

Dispute Resolution and the Post-divorce Family:
Implications of a Paradigm Shift¹

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Abstract

Over the past two decades, there has been a paradigm shift in the way the legal system handles most family disputes – particularly disputes involving children. This paradigm shift has replaced the law-oriented and judge-focused model of adjudication with a more collaborative, interdisciplinary and forward-looking family dispute resolution regime. It has also transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system. This essay examines the elements of this paradigm shift in family dispute resolution and explores the opportunities and challenges it offers for families, children and the legal system.

¹ Portions of this essay are based on the Introduction to JANA SINGER & JANE MURPHY, RESOLVING FAMILY CONFLICTS (2008).

Over the past two decades, there has been a paradigm shift in the way the legal system handles most family disputes – particularly disputes involving children. This paradigm shift has replaced the law-oriented and judge-focused adversary model with a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime. It has also transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system. Although this “velvet revolution” in family conflict resolution offers many potential benefits for children and for parents, it also poses a number of challenges – both for families and for the judicial system. In this essay, I describe the contours of this paradigm shift and explain why I think it may be a double-edged sword.

I. Elements of the Paradigm Shift

The paradigm shift in family dispute resolution encompasses a number of related components. The first component is a profound skepticism about the value of traditional adversary procedures. An overriding theme of recent divorce reform efforts is that adversary processes are ill-suited for resolving disputes involving children.² Relatedly, social science suggests that children’s adjustment to divorce and separation depends significantly on their parents’ behavior during and after the separation process: the higher the levels of parental conflict to which children are exposed, the more negative the effects of family dissolution.³ Armed with these social science findings, academics and court reformers have argued that family courts should abandon the adversary paradigm, in

² See, e.g., Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006); 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 (2000).

³ ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 205 (1994).

favor of approaches that help parents manage their conflict and encourage them to develop positive post-divorce co-parenting relationships.⁴

Family courts across the country have embraced this insight and have adopted an array of non-adversary dispute resolution mechanisms designed to avoid adjudication of family cases.⁵ This rejection of adversary procedures has moved beyond divorce-related custody disputes -- where court-connected mediation is now the norm⁶ -- to the more ‘public’ arena of state-initiated child welfare proceedings, where family group conferencing and other problem-solving approaches have begun to supplant more traditional adjudicative models.⁷ An increasing number of family lawyers have also rejected the adversary paradigm, in favor of a “collaborative law” model under which lawyers pledge at the outset of their representation not to take a client’s case to trial.⁸ As two leading reformers recently stated, “in the last quarter century, the process of resolving legal family disputes has, both literally and metaphorically, moved from confrontation toward collaboration and from the courtroom to the conference room.”⁹

A second element of the paradigm shift in family dispute resolution is the belief that most family disputes are not discrete legal events, but ongoing social and emotional

⁴ See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 94 (2006).

⁵ These mechanisms include mediation, parenting coordination, high conflict couples counseling and hybrid mediation-evaluation processes. See Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 744- 46 (2007) (describing the development of court-based family dispute resolution services).

⁶ 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, 280 (2004) (“In many places, mediation has become the most common procedure for resolving family disputes in litigation.”)

⁷ See, e.g., Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216 (2004); Huntington, *supra* note 2.

⁸ See, e.g., Lande & Herman, *supra* note 6, at 282-84 (describing collaborative law model); Stu Webb, Note, *Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL L. 155 (2008); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L. J. 317 (2004).

⁹ Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006).

processes.¹⁰ This de-legalization of family disputes began with the shift from fault-based to no-fault divorce; more recently, it has become one of the basic tenets of the movement for unified family courts.¹¹ Thus recharacterized, family disputes call not for zealously legal approaches, but for interventions that are collaborative, holistic, and interdisciplinary, since these are the types of interventions most likely to address the families' underlying dysfunction and emotional needs.¹² Understanding family conflict as primarily a social and emotional process, rather than a legal event, also reduces the primacy of lawyers in handling these disputes and enhances the role of non-legal professionals in the family court system.

Third, this new understanding of family disputes has led to a reformulation of the goal of legal intervention in the family. Traditionally, legal intervention was a backward-looking process, designed primarily to assign blame and allocate rights; under the new paradigm, by contrast, judges assume the forward looking task of supervising a process of family reorganization. As Andrew Schepard has noted, family court judges no longer function primarily as fault-finders or rights adjudicators, but rather as ongoing conflict managers.¹³

The therapeutic jurisprudence movement embodies this forward-looking orientation. From a therapeutic perspective, legal intervention in the family strives not merely to resolve disputes, but to improve the material and psychological well being of

¹⁰ See Schepard, *supra* note 2, at 407.

¹¹ See, e.g., Andrew Schepard, Editorial Note, *Special Issue on Unified Family Courts: "The White Flame of Progress"*, 46 FAM. CT. REV. 217(2008) (describing unified family court movement); Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997) (explaining theoretical underpinnings of unified family courts).

¹² See Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L. Q. 333, 339-340 (2003).

¹³ Schepard, *supra* note 2, at 396.

individuals and families in conflict.¹⁴ Problem-solving judges embrace this therapeutic role by attempting to understand and address underlying family dynamics and by using judicial authority “to motivate individuals to accept needed services and to monitor their compliance and progress.”¹⁵

Fourth, to achieve these therapeutic goals, family courts have adopted systems that de-emphasize third-party dispute resolution in favor of capacity-building processes that seek to empower families to resolve their own conflicts. Consistent with this philosophy, jurisdictions across the country have instituted mandatory divorce-related parenting education and other programs designed to enhance litigants’ communication and problem-solving skills.¹⁶ Similarly, the American Law Institute’s Principles of the Law of Family Dissolution endorses individualized parenting plans as an alternative to judicial custody rulings and urges the adoption of court-based programs that facilitate these voluntary agreements.¹⁷ A number of jurisdictions have made such parenting plans a central feature of their divorce and custody regimes.¹⁸ More recently, a number of family courts have added “parenting coordinators” to their staffs; these quasi-judicial officials assist high conflict families to develop concrete parenting plans and to resolve ongoing parenting disputes that arise under these plans.¹⁹

¹⁴ See, e.g., Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055 (2003); Boldt & Singer, *supra* note 4, at 95-97 (discussing influence of therapeutic jurisprudence on problem-solving courts).

¹⁵ Winick, *supra* note 14, at 1055.

¹⁶ Andrew Shepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q.95 (1998).

¹⁷ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (A.L.I. 2002) (an overview of the principles can be found in chapter two).

¹⁸ See, e.g., Wesley Mack Bryant, Comment, *Solomon’s New Sword: Tennessee’s Parenting Plan, The Roles of Attorneys, and the Care Perspective*, 70 TENN. L. REV. 221 (2002) (describing Tennessee statute which requires, with limited exceptions, that parents of minor children must enter into a permanent parenting plan before receiving a divorce).

¹⁹ Christine A. Coates, Robin Deutsch, Hugh Starnes, Matthew J. Sullivan & BeaLisa Sydlik, *Parenting Coordination For High-Conflict Families*, 42 FAM. CT. REV.246, 247 (2004).

A fifth component of the paradigm shift is an increased emphasis on pre-dispute planning and preventive law.²⁰ Familiar examples include the increased acceptance and enforceability of prenuptial agreements and domestic partnership contracts.²¹ Parenting plans that include a mechanism for periodic review or a process for resolving future disagreements are similarly designed to minimize the need for future court intervention. More recently, a number of commentators have advocated a similar, preventive approach to determining, prior to a child's birth, the parental status of a non-biologically-related adult who anticipates caring for the child.²² Perhaps more ambitiously, a few states have considered broad-based pre-marriage education requirements as a prerequisite for obtaining a marriage license, and the federal government has invested substantial resources in public and private marriage education programs aimed especially at low income partners.²³ More generally, scholars and advocates of "preventive law" have urged individuals to use legal mechanisms to anticipate and plan for family transitions such as the formation and dissolution of intimate partnerships.²⁴ This emphasis on publicly-supervised private ordering creates a hybrid model that expands the role of family courts and lawyers beyond their traditional dispute-resolution function. It also extends the time frame during which families interact with the legal system.

²⁰ Preventive law has been defined as "a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties." Hon. Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*, 31 CATH. U. L. REV. 685, 692 (1995). It emphasizes the lawyer's role as a planner and endorses up-front private ordering as a method of structuring relationships and avoiding the costs of litigation. See Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997).

²¹ See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and how we think about Marriage*, 40 WM. & MARY L. R. 145 (1998).

²² Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J.L. & FAM. STUD. 1 (2003).

²³ M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 FUTURE OF CHILD. 139 (2005).

²⁴ See, e.g., Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999).

Taken together, these developments hold considerable promise for families. Non-adversary dispute resolution procedures offer families a mode of conflict resolution that is both more enduring and less destructive of ongoing relationships than adversary litigation.²⁵ Non-adversary processes are also more amenable to direct participation by family members – a particularly important feature, given the high percentage of family litigants who are not represented by counsel.²⁶ Similarly, judicial interventions that successfully build capacity and enhance problem-solving skills should allow families to avoid the financial and emotional drain of future encounters with the legal system. On a more theoretical level, the paradigm shift in family dispute resolution appropriately rejects the mythology of the private family – a mythology that characterizes “normal” families as fully autonomous and self-sufficient and that labels families that seek – or are subject to -- state intervention as dysfunctional or inadequate. The new paradigm recognizes instead that family and state governance are intertwined and that most families need public support in order to function effectively.

II. Concerns and Cautionary Notes

Despite the positive potential of these developments, the paradigm shift in family dispute resolution also raises a number of concerns. One concern highlights the tension between the ideology of post-divorce co-parenting and the clean-break philosophy that underlies no-fault divorce. The new dispute resolution paradigm is committed to shared parenting after divorce or separation, based on the core premise that while divorce may

²⁵ See generally EMERY, *supra* note 3.

²⁶ See generally, Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 107-117 (2001).

terminate the spousal bond, it does not dissolve the parenting partnership.²⁷ In popular parlance, “parents are forever.”²⁸ This commitment to shared parenting is reflected not only in the increasingly common statutory preference for post-divorce custody arrangements that facilitate close and continuing contact with both parents, but also in the parenting arrangements actually produced.²⁹ Joint physical custody arrangements are much more common today than in the past – accounting for approximately 15% of all custody outcomes in a recent empirical study.³⁰ Joint legal custody is considerably more prevalent; it gives divorced parents equal and shared legal authority to make major decisions about the children’s lives, regardless of where the children live. Such equal decision-making arrangements are now the norm in many jurisdictions.³¹ For example, a recent study of child custody outcomes in North Carolina indicated that almost 70% of all custody resolutions included joint legal custody, as did over 90% of all mediated custody agreements.³² Other studies show similar trends. Even the ALI Principles contain a

²⁷ See, e.g., Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 770 (1985) (“The cooperative custody system symbolizes the inescapable reality that parents are forever, even if marriages are not.”); SHIRLEY THOMAS, PARENTS ARE FOREVER: A STEP-BY-STEP GUIDE TO BECOMING SUCCESSFUL COPARENTS AFTER DIVORCE (1996). For an early articulation of this philosophy, see Meyer Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, 22 FAM. COORDINATOR 63, 64 (1973).

²⁸ See THOMAS, *supra* note 27.

²⁹ See Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1367 (2005) (noting that enactment of statutory provisions that encouraging shared parenting in Oregon increased joint legal custody awards by 30%).

³⁰ Suzanne Reynolds, Catherine T. Harris & Ralph A. Peeples, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1667 (2007); see ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 164-67 (1992); *But cf.* Ralph A. Peeples, Suzanne Reynolds & Catherine T. Harris, *It’s the Conflict, Stupid: An Empirical Study of Factors That Inhibit Successful Mediation in High-Conflict Custody Cases*, 43 WAKE FOREST L. REV. 505, 516 (2008) (reporting results of study finding that mothers received primary physical custody in 86% of mediated outcomes, 72.6% of lawyer-negotiated outcomes and 66% of litigated outcomes).

³¹ Theresa Glennon, *Still Partners? Examining the Consequences of Post-dissolution Parenting*, 41 FAM. L. Q. 105, 114-115 (2007); see, e.g., Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 422 (noting that joint legal custody has “increased steadily since the early 1980s to the point where today it is the most common outcome after divorce in many states.”)

³² Reynolds, *supra* note 30, at 1674-75.

presumption in favor of joint legal custody³³ -- a presumption that has been largely overlooked by commentators who have focused instead on the Principles' endorsement of past caretaking functions as a basis for allocating (physical) custodial responsibility.³⁴

This commitment to shared post-divorce parenting contrasts sharply with the clean break philosophy that governs the post-divorce relationship of ex-spouses and the financial consequences of divorce. Under the prevailing economic clean break model, “divorced persons and cohabitants who part ways are entirely separate individuals, unencumbered by ongoing legal or financial relationships, free to build new lives and make a fresh start.”³⁵ In particular, alimony and other forms of post-divorce income sharing are dis-favored, and economic disadvantages that arise – or are perceived to arise – from post-separation events are irrelevant to the parties' ongoing financial relationship.³⁶ Individual autonomy and the opportunity to make a fresh start are the overriding values in the economic and emotional spheres. By contrast, post-divorce co-parenting requires that divorced and separated individuals remain deeply involved in each other's lives. A commitment to shared post-divorced parenting also limits the autonomy and decision-making authority of former spouses, not just with respect to children, but with respect to other aspects of their lives, particularly for residential parents. This largely unacknowledged tension sends a decidedly mixed message to divorcing and separating parents – your emotional and economic partnership is over, but your parenting relationship remains intact.

³³ The Principles use the term “decision-making responsibility” in place of the more traditional designation of legal custody. *See* Principles, *supra* note 17.

³⁴ *Id.* (‘Allocation of Custodial Responsibility’ §2.08(1)).

³⁵ Glennon, *supra* note 31, at 105.

³⁶ *Id.* at 105-106.

Moreover, the consequences of this mixed message are highly gendered. As the primary caretakers of children –both before and after divorce –women are likely to be doubly disadvantaged by the disconnect between post-divorce economic norms and post-divorce parenting expectations – first by the dissolution of the couple’s economic partnership and then by the decision-making restrictions that accompany judicially–mandated post-divorce co-parenting.³⁷ Relocation law and practice illustrates this gendered impact.³⁸ Post-divorce relocation disputes have risen dramatically in recent years.³⁹ In many states, a divorced or separated parent who seeks to change a child’s principal residence must first notify the other parent.⁴⁰ If the non-residential parent does not consent to the move, the residential parent must obtain judicial permission to relocate.⁴¹ Often that permission is not forthcoming or is conditioned on the requesting parent relinquishing primary residential custody.⁴² Significantly, while judges are increasingly likely to restrict a residential parent’s ability to relocate, they rarely restrict the mobility of a non-residential parent -- even one with joint legal custody and even though the effect on a child of such a move may be just as dramatic and just as negative. Nor do most courts consider the possibility of a non-residential parent following a residential parent to a new locale when evaluating the residential parent’s request to

³⁷ By contrast, primary breadwinners, who are predominantly men, receive the benefits of both models – freedom to make a clean economic break, along with the opportunity to be an involved post-divorce parent, even if they undertook minimal childcare responsibilities during marriage. See Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit*, 31 FAM. L.Q. 119 (1997).

³⁸ Merle H. Weiner, *Inertia and Inequality, Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1751 (2007) (noting that current relocation doctrine “perpetuates gender stereotypes” and “is contrary to courts’ express commitment to gender equality”).

³⁹ Glennon, *supra* note 32, at 118.

⁴⁰ *Id.* at 119.

⁴¹ *Id.*

⁴² *Id.* at 123-25 (reporting on results of a study of reported cases between 2001-2006 that courts granted permission to relocate in fewer than half of the cases in which a final decision was made).

move.⁴³ Even when a court permits a residential parent to relocate, the court may allocate to the relocating parent some or all of the additional costs for the non-relocating parent to visit or otherwise stay in touch with the children.⁴⁴ By contrast, courts that deny a residential parent's request to relocate do not compensate that parent for lost economic opportunities.⁴⁵

Moreover, joint custody arrangements – both legal and physical -- require parents who are able to cooperate, plan and make decisions together.⁴⁶ This may be an unrealistic expectation for a significant percentage of post-divorce families, even with the assistance of a parent coordinator – the most recent addition to the dispute resolution continuum in many family courts.⁴⁷ Most experts believe that the benefits of joint custody are attenuated - and may be outweighed by the potential for harm - when parents are hostile towards one another or simply cannot get along.⁴⁸ Moreover, several studies suggest that joint custody arrangements are particularly likely to change over time.⁴⁹ To the extent that these changes exacerbate conflict or require ongoing court intervention, the harm to children may outweigh any benefits associated with legally mandated shared custody.

A dogged allegiance to post-divorce co-parenting may also conflict with our commitment to family privacy. Principles of constitutional law, as well as traditional family law doctrine, place a high value on parental autonomy and are wary about ongoing

⁴³ See Weiner, *supra* note 38.

⁴⁴ Glennon, *supra* note 32, at 107.

⁴⁵ *Id.* at 107, 121.

⁴⁶ ROBERT E. EMERY, THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE 176 (2004); see Buchanan & Jahromi, *supra* note 31, at 425 (“Joint custody, more so than sole custody, requires ‘a lot of parental cooperation, emotional restraint, and patience for logistical complications.’”)

⁴⁷ See generally, Coates, Deutsch, Starnes, Sullivan & Sydlik, *supra* note 19.

⁴⁸ Buchanan & Jahromi, *supra* note 31, at 427-28; Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 419, 427 (1995).

⁴⁹ See, e.g., MACCOBY & MNOOKIN, *supra* note 30, at 197.

state involvement in family life.⁵⁰ Parents who are subject to – or repeatedly seek – court oversight of their parenting relationship risk jeopardizing this commitment to family autonomy. When family disputes are viewed not as discrete legal events, but as opportunities for therapeutic, holistic, and interdisciplinary interventions, such ongoing state involvement in family life becomes disconcertingly easy to justify.

Another area of concern focuses on the institutional competence of courts. Although families may benefit from the capacity-building and problem-solving approaches embraced by the new paradigm, it is unclear whether courts are competent to provide these services. Court-based procedures have historically been designed to determine facts and enforce norms. The more comprehensive and forward-looking tasks envisioned by the new paradigm call for very different judicial skill sets and institutional capabilities. Even a restructured family court may be incapable of achieving the formidable task of “improving the well-being and functioning of families and children.”⁵¹

Moreover, asking a court system to take on these tasks may detract from its fundamental role as a forum for fair and authoritative dispute resolution.⁵² As several commentators have noted, unified family courts share many of the goals and ambitions of the turn-of-the-century juvenile court movement, which endorsed therapeutic justice, holistic intervention and an expanded role for the judiciary.⁵³ But these earlier, seemingly progressive reforms became increasingly oppressive for the children involved in the juvenile court system, and the Supreme Court eventually invalidated many of them as

⁵⁰ *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000).

⁵¹ Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America’s Family Justice System*, 46 FAM. CT. REV. 230, 231 (2008).

⁵² See Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm With Caution*, 40 FAM. CT. REV. 435, 441 (2002).

⁵³ *Id.*; see Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259-69 (2008).

violations of individual due process rights.⁵⁴ Critics suggest that the “one judge— one family” policy that underlies the new dispute-resolution paradigm may raise similar due process concerns.⁵⁵

Concentrating treatment resources in the court system may also detract from their availability in the wider community and may create an undesirable shift from community to court-based interventions. Such a shift may lead state authorities to file cases, and individuals to submit to the court’s jurisdiction, in order to access services unavailable elsewhere, creating a vicious cycle of dependence on court-connected intervention.⁵⁶

Burgeoning family court dockets, coupled with declining state resources, present a final set of concerns. To implement the new paradigm effectively, court systems will need to recruit and train additional judicial and non-judicial staff. These include mediators, parent educators, custody evaluators, parent coordinators and other quasi-judicial officers. But resources available for family courts are declining, while their caseloads continue to grow – due, in part, to increases in post-divorce parenting disputes.⁵⁷ As a result, scarce resources are spread even more thinly and courts may have difficulty meeting both their basic adjudicative functions and the broader, more ambitious goals of the new family conflict resolution paradigm.

Conclusion

So what lessons do I take from these concerns? Certainly not that they merit a rejection of the new paradigm or a return to a full-fledged adversary regime. However,

⁵⁴ Geraghty & Mlyniec, *supra* note 52.

⁵⁵ *Id.* at 436.

⁵⁶ Spinak, *supra* note 53, at 268.

⁵⁷ COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS 2005, 106-123, 125-130, 153-197 (2005) (reporting caseloads for State Courts); COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 35-36 (Richard Schauffler et al., ed.) (reporting domestic relations case loads in state courts).

they do suggest that family court reformers should be mindful of the costs and unintended consequences of even the most well-intentioned court interventions. Thus, in addition to “fitting the forum to the family fuss,”⁵⁸ reformers should make sure that the *resolution* fits both the family and the judicial system. Post-divorce co-parenting is not for everyone; nor is it the only way of ensuring that children maintain a meaningful relationship with both parents. In particular, joint legal custody may be contraindicated where parents have exhausted the dispute resolution continuum and are still unable to reach an agreement. In other words, parents who insist on adjudication of their initial parenting dispute are unlikely to be good candidates for future joint decision-making. Developing a more disengaged “parallel parenting” strategy may be both more realistic and more beneficial for them and their children.⁵⁹

Finally, proponents of the new paradigm might consider “divorcing” some of the services on the family dispute resolution continuum from the court system. A promising model may be a recent reform effort in Australia that introduced community-based “family relationship centres,” whose mission is to direct parenting disagreements away from the court system entirely and into community based institutions.⁶⁰ Those of us who went to law school “to make a difference in people’s lives,” often look first to court-based solutions to social problems. But sometimes the most effective solutions may lie outside our jurisdiction.

⁵⁸ 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).

⁵⁹ See PHILIP M. STAHL, PARENTING AFTER DIVORCE: RESOLVING CONFLICTS AND MEETING YOUR CHILDREN’S NEEDS 31-44 (2d ed. 2007); Phillip M. Stahl, *Cooperative Parenting or Parallel Parenting*, <http://www.parentingafterdivorce.com/articles/parenting.html> (last visited Feb. 20, 2009).

⁶⁰ Patrick Parkinson, *Keeping in Contact: The Role of Family Relationship Centres in Australia*, 18 CHILD & FAM. L. Q. 157 (2006).