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Abigail Davis

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NOT YOUR MOTHER'S MARRIAGE: UTILIZING INTERGENERATIONAL TRAUMA-INFORMED DIVORCE MEDIATION TO DISCOURAGE UNHEALTHY RELATIONAL CYCLES IN CHILDREN OF DIVORCE

Abigail Davis*

I. INTRODUCTION

Many mediation practices preach the benefits of divorce mediation for reducing costs, but a mediator's power posits them to do more than save a client's wallet. While mediators may not have the ability to patch up a broken marriage, they can discourage cycles of broken relationships and reduce a child's propensity for intergenerational trauma.¹ This position of influence should be met with the appropriate amount of care and responsibility.² This note explains why divorce mediators must be well-versed in the effects of intergenerational trauma and the most favorable mediation

* Abigail Davis is a Deputy Attorney General at the Office of the Indiana Attorney General. She received a Bachelor of Arts degree in Journalism and New Media from Lipscomb University, a Juris Doctor degree from Pepperdine Caruso School of Law, and a Certificate of Dispute Resolution from the Straus Institute for Dispute Resolution. She credits her interest in the subject matter to the Faith and Family Mediation clinic at Pepperdine Law and dedicates this research to anyone whose complex family history has made it difficult to love.

¹ See Anita R. White, *Mediation in Child Custody Disputes and a Look at Louisiana*, 50 LA. L. REV 1111, 1118 (1990) (emphasizing the trauma that children of divorce experience when parents enter divorce litigation).

² See *infra* Part VI discussing the responsibilities of a mediator.

outcomes for the well-being of children, as well as why this knowledge should be part of professional expectations for divorce mediators who mediate cases with children.

A. A CHILD IS NOT A LEGAL REMEDY

In the 1958 case *Paxton v. Paxton*, Judge C. Maughmer reversed a circuit court decision awarding full custody to a father, “the innocent and injured party,” after his wife had an affair.³ Written eleven years before California spearheaded no-fault divorce reforms,⁴ this opinion discusses the merits of the husband’s claim for divorce in language that sounds archaic to modern ears.⁵ However, this appellate court judge put forth at least one idea that was not old fashioned, but rather ahead of its time.⁶ With the benefit of experience deciding custody issues like this one, Judge Maughmer stated:

The children stand in a position somewhat similar to that of innocent bystanders. The parents are mature and wound less deeply than does the child of tender years, who is usually cut to the quick. The mother and father, divorced, may, and they often do, find a second and a sometimes happier home. The child will never have a second natural father or second natural mother, and in numerous instances at least, for so long as the parents live, that child will occupy a sort of ‘No Man’s Land’ between them, where it will be buffeted by the recriminations and disturbed by the vicious criticisms which each parent regularly

³ *Paxton v. Paxton*, 319 S.W.2d 280, 288–89 (Mo. Ct. App. 1958). The Court of Appeals of Missouri, Kansas City District reversed the custody decision of the circuit court, in which full custody of four children, two teenage girls and two boys aged eight and five years old, were given to the father for his innocence and injury from the wife’s affair. *Id.* at 281. This decision was made at the trial court despite the woman’s testimony of her husband’s neglect, indifference, abuse, and lifestyle of constant travel for business, preventing him from being a consistent presence in the lives of his children. *Id.* at 282–84.

⁴ DONNA S. HERSHKOWITZ AND DREW R. LIEBERT, ASSEMB. JUDICIARY COMM. CAL. STATE LEG., *THE DIRECTION OF DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT... AND BACK AGAIN?* 1 (1997), <https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1197%20divorcereform97.pdf>.

⁵ See generally *Paxton*, 319 S.W.2d.

⁶ *Id.* at 288–89

fires as a sort of barrage in the general direction of the other, hoping thereby to influence the child.⁷

In taking this position Judge Maughmer emphasized three important points about children of divorce. First, children are not a legal remedy to be awarded to the parent in the “rightful” position.⁸ Second, there is a certain fragility of many children experiencing divorce, a sacred suffering brought about by separation, which will inevitably cause an upset of their well-being to some degree.⁹ Finally, this statement embodies the helplessness of a child’s circumstances when their parents separate, especially when the process treats them as uninterested bystanders.¹⁰ These points call attention to the need for a legal system that prioritizes children of divorce over simply indulging the parents. While no court today would entertain the idea of a “meritless” divorce, the role of children in this decision reflects an antiquated system that fails to satisfy society’s true needs.

Sixty-five years after Judge Maughmer decided to prioritize the children of a divorce over a husband’s wounded ego, reform in how the legal community views and responds to toward divorce is still as necessary as ever. As more and more divorcees opt for a quicker and cheaper alternative to litigation, parties most popular option is divorce mediation.¹¹ This note will explore how divorce mediators are in a unique position to effect change in attitudes towards divorce and advocate for children in the process.

B. CHILDREN ARE PARTIES TO A DIVORCE, NOT TERMS

To love and to marry or to separate and to divorce are all choices never made by children, but frequently made for children. Children are not treated as separate entities or parties to a divorce case or a mediation, but rather a term of the divorce.¹² Yet, as Judge

⁷ *Id.*

⁸ *See id.* at 289. This case marked the reversal of a decision that demonstrated children were a prize to be won by the parent in the “rightful position” as to marital relations at the time of the dissolution of the marriage. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See, e.g.,* Ben Coltrin, *What the Statistics Tell Us About Divorce and Custody Mediation*, *MEDIATE.COM* (July 14, 2022), <https://mediate.com/what-the-statistics-tell-us-about-divorce-and-custody-mediation/#:~:text=A%20recent%20Custody%20X%20Change,the%20most%20popular%20ADR%20method.>

¹² *See infra* Part II.

Maughmer observed, decisions surrounding divorce often impact children more than the divorcing parents.¹³ In essence, leaving children out of these decisions is leaving the most interested party out of the negotiation.

Some social scientists assert the nurture over nature argument, stating children are almost entirely a product of their environment, which are often shaped by their parents' choices. Turkheimer's research demonstrates this point, asserting "heritability is not the answer" and somewhat controversially states that "all traits are the same: they all require interaction of genes and environment to develop, and that's that."¹⁴ Though psychology's biggest debate persists, there are few social theorists that argue environment is unimportant in determining a child's fate. One article suggests: "the environment and one's biologically based dispositional tendencies may dance with each other across development to lead, in some cases, to compensate for each other's vulnerabilities, and, in other cases, to potentiate each other's effects."¹⁵ In essence, both genetic predisposition and environment-related factors are relevant.

Yet, children of divorce, whose environments will form the trajectory of their lives and whose well-being depend on the outcome of a mediation, are rarely consulted on these matters.¹⁶ Children do not choose their parents or their circumstances, but a stranger impacts their lives the moment their parents' marriage falls apart. Instead, oftentimes, those strangers—whether they be lawyers, mediators, or judges—rely on external pressures and motivations far-removed from the basic well-being of children in making their decisions. This is illustrated by the sheer volume of cases, and subsequent duties and roles, that judges must take on in these cases.¹⁷

With regard to judges, Judge Phyllis Gangel-Jacob, illustrated his apathy when he offhandedly noted, "[c]ustody and visitation should be, and generally is, the least contentious element in an agreement and is easily dealt with by the parties and their

¹³ See *Paxton*, 319 S.W.2d at 288–89.

¹⁴ Eric Turkheimer, *Genetics and Human Agency: Comment on Darwin-Nimrod and Heine* (2011), 137 PSYCH. BULL. 825, 826 (2011).

¹⁵ Kenneth A. Dodge, *The Nature-Nurture Debate and Public Policy*, 50 MERRILL-PALMER Q. 418, 424 (2004).

¹⁶ See *infra* Part VII.

¹⁷ See, e.g., Naomi Schaefer Riley, *The Tragedy of a Family Court*, CITY J. (2018), <https://www.city-journal.org/article/the-tragedy-of-family-court> (illustrating overload in family court in Queens County, New York, adding how "It's astonishing to watch judges take on the role of administrative assistants, especially in a system in which most agree that more judges are needed to deal with the crush of cases").

attorneys.”¹⁸ Judge Gangel-Jacob critiqued the more facilitative, rather than evaluative, model that many divorce mediators use, as well as mediators’ lack of knowledge pertaining to best financial outcomes.¹⁹ This note, with the foresight of twenty-eight years since Judge Gangel-Jacob wrote his critique, will bring yet another critique from an opposite viewpoint—custody and visitation should not be “easily dealt with” as an afterthought in a mediation or otherwise.²⁰ In the same way Judge Gangel-Jacob advocated for a more evaluative model in economic issues,²¹ this research will advocate for a more evaluative model of monitoring and endorsing mediation agreements that promote the best interests of minor children.

Furthermore, an empirical study conducted by attorney Hiroharu Saito illustrated that, “compared to respondents before ethical education, respondents after ethical education defer to the parent’s (the client’s) interests more; and in return, they are more reluctant to disclose true information or to care about the child’s welfare.”²² While Saito advocated strongly for reform of the ethical lawyering code, these types of changes have historically proven to be tedious and stagnant, as the author asserts that “attorneys would rather sacrifice the welfare of the child to achieve the interests of the parent, the client.”²³ Children and parents need a more immediate solution. In the same way that Saito argues that the ethical code may cause a decline in ethical behaviors such as truthfulness and third party’s human rights,²⁴ mediators who operate less out of a stringent

¹⁸ Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, 23 HOFSTRA L. REV. 825, 831 (1995).

¹⁹ *See id.*; *see also* Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, HARV. L. SCH: PROGRAM ON NEGOT. (Feb. 27, 2024), <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/> (explaining seven types of mediation and describing the facilitative model as when a “professional mediator attempts to facilitate negotiation between the parties in conflict. Rather than making recommendations or imposing a decision” and the evaluative model as “a type of mediation in which mediators are more likely to make recommendations and suggestions and to express opinions”).

²⁰ *See id.*

²¹ *See generally id.*

²² Hiroharu Saito, *Do Professional Ethics Make Negotiators Unethical? An Empirical Study with Scenarios of Divorce Settlement*, 22 HARV. NEGOT. L. REV. 325, 325 (2017) (describing the impact of ethics courses on law students’ likelihood to tell the truth and prioritize children of a divorce).

²³ *Id.* at 364.

²⁴ *Id.*

ethical structure and more on personal values are more at liberty to provide this immediacy that could provide more just outcomes.

This note discusses the intersections of an array of issues pertaining to divorce in the United States, including why divorce occurs, how epigenetics and intergenerational trauma impact children of divorce, the role of family privilege in these situations, and how knowledge of all these topics can lead divorce mediation into a new era of trauma-informed practice.

Children of divorce deserve an educated mediator who will intervene in settlements that do not promote their well-being, and who can coach parties to and recognize, and more importantly understand their trauma instead of projecting further trauma onto them during and after divorce. Reframing how divorce mediations are conducted in this light could have a profound effect on divorced families in the United States and the well-being of future generations.

II. DIVORCE IN THE U.S.

When asked to express his feelings during a research project, a child with divorcing parents remarked, "I'd like to become a lawyer when I grow up so that I could stop divorces."²⁵ Children are the most vulnerable party in a divorce and often do not have a seat at the table in settlement meetings. Yet, children sometimes offer surprising insights as witnesses of the dissolution of the marriage. Even though children witnessing divorce sometimes gain a unique perspective about their parents' issues, like the boy who wanted to proactively prevent others from the pain he experienced,²⁶ children can also inherit negative relational behaviors observed in the divorce.²⁷ Choosing divorce must be explored, as this is indicative of deeper underlying issues within conflict that may be passed down to children.

A. REASONS FOR DIVORCE

Conservative scholars writing on the increase of divorce claim women leaving the home for the workforce is most to blame

²⁵ Peggy Beck LCSW & Nancee Biank LCSW, *Enhancing Therapeutic Intervention During Divorce*, 4 J. ANALYTIC SOC. WORK 63, 64 (2008).

²⁶ *See id.*

²⁷ *See* TEDx Talks, *How To Maximize The Gifts of Intergenerational Trauma* | Carolyn Coker Ross, MD | TEDxPleasantGrove, YOUTUBE (Mar. 15, 2020), <https://www.youtube.com/watch?v=ljdFLCc3RtM&t=2s>.

for the over one-half of all marriages that end.²⁸ Yet, this belief stretches beyond conservatism, as “scholars use different terminology, but most stress the same agent of change.”²⁹ One study showed scholars will indirectly cite the “rise in economic opportunities for women” as a “necessary condition for the increase in divorce and separation.”³⁰

A study by Steven Ruggles supports this consensus among different-minded colleagues, noting “lack of commitment” as the number one reason for divorce, further illustrating the fear of being unable to financially support oneself no longer serves as a motivation for women to stay in a harmful or unsatisfying marriages.³¹ The same study mentions cultural shift as a reason for the uptick in separating couples, arguing “[t]he rise of individualism associated with urbanization and industrialization has meant increasing emphasis on self-fulfillment and growing intolerance of unsuccessful marriages.”³² Included in the research was a visual demonstration of the top eleven reasons for divorce, most commonly cited in this research, with lack of commitment, infidelity, and too much conflict as the top three.³³ Following these three were: Getting Married Too Young, Financial Problems, Substance Abuse, Domestic Violence, Health Problems, Lack of Support From Family, Religious Differences, and Little or No Premarital Education, respectively.³⁴

Using this research as an indicator, mediators should spend time educating themselves on the primary causes of divorce and anticipating the needs of children and families.³⁵ The first and second reasons—lack of commitment and infidelity respectively—go hand in hand.³⁶ Some participants explained “commitment within their relationships gradually eroded until there was not enough commitment to sustain the relationship, while others reported more drastic drops in commitment in response to negative

²⁸ See Steven Ruggles, *The Rise of Divorce and Separation in the United States, 1880-1990*, 34 DEMOGRAPHY 455, 463 (1997).

²⁹ *Id.* at 455.

³⁰ *Id.*

³¹ *See id.*

³² *Id.* at 456.

³³ Shelby B. Scott et al., *Reasons for Divorce and Recollections of Premarital Intervention: Implications for Improving Relationship Education*, 2 COUPLE & FAM. PSYCH.: RSCH. & PRAC. 131, 135 (2013).

³⁴ *Id.* This research compiles answers from 52 individuals who underwent the PREP program designed to teach engaged couples healthy communications skills and conflict resolution strategies, and later chose to divorce.

³⁵ *See generally id.*

³⁶ *See id.*

events, such as infidelity.”³⁷ While discussing lack of commitment, one participant wrote:

It became insurmountable. It got to a point where it seemed like he was no longer really willing to work [on the relationship]. All of the stresses together and then what seemed to me to be an unwillingness to work through it any longer was the last straw for me.³⁸

Another study discussing how the lack of commitment in marriage and divorce affects children explains, “women whose parents divorced are more likely to enter marriage with relatively lower commitment to, and confidence in, the future of those marriages, potentially raising their risk for divorce.”³⁹ Even more, another article noting the impact of parental infidelity on children found that children often feel abandoned, compelled to “win over” the cheating partner, often question themselves and others, are more likely to cheat on their own future partners, or suffer from depression.⁴⁰ Finally, a participant in one study noted the third most recurring reason for divorce (too much conflict and arguing), stating, “[w]e’d have an argument over something really simple and it would turn into just huge, huge fights . . . and so our arguments never got better they only ever got worse.”⁴¹ Ideally, a mediator should be educated on the common impact on children for each of these most reoccurring issues and be equipped with strategies based specifically on the cause of divorce.

III. DIVORCE MEDIATION

Many family law disputes, including divorce, embrace mediation as the golden alternative to litigation—which some say induces “debilitating expense, frustrating delay, and fails to address the emotional needs of the parties.”⁴² However, mediation offers

³⁷ *Id.*

³⁸ *Id.*

³⁹ Sarah W. Whitton et al., *Effects of Parental Divorce on Marital Commitment and Confidence*, 22 J. FAM. PSYCH. 789, 789 (2008); see also discussion *infra* Part IV.

⁴⁰ Jennifer Parris, *8 Surprising Ways Infidelity Affects Your Kids*, ROMPER (Feb. 20, 2024), <https://www.romper.com/parenting/8-effects-of-infidelity-on-kids-experts-say-its-not-all-bad>; see also discussion *infra* Part IV.

⁴¹ Scott et al., *supra* note 33, at 135.

⁴² Steven T. Knuppel, *Promise and Problems in Divorce Mediation*, J. DISP. RESOL. 127, 128 (1991).

increased flexibility which allows parties to negotiate important issues like child custody, visitation, and child or spousal support more freely.⁴³ Oftentimes, this freedom translates to parties' willingness to follow agreements since they play an active role in crafting the deal.⁴⁴ Despite the aforementioned benefits, the number of divorce clients who would rather expend extra resources to litigate their issues and are unwilling to mediate perplexes many scholars and legal professionals.⁴⁵

The downfalls of divorce mediation may very well keep parties running back to the courtroom.⁴⁶ Some of these setbacks include a lack of qualified mediators and difficulty defining the role of a mediator.⁴⁷ Perhaps the most compelling downfall is the idea that divorce mediation could promote unequal bargaining power amongst parties.⁴⁸ On one hand, there are concerns of power imbalances due to differing financial positions often common in divorce proceedings.⁴⁹ A party in a better financial position may be able to coerce the other party into an agreement by withholding support.⁵⁰ Additionally, some cases are immensely emotional.⁵¹ If one party does not want the divorce, they are put in an extremely vulnerable position when asked to sit across from the other party and negotiate a settlement.⁵²

In her article, *Some Words of Caution About Divorce Mediation*, Judge Phyllis Gangel-Jacob warns against the immediacy of mediation in the divorce context, stating “[t]here are times when the delays in the court system serve a necessary and humanitarian purpose.”⁵³ She also critiqued the “duplicative” process of mediation, adding a neutral facilitator could be removed in favor of a four-way conference between parties and attorneys.⁵⁴ Judge Gangel-Jacob argues that unless a facilitator is able to advise a party about the intricacies of their financial decisions on things such as “spousal support [being] deductible by the payor and taxable to the payee; . . . [the potential for] debts [to] be consolidated; [and] that the lender may be entitled to nine percent rather than the

⁴³ *Id.* at 128–29.

⁴⁴ *Id.* at 129.

⁴⁵ *See generally id.* at 127–28, 130.

⁴⁶ *Id.* at 130.

⁴⁷ *Id.*

⁴⁸ *Id.* at 131.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 132.

⁵² *Id.*

⁵³ Gangel-Jacob, *supra* note 18, at 828.

⁵⁴ *Id.* at 829.

contractual interest rate which may be twenty-two percent,” then facilitators should be removed from the process entirely.⁵⁵

IV. IMPACT OF DIVORCE ON CHILDREN

A. COMMON DIVORCE TRENDS

Regardless of the primary reason why a couple chooses to divorce, it is often a scary and disheartening experience, especially when there are minor children involved. Statistics show, with some fluctuation over the years, that nearly “50% of all American children will witness the end of their parents’ marriage.”⁵⁶ Meanwhile, teenagers of divorced parents are 300% more likely to suffer from mental health issues, and children of divorce are four times more likely to have social issues and two times more likely to commit suicide.⁵⁷

Children experiencing divorce at younger ages, exacerbates an already common issue for children of divorce known as separation trauma, or the “pathological consequences in the child who feels separated from a nurturing parent.”⁵⁸ The three factors that most aggravate this harm include the: “(a) separation occur[ing] before the child is 6 years old, (b) the child is particularly vulnerable because of pre-existing poor parental care, and (c) the child has little or no consistent contact with the absent parent.”⁵⁹ Knowing these factors and statistics, and being able to recognize which agreements favor the child’s best chance for development and growth in a divorced environment, should be a priority of the mediator.

B. PARENTAL MODELING OF RELATIONAL BEHAVIORS

Parental divorce may also exacerbate a child’s propensity for bad relational cycles.⁶⁰ As this cycle progresses, “parental divorce may also undermine offspring’s perceived ability to attain a happy, lasting marriage.”⁶¹ One study uses Amato and Patterson’s Intergenerational Transmission of Union Instability (ITUI) model, which “delineates the link between parental and offspring union instability and includes explanatory factors from various theoretical

⁵⁵ *Id.* at 829–30.

⁵⁶ Marija Lazic, *13 Saddening Children of Divorce Statistics for 2022*, LEGALJOBS (May 20, 2023), <https://legaljobs.io/blog/children-of-divorce-statistics>.

⁵⁷ *Id.*

⁵⁸ Beck & Biank, *supra* note 25, at 66.

⁵⁹ *Id.* at 67 (citations omitted).

⁶⁰ See Whitton et al., *supra* note 39, at 789.

⁶¹ *Id.*

frameworks as mediators in this transmission.”⁶² This impact is twofold. First, children of divorce form relational expectations and behaviors (depending on the child’s age, personality, gender, outside influences, etc.) that they carry into their own interpersonal relationships.⁶³ Research shows divorce makes dating and forming romantic attachments harder for teens and adults who experienced parental divorce, due to lack of trust, fear of rejection or infidelity, and later a hesitancy toward marriage.⁶⁴ These relational problems can materialize in a way that “young women from divorced families will feel a need for love and attention and yet fear abandonment.”⁶⁵ Similarly, according to this research young men who are known to have fewer examples of intimacy outside of the family, “are inclined to be simultaneously hostile and a ‘rescuer’ of the women to whom they are attracted, rather than the more open, affectionate, cooperative partner, more frequently found among men raised by parents of an intact marriage.”⁶⁶

Second, long-term effects of divorce can result in children carrying their parental environment’s epigenetic expression.⁶⁷ These negative expressions, otherwise known as intergenerational trauma, can further impact children’s experiences with their parents’ divorce.⁶⁸ Research observing long-term effects of intergenerational divorce illustrates that parental divorce has consequences for children and subsequent generations:

[D]ivorce in the first generation (G1) was associated with lower education, more marital discord, weaker ties with mothers, and weaker ties with fathers in the third generation (G3). These associations were mediated by family characteristics in the middle generation (G2), including lower education, more marital discord, more

⁶² Emily J. Charvat et al., *The Intergenerational Transmission of Relationship Instability: A Focus on Emerging Adult On-Off Relationships*, 62 FAM. PROCESS 423, 424 (2023).

⁶³ See *Effects of Divorce on Children’s Future Relationships*, MARRIPEDIA (Apr. 20, 2022), https://marripedia.org/effect_of_divorce_on_children_s_future_relationships.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Epigenetics, Health, and Disease*, CDC (May 15, 2024), [https://www.cdc.gov/genomics-and-health/about/epigenetic-impacts-on-health.html?CDC_AAref_Val=https://www.cdc.gov/genomics/disease/epigenetics.htm#\(defining epigenetics as the “study of how your behaviors and environment can cause changes that affect the way your genes work”\)](https://www.cdc.gov/genomics-and-health/about/epigenetic-impacts-on-health.html?CDC_AAref_Val=https://www.cdc.gov/genomics/disease/epigenetics.htm#(defining%20epigenetics%20as%20the%20%22study%20of%20how%20your%20behaviors%20and%20environment%20can%20cause%20changes%20that%20affect%20the%20way%20your%20genes%20work%22)).

⁶⁸ See *id.*

divorce, and greater tension in the early parent-child relationships.⁶⁹

In some cases, a mediator may be the only party besides the parents involved who yield power to change the course of the child's future.⁷⁰ However, this will only be successful if the mediator is well-informed, prepared to practice trauma-informed mediation, and well-equipped with referrals to further treatment and resources for the family following the mediation process.⁷¹ A later Part will further discuss how divorce mediators can serve as intermediaries of intergenerational trauma.⁷²

V. TRAUMA-INFORMED MEDIATION

Trauma-based and trauma-informed practices are becoming commonplace in the legal realm, but both scholarship and practice still widely underrepresent the connection between intergenerational trauma and divorce mediation.⁷³ While some research focuses on components leading to divorce, this note will explore how a divorce mediator can play a role in ending generational cycles for children of divorce.

Neurologically speaking, divorce mediation can be an uphill battle. Dawn Kuhlman comments that mediation is most productive when individuals are operating out of their prefrontal cortex; however, most divorce clients operate out of the amygdala, the fight or flight response, after enduring perpetual cycles of stress from separation, custody disputes, litigation, or other taxing events once they reach mediation.⁷⁴ Trauma can impact parts of the brain functions such as the hypothalamic-pituitary-adrenal (HPA) axis,⁷⁵

⁶⁹ *Long Term Effects of Divorce*, MARRIPEDIA (May 5, 2022), https://marripedia.org/long_term_effects_of_divorce.

⁷⁰ Beck & Biank, *supra* note 25, at 68.

⁷¹ *Id.*

⁷² *See infra* Part VI.

⁷³ *See* Charles Portney, *Intergenerational Transmission of Trauma: An Introduction for the Clinician*, 20 PSYCHIATRIC TIMES (Apr. 1 2003), <https://www.psychiatristimes.com/view/intergenerational-transmission-trauma-introduction-clinician>.

⁷⁴ TEDx Talks, *Trauma Informed Mediation | Dawn Kuhlman | TEDxOverlandPark*, YOUTUBE (Jan. 31, 2019), <https://www.youtube.com/watch?v=hTdJK04Q38M>.

⁷⁵ *See* Catherine J. Dunlavy, *Introduction to the Hypothalamic-Pituitary-Adrenal Axis: Healthy and Dysregulated Stress*, 16 J. UNDERGRADUATE NEUROSCIENCE EDUC. R59 (2018) (defining the HPA as the “main stress response system” and the “neuroendocrine link between perceived stress and physiological reactions to stress”).

making it increasingly difficult to switch to the problem-solving center of the prefrontal cortex,⁷⁶ even when doing so is imperative to the success of a mediation or other alternative dispute resolution encounter.

However, for this trauma-informed mediation to be effective, there must be parental buy-in, as no mediator can force a parent to participate in responsible divorce.⁷⁷

A. INTERGENERATIONAL TRAUMA

In the years following the Holocaust, scholars produced more literature pertaining to the generational effect of trauma, genetic expression of post-traumatic stress disorder (PTSD), and other psychiatric disorders passed down from parents to children.⁷⁸ Among the initial findings was a study suggesting that children of Holocaust survivors are more likely to develop PTSD after a traumatic event and experience more symptoms compared to the rest of the population.⁷⁹ Similarly, children of parents demonstrating “traumatic reliving, emotional numbing, [or] dissociative phenomena” often experience a lack of safety or positive self-image⁸⁰ These feelings regarding safety and self-worth can then impact how children of parents with these conditions respond to stressors later in life.⁸¹

Tabitha Mpamira-Kaguri, founder and Executive Director of Edja Foundation, an organization dedicated to female survivors of domestic abuse or sexual assault, explains that “[t]rauma not transformed is trauma transferred. It might not have started with us, but it can end with us.”⁸² Others have joined, asking their listeners Mpamira-Kaguri’s daunting, rhetorical question: “[w]hat are you going to do and pass on for the next generation?”⁸³

⁷⁶ *Id.*; see also William R. Hathaway & Bruce W. Newton, *Neuroanatomy, Prefrontal Cortex*, STATPEARLS (May 29, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK499919/> (defining the prefrontal cortex as the “personality center” of the brain and “where we process moment-to-moment input from our surroundings, compare that input to past experiences, and then react to them”).

⁷⁷ See *infra* Part VIII (discussing challenges with implementing trauma-informed practices without parental buy-in).

⁷⁸ See Portney, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See *id.*

⁸² See TEDx Talks, *Trauma not Transformed is Trauma Transferred | Tabitha Mpamira-Kaguri | TEDxOakland*, YOUTUBE (Dec. 3, 2019), <https://www.youtube.com/watch?v=b4loBphYCXI>.

⁸³ *Id.*

B. EPIGENETICS

When a couple makes the decision to intertwine their lives with those two words, “I do,” they may not immediately see the future impact on their own lives, let alone their children’s lives.⁸⁴ Nor do they see the history, to which they are committing themselves, living deep within the genome of their spouses that generations of behaviors left behind.⁸⁵ Trauma passing through generations goes far beyond social rhetoric and inspirational speaking.⁸⁶ Recent studies have explored traumatic experiences and their effect on the body under the umbrella of “epigenetics.” According to the CDC, “[e]pigenetics is the study of how your behaviors and environment can cause changes that affect the way your genes work. Unlike genetic changes, epigenetic changes are reversible and do not change your DNA sequence, but they can change how your body reads a DNA sequence.”⁸⁷ This means many symptoms of intergenerational trauma are treatable and even reversible.⁸⁸ One simple example of epigenetics is the relationship between genetic expression and diet.⁸⁹ One study explains that “[v]arious dietary components have been reported to influence intermediate risk factors and the prevalence of age-related disease outcomes;” thus, it is commonplace for doctors to recommend patients increase their consumption of things like fruits and vegetable, whole grains, and omega-3 fatty acids, which are proven to positively impact gene expression.⁹⁰ Like health-related dietary decisions, changes in behavior and environment can reverse intergenerational trauma.⁹¹ Beyond the epigenetic expression illustrated through an individual’s own personal life choices, many

⁸⁴ See, e.g., Jessica Grose, *There’s Still Overwhelming Cultural Pressure to Get Married and Have Kids*, N.Y. TIMES (Sept. 16, 2023), <https://www.nytimes.com/2023/09/16/opinion/marriage-children-parents-friends.html>.

⁸⁵ See, e.g., Vicki R. Nelson & Joseph H. Nadeau, *Transgenerational Genetic Effects*, 2 *Epigenomics* 797 (2010).

⁸⁶ See Rachel Zimmerman, *How does trauma spill from one generation to the next?* WASH. POST (June 12, 2023), <https://www.washingtonpost.com/wellness/2023/06/12/generational-trauma-passed-healing/>.

⁸⁷ See CDC, *supra* note 67.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Austin Quach et al., *Epigenetic Clock Analysis of Diet, Exercise, Education, and Lifestyle Factors*, 9 *AGING* 419, 420 (2017).

⁹¹ See CDC, *supra* note 67.

studies also show effects of parent and grandparents' health decisions on the epigenome of their offspring.⁹²

Dr. Randy Jirtle at Duke University started the study of epigenetics with his experiment on agouti mice.⁹³ Agouti mice have the agouti gene, making them yellow and obese with a short life span.⁹⁴ When Dr. Jirtle put one mouse on a diet of all greens, her offspring was a lean, brown mouse that lived longer than the other agouti mice.⁹⁵ Geneticist Courtney Griffins explains how sperm or eggs can transmit these genetic expressions through generations.⁹⁶ Dr. Griffins cites a study showing boys who ate too much or smoked in their pre-pubescent years when their sperm was starting to develop “went on to have sons and grandsons with significantly shorter lifespans.”⁹⁷ While some scientists still debate whether epigenetics exists in human populations, many studies reiterate that non-human organisms can pass down epigenetic marks through tens of generations.⁹⁸ This led Dr. Pamela Peeke to coin the phrase, “You are what your grandparents ate.”⁹⁹ She contends this scientific breakthrough instills a renewed sense of responsibility in each person because “[e]very single thought, every mouthful, every single movement that you take changes gene expression.”¹⁰⁰ For those with predisposition for certain illnesses and diseases, her statement inspires hope that “[g]enetics may load the gun, but epigenetics pulls the trigger.”¹⁰¹

⁹² See TEDx Talks, *Epigenetic Transformation – You are What Your Grandparents Ate: Pamela Peeke at TEDxLowerEastSide*, YOUTUBE (Jan. 10, 2014), <https://www.youtube.com/watch?v=Udlz7CMLuLQ>.

⁹³ See generally Randy L. Jirtle, *The Science of Hope: An Interview with Randy Jirtle*, 14 EPIGENOMICS 295 (2022).

⁹⁴ See TEDx Talks, *supra* note 92.

⁹⁵ See *id.*

⁹⁶ See generally Negusse Tadesse Kitaba et al., *Fathers' Preconception Smoking and Offspring DNA Methylation*, 15 CLINICAL EPIGENETICS 1 (2023).

⁹⁷ TEDx Talks, *Epigenetics and the Influence of Our Genes | Courtney Griffins | TEDxOU*, YOUTUBE (Feb. 23, 2012), <https://www.youtube.com/watch?v=JTBg6hqeuTg>.

⁹⁸ See generally Carrie V. Breton et al., *Exploring the Evidence for Epigenetic Regulation of Environmental Influences on Child Health Across Generations*, 4 COMMC'NS BIOLOGY 1 (2021).

⁹⁹ TEDx Talks, *supra* note 92.

¹⁰⁰ *Id.*

¹⁰¹ See *id.*

C. EFFECTS OF TRAUMA ON EPIGENETICS

Dr. Carolyn Ross takes a unique approach to this phenomenon, which experts sometimes call epigenetic memory.¹⁰² She explains that:

Childhood trauma does not change the DNA, but the science of epigenetics is showing that it can change the expression of a gene. So the genes for addiction, obesity, depression, can be turned on by early life adversity and this change in gene expression can then be passed to the next generation.”¹⁰³

Her approach exemplifies that trauma does not manifest as a permanent alteration or disorder, but rather like a lever that lived experiences flip on or off.¹⁰⁴ Through this lens, Dr. Ross proposes an optimistic view that people may receive “gifts” in exploring intergenerational trauma.¹⁰⁵ She demonstrates this potential through her own personal history growing up in the segregated South, tracing her ancestry back to slavery, and reclaiming stories of trauma experienced by the generations before her.¹⁰⁶ She now informs others about how to find the “buried treasures” of intergenerational trauma, which can bring healing and restoration when people account for it, or similar to Mpamira-Kaguri’s warning this can lead to a cycle of suffering when people ignore it.¹⁰⁷

One important decision many parents face when working through their own trauma is whether to share these experiences with their children, and if so, how.¹⁰⁸ Dr. Rebecca Babcock explains this is not an “all or none phenomena,” stating, “either extreme can have some negative consequences.”¹⁰⁹ According to Dr. Babcock, parents should share these experiences in a thoughtful and methodical way to avoid traumatizing children by projecting their grief, and not brush these subjects under the rug which would prevent children from having any insight into why a parent functions

¹⁰² See TEDx Talks, *supra* note 27.

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; TEDx Talks, *supra* note 82.

¹⁰⁸ See Jen Lumanlan, *Reducing the impact of intergenerational trauma*, APPLE PODCASTS: YOUR PARENTING MOJO (July 22, 2018), <https://podcasts.apple.com/us/podcast/069-reducing-the-impact-of-intergenerational-trauma/id1148570190?i=1000416380444>.

¹⁰⁹ *Id.*

in a certain way.¹¹⁰ One negative aspect this parental disclosure of trauma with children is it can negatively warp a child's perception of the world.¹¹¹ However, this risk is sometimes outweighed by the benefit a child may receive when they can understand why their parent may react differently in some situations than the average parent.¹¹² Some important factors to consider in making this decision include the child's developmental stage, the involved family members' personalities, and the time since the trauma occurred.¹¹³

VI. DIVORCE MEDIATORS AS INTERMEDIARIES OF INTERGENERATIONAL TRAUMA

A. THE NECESSITY FOR TRAUMA-INFORMED PRACTICE

The lack of current intergenerational trauma-based mediation practices to settle disputes for divorcing clients with minor children is a missed opportunity at best, and a derelict of duty, at worst.¹¹⁴ The Journal of Psychoanalytic Social Work approached the issue of cross-disciplinary care from the opposite perspective, discussing the detriment of therapists not familiarizing themselves with the inner workings of divorce mediation.¹¹⁵ Similarly, mediators must be informed and conscientious about the psychological impact of divorce and custody arrangements on a child.¹¹⁶ In cases involving minor children, a divorce mediator has an opportunity to not only help parties reach settlement, but also deliver life and hope into the separated parents, guiding the parties to a settlement that will bring the most healing for the children of the divorce.¹¹⁷ One critique revealed the irony in mediators' decision-making when children are not prioritized at the forefront:

Mediators regularly recommend that parents have their real estate and pension plans objectively assessed, and that they seek advice from accountants,

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See generally Beck & Biank, *supra* note 25.

¹¹⁵ See *id.*

¹¹⁶ See, e.g., Lenore Myers, *Why You Owe It to Your Children to Try Divorce Mediation*, MAIN LINE FAM. L. CTR., <https://www.mainlinedivorcemediator.com/healthy-divorce-blog/why-you-owe-it-to-your-children-to-try-divorce-mediation> (last visited Apr. 19, 2024); see also *supra* Part I(B).

¹¹⁷ See Myers, *supra* note 116.

tax specialists, and financial planners. But children are the most valuable asset of all, and mediators should advise parents to have their children assessed. When this is not done, the results for the children can be devastating¹¹⁸

B. PRACTICAL APPLICATION FOR DIVORCE MEDIATORS

Practicing informed mediation could be as simple as asking questions to give clients room to discuss their emotions related to their past in the context of their current separation.¹¹⁹ As opposed to litigious options, mediation introduces “fewer traumas” and gives more opportunity for mutuality.¹²⁰ Recognizing the need and opening space for these conversations in a divorce mediation could have a major impact on the settlement agreement and the children’s future.¹²¹

Another way mediators can make a difference for their clients is to be well-equipped with good referrals for alternative measures of care.¹²² A referral service for attorneys usually involves a list of numbers to call when an issue arises that is more within another colleague’s expertise.¹²³ But for a divorce mediator, this involves trans-occupational referrals.¹²⁴ To best serve a child experiencing divorce, ideally, a divorce mediator will have a list of trustworthy and competent counselors, trauma therapists, social workers, and other licensed mental health professionals to aid the parents in their goal of promoting well-being for their children. Introducing these methods would encourage healthier and more

¹¹⁸ Beck & Biank, *supra* note 25, at 68.

¹¹⁹ See, e.g., Laura Athens, Trauma-Informed Care in Mediation, MEDIATE.COM (July 18, 2023), <https://mediate.com/trauma-informed-care-in-mediation/>.

¹²⁰ *Everything about Divorce Mediation Process*, DIVORCESTATISTICS.COM, <https://www.divorcestatistics.info/everything-about-divorce-mediation-process.html> (last visited Apr. 19, 2024).

¹²¹ See Athens, *supra* note 119.

¹²² See generally *Mediators Ethics Guidelines*, JAMS ADR, <https://www.jamsadr.com/mediators-ethics/> (last visited Apr. 19, 2024).

¹²³ See generally *Lawyer Referral and Information Service Policy*, AM. BAR ASS’N (Aug. 1993), https://www.americanbar.org/groups/lawyer_referral/policy/.

¹²⁴ See generally Ben Earwicker, *Mediator Therapist: A Review*, VIRNET MEDIATION, <https://virtualmediation.org/clinical-mediation-and-counseling-resources> (“It is not uncommon for non-therapist mediators to refer clients for therapy.”).

productive divorce mediation and help end negative relational cycles for children of divorce.¹²⁵

C. EXAMPLES FROM THE FIELD OF PRACTICING TRAUMA-INFORMED PROFESSIONALS

Bryan P. Range is a self-proclaimed, trauma-informed divorce mediator in Coralville, Iowa.¹²⁶ His website delineates his approach as a collaborative law coach and child specialist, stating: “I utilize mostly the facilitative style of mediation which includes being less directive, rarely providing my opinion, orchestrating the process, leaving outcomes to the parties, asking a lot of questions to encourage understanding, assisting parties to develop and evaluate their own proposals for settlement.”¹²⁷

His website also discusses “trauma, multicultural, and social justice informed [services].”¹²⁸ These topics address some of the same issues and source of intergenerational trauma, which may create the same effect on clients in a mediation.¹²⁹ Mr. Range’s description of his practice is rare.¹³⁰ Often, mediators in divorce or family law mention nothing about trauma-informed practices, suggesting it is unlikely they implement these practices in their sessions. As this notes demonstrates, trauma-informed practice involves deliberate preparation and information gathering that goes beyond the traditional responsibilities of a mediator.

The Center for Families in Transition proposes another specific practice.¹³¹ The Center’s assessment begins with an evaluation of family history including the spouses’ families of origin, information about the marriage, and the child’s birth and development.¹³² This method also uses drawing prompts and fill in the blank stories to evaluate the child’s emotional state amidst the separation.¹³³ These are simple practices mediators could

¹²⁵ *See id.*

¹²⁶ Bryan P. Range, *Divorce Mediation Information Page*, B.P.R. SERVICES (2018), <https://bprtmcs.com/divorce-mediation-information-page>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *See generally* Jessica P. Cerdeña et al., *Intergenerational Trauma in Latinxs: A Scoping Review*, 270 SOC. SCI. & MED. 1 (2021).

¹³⁰ *See* Range, *supra* note 126.

¹³¹ Beck & Biank, *supra* note 25, at 74.

¹³² *Id.*

¹³³ *Id.* Another attorney making a difference in this field is Kelly Chang Rickert, a selected Super Lawyer who is a certified family law specialist in Pasadena, California. *See* Kelly Chang Rickert (@lawyerkelly), INSTAGRAM, <http://instagram.com/lawyerkelly> (last visited Apr. 19,

implement to invite children to the mediation or encourage parents to adopt these practices with children at home.¹³⁴

D. HYPOTHETICAL EXAMPLE OF PRACTICING TRAUMA-INFORMED PROFESSIONALS

Suppose a mediator takes on a case with children under the age of six, who are statistically more prone to separation trauma and long-term effects from their parents' divorce.¹³⁵ A mediator may push back on a settlement involving an isolation of one parent, or a complete shift in a child's environment overnight, and instead suggests something like the scientifically backed method: "birdnesting."¹³⁶ Using this method, children stay in the current, matrimonial home and parents acquire an alternate living space (most often an apartment nearby), whereby the parents can alternate living in and out of the matrimonial home.¹³⁷ According to family psychotherapists and attorneys alike, this method is an effective way to allow children to adapt to a new normal in their living situation with divorced parents.¹³⁸ In practice, trauma-informed mediation involves an awareness of the effects of certain arrangements and use of innovative ideas.¹³⁹

VII. GIVING CHILDREN A VOICE

Kelly Chang Rickert, a Pasadena-based divorce super lawyer, wrote the following in an Instagram post depicting a book reading and signing for her children's book about divorce:

My heart breaks for children, who have no voice and no choice in important decisions like where they should live. As parents, we are given temporary stewardship of them. We should hold that privilege near and dear. Divorce leaves

2024). Ms. Rickert discourages "scorched earth" tactics and encourages mediation whenever possible. *Id.* She also writes children's books about divorce. Her first book helps "explain the concepts of separation and divorce" to children. *See* KELLY CHANG RICKERT, *TWO ADVENTURES WITH MOM AND DAD: EXPLAINING DIVORCE TO YOUNG CHILDREN* (2020).

¹³⁴ Beck & Biank, *supra* note 25, at 74.

¹³⁵ *Id.* at 67.

¹³⁶ Nicole Spector, 'Birdnesting' gives kids one stable home after a divorce. *Does it work?*, NBC NEWS (Nov. 13, 2018), <https://www.nbcnews.com/better/health/birdnesting-gives-kids-one-stable-home-after-divorce-does-it-ncna935336>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

a lasting legacy on their little lives. If you're going through it, make it easier for them.¹⁴⁰

Child involvement in divorce decision-making processes is a hotly contested topic. While most mediators strongly advise against, or prohibit entirely, bringing children to a mediation, one attorney suggests that if bringing children “may help you work out a better custody schedule, then you may want to bring them along.”¹⁴¹

Depending on the family dynamics, it is useful to teach a child to identify a family member's triggers and simple coping strategies such as saying, “Mama, do you want to take a breath?”¹⁴² Another way to empower a child and teach the child to cope with the difficult emotions of divorce is through parental modeling.¹⁴³ The empirically supported, Parent-Child Interaction Therapy (PCIT) involves a parent wearing a headset being coached by a therapist on how to assist their child with a behavioral disorder.¹⁴⁴ Research shows that modeling by the parent is an effective way to calm down the nervous system of the parent and teach children healthy coping mechanisms.¹⁴⁵ A PCIT coach could be another helpful referral for the mediator to consider having in their back pocket.¹⁴⁶

VIII. LIMITATIONS OF INTERGENERATIONAL TRAUMA-INFORMED MEDIATION

What happens if parents are already too impacted by trauma to use any problem-solving methods for mediation? Even if it seems like the parents' children could be the most negatively impacted, mediation is only successful when the parties are willing to agree to the outcome.¹⁴⁷ Further, intergenerational trauma-informed mediation is only a viable option when parents can recognize trauma in themselves and display the amount of care needed to implement proactive solutions.¹⁴⁸

¹⁴⁰ See RICKERT, *supra* note 133.

¹⁴¹ *Should you include your children in divorce mediation?*, HIRSCH & EHLENBERGER (Oct. 21, 2021), <https://www.novafamilylaw.com/blog/2021/10/should-you-include-your-children-in-divorce-mediation/>; see also Beck & Biank, *supra* note 25, at 64–65.

¹⁴² Lumanlan, *supra* note 108.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; see discussion *supra* Part VI(B).

¹⁴⁷ See Beck & Biank, *supra* note 25, at 64, 71.

¹⁴⁸ See *id.*; Lumanlan, *supra* note 108.

Mediating in a “healthy” family has its challenges, as mediators must still address and consider “little ‘t’ traumas,” or “events that typically don’t involve violence or disaster, but do create significant distress.”¹⁴⁹ However, trauma-informed mediation is most important for families with the most severe traumas and those with parents who also grew up in dysfunction—yet these are also the most challenging cases that push theory to its brink in practice.¹⁵⁰

Research shows early life experiences can play a role in the development of relationships and self-value later in life, with one study demonstrating, “adults with greater trauma histories report more psychological distress, self-blame regarding the divorce, and distress in response to discussing the divorce experience.”¹⁵¹ Furthermore, statistics reflect the impact of these family systems on children in that “teachers and mothers rated the behavior problems of children from divorced families approximately one-fifth of a standard deviation higher than the problems of children from intact families.”¹⁵² This study also examined the impact of children experiencing divorce, finding “the effects of divorce may still remain years following the event.”¹⁵³ This is indicative that families with generational traumas and adverse experiences like divorce are susceptible to perpetuating these traumas in their own future families.¹⁵⁴ In fact, one statistic shows “children of divorce are 50 percent more likely to marry another child of divorce.”¹⁵⁵ Also, “certain studies have shown that daughters of divorced parents have a 60 percent higher divorce rate in marriages than children of non-divorced parents while sons have a 35 percent higher rate.”¹⁵⁶

¹⁴⁹ *Big T vs. Little t Trauma in Young Adults: Is There a Difference?*, NEWPORT INST. (June 17, 2022), <https://www.newportinstitute.com/resources/mental-health/big-t-little-t-trauma/>.

¹⁵⁰ See Portney, *supra* note 73; TEDx Talks, *supra* note 74.

¹⁵¹ Jessica L. Borelli & David A. Sbarra, *Trauma History and Linguistic Self-Focus Moderate the Course of Psychological Adjustment to Divorce*, 30 J. SOC. & CLINICAL PSYCH. 667, 667 (2011).

¹⁵² Jennifer Weaver & Thomas Schofield, *Mediation and Moderation of Divorce Effects on Children's Behavior Problems*, 29 J. FAM. PSYCH. 39, 49 (2014).

¹⁵³ *Id.* at 52.

¹⁵⁴ *Id.* at 49.

¹⁵⁵ *Divorce Statistics: Over 115 Studies, Fact and Rates for 2022*, WILKINSON & FINKBEINER, <https://www.wf-lawyers.com/divorce-statistics-and-facts/> (last accessed Apr. 19, 2024).

¹⁵⁶ *Id.*

A. COMBATTING LIMITATIONS OF INTERGENERATIONAL TRAUMA-INFORMED MEDIATION

The fact that families most in need of trauma-informed practices may be the least likely to seek them out presents a challenge to the practical goal of this note.¹⁵⁷ However, this also highlights the dire necessity for these practices to become commonplace in divorce mediation.¹⁵⁸ Parties must find a way to settle their disputes, so if the vast majority of mediators use trauma-informed practices, then all families can receive the help they need.¹⁵⁹

The family systems theory¹⁶⁰ is one practical tool for mediators to better understand what has become known as the “complex family structure.”¹⁶¹ Using this theory help families “put a name to some of the dysfunctional dynamics [they] might have experienced in [their] family and not really had the space to talk about or acknowledge before.”¹⁶² There are many different causes for dysfunction in families from abuse, authoritarian or absent parents, personality disorders, large families, unfortunate life events, and chronic illness.¹⁶³ Family dynamics in complex family systems usually take on one genre of dysfunction, whether that is chronic conflict, pathological households, chaotic households, dominant-submissive households, or emotionally distant families.¹⁶⁴

¹⁵⁷ See Josuha P. Mersky et al., *Increasing Mental Health Treatment Access and Equity Through Trauma-Responsive Care*, 91 AM. J. ORTHOPYSCH. 703, 704 (2021).

¹⁵⁸ See TEDx Talks, *supra* note 74.

¹⁵⁹ See *id.*

¹⁶⁰ Kina Penelope, *Family Systems theory, Intergenerational Trauma, and the Movie “Honey Boy,”* APPLE PODCASTS: COMPLEX TRAUMA RECOVERY (Nov. 16, 2022), <https://podcasts.apple.com/us/podcast/family-systems-theory-intergenerational-trauma-and/id1540714935?i=1000499301364>.

¹⁶¹ Tarek Mostafa et al., *The Impact of Complex Family Structure on Child Well-being: Evidence from Siblings*, 80 J. MARRIAGE & FAM. 902, 902 (2018).

¹⁶² Penelope, *supra* note 160.

¹⁶³ Basem Abbas Al Ubaidi, *Cost of Growing up in Dysfunctional Family*, 3 J. FAM. MED. & DISEASE PREVENTION, 1, 2–3 (2017).

¹⁶⁴ *Id.* A chronic conflict family is categorized by perpetual conflict amongst family members in a way that causes long-term wounds and can even damage the neurochemistry of a child. *Id.* A pathological household is when one or more parents are impaired from substance abuse and usually identifiable by the children taking care of the parents. *Id.* The chaotic household has no structure or guidelines for the children where the parents are often not present. *Id.* The dominant-submissive household is run by a “dictator” parent who does not consider the feelings or desires of

These dynamics can lead to an array of symptoms from low self-esteem to seeking out other dysfunctional friends or relationships.¹⁶⁵ Children who grow up in these environments are also known to take on one of six roles: the good child or peacekeeper, the problem child or rebel, the Scapegoat role, the lost child, the mascot or charm child, or the mastermind.¹⁶⁶ A mediator who can identify and understand these family dynamics is better equipped to help redress the needs of complex families and serve those who are not willing or unlikely to seek out alternative services to promote their children's well-being.¹⁶⁷

IX. A NOTE ON FAMILY PRIVILEGE

Family privilege, a privilege status based on family structure, holds a significant place in the conversation regarding changed attitudes in the legal field and divorce mediators' responsibility to their clients when forming custody or visitation agreements that impact minor children.¹⁶⁸ Professor Bethany Letiecq defines family privilege as: "the benefits, often invisible and

the other family members. *Id.* Parents who repress their feelings and struggle to show affection to their children produce emotionally distant families. *Id.*

¹⁶⁵ *Id.* at 3.

Common signs of a dysfunctional family: 1) Lack of empathy, respect, and boundaries towards family members, 2) Borrowing or destroying personal possessions without consent, 3) Invading personal privacy without permission, 4) Extreme conflict and hostility in the family environment (verbal and physical assault) between parent-child or sibling-sibling assaults against each other 5) Role reversal or role confusion: both parent and child change their roles (early paternalism), 6) Restricted friendships and relationships with outsiders lead to family isolation, 7) Secrecy, denial, rigid rules from extremist (religious fundamentalist), 8) Perfectionism and unrealistic expectations to their children (parent's expectation beyond their child's skills, abilities and development), 9) Emotional, verbal abuse, ridicules behavior and blaming each family member, 10) Stifled speech and emotion (Not allowing their children to have own opinions and neither accepted sadness or happiness emotion), 11) Using children as weapons against each other for revenge attitude, 12) Conditional emotional love and support are always pathological. *Id.*

¹⁶⁶ *Id.* at 4.

¹⁶⁷ *Id.* at 2–3; TEDx Talks, *supra* note 74.

¹⁶⁸ See generally Bethany L. Letiecq, *Surfacing Family Privilege and Supremacy in Family Science: Toward Justice for All*, 11 J. FAM. THEORY & REV. 398, 398 (2019).

unacknowledged, that one receives by belonging to family systems long upheld in society as superior to all others. It serves to advantage certain family forms over others and is typically bestowed upon White, traditional nuclear families.”¹⁶⁹ The scholarly term for families existing outside of this privilege, as referenced above, is “complex family structure.”¹⁷⁰ While accepting deviant family structures is a positive aim, these ideas can also be counterproductive and even harmful to children who grow up in these complex environments, if their unique needs are ignored in favor of acceptance.¹⁷¹ Additionally, this definition wrongly assumes causation between societal norms and attitudes, and the quality of life for children in complex family structures.¹⁷²

Research into how some family environments posture children for success and others cause barriers provides a more practical and child-focused definition of family privilege. One study by physician and former Clinical Professor of Pediatrics at the University of California, San Francisco, paints a despairing mural of the effect of divorce on children, listing: time lost with each parent, loss of economic security, loss of emotional security, decreased social and psychological maturation, change in outlook on sexual behavior, loss of religious faith or practice, loss of cognitive and academic stimulation, effects on physical health, and higher risk of emotional distress.¹⁷³ Anderson goes on to highlight how these effects on children, which can alter later behaviors as teens and adults, negatively affect society listing diminished future competence, weakened family structure, contribution to early sexual experimentation, less religious worship, reduced household income, increased crime rate and substance use, and increased risk for school suspensions.¹⁷⁴ Anderson finally explains how these behaviors lend to a weaker economy as the estimated financial consequence of divorce in the United States was around \$33.3 billion in 2003,¹⁷⁵ while study from 2008 estimated “family fragmentation” costed the United States \$112 billion each year.¹⁷⁶ In sum, Anderson advocates, based on years of clinical experience, for the promotion

¹⁶⁹ *Id.*

¹⁷⁰ Mostafa et al., *supra* note 161, at 904.

¹⁷¹ *See id.* at 903–04.

¹⁷² *See id.*

¹⁷³ Jane Anderson, *The Impact of Family Structure on the Health of Children: Effects of Divorce*, 81 LINACRE Q. 378 (2014).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ BENJAMIN SCAFIDI, THE TAXPAYER COSTS OF DIVORCE AND UNWED CHILDBEARING: FIRST-EVER ESTIMATES FOR THE NATION AND ALL FIFTY STATES 5 (2008).

of marriage, and children being raised in a married home, for the best well-being of the child and society as a whole.¹⁷⁷

Another study on the impact of siblings on child well-being indicates how growing up in a home with biological siblings (with the same biological parents or adopted by the same two parents) can be an indicator of success, while growing up in a home with half or step siblings correlates with behavioral and other issues in children.¹⁷⁸ This study on family complexity through sibling diversity, a factor often associated with other complex family factors such as divorce, remarriage, and separation from parents indicates the following:

Family complexity is positively associated with adverse circumstances such as low employment, low education, low income, and maternal depression. In other words, both family complexity and adverse circumstances are associated with the outcome in the same direction. Family fixed effects account for both the measured and unmeasured adverse circumstances of the family. They also account for any unmeasured correlates of complexity that affect the outcome in the opposite direction (which we term *family mitigating factors*). These might include proactive parenting, parental resilience, and good temperaments. If adverse factors dominate, the estimated impact of family complexity will decline in a fixed effect estimation over OLS, but if mitigating factors dominate, it will rise. Some estimated impacts did rise for single parents in the family fixed effects models. Therefore, the family fixed effects on internalizing problems in single-mother families, for example, were dominated by mitigating factors in the family.¹⁷⁹

Furthermore, “[m]ost researchers now agree that together these studies support the notion that, on average, children do best when raised by their two married, biological parents who have low-conflict relationships.”¹⁸⁰ Yet, social rhetoric continues to downplay this vast body of research through the idea that a child’s struggles from lack of family privilege comes from societal

¹⁷⁷ See generally Anderson, *supra* note 173.

¹⁷⁸ Mostafa et al., *supra* note 161, at 904.

¹⁷⁹ *Id.* at 913.

¹⁸⁰ Mary Parke, *Are Married Parents Really Better for Children?*, CTR. FOR L. & SOC. POL’Y 1, 2 (2003), <https://files.eric.ed.gov/fulltext/ED476114.pdf> (citations omitted).

pressures to grow up in a conventional family, rather than actual traumas and difficulties they face because of their parents' decisions and chaotic environments.¹⁸¹

The aforementioned ideas, which place blame on social structures rather than parents, in many ways are antithetical to the research put forth in this note. Advocating for education for dispute resolution professionals and creating accountability in parents for the likelihood of their child's success and well-being based on settlement agreements, promotes responsibility-inducement. When mediators encourage parents to: allow children contact with both parents, refrain from negative talk about an ex-partner to a child, raise children with their biological siblings, and most importantly understand that divorce in most cases will cause some disadvantage for a child that a parent is responsible to mitigate, these are all acts of transferring responsibility to a parent. This is at variance, however, with the idea that societal norms regarding families are what cause harm for children growing up without family privilege.¹⁸² A person's ability to change their children's trajectory based on their environment-related epigenetic gene expressions should not be shame-inducing, but hope-inspiring.

X. CONCLUSION

Mediators are in a position of influence to not only save costs and time through mediation but hold parents accountable for decisions made surrounding their divorce. This includes encouraging families into a better settlement, referring parties to important resources for proactive parenting or necessary mental health referral, and bettering the lives of children experiencing divorce. The mediator acting alone will have a singular effect, but a mediator well-equipped with a strong referral system and cross-disciplinary knowledge of social, emotional, and behavioral science will make a lasting impact for families. A transformed legal community filled with trauma-informed practice will not only make an impact on individual families, but also encourage healthy relational cycles that uplift entire communities and shape society.

¹⁸¹ *Id.* at 6.

¹⁸² *Id.*