies thus far are not entirely promising. An early look at case law following the #MeToo movement found only one circuit that referenced the movement as a basis for overturning a summary judgment motion in a Title VII sexual harassment case.[304] The case – *Minarsky v. Susquehanna City*[305] – is encouraging. In it, the Third Circuit reversed a trial court's grant of summary judgment on the *Ellerth/Faragher* defense after the trial judge adopted a magistrate's recommendation to grant the motion in part because the plaintiff, Minarsky, was not reasonable in failing to report the harassment under the employer's anti-harassment policy.[306] While the plaintiff alleged that she failed to report the harassment earlier for fear of retaliation, the trial court ruled that her delay was unreasonable and her fears of retaliation unfounded.[307] In reversing the trial court, the Third Circuit seemingly relied on the #MeToo movement (although it didn't name it directly) in a footnote, holding that a jury could find her failure to report reasonable under the circumstances.[308] Footnote 12 alludes to a "veritable firestorm of allegations of rampant sexual misconduct

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302 26 U.S.C. § 162(q)(1) (West 2022).

303 *See, e.g.,* Workplace Transparency Act, 802 Ill. Comp. Stat. Ann. § 96/1-20 (West 2020) (prohibiting contracts that limit employees' ability to report sexual misconduct to public officials); *Id.* § 1-25 (prohibiting unilateral requirement of employment that requires arbitration of employment claims); N.Y. Lab. Law § 201-g (McKinney 2019) (requiring employers to adopt the model sexual harassment prevention policy developed by the state); *see also* Chris Micheli & Ashley Hoffman, *How California Lawmakers Responded Legislatively to the #MeToo Movement*, 53 U. Pac. L. Rev. 724 (2022) (describing California's legislative changes directed at issues raised by the #MeToo Movement).

304 Natalie Pedersen & Christine Cross, *#MeToo and the Courts: An Analysis of the Movement's Effect on Workplace Sexual Harassment Law*, 53 U. Tol. L. Rev. 71 (2021).

305 895 F.3d 303 (3d Cir. 2018).

306 *Id*. at 311.

307 *Id*.

308 *Id*. at 313.

that has been closeted for years, not reported by the victims."[309] Apparently based in part on the public discussion from many victims who failed to report harassment, the court explained that "a mere failure to report one's harassment is not *per se* unreasonable."[310] Instead, the circumstances of incidents of harassment are "highly circumstance-specific," and the "reasonableness of a plaintiff's actions is a paradigmatic question for the jury."[311] This shift in the court's approach appears to be influenced by the #MeToo movement.

While this 2021 study documented one other district court alluding to the Third Circuit's footnote,[312] there are now several more district court cases from the Third Circuit that refer to the reasoning in *Minarsky* and hold that the plaintiff will have an opportunity to present facts at trial to establish she was reasonable in failing to report harassment.[313] District courts outside of the Third Circuit have cited *Minarsky* positively to deny summary judgment to employers asserting the *Ellerth/Faragher* defense.[314] Consistent with this, a recent study by Li, Hall, and Martinez found a pro-plaintiff shift in the federal trial courts after the #MeToo

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309 *Id*. at 313 n.12.

310 *Id*. at 314.

311 *Id*.

312 *See* Pedersen & Cross, *supra* note 304, at 80-81; Williams v. United Launch Alliance, L.L.C., 2018 U.S. Dist. LEXIS 235684 (N.D. Ala. Sept. 14, 2018) (referring to the *Minarsky* footnote in denying the defendant fees in a case in which the plaintiff lost).

313 *See, e.g.,* Delval v. Town of McCandless, No. 2:20cv1839, 2024 WL 1346670 (W.D. Pa. Mar. 29, 2024); Lockhart v. Energy Transfer Partners, LP, No. 2:20cv258, 2022 WL 4553183 (W.D. Pa. Sept. 29, 2022); Kanish v. Crawford Area Transp. Auth., Case No. 1:19-cv-00338 (Erie), 2021 WL 1520516 (W.D. Pa. Mar. 26, 2021); Barbounis v. Middle East Forum, Case No. 2:19-cv-05030-JDW, 2021 WL 5106046 (E.D. Pa. May 28, 2021); Mercado v. Sugarhouse HSP Gaming, L.P., Civ. Action No. 18-3641, 2019 WL 3318355 (E.D. Pa. July 23, 2019); Kastanidis v. Pennsylvania Dept. of Hum. Servs., Civ. Action No. 1:16-CV-1548, 2018 WL 3584976 (M.D. Pa. July 16, 2018)

314 *See, e.g.,* Orr v. Russell Forest Products, Inc., Case No.: 5:19-cv-01173-HNJ, 2021 WL 5216884 (N.D. Ala. July 14, 2021); Doe v. District of Columbia, Civ. Action No. 1:19-cv-01173 (CJN), 2023 WL 3558038 (D.D.C. Feb. 14, 2023); Moore v. U.S. Virgin Islands Dep't of Tourism, Civ. Action No. 2014-0081, 2020 WL 5219533 (D. V.I. Aug. 31, 2020).

movement.[315] Indeed, a quick Westlaw search reveals 132 cases – mostly in the district courts -- with "#MeToo" mentioned.[316]

The story is different in the courts of appeals. Li, Hall, and Martinez found no pro-plaintiff impact in the courts of appeals after the #MeToo movement; in fact, the study found the probability of a pro-employee ruling dropping in the circuit courts of appeal after 2017 – the beginning of the #MeToo movement.[317] Interestingly, among the 132 cases I discovered after a recent search in Westlaw for the term #MeToo, there were no court of appeals cases that used the term #MeToo in a pro-plaintiff manner, and in several cases alleged perpetrators of harassment or sexual assault argued that the #MeToo movement had caused an overreaction – and even sex discrimination – directed at alleged harassers.[318] In none of the court of appeals cases in which the movement was directly mentioned was it used to help a Title VII plaintiff.

While courts are showing mixed results, hope does come from the corporate sphere. Legal scholars have documented a shift in corporate governance cases.[319] Hemel and Lund recounted outcomes of shareholder lawsuits involving sexual misconduct pre-2017 and those in the period after the #MeToo movement became part of household discussions, explaining that shareholder suits started making it past motions to dismiss or settling for significant sums post #MeToo.[320] This was not the case for pre-#MeToo lawsuits. In addition, like Cahn et al.,[321] they recount the ouster of several CEOs as a result of sexual harassment allegations.[322]

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315 Carol T. Li, Matthew E.K. Hall & Veronica Root Martinez, #*MeToo & the Courts: The Impact of Social Movements on Federal Judicial Decisionmaking*, 81 Wash. & Lee L. Rev. Online 79, 83 (Dec. 29, 2023).

316 Westlaw search by author on August 1, 2024. Search of all federal cases with search terms "#MeToo" or "MeToo Movement".

317 Li et al., *supra* note 315, at 83 ("The probability of a pro-employee ruling . . . increased from .03 to .13 after November 1, 2017.").

318 *See, e.g.,* Doe v. Stonehill Coll., Inc., 55 F. 4th 302, 335-336 (1st Cir. 2022) (Title IX case, in which the court did not support the plaintiff's position); Johnson v. Marian Univ., 829 Fed. Appx. 731, 732 (7th Cir. 2020) (Title IX case).

319 *See* Brenda Cossman, #*MeToo and the Corporation in Popular Culture*, 46 Seattle U. L. Rev. 607, 636-38 (2023) (recounting the shift); Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 Colum. L. Rev. 1583, 1612-28 (2018) (discussing cases before and after #MeToo).

320 Hemel & Lund, *supra* note 319.

321 Cahn et al., *supra* note 2, at 221.

322 Hemel & Lund, *supra* note 319, at 1614-15.

The impact of sexual harassment allegations levelled at corporate CEOs goes beyond successful shareholder derivative suits and fired CEOs. Revelations of sexual misconduct by CEOs has resulted in significant drops in stock prices.[323] Increasingly, lawsuits involving allegations of sexual misconduct by CEOs are settling – suggesting that the shift in understanding of the serious nature of sexual harassment allegations has reached corporate legal counsels' offices.[324] This has led one commentator to opine, "It is not the law that has changed; the tests for fiduciary duty liability and securities non-disclosure liability remain unchanged. What has changed is the understanding of how sexual misconduct fits into that legal framework."[325]

A recent study of CEO employment contracts revealed a significant increase in what the authors of the study call "MeToo termination rights" clauses, whereby companies can terminate CEOs for cause based on sexual harassment or other sexual misconduct.[326] These researchers found the incidence of these contract clauses went from 3.9% in the three years before #MeToo to 15.2% in the three years after #MeToo became a household word.[327] Interestingly, this trend increased over the three years of the study after #MeToo, with the third quarter of 2020 showing nearly 40% of the contracts including a sexual harassment clause.[328] Thus, although at first the gains may look modest, the trend appears to be increasing over time. In addition, there was a significant rise in contract terms allowing for "for cause" termination due to

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323 *See id*. at 1620, 1624, 1625 (recounting instances of stock prices dropping for corporations shortly after allegations of sexual harassment by CEOs became public).

324 *See id*. at 1621, 1622 (recounting cases that have settled); *see also In re* Signet Jewelers Ltd. Sec. Litig., Civ. Action No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468 (S.D.N.Y. July 21, 2020) (order approving $240 million settlement of shareholder suit against Signet Jewelers regarding sexual misconduct by the CEO and others).

325 Cossman, *supra* note 319, at 637.

326 Rachel Arnow-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of "MeToo Termination Rights" in CEO Contracts*, 98 Ind. L.J. 125 151-52 (2022).

327 *Id*. at 151.

328 *Id*. at 154-55. The authors are hesitant to say the trend will continue into the future. As they point out, "it may be that the incidence of these clauses will reach a natural ceiling." *Id*. at 155; *see also id*. at 173 (discussing uncertainty that the trend will persist).

violations of company policy, with the presence of such clauses rising from 53% pre-#MeToo to 67% post-#MeToo.[329] These types of clauses, which are publicly available,[330] signal that those at the top of the corporate food chain will be held accountable for sexual misconduct on the job.[331] This is something that was unlikely pre-#MeToo.[332] Importantly, this lets other workers at these businesses know that this misconduct will not be tolerated by anyone in the workplace. It also likely will lessen sexual harassment in these workplaces, as studies suggest that the more seriously an organizational leader takes sexual harassment allegations, the less likely harassment will occur.[333] When the head of an organization is him or herself someone who engages in sexual harassment and gets away with it, this undermines efforts to change this part of the corporate culture.

Cahn et al. also recount some of the impact of the #MeToo movement, but the extent of the #MeToo movement's impact on court decisionmaking remains to be seen. The movement in corporate cases and CEO contract clauses are promising. However, it's still unclear whether this will extend to women (and some men) who challenge sexual harassment directly in court. Although historically there are examples of courts shifting positions based on social movements,[334] the continued salience of this movement for sexual harassment cases remains unclear. Still, given the potential for social movements to influence courts, as Cahn et al. suggest, this is one sensible strategy to address the gender wage gap. Less sexual harassment at work should keep women in positions and help them thrive in the workplace.

Along with sexual harassment, many of the women highlighted experienced sex discrimination – whether through employers paying women less than similarly situated men or employers penalizing women for actions when men were given a pass for

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329 *Id*. at 152. The authors note that many of these clauses include some limitations on for cause terminations on these grounds, such as a seriousness threshold, intent requirements, or procedural protections. *See id*. at 156-57.

330 *Id*. at 147.

331 *Id*. at 170.

332 *Id*. at 133.

333 Beiner, *supra* note 135, at 128-31.

334 Pedersen & Cross, *supra* note 304, at 85-88 (providing examples); *see generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821 (2021).

engaging in the same actions. And, several of these women – Dukes (Walmart), Pao (Kleiner Perkins), and Martinez (Aspen Dental) – lost their lawsuits. Like the difficulties faced by plaintiffs in sexual harassment cases, plaintiffs in sex discrimination lawsuits also face substantial hurdles to success. Increasing damages and making Title VII and the Equal Pay Act more effective in court can only help women be more successful in these lawsuits. Given the questionable progress in the courts after #MeToo, it may well take congressional action – such as eliminating the damage caps under Title VII – to make a difference.

B. The Mothering Penalty and the WTA Workplace

The authors lay much of the blame for the continued gender wage gap at the feet of the WTA economy and business leaders who adopt this approach to running their organizations. They make a persuasive case that these workplace environments are not places where many women can thrive or would wish to work. Indeed, regardless of whether or not the shift from cooperative workplaces to WTA workplaces is the cause of the continued gender wage gap, it's clear that women will struggle to be successful in these workplaces. Given that studies show that women are successful in the modern workplace,[335] discouraging employers from adopting policies that foster a WTA workplace makes sense. It's also likely that many men wouldn't thrive in these workplaces, although clearly more men than women do. The personality type that Cahn et al. identify as prevalent in these workplaces may be more common among men, but many men would not conform as well.[336] But is the WTA economy the root cause of the persistence of the gender wage gap or is something else going on?

Women were making significant gains in wages vis-a-vis men through the 1980s.[337] Beginning in the 1990s, those gains slowed

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335 Indeed, Cahn et al. cite many instances of women leaders being successful in a variety of businesses. *See, e.g.,* CAHN ET AL., *supra* note 2, at 59.

336 *See id.* at 139 (describing personality type that succeeds in these environments).

337 Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7 (2007); Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. RELATIONS REV. 45 (2006).

and that stagnation has continued into the twenty-first century.[338] Women begin their careers with near wage parity with men, but lose that parity as they continue to age and progress through their careers.[339] Economist Claudia Goldin has looked at workplaces and why women are less often making it to the top tier (and better paying) positions. For her, it is about family. Most women have children, and, for couples, it makes sense for one person in the couple to pursue a higher income position that has more time demands while the other person in the couple takes a lesser-paying, more flexible position so that there is time for the needs of children and the family.[340] Goldin talks in terms of "greedy work" – work that demands overtime, weekend and evening work in order to earn the most income.[341]

Goldin has gathered studies looking at women's and men's earnings in professional occupations where earnings are highest – the area of the workforce that has the greatest gender wage gap.[342] The gender wage gap in earnings changes over time, with "women usually taking a big earnings hit when they have children."[343] While the wage gap has closed since the 1960s and 1970s, interestingly, the gap today is larger for college educated women than it is for all women.[344] While education, job experience, and other skill-related explanations accounted for the gender wage gap early on, the continued gap is complicated.[345] Looking at college graduates, Goldin recounts how these men and women start out with fairly similar salaries; however, as these women continue in their careers, the earning gap grows.[346] In a study recounted by Goldin of University of Chicago MBA students who graduated between 1990 and 2006, in their first jobs, these women earned 95 cents on the male MBA graduate dollar.[347] By year thirteen, these women were earning 64 cents on the male dollar; their

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338 Kochhar, *supra* note 167.

339 *See id.*

340 *See* Claudia Goldin, Career and Family: Women's Century-Long Journey Toward Equity 9-13 (2021).

341 *Id*. at 9.

342 *See id.* at 170.

343 *Id*. at 160.

344 *Id*.

345 *See id*.

346 *Id*. at 161-62.

347 *See id.* at 162.

earnings relative to men had dropped considerably.[348] This gap was not a random phenomenon. As Goldin points out, "it emerges largely with the arrival of children."[349]

Two factors relevant for this group were that women had more career interruptions and worked fewer weekly hours than men.[350] She notes that the time off these women took was not that extensive – after seven years, they took just over four months and after thirteen years, just about a year.[351] Still, it was less than their male counterparts, who only took off less than one month at year seven and six weeks at year thirteen.[352] So, even though these women didn't take a lot of time off in those years, it was more than the men. The other significant difference was the difference in hours worked per week between men and women. At the beginning of their careers, both men and women were averaging around 60 hours per week, but the difference by the time they are thirteen years from graduation is eight hours per week – women in this sample averaged 49 hours whereas men averaged 57 hours.[353] The gender pay gap for these MBA degree earning individuals, according to Goldin, exists "because the high-paying corporate and financial sector positions heavily penalize employees who have even brief career disruptions and those who do not work exceptionally long and grueling hours."[354] Hours-wise, this sounds like the WTA economy, but Goldin calls the arrival of children and the caregiving responsibility that comes with this as the "main contributor" to women's lack of continuity and lesser work hours, resulting in less pay.[355] Indeed, University of Chicago MBA women without children were earning only about 9 cents less than their male counterparts thirteen years after graduation.[356] They still earn less than men, but not nearly as stark as the difference for women with children.

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348 *Id.*

349 *Id*. at 163.

350 *Id*. at 163-64.

351 *Id*. at 164.

352 *Id*.

353 *Id*. at 164. Much of this difference is because more of these women work part-time – around 18% of them. In addition, a majority of those who worked part-time worked for themselves. *Id*.

354 *Id*. at 165.

355 *Id*.

356 *Id*. at 166.

The gender pay gap does vary by profession, with women in science and engineering (among highly educated women) having a lesser gap.[357] Finance – one of the areas discussed in *Fair Shake* – has one of the largest gender wage gaps.[358] Interestingly, unlike the women in tech described in *Fair Shake*, the study Goldin relies on found a lower gender wage gap in tech, where women earned 94 cents on the male dollar but used "engineering" for tech – a potentially very different occupational group from the one that Cahn et al. were using.[359] Looking at the Occupational Information Network maintained by the U.S. Department of Labor, Goldin recounts how certain occupations have higher time demands and larger gender wage gaps, while other occupations (including engineering and science) have lower time demands and a lower gender wage gap.[360] Fields with high client contact, such as doctors, dentists, and lawyers, have a higher gender wage gap, as do management, administration, and sales.[361] Women are more likely to be the "on call" parent, requiring more flexibility in hours worked.[362] As Goldin concludes, "[w]omen incur penalties in certain occupations because they require more controllable hours."[363] With high client demands and long hours in the office leading to higher incomes, this is sounding more like the WTA economy that Cahn, Carbone, and Levit identify in *Fair Shake*.

Still, it looks like children and the caregiving responsibility they require are a major factor in the gender wage gap that the structure of certain positions exacerbates. Using a hypothetical involving a couple who are both attorneys, Goldin argues that the resulting wage gap between the husband and wife after they decide to have children is based upon "the very structure of work."[364] In particular with attorneys, studies Goldin relies upon show that the attorneys who average a 60 hour week earn more than two and a half times those who only work 30 hours per week – regardless of

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357 *Id*. at 170 & Fig. 8.4.

358 *Id*. Women in finance earn 77 cents on the male finance dollar.

359 *Id*. at 170; Cahn et al., *supra* note 2, at 133-34..

360 Goldin, *supra* note 340, at 173.

361 *Id.* at 173, 184.

362 *Id*. at 171.

363 *Id*. at 174.

364 *Id*. at 180.

gender.[365] Thus, there's an hourly premium paid to those who are willing to work longer hours.

While Goldin acknowledges that sex discrimination was prevalent in the past, she argues that it doesn't have much of an impact on the current gender wage gap. As she explains:

> The difference in earnings between men and women, according to the logic and data we're exploring, have little direct relationship to bias in the workplaces or to a lack of family-friendly policies or to any of the other quick fixes mentioned. . . . But the features of the jobs they have now are the reason why they are earning less. These are the aspects of jobs that make a particular worker – lawyer, accountant, consultant, financial advisor – indispensable to the account, client, deal.[366]

To create the kind of equity that would allow both men and women with children to earn at the same levels, Goldin argues that the "system" of how work is arranged would need to change.[367] She uses pharmacists as an example of where it has changed in a way that has increased earnings equity while creating a workplace with flexible hours.[368] Pharmacy used to be a male-dominated field that featured individually owned pharmacies.[369] In that environment, women pharmacists were few and usually worked for a male-owned pharmacy as an assistant, earning 67 cents on the male pharmacist's dollar.[370] These pharmacists were a lot like lawyers – they could be woken up in the middle of the night to fill a prescription for an important client and had individual relationships with their customers.[371] There was a shift in ownership of these pharmacies to corporations, which, along with changes in insurance and health care, resulted in pharmacy becoming a rare area where the entering of corporations into the business actually helped create a more gender egalitarian workplace.[372] With drugs becoming more standardized and technological advances, pharmacists didn't need to have an ongoing personal relationship with a client in order to provide safe advice on things like drug interactions.[373] All these

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365 *Id*.
366 *Id*. at 186.
367 *Id*. a 186-87.
368 *Id*. at 187-92.
369 *Id*. at 188.
370 *Id*.
371 *Id*. at 189.
372 *Id*.
373 *Id*. at 190.

changes did not mean that being a pharmacist became easier; indeed, medicines became more complex requiring more education on the part of pharmacists.[374] With huge national chains such as Walgreens, CVS, and the like taking over the ownership part of the business, pharmacists became employees and much more fungible.[375] Because pharmacists could easily substitute for each other, the penalty for part-time work nearly disappeared, with the median salary for female pharmacists being around 94 cents on the male pharmacist dollar.[376] Women pharmacists took advantage of this, with nearly one-third of those at thirty years old working less than 35 hours per week.[377] With about 65% of PharmD graduates being women, earnings have remained high. Pharmacy is a rare female-dominated occupation where salaries didn't decrease even though it is dominated by women.[378]

It's not so clear how the restructuring of the pharmacy workplace might translate into other workplaces that reflect the WTA economy. However, it is interesting that one of the aspects of the economy that the authors bemoan – corporatization of health care – actually helped women in the case of pharmacy. That employees can be substituted for one another is an interesting idea, but doesn't help women who want to climb to the top of the corporate ladder in their workplaces. These positions usually are dependent on unique skills.

Still, the ideas in Goldin's book are worth exploring as a way of lessening the gender wage gap. She has several suggestions that might help, including getting men on board to help implement change.[379] Additional solutions she suggests include reducing the

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374 *Id*.

375 *Id*. at 190-91.

376 *Id*. at 191.

377 *Id*.

378 *Id*. at 192. Increased use of AI and automation in pharmacy likely accounts for part of this as well as the decline in the number of pharmacists. *See* Joy Liu, Opinion, *Addressing the Decline in Graduating Pharmacists: The Role of Artificial Intelligence and Automation*, Pharmacy Prac. News (June 6, 2024), https://www.pharmacypracticenews.com/Opinion/Article/06-24/Addressing-the-Decline-in-Graduating-Pharmacists-The-Role-of-Artificial-Intelligence-and-Automation/74011.

379 Goldin, *supra* note 340, at 218.

cost of job flexibility,[380] lessening the cost of childcare,[381] and altering societal norms so that women are not always the ones who take on the majority of childcare and home-related duties.[382] These are fairly sweeping changes and, unlike the approach of the authors of *Fair Shake*, Goldin provides no clear guidance on how these solutions might be accomplished. Still, considering how work might be restructured so that gender pay equity decreases has appeal. The workplaces that actually are innovative enough to do so just might end up the winners when it comes to attracting and retaining talented employees.

380 *Id*.
381 *Id*. at 219.
382 *Id*.

Comment, Collaborative Divorce: The Ethical Concerns of Conscious Uncoupling

Introduction

"It's conscious uncoupling that prevents families from being broken by divorce and creates expanded families that continue to function in a healthy way outside of traditional marriage."[1] A term coined in the early twenty-first century and later popularized by celebrity use and promotion offers at its core what most couples desire at the dissolution of their relationship: civility.[2]

The term "conscious uncoupling" found its popularity when used by *New York Times* bestselling author Katherine Woodward Thomas.[3] As a licensed marriage and family therapist, Thomas promoted the concept of amicable divorce through her five-step approach to the dissolution process.[4] By that time, in 2015, the practice of collaborative divorce and seeking civil approaches for the dissolution of marriage had already found some popularity within the legal community.[5] This forward-thinking approach to dissolving a marriage has posed a number of questions concerning lawyers' ethical and professional duties if they are participating in collaborative divorce practice.[6] This comment will explore the origins of collaborative law, its impact on family law, and possible solutions the legal community can adopt to encourage this practice alongside other forms of alternative dispute resolution (ADR). With this effective conflict resolution model's nomination

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1 Editors of goop, *Conscious Uncoupling*, GOOP (Mar. 25, 2014), https://goop.com/wellness/relationships/conscious-uncoupling-2/.

2 James P. Cunningham, *Marriage in the 21st Century: The Death of "Till Death Do Us Part",* 83 MICH. B. J., 19, 20 (Jan. 2004).

3 KATHERINE WOODWARD THOMAS, CONSCIOUS UNCOUPLING: 5 STEPS TO LIVING HAPPILY EVEN AFTER 58 (1st ed. 2015).

4 *Id.*

5 Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 FAM. L.Q. 179, 180 (2014).

6 *Id*.

for a 2023 Nobel Peace Prize, collaborative law will seemingly, over time, become one of the more popular forms of modern ADR.[7]

To illustrate the collaborative divorce process and highlight the possible changes that will bring a new perspective to this practice, this comment will proceed in several parts. Part I will discuss the origins of collaborative law and its recent impact on family legal practice. Part II will explore the steps and processes of a collaborative divorce. Part III will address the benefits of the collaborative law process and the possible concerns of the legal community regarding this form of dispute resolution. In conclusion, Part IV will examine a current practitioner's perspective on the realities of practicing this dispute resolution.

I. The History of Collaborative Law

The collaborative process offers a new way for parties to seek amiable resolutions with the aid of legal knowledge and representation. Here, the parties involved agree to avoid litigation while concentrating primarily on the resolution of financial and logistical matters.[8] In this process, the cost of failure (i.e., resolving the matter through litigation) is so high to those involved that parties are more likely to continue toward an amicable resolution regardless of possible contention the future negotiations will create.[9] While this is a relatively new form of ADR in the family law context, its benefits are worth the widespread application and popularity that other forms have today.

The application of collaborative law to the family law context occurred over thirty years ago with the work of Minneapolis divorce attorney Stuart "Stu" Webb.[10] Webb sought to create a new style of dispute resolution that would facilitate, but mainly encourage, the development of creative settlement arrangements for attorneys and clients alike.[11] Webb later termed his model the

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7 *IACP Nominated for Nobel Peace Prize*, Bench & B. (Minn.), May/June 2023, at 6.

8 Gregg Herman, *The Role of a Family Law Attorney in Settlement Negotiations*, 53 Fam. L.Q. 71, 75 (2019).

9 *Id*.

10 Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. Am. Acad. Matrim. Law. 155 (2008).

11 *Id*.

"collaborative law" process.[12] Webb's model invites collaborative lawyers to combine neutrality, advocacy, and equity to their role while representing their client at the dissolution of the marriage, all while outside the courtroom.[13] This model solely focuses on the client's interests while also inviting the couple to be forthright and honest during the contentious process.[14]

Webb's inspiration came from a desire to locate somewhere within the legal practice, in particular within the field of family law, methods that removed the adversarial nature of dispute resolution.[15] Webb found the available forms of ADR to have still a threat of litigation looming, which allowed the adversarial energy of judicial proceedings to enter those supposed neutral or civil atmospheres.[16] Ultimately, Webb asked himself, "Why not create [a] settlement climate . . . [that would remove] the trial aspects and [create] a coterie of lawyers who would agree to take cases only for settlement?"[17] This model provides the desired privacy couples want as it focuses on warding off litigation and avoiding the public attention of the court system.[18] Webb's only issue, after naming the process, was the lack of other collaborative lawyers with whom to use the model together. His promotion and teaching of this process have created a growing group of collaborative lawyers within the United States and abroad in various international communities.[19] Webb's collaborative law process, in its application to the dissolution of marriage, will be discussed and examined further in subsequent sections.[20]

A. *The Uniform Collaborative Law Act*

While every state recognizes collaborative law practice, there is a need for cross-jurisdictional uniformity.[21] Family law matters are

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12 *Id*.

13 Kristen M. Blankley, *Agreeing to Collaborate in Advance?*, 32 Ohio St. J. Disp. Resol. 559, 563 (2017).

14 *Id*. at 565.

15 *Id*.

16 Webb, *supra* note 10, at 155.

17 *Id*. at 156-57.

18 *Id*.

19 Linda D. Elrod, *Establishing the Attorney-Client Relationship*, *in* Child Custody Practice & Procedure § 2:15 (2023).

20 *See infra* text at notes 39– 43.

21 *Judges Love Collaborative Law--Here's Why,* Am. B. Ass'n (July 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/

primarily regulated by state law.[22] With the common occurrences of travel and relocation for individuals in the modern world and in an effort to create uniformity, the Uniform Law Commission (ULC), an organization consisting of lawyers, judges, and legislators, was established to research, create, and promote the ratification of uniform state laws where it is practical.[23] The ULC completed the Uniform Collaborative Law Act (UCLA) in 2010 to explain the collaborative law process, identify and discuss the major policy issues raised during the Act's creation, and establish why the rules within the act should be uniformly applied across the United States.[24] The primary goal of collaborative law requires lawyers to limit their role to the narrow "purpose of acting as advocates and counselors."[25] The social policy behind the UCLA and collaborative law generally is not to eradicate litigation; instead, it focuses on developing a unique and reasonable alternative to litigation so parties have multiple options for resolving their disputes.[26]

The question is often posed as to why this process should gain popularity within the legal community since mediation is already available.[27] Collaborative law, unlike mediation in most aspects, allows legal professionals to represent and advocate for their clients during the negotiation process.[28] Unlike the mediation process, a neutral third party does not facilitate or act as the parties' intermediary within the collaborative practice. Still, the collaborative process is managed by the lawyers who provide candid legal advice to

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neither-mediators-nor-negotiators--collaborative-lawyers-emphasi/#:~:text=Today%2C%20every%20U.S.%20state%20and,acknowledges%20this%20practice%20of%20law.

22 *In re* Burrus, 136 U.S. 586, 593-94 (1890) (holding "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

23 Anne L. Argiroff & James W. Chryssikos, S*eeking Uniformity: Premarital and Marital Agreements*, 102 Mich. B.J. 14, 16 (Jan. 2023).

24 Prefatory Note to Unif. Collaborative L. Act (Unif. L. Comm'n. 2010) [hereinafter Prefatory Note], https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&communitykey=fdd1de2f-baea-42d3-bc16-a33d74438eaf&defaultview=&libraryentry=66022291-b069-4242-b19f-43fa27a1c5fb&libraryfolderkey=&pageindex=0&pagesize=12&search=&sort=most_recent&viewtype=row.

25 *Id*. at 1.

26 *Id*. at 12.

27 *Id*. at 1.

28 *Id.* at 3.

their clients while facilitating the continuation of collaboration.[29] A major aspect of the process is that collaborative lawyers are bound to the model and cannot represent their clients, in possible future litigation on this matter, upon the dissolution of the negotiations.[30] While this obligation often poses ethical and professional concerns, its primary goal is to narrow a lawyer's duty within this role. Not being able to represent their clients if the process were to break down allows collaborative law attorneys to look at their client's case in a way that often removes the conflict and strategic jockeying associated with litigating a divorce.[31]

UCLA enactments can occur by court rule or bill, with twenty-three jurisdictions currently having enactments and an additional four jurisdictions introducing the act through legislative bills in 2023.[32] The drafting committee suggested that each state enact this collaborative law or regulation within the scope of their state's view of the separation of powers and the nature of the practice.[33] The committee also recommended enactment by "legislation or court rule."[34] The purpose of the act is to provide uniformity that would protect communication during the collaborative law process for occasions where later litigation might occur.[35]

Like other approaches that reimagined modern dispute resolution, collaborative law has received criticism regarding lawyers' professional and ethical duties utilizing this practice model.[36] In 2010, the drafting committee for the UCLA detailed the possible concerns

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29 *Id*.

30 *Id.*

31 *Id*.

32 *Collaborative Law Act Map*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=fdd1de2f-baea-42d3-bc16-a33d74438eaf (last visited Nov. 15, 2023) (as of November 15, 2023, Missouri, Kentucky, Mississippi, and West Virginia have pending Uniform Collaborative Law Act bills); *See also*, Kristen Blankley, *The Uniform Collaborative Law Act and Path to ABA Approval*, Am. B. Ass'n (Feb. 2023), https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/february-2023/uniform-collaborative-law-act-path-to-aba-approval/.

33 Prefatory Note, *supra* note 24, at 21.

34 *Id*.

35 *Id*. at 38.

36 Those concerns regarding the ethical and professional duties lawyers could fail to uphold will be discussed specifically in Subpart B. *See infra* text at notes 51 - 61.

already voiced regarding the use of dispute resolution.[37] This process does not inherently expose lawyers or clients to new or additional types of ethical or professional violations.[38] The ABA has approved this ADR form without ethical or professional concerns.[39] In subsequent sections, this comment will discuss how the ULC, in its promotion of enacting the UCLA, would remedy the ethical or professional concerns felt within the family practice of the legal community.

II. The Collaborative Divorce Process

A collaborative divorce, while more efficient than a divorce through litigation, is a lengthy rule-laden process that requires meticulously following set procedures.[40] These steps encourage those entering the process to continue even when unavoidable difficulties arise; the required procedures ensure all parties understand the process and, most importantly, set ethical and professional guidelines for all parties involved in the negotiation.[41] Organizations, like the International Academy of Collaborative Professionals (IACP), provide steps and regulations for collaborative law action.[42] Notably, the UCLA creates legislative uniformity for this process, and its application would unify and regulate the collaborative divorce process for all participants.[43] The optimal collaborative practice model involves one where the clients, not the professionals, lead the settlement process toward resolution.[44] The subsequent sections will detail the steps spouses, attorneys, and professionals must take to enter the collaborative process.

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37 Prefatory Note, *supra* note 24, at 49 (referencing the potential professional and ethical responsibility concerns legal representation may encounter in their role as collaborative lawyers).

38 John A. Fiske & Michael L. Leshin, *Mediation and Other Dispute Resolution Alternatives*, *in* Massachusetts Divorce Law Practice Manual, at Exh. 3B (5th ed. 2023).

39 *Id*.

40 David Hoffman & Pauline Tesler, *The Collaborative Law Process*, 1 Alt. Disp. Resol. Prac. Guide § 41:5 (2023).

41 *Id*.

42 International Academy of Collaborative Professionals, *Standards and Ethics* (adopted Oct. 13, 2011, amended June 21, 2017) [hereinafter Standards and Ethics], https://www.collaborativepractice.com/sites/default/files/IACP%20Standards%20and%20Ethics%202018.pdf.

43 Argiroff & Chryssikos, *supra* note 23, at 20-21.

44 David A. Miller, *Collaborative Practice: Does It Work?*, Lawyers J., July 30, 2021, at 11. *See also* Elizabeth A. Dalton, *Divorce and Co-Parent Coaching*,

A. *Obtaining Legal Representation*

In this form, the primary step for spouses seeking to divorce is to obtain legal representation with a lawyer who has sufficient training and knowledge to participate in the collaborative process. All lawyers have an ethical obligation to achieve the best possible outcome for their client; uniquely, collaborative lawyers, due to the form of the process, can focus on more than just the financial outcome of their client.[45] They can also pay attention to the numerous emotional and ethical concerns many individuals value highly, but which are often overlooked during a litigation-styled resolution process.[46]

Collaborative lawyers are required to meet the qualifications and training standards of various law practice groups, like the IACP. All states adopting collaborative law regulations require attorneys to be licensed in the state they practice; some require a set number of years of experience within the field of family law, in addition to training through designated programs and yearly CLE programs.[47] The UCLA does not prescribe specific qualifications or training for collaborative lawyers but expects the professionals affiliated with the dispute resolution method to meet the standards of practice created by collaborative lawyering groups.[48]

Collaborative lawyers retain their ability to advocate during the negotiations.[49] This form of alternative dispute resolution promotes a new way of thinking about a particular dispute, since the representatives can think in the best interests of their clients within all boundaries of professional responsibility while keeping the process honest, respectful, and productive on both sides.[50]

B. *Signing the Collaborative Participation Agreement*

After parties obtain representation, they will begin the process by signing a written contract, a collaborative participation agreement.[51] The agreement provides information about the

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30 Utah B.J. 32, 33 (Oct. 2017) (noting that a collaborative lawyer will act as "a 'thinking partner' who is willing to patiently walk alongside their clients. . .").

45 Hoffman & Tesler, *supra* note 40, at § 41:6.

46 *Id*.

47 Prefatory Note, *supra* note 24, at 20.

48 *Id*.

49 *Id*.

50 *Id*.

51 Hoffman & Tesler, *supra* note 40, at § 41:5.

commitments, goals, and format of the spouse's collaborative divorce.[52] Equally, it outlines the cautions, limitations, and, most notably, the obligations parties have during the process.[53] This agreement ensures all parties, including the collaborative lawyers who must sign and abide by the document, are aware of the legal obligations to which they bind themselves by participating in this alternative form of dispute resolution.[54] Obtaining the informed consent of all parties to the participation agreement assures that the couple received "competent information about the risks and benefits of all options for resolving conflict."[55]

A large portion of most participation agreements detail the disclosure obligations spouses have during the negotiations.[56] These guidelines set candor requirements regarding information pertinent to the couple's legal dissolution.[57] The key features of the participation agreement are: (1) agreement to not litigate the marital dissolution; (2) agreement to provide all reasonable and necessary discovery items freely and voluntarily; (3) every part of the process is done together and by agreement; (4) an agreement to attend meetings which follow a formal agenda during each part of the process; and (5) if the process were to end, the spouses are prohibited from subpoenaing any member of the collaborative team or retaining individuals for future litigation.[58]

The clause that raises the most professional and ethical concern focuses on the aftermath of a party voluntarily withdrawing from the process.[59] This contract acts as a safeguard for the process as it promotes the spouse's continued participation since the

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52 *Id*.

53 D. Susanne Snearly, *Collaborative Divorce Where We Were, Where We Are, Where We Are Going*, Fam. Advoc., Fall 2023, at 36.

54 *Id*.

55 Stu Webb & Ron Ousky, *History and Development of Collaborative Practice*, 49 Fam. Ct. Rev. 213, 218 (2011).

56 Snearly, *supra* note 53, at 36.

57 *Id*.

58 *Id*.

59 Prefatory Note, *supra* note 24, at 35. *See also* Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. Am. Acad. Matrim. Law. 141, 144-45 (2008) (noting that ABA Model Rule 1.2(c) states a lawyer may limit the scope of their representation where the limitation is founded with reasonableness. Reasonableness may be established where a participation agreement is understood and subsequently signed by the parties participating in the collaborative process).

mandatory withdrawal if the negotiations were to end requires parties to restart the divorce proceedings.[60] While there are realistic and valid concerns about this requirement from the participation agreement, the application of the agreement demonstrates how it aids in maintaining the professional and ethical standards collaborative lawyers have while representing their clients.[61] The participation agreement and the collaborative process generally are done under a framework that protects the lawyer's and client's interests. This comment will discuss this obligation further in subsequent sections.[62]

C. *Neutral Experts and Professionals to the Process*

A collaborative divorce is unique compared to other forms of alternative dispute resolution in the family law context. A divorce or separation using this method of dispute resolution often involves the knowledge and support of outside neutral professionals offering varying expertise in their fields.[63] Most commonly, child specialists, mental health coaches, and financial consultants are available for spouses during this method of dispute resolution.[64] These professionals are hired jointly by the couple rather than as consultants or witnesses hired by one party but not the other.[65] These individuals are not utilized in the process unless agreed to by the parties. The neutral experts are hired to advise and perform specific tasks that further the settlement process between the parties. In a collaborative divorce, a client's team "will always include attorneys and other professionals."[66] This team, usually including a financial neutral, divorce coach, and child specialist, could include some or all of the neutrals familiar with the collaborative process.[67] Collaborative lawyers should represent their clients during this process; their expertise on finances or parenting plans is not used here to maintain neutrality.[68]

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60 Rachel A. DeGraba, *Family Law*, 56 U. Rich. L. Rev. 87, 89 (2021).

61 Prefatory Note, *supra* note 24, at 59.

62 *See infra* text at notes 108 - 111.

63 Brendan Forrest, *Collaborative Law*, 44 Man. L.J. 121, 123 (2021).

64 *Id*. at 122.

65 Hoffman & Tesler, *supra* note 40, at § 41:5.

66 Gary Allen Gardner, *Other Professionals: Why, When, and Who*, 40 Fam. Advoc. 16, 19 (Summer 2017).

67 *Id*. at 16.

68 *Id*. at 19.

Collaborative divorce coaches offer mental health counseling for the spouses and help them navigate the tough emotional challenges a divorce can have on an individual.[69] Equally, these coaches, if needed, can offer child consulting. In this, the coaches use their knowledge base for creating custody and visitation plans for the parties involved and they advise the parents how to provide a natural transition from being a one-household family to being a two-household family.[70]

Financial planners are available to address the concerns parties may have regarding the spending of either party and the separation of assets or physical property.[71] Most commonly, financial planners are available to answer any questions regarding the parties' financial status during the division of assets.[72] These neutrals can act objectively towards the status of the spouses.[73] Unlike the spouse's legal representation during the process, these experts must act as neutrals towards either spouse. This neutrality should be displayed throughout every conference, because their knowledge will lay a foundation for the collaborative lawyers and their clients to negotiate on those terms in dispute.[74]

D. *The Collaborative Path*

After each party reviews and signs the participation agreement, the collaborative process officially begins.[75] Through individual and group discussions regarding the spouses' interests, the collaborative process slowly creates the space for amicable negotiation on topics related to the marital dissolution, like the division of property and assets, and discussion of child custodial statuses if applicable.[76] Each

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69 Standards and Ethics, *supra,* note 42, at 12. *See also* Linda Wray et al., *The 2015 Divorce Experience Study Report*, Collaborative Practice 10 (2015), https://www.collaborativepractice.com/sites/default/files/IACP-2015_DivorceExperienceStudy.pdf (noting within collaborative cases, 67% involved a financial professional, 55% included a coach, neutral facilitator, or other mental health professional, and 28% involved a child specialist.).

70 *Id*. at 17.

71 *Id*. at 17-18.

72 *Id*.

73 Jay E. Grenig, *Interdisciplinary Approach—Roles of the Team Members*, 1 Alt. Disp. Resol. § 23:23 (2023).

74 *Id*.

75 Blankley, *supra* note 13, at 564.

76 *Id*.

meeting attempts to further the parties' commitment to resolving the dispute, in this context, the dissolution of the couple's marriage.[77]

The most common initial meeting involves both spouses and their representing collaborative lawyers.[78] Here, the parties can bring forward the primary interests of each spouse; the collaborative process aims to leave each spouse with an equitable portion of assets and address other interests of importance.[79] Collaboration encourages parties and their legal representatives alike to set down their weaponry and locate solutions that might not be found or even accessible if the couple had utilized the litigation method of divorce.[80]

The parties follow an agenda at the subsequent "four-way meetings" to continue the previously outlined process. The financial and coaching neutrals in the process are tasked with collecting and organizing information for each meeting. Attorneys are not participating in the discovery most litigation-focused divorces require. The neutrals replace them, act as the expert within the focus area, and provide a review of information that is correct and complete. With all the necessary and voluntarily disclosed information, the negotiations only sometimes end with a resolution. This process focuses on interest-based negotiations, which keep the goals of each participant at the center of the dispute resolution, rather than the malice of personal feelings or desire to combat that litigation often invites.[81] If the collaborative process ends before a final settlement can be facilitated between the parties, the collaborative attorneys are unable to represent their previous clients in possible future litigation.[82]

E. *Concluding in the Court*

The final step in the process is most couples' first interaction with the judicial system. After the final negotiation, a separation

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77 *Id.*

78 *Id.*

79 *Id.*

80 David Hoffman & Pauline Tesler, *Collaborative Law as a Paradigm Shift*, 1 Alt. Disp. Resol. Prac. Guide § 41:6 (2023).

81 Wray et al., *supra* note 69, at 9 (noting that 94% of couples using the collaborative process reported a concluded settlement, indicating that 6% of couples either sought the use of traditional litigation or a termed "DIY" process for their legal separations).

82 *Id.*

agreement detailing the division of assets and other various choices of the parties during this dissolution is submitted to the court.[83] For many couples using the collaborative process, this is their initial interaction with the courts. The process concludes once the judge has finalized the divorce, and the parties are bound to their agreement. Staying out of the courtroom and using the collaborative model usually allows for heightened levels of privacy and a more expedient timeline for a couple's divorce.[84] This interaction with the court is not only the first but also the final step for most couples who participate in this form of dispute resolution.

III. The Benefits and Concerns of Collaborative Divorce

As a new form of dispute resolution, the collaborative process carries benefits and concerns. Its novelty and lack of universal adoption among the national family law community raises the issue of why there would be a need for another form of ADR. Part of the answer is that this process promotes civility, integrity, and respect between individuals undergoing a highly contentious and trying time.[85] With the additional mental health, financial, and legal support, this form of ADR acts as a new way for couples to legally dissolve their relationship with less conflict.[86] This process, because it removes the contentiousness of litigation, has a narrow focus on the needs and interests of the family. The couple is supported by neutrals independently and as a pair, with the hopes of creating an amicable atmosphere for the divorce.[87]

A. *Benefits*

As mentioned in prior sections, this form of dispute resolution reframes the duties of lawyers. It allows them to act within the narrow role of advocacy while maintaining respect and civility

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83 Prefatory Note, *supra* note 24, at 50.

84 Wray et al., *supra* note 69, at 9 (reporting that a 2010 study found that "[f]ifty-eight percent (58%) of all cases [were] completed in 8 or less months").

85 *Id*. at 11 (noting that "77% of all Collaborative Process responders were generally satisfied (a rating of a 4 or 5) with the Collaborative Process.").

86 H.K. v. A.K., 950 N.Y.S.2d 723, 724 (N.Y. Sup. Ct. 2012).

87 *Id*.

during the process that litigation often seems to strip away. The most common benefit is the efficiency of this process.[88] The process of litigating a divorce requires not only the litigation of the case itself but also the push toward other forms of resolution; most courts require couples to attend mediation during or before the litigation process to determine if the dispute can be resolved outside of the courtroom.[89] If a couple has significant assets to divide or has difficulties determining the custody situation for their children, this can add on even more months of back and forth between the parties.[90] For some parties, the collaborative divorce process offers many opportunities to quicken the time for legal separation. In contrast, for others, scheduling these meetings can cause the case to "linger on longer" than traditional litigation.[91]

Second, the mental and emotional health benefits of this process are notable. The role of the neutral coach is to help couples and individuals process the closing and beginning of chapters in their lives.[92] Here, coaches can aid in the communication between spouses, support the needs of each individual, and, most importantly, remind the parties of the importance of staying within the process when they feel like litigating would bring outcomes that they want.[93] Where the custody of children needs to be determined, these coaches are equally, if not more, influential. Most coaches are trained and educated in creating parenting plans for divorcing couples.[94] These plans aim to provide the most family interaction with their children and seek an equitable split of each spouse's time with their children going forward.

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88 Wray et al., *supra* note 69, at 9 (The IACP's 2015 study concluded the collaborative divorce process and the traditional litigation route for dissolving marriages had minimal differences in the length of case. Current practitioners' opinions suggest that the collaborative process should follow at the pace the clients set. Since this process can sometimes follow a client constructed timeline, determining the average duration of a collaborative divorce is complex.).

89 Blankley, *supra* note 13, at 569.

90 *Id*.

91 *Id*. at 568.

92 Elizabeth S. Thayer, *Ethics in Collaborative Divorce*, *in* Collaborative Law: Practice and Procedures (Amy C. Connolly ed. 1st ed. 2014) (referencing the standards of procedures and ethics prescribed by the IACP).

93 *Id*.

94 *Id*.

Third, people are already practicing this form of dispute resolution informally. With the increased cost of litigation and a societal shift towards civility when dissolving the marriage, couples are already mimicking portions of this process without the formality of a collaborative divorce.[95] Couples are having these negotiations between themselves, possibly including the help of a mental health counselor and financial planner, and if needed, are employing one lawyer to draft and file the divorce pleadings. The desire to move on swiftly is something already occurring. Being able to regulate this process will only push its use into the mainstream, like mediation.

The most essential benefit is that this practice allows parties to have a completely different mindset around legal separation.[96] Parties can have honesty, respect, and understanding for each other during the negotiation process, ultimately making both parties feel like they have won or accomplished an amicable divorce.[97] This win-win approach is premised on the idea that it is in the best interest of the parties and, if applicable, their children to accommodate the wishes of the other.[98] For lawyers within this process, the most impactful benefit is the ability to remove the hostility of litigation and simply focus on negotiating for their client's best interests while also being able to identify and acknowledge the interests of the other spouse during the dissolution.[99] Overall, this process aims to isolate the focus of the legal separation to the most valued interests each party identifies and aims to achieve during the divorce, as this positive approach aims to fulfill each person's primary goals.[100]

B. *Concerns*

While the collaborative process offers numerous benefits, many lawyers, particularly traditional litigators, have critiqued the possible issues this practice can raise within the divorce process. A primary concern is whether this form of dispute resolution suits all clients. This process is elective, not mandatory. Like other

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95 Robert J. Merlin, *The Long and Winding Road to Implementing the Uniform Collaborative Act and Rules in Florida,* Disp. Resol. Mag., at 12, 16 (Winter 2017).

96 Webb, *supra*, note 10.

97 *Id*.

98 *Id*.

99 *Id*.

100 *See* Salava, *supra* note 5, at 187.

forms of dispute resolution, the suitability of clients is essential before entering the process and lawyers need to be trained to identify the appropriateness of collaborative law for their clients.[101] Relationships with a history unsuitable for an ADR should not use the collaborative model for their dissolution.[102] Some factors that might indicate this process would not be appropriate for a couple include history of intimate partner harm whether it is financial, emotional, or physical in nature.[103]

The second concern questions the duty of candor within the process. In a collaborative divorce, parties agree to disclose pertinent information, including the party's joint and individual financial statements, information on the couple's individual and unified assets, and information about their children, if applicable.[104] "The cornerstone of a collaborative process is that the parties are forthright with each other and do not mislead the other party in hiding assets."[105] The obligation of full disclosure and good faith is detailed in many participation agreements. The failure to disclose assets within the collaborative divorce context is a form of fraud or overreaching that will affect the outcome.[106] While many collaborative divorces lack formal discovery procedures like depositions, interrogatories, and sanctions, the failure to disclose information can conclude the collaborative law process for both parties, since breaching the participation agreement is a factor in finding whether overreaching or fraud occurs.[107]

The most significant concern discussed within the legal community is the obligations on professionals at the time either spouse withdraws from the collaborative process. As noted, clients cannot retain their collaborative lawyers upon the unsuccessful end of the

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101 Prefatory Note, *supra* note 24, at 32.

102 *Id.* at 61.

103 *Id.* at 32. *See also* Margaret Drew, *Collaboration and Intention: Making the Collaborative Family Law Process Safe(r)*, 32 Ohio St. J. on Disp. Resol. 373, 385 (2017).

104 David Hoffman & Pauline Tesler, *Ethical Issues*, 1 Alt. Disp. Resol. Prac. Guide § 41:1 (2023).

105 Geralds v. Geralds, 658 S.W.3d 500, 503 (Ky. Ct. App. 2022) ("Failing to disclose assets to the court and Appellee can be considered fraud affecting the proceedings.").

106 *Id*.

107 *H.K.*, 950 N.Y.S.2d at 728 ("In the eyes of these experienced collaborative law commentators, the remedy for inadequate disclosure is for the aggrieved party to discontinue the collaborative process.").

collaborative process.[108] For many clients, this acts as a motivation to continue the process, since the monetary requirement of starting from the beginning with a new lawyers is not what many clients want to happen at the end of the collaborative process.[109] It is essential for those wishing to use the collaborative process to sign the participation agreement, as the mere intention to sign the agreement does not constitute an actual use of the process.[110]

Some practitioners also question whether the collaborative process can be used as a strategic tool by one party to the dissolution.[111] This idea of a strategic removal from the process, in reality, fails to understand the interests of the parties participating in this form of dispute resolution. Additionally, many collaborative participation agreements detail the timeline at the termination of the process.[112] Agreements typically detail set waiting periods, and some agreements may include clauses about the inability to subpoena their representatives if the collaborative process ends.[113] A participation agreement can deter this type of strategy in many ways, but most importantly, the clientele that utilize this form of dispute resolution are likely to act differently.[114]

For the appropriate clients, a collaborative divorce is an efficient and more respectful form of dispute resolution. It aims to provide security to parties undergoing a traditionally anger-involved process. With the aid of legal advocacy, informed financial and mental health experts, and a participation agreement that details the path of the process, a collaborative divorce minimizes the clashes most parties experience during a divorce.[115]

The UCLA provides rules and guidelines for the collaborative process, just like similar acts prescribed to other forms of dispute resolution. The act discusses the protection of confidentiality,

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108 Snearly, *supra* note 52.

109 *Id*.

110 Mandell v. Mandell, 949 N.Y.S.2d 580, 583 (N.Y. Sup. Ct. 2012) (holding that the failure to sign the participation agreement, regardless of commencing a collaborative divorce process, disqualifies the agreement and the agreement becomes unenforceable in matrimonial actions).

111 *Id*.

112 Robert Joseph Merlin, *Collaborative Process*, Collaborative Family Law § 22.4 (Margaret O'Neill, Jamie Spargo & Chelsea Chick eds., 15th ed. 2023).

113 *Id*.

114 *Id*.

115 *Id*.

the privileges related to communications of the legal process, and the requirements of disclosing pertinent information. Most importantly, it provides a standard of uniformity the process needs to remove possible jurisdictional differences.[116] A number of the concerns about this form of dispute resolution can be countered by a uniform adoption of rules and processes related to the process through the UCLA.

The American Bar Association has stated that the UCLA does not affect the lawyer's duties under the Rules of Professional Conduct. The Bar sees this as "a permissible limited scope representation" for dispute resolution. In 2007, the ABA concluded "that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication."[117] It is only available to couples mutually seeking this process, who are informed of the process and consent to its features.[118] The Bar Association's ethics committees have supported collaborative practice, requiring that lawyers advise the client of the benefits and risks of participation before representing a client in a collaborative law process.[119] The Ethics Committee for the Colorado Bar Association previously stated that collaborative law violated Rule 1.7(b) of Colorado Rules of Professional Conduct when the lawyer participating in the process enters into a contractual agreement with the opposing party, requiring the lawyer to withdraw if the process is unsuccessful.[120] However, in 2021, since its bar's opinion on the ethical and professional conduct concerns of collaborative law, Colorado has enacted a Uniform Collaborative Law Act for its jurisdiction.[121] The parties' ethical concerns regarding informed consent and the required voluntary disclosure within the process are not at issue when a fully signed and attested participation agreement exists.

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116 Prefatory Note, *supra* note 24, at 12.

117 Fiske & Leshin, *supra* note 38, at 3B.

118 ABA Formal Op. 07–447, *Ethical Considerations in Collaborative Law Practice* (Aug. 9, 2007) (analyzing the implications of the Model Rules on collaborative law practice).

119 *Id.*

120 *Id.*

121 Blankley, *supra* note 32.

IV. A Current Practitioner's Perspective

Current collaborative lawyers state that this style of ADR allows for more communicative, open, and respectful interactions with other collaborative attorneys.[122] A lawyer's ability to distance themselves from the adversarial nature of litigation and simply focus on the advocacy portion of their practice separates this from other dispute resolution styles like mediation. It is a misconception to assume the participation agreement limits their ability to advocate and represent their client during the negotiation process. Here, they can speak frankly with their clients, centralize the most important aspects of the dissolution, and achieve those goals without the contentiousness that litigation creates.[123]

From its origins in the late twentieth century to the emergence of groups such as the IACP and other local chapters of collaborative practitioners, collaborative law is a growing practice with a growing rate of professionals engaged in it.[124] Many collaborative lawyers already follow the regulations and policies implemented by the IACP, an organization focused on promoting collaborative practice. The adoption of UCLA would be an additional guideline for all collaborative lawyers or even lawyers new to the collaborative process. Implementing UCLA and having an open discussion about the practice of collaborative law would remove the common misunderstandings about the practice itself.[125] These practitioners are focused on their client's goals while maintaining a level of civility within a highly emotional and disruptive process.

Conclusion

The legal system currently promotes alternative forms of dispute resolution, and the collaborative law process should be utilized, particularly in the context of marital dissolution. Clients are eager to find respectful and supportive ways to resolve disputes,

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122 I thank divorce mediation attorney Elizabeth Hill for sharing her insight and practical experience on the collaborative divorce process. Hill is a member of the Collaborative Practice Kansas City, a network of divorce attorneys, financial analysts, and mental health professionals committed to offering guidance and support on issues surrounding a divorce outside the courtroom.

123 Prefatory Note, *supra* note 24, at 18.

124 *Id*. at 4.

125 Thayer, *supra* note 92.

including their legal separation.[126] A nationwide enactment of the Uniform Collaborative Law Act would provide standardization within the collaborative divorce process and ensure consistency across state lines. As recommended by the Uniform Law Commission, the legislative implementation of these rules could remove the possible ethical concerns this form of dispute resolution presents.[127]

Those practicing collaborative law should engage with lawmakers and secure a legislative sponsor for a form of the UCLA within their jurisdiction. Uniformity would remove some of the skepticism about this practice and eventually promote its acceptance alongside other forms of dispute resolution. Many couples are already seeking this form of divorce to proceed in a way that promotes civility and understanding. The emotional toll of litigating and fighting on every front is an additional financial and emotional drain that parties want to remove from this process. Creating a marriage within the United States is easy; a divorce, as another legal process, should not require the hostility litigation creates. The collaborative process provides couples with legal advice and amicability, unlike other forms of dispute resolution.

Audrey Doering

126 Wray et al., *supra* note 69 (A 2015 survey from the IACP revealed that those using the Collaborative Process were most satisfied with the "Level of privacy (89.4%)," "Opportunity to express self (81.36%)," and "Respectfulness (76.82%)" the responders experienced during their legal separation.).

127 Prefatory Note, *supra* note 24, at 37-38.

Trauma-Informed Mediation: A Path to Healing and Resolution

> *Rather than being dangerous, conflict holds within it vital messages, regarding unmet needs and areas of necessary change. Given this understanding, safety is increased not by avoiding conflict, but by moving toward it with the intention of hearing the messages within.*
>
> *– Elaine Shpungin and Dominic Barter*[1]

Mediators are often trained to treat family law matters like any other conflict – to impartially facilitate communication and negotiation, promote voluntary decision-making by parties to the dispute, help parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.[2] However, anyone who has participated in a contested domestic mediation will say it is not always that simple. In practice areas such as family law, immigration, child welfare, and criminal law, the goals of mediation are particularly strained since the parties utilizing mediation services are often in a highly vulnerable or emotional state.

Many domestic litigants are survivors of intimate partner violence, have spent years in protracted custody litigation, or have experienced other significant traumatic events that are relevant to their family court matters. Simply being in a state of prolonged stress can be a trauma.[3] A recent study about custody at divorce showed that 93 percent of divorcing parents tried some form of alternative dispute resolution.[4] However, only 82 percent of

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1 Elaine Shpungin & Dominic Barter, *The Fight Room*, Tikkun Mag., Jan. 10, 2012, https://tikkun.org/the-fight-room/.

2 Model Standards of Conduct for Mediators 2 (American Arbitration Association, American Bar Association, Association for Conflict Resolution, Sept. 2005), https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.

3 Dawn Kuhlman, *Trauma Informed Mediation*, 4:23 (Ted talk x Overland Park, Overland Park, Kansas, Nov. 2018), https://www.ted.com/talks/dawn_kuhlman_trauma_informed_mediation [hereinafter "Kuhlman TedTalk"].

4 Ben Coltrin, *What the Statistics Tell Us About Divorce and Custody Mediation*, Mediate.com (July 14, 2022), https://mediate.com/what-the-statistics-tell-us-about-divorce-and-custody-mediation/.

low-income respondents of the same study reported using an alternative dispute resolution method, compared to 93 percent for middle and high-income respondents, likely due to actual or perceived costs associated with it.[5] In some states, divorce mediation is a mandatory first step, particularly if there are custody or visitation issues.[6] Many states have exemptions from mandatory mediation in divorce proceedings if there are allegations of domestic abuse. However, the appropriateness of mediation within the context of domestic violence generally continues to be a hotly contested issue.[7] Therefore, it is still quite possible that mediators will come into contact with parties who have been victims of or perpetrated domestic violence and thus must be equipped with the tools and skills necessary to address traumatic responses in such a situation.

Outside the realm of domestic violence, many family mediations will be impacted by trauma. By necessity, mediating parties must share some of the most intimate and painful details of their lives, which often can be retraumatizing and trigger responses that inhibit the mediation process. Domestic mediations, therefore, command greater attention to the impact that trauma plays on the behavior of the parties, compelling mediators to train themselves in trauma-informed principles and practices that will drive parties toward settlement and, perhaps, even genuine resolution and healing.

This comment provides information necessary for mediators to begin understanding and adopting trauma-informed practices. It sheds light on the ethical and practice implications of trauma, and addresses ways to support mediators and legal professionals encountering trauma, especially in alternative dispute resolution settings. Part I provides a brief introduction to the historical and philosophical underpinnings of trauma-informed mediation. Part II explains what trauma is, the biology behind it, and how it affects the brain, body, and behavior of an individual, and specifically, a mediating party. Part III provides an overview of the principles

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5 *Id*.

6 Donna Saadati-Soto, *An Innovative Alternative or an Institutional Failure of Family Courts?: A Critical Perspective on the Experience of Latinx Families in an Anglo-Centric Mediation Process*, 31 Berkeley La Raza L.J. 25, 26 (2021).

7 Richard McCutcheon, *Addressing Domestic Violence in Mediation: The Need for More Uniformity and Research*, Harv. Negotiation L. Rev. (May 2021), https://journals.law.harvard.edu/hnlr/2021/05/addressing-domestic-violence-in-mediation-the-need-for-more-uniformity-and-research/.

of trauma-informed mediation. Part IV addresses the reasons to adopt trauma-informed mediation. Part V acknowledges both the social challenges to implementing such an approach and concerns about preventing the mediator's secondary trauma.

I. Introduction to Trauma-Informed Mediation and Practice

A. *Historical Framework and the Prevalence of Trauma*

First established in the public and mental health context, the principles of trauma-informed care have been adopted in other professional service contexts, such as education, healthcare, and substance abuse treatment, and now legal practice is joining the list.

Birthed from the ad hoc efforts of the feminist, domestic violence, and child abuse recognition movements of the 1970s and 1980s, and later implemented by veteran service providers after the Vietnam War, the concept of trauma-informed care has evolved significantly over the past forty years and is now applied to a wide range of settings, including public health, education, substance abuse, child welfare, and the criminal justice system.[8] Since the 1990s, research on the individual and collective experiences of and responses to trauma has rapidly increased, "ranging from customized health and wellbeing support for the physical or mental-emotional impact of trauma to government policies and new legislation addressing trauma at the federal or regional level."[9] In 2018, the U.S. House of Representatives unanimously approved House Resolution 443, acknowledging that millions of Americans have experienced trauma that negatively impacts their mental, physical, spiritual, economic, and social wellbeing.[10] The Resolution encouraged the use of trauma-informed care in federal

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8 Charles Wilson, Donna M. Pence, & Lisa Conradi, *Trauma-Informed Care*, Encyclopedia of Social Work (Nov. 4, 2013), https://doi.org/10.1093/acrefore/9780199975839.013.1063.

9 Trauma-Informed Law: A Primer for Lawyer Resilience and Healing 18 (Helgi Maki, Marjorie Florestal, Myrna McCallum, & J. Kim Wright, eds. American Bar Association: Law Practice Division, 2023) [hereinafter Trauma-Informed Law].

10 H. Res. 443, *Recognizing the Importance and Effectiveness of Trauma-informed Care* (Feb. 2018), https://www.congress.gov/bill/115th-congress/house-resolution/443/text?q=%7B%22search%22%3A%5B%22gallagher%22%5D%7D.

agencies and programs, finding that trauma-informed care could effectively assist individuals, children, and families in overcoming trauma and leading healthy lives.[11]

A greater awareness of the prevalence of trauma in American society can be credited to the Adverse Childhood Experiences (ACE) study, performed in 1996 and 1997, which found a connection between traumatic adverse childhood experiences and many of the leading causes of death in adults.[12] Almost two-thirds of the general population of the United States report experiencing at least one indicia of trauma (such as domestic violence or abuse) before adulthood.[13] Trauma has been labeled a "public health epidemic."[14]

Over the last decade, there has been a movement to implement trauma-informed principles in the legal field, with the America Bar Association's Law Practice Division producing *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing* in just 2023.[15] In recent years, there has been a growing recognition of the profound impact trauma has on individuals involved in mediation processes.[16] However, while the subject has garnered attention from major players like Congress and the American Bar Association, efforts to teach trauma-informed practice in the mediation context remain largely ad hoc, with local and regional bar associations and community leaders sharing materials

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11 *Id*.

12 *See generally* Vincent J. Felitti et. al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14(4) Am. J. Prev. Med. 245 (1998).

13 Centers for Disease Control and Prevention, *Fast Facts: Preventing Adverse Childhood Experiences* (updated Apr. 6, 2022), https://www.cdc.gov/violenceprevention/aces/fastfact.html#:~:text=Preventing%20ACEs%20could%20potentially%20reduce,or%20more%20ACEs%20than%20others (indicating 64% of American adults reported experiencing at least one traumatic event in their childhood).

14 Trauma-Informed Law, *supra* note 9, at 32.

15 *Id*. at 17-18.

16 In-Person Interview with Dawn Kuhlman, in Liberty, Missouri (Sept. 7, 2023) [hereinafter "Kuhlman Interview"]. Dawn Kuhlman is the executive director of M.A.R.C.H. Mediation, a Missouri Nonprofit that provides free mediation services to families that are IV-D recipients. She has spent the last ten years crafting her own trauma-informed mediation model that she now teaches to mediators all over Missouri and in programs around the United States. Her work has informed much of this paper.

and training as the concept becomes popular in their community. Because of this, there is no single definition or guidebook for "trauma-informed mediation." One goal of this Comment is to sort through an abundance of methodologies, philosophies, and practices employed by attorneys nationwide, especially those relevant to family law mediators.

B. *Underpinnings and Goals of Trauma-Informed Mediation*

Simply put, trauma-informed practice is "when the practitioner puts the realities of the client's trauma experiences at the forefront in engaging with the client, and adjusts the practice approach informed by the individual client's trauma experience."[17] It is "grounded in an understanding of and responsiveness to the impact of trauma, that emphasizes physical, psychological, and emotional safety" and provides "opportunities for survivors to rebuild a sense of control and empowerment."[18] This approach also encompasses the practitioner employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner.

Applied to the context of mediation, trauma-informed practice acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the process. By contrast, trauma-informed mediation recognizes that unresolved trauma can significantly impede effective communication and decision-making.

Through a trauma-informed lens, an individual's behaviors are viewed more compassionately as a response to surviving trauma, reframing the opening question from: "What is wrong with you?" to

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17 Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clin. L. Rev. 359, 360 (2016). This article discusses how to teach trauma-informed lawyering through direct examples of pedagogical approaches.

18 Laura Athens, *Trauma-Informed Care in Mediation*, Oakland Cnty. Legal News (May 30, 2023), https://mediate.com/trauma-informed-care-in-mediation/.

"What has happened to you? or "What did you experience?"[19] The first question pathologizes trauma when it can be an expected or even predictable response to an overwhelming situation, while the second question ensures that a person's lived experience and environment are specifically included when considering the factors that influence behavior.[20] Mediating parties frequently experience trauma in the form of a divorce, an accident, an assault, malpractice, death of a loved one, loss of employment, or other injury. Litigation itself can be a traumatic experience, forcing parties to relive the pain and anguish that led to the lawsuit.[21] As one mediator notes, "the pervasive and harmful impact of traumatic events on individuals, families, and communities and the unintended but similarly widespread retraumatizing of individuals within our public institutions and service systems makes it necessary to rethink doing 'business as usual.'"[22]

The impact of trauma can show up in responses and behavior that do not fit with the way legal processes, and more specifically, the mediation process, are designed to work, thus complicating the mediator's role. The psychobiological impacts of trauma can limit a mediator's capacity to resolve conflict and the parties' abilities to advocate for their own best interests. Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a traumatic response during mediation. Mediating parties, especially in the realm of family law, often face adversity that rises to the level of trauma, which is exacerbated by issues involving race, gender, religion, child custody, domestic violence, substance abuse, mental health, poverty, access to opportunities, and more.

Having a better understanding of trauma, as well as clear tools for addressing it in practice, can help lawyers and mediators reconsider that a so-called difficult client may instead be reacting out of trauma. Understanding this, the mediator can endeavor to prevent retraumatization, improve communication, increase

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19 Kuhlman Interview, *supra* note 16. *See also* Bruce D. Perry & Oprah Winfrey, What Happened to You?: Conversations on Trauma, Resilience, and Healing (2021).

20 Trauma-Informed Law, *supra* note 9, at 20. *See also* Liz Wall, Daryl Higgins & Cathryn Hunter, *Trauma-informed Care in Child / Welfare Services* (CFCA Paper No. 37) (2016), https://www.researchgate.net/publication/294775580_Trauma-informed_care_in_childwelfare_services_CFCA_Paper_No_37.

21 Athens, *supra* note 18.

22 *Id.*

litigant satisfaction with the legal process and outcomes, and expand access to justice by removing trauma-related barriers. At its core, legal practice is a helping profession. Mediators therefore must work to meet the needs of clients and mediating parties with compassion and competency and be willing to bear discomfort and inconvenience in the service of justice and resolution. Due to the pervasiveness of trauma, it is highly likely that practicing attorneys and mediators have already encountered trauma in their practice and their personal lives and will continue to do so in the future. However, integrating a trauma-informed approach can help mediators anticipate and respond to trauma appropriately, potentially mitigating vicarious trauma as a result.

II. The Effects of Trauma on the Brain, Body, and Behavior

A. *Trauma Defined*

Originating from the Greek word for "wound,"[23] trauma denotes injuries that are often unseen or misinterpreted. There is no one definition of trauma,[24] and the various fields employing a trauma-informed approach disagree on the most appropriate way to frame the issue. From a public health perspective, trauma can be defined as a person's response to a situation, whether an acute or chronic situation, whether personal or systemic, that overwhelms their human ability to cope effectively.[25] Traumatic experiences can

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[23] Amar Dhall, *The Neuro-Somatic Approach to Trauma-Informed Lawyering: From Survival of the Fittest to Fittest for Survival*, *in* Trauma-Informed Law, *supra* note 9, at 43. Dr. Dhall says "The essence of trauma is that the experience encounters an event that they cannot integrate into their body-mind (e.g. they experience a disintegration), which leads to some form of either rigidity or chaos." *Id.*

[24] The Substance Abuse and Mental Health Services Administration defines trauma as resulting from "an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being." SAMHSA's Trauma and Justice Strategic Initiative, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, HHS Publ'n No. (SMA) 14-4884 (2014), https://store.samhsa.gov/sites/default/files/d7/priv/sma14-4884.pdf.

[25] Trauma-Informed Law, *supra* note 9, at 19 ("To facilitate the growing practice of trauma-informed lawyering and the evolving nature of this

emerge from everyday life, such as divorce and infidelity, or can result from more significant events, such as abuse and neglect.[26] Even prolonged stress can become a source of trauma, which is especially prevalent among family court litigants, some of whom have been in litigation for years. Trauma is not the experience of the event itself, but rather the body and mind's response to the event; thus, even people's thoughts can become a trauma trigger.[27] Kate Porterfield, a psychologist who works at the Bellevue Program for Survivors of Torture,[28] describes trauma as a "biopsychosocial" experience in which the deep distress of trauma disrupts people's ability to engage all of their biological, psychological, and social skills and resources and puts people in survival mode.[29]

Anyone can be impacted by trauma. Responses to trauma may be emotional, physical, cognitive, or behavioral and may be temporary, prolonged, acute or chronic, mild or severe.[30] No two people experience trauma in precisely the same way. Thus, consequences of the same traumatic experience will differ as "their past accumulated traumas, histories, backgrounds, and childhoods all factor into how exhausted their body already is and how fast it may be able to bounce back this time."[31] Trauma responses begin forming very early in childhood, so many people erroneously mistake such responses as part of their personality.[32] Some people may be more resilient to trauma than others. Growing up in a loving and supportive home, having a good education, and maintaining strong family and friend connections can help reduce the harm caused by a traumatic event, while people who are raised in broken or

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information due to the continuing advancement of trauma studies, we have taken a 'working definition' approach, defining trauma in public health terms rather than strictly clinical terms.").

26 Kuhlman TedTalk, *supra* note 3, at 0:15.

27 Dhall, *supra* note 23, at 43.

28 Dr. Porterfield has provided clinical care to adults and children who have experienced war and refugee trauma and torture for over 25 years. She regularly consults on issues pertaining to trauma, including in cases at the Guantanamo Bay Detention Center, in U.S. federal courts, and at the International Criminal Court, as well as with journalists and human rights organizations.

29 Trauma-Informed Law, *supra* note 9, at 15.

30 Athens, *supra* note 18.

31 Trauma-Informed Law, *supra* note 9, at 26. *See also* Mallika Kaur, *Trauma and Myths*, *in* Trauma-Informed Law, *supra* note 9, at 25-26.

32 Dhall, *supra* note 23, at 44.

dysfunctional homes have been abused, neglected, or abandoned as a child, or who lack healthy role models may be more adversely affected by a traumatic event.[33]

B. *The Biology of Trauma*

> *All complex animals (of which homo sapiens is one) move through the world with their nervous systems sending the world with one priority question at the fore: "Am I safe?"*
>
> *– Dr. Amar Dhall*[34]

When trauma occurs, the human brain is wired to find a way to survive. The brain perceives trauma as a threat, triggering a fear response. The brain enters a dysregulated state due to an actual or perceived lack of control.[35] Under normal circumstances, human brains operate out of the prefrontal cortex, which controls "executive functions" such as attention, the capacity to integrate memories into narrative, and the ability to plan and make decisions; those functions are suppressed when the trauma response is triggered. The mediation process, which includes brainstorming, problem-solving, decision-making, and negotiation, requires operating out of the prefrontal cortex. However, when mediating parties are tasked with reliving a traumatic experience, a task that is often necessary to the mediation process, their brains may begin to operate out of the fear-based parts of their brain instead.

When the brain responds out of fear, the limbic brain, rather than the prefrontal cortex, is activated.[36] The limbic brain governs the functioning of emotions, memory encoding (i.e., how memories are stored), and survival responses. The limbic brain functions more quickly than the prefrontal cortex to ensure survival, causing the brain to short-circuit, picking "neural pathways that may not be the most rational response."[37] Two significant structures of the limbic system are the hippocampus and the amygdala. The amygdala—the part of the brain that governs one's response to fear and informs the body to fight, flight or freeze—functions as

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33 Athens, *supra* note 18.
34 Dhall, *supra* note 23, at 43.
35 Trauma-Informed Law, *supra* note 9, at 25-26.
36 *Id.* at 33.
37 *Id.* at 26.

an alarm system, signaling the presence of danger.[38] The amygdala grows as a result of trauma, impacting one's ability to communicate effectively and making it difficult to regulate emotions.[39] It takes twenty to sixty minutes to calm the brain back down when the amygdala is triggered.[40] Fight, flight, freeze, or fawn mode kicks in, resulting in behaviors such as hypervigilance, dissociation, withdrawal, and disrupted memories or narratives.[41] The hippocampus facilitates the production of cortisol under stress.[42] Chronic stress leads to neuron death in the brain, which results in issues with memory.[43] Under threat, the brain becomes focused on survival instead of forming memories or narratives; as a result, memories or narratives may not be linear or chronological.[44]

Ultimately, to employ a trauma-informed approach in mediation, it is less important to understand the precise neurobiology of trauma than it is to understand resources for meeting trauma in clients, communities, and themselves as it arises. The goal of a trauma-informed approach is to calm the brain to operate out of the prefrontal cortex, which governs problem-solving, reasoning, logic, attention, and predicting consequences of actions, rather than out of the amygdala, so that participants can engage constructively in the mediation process.[45] Despite the level of information amassed regarding the lasting impacts of trauma on individuals, mediators do not need to become experts in psychology to understand some

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38 *Id.*

39 Dawn Kuhlman, *Trauma-Informed Mediation 3-Hour Webinar*" given via Zoom to mediators across the United States (May 13, 2022), https://drive.google.com/file/d/1CqvhS55q9xMTEmY7XdzBjqug90XwKHLn/view [hereinafter "Kuhlman Webinar"]. *See also* Dan Siegel, Pocket Guide to Interpersonal Neurobiology: An Integrative Handbook of the Mind (2012); Bessel van der Kolk, The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma (2015).

40 Kuhlman Interview, *supra* note 16.

41 Trauma-Informed Law, *supra* note 9, at 32.

42 *Id.* at 26.

43 Kuhlman Webinar, *supra* note 39.

44 Trauma-Informed Law, *supra* note 9, at 33. For more on the neurobiology of trauma and other important trauma concepts, including the trauma of racism, see Alisha Moreland-Capuia, Training for Change: Transforming Systems To Be Trauma-Informed, Culturally Responsive and Neuroscientifically Focused (2019); Alisha Moreland-Capuia, The Trauma of Racism: Exploring the Systems and People Fear Built (2021).

45 Kuhlman Webinar, *supra* note 39.

of the effects of trauma on the brain and body. By employing this informed approach, mediators can better understand the impact of trauma on the brain and body, helping them connect with and have greater empathy for the parties they are mediating. It also helps them give guidance regarding individuals who are struggling with emotion regulation during mediation.

C. *Implications of Trauma on the Behavior of Mediating Parties*

The impact of trauma on a mediating party will vary considerably based on the source and type of trauma, that person's resilience, and the social and community supports that person has available. Examples of the various categories of trauma include: early childhood trauma, complex trauma, intimate partner or family violence, community violence, natural disaster and refugee trauma, medical trauma, sex trafficking, sexual abuse, and traumatic grief.[46] When a person experiences a trauma response, their human capacity to respond with all possible resources is diminished. Because thoughts themselves can be a trigger, an essential aspect of being a trauma-informed practitioner is "to understand that all trauma work is performed in the present, and why (as a corollary) sharing presence and mindful attention with traumatized clients is an appropriate way to work, because it will help them to ground themselves in the present."[47] Traumatized parties often operate out of a dysregulated state, making it difficult to recall memories, regulate their emotions, set goals, be logical or reasonable, be attentive, predict the consequences of their actions, problem-solve, or manage conflict.[48]

Additional patterns that may be observed when a person experiences a trauma response include:

- gaps in memory, narrative, learning, and decision-making;
- hyperarousal or hypoarousal (also known as fight, flight, freeze, or fawn response);

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46 For more information on the nuances of particular types of trauma, see the National Child Traumatic Stress Network, *Trauma Types*, https://www.nctsn.org/what-is-child-trauma/trauma-types (last visited Jan. 23, 2024). *See also* Center for Substance Abuse Treatment (US), *Chapter 2, Trauma Awareness, in* Trauma-Informed Care in Behavioral Health Services (2014). (Treatment Improvement Protocol (TIP) Series, No. 57.) https://www.ncbi.nlm.nih.gov/books/NBK207203/.

47 Dhall, *supra* note 23, at 43.

48 Athens, *supra* note 18.

- hypervigilance or hopelessness manifested in fearful thoughts and moods, anticipating disaster, or giving up;
- inability to grieve;
- lack of emotion, extreme emotions, or an inability to identify emotions;
- withdrawing or inundating with communication;
- key body functions disrupted, such as sleep;
- feeling unsafe and unable to trust and anxious, insecure, or disorganized attachment patterns; and
- an inability to seek or accept help.[49]

Understanding the prevalence of trauma can change the perspective of mediators, who can then approach each situation with a presumption that one or both parties may exhibit a trauma response during mediation. Acknowledging the biopsychosocial impact of trauma, Kate Porterfield argues that lawyers must become prepared to meet trauma "not just with intellectual strategy or cognitive responses but also to consider how to include biologically calm, psychologically safe, and socially trustworthy approaches" in their work.[50]

III. Principles of Trauma-Informed Mediation

The principles of trauma-informed lawyering are evolving, and various approaches have been proposed by lawyers, clinics, law schools, trauma experts, and government agencies. The trauma-informed approach to mediation acknowledges and addresses the traumatic experiences of participants, fostering a safe and supportive environment that empowers them toward healing and resolution. It seeks to inform mediation participants and make them more mindful of their own cognitive, behavioral, and emotional responses as a result of trauma.[51] Mediators must, therefore, cultivate an awareness of trauma responses in psychobiological terms, which may be complex, counterintuitive, or at first appear to be (or be perceived as) so-called "difficult behavior."[52] It is important to note that lawyers do not need to be therapists to be

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49 Trauma-Informed Law, *supra* note 9, at 34-35.

50 *Id.* at 29.

51 Kuhlman Interview, *supra* note 16.

52 Trauma-Informed Law, *supra* note 9, at 65.

trauma-informed. The mandate of the mediator is to increase safety, trustworthiness, choice, collaboration, and empowerment to guide parties through their trauma responses, making it more likely that they will settle their case.

Dawn Kuhlman is a mediator who has spent the last decade crafting her own trauma-informed mediation model that she now teaches to mediators all over the state of Missouri, and in programs around the United States. Kuhlman's model integrates aspects of the transformative style of mediation with mindfulness, an awareness of trauma neuroscience, and a realistic assessment of the parties' ability to mediate.[53] Her work provides a frame of reference upon which other mediators can continue to build.

Transformative mediation places the principles of empowerment and recognition at the core of helping people in conflict change how they interact with one another. The mediator can empower parties by reminding them they have choices and providing them with resources and coping skills, reframing a victim mindset into the mindset of someone empowered to make decisions about their future.[54] Empowerment can also be cultivated by focusing on individuals' strengths, self-determination, autonomy, choices, and control.[55] Here, control involves enhancing a litigant's ability to be an active part of the legal process, which can be accomplished by asking for permission and feedback from the parties throughout the mediation.[56] Mediators can also encourage and challenge the parties to have greater recognition for the person across the table. They can affirm the parties when they do so, simply telling them, "You did a good job on that."[57] Validating the source of the traumatic experience and the parties' attempts to work through the process can motivate them to engage constructively with one another. Recognition between the parties should be encouraged, as should recognition by the mediator of the parties' successful efforts to engage constructively.

Integrating mindfulness, meditation, and visualization techniques can help the parties self-regulate. Kuhlman, who began using these techniques in 2014, found that "people weren't always

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53 Kuhlman TedTalk, *supra* note 3, at 2:25.

54 Kuhlman Interview, *supra* note 16.

55 Athens, *supra* note 18.

56 Katherine Porterfield, *Trauma-Informed Client Communication Strategies for Lawyers*, *in* Trauma-Informed Law, *supra* note 9, at 69.

57 Kuhlman Interview, *supra* note 16.

able to do this . . . so it was my job to help them calm down. I was doing deep breathing with people. Sometimes we'd just sit in silence."[58] This may also help people identify and be mindful of their thoughts and behavior and how they treat others. Explaining the neuroscience of trauma can go hand-in-hand with the concept of mindfulness, and it may be effective for the mediator to help the parties take a more clinical view of their trauma responses. Such a tactic may also help normalize the effects of trauma and encourage the parties to rise above what is afflicting them.

Safety and trust must be prioritized and considered in everything from the physical space to the mediator's communication style. Individuals who have experienced a trauma that threatened their fundamental sense of safety and security sometimes "operate in the world as if they are still in danger."[59] This priority on safety shapes the mediator's approach in everything from the physical layout of the meeting space to the way topics are introduced and anticipated.[60] Dr. Katherine Porterfield, a psychologist who regularly consults in the U.S. federal courts, has developed three recommendations to enhance safety through communication.

First, the attorney (or mediator) should acknowledge the physical space.[61] The mediator should be aware that the office where the mediation takes place can be intimidating or imposing. The presence of adversaries may increase the individual's threat perception.[62] Porterfield recommends that the lawyers explicitly begin by asking if the litigant is comfortable in the current meeting conditions, proposing a variety of questions that can be utilized, including: "Is this an okay place for us to speak?" and "It's important that you feel safe speaking to me here. Do you feel able to talk?"[63] While simple, these questions signal to litigants that their experience is critical to the mediation process.

In addition to acknowledging the physical space, the mediator should anticipate what will happen next in the mediation and

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58 Kuhlman TedTalk, *supra* note 3, at 7:30.

59 Porterfield, *supra* note 56, at 72.

60 *Id*. at 70.

61 *Id*.

62 *Id*.

63 *Id*. For more information on responding to trauma in the moment, see Rebecca M. Stahl, *Embodied Trauma and How to Respond to It*, *in* Trauma-Informed Law, *supra* note 9, at 124.

explain their role in detail. Traumatized individuals have often experienced severe helplessness and unpredictability in their environments.[64] Therefore, the mediator should make every effort to decrease uncertainty by giving a clear overview of the mediation process, explaining the purpose behind caucusing, the reasoning for their recommendations, and the limitations of their role as a mediator.

Creating a safe environment for a client lays the foundation for communication to proceed constructively. Mediators can also foster safety and dignity by taking a non-judgmental approach to communication with the parties, providing them time and space to discuss their needs and preferences.[65] Mediators should be mindful of their tone and how the parties will perceive their communication style. The ABA Legal Practice Division encourages attorneys to have a "relational practice" by communicating with genuine curiosity and empathy to establish trust with the parties, allowing for relationship formation instead of goal-oriented, transactional communications only.[66] Reflecting back what the individual has said without interpretation, analysis, or disagreement can "create a powerful feeling of being a subject in one's own story, rather than being seen as an object in another's interpretation."[67] The mediator should make known to the parties that she genuinely wants to understand their respective positions and help them reach a resolution if possible. Additionally, rather than abruptly ending the mediation session, which can leave the parties feeling exposed and distressed, the mediator can provide closure in ways that recognize the work the parties have done, the stress they might be under, and the need for a sense of what is happening next.[68] The mediator can use closure to transition the parties away from the traumatic material, increasing their satisfaction with the process and buy-in on their settled agreement.

Mediators using a trauma-informed approach sometimes hold pre-mediation sessions with each party to foster trust and a sense of safety. These sessions, often one hour long, allow the mediator to listen to each party's story privately and without interruption, helping them

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64 *Id*.

65 Athens, *supra* note 18.

66 Trauma-Informed Law, *supra* note 9, at 65.

67 Porterfield, *supra* note 56, at 73.

68 *Id.* at 74.

feel heard and supported.[69] This time can also be utilized to explain the process in detail and place parameters around how the parties will interact with one another in mediation, identifying triggers and equipping them with coping skills before the mediation even starts.[70] The mediator can encourage shared agreements regarding what to do if a party gets trigger during the session, thereby avoiding re-traumatization and respecting personal boundaries.[71] This will assist the mediator in setting an agenda and identifying "low-hanging fruit," or issues that are more easily resolved, to be addressed at the beginning of the mediation and in a manner that does not waste time.[72] Pre-mediation sessions encourage transparency and accountability, which can help mitigate the impact of trauma on mediating parties by preparing and respectfully educating them about the mediation process in advance, clearly articulating what they can expect and giving an overview, and being a reliable facilitator by doing what they say they will do.

Some mediators admit that this approach is not very practical in attorney-assisted mediations,[73] while others insist that hearing from attorneys can help reduce retraumatization.[74] Additionally, parties do not always have four hours to spare for mediation. However, when parties exhibit difficulty regulating their emotions and are unrepresented at mediation, a pre-mediation session with both parties can go a long way toward de-escalating and equipping them with the skills to reach a resolution.

Another way to foster a sense of comfort and safety is to offer several formats for mediation: in-person, zoom, or by phone. While many mediators prefer in-person mediations over those of a virtual or auditory format, there are benefits to allowing parties to attend from the comfort of their own homes, in the presence of their pets or comfort objects. Mediators utilizing this approach reflect that offering such formats can reduce trigger responses and help the parties calm down more quickly when they get upset.[75] However, in

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69 Kuhlman Interview, *supra* note 16.

70 *Id.*

71 Mediators Beyond Boarders, *Trauma-Informed Conflict Engagement*, https://mediatorsbeyondborders.org/what-we-do/conflict-literacy-framework/trauma-informed/ (last visited Jan. 23, 2024).

72 Kuhlman Interview, *supra* note 16.

73 *Id.*

74 Terri Round, Interview via Zoom (Sept. 13, 2023), Kansas City, Missouri.

75 Kuhlman Interview, *supra* note 16.

online mediations, there should be built-in breaks for participants to have an opportunity to recharge or consult with their attorneys.[76] Regardless of the format, the mediator must frequently monitor the participants' comfort level and sense of security.

One more consideration to be aware of when implementing a trauma-informed approach to mediation is the parties' present ability to mediate. The mediator needs to be aware if she is working harder than the parties. If this is the case, then their problem is likely bigger than mediation, and the mediator should consider ending the mediation and referring the parties to community resources to obtain specific interventions as necessary.[77] This is especially noticeable when parties are repeatedly rehashing the same issue and "continually going off the rails."[78] To avoid burnout, the mediator must recognize the limitations of her position and have resources to which she can refer the parties when their challenges are beyond her role and skill set.

To summarize, trauma-informed mediators should develop skills such as empathy, empowerment, recognition, flexibility, patience, preventing traumatization, rapport building and offering a sense of safety, and identifying opportunities for closure. They must cultivate an awareness of trauma responses in psychobiological terms and increase the mindfulness of the parties in this regard, as well. Having such a skill set can empower parties toward healing and resolution.

IV. Reasons To Adopt Trauma-Informed Mediation

While the context and impact vary drastically from individual to individual, most people have had some sort of traumatic experience, making it exceedingly likely that mediators will encounter parties exhibiting trauma symptoms. Traditional mediation often fails to consider the underlying trauma that parties may have experienced. This oversight can exacerbate feelings of powerlessness, fear, and retraumatization during the mediation process. By contrast, trauma-informed mediation recognizes that unresolved

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76 Athens, *supra* note 18.

77 Kuhlman Interview, *supra* note 16.

78 *Id.*

trauma can significantly impede effective communication and decision-making. Mediators should be "keenly aware of the likelihood that parties have been exposed to trauma to such an extent that it colors their perceptions and beliefs, and therefore, influences how they engage in conflict resolution."[79] Using trauma-informed tools can help parties engage in the dispute resolution process in a more emotionally regulated manner, allowing for full engagement of the executive function in the brain's prefrontal cortex, making them more likely to have full access to all of their capacities, make decisions with agency, and be less likely to feel limited by toxic stress or act as if they are still in "survival mode."

Thomas Hubl, author, teacher, and host of the Collective Trauma Summit,[80] provides insight into why trauma-informed care matters:

> Whether individual or collective, trauma fragments and fractures, it disowns and silences. It creates denial and forgetting to assist in its repair, we must choose to acknowledge, to witness, and to thereby feel together, what has actually occurred, even the most horrific details we would rather close our eyes to. Because to look away, to dismiss, deny, minimize, or willfully forget, is to uphold the institutions of inequality, of inhumanity, that created them.[81]

There are significant costs to neglecting the impact of trauma on the legal system. For attorneys representing parties in mediation, failing to acknowledge a client's trauma may lead to a tolerance of legal services that do not support their best interests, and may even inadvertently harm them. In a representative capacity, attorneys have an ethical duty to pursue the best interests of their clients. To do so, attorneys must explicitly seek to understand their clients' needs more closely. While mediators do not have such a duty, conflict resolution is best served by having a deeper understanding of the parties' injuries and needs. The mediator can identify more effective problem-solving strategies by gaining a greater

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79 Athens, *supra* note 18.

80 The Collective Trauma Summit is an annual conference bringing together teachers, coaches, authors, artists, activists, and leading experts in trauma, self-care, health and wellness, mindfulness, and more to illuminate the root causes of trauma and help create a global healing response system.

81 Thomas Hubl, Healing Collective Trauma: A Process of Integrating Our Intergenerational and Cultural Wounds 79 (New York: Sounds True Inc., 2021).

proximity to the nuances and details of a party's situation, such as their social context, socioeconomic, cultural, or personal factors.

Without trauma-informed lawyering, litigants impacted by trauma risk being inadvertently deprived of justice by the very injuries that the injustice caused in the first place. Ignoring trauma perpetuates its presence as a barrier to accessing justice, legal assistance, or alternative dispute resolution services, dissuading individuals from engaging with a system that remains oblivious to its potential to inflict further damage despite its intentions to aid them. This lack of awareness creates an environment where individuals feel unsupported and discouraged from seeking justice through traditional means. Additionally, overlooking the impact of trauma on lawyers' and mediators' wellbeing poses a considerable problem. Failing to address this issue can have detrimental effects on their ability to effectively represent clients and provide quality service, also increasing the likelihood that the lawyer will run afoul of written and unwritten rules of professional responsibility.[82] Therefore, lawyers, especially mediators, should turn toward trauma in litigants, in systems, and in themselves, "with the same humanity [they] would offer a fellow human who has experienced a visible injury."[83]

V. The Challenges

A. *Social Influences*

Lawyers and mediators may face challenges in applying trauma-informed practice tools because these tools' underlying principles differ drastically from, and are even opposite to, the principles underlying traditional legal training, which teaches that analysis and judgment are the primary skills to be employed in any situation.[84] By contrast, trauma-informed practice emphasizes the practical utility of nonjudgment, empathy, and compassion. Without practice, employing these skills can be uncomfortable and inconvenient.

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82 Kenneth Townsend, *Ethics and Professional Responsibility: What Lawyers Should Know and Trauma-Informed Lawyering as a Legal Competency*, *in* Trauma-Informed Law, *supra* note 9, at 76.

83 Trauma-Informed Law, *supra* note 9, at 21-22.

84 *Id.* at 101.

Individualizing trauma can overlook the ethical and political dimensions of a party's situation.[85] Their communities define what experiences are normal or deviant and what the individual's range of possible action looks like. Thus, parties do not always possess the agency to identify their own trauma, tell their story, or advocate for themselves.

B. *Preventing the Mediator's Secondary Trauma*

Lawyers are not exempt from the prevalence of trauma. Numerous studies and literature reviews have generally found that trauma is prevalent among lawyers, judges, and law students.[86] In the context of the legal system, vicarious trauma is the phenomenon experienced by lawyers, judges, and mediators "who hear, see, or read about trauma on a regular basis, then begin to experience adverse mental health impacts similar to those who are directly victimized or traumatized."[87] Such trauma can be more prevalent, subtler, and more chronically present than it may first appear, coming from one's own experience or from working with someone who has had a traumatic experience.[88] Addressing secondary or vicarious trauma, burnout, or compassion fatigue is a continuous process, and no one can provide a universal guide to resilience. The underlying concept, however, involves openly asking ourselves what happened to us and what we have experienced, believed, or assumed.

Adversity is an inevitable part of life, and its impact varies drastically from person to person. This holds true for lawyers as well, as they encounter different forms of trauma in their practice areas. While some areas of law may be more prone to trauma, no field appears to be completely immune to it. Practice areas such as family law, criminal law, immigration law, and personal injury or

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85 Susanne Van der Meer, *Looking at Law and Trauma Through a Philosophical Lens: Zooming Out from One Victim to a Community of Actors*, *in* Trauma-Informed Law, *supra* note 9, at 47-48.

86 Dawn D'Amico, *Trauma And Well-Being Among Legal Professionals* (2021); M.-J. Leonard et al., *Traumatic Stress in Canadian Lawyers: A Longitudinal Study*, APA PsycNet (2023), https://doi.org/10.1037/tra0001177; Karen Oehme & Nat Stern, *Improving Lawyers' Health by Addressing the Impact of Adverse Childhood Experiences*, 53 U. Rich. L. Rev. 1311 (2018-2019).

87 Trauma-Informed Law, *supra* note 9, at 160.

88 *Id.* at 30.

health law often involve personal stories of trauma shared behind the scenes. In the medical field and among therapists, it is widely acknowledged that professionals cannot remain untouched by suffering and loss.

Similarly, lawyers cannot expect to be unaffected by the mix of traumas they encounter daily. The very nature of the legal profession is that it serves victims of crime, victims of poverty, and victims of discrimination; and, while attorneys do not personally experience this victimization, they often internalize it, revisiting it throughout the case.[89] While recognizing the existence of trauma does not creating a pain-free life for lawyers, it can help remind those in the trenches that they are not alone, and help cultivate resilience. Trauma-informed tools such as mindfulness, mental health support from qualified practitioners or groups, emotional literacy, emotional intelligence, self-regulation skills, and maintaining appropriate emotional boundaries are crucial for mental and emotional wellbeing.[90]

Self-care plays a vital role in working with trauma. It is considered integral to "trauma stewardship,"[91] which emphasizes both providing care for others while supporting one's own capacity to help. Lawyers who regularly hear about or witness traumatic events can experience vicarious trauma similar to those directly affected by it. By committing themselves to learning about trauma and recognizing its effects on their mental health, judges, lawyers, and mediators can begin their journey towards resilience or recovery strategies. Awareness is critical in implementing these strategies effectively. Lawyers, like professionals in other fields, cannot remain untouched by the trauma they encounter. Recognizing and addressing trauma is essential for cultivating resilience and promoting mental health and wellness in the legal profession. Every

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89 Megan Zwisohn, et. al., *Vicarious Trauma in Public Service Lawyering: How Chronic Exposure to Trauma Affects the Brain and Body*, 2 Rich. Pub. Interest L. Rev. 22 (2019), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1455&context=pilr.

90 Trauma-Informed Law, *supra* note 9, at 129-30. *See also* Nazanin Moghadami, *Common Signs and Symptoms of Vicarious Trauma*, *in* Trauma-Informed Law, *supra* note 9, at 133-34.

91 *See* Laura Van Dernoot Lipsky & Connie Burk, Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others (San Francisco: Berrett-Koehler Publishers, 2009).

person needs healthy coping strategies to navigate through challenging times.

VI. Conclusion

In conclusion, trauma-informed mediation is a transformative approach that recognizes the psychological impact of trauma on the mediation process. It acknowledges that individuals who have experienced trauma may exhibit specific behaviors and reactions during mediation, which can significantly affect the outcome. By understanding these impacts, mediators can create a safe and supportive environment that promotes healing and resolution. This approach acknowledges the impact of past traumas on participants' wellbeing. It fosters healing while facilitating resolution by creating an environment rooted in safety, empowerment, collaboration, and self-care. Trauma-informed tools allow the mediator or lawyer to better support a litigant's needs rather than taking a purely intellectualized approach often taught in traditional legal settings. Such tools often have the added benefit of supporting the lawyer's wellbeing. No one should leave mediation sessions feeling more traumatized, victimized, marginalized, or dehumanized than when they entered.[92] Mediators have an opportunity to empower the public toward healing and resolution. As society becomes increasingly aware of the prevalence of trauma within communities, it is imperative to embrace this compassionate method as a means to promote justice and restore harmony among individuals affected by conflict.

Taylor Marshall

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92 Myrna McCallum et al., Trauma-Informed Legal Practice Toolkit 59 (The Law Foundation of British Columbia: Golden Eagle Rising Society, Sept. 2020), https://www.goldeneaglerising.org/docuploads/Golden-Eagle-Rising-Society-Trauma-Informed-Toolkit-2021-02-14.pdf.

Dispute Resolution and Family Law: An Annotated Bibliography

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Tammy Andrews, *The Reality of Having Your Day in Court*, Fam. Advoc., Summer 2022, at 28 (challenging the myth that winning in court is the ideal way to resolve a divorce and urging divorcing couples to consider alternative dispute resolution methods that can help them avoid depleting their assets through a long and costly legal battle).

Jenny Bradley, *The Road to Settlement – ADR Can Offer Cost-Effective Alternatives to Trial*, Fam. Advoc., Summer 2019, at 11 (recommending the use of alternative dispute resolution methods,

such as mediation, neutral evaluation, arbitration, and collaborative law).

Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. Disp. Resol. 91 (examining the view that alternative dispute resolution involves privatization of lawmaking, with reliance on contracts and markets rather than state control, and arguing that it is important to recognize that the pioneers of alternative dispute resolution thought about contracts in terms of families as well as markets).

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Susan Yates & Peter Salem, *Family Court ADR: Decades of Cultivating Innovation*, Disp. Resol. Mag., Fall 2013, at 4 (reviewing the development of alternative dispute resolution programs in family courts).

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Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 Fam. L.Q. 659 (2008) (describing the transformation of the process of divorce that has occurred in recent decades, how it has led to reconsideration of the roles of lawyers and judges in the process, and how funding cuts for family court systems may lead to a two-tiered system of justice with only wealthier parties able to afford options such as private judges, private mediators, collaborative lawyers, and divorce coaches).

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Duncan Joseph Moore, *Medical Surrogacy Mediation: Expanding Patient, Family, and Physician Rights and Reformulating the Virginia Health Care Decisions Act*, 10 Va. J. Soc. Pol'y & L. 410 (2003) (proposing the use of mediation for doctors and family members to make decisions about medical care for a person unable to make decisions due to incapacitation or incompetence).

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dispute resolution was successful in creating a good process and outcomes for divorcing families, but unsuccessful in recruiting enough families interested in alternative dispute resolution to make the center sustainable).

Jonathan W. Wolfe, *The Dual Role Arbitration and Use of a Special Master to Move Your Family Law Case to Resolution*, Fam. Advoc., Fall 2023, at 31 (discussing the judicial vacancy crisis in New Jersey, which led to all divorce trials being postponed indefinitely in some counties, and explaining how family law attorneys can move their cases forward through the use of arbitration and mediation, with one person authorized to act as both arbitrator and mediator, and through the use of special discovery masters who are appointed by courts to oversee complex, sophisticated discovery issues).

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Peter Salem, *Family Dispute Resolution: The More Things Change, the More They Stay the Same*, Disp. Resol. Mag., Spring 2015, at 24 (offering reflections on conversations with Zena Zumeta, a highly experienced mediator in family cases, and Brianna Zielke and Justin Kelsey, two members of the next generation of family dispute resolution practitioners).

Alison Sander, Tom Sander & Ernie Sander, *Sander Family Dispute Resolution*, Disp. Resol. Mag., Fall 2012, at 20 (providing thoughts on how the resolution of routine disputes among his children may have inspired Harvard law professor Frank Sander's pioneering work in the field of alternative dispute resolution).

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through a collaboration between Illinois courts and the Southern Illinois University School of Law).

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Werthen Gass, Comment, *We're Getting Sued??? *Emotional* *With Proof*; Using Alternative Dispute Resolution in Child Influencer Disputes*, 2024 J. Disp. Resol. 164 (recommending the use of alternative dispute resolution for cases arising under laws that require earnings to be set aside in trusts when parents profit from featuring their children in videos on social media).

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Victimization, 24 Cardozo J. Conflict Resol. 139 (2022) (applying restorative justice principles and examining the use of alternative dispute resolution in cases seeking to hold perpetrators liable for child sexual abuse).

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Anne Elizabeth Rosenbaum, *Embracing the Strengths and Overcoming the Weaknesses of Child Protection Mediation*, 15 U.C. Davis J. Juv. L. & Pol'y 299 (2011) (discussing the potential benefits and risks of child protection mediation as a means of resolving issues about child welfare).

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Barbara Atwood, *Religious Arbitration of Family Disputes*, Fam. Advoc., Fall 2019, at 24 (discussing the increasing number of divorcing couples, particularly in Orthodox Jewish communities, who choose to have their legal disputes resolved by faith-based tribunals rather than courts, and evaluating the constitutional and public policy concerns that may arise from having family law issues resolved by religious institutions rather than courts).

Michael J. Broyde, *Multicultural ADR and Family Law: A Brief Introduction to the Complexities of Religious Arbitration*, 17 Cardozo J. Conflict Resol. 793 (2016) (arguing that religious groups have less ability to influence legal and social norms than in the past, so they have shifted to developing their own internal legal processes, including religious arbitration and other forms of alternative dispute resolution).

Michael Broyde, Sharia Tribunals, Jewish Courts, and Christian Panels: Religious Arbitration in America and the West (2017) (examining the trend toward the use of private religious arbitration, considering why religious communities turn away from secular family law, discussing appropriate limits on religious arbitration, and arguing that secular legal frameworks should regulate, facilitate, and enforce religious arbitration).

Gender & Justice in Family Law Disputes: Women, Mediation, and Religious Arbitration (Samia Bano ed. 2017) (examining dispute resolution practices for families in Islamic or other religious contexts).

Evan M. Lowry, Note, *Where Angels Fear to Tread: Islamic Arbitration in Probate and Family Law, a Practical Perspective*, 46 Suffolk U. L. Rev. 159 (2013) (arguing that it may be appropriate to uphold religious arbitration of divorce issues based on Shari'a principles, because a divorce involves two adult parties who can consent to be bound by the religious arbitration, but allowing religious arbitration of custody disputes should not be permitted).

Mark D. Rosen, *Religious Law, Family Law and Arbitration: Shari'a and Halakha in America*, 90 Chi.-Kent L. Rev. 163 (2015) (using John Rawls' principles of political liberalism to argue that courts should police the results of religious arbitration of family disputes on a case-by-case basis, overriding an arbitrator's decision

if it violates public policy, rather than categorically prohibiting all religious arbitration of family matters).

Laura Traum, Note, *Involved, Empowered and Inspired: How Mediating Halakhic Prenuptial Agreements Honors Jewish and American Law and Builds Happy Families*, 17 Cardozo J. Conflict Resol. 179 (2015) (explaining the significance and the shortcomings of halakhic prenuptial agreements for Orthodox Jewish marriages and recommending the use of prenuptial mediation as the best way to prepare such agreements).

Aviva Vogelstein, Note, *Is ADR the Solution? How ADR Gets Around the Get Controversy in Jewish Divorce*, 14 Cardozo J. Conflict Resol. 999 (2013) (discussing the beth din system of arbitration used to resolve disputes within Orthodox Jewish communities and how it can be used to address controversial situations in which a husband refuses to grant the permission necessary for his wife to remarry).

Arbitration

Advantages and Disadvantages of Arbitration

Steven D. Baker, Rachal v. Reitz *and the Efficacy and Implementation of Mandatory Arbitration Provisions in Trusts*, 9 Est. Plan. & Community Prop. L.J. 1991 (2017) (assessing the advantages and disadvantages of trust provisions that require arbitration of disputes between trustees and beneficiaries, analyzing a decision by the Supreme Court of Texas enforcing such a provision, and providing sample language and advice on drafting mandatory arbitration provisions for trusts).

Ashley Carleton, Comment, *An Ethics Analysis of Arbitrating Malpractice Claims*, 27 J. Am. Acad. Matrim. Law. 445 (2015) (examining whether courts should enforce provisions in attorney/client agreements that would require legal malpractice claims to be resolved through arbitration, with a focus on the legal ethics issues raised by such provisions, and providing a review of current state approaches to the issue).

Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, Law & Contemporary Problems, Winter/Spring 2004,

at 105 (discussing cognitive errors and illusions that affect decisionmaker and summarizing the results of empirical studies that suggest arbitrators, like judges, may be less susceptible to some cognitive illusions than jurors).

Linda D. Elrod, *Arbitration of Child-Related Issues and the Uniform Family Law Arbitration Act*, Fam. Advoc., Fall 2023, at 14 (describing the advantages of resolving family law disputes through arbitration rather than trials, with arbitration involving more privacy, less cost, and less adversarial posturing, and with decisions made by a professional familiar with child development and children's needs rather than a judge who may be unprepared for the emotional aspects of family conflicts).

Julie J. Nelson & Bryant J. McConkie, Taylor *and the Impact of Arbitration in Divorce Proceedings*, Utah B.J., May/June 2024, at 43 (providing a conversation among divorce lawyers about the effects of a new ruling from the Utah Supreme Court that favors enforcement of arbitration of divorce cases and leaves limited room for appellate review of arbitrators' decisions).

Rachel Schwartzman, *Utilizing Final-Offer Arbitration to Settle Divorces: A Proposal and Analysis*, 53 Fam. L.Q. 3 (2019) (recommending the use of the binding final-offer mode of arbitration, in which each party submits their final, best offer and the arbitrator must choose one of the offers, as a way to incentivize parties to make reasonable offers rather than extreme demands and a way to prevent arbitrators from routinely splitting matters down the middle by reaching a compromise result in between the parties' positions).

Carolyn Moran Zack, Family Law Arbitration: Practice, Procedure, and Forms (2020) (assessing the advantages and disadvantages of resolving family law issues through arbitration, providing a state-by-state summary of laws concerning family law arbitration, and providing sample forms and practical advice about issues like how to choose an arbitrator and how to draft an arbitration agreement).

Carolyn Moran Zack, *Family Law Arbitration, An Underutilized ADR Option*, Fam. Advoc., Fall 2023, at 18 (explaining the benefits of arbitration in family law cases, offering answers to some of the most common questions about arbitration, discussing the Uniform

Family Law Arbitration Act, and providing a chart of information about all state laws relating to family law arbitration).

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Bridgette Woodford, *Leave It to the Courts: Why Child Custody Arbitration Is Improper*, 14 Pa. St. Arb. L. Rev. 54 (2023) (reviewing the history of arbitration, examining how states treat child custody arbitration, and arguing that arbitration of child custody disputes should not be permitted because courts are better equipped to handle child custody matters).

Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After* Troxel*, the Parens Patriae Power of the State, a Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 Hamline J. Pub. L. & Pol'y 357 (2006) (arguing that the fundamental right to parent weighs in favor of allowing arbitration as a dispute resolution method for child custody disputes).

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Linda D. Elrod, *The Case for Arbitration in Family Cases—and for the Uniform Act*, Disp. Resol. Mag., Winter 2017, at 18 (reviewing major elements of the Uniform Family Law Arbitration Act).

Lisa J. Gill, *The Proposed Tennessee Domestic Relations Arbitration Act*, Tenn. B.J., Mar./Apr. 2023, at 29 (endorsing the enactment of legislation that would govern arbitration of family law disputes in Tennessee).

George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. Am. Acad. Matrim. Law. 429 (2003) (analyzing North Carolina's Family Law Arbitration Act and comparing it with federal and state legislation, the Uniform Arbitration Act, the Revised Uniform Arbitration Act, and arbitration rules).

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Carolyn Moran Zack, *It's Time for Pennsylvania to Adopt the Uniform Family Law Arbitration Act*, Pa. Law., Mar./Apr. 2020, at 34 (discussing the Uniform Family Law Arbitration Act and arguing that Pennsylvania should follow the lead of the three states that have enacted it).

Mandatory Arbitration Clauses in Nursing Care Contracts

Suzanne Gallagher, *Mandatory Arbitration Clauses in Nursing Home Admission Agreements: The Rights of Elders*, 3 NAELA J. 187 (2007) (arguing that mandatory arbitration provisions in nursing home admission agreements should not be enforced because they raise policy concerns about unconscionability, capacity, and fraud, as well as potential lack of authority when representatives of an incapacitated elder sign the agreement for the elder).

Laurence I. Gendelman, Case Note, Kindred Nursing Centers v. Clark: *United States Supreme Court Decisions on Mandatory Arbitration Provisions*, 15 NAELA J. 55 (2019) (analyzing the implications of Supreme Court decisions striking down state laws or rules that disfavor enforcement of mandatory arbitration clauses in contracts for care at nursing facilities).

David L. McGuffey, Case Note, Marmet Health Care Center v. Brown: *Nursing Home Arbitration Agreements*, 8 NAELA J. 239 (2012) (discussing court decisions allowing the enforcement of arbitration provisions in nursing home contracts and urging elder law attorneys to respond to these decisions by working to ensure that elder clients and their families understand and make informed decisions about agreeing to such provisions, as well as considering whether to draft power of attorney and other agency documents in ways that do not give the agent power to agree to binding arbitration).

Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 Elder L.J. 453 (2006) (arguing that mandatory arbitration clauses in nursing home agreements should be enforced and that attorneys representing

elders should focus on improving the language of arbitration clauses and the effectiveness of the arbitration process, especially through the use of model nursing home agreements, rather than fighting to make arbitration provisions unenforceable).

Charlie Sabatino, *Our New Nursing Home Arbitration Mandate: Educate, Educate, Educate*, BIFOCAL, July/Aug. 2019, at 120 (discussing how new rules issued by the Centers for Medicare and Medicaid Advocacy allow contracts between nursing homes and their residents to include binding provisions for resolution of disputes through arbitration, but provide some protections meant to ensure that residents make informed and voluntary decisions about whether to agree to such provisions, and stressing the importance of educating residents and their families about these provisions and advising them not to agree to such provisions).

John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents*, 22 ELDER L.J. 141 (2014) (analyzing the controversy over enforceability of nursing home arbitration agreements and discussing how nursing homes, elder law practitioners, arbitrators, and legislatures can take steps to improve the use of arbitration in nursing home cases and ensure that nursing home patients receive better information before agreeing to arbitration and have enhanced procedural protections during arbitration).

Erica F. Wood, *Should CMS Prohibit Arbitration in Nursing Home Admission Contracts?*, BIFOCAL, July/Aug. 2015, at 128 (noting that the American Bar Association opposes the use of mandatory, binding arbitration provisions in agreements between nursing care facilities and their residents, because of risks that residents and their families may not fully understand and voluntarily choose to accept such provisions, and urging the Centers for Medicare and Medicaid Services to prohibit the use of such provisions).

Collaborative Law

Advantages and Disadvantages of Collaborative Law

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collaborative and therapeutic family law and discussing why collaborative law is the most promising approach to dispute resolution in family law cases).

Paolo Cecchi-Dimeglio & Peter Kamminga, *The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World*, 38 J. Legal Prof. 191 (2014) (reporting the findings of a survey of collaborative law practitioners from around the world, which sought to explore how they think about questions such as whether collaborative law is successful, how collaborative law is perceived by their legal community, and why clients decide to use collaborative law).

Lyn C. Conniff, *Collaborative Law: An Alternative, Not a Replacement*, *in* The Impact of the Uniform Collaborative Law Act: Leading Lawyers on Guiding Clients Through Cooperative Divorce 95 (2013) (comparing the collaborative law process to other methods of dispute resolution and reviewing its potential advantages and drawbacks).

Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. Fla. J.L. & Pub. Pol'y 113 (2009) (situating collaborative law within the larger "comprehensive law movement" seeking to make law sustainable for human well-being).

Marsha B. Freeman, *Collaborative Law: Recognizing the Need for a New Default Method of Family Law Resolution*, 17 Barry L. Rev. 15 (2011) (considering the difficulty of applying the collaborative law approach in different cultures, examining the costs of the collaborative process and how they may prevent it from being an option for lower and middle class families, and discussing the adoption of the Uniform Collaborative Law Act).

Susan Gamache, *Collaborative Practice; A New Way to Address Children's Best Interests in Divorce*, 65 La. L. Rev. 1455 (2005) (asserting that collaborative law maximizes the chances of good outcomes for children after divorce because it provides a rich, multidisciplinary pool of resources to help families resolve legal, emotional, and financial issues and thus reduces the risk of prolonged conflict between parents).

Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the 'Collaborative Law' Revolution and Collaborative Advocacy*, 13 Cardozo J. Conflict Resol. 61 (2011) (examining how collaborative law contributes to the reconceptualization of the role of attorneys in family law practice, considering whether attorneys can and should shift from an adversarial to a collaborative mode, and proposing a principled bargaining model as a means of addressing criticisms of collaborative law).

Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. Disp. Resol. 179 (reporting the preliminary findings from an empirical study of the experiences of lawyers, clients, and other professionals using the collaborative law process in the United States and Canada).

Lawrence P. McLellan, *Expanding the Use of Collaborative Law: Consideration of Its Use in a Legal Aid Program for Resolving Family Law Disputes*, 2008 J. Disp. Resol. 465 (reporting on the results of an assessment of the feasibility of starting a collaborative law program within the Volunteer Lawyers Project run by the bar association and legal aid society in Des Moines).

Ralph Peeples & John Sarratt, *Sinn Féin Amháin: Taking Collaborative Law Beyond Divorce*, 52 Wake Forest L. Rev. 139 (2017) (analyzing the use of collaborative law in family cases and arguing that the approach should be extended to other areas of civil litigation).

Barton Pokras, *The Unique Challenges of Collaborative Law*, *in* The Impact of the Uniform Collaborative Law Act: Leading Lawyers on Guiding Clients Through Cooperative Divorce 39 (2013) (examining problems that can arise in the collaborative divorce process that generally do not arise in litigated divorces, including parties who are not well suited for the collaborative process, lack of trust between the parties and counsel, and problems with opposing counsel who cannot fully adapt to a nonadversarial approach).

Luke Salava, *Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution*, 48 Fam. L.Q. 179 (2014) (considering why collaborative practice has not become the customary approach to divorce cases, suggesting that it has been held back by some resistance to it in the legal community and the general public's unawareness of

it, and arguing that attorneys and legislators should take steps to expand the availability of collaborative divorce).

Richard W. Shields, Judith Ryan & Victoria L. Smith, Collaborative Family Law: Another Way to Resolve Family Disputes (2003) (explaining the collaborative approach to family law matters in Canada, including a seven-step model for negotiation).

Tara L. Smith Ruesga, *Cooperative or Collaborative Practice Models*, Fam. Advoc., Fall 2012, at 34 (explaining how cooperative or collaborative approaches, in which the parties plan and carry out a negotiation process, can benefit families facing financial crises as well as family court systems facing budget cuts and limited resources).

D. Susanne Snearly, *Collaborative Divorce*, Fam. Advoc., Fall 2023, at 36 (discussing the origins and spread of the collaborative approach to divorce practice, praising the trend toward using multidisciplinary teams that include mental-health and financial experts, and predicting that the collaborative approach will spread beyond divorce to other areas of family law such as pre-nuptial agreements, adoptions, and disputes involving unmarried parents).

Elizabeth Strickland, Comment, *Putting "Counselor" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979 (2006) (describing the collaborative method for handling divorces and arguing for the enactment of statutes that would facilitate the method's use).

Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. Am. Acad. Matrim. Law. 155 (2008) (offering views about the creation and development of collaborative law, from the perspective of the family law attorney regarded as the originator of the collaborative law approach).

Stuart Webb & Ron Ousky, The Collaborative Way to Divorce (2006) (providing a general guide for couples considering a collaborative divorce and arguing that it is a revolutionary way to achieve better and less expensive results for families and their children).

Domestic Violence and Abuse

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and the risks of applying the collaborative law model to cases involving abuse).

Claudia Lanzetta, *Mediation/Collaborative Law: Exploring a New Combination in Alternative Dispute Resolution in Cases of Divorce and Domestic Violence*, 20 Cardozo J. Conflict Resol. 329 (2019) (proposing a new hybrid form of dispute resolution, which would combine features of mediation and the collaborative practice of law, for divorce cases involving domestic violence issues).

Nancy Ver Steegh, *The Uniform Collaborative Law Act and Intimate Partner Violence: A Roadmap for Collaborative (and Non-Collaborative Lawyers)*, 38 Hofstra L. Rev. 699 (2009) (examining the intimate partner violence provisions of the Uniform Collaborative Law Act and providing a checklist for collaborative lawyers seeking to ensure that they comply with the requirements about reasonably inquiring and continuously assessing whether a relationship involves violence or coercion).

Elder Law Issues

Aubrey Harry Ducker, Jr., *Managing Family Law/Elder Law Care Nexus Cases Using Collaborative Law Strategies*, *in* Strategies for Family Law in Florida (2014) (describing a collaborative law practice that focuses on issues at the intersection of family law and elder law, including divorce, guardianship, and Medicaid planning issues).

Sherri Goren Slovin, *The Collaborative Process: Divorce with Dignity*, Experience, Spring 2006, at 13 (explaining the collaborative approach to divorce, why it is not the same as simply having two reasonable lawyers negotiating a case, and how it can be particularly beneficial for older couples because of its emphasis on client empowerment).

Ethical and Professional Issues

Premela Deck, *Ethics—Law and Social Work: Reconciling Conflicting Ethical Obligations Between Two Seemingly Opposing Disciplines to Create a Collaborative Law Practice*, 38 W. New Eng. L. Rev. 261 (2016) (examining how attorneys and social workers,

despite having different goals and ethical obligations, can form effective interdisciplinary teams for a collaborative law approach).

David D. Dodge, *Legal Ethics and Collaborative Law Practice*, Ariz. Att'y, May 2017, at 8 (analyzing ethical concerns arising from the use of collaborative law, including conflict of interest issues and scope of representation issues generated by the creation of a "four-way" agreement among the parties and their lawyers).

Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. Am. Acad. Matrim. Law. 141 (2008) (explaining that there is little specific regulation of collaborative lawyering and analyzing some of the key ethical issues addressed in ethics opinions on the subject, including issues about confidentiality, conflicts of interest, zealous advocacy, the competence of attorneys offering collaborative approaches, and withdrawal from representation of clients if the collaborative approach is unsuccessful).

David Hoffman & Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the "Prisoner's Dilemma": The Vital Role of Professional Relationships in the Collaborative Law Process*, 2010 J. Disp. Resol. 271 (analyzing the importance of the web of professional relationships involved in collaborative practice, reviewing the results of interviews with teams of collaborative lawyers and other professionals, and suggesting ways to overcome tendencies to revert to competitive, adversarial forms of interaction and negotiation).

Rebecca A. Koford, Note, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 Geo. J. Legal Ethics 827 (2008) (discussing a disagreement, between ethics committees of the Colorado Bar Association and the American Bar Association, over whether the clauses in collaborative law agreements that disqualify attorneys from continuing to represent clients if the collaborative process is unsuccessful are unethical on the ground that they create conflicts of interest that cannot be waived by clients).

John Lande & Forrest S. Mosten, *Before You Take a Collaborative Law Case*, Fam. Advoc., Fall 2010, at 31 (emphasizing that lawyers offering collaborative representation must comply with all legal ethics requirements and explaining the ethical issues

that may arise involving limited scope of representation, conflicts of interest, and obtaining informed consent).

John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 Ohio St. J. on Disp. Resol. 347 (2010) (analyzing the potential benefits and risks of collaborative law and the ethical obligation to screen cases to assess whether they are appropriate for collaborative law and the need to obtain a client's informed consent to use the process).

Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. Disp. Resol. 131 (arguing that collaborative law can be permissible under the current rules of legal ethics but that collaborative lawyers must be careful in how they conduct their practice in order to avoid ethical problems).

Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 Ariz. L. Rev. 289 (2008) (examining the major themes in mainstream bar associations' ethics opinions about collaborative law, including trends toward favoring experimentalism, client autonomy, and departures from the adversarial paradigm).

Practical Advice for Collaborative Law Practitioners

Sherrie Abney, *Moving Collaborative Law Beyond Family Disputes*, 38 J. Legal Prof. 277 (2014) (explaining collaborative law and practical issues such as how to become a collaborative lawyer, how to determine if the collaborative approach is suitable for a particular client, how to prepare for the first meeting in the collaborative process, and what to do if the process reaches an impasse).

Abby Cole et al., *Collaborative Divorce: A Paradigm Shift in Theory and Practice*, 8 Prac. Innovations 196 (2023) (explaining collaborative divorce and encouraging psychologists to obtain specialized training to expand their practices to include collaborative divorce services).

Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 Tex. Wesleyan L. Rev. 45 (2004) (discussing the

development of collaborative law in Texas, with advice for practitioners and an outline of how a typical case would be handled).

Susan L. Elkouri, *Understanding the Collaborative Law Process and Its Applications*, *in* The Impact of the Uniform Collaborative Law Act: Leading Lawyers on Guiding Clients Through Cooperative Divorce 83 (2013) (providing an introductory overview of the collaborative law process for family law attorneys interested in the collaborative model but who have little knowledge about it).

Larry Hance, *Integrating Collaborative Law into a Traditional Family Law Practice*, *in* Developing a Collaborative Family Law Practice 87 (2011) (providing advice for lawyers who are new to collaborative law, including advice on marketing, training, ethics, and strategies).

Forrest S. Mosten, Collaborative Divorce Handbook: Helping Families Without Going to Court (2009) (discussing how the collaborative approach to lawyering, relying on joint problem solving rather than adversarial litigation, can be applied to resolve disputes for divorcing couples).

> J. Herbie DiFonzo, *From Dispute Resolution to Peacemaking*, 44 Fam. L.Q. 95 (2010) (reviewing Forrest Mosten's *Collaborative Divorce Handbook* and discussing how a collaborative approach makes the parties the central figures in resolving their divorce).

Nanci A. Smith, *Divorce with Dignity*, Vt. B.J., Spring 2016, at 24 (describing the use of collaborative law in divorce cases and how family attorneys can determine if they would be effective collaborative divorce lawyers).

Ronald Melin Supancic, *The Value of Collaborative Law in Divorce Cases: A New Outlook on Old Practices*, *in* The Impact of the Uniform Collaborative Law Act: Leading Lawyers on Guiding Clients Through Cooperative Divorce 7 (2013) (providing personal reflections on the transition to collaborative law after many years of litigating divorce cases, examining obstacles that arise in the collaborative law process, and explaining how collaborative law led to a new outlook on family law which emphasizes helping families find peace).

Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation (3d ed.

2017) (providing an overview of how the collaborative approach to law can be applied to divorce cases, with discussion of the theoretical foundations of the approach as well as practical advice about developing a collaborative family law practice).

Pauline H. Tessler & Peggy Thompson, Collaborative Divorce: The Revolutionary Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life (2006) (providing a step-by-step explanation of a collaborative approach to divorce, utilizing a team that includes lawyers, coaches, a financial consultant, and a child specialist).

Gary L. Voegele, Linda K. Wray & Ronald D. Ousky, *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 Wm. Mitchell L. Rev. 971 (2007) (providing a detailed account of the collaborative law process for family law cases, including the disqualification agreement and other common features of collaborative law, the protocols of practice for collaborative lawyers, ethical considerations, and proper training for collaborative practice).

Maury White, *Using Collaborative Law to Create an Individualized Resolution in Family Law Cases*, *in* Understanding Collaborative Family Law (2011) (describing typical collaborative family law cases and important considerations for attorneys navigating the collaborative process).

Uniform Collaborative Law Act

Yishai Boyarin, *Generating "Win-Win" Results: Negotiating Conflicts in the Drafting Process of the Uniform Collaborative Law Act*, 38 Hofstra L. Rev. 495 (2009) (describing the balanced approach taken in drafting the Uniform Collaborative Law Act, in order to preserve the unique aspects of collaborative law while ensuring the practice's strength, legitimacy, and long-term acceptance by legal communities).

J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 Hofstra L. Rev. 569 (2009) (presenting the report of the Conference on the Uniform Collaborative Law Act held at Hofstra University School of Law in November 2009, with discussion of informed consent, withdrawal from representation, information

disclosure requirements, interdisciplinary practice, coercive or violent relationships, access to justice, and training).

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Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. on Arb. & Mediation 212 (2012) (reviewing the provisions of the Uniform Collaborative Law Act and the arguments for and against its adoption).

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Peter K. Munson, *Uniform Collaborative Law Enhances Client-Driven ADR*, Fam. Advoc., Spring 2017, at 42 (discussing the Uniform Collaborative Law Act, the states that have adopted it, and the potential benefits of collaborative dispute resolution).

Andrew Schepard & David A. Hoffman, *Regulating Collaborative Law*, Disp. Resol. Mag., Fall 2010, at 26 (reviewing the history of the Uniform Collaborative Law Act, from the perspective of the reporter for the drafting committee, and responding to arguments against collaborative law and the uniform act concerning it).

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2007, at 10 (suggesting that mediation may be less effective than early neutral evaluation, a process in which a facilitator who is an expert on the subject of the dispute identifies the core issues in the case, develops an evaluation of the merits of the issues, and helps the parties develop a plan for making responsible judgments about the likely outcome of litigation).

Wayne D. Brazil, Early Neutral Evaluation (2012) (explaining early neutral evaluation, the circumstances in which it can be effective, and how it compares to other methods of dispute resolution such as mediation).

John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 Ohio St. J. on Disp. Resol. 81 (2008) (explaining and advocating the use of early case handling, including early case assessment protocols, pretrial conferences, case management systems, and early neutral evaluation).

Forrest S. Mosten, *Confidential Mini Child-Custody Evaluations: Another ADR Option*, 45 Fam. L.Q. 119 (2011) (advocating for the use of Confidential Mini Child-Custody Evaluations, a form of early neutral evaluation of a case that gives the parties a safe venue for obtaining expert information that can help them to reach an agreement).

Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 Fam. Ct. Rev. 672 (2006) (reporting on the success of the early neutral evaluation method in Minnesota, where child custody and parenting time cases were referred to a team of experienced neutral evaluators for early feedback on likely outcomes and an opportunity for the parties to negotiate a settlement based on that feedback).

Cindy M. Perusse, *Early Neutral Evaluation as a Dispute Resolution Tool in Family Court*, Colo. Law., May 2012, at 37 (discussing the use of early neutral evaluation, comparing it to mediation, and arguing that it can be an effective way to correct parties' misperceptions about the strength of their cases and prevent cases from unnecessarily going too far down the path toward trials).

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Amel Ketani, *The First Family Mediation Meeting: Purpose, Context, and Proposals for Change*, 76 DISP. RESOL. J. 113 (2023) (reporting the results of a survey of family mediators and lawyers in England and Wales, where a 2014 law made mediation compulsory in family cases, about their experiences in initial family mediation meetings).

Esther Lenkinski & Maneesha Mehra, *Are We Counsel or Counsellors? Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada*, INT'L ACAD. FAM. LAW. (2010), https://www.iafl.com/resources/articles/alternatives-to-court/ (analyzing the role of alternative dispute resolution in Canadian family law, including how the process and legal requirements vary across the different provinces).

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Dilia Leticia Jorge Mera, *Alternative Resolution of Disputes in the Dominican Republic*, INT'L ACAD. FAM. LAW. (2010), https://www.iafl.com/resources/articles/alternatives-to-court/ (discussing the use of mediation, conciliation, and arbitration in family cases in the Dominican Republic).

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articles/alternatives-to-court/ (describing the financial dispute resolution hearings required in divorce cases in England and Wales, which involve having a judge provide a non-binding evaluation of the issues at an early stage of the litigation).

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Satoshi Minamikata, *Resolution of Disputes over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach in Chotei (Family Court Mediation)*, 39 Fam. L.Q. 489 (2005) (explaining the process in Japan for resolving disputes about parental rights and duties after separation or divorce, including the Chotei procedure, a mandatory mediation proceeding in which a committee made up of a family court judge and two or more other mediators try to help the parties resolve their dispute).

Róisín O'Shea & Sinéad Conneely, *Family Mediation: The International Context*, 36 J. Am. Acad. Matrim. Law. 485 (2024) (examining the trend toward national legal regulation of mediation in Europe and North America, reviewing the international and supra-national legal frameworks that seek to facilitate mediation of cross-border family disputes, and discussing the International Social Service's global program on international family mediation).

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Marian A. J. van Dijk, Sven Zebel & Ellen Giebels, *Power Asymmetry and Early Intervention in Divorce*, 29 Psychol., Pub. Pol'y & L. 383 (2023) (reporting the results of a survey that examined how an educational web-based intervention affected Dutch adults and the impact that imbalances of power had on their divorce processes, perceptions, and outcomes).

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Advantages and Disadvantages of Mediation

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Carolynn Clark Camp, *Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases*, 26 BYU J. Pub. L. 187 (2012) (examining the advantages of mediating rather than litigating family cases and arguing that facilitative mediation techniques are more effective than evaluative techniques).

Barry Goldman, *The Psychology of Mediation*, 4 NAELA J. 115 (2008) (using social psychologist Robert Cialdini's six psychological "weapons of influence"—liking, authority, reciprocity, scarcity, consistency, and social proof—to explain why mediation is an effective method for resolving disputes).

Rose Mirzaie, *Divorce Mediation for Women: An Examination of Feminist Critiques*, 71 Disp. Resol. J. 161 (2016) (assessing the feminist argument that power imbalances make divorce mediation unfair to women and arguing that mediators should have special training to recognize and address this unfairness).

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Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. Rev. 425 (2003) (examining concerns about the use of mediation in divorce cases, including questions about power imbalances, ethical standards, and mediator qualifications).

Lindsay Simonson, *What Now?: Divorce Mediation in the Wake of Legalizing Same-Sex Marriage*, 8 Y.B. on Arb. & Mediation 219 (2016) (explaining how same-sex couples can be better incorporated into the practice of divorce mediation in the wake of the Supreme Court's decision in favor of marriage equality rights).

John Van Winkle, Mediation: A Path Back for the Lost Lawyer (2001) (discussing the expanded use of mediation, techniques for mediators, and advice for developing a mediation practice).

Child-Inclusive Mediation

Cassandra W. Adams, *Children's Interest—Lost in Translation: Making the Case for Involving Children in Mediation of Child Custody Cases*, 36 U. Dayton L. Rev. 353 (2011) (recommending the expanded use of child-inclusive mediation, in which children have a chance to be heard within the mediation process, and discussing how to identify divorce and child custody cases where child-inclusive mediation would be appropriate).

Robin H. Ballard et al., *A Randomized Controlled Trial of Child-Informed Mediation*, 19 Psychol., Pub. Pol'y & L. 271 (2013) (reporting the results of a study finding that child-focused mediation and child-inclusive mediation had a positive effect on outcomes compared to conventional mediation in divorce cases).

Felicity Bell, Judy Cashmore, Patrick Parkinson & Judi Single, *Outcomes of Child Inclusive Mediation*, 27 Int'l J. L. Pol'y & Fam. 116 (2013) (reporting the results of a study of child-inclusive mediation in Australia, which found that the participation of children did not improve outcomes for parental relationships or resolution of disputes, but parents nevertheless found it beneficial to have children involved in the mediation process).

Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation—Comments on Kelly's "Resolving Child Custody Disputes,"* 10 Va. J. Soc. Pol'y & L. 164 (2002) (warning that creating a greater role for children

in divorce mediation may lead to children being given inappropriate responsibility for making adult decisions about custody arrangements).

Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 Va. J. Soc. Pol'y & L. 129 (2002) (examining how divorce affects children and discussing empirical research on the impact of child-inclusive mediation and other interventions meant to benefit children by including their voices in the divorce dispute resolution process).

Samantha Lamka, Note, *Empowering Children's Rights Where They Matter: Implementing Child-Inclusive Mediations in Divorce Proceedings*, 39 Ohio St. J. on Disp. Resol. 149 (2023) (analyzing an Australian study of how different mediation styles affect divorcing families and arguing for an approach that empowers children to participate and assert their own legal rights).

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Connie J. A. Beck et al., *Mediator Assessment, Documentation, and Disposition of Child Custody Cases Involving Intimate Partner Abuse: A Naturalistic Evaluation of One County's Practices*, 34 L. & Hum. Behav. 227 (2010) (reporting the results of a study finding that a large portion of cases in divorce mediation involve reports of intimate partner abuse, but only a small number of those cases are screened out of mediation).

Lydia Belzer, *Domestic Abuse and Divorce Mediation: Suggestions for a Safer Process*, 5 Loy. J. Pub. Int. L. 37 (2003) (discussing safeguards that can be installed to protect victims of domestic violence in divorce cases resolved through mediation).

Amy Holtzworth-Munroe et al., *Intimate Partner Violence (IPV) and Family Dispute Resolution: A Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation,*

and Litigation, 27 PSYCHOL., PUB. POL'Y & L. 45 (2021) (reporting that a study comparing litigation with two styles of mediation, for divorce cases involving domestic violence, showed some favorable results for mediation, including enhanced feelings of safety, more satisfaction with the process, greater likelihood of reaching settlements, and less time to reach final resolution of cases).

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Kevin Lam, Note, *Mediating Domestic Violence Disputes in Chinese Immigrant Families in the U.S.: The Case for Court-Appointed Mediation Programs*, 17 CARDOZO J. CONFLICT RESOL. 989 (2016) (proposing the use of court-appointed mediation in family court cases involving domestic violence within Chinese immigrant families, observing that the risk of deportation may make immigrants less likely to use private or community-based mediation services, and describing the steps that mediators in such cases must take to be culturally sensitive and to screen out cases that are inappropriate for mediation).

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Violence, 28 J. Am. Acad. Matrim. Law. 455 (2016) (explaining why mandatory mediation may be valuable in most divorce cases but may be harmful or even dangerous in situations involving intimate partner violence, reviewing various state laws and rules addressing whether mediation is required in these situations, and stressing how important it is for attorneys to screen for the possibility that domestic violence is an issue).

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Elder Law Issues

Ellie Crosby Lanier, *What Is Quality in Elder Care Mediation and Why Should Elder Law Advocates Care?*, Bifocal, Nov./Dec. 2010, at 15 (describing the growing field of elder care mediation, why mediation is an effective tool, and how to find a qualified elder care mediator).

Eleanor Crosby Lanier, *First Do No Harm – Why Mediator Competency Matters in Eldercare Cases and What the Mediation Community Is Doing to Develop Qualified Practitioners*, Experience, Fall/Winter 2015, at 23 (explaining how the elder

mediation training objectives developed by the Association for Conflict Resolution's Section on Elder Decision-Making and Conflict Resolution can be used to promote best practices in the field of eldercare mediation).

Rikk Larsen & Crystal Thorpe, *Elder Mediation: Optimizing Major Family Transitions*, 7 Marq. Elder's Advisor 293 (2006) (recommending the use of mediation for family disputes about decisions and transitions for an elder person, such as disputes among adult siblings over their aging parent's living situation, medical treatment, or financial matters).

Carolyn L. Rosenblatt, *Mediating Elder Disputes in Assisted Living Facilities*, 19 Experience, no. 1, 2009, at 27 (explaining how mediation can help assisted living facilities and residents to resolve conflicts, with a case study about collaborative mediation of a dispute about a resident hitting his neighbor).

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Erica F. Wood, *Dispute Resolution and Aging: What Is the Nexus and Where Do We Stand?*, Bifocal, Jan./Feb. 2015, at 73 (discussing the impact of aging on dispute resolution, including how certain kinds of conflicts become more common as people get older and how the age of parties in mediation may affect the mediation process and the skills the mediator needs to have).

Zena Zumeta, *About the ABA Dispute Resolution Section Task Force Elder Abuse and Neglect Screening Guidelines for Mediators*, Bifocal, Jan.-Feb. 2021, at 65 (reporting on an ABA task force's development of guidelines to assist mediators in knowing how to identify signs of elder abuse, how to determine whether mediation is appropriate, how to empower elderly parties participating in mediation, and how to know when to bring additional professionals into the mediation process).

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Catherine A. Seal & Michael A. Kirtland, *Using Mediation in Guardianship Litigation*, Experience, Fall/Winter 2015, at 16 (reviewing issues raised by the use of mediation to resolve disputes about the appointment of a guardian for a person who is alleged to be incapacitated, including due process concerns, evidentiary standards, information needed for an effective mediation, and the extent to which the allegedly incapacitated person should participate in the mediation).

Eva M. Soeka, *An Option for Families and Older Adults: Adult Guardianship Mediation*, GPSolo, Mar. 2000, at 58 (assessing the use of mediation for adult guardianship cases).

International Parental Child Abductions

Elizabeth Cunha, Note & Comment, *The Potential Importance of Incorporating Online Dispute Resolution into a Universal Mediation Model for International Child Abduction Cases*, 24 Conn. J. Int'l L. 155 (2008) (discussing the value of online mediation in international child abduction cases).

Nuria González Martín, *International Parental Child Abduction and Mediation: An Overview*, 48 Fam. L.Q. 319 (2014) (explaining and assessing the value of the Guide to Good Practice on Mediation, a "soft law" instrument issued by the Hague Conference on Private International Law as a supplement to its Hague Convention on

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(discussing the potential benefits and drawbacks to conducting divorce mediation online rather than face-to-face).

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the experience, for a judge and mediator, of conducting mediation online during the COVID-19 pandemic and sharing tips and best practices for how to achieve a personal connection with the parties when doing mediation online rather than in person).

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Practical Advice for Mediators and Attorneys

Harriet E. Cummings, *Safety Considerations for Family Law Mediators*, Nev. Law., Nov. 2019, at 19 (advising mediators about the importance of ensuring that all participants in the mediation feel safe and discussing the many factors to consider in determining how to structure and conduct a safe mediation).

Divorce and Family Mediation: Models, Techniques, and Applications (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004) (examining theoretical and practical issues surrounding mediation of divorce and other family issues, with chapters by professionals with expertise in law, psychology, and social work).

Anne Dranginis, *Is Truth Essential in Mediation?*, Fam. Advoc., Fall 2023, at 6 (exploring the importance of truth in mediation, including the extent to which attorneys have an ethical obligation to determine the truth of information presented by their clients in mediation, and discussing how to prepare clients for the reality that their version of the truth may be challenged or questioned in mediation).

Carol Gersten, *Mediate the Move—Quelling Clients' Fears and Clarifying Options*, Fam. Advoc., Spring 2006, at 30 (providing advice about the use of mediation for divorced couples who share custody of a child, when a dispute arises because one seeks to relocate and take children with them).

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guardians ad litem should be excluded from participating in mediation of child custody cases, because the guardian ad litem should investigate and form independent judgments about the family that are not influenced by the mediation, parents may be confused about the roles of the mediator and guardian ad litem if both are at the mediation, and the presence of the guardian ad litem in the mediation may undermine the parties' perceptions of the neutrality of the guardian ad litem).

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Douglas E. Noll, *Hey, I'll Just Be a Mediator When I Retire! Not So Fast…*, Experience, Jan./Feb. 2018, at 17 (providing advice to retiring lawyers and judges on what they need to know if they are interested in becoming a mediator, including warnings about how the business of being a mediator is very different from practicing law).

Thomas E. Spahn, *Staying Active in ADR Proceedings After Retirement Raises Unique Issues*, Experience, Fall/Winter 2015, at 47 (listing issues that retiring lawyers need to consider if they want to do work in the field of mediation or arbitration, including whether they need to retain their licenses to practice law, whether they can participate in mediation or arbitration proceedings in

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Donna Saadati-Soto, *An Innovative Alternative or an Institutional Failure of Family Courts?: A Critical Perspective on the Experience of Latinx Families in an Anglo-Centric Mediation Process*, 31 Berkeley La Raza L.J. 25 (2021) (observing that Latinx families do not have the same cultural norms and family structures as White families, arguing that the traditional Anglo-European model of alternative dispute resolution fails Latinx people, and suggesting ways to make the mediation process more effective for Latinx families).

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Rochelle B. Grossman & Carolyn Moran Zack, *Should the Mediator Draft the Divorce Agreement?*, Fam. Advoc., Fall 2023,

at 40 (2023) (explaining ways to avoid the potential pitfalls that can occur when a mediator agrees to draft the divorce agreement at the end of mediation that results in an agreement between the parties).

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of child custody and visitation issues is mandatory, which found that attorney-mediators and judge-mediators believe the primary goal of mediation is to expedite the process of resolving disputes, while counselor-mediators also emphasize the importance of helping parents to develop interpersonal and relational skills that will enable them to make child-oriented decisions and manage future conflicts).

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Thomas Spahn, *Negotiation Ethics—What About "Little White Lies?"* 19 Experience, no. 3, 2009, at 44 (discussing how attorneys in negotiations should handle situations where they cannot give a truthful answer to a question about whether their client would be willing to settle for a certain amount without revealing strategic information that will impair the attorney's ability to try to negotiate a better outcome for the client).

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whether ethical rules permit attorneys to make deceptive statements about their client's objectives or demands as a bargaining tactic in negotiation or mediation, observing that the Model Rules of Professional Conduct provides that "settlement puffery" is not a misstatement of material fact, and arguing that this allows for the use of deceptive tactics that can harm the parties and their familial relationships).

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H. Lee Hetherington, *Planning for Settlement Negotiations: The Big Picture*, Fam. Advoc., Winter 2015, at 9 (explaining how to prepare for negotiating a family law dispute, such as a divorce or

child custody case, and explaining how preparation provides the information and negotiating principles to achieve a successful result).

Kathleen A. Hogan, *Lessons in Negotiation*, Fam. Advoc., Winter 2015, at 4 (observing that lessons about negotiation skills can come from many aspects of life, not just from law school or practicing law).

John Lande, *Family Lawyering with Planned Early Negotiation – How to Get Good Results for Clients and Make Money*, Fam. Advoc., Winter 2015, at 12 (providing advice for family law attorneys seeking to follow a planned early negotiation approach, which means planning and preparing to negotiate cases at the earliest appropriate time, based on interviews with attorneys who successfully implement this approach).

John Lande, *Overcoming Roadblocks to Reaching Settlement in Family Law Cases*, Fam. Advoc., Winter 2018, at 26 (discussing ways to overcome obstacles to settlement agreements, including cognitive biases and fears that perpetuate the adversarial culture of litigation).

Kenneth H. Waldron, *Game Theory and Its Application to Divorce Settlement Negotiations*, Fam. Advoc., Winter 2015, at 40 (explaining how game theory, a branch of mathematics that studies decision-making strategy in situations where one person's decisions affect decisions by others, can provide insight on divorce settlement negotiations).

Tess Wilkinson-Ryan & Deborah Small, *Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining*, 26 Law. & Ineq. 109 (2008) (reviewing empirical evidence about how men and women have different negotiating styles and tactics and considering how this may lead to worse outcomes for women in divorce settlement negotiations).

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Linda J. Ravdin, *How to Avoid Malpractice in the Negotiation and Drafting of Premarital and Postmarital Agreements*, Fam. Advoc., Fall 2017, at 34 (providing recommendations and warnings for attorneys about how to avoid legal malpractice when drafting premarital and postmarital agreements, including the importance of adequate financial disclosures, drafting mistakes to avoid, and what records to keep).

Linda Ravdin, Premarital Agreements: Drafting and Negotiation (3d ed. 2023) (covering key aspects of negotiating a premarital agreement).

Self-Represented Parties

Joseph W. Booth, *Successfully Negotiating with the Self-Represented Party*, Fam. Advoc., Winter 2015, at 36 (providing advice for attorneys attempting to negotiate a settlement between a client and a person without an attorney, including how to build rapport with the unrepresented litigant, how to set ground rules for the negotiation, and how to give credence to emotional issues without letting them make it impossible to reach an agreement).

Jim Hilbert, *Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in Family Court*, 43 Fam. L.Q. 545 (2009) (proposing that family courts should provide educational workshops on negotiation and settlement to help self-represented litigants better understand how to approach settlement negotiations).

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Jennifer R. Morra, *Going Private*, Fam. Advoc. Fall 2023, at 26 (explaining how the use of a private judge differs from arbitration, because private judges have the same authority as public judges and their decisions are subject to appeal through the court system, and describing the potential benefits of using a private judge versus using arbitration or the public judiciary).

Sheila Nagaraj, Comment, *The Marriage of Family Law and Private Judging in California*, 116 Yale L.J. 1615 (2007) (discussing the growing use of private judging in family law matters, explaining why critics of private judging believe it gives the parties too much

confidentiality and improperly limits the public's and the media's access to information, and proposing the adoption of regulations of private judging that would strike an appropriate balance between interests in privacy and disclosure).

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Kathleen M. Scanlon & Sumit Bisarya, *Private Judging by Consent*, Alternatives to the High Cost of Litig., May 2002, at 1 (providing a basic primer on private judging and a listing of relevant state statutes).

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