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# Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents

Jessica J. Sauer

## I. INTRODUCTION

While alternative dispute resolution has become widely accepted in recent years, several types of legal disagreements continue to be regarded as unsuitable for mediation.<sup>1</sup> Child custody disputes between "high conflict" couples are one such category.<sup>2</sup>

Unfortunately, the process of litigating custody disputes between high conflict couples can be more damaging to children than the parents' actual divorce.<sup>3</sup> By encouraging parents to adopt polarized positions, the adversar-

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1. See, e.g., Ryan P. Hatch, *Coming Together to Resolve Police Misconduct: The Emergence of Mediation As a New Solution*, 21 OHIO ST. J. ON DISP. RESOL. 447, 472 (2006) (indicating that mediation may not be an appropriate way to resolve all complaints about police officer conduct).

2. See Jerry H. Dunn, Barbara E. Flory & Marla Berg-Weger, *Parenting Plans and Visitation: An Exploratory Study of Supervised Access and Custody Exchange Services: The Children's Experience*, 42 FAM. CT. REV. 60, 61 (2004) (noting that many legal professionals "consider mediation inappropriate" for high conflict couples, because these parents "levy allegations of neglect, child abuse, sexual abuse, and child abduction against each other in unprecedented numbers") (citations omitted).

3. See Elizabeth Scott & Andre Derdeyn, *The Parent-Child Relationship and the Current Cycle of Family Law Reform: Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 491-92 (1984). "[R]esearch findings suggest that the level of interparental conflict may be more central to the child's post-divorce adjustment than the loss of the father or the disruption occasioned by marital dissolution per se." *Id.* at 491-92 (citing the research of Robert Emery in *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 313 (1982)). See also Rebecca Hinton, Comment, *Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes*, 65 LA. L. REV. 1539, 1547-49 (2005) (discussing the negative effects adversarial proceedings have upon children).

ial process weakens any remaining bonds between them and impairs their ability to provide a stable and nurturing environment for their children in both the present and the future.<sup>4</sup> Instead of dismissing mediation out of hand because of the difficulties in helping these parents see eye-to-eye, scholars might be wise to reevaluate the potential for mediating these disputes.<sup>5</sup> While challenges are inherent in facilitating interaction between high conflict couples, it is possible that certain mediation techniques could be used to help even the most litigious of parents engage in active problem-solving to benefit their common children.<sup>6</sup>

This article will attempt to advance this idea in several ways. To begin, it will define the characteristics of the high conflict couple and explore the challenges they pose within dispute resolution processes.<sup>7</sup> Next, it will briefly review the history of custody mediation<sup>8</sup> before describing specific benefits that high conflict litigants and their children can achieve through mediation.<sup>9</sup> Finally, the article will suggest a six point model for effectively mediating between high conflict couples.<sup>10</sup> Significant aspects of this model include educating the parties about mediation,<sup>11</sup> encouraging them to emotionally prepare for the mediation,<sup>12</sup> selecting an appropriate mediator,<sup>13</sup> setting firm rules for their interactions,<sup>14</sup> filtering their communication,<sup>15</sup> and finding sensible ways to involve the children at issue in the mediation process.<sup>16</sup>

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4. Louise Everett Graham, *Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience*, 81 KY. L.J. 1107, 1111-12 (1992-93).

5. See Bruce Derman, *A Model for Divorce Mediation with High Conflict Couples*, The Coalition for Collaborative Divorce, [http://www.nocourtdivorce.com/articles\\_text.phtml?articleID=33](http://www.nocourtdivorce.com/articles_text.phtml?articleID=33) (last visited on Aug. 22, 2007).

6. See *infra* notes 126-215 and accompanying text.

7. See *infra* notes 17-49 and accompanying text.

8. See *infra* notes 50-59 and accompanying text.

9. See *infra* notes 60-119 and accompanying text.

10. See *infra* notes 120-219 and accompanying text.

11. See *infra* notes 120-24 and accompanying text.

12. See *infra* notes 125-50 and accompanying text.

13. See *infra* notes 151-62 and accompanying text.

14. See *infra* notes 163-74 and accompanying text.

15. See *infra* notes 175-86 and accompanying text.

16. See *infra* notes 187-211 and accompanying text.

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## II. DEFINING THE HIGH CONFLICT COUPLE

Dr. Bruce Derman,<sup>17</sup> a licensed clinical psychologist, describes a "typical" mediation encounter with a high conflict couple in the following scenario:

[A] couple walks in for their first mediation session. As soon as they sit down you can feel a tension in the room that you'd have to be numb not to recognize . . . .

Hardly settling into their respective chairs the couple opens with, "We don't do too well with professionals, especially the last six[.]" You possibly begin to think, "I'm in for trouble."

[Y]ou start to ask some preliminary questions. With each question that you ask, the couple continuously interrupts or corrects one another before any answer can be completed. Again you wonder to yourself, "How in the world am I going to ever get to the tougher questions?[" Pursuing further you inquire about the major issues that they are going to need to address. The husband responds, "I believe we need to come to some understanding about spousal support.[" The words are barely out of his mouth and the wife retorts, "There's no use in discussing that with a man as cheap and devious as you and who never did want to take care of me." Unable to curtail these eruptions and noticing that you are not even past the first half hour, you may start to feel a tightness in your chest and an overwhelming sense of powerlessness.<sup>18</sup>

While particular methods of categorizing these couples have been criticized, practical experience proves that high conflict couples exist.<sup>19</sup> "High conflict couple" is a term used to describe two parties whose "disagreement about . . . finances, custody, child rearing or property, continues intractably, and when . . . [the parties] attempt to resolve conflicts by using tactics such as verbal aggression, physical coercion, and recurrent litigation."<sup>20</sup>

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17. Bruce Derman has his Ph.D. and is a "licensed clinical psychologist." The Coalition for Collaborative Divorce, *Bruce Derman, Ph.D.*, [http://www.nocourtdivorce.com/members\\_info.phtml?search=MID3d8a7ebd3801d](http://www.nocourtdivorce.com/members_info.phtml?search=MID3d8a7ebd3801d) (last visited Aug. 22, 2007). "He is trained and experienced in divorce mediation, collaborative divorce, child custody, and divorce coaching." *Id.*

18. Derman, *supra* note 5 (quotations added).

19. See, e.g., Jane W. Ellis, Book Review, 22 N.Y.U. REV. L. & SOC. CHANGE 253 (1996) (reviewing CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH CONFLICT DIVORCE (1994)). Ellis criticizes the authors' failure to initially provide readers with "a clear definition, or even a clear description, of the types and degrees of conflict" which can be characterized as "high conflict" and for the vagaries of their "less-than-elucidating" conflict assessment scale. *Id.* at 254-55.

20. H. Patrick Stern, Michael W. Mellon, Beth O. Butler, Suzanne E. Stroh, Nicholas Long & Jerry G. Jones, *Battered-Child Syndrome: Is It a Paradigm for a Child of Embattled Divorce?*, 22 U. ARK. LITTLE ROCK L. REV. 335, 339 (2000). In other words, a high conflict couple "cannot resolve their differences in either a business like manner nor in a friendly way." Kathy J. Marshack, *Recognizing a High Conflict Divorce*, available at

A. *Characteristics of High Conflict Individuals*

"The list of traits a high conflict litigant brings to a psychotherapist's office is, in fact, a therapist's nightmare."<sup>21</sup> Scholars have statistically "demonstrated that parents caught up in high conflict child custody disputes have personality characteristics quite different from those shown by a variety of other statistically 'average' groups."<sup>22</sup> Specifically:

The behavioral traits manifested by high conflict litigants, translated into non-technical terms, include all of the following: They are self-centered and narcissistic, harboring angry, self-righteous attitudes and exceedingly blaming orientations, and they have an inability to tolerate negative or even complex emotions. These traits, along with a need to make others experience the negative emotions they themselves feel, led one of [the] subjects to say: "I don't get ulcers; I give them!" They have a propensity to "see" their own negative emotions as though these emotions are taking place within persons with whom they interact rather than within themselves. They are unable to recognize their own dependency. Their perceptions of others are marred by "tunnel vision." They only see what they want to see. This compromises their ability, when interacting with others, to see a "whole person." They have disturbed self esteem and often have married people with the same (or similar) sets of attributes. As if all of these traits were not bad enough, they are further characterized by statistically deviant and negative perceptions and reasoning processes. They lack insight into their own negative contributions at impasse points.<sup>23</sup>

In a high conflict relationship, the partners assume polarized positions about nearly every issue.<sup>24</sup> The result is "constant fighting" via "angry and righteous interchanges."<sup>25</sup> Any topic, no matter how insignificant, can trigger an argument.<sup>26</sup> Interactions escalate quickly because "every disagreement is taken as a personal affront that requires defending or attacking."<sup>27</sup> These couples participate in "very little actual dialogue" when left to communicate on their own because they prefer to "talk in monologues with al-

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<http://www.kmarshack.com/therapy/divorce/recognize.html>. Instead, "[t]hey create a war that is costly and damaging to the children and to themselves." *Id.*

21. Barry Bricklin & Gail Elliot, *Qualifications of and Techniques to be Used by Judges, Attorneys, and Mental Health Professionals who Deal with Children in High Conflict Divorce Cases*, 22 U. ARK. LITTLE ROCK L. REV 501, 508 (2000).

22. *Id.* at 507.

23. *Id.*

24. Derman, *supra* note 5.

25. *Id.*

26. *Id.*

27. *Id.*

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most no indication of any doubt as to their view of the other."<sup>28</sup> Not surprisingly, "standard clinical procedures are exceedingly unlikely to achieve positive results" with high conflict couples.<sup>29</sup>

Several conditions appear to be quite common among high conflict couples and may cause custody disputes to escalate.<sup>30</sup> While the presence of these characteristics will not automatically trigger high conflict behavior, at least one member of a high conflict couple is likely to lack basic psychological skills,<sup>31</sup> be a victim or perpetrator of domestic violence, child abuse, or child neglect,<sup>32</sup> have a history of substance abuse,<sup>33</sup> or struggle with a mental disorder.<sup>34</sup>

### B. *The Legal System and the High Conflict Couple*

The legal system, with the unique pressures it puts upon litigants, can create new tensions and aggravate those that are preexisting.<sup>35</sup> As one scholar vividly elucidated, "[t]he formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another."<sup>36</sup>

28. *Id.*

29. See, e.g., Bricklin, *supra* note 21, at 508 (discussing Carl Hoppe's research on the characteristics of custody litigants).

30. See, e.g., A.B.A., *High Conflict Custody Cases: Reforming The System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589, 590 (2001) [hereinafter A.B.A., *Conference Report*].

31. See *id.* at 507-08.

32. A.B.A., *Conference Report*, *supra* note 30, at 590.

33. See Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?*, 22 U. ARK. LITTLE ROCK L. REV. 453, 455 (2000) [hereinafter Johnston, *Building Multidisciplinary Professional Partnerships*].

34. *Id.* An additional study by C. Henry Kempe found "psychiatric evaluations of parents in a high conflict divorce often revealed at least one parent has had a psychiatric disorder such as borderline personality, depression, narcissism, paranoid schizophrenia, co-dependency, or sociopathy." Stern, *supra* note 20, at 341 (citing to Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MEDICAL ASS'N. 17-24 (1962)).

35. See A.B.A., *Conference Report*, *supra* note 30, at 590. See also Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 10-11 (1990) ("The adversarial model increases trauma and escalates conflict.").

36. Hugh McLissac, *Programs for High Conflict Families*, 35 WILLAMETTE L. REV. 567, 580 (1999) (Hugh McLissac serves as the Director of Family Court Services for Multnomah County, Oregon. See <http://www.mediate.com/people/personprofile.cfm?auid=656> (last visited on Aug. 22, 2007)).

Within the court system itself, "procedures, delays or errors [may] cause unfairness [and] frustration or facilitate the continuation of the conflict."<sup>37</sup> Likewise, conversations with mental health experts working to support their case may cause clients to "solidify already negative, polarized views," which encourages them to adopt uncompromising stands against the former spouse.<sup>38</sup> As the idea of taking entrenched positions appeals to the high conflict couple from the start, any interaction that encourages them to continue in this pattern appears to aggravate their hostile tendencies.<sup>39</sup>

In the child custody context, the situation can be further compounded in several ways. On one hand, each parent may feel that they are the one best able to provide their children at issue with the love, resources, and skills that they need.<sup>40</sup> Parents also have legal and ethical duties to protect their child from harm that could be caused by the other parent.<sup>41</sup> On the other hand, a parent might not have their children's interests in mind at all, or at least only in a very limited way, while waging a custody battle.<sup>42</sup> For example, convictions regarding the children's future may stem more from a threat to the parent's own ego<sup>43</sup> or need for personal validation rather than the child's interests.<sup>44</sup> Conflicts may also be inflamed by parents who harbor a desire to "win" a custody battle to compensate for feeling like the "losers" of the di-

37. A.B.A., *Conference Report*, *supra* note 30, at 590.

38. See Johnston, *Building Multidisciplinary Professional Partnerships* *supra* note 33, at 461-64. More specifically, Johnston claims that this polarization can occur from meeting with traditional mental health experts because they only have an opportunity to see one of the parties to the conflict. *Id.* In turn, child custody evaluators can contribute to the problem by delivering exhaustive reports that focus on "pathologizing" the parents rather than exploring ways to help the family to resolve the impasse. *Id.* at 464.

39. Derman, *supra* note 5.

40. See, e.g. Seagroves & Stanback, PLLC, *Who gets custody of the kids?* (available at <http://trianglefamlaw.com/divorce-library-info-child-custody.asp>).

41. See Adele M. Morrison, *Changing the Domestic Violence (Dis)course: Moving From White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1103-05, 1103 n.184 (2006). Regrettably, many high conflict cases involve allegations or histories of domestic violence against the child or the former spouse. See generally Johnston, *Building Multidisciplinary Professional Partnerships*, *supra* note 33, at 455. Statistics regarding domestic violence may also be underreported as threats regarding harm to or the potential for kidnapping the child may make individuals reticent to report abuse. See generally PHYLLIS CHESLER, *MOTHERS ON TRIAL* 81 (1986).

42. See *infra* notes 43-47 and accompanying text.

43. See Melissa Douthart Philbrick, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 COLUM. J. L. & SOC. PROBS. 419, 422 (1985) (quoting H. IRVING, *DIVORCE MEDIATION, A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM* 19-20 (1981) ("Parents often use their children to salve their own bruised egos.")).

44. See Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 891 (1994).

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orce,<sup>45</sup> as it is common for parties to perceive child custody settlements as one final way to "get at each other" in the divorcing process.<sup>46</sup> A custody agreement may also be perceived as an enduring way to manipulate and control the former spouse.<sup>47</sup>

In any event, court observers have described child custody disputes between high conflict couples as being "the most bitter and acrimonious they have ever seen in court."<sup>48</sup> Research supports the assertion that disputes are at their worst "(1) when post-divorce conflicts last more than two years, (2) when the children become enmeshed in the parents' continued disputes, and (3) when the parents have poor coping strategies."<sup>49</sup>

### III. ADVANCEMENTS AND PLATEAUS IN MEDIATING CHILD CUSTODY DISPUTES

The movement to encourage mediation<sup>50</sup> in child custody disputes began early in the 1980s.<sup>51</sup> Recognizing that custody litigation can have devastating effects on the children at issue, advocates began to push for the general acceptance of mediation in these controversies.<sup>52</sup> Now, the academics, judges, and politicians who first promoted mediation live in an era when

45. See generally Johnston, *Building Multidisciplinary Professional Partnerships*, *supra* note 33, at 456. The parties' perceptions of spousal support settlements, divisions of the assets, or the involuntary nature of the divorce can make them feel like "losers" in the game of divorce. *Id.* Parents who "lose" in the first dispute may come back for future "rounds" of fighting in the courtroom and persist in these habits until they are declared the winner. *Id.* Moreover, the ability to modify the outcome of a litigated custody dispute encourages repetitive conflict. *Id.*

46. WILLIAM V. ARNOLD, *WHEN YOUR PARENTS DIVORCE* 112 (Wayne E. Oates ed., Westminster Press 1980) (1941). In states where "'No Fault' is the rule in terms of the divorce, some parents have used the issue of child custody to get at each other by trying to prove that the other is 'unfit' to be a parent." *Id.* These feelings are magnified when a divorcing party has unresolved feelings about the former spouse. *Id.* Love thwarted may be channeled into a potent desire for revenge. *Id.*

47. See Scott, *supra* note 3, at 492-93.

48. THE COMMITTEE OF THE FAMILY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *DIVORCE, CHILD CUSTODY, AND THE FAMILY* 7 (1981) [hereinafter GROUP FOR THE ADVANCEMENT OF PSYCHIATRY] (internal citations omitted).

49. Bricklin, *supra* note 21, at 501 (citing to David B. Doolittle & Robin Deutsch, *Children and High-Conflict Divorce: Theory, Research and Intervention*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* 425 (Robert M. Galatzer-Levy & Louis Kraus eds., 1999)).

50. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (2d ed. 1996) (defining mediation as "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.").

51. Johnston, *Building Multidisciplinary Professional Partnerships*, *supra* note 33, at 453-54.

52. *Id.*



custody mediations are commonplace.<sup>53</sup> Nevertheless, experts estimate that over the past two decades, two million children in the United States have been caught in the endless cycle of their parents' high conflict litigation, "passing in and out of a revolving court door."<sup>54</sup>

Trends in technology and the law may foster an increase in the number of high conflict disputes.<sup>55</sup> Modern legal standards, which use vague and subjective terms, introduce considerable ambiguity into custody dispute resolution.<sup>56</sup> Simultaneously, the widespread use of the Internet has given parties unprecedented free access to "scientific and pseudo-scientific materials" to use in their litigation.<sup>57</sup> In the brave new world of the information superhighway, attorneys can help their clients find an astounding amount of evidence to support or oppose "almost any position on anything."<sup>58</sup> The combination of malleable standards and free litigation materials provides advocates, including pro se litigants, with the ammunition needed to wage a complex and protracted custody battle. As a result, it is anticipated that a greater number of custody cases will become high conflict in the coming years.<sup>59</sup>

With the potential for more children than ever to be thrown into the tumultuous experience of these disputes, mediators must become more effective in drawing high conflict couples out of litigation. To improve the lives of the children at issue, techniques for actively resolving high conflict custody disputes should be actively developed and explored.

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53. See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 48, at 7 ("Judges almost always try to persuade the divorcing parents to work out a compromise or a negotiated solution, since they, the judges, regard decisions in contested custody cases as most difficult to make.")

54. *Id.* at 454-55. See also Scott, *supra* note 3, at 493 (observing that while issues regarding the division of marital property can be resolved expeditiously, children "can remain a focus of conflict for years"). "Even where the parents agree on custodial and visitation terms and court approval is routine, changed circumstances may lead to petitions to modify prior custodial orders." *Id.* "[F]amily disputes comprise the largest category of civil matters handled by our overburdened legal system." GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 48, at 1. "Over half of the cases filed in our trial courts of original jurisdiction are concerned with matrimonial actions, that is, divorce or legal separation; these ordinarily involve issues of child custody and visitation rights." *Id.*

55. See generally Bricklin, *supra* note 21, at 506.

56. See *id.* For example, courts seek to place a child with the "psychological parent" but balance this objective with the goal of acting in the child's "best interests." *Id.*

57. *Id.*

58. *Id.*

59. See *id.*

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## IV. THE ADVANTAGES OF MEDIATING CHILD CUSTODY DISPUTES

Faced with the daunting characteristics of the high conflict couple, should anyone even try to mediate their custody disputes? The traditional answer to this question has been quite simple: "no."<sup>60</sup> However, while steering clear of extrajudicial action may continue to be the best model in some cases, there are many strong reasons why creative mediation options for the high conflict couple should be more fully explored.<sup>61</sup>

A. *The Benefits for Children*

In all fifty states, the governing principle behind every litigated custodial outcome is the "best interests of the child" standard.<sup>62</sup> However, it is doubtful that incessant adversarial litigation can ever really be in the best interest of children with two non-abusive parents.

## 1. Improved Emotional Health

Scholars agree that where high conflict couples persist in litigating custody, their children will suffer significant consequences.<sup>63</sup> Studies indicate that children involved in such circumstances are likely to demonstrate paren-

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60. See, e.g., Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53, app. B at 81-82 (2005). Murphy and Rubinson suggest the use of an intake questionnaire to see if the clients are suitable for mediation. *Id.* A positive response to a single question regarding violent or abusive behavior on the questionnaire leads to the conclusion that mediation will be an inappropriate way to address the situation. *Id.* Mediators may prefer to focus their efforts on situations where there is a higher probability that the parties will reach an agreement. See Rhonda Freeman, *Parenting After Divorce: Using Research to Inform Decision-Making About Children*, 15 CAN. J. FAM. L. 79, 119-21 (1998). In one study, all of the clients who failed to reach an agreement during a mediation fit the description of a high conflict couple. *Id.* (citing to JANET JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 231 (1997)).

61. See *infra* notes 62-119 and accompanying text.

62. Johnston, *Building Multidisciplinary Professional Partnerships*, *supra* note 33, at 453-54.

63. See Ellis, *supra* note 19, at 253. "It is beyond dispute that ongoing interparental hostility is bad for children." *Id.* (referring to ROBERT E. EMERY, *MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT* 94-98 (1988)); see also E. MARK CUMMINGS & PATRICK DAVIES, *CHILDREN AND MARITAL CONFLICT: THE IMPACT OF FAMILY DISPUTE AND RESOLUTION* 9 (1994) (finding that a high level of family conflict is more strongly related to childhood difficulties than is family structure *per se*).

tal detachment and impaired abilities to relate to others – in a word, developmental retardation.<sup>64</sup>

Psychologists report that children are damaged in many ways by the escapades of parents engaged in protracted custody disputes.<sup>65</sup> One such psychologist and researcher, Dr. Carl F. Hoppe, observed that the children of these "high conflict litigants" were likely to "suffer heightened levels of anxiety in the real or psychological presence of these parents," have a shrunken "sense of self-worth," be more aggressive than their peers, and be terrified of their parents' aggressive behavior while paradoxically imitating it.<sup>66</sup> Other issues that Hoppe observed in these children included enduring distortions of self image, passivity, impaired functioning, distorted perspectives about life events, and difficulties in "initiating or completing tasks," "sustaining intimacy," and "relating to others."<sup>67</sup>

Moreover, researchers who tracked "families involved in chronic custody disputes for a period of one to four and a half years" concluded that children who had "frequent access to both [of their high conflict] parents had more behavioral and emotional problems" than other children.<sup>68</sup> The re-

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64. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 48, at 70. Some researchers dispute the theory that there is a "direct relationship between what parents do, and the impacts of such behaviors on specific children." See Bricklin, *supra* note 21, at 505 (citing to the work of Garity & Baris, *supra* note 19). Bricklin and Elliot acknowledge this criticism, but dispute its validity. *Id.*

65. Bricklin, *supra* note 21, at 504 (citing to Hoppe's "own summation of his empirical research" and specifically to Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, in *EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION* (Stefan Podrygula ed., 1993); Carl F. Hoppe & Lynne M. Kenney, *Characteristics of Custody Litigants: Data from the Southern California Group* (1994) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association); Carl F. Hoppe & Lynne M. Kenney, *MMPI-2 and Rorschach Profiles of Custody Litigants: A Intercorrelational Study* (1995) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association); Carl F. Hoppe & Lynne M. Kenney, *Therapeutic Intervention in High-Conflict Divorce: Countertransference and the Horrible Decision* (1997) (unpublished manuscript, on file with author) (presented at a meeting of the American Psychological Association)).

66. *Id.* at 504-05. Hoppe also observed that these traits were related to the characteristics of the parents, "not just with the fact that they were openly disputatious." *Id.* This important qualification emphasizes the vital need for parents to participate in a process to improve specific skills, including: "modeling and giving advice on developing close interpersonal relationships," and helping their children to deal "with separation/individuation issues [and] interpersonal decision making." *See id.*

67. Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 510 n.65 (citing to Carl F. Hoppe, *Test Characteristics of Custody-Visitation Litigants: A Data-Based Description of Relationship Disorders*, in *EMPIRICAL APPROACHES TO CHILD CUSTODY DETERMINATION* (Stefan Podrygula ed., 1993)).

68. Bricklin, *supra* note 21, at 502. (citing to Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989)).

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searchers also noted a correlation between the severity of these symptoms and the degree of parental conflict, observing that "[t]he more overt the parental conflict, the more disturbed the children are likely to be."<sup>69</sup> The gender of the children appeared to affect their response to the situation, but did not protect them from negative consequences.<sup>70</sup> It was noted that girls "suffered more in emotional and behavioral adjustment, while boys . . . suffered disruptions in social competence and school performance."<sup>71</sup>

Researchers at the Virginia Longitudinal Study of Divorce and Remarriage also observed that children who came from homes with "high levels of conflict" were found to be overly aggressive or insecure.<sup>72</sup> The researchers noted that "witnessing hostility between parents led to aggressive behavior in children for several years following divorce."<sup>73</sup> In this study, researchers attributed the children's negative behavior to the inability of the parents to work together, noting that there was an "inverse relationship between interparental hostility and parenting skills"<sup>74</sup>

To minimize the emotional pain of this stressful experience and to ease the ensuing conflicts of loyalty, children may cope with a high conflict custody dispute by aligning with one parent and alienating the other.<sup>75</sup> In other

69. *Id.*

70. *See id.*

71. *Id.* at 502-03. Boys were also more "frequently used and caught in the middle of parental disputes." *Id.*

72. *Id.* at 502.

73. *Id.* (citing to P.E. Walsh & A.L. Stolberg, *Parental and Environmental Determinants of Children's Behavioral, Affective and Cognitive Adjustment to Divorce*, 12 J. DIVORCE 265 (1989)).

74. *Id.* ("[H]ostility interfered with co-parenting ability.").

75. *See* John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 100 (2005).

[C]hildren in high-conflict divorces who were younger than nine years old felt torn in their loyalty to each parent, but . . . nine- to twelve-year-olds tended to ally with one parent or the other, perhaps as a way of resolving the loyalty conflict.

*Id.* (referring to a study performed by Johnston, Campbell, and Mayes in 1985). Janet Johnston, a prominent researcher and scholar in the field of divorce and child custody issues, views the adversarial divorce process as a key factor contributing to the rejection or alienation of certain parents. *See* Janet R. Johnston, *Children of Divorce who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 FAM. L.Q. 757, 764 (2005) [hereinafter Johnston, *Children of Divorce*].

[M]ultiple factors contribute to children's rejection of a parent including a history of intense marital conflict; a humiliating separation or custody disposition, the psychological vulnerability of both parents; the child's age, cognitive capacity and temperament; the influence of siblings, new partners and extended family; and an adversarial litigation process where powerful professionals are seen as allies or enemies.

cases, children may destroy their positive relationships with both parents.<sup>76</sup> In short, when two parents are engaged in a high conflict dispute, their children will "have difficulty in relating positively to, profiting from, and maintaining contact" with both of them.<sup>77</sup>

While many studies affirm the importance of having two parents involved in a child's life,<sup>78</sup> it has been strongly asserted that "[i]n some cases, a child may be better off - at least temporarily - by being removed completely from any contact" with one of the parents.<sup>79</sup> Indeed, studies show that removing one parent from the equation could even reverse the negative effects of high interparental conflict.<sup>80</sup>

This conclusion is implicitly recognized in the advice that lawyers have provided to divorcing parties for years.<sup>81</sup> Specifically, attorneys advise divorcees to seek exclusive custody "in order to avoid a destructive tug of war with the child in the middle" if they suspect that their former spouse has a very dissimilar value system or will use joint custody as a means of harassment.<sup>82</sup>

Mediation can be used to secure similar ends and benefits to the children through means less adversarial than litigation. Mediators can talk with each parent about the strengths and weaknesses of their custody case and encour-

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*Id.* Johnston argues that a child's "rejection of a parent is a family system's pathology exacerbated by an adversarial legal system . . . not an individual psychiatric disorder." *Id.* at 760.

76. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 48, at 39-40 n.25 (footnote omitted).

77. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 448 (1983) (referring to a study by J. Goldstein, A. Freud & A. Solnit).

78. See, e.g., Risa J. Garon, Danielle Saba Donner & Kristin Peacock, *From Infants to Adolescents: A Developmental Approach to Parenting Plans*, 38 FAM. & CONCILIATION CTS. REV. 168 (2000) ("[S]ocial scientists, researchers, parents, and children concur that both mother and father should play vital roles in the lives of their children.").

79. RIANE TENNENHUAS EISLER, DISSOLUTION: NO FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 243, 242 (1977). See also Scott, *supra* note 3, at 491. "Much research indicates that children fare better in harmonious single-parent families than in intact families with a high level of interparental conflict." *Id.* (citing to MCCORD, MCCORD & ZOLA, ORIGINS OF CRIME: A NEW EVALUATION OF THE CAMBRIDGE-SOMERVILLE YOUTH STUDY (1959); Gibson, *Early Delinquency in Relation to Broken Homes*, 10 J. CHILD PSYCHOL. & PSYCHIATRY 195 (1969); Hetherington, *Family Interaction and the Social, Emotional, and Cognitive Development of Children Following Divorce*, in THE FAMILY: SETTING PRIORITIES (V.C. Vaughan & T.B. Brazelton eds., 1979); McCord, McCord & Thurber, *Some Effects of Paternal Absence on Male Children*, 64 J. ABNORMAL & SOC. PSYCHOL. 361 (1962); Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, 19 MARRIAGE & FAM. LIVING 356 (1957)).

80. See Scott, *supra* note 3, at 491.

81. See generally EISLER, *supra* note 79, at 242-43.

82. *Id.*

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age them to arrive at a settlement agreement.<sup>83</sup> A mediator can also be useful in pointing out to parents "the benefits and risks associated with their options if mediation should end without an agreement."<sup>84</sup> Enhancing a parent's knowledge of the relative strength or weakness of their case and the capriciousness of litigated outcomes can motivate the parties to a child custody dispute to earnestly consider their settlement options.<sup>85</sup>

The mediator is also in a good position to use other techniques to encourage settlement. For example, mediators can work with the parties to brainstorm creative ways to resolve the conflict.<sup>86</sup> Mediators can help clients think through their options and discuss the merits of settlement alternatives.<sup>87</sup> Mediators can also use techniques to help the client "save face" and encourage parents likely to lose custody at trial to voluntarily alter the role that they play in the child's life.<sup>88</sup>

Even if mediation fails to secure a settlement between former spouses or completely repair the relationship between them, it can still be tremendously beneficial for the emotional health of the children to the extent that it eases parental conflict<sup>89</sup> and allows each parent to model healthy interactions with the other.<sup>90</sup> If nothing more, mediation can provide opportunities to educate

83. Amy B. Jenkins, *Mediation Advocacy*, 29 WYO. LAW. 32 (Dec. 2006); see also Gary D. Williams, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 832 n.81 (quoting Michael D. Donahue & Susan H. Tregub, *Nuts and Bolts of NASD Mediation*, in SECURITIES ARBITRATION 1999: SETTLEMENTS, LAPTOPS, EXPERTS & ARBITRATORS 645, 651-52 (PLI Corporate Law and Practice Course Handbook Series No. B-1131, 1999)) ("Mediation may be the first time that you are forced to assess the merits of your client's case and convey the likelihood and scope of recovery that your client can expect.").

84. Robert Gatter, *Unnecessary Adversaries at the End of Life: Mediating End-of-Life Treatment Disputes to Prevent Erosion of Physician-Patient Relationships*, 79 B.U.L. REV. 1091, 1107-08 (1999) (citing JAY E. GRENIG, *ALTERNATIVE DISPUTE RESOLUTION WITH FORMS 142* (2d ed. 1990)).

85. See *id.* at 1108.

86. See Jerry Conover, *What Makes an Effective Mediator?*, 12 ALTERNATIVES TO HIGH COST LITIG. 101 (1994); see also Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 256 (2001).

87. See Love, *supra* note 86, at 256.

88. Gerald S. Clay & James K. Hoenig, *The Complete Guide to Creative Mediation*, 52 DISP. RESOL. J. 9, 10-11 (1997).

89. See Scott, *supra* note 3, at 490-91 (citing to Rutter, *Protective Factors to Children's Responses to Stress and Disadvantage*, in PRIMARY PREVENTION OF PSYCHOPATHOLOGY; SOCIAL COMPETENCE IN CHILDREN 49 (1979)). "[A]ggressive children removed from conflict-ridden nuclear families . . . improved after a reduction in conflict. Similarly, children who experienced a postdivorce reduction in family conflict showed improvement." *Id.* at 491.

90. See generally Bricklin, *supra* note 21, at 501-02.

the parents about the effects the conflict is having on the children involved and the danger of continuing their hostile interactions.<sup>91</sup> Addressing these issues has been identified as one of the most beneficial things that can be done when working with a high conflict couple.<sup>92</sup>

## 2. Development of Customized Solutions to Address Accusations of or Concerns Regarding Abusive Behavior

While it can be argued that a history or allegation of abuse should not automatically exclude clients from mediation, those who argue against mediating such cases raise many valid points. After all, the emotional and physical health of living, breathing persons is at stake in custody mediations.<sup>93</sup> Mediators should be guided by ethical, legal, and professional considerations to do everything they can to protect the parents and children involved from future abuse and neglect.<sup>94</sup> Mediators should not work on cases where abuse has been alleged if they feel unprepared to deal with the complex challenges these cases present.<sup>95</sup>

That said, the presence of or allegations of abuse should not automatically prevent a couple from seeking to mediate their dispute. Mediation presents some unique opportunities for dealing with these sensitive but all-too-common issues—opportunities that could be used to develop treatment and supervisory options to benefit all parties involved. At the end of the day,

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91. See Ron Neff & Kat Cooper, *Progress in Parent Education: Parental Conflict Resolution: Six-, Twelve-, and Fifteen-Month Follow-Ups of a High-Conflict Program*, 42 FAM. CT. REV. 99, 102-03 (2004) (suggesting that the best thing that can be done with high-conflict parents, including those who are personality disordered, is to "[p]oint out—clearly, simply, and repeatedly—the consequences of continuing their present course of action.").

92. See *id.* at 103. Rather than attempting the broader goal of altering "the client's general approach to life," Neff and Cooper encourage those involved in the process of a child custody dispute to focus their efforts on changing the client's view of a single reality: the conflict with the other parent and the consequences that will have on the children. *Id.* This strategy of explaining consequences is described as being "the heart of" their program for high conflict couples. *Id.* Neff and Cooper were instrumental in developing the Parental Conflict Resolution Program in Maricopa County, Arizona. *Id.* at 99.

93. See Elrod, *supra* note 67, at 496.

94. See, e.g., *Professional Standards of Practice for Mediators*, The Mediation Council of Illinois, available at [http://www.mediationcouncilofillinois.org/standards\\_of\\_practice.shtml](http://www.mediationcouncilofillinois.org/standards_of_practice.shtml). "If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws." *Id.* "The mediator should facilitate the participants' formulation of parenting plans that protect the physical safety and psychological well-being of themselves and their children." *Id.*

95. See e.g., *id.* ("[A] mediator shall not undertake a mediation in which the family situation has been assessed to involve domestic abuse without appropriate and adequate training."). See also KIMBERLEE K. KOVACH, *MEDIATION PRINCIPLES AND PRACTICE* 486 (3d ed. 2004).

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mediation must be evaluated against its primary alternative – litigation. Regrettably, even litigation, though it may be a superior alternative in many circumstances, fails to guarantee that children will be protected from violent or abusive parents.<sup>96</sup> Litigation also limits the ability of parties to customize solutions to meet their complex needs.<sup>97</sup>

While mediation often involves compromise, this does not mean that parents should ever consent to an agreement that could potentially result in harm to their children. Parents who feel that the safety of their children would be compromised by the arrangements that can be negotiated with the other party should not agree to them. Even if parents or their lawyers are confident that they could not win anything better than the proposed settlement in court, they might be wise to delay inevitable circumstances as long as possible if the proposed arrangement could put the child in danger. The right to refuse to settle the case is always an option in a true mediation.<sup>98</sup>

However, instead of viewing mediation as a one-way street that can only bring harm to children, parents and lawyers should begin to consider that mediation can be a way for the parties to develop creative solutions to the complex problems presented by allegations of abuse. For example, a parent concerned about the other verbally abusing the children could link the

96. See Elrod, *supra* note 67, at 539. As most children do not have their own attorneys during a child custody litigation but must instead rely on judges and their parent's attorneys to protect their interests, Elrod notes that:

[z]ealous representation of a client in a custody dispute is complicated by the fact that the end result (residential placement) will have profound consequences on a third party—the child. The Model Rules of Professional Responsibility do not specifically address the duty of a lawyer for a parent to not harm the child. Rule 2.1 requires a lawyer to exercise independent professional judgment and render candid advice and Rule 1.4(b) suggests that a lawyer explain "a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Although these can be read as requiring the lawyer to inform the client as to why the lawyer believes the client's course of conduct is not in the child's best interests, the rules do not specifically require a lawyer to consider the child's interest.

*Id.* (footnote omitted).

97. Litigated decisions about custody and treatment are left to the discretion of a single judge. See Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After Troxel, The Parens Patriae Power of the State, A Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes*, 27 *HAMLIN J. PUB. L. & POL'Y* 357, 364 (2006). Regrettably, it is unlikely that the involved judge will have sufficient time to explore all of the many options available to the parties.

98. Corinne Bendersky, *Complementarities in Organizational Dispute Resolution Systems: How System Characteristics Affect Individuals' Conflict Experiences*, 60 *INDUS. & LAB. REL. REV.* 204 (2007) (observing that mediators "facilitate the dispute resolution process directly or indirectly, but leave decision-making authority to the parties themselves").



other's visitation time to the successful completion of an anger management course and documented weekly visits with a therapist. In cases where the physical safety of the children in the presence of one of the parents is in question, the concerned parent might agree to let the other interact with the children in a formal supervised visitation program.<sup>99</sup> Likewise, a parent might agree to let another whose parenting skills are in substantial question spend time with the children during visits informally supervised by trusted and specified persons. Community-based visitation could also be used to accommodate children who are uncomfortable with being left alone with one of the parents but are in no discernable danger of being kidnapped or mistreated.<sup>100</sup>

Another prime advantage of addressing allegations of abuse in the context of mediation is the potential of the setting to inspire candid discussions that can focus on addressing the underlying concerns rather than pinning blame.<sup>101</sup> In this confidential environment, there is no judge to decide who is ultimately right.<sup>102</sup> Instead, the parties must address the reality of their situations as both they and the opposing parent perceive it to be. Without a judge to impress, allegations of abuse lose their status as a strategic advantage. Instead, these contentions might be used to highlight issues that the parents need to address before they are ready to have custody of or visitation with the children. By examining the concerns of each parent and child, the parties may be able to find mutually acceptable solutions to the problems at issue.

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99. Supervised visitation has been defined as a "safe and secure setting where children and their parents visit or exchange custody under the guidance of trained staff or volunteers." Rachel Birnbaum & Ramona Alaggia, *Supervised Visitation: A Call For a Second Generation of Research*, 44 FAM. CT. REV. 119, 120 n.1 (2006).

100. For example, a father in this situation might propose being involved in his son's life by participating in a community jazz band together, coaching the son's baseball team, or assisting the leader of his Boy Scout Troup. Solutions like these might allow parents to be involved in the lives of their children in ways that the children feel comfortable with because there are other people around who the children know and trust. Parents could negotiate the framework for these arrangements during the course of the mediation to make sure that the situation will address the particular concerns at issue.

101. See A.B.A., *Reaching the Community*, Practical Law Presentations: *Choosing Mediation Over Litigation*, available at [http://www.abanet.org/publiced/lawday/community/mediation\\_litigation.html](http://www.abanet.org/publiced/lawday/community/mediation_litigation.html) (last visited Sept. 18, 2007).

102. See John A. Fiske & Michael L. Leshin, *Mediation and Other Dispute Resolution Alternatives*, in 1 MASSACHUSETTS DIVORCE LAW PRACTICE MANUAL, § 4.2.2 (2005) (observing that in mediation, a "mediator has no power to decide the outcome"). Parties, rather than the mediator, are the ones who must decide how to settle the case. Sally Ortner & Merrill Shields, *Colorado Now Has Model Standards of Conduct For Mediators*, 2000 COLO. LAW. 45, 46 (asserting as fundamental the principle that "the parties, not the mediator, decide the outcome of their dispute").

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While working out a plan for dealing with abuse may not be realistic in certain cases, mediation should at least be considered in deciding how to address the problem. If creative solutions could resolve the issues of primary concern to the parties, mediation may be able to offer effective options to families dealing with the difficult issues presented by fears of mistreatment and abuse.

### *B. The Benefits for Parents*

Mediation also offers advantages over litigation that parlay to the parents themselves.<sup>103</sup> Educating the couple about these incentives may encourage their participation in the mediation process.

#### 1. Convenience

There are two main advantages of convenience for parents arriving at an agreement themselves rather than submitting their case to judgment. First, mediation offers parents an opportunity to take their specific schedules and responsibilities into account when formulating a child custody plan. Second, mediating an agreement can make it more convenient to resolve the actual dispute.

While the courts will try to take the schedules and needs of the parties into consideration when formulating a custodial arrangement, a judge will necessarily be less familiar with the situation than the parents themselves. Accordingly, parenting schedules produced as a result of litigation may fail to take into account all of the factors of concern to the parties.

In contrast, mediation allows the parents to make their own decisions about who will participate in raising their child and when that participation will take place.<sup>104</sup> While a mediator can help facilitate this process, the parties themselves control the outcome of the negotiations and are free to reject proposals that fail to take their interests into account.<sup>105</sup>

Regarding the second point, mediation may also be able to improve the overall convenience of resolving issues of child custody. If the couple is

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103. See *infra* notes 104-19 and accompanying text.

104. *Id.* See also Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1169 (1986) ("Divorcing couples with minor children should be especially attracted to mediation since it shields their offspring from the trauma of litigation, and allows the parents – not the court – to determine what is in the best interests of their children.").

105. Bendersky, *supra* note 98, at 204.

able to reach an agreement about how to raise their child, this could minimize the amount of time they will spend in court in the future. While the process of strategizing, counseling, and mediating may take a significant investment of time at the outset, engaging in this process may result in more durable agreements.<sup>106</sup>

In addition to these long-term benefits, parties may also appreciate the short-term benefit of being able to control the time and place of the mediation. This consideration may be particularly meaningful to a party who has already endured ill timed, but mandatory, court appearances resulting in a scramble for childcare, additional childcare costs, or excessive absences from work.

## 2. An Opportunity to be Heard

Researchers have observed that having a "voice" in the process of custody decision-making is of considerable significance to parents and suggests "that affirmation of their parental role is at least part of what" those who participate in a custody dispute are seeking.<sup>107</sup> Mediation provides parents "a forum for the telling and legitimation [sic] of their custodial claims, which is [seemingly] denied to them in litigation."<sup>108</sup>

In court, procedural formalities limit the ability of the parties to tell the judge all that they would desire to say about their case.<sup>109</sup> In mediation, parties can use the words of their children or other third parties to convey their own feelings and concerns without worrying about the application of the hearsay rule.<sup>110</sup> This allows clients, especially those who frequently speak in quotes, to feel that they have expressed themselves and are being heard.<sup>111</sup>

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106. See Carboneau, *supra* note 104, at 1169 ("The fact that the final result is the product of personal involvement, and largely self-determined, facilitates initial and continuing compliance with the mediated agreement. These circumstances, in turn, lessen the possibility of reconsideration or litigation."). Once a result developed by the parties themselves has been reached, it is less likely that the same issue will need to be debated ad nauseam. See *id.*

107. Kandel, *supra* note 44, at 891 (citing Robert E. Emery, et al., *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. OF CONSULTING & CLINICAL PSYCHOL. 410 (1991)).

108. *Id.*

109. *Id.* at 896-97.

110. *Id.* at 901.

111. *Id.* at 902. Kandel notes that "ethnographic studies suggest that reporting speech and 'talking about talking' occurs more often in women's speech than in men's." *Id.* at 897 (internal citations omitted).

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Giving parents a chance to air their concerns can be particularly effective in securing their satisfaction with the dispute resolution process.<sup>112</sup>

### 3. Enhancement of Communication Skills

Participating in mediation may assist the parties in developing better methods for communicating with one another in the future.<sup>113</sup> While it might be impossible to convince a high conflict litigant that this is an area in which they need improvement, it may be a more palatable suggestion when phrased in terms of an opportunity to enhance the skills of the other party.

In the mediation context, couples must learn how to relate to one another in positive ways, though the extent of their interactions will vary depending upon the particular structure of the sessions.<sup>114</sup> During mediation, they would have an opportunity to see the mediator (and hopefully the lawyers) model positive and professional ways to relate and respond to individuals and ideas that they may disagree with.<sup>115</sup>

Developing ways to communicate effectively and respectfully will be vital for the parties in the future. "The reality is that where there are children, a divorce does not sever the bonds between members of a family - it only alters them."<sup>116</sup> The former couple will likely need to communicate as they go through certain experiences in the child's life together.<sup>117</sup> Ultimately, even a mediation that fails to produce a settlement agreement can improve their ability to handle this reality.

112. *Id.* at 890-91. Overall, fathers tended to be more satisfied with the outcome of mediation than mothers, even when there were no meaningful differences in the resulting outcomes. *Id.* Kandel hypothesizes that this is a result of a stronger desire on the part of fathers to be heard and affirmed during the custody resolution process. *Id.* at 891.

113. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 753 (1988) (citing Mona Barsky, *Strategies and Techniques of Divorce Mediation*, 65 SOC. CASEWORK 102, 105 (1984)).

114. See *infra* notes 175-96 and accompanying text.

115. Fineman, *supra* note 113, at 774 (suggesting that mediators can be role-models for "the 'how to' of cooperative conflict resolution" and asserting that participation in the process can prepare parties to "emulate the system for their future needs").

116. EISLER, *supra* note 79, at 242.

117. Fineman, *supra* note 113, at 734 n.24 (1988) ("Outside the courtroom there is no such thing as sole custody; divorce requires restructuring of the family but will include continued influence by both parents") (citing Pruhs, Paulsen & Tysseling, *Divorce Mediation: The Politics of Integrating Clinicians*, 65 SOC. CASEWORK 532, 535 (1984)).

#### 4. Reduction of Emotional Stress

The mere thought of losing custody of one's children can take an exacting emotional toll upon an individual, though the stress may translate differently for mothers and fathers.<sup>118</sup> As a result of these feelings and a desire to retain close bonds with one's offspring, some parents litigate the issue of custody for years after their divorce, doing everything in their power to assert and preserve their rights relating to the child.<sup>119</sup>

Mediation can help to minimize parental stress by introducing elements of control into the ambiguous world of custody litigation. First, mediation provides the parties with an additional opportunity to decide the course of their children's future for themselves. Instead of taking their chances in the courtroom (where a judge could deprive the party of all parental rights), parties can determine their custody situation to the extent that they are able to find a mutually agreeable solution to the dispute. Second, mediation can provide the parties with control over another emotionally volatile situation, namely how and where they will interact with their former spouse. Being able to have a say in these sensitive and important issues could help reduce parental stress.

#### V. CREATING AN EFFECTIVE MEDIATION MODEL FOR HIGH CONFLICT COUPLES

Attorneys and mediators may find that the techniques they typically employ in other types of mediation settings are insufficient to lead a high conflict custody mediation to a successful conclusion. Traditional mediation techniques might benefit from infusion with strategies tailored to address the particular demands of the high conflict couple.

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118. CHESLER, *supra* note 41, at 81 (citing statistics to show that fathers who lose custody may feel particularly threatened by the loss of status, reminder of present impotency, or deprivation of what is perceived to be a "patriarchal right").

119. See, e.g., Theodore Sliwinski, *New Jersey Child Support, Part 2*, March 02, 2005 (available at [http://www.divorcenet.com/states/new\\_jersey/new\\_jersey\\_child\\_support\\_part\\_2](http://www.divorcenet.com/states/new_jersey/new_jersey_child_support_part_2)) (indicating that parties can "generally litigate for years" even in battles about *jurisdiction* over child support) and Ann Bradley, *This is Not Your Parent's Divorce - 7 Ways Divorce is Different Today* (available at <http://ezinearticles.com/?This-is-Not-Your-Parents-Divorce-7-Ways-Divorce-is-Different-Today&id=534330>) (asserting that "[i]f mothers want their children, they often have to fight for them in a long and protracted battle."). See also *supra* notes 40-49 and accompanying text.

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### *A. Educate Clients About the Mediation Process*

Family law mediators acknowledge that "a high percentage of couples entering mediation are ill-prepared for the process."<sup>120</sup> Unlike commercial clients, family law clients may be completely new to the concept of mediation and require special assistance understanding how the process works. Family law attorneys and mediators should be able to discuss the general process and rules of the mediation.<sup>121</sup> They should provide the client with a thorough "outline of what to expect" so that they will not be surprised by any aspect of the process.<sup>122</sup> The mediator's role should also be discussed so that the "client understands that the mediator is neutral."<sup>123</sup>

Clients should also be counseled about the realities and risks of mediation.<sup>124</sup> Parties should go into mediation cognizant of the fact that they may need to address sensitive issues relating to their own conduct and the future of their children. They should also be informed that decisions made through mediation agreements could have legally binding effects.

### *B. Encourage Clients to Emotionally Prepare for Mediation*

Attorneys and mediators should also encourage their high conflict clients to emotionally prepare for mediation.<sup>125</sup> As part of this process, the clients should reflect upon their goals for the children's future, think about creative solutions to resolve the custody impasse, and prepare to interact with their former spouse.<sup>126</sup>

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120. See Mark A. Ingram, *Preparing Your Client for a Successful Child Custody Mediation*, 46 OHIO ADVOC. 13 (2003).

121. See A.B.A. Section of Litigation, *Handbook on Limited Scope Legal Assistance*, A Report of the Modest Means Task Force 1 (2003).

122. Alexander S. Polsky, *Risk-Oriented Mediation Manages Emotional Disputes*, 49 ORANGE COUNTY LAW 31, 32 (2007).

123. *Id.*

124. See Jane C. Murphy, *Objecting to Court Ordered Mediation*, 38 MD. B.J. 54, 54-56 (2005). Advising clients about the risks of engaging in mediation is particularly important in situations where the client may have been a victim of domestic violence. See *id.* at 56.

125. Polsky, *supra* note 122, at 31.

126. *Id.* at 32.

### 1. The Utility of & Strategies For Involving Counselors While Preparing for a High Conflict Mediation

Counselors can be very useful in preparing clients to face the emotionally-charged atmosphere of a high conflict custody mediation.<sup>127</sup> With essential life choices hanging in the balance, clients will be well served by taking time to think through their feelings, the details of what they desire to say, and the range of potential settlement alternatives.<sup>128</sup> While a client might begin this process with their attorney and continue it in caucuses with the mediator, involving a counselor from the outset could make better financial sense for the client and enable them to achieve superior mediation results.<sup>129</sup>

Therapists can work with the parties to establish objectives for the mediation, assisting them in identifying goals and preparing them to converse with the other party.<sup>130</sup> Therapists can also help clients evaluate their parenting skills and create strategies for improving them.<sup>131</sup> Likewise, counseling can be an appropriate place for clients to work through and resolve lingering feelings about the former spouse.<sup>132</sup>

High conflict clients may be particularly resistant to the idea of seeking psychological help because they tend to perceive the other party as the cause of everything that is wrong with the relationship and situation.<sup>133</sup> They may also need extra help in recognizing that their unresolved feelings affect their actions and parenting ability.<sup>134</sup> At the same time, the high conflict couple's destructive patterns of communication make therapy almost necessary.<sup>135</sup> Without counseling, the parties might never learn how to behave in ways

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127. See Elrod, *supra* note 67, at 543 (observing that during a high conflict custody dispute, "both the parents and the children may need therapy").

128. See Polsky, *supra* note 122, at 32.

129. *Id.* at 31-32.

130. See *id.*

131. See Janet R. Johnston, Marjorie Gans Walters & Steven Friedlander, *Alienated Children in Divorce: Therapeutic Work With Alienated Children and Their Families*, 39 FAM. CT. REV. 316, 323 (2001) [hereinafter Johnston, *Alienated Children*] (observing that once a client has acknowledged that the criticisms raised by the other parent could be true, to an extent, the "therapist can coach and counsel the rejected parent in specific and concrete ways regarding these issues"). Johnson, Walters and Friedlander observe that a therapist may also be useful in encouraging a parent to model positive behavior for their children. *Id.* While these comments are offered in reference to cases of parental alienation, these observations seem applicable to high conflict couples in general. *Id.*

132. Elrod, *supra* note 67, at 501 ("[A] divorce legally ends a relationship between people who may not have separated emotionally and who must continue to interact as long as there are minor children.").

133. See Bricklin, *supra* note 21, at 508.

134. See JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 197 (1989) (observing that parties may use their children as "conduits for the expression of their feelings for one another").

135. See *id.*

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conducive to resolving their conflicts. Accordingly, attorneys and mediators may need to be particularly persuasive when encouraging these clients to engage in counseling or therapy. Before accepting a client, they might seek to condition the provision of services on the high conflict client's commitment to seek psychological assistance.

Those involved in or encouraging the counseling process must "recognize the psychological functioning of the parent and . . . note that he or she is in a particularly vulnerable place with his or her parenting under scrutiny."<sup>136</sup> Because the parent may view such comments as a reason to view the speaker as "a biased spokesperson" for the other parent, those who broach these subjects should be especially careful to do so in a way that is supportive.<sup>137</sup>

In general, the idea of seeking psychological assistance has been "gaining currency" with divorcees.<sup>138</sup> The assistance may take the form of professional divorce counseling or attendance at self-help groups.<sup>139</sup> Whatever the form, those who have participated in divorce counseling claim that it can be very beneficial, "providing much needed emotional support at a difficult time" and creating opportunities to consider the custodial and visitation arrangements that will be best for their family.<sup>140</sup>

Therapists working with high conflict parties should be advised to follow several precautions. First, they must be particularly vigilant in encouraging their clients to tell them the truth – without exaggeration.<sup>141</sup> While it is important for the clients to express themselves and to work through their issues, the mediation will be more successful if the therapist is able to focus on examining realistic instances of past behavior, rather than exaggerated notions of the way the other party behaved in the past.<sup>142</sup> Second, therapists preparing clients for the mediation process should ideally be "tough, decisive, and hugely knowledgeable about the ploys and maneuverings of high conflict . . . cases."<sup>143</sup> Following these guidelines can help prevent psychological therapy from needlessly aggravating tensions between the litigants.<sup>144</sup>

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136. *Id.*

137. *Id.*

138. EISLER, *supra* note 79, at 242.

139. *Id.*

140. *Id.*

141. Bricklin, *supra* note 21, at 512.

142. *See id.* at 512-13.

143. *Id.* at 512.

144. *See id.* *See also* Johnston, *Alienated Children*, *supra* note 131, at 321.



## 2. The Particular Importance of Providing Counseling to Victims of Domestic Violence

Individuals who have been abused will experience many emotions and feelings of powerlessness that should be addressed before they engage in mediation.<sup>145</sup> Participation in mediation must be a voluntary process.<sup>146</sup> Voluntary participation cannot occur if one party is still entirely submissive to the other.<sup>147</sup> A counselor's assistance may be crucial in preparing parties to mediate with someone who has attacked or controlled them in the past.

While helping clients to understand and process their history is crucial, allowing clients to dwell in a victim mentality can needlessly fuel the litigious process.<sup>148</sup> Psychologists involved in preparing clients for mediation should walk a tight line between facilitating understanding and channeling their interactions in ways that will empower clients to negotiate with confidence<sup>149</sup> and resolve problems that actually exist.<sup>150</sup>

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[T]he therapist should beware of inadvertently confirming the parent's often-distorted, simplistic view of the situation, especially their tendency to blame the problem entirely on the other parent. Instead, it is important to provide them with a more complete explanation of what has actually happened to their child in the context of the family and of the contribution of both parents, including and especially their own, to the problem.

*Id.*

145. Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 404 n.33 (quoting JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1984) (asserting that "long-standing patterns of dominance and submission, deference and competition, dependence and competence" will result in power imbalances during the mediation)).

146. Some states make mediation mandatory in child custody disputes. See Christy L. Hendricks, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes*, 32 LOUISVILLE J. FAM. L. 491 (1994).

Mandatory mediation may seem to be something of an oxymoron because mediation is fundamentally a voluntary process. However, mandatory mediation is still a voluntary process despite the fact that the parties are not participating voluntarily. The right to decline settlement preserves the fundamental fairness and voluntariness of mediation. As long as a settlement is entered into voluntarily by the parties, the process is mediation.

David S. Winston, Comment, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead A Horse to Water. . . ."*, 11 OHIO ST. J. ON DISP. RESOL. 187, 189-90 (1996).

147. See Johnston, *Building Multidisciplinary Professional Partnerships*, *supra* note 33, at 469. Victims of domestic violence "are often subject to ongoing manipulation and control by the abusive partner after separation." *Id.*

148. *Id.* at 461-65.

149. Andrew Schepard, *The Evolving Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000) ("Some victims of domestic violence may have recovered their self-confidence enough to be a suitable mediation participant if advised by counsel and protected by appropriate safeguards in the mediation process.").

150. Bricklin, *supra* note 21, at 512-13.

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### C. *Select an Appropriate Mediator*

[I]t is crucial that any custody proceeding not only be fair but also be so perceived by the contestants. This is especially necessary in matters of custody, not just because future parenting by the 'loser' may depend upon it, but also because violence and/or child snatching may well ensue without it.<sup>151</sup>

The neutrality of the mediator is one characteristic that is important in bringing parties on board with a mediation agreement. Mediators must show that they are not trying to favor one party over the other in their techniques.<sup>152</sup> They must be especially vigilant in this regard when dealing with the high conflict couple, as their clients will be quick to observe and resent any signs of partiality.

At the same time, however, the mediator should be partial to the safety interests of everyone who will be affected by the results of the mediation—including the children at issue.<sup>153</sup> A good custody mediator should also be able to encourage weaker parties to stand up for their rights in an assertive but positive way and help keep aggressive parties in check.<sup>154</sup>

Those mediating a high conflict dispute should be well versed in basic mediation techniques such as integrative bargaining.<sup>155</sup> For example, the mediator should be effective in encouraging parties to discover new solutions to their conflict by engaging in brainstorming.<sup>156</sup> The mediator should also be able to help the parties focus on their interests rather than fixed positions.<sup>157</sup>

151. Mary Mcdevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857, 876 (1995).

152. Evan M. Rock, Note, *Mindfulness Mediation, The Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 354-55 (2005) ("If a mediator were to support one party over another, disfavored parties might become distrustful and recalcitrant, creating further obstacles in reaching an agreement.").

153. Schepard, *supra* note 149, at 420 ("The mediation community is in the process of revising its standards of practice to implement the general principle that [w]hile [mediators] are neutral about the particular agreement reached (provided it is reached voluntarily), [mediators] are not neutral about the safety of our clients and their children.").

154. See generally Polsky, *supra* note 122, at 31.

155. For an examination of integrative bargaining techniques, see *Mediation: The Art of Facilitating Settlement*, Straus Institute for Dispute Resolution, 10:5-10:7 (Copyright 1993-2005) [hereinafter *The Straus Mediation Handbook*].

156. *Id.* at 10:7.

157. See *id.* at 10:6.

Additionally, the mediator should be highly skilled in distributive bargaining techniques.<sup>158</sup> The mediator should be effective at keeping the negotiation process going, moving the parties toward the resolution of the dispute.<sup>159</sup> A mediator may be particularly effective at this task if they can frame offers constructively to help the parties save face and use caucuses to facilitate the making of realistic offers.<sup>160</sup>

Given the difficulties of mediating between a high conflict couple, a mediator should also be able to take control of volatile interactions between others and help diffuse their virulence.<sup>161</sup> Having considerable mediation and life experience will assist them in this difficult task.<sup>162</sup>

Selecting the appropriate mediator could make all the difference in a high conflict couple's ability to reach a settlement. If a high conflict couple is going to mediate, they should engage a highly skilled professional able to handle their complex needs.

#### *D. Set Firm Rules for Direct Interaction Between Parents*

In the eyes of a high conflict couple, an opportunity to fight with the former spouse might be perceived as one of the main advantages of mediation and its ensuing confidentiality.<sup>163</sup> However, if the goal of mediation is to find resolution, the parties would be wise to establish guidelines to govern these potentially vituperative interactions.<sup>164</sup>

With high conflict couples expressly in mind, social workers in Portland, Oregon created a set of programs to assist parents in resolving their disputes.<sup>165</sup> Participants in this program were required to adhere to five basic rules:<sup>166</sup>

1. Members of the group will speak respectfully to one another.
2. Each will listen carefully to what the other is saying and will not interrupt.
3. Members of the group will use "I" messages, and not "you" messages.

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158. For an examination of distributive bargaining, see *id.* at 10:1-10:4.

159. *Id.* at 10:1.

160. *Id.* at 10:4.

161. See generally Derman, *supra* note 5.

162. See Kenneth S. Gallant, *Promoting the Best Interests of Children Whose Parents are Divorcing: The Next Steps for Arkansas*, 22 U. ARK. LITTLE ROCK L. REV. 607, 609 (2000) ("Durable resolution of high conflict custody battles requires special mediation skills that can only be developed by thoughtful reflection on experience.").

163. See *id.*

164. See, e.g., Derman, *supra* note 5.

165. McIssac, *supra* note 36, at 569.

166. *Id.* at 570, 572. The name of this program is "Parents Beyond Conflict." *Id.* at 569.

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4. Members of the group will not speak disparagingly of the other parent, their significant other, or any other person involved.
5. Members of the group will continue these courtesies between group meetings.<sup>167</sup>

In addition to following these rules in their interactions with one another, parents were required to read a book entitled *Joint Custody with a Jerk*.<sup>168</sup> Through reading this book and participating in the program, parents were encouraged to communicate about what, rather than who, is wrong.<sup>169</sup>

Participants in the program were also given a helpful tool to clarify what they needed from the other parent.<sup>170</sup> In using the so-called "problem pyramid," parents were provided with a way to remember to "frame requests in positive ways," ask questions rather than propose solutions, and resist using "always" and "never" statements.<sup>171</sup>

The techniques used by the Portland researchers appear to have much promise in changing the ways that high conflict parties relate to each other. By elucidating ways to actively respect the other parent and engage in problem solving rather than problem dwelling, it is hoped that high conflict parties taught to embrace these techniques will achieve better results in mediation.

Educating the parties about particular conflict resolution techniques may prepare a workable framework for high conflict mediation. Establishing rules, such as those set forth in *Parents Beyond Conflict*, for the couple's interactions can encourage them to use productive forms of communication. Employing somewhat codified procedures could allow each participant to learn the ground rules for the mediation through pamphlets or in group settings, options which could reduce the overall cost to the participants and free mediators from the monotony of teaching them to every new client.<sup>172</sup> Once these rules are understood, the mediator could serve loosely as referee between the parties, encouraging them to engage each other in productive

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167. *Id.* at 572.

168. *Id.* at 571 (referencing JULIE A. ROSS & JUDY CORCORAN, *JOINT CUSTODY WITH A JERK: RAISING A CHILD WITH AN UNCOOPERATIVE EX* (1996)).

169. *Id.* at 573. This book encourages parents to take ownership of problems by framing "the problem around a person's feelings and focus[ing] . . . on 'what is wrong' . . . [rather than framing] the problem[s] around blame and recrimination . . . focus[ing] on 'who is wrong.'" *Id.*

170. McIssac, *supra* note 36, at 573.

171. *Id.* at 574. Parents are also coached to: "(1) identify the problem; (2) state how you feel; (3) state why you feel that way; and (4) make specific requests for change" when interacting with their former spouse. *Id.* at 573.

172. See McIssaac, *supra* note 36, at 571.

ways.<sup>173</sup> Attorneys and therapists may also be able to assist in this process by encouraging their clients to exercise civility at all times, even in the face of disrespect.<sup>174</sup>

### *E. Use Filters to Control Communication Between the Parties*

#### 1. Maximize the Use of the Caucus

One of the techniques that can be used in mediation is called a caucus.<sup>175</sup> A caucus is a time where the mediator meets with each side individually to discuss and explore their underlying interests.<sup>176</sup> The caucus can also be used to explore potential settlement alternatives and to encourage the parties to make proposals about how to resolve the conflict.<sup>177</sup>

Caucuses may be used during the entire mediation or in selective portions of the process. The technique may be particularly effective in brokering agreement with high conflict couples because it allows mediators to control and deescalate the interactions that occur between the parties.<sup>178</sup>

The inability of a high conflict couple to effectively communicate is the downfall of many of their mediation attempts.<sup>179</sup> By acting to insulate the parties from direct interaction with one another through a caucus, skilled mediators may be able to help parties arrive at a consensus without necessarily resolving all of their communicative quirks and deficiencies.<sup>180</sup> By conducting the mediation partially or exclusively through caucuses, mediators can decide precisely what would be most relevant or productive for the parties to hear regarding the other party's positions and expectations and screen

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173. See Carrie Menkel-Meadow, *Mediation: Theory Practice and Policy*, in DISPUTE PROCESSES AND CONFLICT RESOLUTION: BEYOND THE ADVERSARY MODEL 266 (2005) (comparing a mediator's role to that of a referee).

174. See Renee Goldenberg, *Family Law: Practical Aspects of Parenting Conflicts: Preparing Parents for Litigation*, 72 FLA. B.J. 54, 56 (Jan. 1998) ("The attorney should admonish the parent that behavior must be controlled or that the parent must learn how to and must act reasonably at all times, even when faced with unreasonableness."). Goldenberg's comments are made in the context of preparing for family law litigation. See *id.* However, they appear generally applicable to show that attorneys can play an important role in preparing a client for interactions with the opposing party. See generally *id.*

175. See Tom Arnold, *Mediation Outline - A Practical How-To Guide for Mediators and Attorneys*, 976 A.L.I.- A.B.A. 579, 622-23 (1994) [hereinafter A.B.A. Mediation Outline].

176. See *id.* at 622.

177. The Straus Mediation Handbook, *supra* note 154.

178. See MOORE, *supra* note 50, at 319.

179. See Derman, *supra* note 5.

180. A.B.A. Mediation Outline, *supra* note 175, at 623-24.

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out the remaining statements.<sup>181</sup> Mediators can also rephrase the parties' messages to one another in order to express them in terms that are more palatable to the other party.

Caucuses also create a safe environment for the mediator to "reality test" the positions of each party.<sup>182</sup> In other words, the caucus is a good time for a mediator to help each client identify the strengths and weaknesses of their case.<sup>183</sup> Exploring these concerns in the privacy of the caucus can encourage a party to modify its expectations and demands, a vital step if there is to be a voluntary agreement.<sup>184</sup>

Caucuses have proven themselves to be a valuable tool for mediators to use to diffuse tension in many other areas of the law.<sup>185</sup> Depending on the level of hostility that exists between the parties, mediators may decide to conduct the negotiations exclusively through caucuses.<sup>186</sup> In this scenario, mediators may choose to take advantage of existing technology by conducting the caucuses through teleconferencing, videoconferencing, or instant messaging.

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181. See generally *id.* at 631-32.

182. *Id.* at 623; see also Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 57 (2005) (discussing reality testing).

183. The Straus Mediation Handbook, *supra* note 154 at 9:15.

184. A.B.A. Mediation Outline, *supra* note 175, at 623-24.

185. See generally, *Mediation Defined*, JAMS (available at <http://www.jamsadr.com/mediation/mediation-defined.asp>).

Mediation generally begins with a joint session to set an agenda, define the issues and ascertain the position and/or concerns of the parties. This allows the parties to attack the resolution process either on an issue-by-issue or group-by-group basis.

The joint session is then followed by a separate caucus between the mediator and each individual party or their counsel. This allows each side to explain and enlarge upon their position and mediation goals in confidence. It also gives the mediator an opportunity to ask questions which may well serve to create doubt in an advocate's mind over the validity of a particular position.

*Id.*

186. See *Mediation Procedure Commentary*, The International Institute for Conflict Prevention & Resolution (available at [http://www.cpradr.org/med\\_comment.asp?M=9.2.10.5](http://www.cpradr.org/med_comment.asp?M=9.2.10.5)).

When strong hostility exists between opposing party representatives or their attorneys a joint session may be counterproductive. Under those circumstances the mediator may decide to meet with the parties separately from the beginning. *Id.*

## 2. Maximize Attorney Involvement

Involving attorneys in the actual mediation is another option that high conflict couples should seriously consider.<sup>187</sup> This mediation technique may be particularly useful if there is an actual or perceived imbalance of power between the parties.<sup>188</sup> In addition to being present with the parties through all aspects of the mediation, skilled and sensitive attorneys can be useful in conveying messages graciously and expressing options received by the other side in terms palatable to the clients.<sup>189</sup>

Dr. Bruce Derman suggests that it can be highly effective for "the attorneys [to] represent each member of the couple and dialogue with their counterpart with the couple [just] listening[]" during the initial stages of the mediation.<sup>190</sup> The rationale is that this will eliminate intense interactions between the parties and keep them as observers who can explore "their mutual needs and interests . . . at a safe, unemotional distance."<sup>191</sup> By eliminating "emotional drama" and taking "into account the fact that this couple is not ready to talk directly," the mediation may thus be saved from premature failure.<sup>192</sup> If the parties continue with the process, they may later be "invited to engage" each other by "talking . . . [exclusively] through the coaches and

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187. See Derman, *supra* note 5.

188. The presence of actual or perceived power imbalances appears to be one of the most frequent criticisms of mediation in the family law context. See generally Jennifer Wiggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 260 n.143 (2000) (citing Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 445 (1992) (noting that "mediation empowers the 'already more powerful husband' in divorce proceeding to the disadvantage of the wife"). "[C]oncerns have also been raised that the mediation process reinforces power dynamics that can be undercut somewhat by the formality of the litigation process." Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (concluding that mandatory mediation does not provide a more humane or just alternative to the adversarial system).

189. See generally *Mediation Defined*, *supra* note 185.

190. Derman, *supra* note 5. Derman's comments are made in the context of a broader scheme for mediating high conflict disputes. See *id.* Derman asserts that his model:

creates a safe container that truly respects their brittle and explosive nature and doesn't try to force them into being anyone they are not . . . contain[s] the rage of the couple without denying its existence . . . offers a real alternative for communication beyond defending and blaming . . . is just as powerful in reducing heat as the couple is in raising the heat . . . allows for increases in responsibility when the couple demonstrates that they can handle it . . . permits a couple to operate from a distance that is emotionally suitable for them . . . assists in balancing the extreme imbalances, real or imagined, that exist . . . insures that both voices will be heard.

*Id.*

191. *Id.*

192. *Id.*

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or attorneys."<sup>193</sup> Eventually, they may also be invited to communicate directly with one another.<sup>194</sup>

This model may be particularly appropriate in the context of situations where one parent feels unprepared to take on the other alone.<sup>195</sup> This system also helps minimize the risk that a "mediator may be deceived into allowing, and even contributing to, the unconscionable exploitation of the weaker spouse by the dominant spouse," which may in turn help to protect the children from potentially abusive situations.<sup>196</sup>

#### F. *Decide How the Children Will be Involved*

Deciding how to involve children in the mediation process could be an important step in developing the framework for the mediation. Children will always be involved in the custody mediation in the sense that its outcome will tangibly affect their lives. Parents should at least consider the possibility of inviting the children to contribute to the process that could determine the course of their future.

In most custody proceedings, the children's preference regarding contact with their parents is given scant consideration, if any at all.<sup>197</sup> In one study, "[e]ighty-six percent of the children [surveyed] said they had no say at all in which parent got custody."<sup>198</sup> This statistic held true "even though some of them had a very definite opinion and preferred one parent to the other."<sup>199</sup>

While a majority of researchers argue that children should not be involved in custody decision-making,<sup>200</sup> strong arguments can be made to refute this proposition. Research demonstrates that children will be able to cope better with the results of a custody decision "if they have been partici-

193. *Id.*

194. *Id.*

195. See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U.J. GENDER SOC. POL'Y & L. 657, 723 (2003). See also Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 411 (2005). The model may be particularly useful when employed to protect a party that claims to be a victim of domestic violence.

196. Nancy Ilman Meyers, *Power (Im)balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 860 (1996).

197. See Glynnis Walker, *Solomon's Children* 87 (Arbor House 1986) (1951).

198. *Id.*

199. *Id.*

200. See Bricklin, *supra* note 21, at 510 (citing the author's own research in BARRY BRICKLIN, *THE BRICKLIN PERCEPTUAL SCALES: CHILD PERCEPTION OF PARENT SERIES* (1984)).



pants in the process."<sup>201</sup> Many children are at least sufficiently developmentally prepared "to have a voice in decisions about whether they will visit with a parent."<sup>202</sup> Allowing children to participate in some way "honors the young person's need for autonomy and a sense of fairness that will foster their respect for the process of justice."<sup>203</sup> Conversely, putting children in situations where they have no input at all can cause them to feel profoundly distressed.<sup>204</sup>

While there may be cause for concern in allowing children to have the final and absolute say in the decision,<sup>205</sup> it does not necessarily follow that children should be entirely excluded from the process that will determine their future. There are many ways to meaningfully involve children in custody decision-making short of giving them full veto power. One such option would be to ask the children involved to create lists about the pluses and minuses of living with each parent<sup>206</sup> or to describe the things that they enjoy doing with each parent. This information could be examined during mediation sessions to encourage consideration of the children's concerns and how the settlement agreement could preserve the interactions they enjoy having with each parent.

At any age or perceived level of maturity, children who have expressed interest in determining the outcome of the mediation should be given an opportunity to communicate their perspectives to both parents, and, if the parents consent, to the mediator.<sup>207</sup> Children who harbor "strong feelings and fears about access" will feel "overwhelmingly helpless, unheard, not believed. . . [and] dismissed as being no more than a puppet of the other parent" if they are deprived of an opportunity to weigh in about their future living situation.<sup>208</sup> Having an opportunity to air their sentiments can help children feel that their feelings are valid and recognized.<sup>209</sup>

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201. BLACK, *supra* note 134, at 151.

202. Johnston, *Children of Divorce*, *supra* note 75, at 768.

203. *Id.*

204. BLACK, *supra* note 134, at 149. This is particularly true for younger children, who have often been excluded from participation in the resolution of custody disputes. *Id.*

205. See Johnston, *Children of Divorce*, *supra* note 75, at 768 (noting the view that young children put in such a position may feel burdened and frightened). Other experts have noted that giving children the final decision about custody may cause them to feel guilty later in life for having chosen one parent over the other. See Bricklin, *supra* note 21, at 510-11. To resolve these concerns, children who are invited to give a concrete recommendation during the process could be told that while their opinion will be considered, it will not determine the final resolution of the dispute. See *id.* at 149.

206. BLACK, *supra* note 134, at 148.

207. See Johnston, *Children of Divorce*, *supra* note 75, at 767.

208. See *id.*

209. *Id.*

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It is also possible that the children's opinions can provide insight vital to resolving the custody impasse. In all probability, the children have spent more time with the parties and know the subtle realities of their own family life better than any judge, attorney, or mediator. Providing them with an opportunity to participate in custody mediation could help uncover durable and effective ways to divide parental influence.

Children's participation in the mediation process could take on a wide variety of forms based on their personalities, maturity, and interests.<sup>210</sup> Assertive and extraverted children could be invited to meet with the mediator to air their opinions either one-on-one, in the presence of one or both parents, or in the presence of a trusted babysitter or teacher. Children who are shy or introverted might prefer to express their thoughts on a digital voice recorder, in a journal, through a drawing, or in a private blog.

Providing the children at issue in the custody dispute with opportunities to express their feelings and opinions may help relieve their anxieties and improve their ability to cope with the intense ambiguity of their living situation.<sup>211</sup> Due to the flamboyant nature of their parent's interactions, the children at the center of a high conflict custody battle are all too likely to be cognizant of the issues involved and anxious about the course of their future. Validating the children's desire to participate in the custody decision-making process in limited and age appropriate ways can support their fragile psychological health during the indeterminate duration of the parents' conflict.

## VI. CONCLUSION

Lawyers, mediators and psychologists should continue to develop techniques to more effectively facilitate the resolution of high conflict custody disputes. With the psychological health and well-being of countless children on the line, finding alternatives to the nightmare of protracted custody litigation is a concept worthy of further study and review.

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210. *See Id.* at 768.

211. *See id.* at 151.

