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RESOLVING FAMILY CONFLICTS

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Resolving Family Conflicts

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Series Preface

The family is a central, even an iconic, institution of society. It is the quintessentially private space said, by Christopher Lasch, to be a 'haven in a heartless world'. The meanings of 'family' are not constant, but contingent and often ambiguous. The role of the law in relation to the family also shifts; there is increasing emphasis on alternative dispute-resolving mechanisms and on finding new ways of regulation. Shifts have been detected (by Simon Roberts among others) from 'command' to 'inducement', but it is not a one-way process and 'command' may once again be in the ascendancy as the state grapples with family recalcitrance on such issues as child support and contact (visitation) arrangements. Family law once meant little more than divorce and its (largely) economic consequences. The scope of the subject has now broadened to embrace a complex of relationships. The 'family of law' now extends to the gay, the transgendered, 'beyond conjugality', perhaps towards friendship. It meets new challenges with domestic violence and child abuse. It has had to respond to new demands – from women for more equal norms, from the gay community for the right to marry, from children (or their advocates) for rights unheard of when children were conveniently parcelled as items of property. The reproduction revolution has forced family law to confront the meaning of parentage; no longer can we cling to seeing 'mother' and 'father' in unproblematic terms. Nor is family law any longer a 'discrete entity'; it now interfaces with medical law, criminal law, housing law and so on.

This series, containing volumes on marriage and other relationships (and not just cohabitation), on the parent–child relationship, on domestic violence, on methods of resolving family conflict and on pluralism within family law, reflects these tensions, conflicts and interfaces.

Each volume in the series contains leading and more out-of-the-way essays culled from a variety of sources. It is my belief, as also of the editors of individual volumes, that an understanding of family law requires us to go beyond conventional, orthodox legal literature – not that it is not relevant – and use is made of it. But to understand the context and the issues, it is necessary to reach beyond to specialist journals and to literature found in sociology, social administration, politics, philosophy, economics, psychology, history and so on. The value of these volumes lies in their coverage as they offer access to materials in a convenient form which will not necessarily be available to students of family law.

They also offer learned and insightful introductions, essays of value in their own right and focused bibliographies to assist the pursuit of further study and research. Together they constitute a library of the best contemporary family law scholarship and an opportunity to explore the highways and byways of the subject. The volumes will be valuable to scholars (and students) of a range of disciplines, not just those who confront family law within a law curriculum, and it is hoped they will stimulate further family law scholarship.

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Introduction

Over the past two decades, virtually all areas of family law have undergone major doctrinal and theoretical changes – from the definition of marriage, to the financial and parenting consequences of divorce, to the legal construction of parenthood. Family law scholars have analysed and critiqued these changes from a variety of perspectives. But scholars have paid less attention to another important set of family law developments: changes that signal a paradigm shift in the way that most family legal conflicts are resolved. These changes in family conflict resolution have transformed the practice of family law and fundamentally altered the way in which disputing families interact with the legal system. Moreover, the changes have important implications for the way that family law is understood and taught. Our objective in this volume is to examine the contours of this paradigm shift in family conflict resolution and explore its implications for family law practice and scholarship. In this Introduction, we describe the elements of the paradigm shift and sound some cautionary notes. We also highlight the major themes of the essays and excerpts that follow.

I. Elements of the Paradigm Shift

A. Rejection of Adversary Procedures

The paradigm shift explored in this volume encompasses a number of related components. The first component is a profound scepticism about the value of traditional adversary procedures. An overriding theme of recent family law reform efforts is that adversary processes are ill-suited to resolving disputes involving children. Similarly, social science research suggests that children's adjustment to divorce depends significantly on their parents' behaviour during and after the separation process: the higher the level of parental conflict to which children are exposed, the more negative the effects of family dissolution (Emery, 1994, p. 205; see also Chapter 9 herein). Armed with these social science findings, court reformers have argued that family courts should abandon the adversary paradigm, in favour of approaches that help parents manage their conflict and encourage them to develop positive post-divorce co-parenting relationships. Gregory Firestone and Janet Weinstein (Chapter 1) detail the aspects of the adversary model that disserve the interests of children and families. Adversary processes, they contend, 'legalize' complex family relationships and disempower parents and other participants. Divorce litigation is expensive and produces delays that conflict with a child's sense of time. The zealous advocacy demanded of lawyers unnecessarily exacerbates family conflict and improperly privileges individual rights over mutual interests and ongoing relationships.

Clare Huntington (Chapter 3) offers a similar critique of rights-based child welfare practice. Huntington argues that 'as currently implemented, the rights-based model of child welfare protects neither parent nor child in the typical case' (p. 33). In part, this is because rights create

a win–lose mentality that fuels an adversarial relationship between parents and the state. In place of this adversarial process, Huntington proposes a problem-solving model designed to foster collaboration between the state and families involved in the child welfare system. Similarly, Firestone and Weinstein propose a comprehensive dispute resolution system for families in transition. This system would offer families an array of problem-solving mechanisms and supportive services and would accord traditional adversary procedures a sharply limited role in the overall resolution of family conflicts.

Family courts have embraced these insights and have adopted an array of non-adversary dispute resolution mechanisms designed to avoid adjudication of family cases. Divorce-related custody mediation is the best known and established of these procedures.[1] Robert E. Emery, David Sbarra and Tara Gover (Chapter 9) detail the reasons for the rapid spread of court-connected custody mediation and review the research on its effectiveness. The authors conclude that, while additional studies are needed, existing research strongly suggests that custody mediation increases settlement, reduces legal costs, enhances party satisfaction and improves long-term relationships between non-residential parents and children and between divorced parents.[2]

The appeal of non-adversary dispute resolution has moved beyond divorce-related custody cases to the more public realm of child welfare proceedings, where family group conferencing and other problem-solving approaches have begun to supplant more traditional adjudicative models (See, for example, Chandler and Giovannuci, 2004; Merkel-Holguin, 2004). Clare Huntington (Chapter 12) describes the theoretical underpinnings of family group conferencing and explores its potential for reforming the child welfare system. Similarly, Robert Wolf (Chapter 6) describes the creation and functioning of a family treatment court that handles child neglect cases involving substance-abusing parents. Drawing on a criminal drug court model, the Manhattan treatment court combines a problem-solving approach with extensive judicial monitoring, in order to rehabilitate drug-abusing parents and reunite them with children previously removed from their care. Greg Berman and John Feinblatt (Chapter 5) provide a broader context for these family court reforms by tracing the history of problem-solving courts and outlining their common goals and elements.

An increasing number of family lawyers have also rejected the adversary paradigm, in favour of a 'collaborative law' model. Pauline Tesler (Chapter 19) describes the basic elements of this collaborative model, under which lawyers and clients agree at the outset of the representation that the lawyers will withdraw if the matter proceeds to litigation.[3] Tesler argues that this withdrawal obligation gives collaborative lawyers a significant external incentive to remain at the negotiating table in the face of apparent impasse, since '[u]nlike litigation attorneys, collaborative lawyers share the risk of failure in collaboration with their clients' (p.

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[1] For a comprehensive examination of divorce-related custody mediation see Jay Folberg, Ann Milne and Peter Salem, 2004.

[2] A recent survey of parents involved in custody and child support disputes indicates higher levels of satisfaction with mediation than with judges, attorneys or other court-connected services (Leite and Clark, 2007).

[3] For a recent, comprehensive discussion of collaborative lawyering see Gary Voegele, Linda Wray and Ronald Ousky, 2007; see also Symposium, 2004. For a description of a team-based collaborative model, in which lawyers work closely with mental health professionals who serve as divorce coaches and child specialists see Susan Gamache, 2005.

396). Barbara Glesner Fines (Chapter 20) examines a number of ethical issues raised by the collaborative law model. These include concerns about lawyer competence and limited scope representation, as well as the possibility that a commitment not to litigate may compromise the lawyer's duty of zealous advocacy. Glesner Fines concludes that while collaborative lawyering presents an exciting variation on the growth of consensual, cooperative dispute resolution processes, family lawyers who adopt this model must be extremely diligent in their evaluation of clients, opposing counsel and their own skills and motivations in order to provide ethical representation.[4]

Forrest Mosten (Chapter 18) situates collaborative law in its larger social and professional context by examining a number of emerging roles for the family lawyer that stem from the shift to a less adversarial dispute resolution model. These emerging roles include dispute resolution manager, consultant during mediation, family advocate and preventive legal health care provider. The essays by Mosten, Glesner Fines and Tesler underscore the point made by two leading commentators that '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' (Schepard and Salem, 2006, p. 516).

B. Recharacterizing Family Disputes as Social and Emotional Process

A second element of the paradigm shift is the assertion that most family disputes are not discrete legal events, but ongoing social and emotional processes. This re-characterization 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. Barbara A. Babb (Chapter 2), a leading advocate of unified family courts, urges family law decision-makers to adopt an ecological approach that 'look[s] beyond the individual litigants involved in any family law matter, to holistically examine the larger social environments in which the participants live' (p. 23). Armed with this perspective, family court judges should fashion remedies that strengthen a family's supportive relations and that 'facilitate linkages for the litigants between and among as many systems in their lives as possible' (p. 23).

Thus re-characterized as social and emotional processes, family disputes require interventions that are not zealously legal, but rather collaborative, holistic and interdisciplinary. As Professor Babb explains, to positively affect family members' behaviour, 'family law remedies must reflect an integrated approach to family legal issues. This means that decision-makers must consider all of the parties' related family proceedings, as well as all of the institutions or organizations potentially affecting the behavior of families and children' (p. 23). In contrast to the narrow, issue-oriented focus of traditional adversary procedures, such an interdisciplinary focus invites judges to develop a holistic assessment of the family's legal and social needs and to devise more comprehensive legal remedies. Catherine Ross (Chapter 7) identifies both inter-disciplinary training and the provision of comprehensive family services as critical components of a unified family court system. Similarly, Patrick Parkinson (Chapter 28) describes recent efforts in Australia to establish a network of community-based family relationships centres

[4] For additional discussion of these ethical issues see John Lande, 2003; see also Voegele, Wray and Ousky, 2007; Schwab, 2004).

that would help divorcing and separating parents avoid contested legal proceedings. An explicit goal of this initiative is to change cultural understandings so that decisions about post-separation parenting are no longer 'seen in the first place as a legal issue' (p. 548).

Understanding family conflict primarily as a social and emotional process, rather than a legal event, also reduces the primacy of lawyers and enhances the role of mental health professionals in the family court system. Janet Johnston (Chapter 15) describes how the traditional orientations of lawyers and therapists have fuelled divorce-related conflict; she then explains how lawyers and mental health professionals can work more collaboratively to meet the needs of high-conflict families. The 'delegalization' of family disputes also transforms the role of the judge. Unlike the solitary, detached jurist who presides over a courtroom isolated from the non-legal world, the modern family court judge functions as a 'team leader' who embraces interdisciplinary collaboration and coordinates a range of court-connected services (Boldt and Singer, 2006, p. 96).

C. From Backward-Looking Adjudication to Forward-Looking Intervention

This new understanding of family disputes has also 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; by contrast, under the new paradigm judges assume the forward-looking task of supervising a process of family reorganization. As Andrew Schepard (Chapter 4) explains, family court judges no longer function primarily as fault-finders or rights adjudicators, but as ongoing conflict managers. Indeed, Schepard analogizes the modern family court judge to a bankruptcy court judge overseeing the reorganization of a financially distressed business: 'The business is raising children and the parents – the managers of the business – are in conflict about how the task is to be accomplished. The court's aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them.' (p. 56) More generally, Greg Berman and John Feinblatt (Chapter 5) explain that problem-solving courts 'seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the future well-being of communities' (p. 73).

The therapeutic jurisprudence movement incorporates this forward-looking perspective. As a number of scholars have noted, therapeutic jurisprudence provides the theoretical foundation for problem-solving courts, including unified family courts (Winick and Wexler, 2003; see Kuhn, 1998, pp. 67–8). From a therapeutic perspective, the goal of legal intervention is not merely to resolve disputes, but to improve the material and psychological well being of individuals and families in conflict. Family court judges embrace this therapeutic role by attempting to understand and address underlying family dynamics and by structuring interventions that 'aim to improve the participants underlying behaviour or situation' (Babb, Chapter 2, p. 20).

D. Capacity Building to Empower Families and Promote Settlements

To achieve these therapeutic goals, family courts have adopted systems that de-emphasize third-party dispute resolution in favour 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 skill-building programmes. Andrew Schepard (Chapter 27) describes a number of these programmes and analyses their role in preventing and defusing family conflict. Similarly, the American Law Institute's *Principles of the Law of Family Dissolution* (2002) endorses individualized parenting plans as an alternative to judicial custody rulings and urges the adoption of court-based programmes that facilitate these voluntary agreements.[5] More recently, a number of family courts have added 'parenting coordinators' to their staff; these quasi-judicial officials assist high-conflict families to develop concrete parenting plans and to resolve ongoing parenting disputes that arise under these plans.[6] Christine Coates and her colleagues (Chapter 14) analyse the increased use of parenting coordination to manage high-conflict custody cases and explore the legal challenges that this practice has provoked. As Andrew Schepard (Chapter 4) explains, such capacity-building programs 'are the core of a newly created settlement culture, and trials are a last resort for particularly troublesome cases' (p. 56).

E. Pre-Dispute Planning and Preventative Law

A fifth component of the paradigm shift is an increased emphasis on pre-dispute planning and preventive law. Familiar examples include the increased acceptance and enforceability of prenuptial and domestic partnership agreements (see, generally, Bix, 1998; Silbaugh, 1998). June Carbone and Harold Fink (Chapter 26) propose a more comprehensive planning approach to both pre-marital agreements and pre-birth determinations of parenthood. Their proposal combines private negotiation with mediation and up-front judicial approval to anticipate and resolve issues of parentage and post-separation obligation. By combining public and private processes, Fink and Carbone hope to capture the benefits of private ordering, while limiting the results of unequal bargaining power and providing a measure of protection for children. Proposals for mandatory or government-encouraged pre-marital education reflect a similar preventive theme. Over the past decade, the United States' government has invested substantial resources in public and private marriage education programmes aimed especially at low income partners (Dion, 2005). More generally, scholars and advocates of 'preventive law' have urged individuals to use legal mechanisms to anticipate and plan for family transitions (see, for example, Robbennolt and Johnson, 1999). This emphasis on publicly-supervised private ordering creates a hybrid model that expands the role of family lawyers and courts beyond their traditional dispute–resolution function. It also extends the time frame during which families interact with the legal system.

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[5] For additional discussion of parenting plans see Michael E. Lamb, 2002; Francis J. Catania, Jr., 2002. The American Academy of Matrimonial Lawyers has developed a model parenting plan. For a discussion of that model see Mary Kay Kisthardt, 2007.

[6] In 2006, an interdisciplinary taskforce of the Association of Family and Conciliation Courts (AFCC) issued guidelines for parenting coordination that address the role, qualifications and ethical obligations of parenting coordinators. See AFCC Task Force on Parenting Coordination (2006), p. 164.

F. International Perspectives

The paradigm shift that we describe is by no means unique to the United States. Indeed, in many ways, the transformation taking place in the United States today tracks developments that have been underway for several decades in a number of European and Commonwealth countries. For example, the Family Court of Australia, created in 1976, was an integral part of that nation's adoption of no-fault divorce. From the beginning, the Australian Family Court was envisioned as a new kind of legal institution – a pro-active and interdisciplinary enterprise that would blend law, counselling, social and dispute resolution services (Nicholson, 2002; see Parkinson, 2005). The New Zealand Family Court, created five years later, consciously followed the Australian example; both reflected what one New Zealand jurist later described as the enthusiasm of a 'more therapeutically optimistic time' (Elias, 2002, p. 297). Like their Australian counterparts, the New Zealand reformers 'recognized that the adversarial system was an inappropriate vehicle for the resolution of family disputes in the vast majority of cases, particularly where the continued parenting of children was an issue' (Nicholson, 2002, p. 287). Like current reformers in the United States, the architects of the Australian and New Zealand courts envisioned a collaborative and supportive forum in which the judge 'would be removed as a distinct power figure' and 'those involved in family conflicts [could] negotiate, settle and accept their own resolutions' (Elias, 2002, p. 297). Patrick Parkinson (Chapter 28) describes that nation's most recent family law reform efforts, which seek to redirect parenting disagreements away from the judicial system entirely and into community-based dispute-resolution centers.[7]

Scholars and court systems around the world are also struggling with a common set of dilemmas about how best to incorporate children's voices in divorce, custody and child protection proceedings.[8] Nigel Lowe and Mervyn Murch (Chapter 22) describe current debates in England over the appropriate extent and means of children's participation in the resolution of family legal disputes.[9] Excerpts from works by Martin Guggenheim (Chapter 21) and Barbara Ann Atwood (Chapter 23) present different American perspectives on this question. Professor Guggenheim criticizes advocates who seek to enhance children's participation in contested custody proceedings, particularly through legal representation. He notes that children ordinarily have no say in determining their living arrangements outside the context of divorce or parental separation, and he questions whether giving children a significant voice in disputed custody matters actually serves children's interests. Professor Atwood focuses more broadly on the legal representation of children in both abuse and neglect proceedings and private custody disputes. She notes that 'while many courts and commentators agree that children should have a "voice" in proceedings affecting their interests, the meaning of the child's voice is fraught with ambiguity' (p. 447). Despite the lack of clear guidance for children's representatives, Atwood emphasizes the value to children of having a lawyer

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[7] For a related proposal to remove divorce from the courts, based on the Danish system of administrative dissolution see Susan Zaidel, 2004.

[8] For a comprehensive analysis of children's participation in child protection proceedings around the world see Jean Koh Peters, 2006.

[9] For a thoughtful discussion of the challenges posed by a desire to incorporate children's views into the divorce process see Carol Smart, 2002.

advocate their wishes; she concludes that 'children can only benefit from the ongoing efforts to improve the performance of those who speak for them' (p. 455).

G. The Promise of the New Paradigm

Taken together, these developments hold considerable promise for families. Most legal experts agree that adversary justice works best for antagonists with conflicting interests and no ongoing personal ties. Alternative dispute resolution procedures offer families a mode of conflict resolution that is both more enduring and less destructive of ongoing relationships than adversary litigation. 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 (see Berenson, Chapter 17). 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 that we describe appropriately rejects the mythology of the private family – a mythology that characterizes well-functioning families as fully autonomous and self-sufficient and that labels families that seek – or are subject to – state intervention as dysfunctional or inadequate.[10] The new paradigm recognizes instead that family and state governance are intertwined and that families need both private space and public support in order to function effectively.

II. Some Cautionary Notes

Despite the promise these developments hold for families in conflict, a number of cautionary comments are in order. Although these dramatic shifts in family dispute resolution have been underway for close to a decade, scholars and family policy makers have engaged in relatively little critical analysis of the risks and potential negative consequences of such change. This volume explores these concerns by examining: the limits of the institutional competence of courts, the surrender of fact-finding and decision-making to individuals without legal training, the loss of autonomy and privacy for family members subject to continuing court oversight, particularly low income families, and the disjunction between alternative dispute resolution and authoritative legal norms.

As with most discussions of relative strengths and weaknesses, many of the concerns raised here are really the 'flip-side' of a potential benefit. Giving courts the flexibility and informality to respond quickly to families in transition can lead to legitimate concerns about reduced accountability and fairness. Having the benefit of a variety of experts from a number of disciplines to address family conflict may result in confusion about roles and authority to act. Providing mechanisms to sustain co-operation and agreement achieved in court proceedings may threaten strongly valued norms of family privacy and autonomy. As with any reform, the value and impact of these developments must be evaluated in the context of available alternatives. And the potential risks posed by the new paradigm may well be worth taking given the demonstrated

[10] For a thoughtful discussion of this mythology see Clare Huntington, 2007.

problems in the adversary system. But in order to begin a meaningful evaluation of these reforms it is critical to identify the potential problems and concerns.

A. Questions about the Institutional Competence of Family Courts

Although families may benefit from the capacity-building and problem-solving approaches embraced in the new paradigm, it is unclear whether courts are competent to provide these services. As Anne Geraghty and Wallace Mlyniec (Chapter 8) explain, court-based procedures have historically been designed to determine facts and enforce norms. The unified family court movement has sought to expand these functions to address both the legal and non-legal problems of families who come to courts seeking resolution of their disputes. While the goals of the court system have expanded substantially, the structural changes contemplated in even the ideal family courts may not be sufficient to meet the reformers' ambitious agendas. Courts with their 'limited remedial imaginations', may not be the best institutional settings for resolving the non-legal issues proponents wish to place within their authority (Menkel-Meadow, 1996, pp. 5–7). As a result, the restructured family courts may be incapable of achieving the formidable task described by Geraghty and Mlyniec as 'provid[ing] coordinated holistic services ... to address the physical and mental needs of the family' (p. 121).

These institutional shortcomings may be particularly acute at a time when American trial courts' caseloads, particularly the family law cases, continue to grow and resources for these courts are on the decline in many states. Recruiting, training and retaining appropriate judicial and non-judicial staff for the multiple functions contemplated or, in some cases, statutorily mandated in these courts would challenge even a well-financed, broadly committed effort.

Geraghty and Mlyniec argue that asking a court system to take on these broader tasks may detract from its fundamental role as a forum for fair and authoritative dispute resolution. Scarce resources must be spread even more thinly and some courts may have difficulty meeting both basic dispute resolution functions and the broader and more ambitious goals of the new family courts. As several essays in this volume suggest, making good on the broad promise of reform for even a handful of parties may come at a substantial cost to long-held values of due process, family privacy and autonomy (Chapters 8 and 13; see also Hardcastle, 2003).

B. The Surrender of Fact-Finding and Decision-Making to Non-lawyers

The new paradigm for family law decision-making contemplates substantial involvement and reliance on non-legal staff to 'manage' cases, provide court-connected services and assist fact-finders and decision-makers in achieving settlements or reaching decisions. Catherine Ross (Chapter 7) describes the perceived need for an expanded role for these new players in the system:

> Each court needs an intake team and a case manager for every family ... Courts should have well-trained resource personnel at all levels, including magistrate hearing-officers, special masters, mediators, court clerks, social workers, and other service providers who can perform triage. ... Judges focus on complex cases by, among other things, delegating to others matters that can safely be handled by alternative forms of dispute resolution. If handled properly, many or most of these cases need never reach a judge (p. 108).

Non-legal and, in many instances, non-professional staff have always exercised enormous influence in child welfare proceedings where the state has intervened after allegations of child abuse or neglect.[11] But the new paradigm expands the role of such staff, particularly case managers and mediators, in both child protection and divorce and child access proceedings in the new model courts. Amy Sinden (Chapter 13) explores this expanded use of non-legal personnel in the context of child protection. She attributes the expanded role to the 'subtle dynamic' that 'arises on a day-to-day level in these cases, due in part to the prevalence of social work discourse and the tendency of the participants to view these cases in therapeutic rather than legalistic terms. This dynamic implicitly suppresses rights talk and discourages the participants from taking advantage of those procedural protections that do exist' (p. 240).

Although generally supportive of these developments, Clare Huntington (Chapter 3) notes the role of the family court movement in the expansion of informal, non-adversarial alternative dispute resolution mechanisms in child welfare cases. Under the new regime, social workers, 'coordinators,' and other non-legal actors play a central role in decisions about removal and placement of children where abuse or neglect is alleged. As Sinden explains, the danger for families, primarily poor, involved in these proceedings is that the disregard for statutory and constitutional norms will result in extensive state involvement in these families by non-judicial personnel prior to any judicial determination justifying such involvement. And decisions will be made in informal settings based upon the evaluations, however flawed, of staff with few standards for guiding these decisions and little or no opportunity for review.

The new paradigm has also expanded the role of such non-judicial personnel in family disputes involving divorce and child access in which the state is not a party. This expansion includes broader authority for professional staff drawn from mental health and social work backgrounds with relatively established roles, such as mediators and custody evaluators. It also includes non-legal personnel with new titles and somewhat less-established roles such as 'parenting coordinators' as described by Christine Coates et al. (Chapter 24). Other newly endowed non-judicial positions include early neutral evaluators (see, for example, Santeramo, 2004; Johnston, Chapter 15) and 'family law facilitators' (Chase, 2003).

These expanded roles are controversial. Two contributors to this volume respond to Timothy M. Tippins' and Jeffery Whittmann's (2005) critique of the growing reliance by judges on 'expert' opinions by non-legal personnel and call for an end to the practice of custody evaluators making recommendations to judges to resolve custody cases.[12] Mary Kay Kisthardt and Barbara Glesner Fines (Chapter 24) urge changes intended to reduce the role of custody evaluators in making the ultimate judgment about child placement in contested cases while preserving a role for these evaluators in a non-decisional capacity. In a companion piece, Joan B. Kelly and Janet R. Johnston (Chapter 25) accept much of the critique that custody evaluators have 'flimsy grounds (ethically, empirically, and legally) for making recommendations on the ultimate issue' of child placement (p. 474). They urge courts to limit the use of these non-legal players to conducting forensic custody evaluations in serious cases

[11] See for example Murphy, 1998, p. 707, who concludes that child protective service workers who may have little or no experience or specialized education make most of the decisions in this arena.

[12] As early as the 1980s, a few commentators recognized these shifts in both the rhetoric and decision-making in family disputes, particularly with regard to child access. Martha Fineman, in an early and much cited article, noted that the 'professional language of the social workers and mediators has progressed to become the public, then the political, then the dominant rhetoric' (Fineman, 1988).

of child abuse or neglect rather than routinely investigating and making recommendations in all contested custody cases.

C. The Loss of Privacy and Autonomy for Families

A particularly troubling risk associated with the new paradigm in family dispute resolution is the increased loss of privacy that results from the expanded role of the family court. When family disputes are viewed as opportunities for therapeutic and holistic interventions in the family, increased state involvement in family life is inevitable. Of particular concern in the new model courts, however, is both the lack of clearly defined parameters for such intervention and the disparate impact expanded state intervention may have on poor families.

Increased reliance on informal procedures such as family group conferencing heightens the risk of unchecked state intervention and threats to due process in these cases. Amy Sinden describes these new informal procedures for resolving allegations of child abuse and neglect as a 'free ranging family therapy session' in which there is 'virtually no limit on the topics that can be discussed or on the people who may be invited to join' (Chapter 13, p. 258).

The new regime also raises similar concerns in divorce and child access proceedings. Both the enhanced goals of intervention and the expanded roles of court personnel increase the risk of due process violations and loss of privacy in family life. As noted by Catherine Ross (Chapter 7), one of the principle components of the new family court is that one judge will hear all matters involving a single family. Such an approach may result in both more informed and more efficient decision-making. But, as Geraghty and Mlyniec (Chapter 8) point out, it may also result in judges having access to information about a family that would be inadmissible in traditional adversarial proceedings. Judges may also reach decisions in one proceeding based upon conclusions reached in another. The risks of coercion and unwarranted interference increase as the judges' role in the new 'problem solving' family court shifts from mere dispute resolution to the less defined and potentially broader role of using their 'authority to motivate individuals to accept needed services and to monitor [the parties'] compliance and progress' (Boldt and Singer, 2006, p. 96: quoting Winick, 2003).

The threat to family privacy and autonomy is particularly high when families navigate the court system without lawyers. Stephen Berenson and Russell Engler have both contributed pieces to this volume that address the issue of the unrepresented litigant in family court. Berenson (Chapter 17) documents the broad scope of the problem and describes the burdens it creates for the unrepresented parties as well as for the court. He concludes that when family law disputes proceed through courts with no lawyers on one or both sides there is often 'a failure of legal justice for the parties to family law disputes' (p. 345).

The increase in unrepresented litigants may also require a rethinking of traditional assumptions about legal and judicial practice. Russell Engler (Chapter 16) begins by explaining that rules about who is authorized to give legal advice and requirements of judicial impartiality were developed with an assumption that parties appearing before courts would have full legal representation. Engler argues that these rules frustrate the goals of justice and fairness when applied to unrepresented litigants. The threat to justice and fairness includes unchecked state intrusion into the lives of poor families who lack access to legal representation. When the court orders mediation, represented parties may be able to bypass court sponsored programmes. Their attorneys can object to mediation, negotiate directly with opposing counsel or choose