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# Mediation of Marital Disputes Before It Is Too Late: A Proposal For Premarital Contract Provisions For Mediation of Disputes Within the Intact Family and at Separation

Robert F. Cochran, Jr.\*

## I. INTRODUCTION

Mediation generally is superior to litigation as a means of resolving marital disputes for several reasons.<sup>1</sup> While litigants within the adversary system too often focus on fighting and winning, mediation encourages parties to focus on communicating, compromising, and cooperating. Mediation generally is less damaging emotionally,<sup>2</sup> involves less conflict,<sup>3</sup> preserves greater individual and family autonomy,<sup>4</sup> and produces arrangements which have greater support from the parties<sup>5</sup> than traditional litigation. The ideal resolution of some marital disputes is the reconciliation of the parties, and resolution of disputes through mediation is more likely than litigation to

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1. For a description of mediation, *see infra* text accompanying note 18. In the late 1970's, several legal commentators and mental health professionals advocated that divorce disputes be mediated. *See generally* O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978); Spencer & Zammit, *Mediation-Arbitration: A Proposal For Private Resolution Of Disputes Between Divorced Or Separated Parents*, 1976 DUKE L.J. 911; Winks, *Divorce Mediation: A Nonadversary Procedure For the No-Fault Divorce*, 19 J. FAM. L. 615 (1980-81); Comment, *Non-Judicial Resolution Of Custody And Visitation Disputes*, 12 U.C. DAVIS L. REV. 582 (1979).

2. *See infra* text accompanying note 19.

3. *See infra* notes 19-20 and accompanying text.

4. *See infra* notes 22-23 and accompanying text.

5. *See infra* note 24 and accompanying text.

pave the way for reconciliation.<sup>6</sup> Mediation has the additional advantage of teaching the parties dispute resolution skills.

Most mediation of marital disputes occurs after separation, in anticipation of divorce. Mediation of disputes prior to separation might enable a substantial number of couples to avoid divorce. By the time the parties separate and file divorce or custody petitions, they have typically subjected each other to a substantial amount of hostility, they have lost sight of the initial source of conflict in the ensuing fight, and reconciliation is unlikely. Ideally, therefore, marital disputes should be resolved early, before the dispute and the conflict that it causes leads to the irretrievable breakdown of the marriage.<sup>7</sup>

Courts have traditionally refused to resolve disputes between spouses who are living together because litigation interferes with family privacy<sup>8</sup> and litigation is likely to increase conflict.<sup>9</sup> The same problems do not arise from mediation, however. Mediation preserves family privacy in that couples choose the mediators who help them to resolve their disputes in private, and mediation of disputes is not likely to exacerbate the conflict.<sup>10</sup>

What is needed is a nonadversarial structure for early resolution of marital disputes. Couples should establish a means of dispute resolution in a prenuptial agreement. They should agree to mediate serious disputes that arise between them during the marriage and identify an individual or group who would mediate such disputes. Courts should then enforce such agreements to mediate.<sup>11</sup>

This article will first compare mediation of marital disputes with litigation. Next, it will examine the possibility of establishing a mediation structure in a premarital contract. Finally, it will consider the use of mediation to resolve disputes within the intact family.

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6. Mediation of marital disputes conducted by the Christian Conciliation Service of Orange County, California has resulted in a reconciliation of the parties in a substantial majority of cases. Interview with Kimberly Parker, Director of Christian Conciliation Services of Orange County (Apr. 2, 1987).

7. See *infra* text between notes 35-36.

8. See *infra* text accompanying notes 50-53.

9. See *infra* notes 55-56 and accompanying text.

10. See *infra* note 20 and accompanying text.

11. It may seem anomalous to speak of a court enforcing mediation. The mediator of a dispute has no power to decide a dispute or to require any party to accept a particular resolution. If a court mandated that a party participate in mediation, that party could effectively sabotage the mediation by refusing to cooperate once the mediation process began. However, mandated mediation may enable a party that is initially resistant to mediation to often recognize that he or she can benefit from reaching agreement through the mediation process. California requires that when there is an issue as to child custody or visitation, "the matter *shall* be set for mediation," even when parties do not want to participate. CAL. CIV. CODE § 4607(a) (West Supp. 1987) (emphasis added).

## II. MEDIATION OF MARITAL DISPUTES

The traditional adversarial litigation system was not designed to resolve modern marital disputes. Courts typically are not concerned with controlling the emotional tension that litigation causes the parties or encouraging the maintenance of a good future relationship. Yet, in marital disputes, both the mental health of the parties and the future relationship of the parties are very important. The parties are generally under great emotional stress, experiencing the breakup of what is probably their most important relationship.<sup>12</sup> The mental well-being of the parties to a marital dispute is an important consideration not only for the sake of the parties themselves, but also for the sake of any children. Divorce is often more traumatic for children than for the parents,<sup>13</sup> and it is important, therefore, that par-

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12. In 1976 Mavis Hetherington and Martha and Roger Cox of the University of Virginia studied 48 divorced families. They reported that: "Two months after divorce, about one-third of the fathers and one-fourth of the mothers reported an ebullient sense of freedom which alternated with apprehension and depression; by one year the elation had been largely replaced by depression, anxiety, or apathy." Hetherington, Cox & Cox, *The Aftermath of Divorce*, in MOTHER/CHILD, FATHER/CHILD RELATIONSHIPS 158 (1978) [hereinafter Hetherington]. One year after divorce, 60% of the fathers and 73% of the mothers reported that "they thought the divorce might have been a mistake, that they should have tried harder to resolve their conflicts, and that the alternative lifestyles available to them were not satisfying." *Id.* at 162. Two years after the divorce, most spouses appeared to be coping well with their new lives. *Id.*

13. Parental separation is one of the most damaging things that can happen to a child. The most extensive study of the effects of parental separation on children is that of Judith Wallerstein of Berkeley's School of Social Welfare and Joan Kelly, a clinical psychologist. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980). The study investigated 60 families in Marin County, California, beginning in the mid-seventies. *Id.* at 5. Wallerstein and Kelly intended to complete their study in one year, in light of the then-conventional wisdom that families adjust to divorce within a year. Eighteen months after separation they found many children experiencing great difficulties and still on a downward course. The study was extended to five years. *Id.*

For over 90% of the children the parental breakup brought "an acute sense of shock, intense fears, and grieving which the children found overwhelming." *Id.* at 35. The children suffered fear, worry, sadness, feelings of rejection, loneliness, anger, and guilt. *Id.* at 45-50. Less than 10% of the children were relieved by the separation. *Id.* at 35. Two-thirds of the children yearned deeply for the absent father. *Id.* at 46. Surprisingly, the yearning for the father was not necessarily related to a good father-child pre-divorce relationship. *Id.* at 47.

The children were observed playing as a part of the evaluation. They were each given a family of dolls and two houses. One might imagine that the children would place the dolls in a manner that would parallel their own lifestyle, with the father in one house and the mother and children in another house. Surprisingly, however, the mother and father dolls were always placed in the same house with the children, and generally the mother and father dolls were placed holding one another tightly. *Id.*

ents have the emotional strength to deal with the stress that the children suffer.

Marital disputes should be resolved in a manner that will reduce hostility and enable the parties to maintain a reasonably good relationship with one another. Even if the parties are to be divorced, they will often be required to maintain some contact in the future. One party may have continuing spousal or child support responsibilities to the other. As a result, the parties ought to strive to make their relationship cordial.

There are two reasons why maintenance of a good relationship is especially important if the parties have children. First, exposure to hostility between their separated parents is extremely damaging to children.<sup>14</sup> Therefore, disputes should be resolved in a way that reduces, not exacerbates, this hostility. Second, children whose parents separate often suffer substantial psychological difficulties, but they do much better if they maintain regular and frequent contact with both parents after a separation.<sup>15</sup> It is difficult to arrange such

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14. Parental conflict is emotionally destructive to children, especially when the conflict occurs after the parents separate. See Hetherington, *Family Interaction and the Social, Emotional, and Cognitive Development of Children After Divorce*, in THE FAMILY: SETTING PRIORITIES 71 (1979); Jacobson, *The Impact of Marital Separation/Divorce on Children: II. Interparent Hostility and Child Adjustment*, 2 J. DIVORCE 3 (1978). See also Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOLOGICAL BULL. 310 (1982) and sources cited therein.

E. Mavis Hetherington examined 72 children from broken homes during the two years following separation and 72 children of intact nuclear families. Hetherington, *supra* note 12, at 150. The problem behaviors and the positive behaviors of the children were studied through extensive interviews with parents and teachers and through observations of the children at home and at school, two months, one year, and two years following divorce. *Id.* at 151. The study found that the children of divorced families in which there was high conflict after the divorce showed greater problems than any of the other children in the study at all three times that the children were evaluated. *Id.* at 162-63. The only exception was that, two years after the divorce, girls in high-conflict divorced families and girls in high-conflict nuclear families were experiencing the same high level of difficulty. *Id.*

Not only do children suffer from the conflict, but increasing interparental hostility causes increasing levels of psychological difficulty. Jacobson, *supra* at 17. Doris S. Jacobson's study of 51 children whose parents had separated within a year before the study, examined the impact of post-separation interparent hostility on children. *Id.* at 6. The results of two tests were used and compared. One test measured the occurrence of incidents of interparent hostility and the other measured the children's poor social adjustment behavior, such as aggression, hyperactivity, social withdrawal, fear, and inhibition. The study found that interparent hostility after separation is destructive to children and that "the greater the amount of interparent hostility, the greater the maladjustment of the child." *Id.* at 17.

15. Wallerstein and Kelly found that children of divorced parents not only desire substantial visitation, but that those children who do best after divorce are those whose visitation with the noncustodial parent is regular and dependable. J. WALLERSTEIN & J. KELLY, *supra* note 13, at 215.

Doris S. Jacobson found that the extent of the psychological maladjustment of children following divorce was directly related to the loss of time with the father. Jacobson, *The Impact of Marital Separation/Divorce on Children: I. Parent-Child*

contact, however, when the couple does not have a good relationship. An increasing number of separated parents are sharing joint physical and joint legal custody.<sup>16</sup> Joint physical custody requires the parents to make arrangements to transfer the children back and forth with sufficient frequency that both parents are able to spend substantial time with the children, while joint legal custody requires that the parents make all major decisions for the child jointly. Both aspects of joint custody create considerable opportunities for parental conflict between parents that do not have a good relationship.

Traditional adversarial family litigation is not designed to encourage the maintenance of a good relationship between the parties. In fact, it generally harms the relationship. In the typical marital dispute, each party is represented by his or her own attorney. The attorneys are required to zealously represent their clients. Clients are usually advised not to talk to each other about the dispute, not to admit to wrongdoing, not to volunteer to allow the other party to spend extra time with the children, and not to pay more than the bare minimum in spousal and child support. If there is litigation, the parties are further encouraged to paint the other party in the poorest possible light before the court. If custody is at issue, all the faults of the other party are brought out and amplified. Every conceivable

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*Separation and Child Adjustment*, 1 J. DIVORCE 341, 356 (1977). Jacobson studied both the effects of parental conflict on children and the effects of parental visitation on children. *Id.* at 342. In her visitation study, Jacobson compared the results of the Louisville Behavior Checklist with those of a form that measured the time spent by each parent in the presence of the child during a two-week period following separation. *Id.* at 348-49. The study found that during the two weeks before separation, the mothers spent an average of 94.94 hours with the children, and after separation an average of 73.30 hours. *Id.* at 351. The fathers spent an average of 53.60 hours with the children during the two-week period before separation, and an average of 20.12 hours with them after separation. *Id.* The Jacobson study found that the greater the loss of time with the father, the higher the maladjustment of the child. *Id.* at 356. No significant association was found between the child's adjustment and time lost with the mother. *Id.*

16. Comment, *Joint Custody: An Alternative for Divorced Parents*, 26 UCLA L. REV. 1084 (1979). This article distinguished the responsibilities of legal custody and physical custody as follows:

Legal custody is the consequence of a judicial determination that a particular parent will have the ultimate power to determine those facets of the child's life outside the immediate daily requirements. The legal custodian directs the child's education, health care, or religion, and also is entitled to the child's earnings. The physical custodian, on the other hand, ensures that the child's daily needs are met. Graphically stated, the legal custodian chooses the nursery school; the physical custodian determines the child's bedtime.

*Id.* at 1087 (footnotes omitted).

means, from bribery<sup>17</sup> to slander is used to turn the children against the other parent. Traditional litigation is unlikely to clear the way for reconciliation or the maintenance of a good post-divorce relationship.

Mediation does not deny the fact that the parties have differences, but it is designed to enable the couple to resolve those differences in a reasonable manner. In mediation, the parties meet with a mediator who "encourages the disputants to find a mutually agreeable settlement by helping them to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement."<sup>18</sup>

Resolution of marital disputes through mediation is superior to resolution through litigation for several reasons. First, mediation is not as traumatic for the parties as litigation.<sup>19</sup> It is not therapy, and certainly the mediator should not be expected to resolve the psychological problems of the parties. However, most mediators have counseling skills and will be sensitive to the parties' emotional problems. Mediation is less stressful than litigation partially because of the support of the mediator. In cases in which one of the parties is experiencing severe emotional difficulties, the mediator may recognize the need of the party for counseling and may make a needed referral.

A second advantage of mediation is that it involves less conflict than litigation. There is not the "winner take all" attitude which is often present in litigation. Rather, the parties are encouraged to clarify their priorities and compromise. They are much more likely to reach an agreement than parties who limit themselves to negotiation within the traditional adversarial system.<sup>20</sup> This reduction in conflict

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17. See, e.g., *In re Marriage of Mikelson*, 299 N.W.2d 670 (Iowa 1980); *Johnston v. McCullough*, 410 So. 2d 1105, 1107 (La. 1982) (where the court failed to abide by the desire of a 13-year-old boy to live with the father who gave him, among other things, a horse, two color television sets, a shotgun, a minibike, a motorcycle, and a private telephone shortly before the custody hearing).

18. Pearson & Thoennes, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 51, 53 (1982) [hereinafter Pearson].

19. See J. FOLBERG & A. TAYLOR, *MEDIATION* 18-36 (1984); R. COULSON, *HOW TO STAY OUT OF COURT* 78 (2d ed. 1984).

20. Jessica Pearson and Nancy Thoennes conducted an extensive empirical study comparing mediation with the traditional adversary system in custody disputes. Pearson, *supra* note 18, at 55-57. Under that study, divorcing couples were randomly assigned to mediation and control groups. *Id.* at 56. Each member of the control groups proceeded through the regular adversary procedure, while those in the mediation group were offered cost-free mediation services. *Id.* Half of the couples who were offered mediation services rejected them. *Id.* Interviews with the members of the control group were held: (1) when a pleading initiating a custody or visitation dispute was filed; (2) soon after the court promulgated a final order; and (3) six to twelve months

is especially important where there are children involved.<sup>21</sup> Mediation is not only likely to resolve the parental conflict, but it also provides a forum away from the children in which the parents can express their anger.

A third advantage of mediation is that it grants people greater autonomy over their own lives. They can choose the mediator that will assist them in reaching a resolution, rather than having the dispute resolved by a judge whose authority is forced on them by the state.<sup>22</sup> They can choose a mediator who shares the same ethical or cultural values that they have, one that understands their concerns better than the judge who might otherwise resolve their dispute.<sup>23</sup> Further, with the help of the mediator, they can structure their own agreement rather than having one imposed on them.

Fourth, a mediated agreement is preferable to a solution imposed through litigation, or negotiated by attorneys, because its terms are more likely to be tailored to the specific concerns of the parties. After all, on every issue in a marital dispute, from the form of child custody arrangement to the distribution of the joint personal property, the parties know their preferences better than the judge or the attorneys. They are also more likely to know the needs of their children. In a mediated dispute, the parties can adapt the agreement to their preferences rather than those of a judge who knows little about the parties. Mediation also avoids the potential for inefficiency and

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after the final order. *Id.* Couples who accepted mediation were assigned to trained male-female mediation teams of lawyers and mental health professionals and were interviewed: (1) before mediation; (2) immediately after mediation; (3) soon after the court promulgated a final order; and (4) six to twelve months after the final order. *Id.*

The Pearson and Thoennes article presents a short-term comparison of 125 mediation clients, 63 individuals in the adversarial control group, and 95 individuals who rejected mediation; and a six- to twelve-month term comparison of 92 mediation clients, 50 control group individuals, and 74 individuals who rejected mediation. *Id.* at 57.

Fifty-eight percent of the couples who attempted mediation were able to reach agreement on the issues of custody and visitation during mediation, and of those who failed during mediation, 65% were able to reach agreement before they went to court. *Id.* at 57-58. Thus, a total of 80% of the couples accepting mediation produced their own custody and visitation agreement, either during or after mediation. *Id.* at 58. By contrast, only half of those in the control group and half of those in the group that chose not to accept mediation reached an agreement. *Id.* at 57-58.

21. *See supra* note 14.

22. *Cf.* P. BERGER & R. NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).

23. Examples of alternative dispute resolution services offered to parties who share a common ethical or cultural base are the Jewish Rabbinical Courts. *See, e.g.*, Comment, *Rabbinical Courts: Modern Day Solomons*, 6 COLUM. J.L. & SOC. PROBS. 49 (1970). *See also* L. ECK & L. BUZZARD, *TELL IT TO THE CHURCH* (1985) (discussing alternative dispute resolution services for Christians).

ineffectiveness associated with attorney negotiation. Obtaining the approval of each party's attorney before the agreement is finalized, however, the parties may avoid consenting to an unfair agreement.

A fifth advantage of mediation is that parties are more likely to comply with the terms of their own agreement than the terms of an agreement imposed by a judge or reached by attorneys,<sup>24</sup> since their own agreement is probably more realistically geared to their personalities. The couple may also be more willing to comply because the agreement is of their own making and they want to see their creation succeed.

A final advantage of mediation is that it teaches the parties dispute resolution skills. The types of things that the mediator encourages the parties to do—communicate, be flexible, understand the interests of the other party, and consider alternative solutions—are things that the parties can learn to do with each other through the experience of mediation. These dispute resolution skills may enable the couple to better resolve any future disputes between them.<sup>25</sup>

### III. MEDIATION PROVISIONS IN PREMARITAL AGREEMENTS

Mediation of marital disputes is generally arranged by the parties following the breakdown of the marriage or entered into as a result of statutes mandating mediation of child custody disputes.<sup>26</sup> How-

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24. The Pearson and Thoennes study found that six to twelve months after divorce, a much smaller percentage of those individuals who had successfully reached an agreement during mediation had filed a motion to modify the court decree than the percentage who had filed motions to modify in all other groups, and a substantially greater percentage reported their spouses in compliance with the court decree than in the other groups. *See* Pearson, *supra* note 18, at 59. The percentage of each group who reported filing motions to modify was: successful mediation group — 9%; unsuccessful mediation group — 22%; control group — 20%; group that rejected mediation — 20%. *Id.* at 73. The percentage who reported that their spouses were in compliance was: successful mediation group — 59%; unsuccessful mediation group — 30%; control group — 30%; group that rejected mediation — 37%. *Id.*

An additional benefit to the children of parents choosing mediation is that the couples who were exposed to mediation chose some form of joint custody substantially more often than those in other groups. *Id.* at 60. The percentages of those couples within each group agreeing to joint custody were: successful mediation group — 69%; unsuccessful mediation group — 14%; control group — 7%; group that rejected mediation 6%. *Id.* at 72. On the average, children whose parents were exposed to mediation saw the parent with whom they did not live on a day-to-day basis more often than did other children. *Id.* at 61. Soon after the court decree, the average number of days per month with such parent for each group was as follows: successful mediation group — 7.7; unsuccessful mediation group — 5.5; control group — 4.9; group that rejected mediation 4.9. *Id.* At six to twelve months following the court decree, the average number of days per month with the parent that was not the primary custodian was: successful mediation group — 9.0; unsuccessful mediation group — 7.1; control group — 5.1; group that rejected mediation — 5.4. *Id.* at 73.

25. Winks, *supra* note 1, at 651.

26. *See, e.g.,* CAL. CIV. CODE § 4607 (West Supp. 1987).

ever, a mediation provision could be drafted in a premarital agreement between the parties.

In *Avitzur v. Avitzur*,<sup>27</sup> the New York Court of Appeals enforced an arbitration provision that appeared in a Jewish couple's premarital agreement. Arbitration differs from mediation in that the arbitrator has the power to make a decision resolving the dispute, whereas a mediator merely assists the parties to reach agreement. The premarital agreement, known as the "Ketubah," was signed as a part of the couple's religious marriage ceremony.<sup>28</sup> In the agreement, the Avitzurs recognized the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America as having authority to resolve disputes between them at the request of either party.<sup>29</sup>

After twelve years of marriage, the husband was granted a civil divorce on the grounds of cruel and inhuman treatment. Under Jewish law, the wife was not considered divorced until she obtained a Jewish divorce decree, known as a "Get," from the husband.<sup>30</sup> After the civil divorce, however, Mr. Avitzur refused to give his wife the Get and refused to appear with her before the Beth Din.<sup>31</sup> Mrs. Avitzur brought suit, requesting that the court order her husband to comply with the arbitration provisions of the Ketubah.<sup>32</sup> The court of appeals, in a four to three decision, held that the husband was required to appear before the Beth Din. The court stated:

[T]he contractual obligation plaintiff seeks to enforce is closely analogous to an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties. There can be little doubt that a duly executed antenuptial agreement, by which the parties agree in advance of the marriage to the resolution of disputes that may arise after its termination, is valid and enforceable. Similarly, an agreement to refer a matter concerning marriage to arbitration suffers no inherent invalidity.<sup>33</sup>

The dissent argued that enforcement of this provision of the Ketubah necessitated an unconstitutional "entanglement of secular courts in matters of religious and ecclesiastical content."<sup>34</sup> The majority, on the other hand, found that there was no excessive entanglement because the provision of the Ketubah requiring the husband to

27. 58 N.Y.2d 108, 446 N.E.2d 136, 459 N.Y.S.2d 572, *cert. denied*, 464 U.S. 817 (1983).

28. *Id.* at 111-12, 446 N.E.2d at 136, 459 N.Y.S.2d at 573.

29. *Id.* at 112, 446 N.E.2d at 136, 459 N.Y.S.2d at 573.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 114, 446 N.E.2d at 138, 459 N.Y.S.2d at 574 (citations omitted).

34. *Id.* at 116, 446 N.E.2d at 139, 459 N.Y.S.2d at 575 (Jones, J., dissenting).

appear before the Beth Din could be interpreted "solely upon the application of neutral principles of contract law, without reference to any religious principle."<sup>35</sup>

In *Avitzur*, the court of appeals enforced a premarital contract provision requiring arbitration of disputes. There is no reason why a similar provision requiring mediation of marital disputes should not also be upheld. Indeed, courts may be more inclined to enforce an agreement to mediate, than an agreement to arbitrate. A court enforcing an agreement to mediate would not be relinquishing its own powers—the mediator can only guide the parties toward an agreement settling a dispute, whereas an arbitrator can make a binding decision resolving a dispute.

Mediation pursuant to a provision in a premarital contract is more likely to be successful than mediation that must be arranged at the time that a dispute arises. When a conflict arises, there may need to be quick intervention. If a mediation structure has not already been created, there may be delay in making the arrangements for mediation, or the parties may be unable to agree on a mediator. By the time mediation is arranged, the hostility between the parties may have escalated and mediation may be difficult. Early mediation is not only more likely to be successful in solving the initial problem, but it is also more likely to resolve the dispute before there is a breakdown of the marriage.

#### IV. MEDIATION OF DISPUTES BETWEEN SPOUSES WITHIN THE INTACT FAMILY

A mediation provision in a premarital agreement could provide for mediation of disputes within the intact family, as well as mediation of disputes at divorce. Courts traditionally have refused to resolve disputes between spouses unless they are separated. If a party's rights to make decisions about finances or children are being violated by a spouse, he or she must leave the other party in order to have those rights enforced in court. This rule is dramatically illustrated by two classic cases. In *McGuire v. McGuire*,<sup>36</sup> the Nebraska Supreme Court refused to allow a trial court to enforce a wife's right to support within the intact family. In *Kilgrow v. Kilgrow*,<sup>37</sup> the Alabama Supreme Court refused to allow a trial court to resolve a dispute over what school a child was to attend when the parents were still living together.

*McGuire* is widely cited for the proposition that courts will refuse

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35. *Id.* at 115, 446 N.E.2d at 138, 459 N.Y.S.2d at 574.

36. 157 Neb. 226, 59 N.W.2d 336 (1953).

37. 268 Ala. 475, 107 So. 2d 885 (1959).

to intervene in ongoing marriages.<sup>38</sup> In that case, Mr. McGuire had considerable assets for a person living in Nebraska in 1953, but he forced his wife to live a life of deprivation, with minimal household amenities, a dilapidated automobile, and without any personal spending money.<sup>39</sup> In spite of this, Mrs. McGuire continued to reside with him, but she sought to enforce the duty of her husband to support her in a manner fitting his means, position, and station in life.<sup>40</sup> The trial court ordered the husband to make improvements on the house, purchase a new automobile, and give the wife a personal allowance of \$50.00 a month.<sup>41</sup>

On appeal, the Nebraska Supreme Court quoted an earlier Nebraska decision which recognized the "well-established rule of law that it is the duty of the husband to provide his family with support and means of living—the style of support, requisite lodging, food, clothing, etc., to be such as fit his means, position, and station in life. . . ."<sup>42</sup> The *McGuire* court went on to hold, however, that:

to maintain an action such as the one at bar, the parties must be separated or living apart from each other.

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf.<sup>43</sup>

The court gave no further explanation for its refusal to allow judicial intervention.

In *Kilgrow*, the husband and wife disagreed over what school their daughter, Margaret, should attend, but "[their] difference seem[ed] not to have affected the conjugal attitude of the parents one to the other."<sup>44</sup> Mr. Kilgrow wanted to send Margaret to a private Catholic school and Mrs. Kilgrow wanted to send her to public school. On one occasion, when he was taking the child to the Catholic school, Mrs.

38. The *McGuire* case is discussed in J. AREEN, FAMILY LAW CASES AND MATERIALS 69-72 (2d ed. 1985); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 762-67 (2d ed. 1976); and W. WADLINGTON, DOMESTIC RELATIONS CASES AND MATERIALS 278-83 (3d ed. 1984). See also Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709, 719 (1956).

39. The husband's assets included land valued at \$83,960, bank deposits of \$12,786.81, and government bonds worth \$104,500. However, the parties drove a 1929 automobile with an inefficient heater, the house they lived in had no bathing facilities, inside toilet, or kitchen sink, and Mr. McGuire had not given his wife any money or clothing for three or four years. *Id.* at 228-30, 59 N.W.2d at 337-38.

40. *McGuire*, 157 Neb. at 228, 59 N.W.2d at 337.

41. *Id.* at 226-27, 59 N.W.2d at 336.

42. *Id.* at 231, 59 N.W.2d at 339.

43. *Id.* at 238, 59 N.W.2d at 342.

44. *Kilgrow*, 268 Ala. at 479, 107 So. 2d at 888.

Kilgrow was seated in the front passenger seat and drove away with the child as Mr. Kilgrow got out of the car to get Margaret from the back seat.<sup>45</sup> Apparently, Margaret did not attend the Catholic school that day.<sup>46</sup> The trial court determined that it was in Margaret's best interest to remain in the Catholic school and enjoined Mrs. Kilgrow from interfering with the child's schooling.<sup>47</sup>

On appeal, the Alabama Supreme Court stated the issue as follows: "[S]hould the jurisdiction of a court of equity extend to the settlement of a difference of opinion between parents as to what is best for their minor child when the parents and child are all living together as a family group?"<sup>48</sup> The court held that the trial court had no jurisdiction to resolve the dispute over the child's school so long as the family was intact.<sup>49</sup> The question of which school Margaret would attend was presumably left to turn on whether in the future Mr. Kilgrow could get Margaret out of the car before Mrs. Kilgrow drove away!

The Alabama Supreme Court gave three reasons for denying jurisdiction: a fear that court resolution of such disputes would open the floodgates to a great number of disputes; a concern with preserving the privacy of the intact family; and a desire to keep families together.<sup>50</sup>

The court said:

It seems to us, if we should hold that equity has jurisdiction in this case such holding will open wide the gates for settlement in equity of all sorts and varieties of intimate family disputes concerning the upbringing of children. The absence of cases dealing with the question indicates a reluctance of the courts to assume jurisdiction in disputes arising out of the intimate family circle. It does not take much imagination to envision the extent to which explosive differences of opinion between parents as to the proper upbringing of their children could be brought into court for attempted solution.<sup>51</sup>

Mediation of disputes within the intact family would not raise any of the concerns feared by the *Kilgrow* court. It would not create a flood of litigation. Mediation would be conducted before mediators, rather than before courts. The number of claims that could be mediated would be limited by the ability of the parties to pay private mediators and the willingness of *pro bono* community, church, or synagogue mediators to resolve such disputes. Some initial litigation over the enforceability of such agreements might arise, but once it

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45. *Id.* at 477, 107 So. 2d at 886.

46. *Id.* at 477, 107 So. 2d at 886-87.

47. *Id.* at 478, 107 So. 2d at 887.

48. *Id.* at 478, 107 So. 2d at 888.

49. *Id.* at 479, 107 So. 2d at 888-89.

50. *Id.* at 479-80, 107 So. 2d at 888-89.

51. *Id.* at 479, 107 So. 2d at 888. The court's concern that judicial resolution of disputes in the intact family would cause a flood gate of litigation should be balanced by the possibility that if courts were to resolve some disputes within the intact family, the number of divorce disputes might be reduced.

became clear that courts would enforce such agreements, litigation would taper off. To the extent that mediation of disputes within intact families proved successful, the case-load of courts might actually be reduced. Moreover, resolution of disputes in intact families through mediation may avert the difficult and time-consuming resolution of divorce disputes in some "out-of-tact" families in the future.

The concern of the *Kilgrow* court with preserving family privacy is suggested by the court's reference to disputes within the intact family as "intimate family disputes . . . [and] disputes arising out of the intimate family circle."<sup>52</sup> This concern is legitimate. Government should interfere in family life only in extreme cases.<sup>53</sup> A public trial and judicial decision is not a discreet way to resolve the issues of how large the McGuire family budget should be or what school Margaret Kilgrow should attend.

Under mediation, a dispute would not be resolved entirely within "the intimate family circle," but the privacy of the parties and the other family members would be preserved to a much greater extent than under litigation. Ideally, the mediator would be someone chosen by both of the parties and would be a person that they would both trust. The mediator would help the parties resolve the dispute in private, without a public airing of the family problem.

The obvious danger of the refusal of courts to resolve disputes within the intact family is that the disputes will remain unresolved and will lead to the breakdown of the marriage. In *Kilgrow*, the Alabama Supreme Court suggested that concern with preserving the marriage led them *not* to grant trial courts jurisdiction of such disputes. The court stated:

It may well be suggested that a court of equity ought to interfere to prevent such a direful consequence as divorce or separation, rather than await the disruption of the marital relationship. Our answer to this is that intervention, rather than preventing or healing a disruption, would quite likely serve as the spark to a smoldering fire. A mandatory court decree supporting the position of one parent against the other would hardly be a composing situation for the unsuccessful parent to be confronted with daily. One spouse could scarcely be expected to entertain a tender, affectionate regard for the other spouse who brings him or her under restraint.<sup>54</sup>

The court's concern that litigation may fuel the hostility between

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52. *Id.* (emphasis added). Judith Areen sees a concern with family privacy at the heart of the *McGuire* decision. She labels the refusal of courts to resolve disputes in the intact family "the doctrine of family privacy." J. AREEN, *supra* note 38, at 73.

53. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979).

54. *Kilgrow*, 268 Ala. at 479-80, 107 So. 2d at 889.

the parties is, of course, one of the primary arguments in favor of mediating, rather than litigating, marital disputes. As noted above,<sup>55</sup> mediation is not as likely to aggravate a dispute between parties as is litigation.

In *Kilgrow*, the court refused to resolve the dispute fearing that its involvement would only intensify the situation. However, the court emphasized the importance of finding some alternative means of resolving the dispute: "The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship, and usually voices the hope that the breach may somehow be healed by mutual understanding between the parents themselves."<sup>56</sup> Mediation may be the "somehow" that will enable many couples to "heal" such disputes by "mutual understanding." A substantial number of disputes within the intact family could probably be resolved through mediation. Therefore, courts should enforce prenuptial agreements to mediate disputes.<sup>57</sup>

## V. CONCLUSION

Mediation should be the preferred way to resolve marital disputes. It is less damaging emotionally, involves less conflict, gives greater autonomy to the parties, yields better terms, and produces results that have greater support from the parties than litigation. Mediation also can teach parties dispute resolution skills that will enable them to resolve disputes without the aid of a mediator in the future.

A husband and wife can create a mediation structure at the time that they are married that can be used to resolve disputes within the intact family, as well as disputes that may arise at separation. A mediation structure that is created by premarital agreement can be put into effect quickly, and early mediation may preserve the family. It is unlikely that many engaged couples, blinded by the illusions of prenuptial bliss, would anticipate the need for a dispute resolution structure. Therefore, attorneys, marriage counselors, churches and synagogues should encourage couples to agree to mediation of disputes in premarital and marital contracts, and the courts should enforce such mediation agreements.

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55. See *supra* text accompanying notes 18-20.

56. *Kilgrow*, 268 Ala. at 480, 107 So. 2d at 889.

57. The dynamics of mediation of disputes within the intact family would generally be different than mediation of disputes between couples anticipating divorce. Since courts will not resolve disputes within the intact family, couples who are mediating such disputes would not be motivated to resolve them for fear that if they did not reach an agreement, a decision would be imposed on them by the judge. However, couples that have not grown too far apart will be motivated to reach agreement by a desire to preserve their marriages.