

---

---

# MARYLAND LAW REVIEW

## ENDNOTES

---

---

VOLUME 75

2016

---

---

### REFLECTIONS ON “INNOVATIONS IN FAMILY DISPUTE RESOLUTION”

DEBORAH THOMPSON EISENBERG\*

Over the past several decades, our conception of “family” has dramatically changed, and so have judicial approaches to resolving disputes about the creation and dissolution of families. The traditional adversarial legal system—in which separating couples bitterly litigate in *Kramer-vs.-Kramer*<sup>1</sup> fashion and judges impose decisions—has given way to experimentation with other models. Processes such as mediation,<sup>2</sup> collaborative law,<sup>3</sup> restorative justice,<sup>4</sup> and other community-based

---

© 2016 Deborah Thompson Eisenberg.

\*Professor of Law and Faculty Director, Center for Dispute Resolution, University of Maryland Francis King Carey School of Law.

1. *KRAMER VS. KRAMER* (Columbia Pictures 1979) (movie about a custody battle, starring Dustin Hoffman and Meryl Streep).

2. Although the definition of mediation varies, a common definition developed by the American Arbitration Association, American Bar Association, and Association for Conflict Resolution provides: “Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.” AM. ARBITRATION ASS’N, AM. BAR ASS’N, & ASS’N FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf).

3. In a collaborative law process, the parties agree that they and their counsel will work cooperatively to share information and negotiate a resolution. *See* MD. ADMIN. OFFICE OF THE COURTS & INST. FOR GOV. SERV. & RES., THE CURRENT AND PROSPECTIVE USE OF COLLABORATIVE LAW IN MARYLAND vi (Sept. 2013). If an agreement is not reached, the collaborative attorneys must withdraw and the parties need to hire new counsel to litigate. *Id.*

4. Restorative justice is commonly defined as “a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is

approaches offer individuals greater voice and control over decisions that will profoundly affect their lives, but also present new questions for courts, legal professionals, and policymakers.

On November 13, 2015, the University of Maryland Francis King Carey School of Law hosted a symposium that brought together more than one hundred legal scholars, dispute resolution practitioners, family law attorneys, community programs, court alternative dispute resolution (“ADR”) program administrators, and law students to explore the promise and challenges of these innovations in family dispute resolution. Three major themes emerged from the discussion: 1) the need for, and promise of, new models for addressing family law issues; 2) the need for new interdisciplinary partnerships to support those models; and 3) the need to expand the scope of training for lawyers navigating the broad range of family dispute resolution options.<sup>5</sup>

*Theme 1: The Need for, and Promise of, New Models for Addressing Family Law Issues*

The symposium highlighted that the one-size-fits-all, adversarial legal approach to family disputes fails to meet the needs of many families. For most people, navigating the judicial process to obtain a divorce or to resolve custody or property matters can be expensive and bewildering and exacerbate tension and conflict. Most lack access to legal counsel. As Professors Jana Singer and Jane Murphy describe in their new book, *Divorced from Reality: Rethinking Family Dispute Resolution*, “a majority of today’s disputing families must navigate a complicated and tiered judicial system without adequate access to legal information or advice—a state of affairs that jeopardizes the ability of today’s dispute resolution regime to achieve durable or just results for many families, particularly families without substantial means.”<sup>6</sup> Those who lack counsel in the traditional legal system run the risk of getting railroaded into second-class justice. At the same time, the informality of self-determined processes like mediation may result in power imbalances and unjust outcomes if individuals do not understand their legal rights and options before agreeing to settlements.

One answer to the problem is to “lawyer up” and ensure that all parties in family law cases have access to free legal counsel. Some advocate for a “civil *Gideon*”—the right of individuals to have free, court-appointed counsel when a fundamental right, such as the custody of a child, is at

---

to be done to right the wrong.” RESTORATIVE JUSTICE AND FAMILY VIOLENCE 4 (Heather Strang & John Braithwaite eds., 2002).

5. Jana Singer, Professor, Maryland Carey Law, Remarks at the Innovations in Family Dispute Resolution Symposium (Nov. 13, 2015) (summarizing themes that emerged from the symposium).

6. JANE C. MURPHY & JANA B. SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 2 (2015).

stake.<sup>7</sup> Another option is limited scope or unbundled legal services. These could be pro se assistance projects, in which lawyers provide legal information and assist parties in preparing legal documents. Alternatively, lawyers can represent parties for a discrete purpose, such as preparing for or reviewing agreements developed at a mediation session.<sup>8</sup>

Another increasingly popular option is to replace the combative court process with dialogue-based, problem-solving processes.<sup>9</sup> Family law matters may involve profound feelings like love, betrayal, and guilt. In a traditional court hearing, the dispute must be filtered through the lens of the law, with little to no outlet for emotional expression. One of the highlights of the symposium was a compelling lunchtime keynote by long-time Philadelphia family attorney Margaret Klaw, who discussed snippets from her memoir, whose title says it all: *Keeping it Civil: The Case of the Pre-nup and the Porsche and Other True Accounts from the Files of a Family Lawyer*.<sup>10</sup> In her book, Ms. Klaw shares a story about a divorcing couple who could not settle their case—despite counsels’ persistent best efforts—because the spouses both had strong emotional attachment to, and wanted possession of, a painting. Rather than simply sending the case directly to trial, the presiding judge invited the parties and counsel into chambers. The judge asked each of the parties to tell her what the painting meant to them and why they felt so strongly about keeping it. The judge listened intently, told them “she understood what an important decision this was, and that she trusted them to figure it out.” The judge then scheduled a trial in the event they could not agree. Ms. Klaw believes that the case finally settled “because the judge showed [the parties] such respect by acknowledging that this was a difficult decision for them. I think they felt heard. And that is so incredibly far from the typical family court experience.”<sup>11</sup>

Although not a mediation, the judge’s conversation with the parties about the painting was similar to what effective mediators do: ask the

---

7. The term “civil *Gideon*” derives from *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the United States Supreme Court held that an indigent individual accused of a crime must have counsel appointed to represent him before the state deprives him of his liberty. *Id.* at 342–43. The “Civil *Gideon*” movement argues that the risk of losing the right to one’s child is at least, if not more, important than spending a few days in jail. See Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 73 (2007). But see Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106 (2013) (arguing that “civil *Gideon*” adopts a lawyer-centric approach to family law, which may cause more harm to families).

8. SINGER & MURPHY, *supra* note 6, at 140–44 (describing new lawyering models for family law disputes).

9. See Oakley & Eckstein, *What is the Collaborative Process?*, <http://www.oakleyeckstein.com/collaborative.html> (last visited Feb. 21, 2016) (describing the collaborative law process).

10. MARGARET KLAW, *KEEPING IT CIVIL: THE CASE OF THE PRE-NUP AND THE PORSCHE AND OTHER TRUE ACCOUNTS FROM THE FILES OF A FAMILY LAWYER* (2013).

11. *Id.* at 153–54.

parties to express what is most important to them, even if irrelevant in the eyes of the law, listen to the parties without judgment, and entrust the parties with developing self-determined solutions. In mediation, a trained third-party neutral facilitates a conversation and negotiation between the parties so they may develop a mutually satisfactory agreement, if they wish. Many state courts mandate mediation for child access cases.<sup>12</sup> At the symposium, Dr. Lorig Charkoudian presented ground-breaking research conducted for the Maryland Judiciary about “what works” in child custody mediations.<sup>13</sup> The Maryland study used behavior observation coding during actual mediations and regression analysis to control for other variables that could impact the results. The Maryland study provides rigorous empirical support that certain mediator techniques—such as reflections and eliciting the parties’ ideas for settlement—lead to positive shifts in the couple’s attitudes about their ability to work together and help them to reach personalized settlement agreements.<sup>14</sup>

Some separating couples do not want their divorce to be a drawn-out, nasty legal battle. They simply want to arrive at a durable agreement that meets both parties’ interests and provides a template for moving forward. Collaborative law provides a team-based process in which the parties hire attorneys, financial experts, and other counselors as needed for the specific purpose of hammering out a mutually satisfactory out-of-court resolution. If they cannot reach agreement, the parties must hire new counsel to represent them in court, and they cannot use materials developed during the collaborative process in any future litigation.<sup>15</sup>

In addition to court-annexed mediation and collaborative law, community-based models provide interdisciplinary services to families in one place. One such model is the Center for Out-of-Court Divorce, a non-profit organization in Colorado.<sup>16</sup> The Center was developed as a pilot program at the University of Denver to provide a holistic, out-of-court process for separating parents.<sup>17</sup> The Center provides families with legal

---

12. For example, Maryland law mandates mediation for child custody and visitation disputes in all cases in which the court deems that mediation may be “appropriate and likely to be beneficial to the parties or the child.” MD. R. 9-205(b)(3).

13. Lorig Charkoudian, Executive Director, Community Mediation Maryland, Remarks at the Innovations in Family Dispute Resolution Symposium (Nov. 13, 2015).

14. See LORIG CHARKOUDIAN ET AL., MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, WHAT WORKS IN CHILD ACCESS MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON CUSTODY CASES AND PARENTS’ ABILITY TO WORK TOGETHER 8 (2014), <http://www.marylandadrresearch.org/publications> (follow “download full PDF” hyperlink under “What Works in Child Access Mediation”).

15. See Maryland Uniform Collaborative Law Act, MD. CODE ANN., Cts. & Jud. Proc. §§ 3-2001, 3-2009 (LexisNexis 2014).

16. See THE CENTER FOR OUT-OF-COURT DIVORCE, <http://centerforoutofcourtdivorce.org/> (last visited Mar. 9, 2016).

17. See G.M. Filisko, *Model Program Brings Holistic Solutions to Divorce*, A.B.A. J. (Feb. 1, 2015),

services, mediation, therapy, counseling, coaching, co-parenting planning, financial education, document drafting, support groups, and more.<sup>18</sup>

The Center conceptualizes divorce not as a legal battle but as a “transition” period or structural reorganization for families.<sup>19</sup> Its mission is to “empower parents by helping them avoid a court process that is often lengthy, expensive and conflicted in order to support the long-term well-being of families.”<sup>20</sup> If the parties reach an agreement, a volunteer judge comes to the Center to hold a final hearing with the parties around a conference table.<sup>21</sup> Judge Robert Hyatt, one of the Center’s volunteers, believes that the agreements reached at the Center tend to be more personalized, durable agreements.<sup>22</sup> He thinks that parties who use the Center rather than traditional legal processes are less likely to have post-decree conflicts and litigation.<sup>23</sup> Professors Singer and Murphy also argue that courts may not be the best places to resolve family disputes, and urge greater experimentation with community-based models.<sup>24</sup>

Of course, family law encompasses more than the reconfiguration of families at the end of a marriage. Family law involves the creation and modification of families through adoption contracts and other deals. A panel at the symposium explored the role of contracts and more informal, non-binding deals, in creating what Professor Martha Ertman calls “Plan B” families. In her insightful book, *Love’s Promises: How Formal & Informal Contracts Shape All Kinds of Families*,<sup>25</sup> Professor Ertman offers us a language, human context, and analytical background for thinking about how the legal system should adapt to our society’s broadening conception of family. She writes: “‘Plan A’ is what’s common: more than nine out of ten kids are raised by their genetic parents, marriage is the most common family form, and most people are straight. But ‘common’ is not the same as

---

[http://www.abajournal.com/magazine/article/model\\_program\\_brings\\_holistic\\_solutions\\_to\\_divorce](http://www.abajournal.com/magazine/article/model_program_brings_holistic_solutions_to_divorce).

18. See THE CENTER FOR OUT-OF-COURT DIVORCE, <http://centerforoutofcourtdivorce.org/services/> (last visited Mar. 9, 2016).

19. See THE CENTER FOR OUT-OF-COURT DIVORCE, <http://centerforoutofcourtdivorce.org/services/planning-for-transition/> (describing divorce services as “planning for transition” and providing “comprehensive transition support program”) (last visited Mar. 9, 2016).

20. See *supra* note 16.

21. Filisko, *supra* note 17

22. *Id.* (“The best thing about the plans is that you can tell—unlike lots of the parenting plans you see in court—that these people have put a lot of thought into them. I’ve been really impressed with the thoroughness and the details of how they’re going to deal with their kids and each other going forward.” (quoting Judge Hyatt)).

23. *Id.*

24. Jane C. Murphy & Jana B. Singer, *Moving Family Dispute Resolution from the Court System to the Community*, 75 MD. L. REV. ENDNOTES 10 (2016).

25. MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL & INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015).

better.”<sup>26</sup> Increasingly, families are also Plan B, which “covers a wide variety of uncommon families, from repro tech and adoption to cohabitation.”<sup>27</sup> Using “Plan B,” rather than “nontraditional” or “unconventional,” replaces “disdain or condescension with a matter-of-fact, morally neutral claim that society and people individually are better off when we can choose when, how, and with whom to have a family.”<sup>28</sup>

The final panel at the symposium examined the arguments for and against the use of restorative justice to address domestic violence. Building on her book, *A Troubled Marriage: Domestic Violence and the Legal System*,<sup>29</sup> Professor Leigh Goodmark explained how the traditional criminal justice system fails many victims of intimate partner violence and suggested that restorative models may provide an empowering option in some cases.<sup>30</sup> Dr. Lauren Abramson, Executive Director of the Baltimore Community Conferencing Center, described the philosophy of restorative justice: that those most impacted by an offense play a role in devising a plan to repair the harm.<sup>31</sup> In a restorative justice conference, the offender and those impacted by the offense, together with support people, come together in a circle with a neutral facilitator to discuss what happened, who was impacted, how they were impacted, and what can be done to repair the harm.<sup>32</sup> Courts are using restorative processes as diversionary alternatives in criminal and juvenile cases.<sup>33</sup> In cases of domestic violence, restorative justice could be a supplement to traditional court process in cases in which partners will continue to interact and parent. As Professor Goodmark writes, “[R]estorative justice has the potential to increase victim participation, voice, and validation, which could help to restore the victim to her place within the community. Increasing victim voice and the

---

26. *Id.* at xiv.

27. *Id.*

28. *Id.*

29. LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM*, 169–73 (2012).

30. *Id.*

31. Lauren Abramson, Executive Director, Baltimore Community Conferencing Center, Remarks at the Innovations in Family Dispute Resolution Symposium (Nov. 13, 2015); *see also* COMMUNITY CONFERENCING CENTER, *About Us*, [http://www.communityconferencing.org/index.php/about/staff\\_board/](http://www.communityconferencing.org/index.php/about/staff_board/) (last visited Feb. 21, 2016).

32. For a sample restorative conference facilitator script, see [https://www.iirp.edu/article\\_detail.php?article\\_id=NjYy](https://www.iirp.edu/article_detail.php?article_id=NjYy) (last updated Apr. 20, 2010) (including questions that explore what happened, perceptions about the incident, how individuals have been impacted, and what can be done to repair the harm).

33. *See, e.g.*, ADMINISTRATIVE OFFICE OF THE COURTS, *ALTERNATIVE DISPUTE RESOLUTION LANDSCAPE: AN OVERVIEW OF ADR IN THE MARYLAND COURT SYSTEM* 81–83 (2014), [www.marylandresearch.org/landscape/county/baltimore-city](http://www.marylandresearch.org/landscape/county/baltimore-city) (describing the use of community conferencing for juvenile cases in Baltimore City courts).

victim's role within the process may also help to right power imbalances between the victim and offender."<sup>34</sup>

*Theme 2: Family Law Innovations Require New Interdisciplinary Partnerships*

Family dispute resolution innovations invite and require the expertise of many different professions to support the needs of families as they form and reorganize. The traditional legal regime for family cases was developed by lawyers and requires lawyers to navigate it. Judges and attorneys will always be necessary and important in family law matters, but the legal profession cannot serve the multi-faceted needs of all families as they experience transitions or strains. Mediators, neutral facilitators, child psychologists, financial experts, social workers and other professions provide unique, critical services that complement and supplement the expertise of the legally trained. Processes like mediation and restorative justice also encourage us to trust in the wisdom of communities and individuals in devising their own self-determined outcomes and strategies for healing after conflicts, and even violence.

As exemplified by the Center for Out-of-Court Divorce, community conferencing, and other models discussed at the symposium, families are better served when the legal profession does not operate in a silo. As innovative processes continue to emerge and evolve, partnerships between and among law schools, the judiciary and bar, ADR practitioners, community organizations, and other professions will help us understand the benefits and challenges of new models of family dispute resolution, and better serve the needs of all families during periods of legal transition and conflict.

*Theme 3: Implications for Family Lawyers*

As new models for the resolution of family conflicts emerge, attorneys will need additional skills to advise clients about the benefits and drawbacks of various dispute resolution options and to navigate non-litigation processes. Most of us want our lawyers to be zealous, competent, and assertive advocates when they represent us in an adversarial court process. Most family law cases, however, are not resolved through a contested trial.<sup>35</sup> They are settled through negotiation with the opposing side, or through an alternative process like mediation. In addition to traditional litigation skills, lawyers need a broader range of negotiation,

---

34. GOODMARK, *supra* note 29, at 169.

35. SHEILA M. GUTMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 107 (2004) ("It is reported that well over 90 percent (the figure has been as high as 98 percent) of all divorce cases are resolved without a trial."); Rome Neal, *The Divorce Process*, CBSNEWS (Nov. 4, 2002), [cbsnews.com/news/the-divorce-process/](http://cbsnews.com/news/the-divorce-process/) (stating that about 95% of family law cases are resolved by means other than litigation).

---

---

conflict resolution, and interprofessional skills that are adaptable based on the needs of their clients and the forum in which they are practicing.

I close with a passage from family-attorney Margaret Klaw's book, which aptly captures the spirit of the symposium, and provides reassurance that family lawyers will always play an essential role in navigating the changing landscape of family dispute resolution. She writes:

[T]here is a strong and growing interest in personally taking charge of the process, in removing [family] disputes from the courts, to mediate, to collaborate, to handle them without lawyers. The do-it-yourself generation wants to take care of its divorces, just as it wants to grow its own vegetables. There is now the notion of the "good divorce," along with the concept that you can still be a family postdivorce, just a reconfigured one; that you can celebrate holidays together and be friends with each other's new spouses, that divorce doesn't have to be war, and that it may even be worthy of marking as a life-cycle event with the ritual of a ceremony.

But no matter how the law and the practice evolve, driving it all will still be the powerful engine of human emotion. . . . And we family lawyers will be there, advising, advocating, and negotiating the timeless passions of the human heart.<sup>36</sup>

---

36. Klaw, *supra* note 10, at 252–53.