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Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion

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DIVORCE CHILD CUSTODY MEDIATION: IN ORDER TO
FORM A MORE PERFECT DISUNION?

BEN BARLOW¹

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I. INTRODUCTION

The adversarial process serves a much needed purpose in American society. Its roots are deep and its usage pervasive. It has become so ingrained in our culture that many are unwilling to discuss possible problems inherent in the system and changes needed to solve those problems.

Nowhere are these problems more apparent than in the sphere of family law. With divorce rates growing in the past fifty years, people have increasingly turned a critical eye toward the system that divorcing parties traverse. The psychological effect of divorce on the parties involved has been widely studied, and frequently counseling is recommended by the family courts involved. Divorcing parties can often proceed in life without close interaction with the other party if there are no children of the marriage; however, a divorce in which children are involved presents an entirely different dynamic. Although the legal system is intended to be a means through which parties can terminate often traumatic relationships, many suggest that some of the trauma suffered in the divorce process is due in part to the process itself, the adversarial pitting of parties against each other in a zero sum game.

Attempts have been made in several states to implement statutes providing for methods of lessening the traumatic effect of the adversarial process. Those statutes often establish a framework of counseling and Alternative Dispute Resolution (“ADR”) that courts can use to soften the process and reach more mutually beneficial resolutions to conflict.

ADR has increasingly come into use as an effective way to handle disputes of all types. One part of ADR is the use of mediation to facilitate resolution of the conflict by the parties themselves. The use of mediation has garnered wide support in disputes of all degrees, from neighborhood squabbles to dispute resolution amongst international actors. Many states have implemented mediation provisions in their family law code. Some states have suggested mediation at the discretion of the court while others have mandated its use.

In family law, however, the use of mediation runs into its strongest opposition. Many suggest that family, namely divorce, disputes are multilayered and that mediation potentially harms parties involved by heightening imbalances of power, by encouraging manipulation, by coercing parties, by not allowing parties to avail

themselves of their legal rights and by not developing agreements that fully reflect the realities of the relationships involved.

Such a backdrop frames the especially pressing problem of the use of mediation in divorce child custody actions. Proponents of mediation suggest that nowhere are the effects of adversarial divorce proceedings more damaging and, thus, nowhere is mediation more needed. Opponents counter that the seriousness of the situation makes the potential harms of mediation all the more pronounced. The truth lies somewhere in the middle and should serve as a basis for the examination of mediation in divorce custody proceedings throughout the nation.

It is evident that typical adversarial divorces are especially damaging to children involved. That factor alone should force us to search for other methods of dissolving unions and resolving child custody in the wake of such dissolutions. Mediation is one viable alternative. Mediation, however, is not a panacea and does not promise resolutions in all disputes. Its use, however, even if agreements are not reached, allows us to view the divorce process in a more helpful light. Statistics show that, even where agreements were not reached, an overwhelming number of participants in mediation are enthusiastic about the process. That result, in itself, should be reason enough to enthusiastically support the process.

Mediation is not appropriate in all situations, and the concerns of mediation opponents must be weighed carefully. Courts should deliberate carefully as to whether the use of mediation is appropriate in situations where there has been domestic violence. Mediators should be specially trained and meet objective standards to ensure that imbalances of power do not provide opportunities for manipulation. All agreements reached in such cases should be carefully reviewed by courts to ensure that concerns regarding power imbalances are addressed. Codifying those concerns within a mandatory mediation and counseling statute could significantly impact the divorce process, making way for agreements and freeing the court docket at best, and encouraging an atmosphere of communication that will hopefully extend past the dissolution into the post-divorce child-rearing phase at worst.

II. THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION, SPECIFICALLY MEDIATION, IN THE LEGAL ARENA

A. *Methods of Alternative Dispute Resolution*

In the 1960's and 1970's, disenchantment with the legal system metastasized. People began looking for new ways to approach legal problems, ways that did not cater to what were seen as the base characteristics of the adversarial system.² People began searching for methods of solving disputes that encouraged parties involved in conflict to meet somewhere in the middle of their dispute and make efforts to heal broken relationships as opposed to engage in the costly, both economically and

²During the last thirty years the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.

National Conference of Commissioners on Uniform State Laws Drafting Committee on Uniform Mediation Act, *Uniform Mediation Act*, 3 PEPP. DISP. RESOL. L. J. 449, 454 (2001).

emotionally, warfare of litigation. As Chief Justice Burger's dissent in *Barrentine v. Arkansas-Best Freight System, Inc.*, noted:

The Court seems unaware that people's patience with the judicial process is wearing thin. Its holding runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts. The Federal Government, as I noted earlier, has spent millions of dollars in pilot programs experimenting in extrajudicial procedures for simpler mechanisms to resolve disputes. Approving an extrajudicial resolution procedure "is not a question of first-class or second-class . . . means. It is a matter of tailoring the means to the problem that is involved." This Court ought not be oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods.³

Many have followed the reasoning of Chief Justice Burger's dissent and have attempted to bring wide-spread changes to the justice system. While many have attempted to introduce broad changes, others have advocated for alternatives other than a system-wide overhaul. Some suggest that what is truly needed is "not to replace the traditional strengths of the profession[,] but to include them in a larger context."⁴ In advocating that the legal profession needs additional tools with which to work, "the point is not that concerns with human aspirations and values should replace technical mastery and analytic rigor. What is needed is a way of bringing together mastery with aspiration, intellect with experience, rigor with value, pragmatism with idealism, competence and skill with caring and a sense of meaning."⁵ Many experts note that "approaches to law school and lawyering, intended to address some of the problems in the profession described above, are proliferating and gaining much attention in the world of law schools and in corners of law practice."⁶

ADR continues to grow in popularity in many circles. From efforts to introduce restorative justice programs in criminal law to mandatory mediation in civil matters, people in increasing numbers are becoming convinced that the adversarial system has serious flaws. The flaws of the adversarial system, in the view of many proponents of ADR, are especially problematic in that they exacerbate the very problems they are supposed to fix. In criminal law, supporters of restorative justice point to soaring recidivism rates and lingering questions of whether incarcerating

³450 U.S. 728, 752-3 (1981) (Burger, J., dissenting) (internal citations omitted). *Barrentine* involved claims surrounding a federal wage claim, not a family law dispute. Chief Justice Burger's dissent, however, succinctly points to the court's own frustration with aspects of the legal system.

⁴ELIZABETH DVORKIN ET AL., *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND LAWYERING* 3 (1981).

⁵Leonard L. Riskin, *Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 18 (2002) (quoting DVORKIN, *supra* note 4).

⁶*Id.* at 18.

primarily non-violent drug offenders in a violent prison environment results in transforming that non-violent offender into a violent offender.⁷ In other criminal contexts, proponents of therapeutic justice attempt to “study . . . the role of law as a therapeutic agent.”⁸ In civil litigation, ADR supporters highlight increasingly negative public opinion about the profession, distrust about the motivation of attorneys, and cynicism about the process itself. More and more often, the concerns of those ADR supporters have been heard and experienced by attorneys and judges who have begun working vigorously to change the way the legal system addresses certain key issues. Though many methods of ADR are proposed in different contexts, mediation has undergone a degree of formalization and is widely used in many situations.

B. Mediation

As opposed to arbitration, where “the parties present the dispute to a selected decision-maker or a panel of decision-makers, usually with the expertise in the subject of litigation . . . [where parties form] binding, non-binding, or advisory [agreements] with very limited grounds for appeal,”⁹ mediation focuses on facilitated interaction between the parties. Given the use of mediation in both legal and non-legal contexts, it is important to define how the term is used within a primarily legal context. In construing a Minnesota statute that used but did not define “mediation,” the Minnesota Supreme Court defined mediation as “[a] forum in which an impartial person, the mediator, facilitates communication between parties to promote conciliation, settlement, or understanding among them.”¹⁰ Others view mediation as “the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.”¹¹

⁷See Jennifer Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (describing the use of Alternative Dispute Resolution in criminal law).

⁸Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL’Y & L. 184, 185 (1997).

⁹Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 370 (2001).

¹⁰*Mechtel v. Mechtel*, 528 N.W.2d 916, 919 (Minn. App. 1995) (quoting Minnesota Supreme Court-Minnesota State Bar Association Task Force on Alternative Dispute Resolution, Final Report, Appendix D (July 1989)); see Campbell C. Hutchinson, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 86 (1996) (providing definition of mediation as “a nonbinding form of dispute resolution that involves the intervention of a neutral third party to facilitate negotiation between the disputants”); see also UNIF. MEDIATION ACT (Nov. 2000 Draft) § 3(2), available at <http://www.pon.harvard.edu/guests/uma/NovUMAWP.htm> (last visited Oct. 29, 2003) (“‘Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”).

¹¹Brenda V. Smith, *Symposium: Battering, Forgiveness, and Redemption*, 11 AM. U.J. GENDER SOC. POL’Y & L. 921, 934 (2003) (quoting JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1984)).

Whether mediation is used in a given situation depends heavily on the motives behind those either advocating for or against its use. Among those supporting the use of mediation, motivations also play an important role in determining where and when the use of mediation is advanced. Those motivations depend heavily on what type of mediation is proposed. While mediation is often divided according to the style of process used, whether evaluative or facilitative,¹² mediation can be further sub-divided according to the goals of the process. Two main sub-categories are 1) transformative mediation and, 2) outcome-oriented mediation. Within the arena of family law, specifically divorce child custody law, the two types of mediation overlap at times and conflict at others.

The authors of a seminal work exploring the fundamental goals of mediation, “argue[d] that their work [was] a part of a larger trend away from the dominant . . . individualistic worldview, which holds as its highest values individual autonomy and fulfillment, towards a relational worldview, which holds as its highest value the integration of individual autonomy and concern for others.”¹³ In transformative mediation, while a settlement is the desired goal, the process “seeks to transform the disputing parties by empowering them to understand their own situation and needs, as well as encouraging them to recognize the situation and needs of their opponents.”¹⁴ Transformative mediators advocate that “the mediation process contains within it a unique potential for transforming people [and] engendering moral growth, by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict.”¹⁵ Some find that transformative mediation is an “attempt[] to transcend a kind of instrumental rationality dominant in many spheres of American life. It is that [rationality] that proponents of transformational mediation . . . see as preventing the realization of basic human good; [it] prevent[s] the realization of moral sources.”¹⁶

Proponents of transformative mediation focus on the inherent benefit of the process itself, and, regardless of specific outcomes, the ability of the process to “[enable parties] to approach their current problem, as well as later problems” in healthier ways.¹⁷ Proponents of transformative mediation also find that the process

¹²See Richard Birke & Louise Ellen Teitz, *American Law in a Time of Global Interdependence: U.S. National Reports to the 7th International Congress of Comparative Law: Section II U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 198-99 (2002) (analyzing the differences between evaluative and facilitative mediation).

¹³Patricia L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO ST. J. ON DISP. RESOL. 1039 (1998) (quoting ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION*, 236-248 (1994) (internal quotes omitted)).

¹⁴Heidi Burgess & Guy Burgess, *Transformative Approaches to Conflict*, Conflict Research Consortium, available at <http://www.colorado.edu/conflict/transform/> (last visited November 25, 2003).

¹⁵ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION*, 2 (1994).

¹⁶Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 708-09 (2001).

¹⁷Burgess & Burgess, *supra* note 14.

“enhances the dignity of those in conflict,” and thus is helpful in situations where parties come to mediation with differing degrees of power.¹⁸

While transformative mediation focuses on the benefits conferred by the process itself regardless of specific outcomes, outcome-oriented mediation focuses on the outcomes of mediations to determine the value of the process in particular situations. In advocating the use of mediation, outcome-oriented mediators focus on high statistical success rates and the docket-clearing benefits that have accompanied the use of mediation in civil disputes. Such emphasis on the “efficiency incentives” of mediation supports the use of mediation in conflicts that are potentially more easily resolved than others. Some practitioners, in exploring the foci of efficiency-driven, or outcome-oriented, mediation have found as follows:

The efficiency approach focuses on reaching an agreement at all costs. This reduces court congestion, frees scarce judicial time, and economizes on public and private expense. Protection of rights focuses on assessing the fairness of the agreement. The protection-of-rights approach holds that the mediator’s primary role, and the main value of the mediation process, is to safeguard the rights of the disputing parties and potentially affected third parties by imposing various checks for procedural and substantive fairness on an otherwise unconstrained bargaining process. This prevents settlement agreements from compromising important rights.¹⁹

Because the docket-clearing feature is a primary objective, mediation is often not advocated for disputes likely to come back before the court, either for additional review or because the issue is not likely to be solved by mediation, because mediation would serve as an *additional* step in such situations, not a reduced step.

Areas in which the two mediation motives overlap are obvious. In many civil disputes, where the success rate of mediation is high, the use of mediation accomplishes the goals of proponents of transformative mediation and outcome-oriented mediation: The dockets are cleared *and* parties benefit from the process. In areas of the law dominated by complicated issues and high emotions, the best example being divorce child custody cases, however, transformative mediation advocates would argue that the process of mediation is nowhere more needed. Outcome-oriented mediators would counter that there is little need to use the process because often more effort is required than would be used if the matter were to stay in the adversarial process.

Within the business community, regardless of motivation, mediation and other methods of Alternative Dispute Resolution have become trusted tools for resolving disputes. Courts have been quick to pick up on that success rate and have implemented mandatory mediation schemes in their own procedures. With the

¹⁸JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 35 (1984).

¹⁹Cynthia Savage, *Culture and Media: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 279-80 (1996) (quoting Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 259-60 (1989) (internal quotes omitted) (internal citations omitted)).

passage of the Alternative Dispute Resolution Act of 1998 (“ADRA”),²⁰ federal courts were mandated to implement ADR programs, to examine the effectiveness of ADR programs already instituted; courts were also given the authority to compel participation in mediation.²¹ Though the ADRA mandated that U.S. district courts implement ADR procedures, “[i]n the absence of such local rules, the ADRA itself does not authorize any specific court to use a particular ADR mechanism.”²² Nevertheless, the ADRA represented a watershed event on the federal stage, the point at which avenues of relief from what was commonly seen as a burdened and burdensome system were codified.

States have followed that lead by implementing mandatory mediation code provisions that establish a mediation framework through which parties must pass before cases come to the courts. The mediation model itself has been used in every type of dispute imaginable, from the typical neighborhood dog-barking dispute to international political impasses that threaten the lives of thousands.²³ There are many reasons why mediation is extensively used, the most important being the statistical success rates achieved by many mediation programs.

C. Statistical Success Rates

There have been few attempts to provide a comprehensive analysis of the success rates of divorce child custody mediation. One evident barrier to providing such an analysis is the vast array of approaches that states take with regard to mediation. As discussed below, states have developed systems in varying ways; however, some states have yet to develop a system at all. In the area of civil mediation, studies of success rates have yielded dramatic results.

A study performed by the Center for Analysis of Alternative Dispute Resolution Systems in the Illinois Twelfth Circuit showed a 69%, on average, agreement or partial agreement success rate.²⁴ Studies conducted regarding divorce mediation have found the process statistically successful. Parties involved are typically very satisfied with the process even when agreements are not reached and generally have a better relationship with the opposing party following the mediation experience.²⁵ When examining the success rates of mediation, the statistics can be viewed in multiple ways. The overall agreement rate is important, and that is the rate scrutinized by those who view mediation as a way to increase judicial economy and efficiency. The partial agreement rate is also important to those proponents, for it

²⁰28 U.S.C. §§ 651-658 (2003).

²¹“Each United States district court shall authorize . . . the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.” 28 U.S.C. § 651(b) (2003).

²²*In re Atlantic Pipe Corp.*, 304 F.3d 135, 141 (1st Cir. 2002).

²³Patricia E. Standaert, *Other International Issues: The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT’L L. 519 (1999).

²⁴Center for Analysis of Alternative Dispute Resolution Systems, *Major Civil Mediation Cross-Circuit Summary Report*, (2004) available at <http://www.caadrs.org/statistics/summary.htm> (last visited November 2, 2004).

²⁵Nancy Thoennes & Jessica Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. SOC. ISSUES 115-25 (1985).

shows areas in which multiple issues can be resolved in cases before they reach court. For proponents of the transformative and long-term benefits of mediation, even the number not reaching agreement is a positive statistic. In those situations, the parties have gone through a process that forced them, at least for a while, to work together to resolve the conflict. In civil mediation circles, those rates are impressive. Though the use of mediation in civil-type contexts continues to expand, mediation in other areas of law faces strong opposition.

III. THE USE OF MEDIATION IN DIVORCE CHILD CUSTODY CASES

As approaches to dispute resolution have changed, so too have the ways in which the judicial system views dispute. In the area of divorce, the law has stopped viewing such disputes in terms of their moral component, or, better put, does not view such disputes through the moral evaluative eye. The law, rather, has adopted a neutral stance, an objective approach, when evaluating a marital dissolution.²⁶ Many state that, when the law focused on the moral aspect of the marital relationship, there historically were certain “defaults” used by the judicial system. As Nancy Lemon presented:

Until the 1970s and the advent of no-fault divorce, abuse by one parent of the other was considered quite relevant to custody decisions throughout the United States, as this was evidence of the abuser’s poor morals. While the rate of divorce was low, victims of domestic violence were usually awarded custody of the parties’ children.²⁷

While Lemon does not provide a thorough analysis of the development of divorce law throughout the latter half of the twentieth century, she does provide an important framework within which one can understand some of the developments in the domestic arena. She goes on to contrast the pre-no fault era with the current process by stating:

A significant change in custody decisions took place in the 1970s, as most U.S. states amended their divorce laws from fault-based divorce to no-fault divorce. Under the new regime, domestic violence was no longer seen as relevant by divorce courts; judges were trained to look toward the future, not admit evidence of past misdeeds, and to consider the parents as generally equally qualified to be custodians of children. Unless the children were physically harmed, what a husband did to his wife was not seen as relevant to his ability to parent.²⁸

²⁶Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1810 (1985).

²⁷Nancy Lemon, *A Minnesota Comparative Family Law Symposium: Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 602 (2001) (citing Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 (1991)).

²⁸*Id.* at 603 (citing Lynne R. Kurtz, *Protecting New York’s Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1347 (1997)).

Lemon, using different terminology, describes the metamorphosis of the domestic system from one employing a moral evaluative view to one employing a neutral arbiter view. That neutral approach seems to many to serve as the impetus for a rapidly rising divorce rate.

As the law has turned a neutral eye toward divorce, it has become obvious that the “apparent normative goal of modern divorce law is the efficient termination of unsuccessful marriages. Once the couple (or either party) determine[s] that the marriage is no longer satisfactory, then quick and easy exit is deemed desirable.”²⁹ The courts have seemed willing to allow that quick and easy “out,” though, the presence of minor children in the marriage repeatedly interrupts pursuits at efficiency. Because the incidence of divorce, despite cycles, appears to be increasing³⁰ and the majority of divorce cases involve minor children,³¹ it is needless to say that many view the neutral approach as an inadequate method of dealing with an increasingly pervasive problem. Some, rather than looking to Alternative Dispute Resolution, have explored legal approaches to changing the ways in which marital dissolutions, especially those marriages involving minor children, are handled.³²

A. Mediation’s Slow Emergence in Divorce Child Custody

It seems interesting that a process that continues to gain steam throughout other areas of the law has yet to gain that same momentum within family law circles. There are a number of reasons why many might be slow to trust mediation in domestic situations. “The use of mediation in the area of family law has led observers to question how far the mediation model can really go.”³³ Some would argue that emotions run too deep in family law disputes and that parties cannot exhibit the level of detachment necessary to sit down with the other party and attempt to reach a resolution. Others argue that inherent in many domestic disputes are imbalances in power and such imbalances make mediation a choice avenue through which more powerful spouses can take advantage of the other party. Some argue that non-attorney mediators are not prepared to handle the intricacies of domestic disputes. Some divorce attorneys, and attorneys in general, oppose any non-adversarial approach to disputes in which non-attorneys are allowed to take part. As one attorney stated:

[The use of ADR, specifically mediation,] would be an outrage as far as I’m concerned. It would ruin our practice. Arbitration and mediation are a blot on the escutcheon. They’ll put us all out of business. As far as I

²⁹Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990).

³⁰“If the current trend continues, almost 50% of marriages begun in the 1980’s will end in divorce.” *Id.* at 94 n.5 (quoting Glick, *How American Families are Changing*, 6 AM. DEMOGRAPHICS 20, 24 (1984)).

³¹*Id.* at 94 n.8 (stating that in 1976, 57% of divorces involved minor children).

³²*Id.* Scott explores how a “precommitment rationale supports legally imposed burdens on divorce decisions by parents of minor children” and how that rationale potentially alters the manner in which divorces are handled when minor children are involved. *Id.* at 14.

³³Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. OF COMP. & INT’L L. 519 (1999).

am concerned they ought to destroy all arbitrators and mediators tomorrow.³⁴

Though that sentiment is probably not typical of the general attitudes of divorce attorneys, especially given the change in the practice since the statement was penned in 1987, it provides an insight into what may motivate some of the other concerns about the use of mediation in the family law arena. Indeed, those reasons are foremost among those trumpeted in attempts to keep mediation out of divorce and child custody disputes.

Proponents of the use of mediation in such situations argue that there is no area of the law more needing of ADR than the family sector. The “United States has one of the highest divorce rates in the world and . . . this rate has continuously grown over the past 140 years.”³⁵ The United States Census Bureau reports that the marriage and divorce statistics forecast that, in the future,³⁶ “the percentage of first marriages ending in divorce may be as high as 50 percent[, which] is up from an estimate of one-third of marriages made by demographers in 1976.”³⁷

As divorce rates in the United States rose dramatically in the latter half of the twentieth century,³⁸ people involved with family law, both legal professionals and mental health professionals began voicing concerns that the divorce process was far too “black and white” in handling marital dissolutions involving child custody. Proponents of mediation argue that there is a need for an empowering process that addresses the needs of the parties and not merely the superficial issues separating them.³⁹ Proponents and examining courts point to the high success rate of divorce mediation within the family law sphere.⁴⁰ In civil disputes, it is often possible for

³⁴Kenneth Kressel & Allan Hochberg, *Divorce Attorneys: Assessment of a Topology and Attitudes Towards Legal Reform*, 10 J. DIVORCE 1, 10 (1987).

³⁵Robert Hughes, Jr., *Children and Divorce: An Internet Inservice Experience for Professionals (Demographics of Divorce)* at <http://www.hec.ohio-state.edu/famlife/divorce/demo.htm#statistics> (last visited November 13, 2003) (citing Furstenburg, Nord, Peterson, Zill, *The life course of children of divorce: Marital disruption and parental contact*, AM. SOC. REV. (1994)).

³⁶“[T]he general marital pattern for the last half of the twentieth century can be described by both delays in marriage and a period of a rapid increase in the likelihood of divorce.” Rose Kreider & Jason Fields, *Number, Timing, and Duration of Marriages and Divorces: 1996*, at 3, United States Census Bureau, Economic and Statistics Administration, available at <http://www.census.gov/prod/2002pubs/p70-80.pdf> (last visited November 12, 2003).

³⁷*Id.* at 19.

³⁸Between 1970 and 1990, divorce rates in the United States rose over 66%, peaking with a divorce rate of 5.3 divorces per 1000 people in 1981. *Statistical Abstract of the United States, Vital Statistics* (U.S. Bureau) 1999, at 75.

³⁹See Nancy Illman Meyers, *Alternative Dispute Resolution Symposium: Power (Im)balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 854 (1996).

⁴⁰See *In re* Report of the Family Court Steering Comm’n, 794 So. 2d 518, 520 (Fla. 2001) (“It has now been clearly established that mediation can resolve a high percentage of these disputes if they are brought before a competent mediator at an early stage of the proceeding.”) (quoting *In re* Report of the Comm’n on Family Courts, 588 So.2d 586, 589); see also Levine

parties to get their judgment and get out, to achieve some sort of closure in their situations and then cut off relations, to some degree, with each other. In suits involving disputes within businesses, although often a long process, employees can be fired and business organizations can be dissolved. In neighborhood disputes, if the matter is serious enough, and the parties have means, one party might choose to move.

Family law is of a different breed and the adversarial zero sum game approach is potentially devastating. In child custody disputes, it is usually not in the best interests of the child to have parties cut off contact; likewise, regardless of which party wins or loses in the adversarial system, the end result is that a common child gets a winning parent and a losing parent. "The adversarial nature of traditional negotiations between lawyers is claimed to be a major factor in creating acrimony between parents."⁴¹ Researchers cite many reasons for the harmful effect the adversarial process is thought to have on parties involved in a divorce. Those "[a]dversarial feelings are thought to spring from three sources:" (1) the use of third parties in negotiating (attorneys, etc.); (2) the nature of the adversarial process itself, the practice of taking two opposing views and using a fact-finder to determine which is more or less correct; and, (3) the fact that parties have little say in the actual development of solutions to the problem, that their role is more or less to present facts.⁴²

The negative effects of divorce on child development are well-established;⁴³ however, what portion of those effects are due to the basic separation aspect of the divorce and what portion may be due to the adversarial relationship that is often cultivated by the legal system is not as well-established. Children of different ages are, naturally, impacted by divorce in different ways, from bedwetting in preschoolers⁴⁴ to the inability of older teens to form healthy relationships.⁴⁵ Four major causes of stress for children of divorcing parents are (1) the family they have always known will be different; (2) loss of attachment; (3) fear of abandonment; and, (4) hostility between the parents.⁴⁶ While the first three causes are endemic to the

v. Bacon, 152 N.J. 436, 441 (1998) ("Mediation has proven to be a useful tool in resolving custody and visitation matters. It allows the parties to arrive at a solution that satisfies both their needs.").

⁴¹Connie Beck & Bruce Sales, *A Critical Reappraisal of Divorce Mediation and Policy*, 6 PSYCH. PUB. POLY. & L. 989, 1013 (December 2000).

⁴²*Id.*

⁴³Karen DeBord, *Focus on Kids, The Effects of Divorce on Children*, North Carolina State University Family and Consumer Sciences, Human Development, Publications, available at <http://www.ces.ncsu.edu/depts/fcs/human/pubs/effectsdivorce.html> (last visited November 13, 2003).

⁴⁴Carma Haley Shoemaker, *The Effects of Divorce on Children: A Potential Cause of Bedwetting*, PRESCHOOLERS TODAY, at <http://preschoolerstoday.com/resources/articles/divorce.htm> (last visited November 13, 2003).

⁴⁵*Children and Divorce*, Wisconsin United for Mental Health at <http://www.wimentalhealth.org/Topics/divorce.htm> (last visited September 5, 2004) (quoting *Children and Divorce*, American Academy of Child and Adolescent Psychiatry at <http://www.aaccp.org/publications/factsfam/divorce.htm> (updated July 2004).

⁴⁶DeBord, *supra* note 43, at 1.

divorce process itself, the fourth, the effect of the hostile relationship between divorcing parties on the children, is one that the mediation process attempts to eliminate. It is not clear that the use of mediation would solve those problems; however, by presenting an alternative to the adversarial system, even for a while, the mediation process helps to diminish the zero sum game approach ingrained into the divorce culture. Though the debate over whether or not mediation statutes are appropriate for divorce child custody cases continues to rage, it is imperative to remember that the face of ADR and Mediation continue to evolve as mediators and courts attempt to better address negative aspects of the process. Such “tweaking,” in many instances, has apparently achieved the desired results.⁴⁷

IV. A QUESTION OF POWER: CONCERNS REGARDING POWER IMBALANCES IN DIVORCE MEDIATION

A primary concern of opponents of divorce and custody mediation is that it does not adequately deal with imbalances of power that are often immersed throughout the domestic dispute. Divorce mediation “tends to bring to the bargaining table unbalanced pairs, typically a husband with a high degree of power, and a wife who possesses a relatively low degree of power.”⁴⁸ If that indeed was representative of parties taking part in divorce mediation, the problems presented are clear. Mediation focuses on a facilitated dialogue that ideally culminates in an agreement between the parties. If parties start from drastically unequal levels of power, the mediation process could, instead of facilitating agreement, further limit the power of the already-powerless spouse. “A mediator may be deceived into allowing, and even contributing to, the unconscionable exploitation of the weaker spouse by the dominant spouse.”⁴⁹ Courts examining questions of tremendous imbalances of power have posited that mediation might be less suited to balance the power of the parties than the adversarial system.

Many recognize that imbalances in power run throughout the adversarial process. In fact, an “apparent weakness of the adversary system is that it assumes that parties bring equal skill and power, in the form of an attorney and economic support, to bear upon the case.”⁵⁰ When parties take part in that process and are not of equal skill and economic support, there is no mechanism present to balance the scales.⁵¹ In fact,

⁴⁷Rhonda Spinak, *Team Mediation Settles 97% of all Cases*, Mediate.com (October 2003) available at <http://www.mediate.com/articles/spinakR.cfm> (last visited October 30, 2003).

⁴⁸Meyers, *supra* note 39, at 859. Meyers cites John Haynes, *Power Balancing*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 277 (Jay Folberg & Ann Milne eds., Guilford Press 1988) to support her generalization about the status of parties involved in divorce mediation. Though there are often instances where imbalances of that type are present, the author found no concrete indications that those power dynamics are more or less prevalent than those present in typical divorce litigation.

⁴⁹Meyers, *supra* note 39, at 860.

⁵⁰Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. OF WOMEN & L. 145, 161-62 (2003) (summarizing Carrier Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 22 (1996)).

⁵¹*Id.* at 161 (summarizing JAY FOLBERG & ANN L. MILNE, eds., *DIVORCE MEDIATION: THEORY AND PRACTICE* (Guilford Press (1988)).

many people empty the system to make use of their power and highlight the lack thereof on the other side. This is done by harassing and intimidating the other party into enduring “traumatic and expensive ongoing litigation.”⁵²

Contained within the discussion about imbalances of power between parties involved in divorce mediation is one of the fundamental concerns with divorce mediation: What do you do in cases involving domestic violence?

A. Power Imbalances in Situations Involving Domestic Violence

Basic inequities in the relative power of divorcing spouses are a fundamental concern to those opposed to the use of mediation in divorce child custody situations.⁵³ Opponents to mediation argue that divorcing parties typically include a relatively powerless woman and a powerful man. They further argue that in such a situation, mediation helps further silence the woman by introducing a “fair” process into an unfair relationship. In such cases it is posited that the woman is not provided with the opportunity to fully air her position; a position that would be available in litigation.

In addition to those questions regarding the power structure present in the marital relationship, the far more specific concerns relating to the balance of power in relationships involving domestic violence are pressing. It is often stated that the issue of whether mediation is appropriate in situations where domestic violence has occurred is one of the most controversial areas of family law.⁵⁴ The fact that one in three women will suffer violence at the hands of an intimate,⁵⁵ and that 5% of all violence against men is at the hands of an intimate, leads to the conclusion that at least a large percentage of divorce cases will involve domestic violence.⁵⁶

It has become widely recognized that domestic violence is often a factor in cases involving child-protection. That realization has come as judges become more aware of the common underlying elements in domestic disputes. The Honorable Leonard Edwards, a former President of the National Council of Juvenile and Family Court Judges, noted that “we have learned that domestic violence can take a terrible toll on the lives of the children that we seek to protect and the families we try to preserve” while recognizing that, in the past, for “a variety of reasons, we had not noticed it, or neglected to ask about it, or thought it was a family matter of little significance.”⁵⁷

⁵²*Id.* at 161-62 (summarizing Katherine M. Reiching, *Protecting Victims of Domestic Violence and Their Children After Divorce: The American Law Institute Model*, 37 FAM & CONCIL. CTS. REV. 393, 394 (1999)).

⁵³*See generally* Steegh, *supra* note 50.

⁵⁴*Id.* at 147.

⁵⁵ABA Network, ABA Commission on Domestic Violence, Statistics (citing American Psychl. Ass’n, *Violence and Family: Report of the American Psychl. Ass’n Presidential Task Force on Violence and Family 10* (1996)), available at <http://www.abanet.org/domviol/stats.html> (last visited Oct. 14, 2003).

⁵⁶*Id.* (citing Bureau of Justice Statistics Selected Findings: *Violence Between Intimates 2* (1994)).

⁵⁷Leonard Edwards, *Domestic Violence and the Child Protection Court*, available at <http://www.thegreenbook.info/read.htm> (last visited Nov. 20, 2003).

When domestic violence is a factor in domestic disputes, specifically child-custody disputes, far more serious balance of power concerns are raised. While the Supreme Court has recognized that there is an increased likelihood that men who batter their spouses will also batter children,⁵⁸ there does not necessarily need to be physical abuse on the children in order for domestic violence to have a dramatic impact on a child's health and development. Aside from physical, yet tangential, abuse, such as abuse that results in abnormal development of fetuses,⁵⁹ or inadvertent physical abuse,⁶⁰ the psychological impact of domestic abuse within the marital relationship has been found to have a devastating impact on minor children. Women, particularly, who have been battered, often go to court facing "woefully inadequate representation, accountability and blame for their own victimization and the very real threat of losing their children."⁶¹ Many believe, in fact, that those factors are often due to an "over-reliance on the criminal-justice system" to deal with domestic violence.⁶²

The existing concerns regarding the respective power or lack thereof, of parties involved in domestic disputes grow dramatically in the face of domestic violence. In general, many criticize the existing judicial methods of dealing with divorce and custody for further exacerbating imbalances in power. Those critics of the current system say that "the unpredictability of divorce proceedings can be used to terrorize women," and that "[u]nder our purportedly sex-neutral system, women . . . come out of divorce settlements with the worst of all possible results," custody with no support.⁶³

The nature of domestic violence amplifies the concerns regarding imbalances of power and divorce child custody mediation. Where opponents of the use of mediation in such instances point to the heightened risk that a powerless party will be further exploited, many domestic violence researchers suggest that the use of ADR, coupled with the psyche of domestic violence victims might exacerbate exploitation. In one example, "[c]ourts may apply psychological pressures that keep women tied to . . . abusers. Friendly parent statutes ask courts to assess each parent's willingness to co-parent when making custody decisions. Despite their reasonable

⁵⁸See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 889-92 (1992).

⁵⁹The abuse of the fetus, inflicted through abusing the mother, has potentially devastating effects on the health of the newborn. More babies are born with birth defects as a result of the mother being battered during pregnancy than from all the immunizable diseases combined." V. Pualani Enos, *Prosecuting Battered Mothers: State Laws Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L. J. 229 (1996).

⁶⁰Domestic violence directed at mothers that inadvertently harms children accounts for nearly 70% of minor children's emergency room visits. *Id.*

⁶¹Hon. David B. Mitchell Testimony at Stop Violence Against Women Congressional Briefing, National Council of Juvenile and Family Court Judges, at 2 (Mar. 7, 2002) at <http://www.thegreenbook.info/read.htm> (last visited Nov. 20, 2003).

⁶²*Id.*

⁶³Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

reluctance to co-parent, battered women may end up being labeled uncooperative, with an increased risk of losing their children.”⁶⁴

As stated, mediation involves an effort to help the parties solve their problems themselves. Whether this can be done at all in a case involving the abuse of one of the parties by the other is not clear. Most opponents to mediation categorically say that mediation cannot occur when domestic violence is at play and many states have codified this concern. Others state that the mediation process has to be specially tailored to fit a situation in which violence has occurred. California has adopted that approach to mediation.

Either way, the import of the issue is clear. If mediation’s main aim is to foster a better relationship between the parties, is it possible to do so in cases involving violence without causing potential harm to the victimized party? Though ADR is used in other cases involving violence, namely restorative justice, in those cases the heavy hand of the state is looming over or clamped down on the violent offender.

With regards to balances of power and domestic violence, states have taken different approaches in their attempts to implement mediation programs, all of those approaches provide valuable lessons to those contemplating such statutes.

V. MEDIATION CODE PROVISIONS IN THE SEVERAL STATES

A. *The State Systems*

Thirty-eight states currently have statutes establishing some sort of mediation framework for use in divorce cases.⁶⁵ Between 1980 and 1995, Delaware, Maine, Nevada, New Jersey, New Mexico, North Carolina, Oregon, South Dakota, Utah, West Virginia, and Wisconsin all introduced their own mandatory child-custody mediation statutes.⁶⁶ Other states have since developed mediation statutes, in addition to those that had developed discretionary statutes prior to 1995. Those states, however, differ greatly in how rigidly they construct that framework. Some states have mandatory mediation statutes while others have a process through which courts can refer parties to mediation in the court’s discretion. The following section provides a brief examination of a representative portion of those state systems.⁶⁷

⁶⁴Daniel G. Saunders, *Child Custody and Visitation Decision in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations*, available at <http://www.vaw.umn.edu/documents/vawnet/custody/custody.html> (last visited Oct. 12, 1998).

⁶⁵In 1980, California became the first state to mandate the use of mediation in contested custody cases. CAL. CIV. CODE § 4607 (West 1993) (repealed 1994). The statute was repealed in 1994 and replaced with CAL. FAM. CODE §§ 3155-77 which were subsequently replaced with CAL. FAM. CODE §§ 3160-92; however, no substantive changes were made to the mediation provision. The enactment of California’s statute occurred after the 1976 Pound Conference where attorneys first discussed, on a large scale, “the potential benefits of family dispute mediation.” Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 255 (2001).

⁶⁶Dane E. Gashen, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469 (1995).

⁶⁷Only a representative portion of the state systems are described in order to provide examples of the different approaches taken by states in creating or not creating divorce child custody mediation statutes.

1. California

As stated above, California led all states in implementing a mandatory mediation statute covering all custody issues stemming out of a divorce.⁶⁸ California continues to have the most rigid of all mediation statutes. The Code provides that:

Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not limited to, parent education programs, booklets, videotapes, or referrals to additional community resources.⁶⁹

California understands its mediation statute to be focused on three primary goals: “(1) [t]o reduce acrimony between the parties; (2) [t]o develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child; and (3) [t]o effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.”⁷⁰ To further those goals, California has attempted to create a system that is applicable in all situations, not simply the cases where there are no exigencies involving violence.

California’s code does not contain a “domestic violence escape clause” as do many state mediation statutes; instead, the Judicial Council’s written protocol states that, in cases involving domestic violence, the mediators shall meet with the parties at separate times and locations.⁷¹ By so providing, California has attempted to address balance of power and violence concerns while still avoiding, at least in the early stages of the proceedings, the adversarial process. California courts have recognized the legislature’s intent to further “mediated, private resolutions” while affirming that normal legal rights remain when the mediation process fails to reach a result.⁷²

The California system is by far the most thorough in its use of mediation. That is appropriate given the early introduction of the act and the ability of the California Legislature, along with family law practitioners, to analyze the effectiveness of the earlier versions of the act and make appropriate changes when needed. Such a development process might indicate that it is best for states to implement a program and then tailor it as needed. Most states, however, are unwilling to take that initial leap.

⁶⁸“If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.” CAL. FAM. CODE § 3170(a) (Deering 2003).

⁶⁹*Id.* at § 3170(b).

⁷⁰*Montenegro v. Diaz*, 27 P.3d 289, 293 (2001) (quoting CAL. FAM. CODE § 3161 (Deering 2003)).

⁷¹Carri-Anne Tonado et al., *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431, 434 (2001).

⁷²*Dunn-Kato v. Dunn*, 126 Cal. Rptr. 2d 636, 637-39 (2002).

2. Delaware

Delaware also has a mandatory mediation statute for all issues relating to custody, support, or visitation;⁷³ however, Delaware specifically provides that “[f]amily [c]ourt mediation conferences shall be prohibited in any child custody or visitation proceeding in which [one] of the parties has been found by a court, whether in that proceeding or in some other proceeding, to have committed an act of domestic violence.”⁷⁴ Delaware’s statute also differs from California’s in that the mediation is scheduled as a pre-trial mediation conference with a court staff mediator primarily to “attempt amicable settlement of all unresolved issues.”⁷⁵ Issues involving child custody are handled in the same way.⁷⁶

The Delaware code includes provisions for additional “courses” for parents involved in divorce actions. Courts may require parents to attend certified parenting courses prior to the finalization of their divorce as well as more intensive courses if either parent has a history of domestic violence.⁷⁷ Components of many state statutes that work in tandem with the state’s mediation laws are counseling statutes that encourage counseling or, as is the case in Delaware, parental education in divorce actions.

Delaware’s system, in making specific provisions for parenting courses, codifies an understanding of the importance of ongoing parental responsibilities. Although the Delaware code provisions differ markedly from those in California, they provide for a system that attempts to deal with the complex issues involved in divorce child custody cases.

3. Florida

The Florida code provides that circuit courts may implement mediation programs. In those circuits where a mediation scheme has been developed, the code provides that courts shall refer all contested family matters, particularly custody disputes, to mediation. In Florida, state law details the mediation process more fully than other state mediation statutes.⁷⁸ The statute defines family law mediation broadly, including “disputes between married or unmarried persons that arise before or after the rendition of a judgment involving dissolution of marriage, property division, shared or sole parental responsibility, visitation, or child support.”⁷⁹ While other states tailor their code provisions especially for custody, visitation, and support issues, Florida includes all issues involved in the divorce proceeding in its statute.

In providing for court-referred mediation, Florida’s mediation statute also contemplates situations involving abuse.⁸⁰ Florida statute provides that, upon motion

⁷³DEL. FAM. CT. CIV. R. 16 (2003).

⁷⁴DEL. CODE ANN. tit. 13, § 711A (2003).

⁷⁵DEL. FAM. CT. CIV. R. 16(a).

⁷⁶DEL. FAM. CT. CIV. R. 16(b).

⁷⁷DEL. CODE ANN. tit. 13, §§ 1507, 1517 (2004).

⁷⁸3-55 FLA. FAM. L. § 55.01 (LEXIS 2003).

⁷⁹*Id.* at § 55.01(1).

⁸⁰FLA. STAT. ANN. § 44-102 (LEXIS 2004).

or request by a party, a court shall not refer a case to mediation “if it finds that there has been a history of domestic violence that would compromise the mediation process.”⁸¹ To what extent Florida’s statute places a burden on parties to prove such a degree of domestic violence, and the effect of that burden, if present, is a concern of some mediators.⁸²

4. Wisconsin

Wisconsin law establishes a mandatory mediation framework for all “actions affecting the family where it appears that issues involving legal custody or physical placement are contested.”⁸³ The framework provides that in all such cases, parties shall be referred to a state family court counseling department for *possible* mediation; the system also provides that a mediator shall be assigned to each referred case.⁸⁴ The Wisconsin legislature, when passing the original act which became the current statute, identified several areas of concern serving as an impetus for the family law overhaul. Upon examination, the legislature found that the existing family law system:

1. [Did] not adequately stress the importance of the best interest of the child and the significance to the child, in most cases, of a continuing, meaningful relationship with both parents.
2. Often increased the anger and polarization of divorcing or separating parents by emphasizing the adversarial nature of custody determinations, instead of providing the parents with the information and dispute resolution mechanisms necessary to plan for the future care of their children.
3. Encouraged the use of joint child custody as a bargaining chip by permitting one parent to veto joint custody, despite the willingness of both parents to maintain an active role in raising their children and despite the apparent ability of the parents to cooperate in the future decision making required by an award of joint custody.
4. Provided for an extremely high standard for postjudgment changes in custody by requiring that the current custodial conditions of the child be harmful to the child’s best interest before a change may be ordered.
5. Fail[ed] to recognize the importance to the child of continuing contact with stepparents and persons with whom the child has lived in a relationship similar to a parent-child relationship.⁸⁵

Wisconsin’s statute expresses concern about both the efficiency of the adversarial system and the effects of that type of atmosphere on the parental relationship following the dissolution of the marriage. Wisconsin’s concerns mirror those of jurisdictions changing their family law system in similar ways. Though the legislation set out a number of provisions intended to address the stated concerns,

⁸¹*Id.* at § 44-102(b).

⁸²See Colleen N. Kotyk, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL OF RTS. J. 227, 307-08 (1997).

⁸³Tonado, *supra* note 71, at 445.

⁸⁴WIS. STAT. ANN. § 767.11 (West 2003).

⁸⁵1987 WIS. LAWS 355.

one of the primary methods chosen was to establish a mandatory mediation provision for custody issues.

5. Colorado

Colorado courts can refer parties to mediation where such programs are available.⁸⁶ If there are allegations of physical or psychological violence, mediation will not be used.⁸⁷ Colorado's focus appears to be on judicial economy and statute explicitly provides that, "[f]or all office of dispute resolution programs, the director shall establish rules, regulations, and procedures for the prompt resolution of disputes."⁸⁸

6. Maine

For any case involving minor children, Maine requires mediation.⁸⁹ Outside of divorce cases involving minor children, mediation may be ordered at the discretion of the presiding court.⁹⁰ For extraordinary cases, the court involved may waive the statute's mandatory mediation provision.⁹¹ In Maine, the desire to open the divorce process up to other methods of dispute resolution is apparent in its statute providing that should either party disagree about the irreconcilability of the parties' differences, mediation will be mandated.⁹²

Cases coming to the fore in Maine also illustrate judicial safeguards that surround the mediation process. In *Cloutier v. Cloutier*, the Supreme Judicial Court of Maine addressed a claim from a husband that a portion of a mediated agreement had been improperly set aside by the lower court.⁹³ The court affirmed the importance of honoring mediated agreements as essential to the protection of the mediation process but emphasized that it is in the court's discretion to set aside agreements or portions thereof when an agreement would be manifestly unjust.⁹⁴

7. North Carolina

In North Carolina, as is the case in a number of states, statute provides for mandatory mediation for child custody and visitation issues in areas where a mediation program has been established.⁹⁵ In fact, the intent of the legislature to support mediation was so clear that North Carolina courts have interpreted the

⁸⁶COLO. REV. STAT. § 13-22-311(1) (2003).

⁸⁷*Id.*

⁸⁸COLO. REV. STAT. § 13-22-305(1) (2003).

⁸⁹ME. REV. STAT. ANN. tit. 19, § 251(2) (West 1998).

⁹⁰*Id.* at § 251(1).

⁹¹*Id.* at § 251(2)(b).

⁹²*Id.* at § 251; *see also* ME. REV. STAT. ANN. tit. 19, § 902 (West 1998).

⁹³814 A.2d 979, 981 (Me. 2003).

⁹⁴*Id.* at 983.

⁹⁵N.C. GEN. STAT. § 50-13.1(b) (2003).

statute, although it is in the divorce and alimony area of the code, as not being limited to those areas of the law.⁹⁶

Because North Carolina at this point does not mandate mediation in custody and visitation matters statewide, the statute can be fairly described as a quasi-mandatory statute. Where mediation exists, there it shall be used. North Carolina has also created the following exemption provision:

For good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting . . . of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems. A showing by either party that the party resides more than fifty miles from the court shall be considered good cause.⁹⁷

The North Carolina legislature, in establishing the provision, also codified its goals for the mediation statute, stating:

The purposes of mediation under [the] section include the pursuit of the following goals: (1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child; (2) The development of custody and visitation agreements that are in the child's best interest; (3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation; (4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and (5) To reduce the relitigation of custody and visitation disputes.⁹⁸

8. Alabama

The Alabama statute provides that "[m]ediation is only mandatory for all parties if a motion is made by any party."⁹⁹ The trial court is also able to mandate mediation on its own motion.¹⁰⁰ In situations where orders of protection are involved or where custody is an issue and domestic violence has been alleged, the courts do not mandate mediation.¹⁰¹ For the costs of the mediation, the statute requires that the

⁹⁶Oxendine v. Catawba County Dep't of Soc. Servs., 281 S.E.2d 370 (1981).

⁹⁷N.C. GEN. STAT. § 50-13.1(c) (2003).

⁹⁸*Id.* at § 50-13.1(b)(1)-(5).

⁹⁹Tonado, *supra* note 71, at 433 (citing ALA. CODE § 6-6-20(b) (1975)).

¹⁰⁰ALA. CODE § 6-6-20(b)(3) (2003).

¹⁰¹*Id.* at § 6-6-20(d)-(e).

mediation fee be reasonable and shared equally by the parties unless directed otherwise by the court.¹⁰²

9. Louisiana

In Louisiana, courts may order the parties to participate in mediation where the court deems appropriate. In such cases, courts may also order either or both parties to pay for the costs of the mediation.¹⁰³ There are no specific statutory provisions recommending mediation in any specific type of case; all of those decisions are left up to the court.

10. Hawaii

In Hawaii, parties are required to go through mediation or state reasons why mediation is inappropriate before they can go to trial for a divorce. For situations involving domestic abuse, the mediation requirement does not apply unless mediation is specifically requested by the victim.¹⁰⁴

11. Kansas

In Kansas, mediation is discretionary and deals with all domestic issues needing resolution.¹⁰⁵ As is the situation in Colorado, Kansas's primary concern seems to be the quick disposition of cases where there is an end in sight, and parties are responsible for their own fees.¹⁰⁶

12. Virginia

The Virginia statute does not establish a mandatory mediation framework; instead, it allows courts discretion to refer parties to mediation if they determine the case is suitable for mediation.¹⁰⁷ The statute neither categorically includes nor excludes certain types of cases from consideration for mediation; instead, "[i]n assessing the appropriateness of a referral, the court shall ascertain upon motion of a party whether there is a history of family abuse."¹⁰⁸

As is the case with California's statute, the Virginia statute also establishes a system through which the costs of mediation are covered. In cases involving custody, visitation, or support, the statute sets a cost of \$100 per mediation session to be paid by the Commonwealth.¹⁰⁹

Virginia, while leading the nation in its advocacy of mediation in other areas of the law, has been hesitant to provide that same advocacy in family law contexts. The success of mediation in other areas, and the desire of the Virginia judiciary for the

¹⁰²*Id.* at § 6-6-20(b)(2).

¹⁰³*Edwards v. Edwards*, 755 So. 2d 331, 334 (La. Ct. App., 1999).

¹⁰⁴HAW. REV. STAT. § 580-41.5 (2003).

¹⁰⁵KAN. STAT. ANN. § 23-701 (2002).

¹⁰⁶*Id.*

¹⁰⁷VA. CODE ANN. § 20-124.4 (Michie 2003).

¹⁰⁸*Id.*

¹⁰⁹*Id.*

efficiency impact of mediation might further the use of mediation in such situations. Experts, when examining Virginia's family law mediation provisions find that "[d]ivorce mediation and arbitration alternatives to traditional court litigation, however[,] are not feasible for all parties, and both alternatives require a certain amount of mutual agreement between the parties to settle their disputes in a nonadversarial manner."¹¹⁰

B. The State Approaches Analyzed

States have taken varied approaches in their efforts to implement mediation programs. Some, such as California, have taken on mediation part and parcel. In those instances, states have determined that the concerns regarding mediation in divorce cases can be addressed within the mediation framework, not by creating special exceptions to mandatory mediation statutes. California's system best demonstrates this approach by requiring mediation in cases involving domestic violence but by conducting the mediation in a different way.

Other states, such as Delaware, have created mandatory mediation statutes that categorically exclude the statute's application to cases involving domestic violence. Such approaches fully appreciate the grave concerns surrounding domestic violence and the potential exacerbation of those problems by the mediation process.

While Delaware and California present different approaches while applying mandatory mediation, some states have implemented discretionary mediation statutes, allowing courts to determine whether mediation is appropriate. Such a case by case determination attempts to address the concerns raised regarding imbalances in power and domestic violence. Still other states, among them Virginia, have shown a strong preference for mediated settlements of other types of cases and have granted judges discretion to order mediation in divorce cases that they deem suitable. Other states have failed to implement either mandatory or discretionary mediation statutes, they, for the most part, remain committed to the use of mediation in other areas yet are caught in the netherworld between knowing that their current systems are failed and fearing the possible downsides supposedly attached to mediation.

An interesting component in an examination of the state systems is the approach taken to mediation costs. In that regard, both Virginia, which does not have a mandatory mediation statute, and California, with the oldest and most comprehensive mandatory mediation statute, have demonstrated their assessment of the value of mediation by providing the mediation services free of charge to the parties involved. Such fee provisions within state mediation frameworks might address one potential problem with litigation; that attorneys might prolong the adversarial process to generate fees.¹¹¹

¹¹⁰PETER SWISHER, ET AL., *VIRGINIA PRACTICE, FAMILY LAW: THEORY, PRACTICE AND FORMS*, § 8.7 (2003).

¹¹¹Connie Beck & Bruce Sales, *A Critical Reappraisal of Divorce Mediation and Policy*, 6 *PSYCHOL. PUB. POL'Y & L.* 989, 1013 (2000).

VI. THE FUTURE OF DIVORCE CHILD CUSTODY MEDIATION

A. *Essential Elements Needed to Address Specific Concerns*

The concerns raised by opponents of divorce mediation are not easily dismissed. The questions surrounding balances of power and domestic violence present real hurdles that must be addressed if any systemic changes to the divorce process are to be made. Concerns raised about the use of mediation in divorce cases are amplified when child custody issues are present. Additional concerns are present when determining whether such mediation should be mandatory. The advocates of mandatory mediation statutes argue vigorously that “[p]arties that would not voluntarily mediate may settle in mandatory mediation and be satisfied with the process. Mandatory mediation may increase the mediation’s efficiency impact.”¹¹² Others counter that mandatory mediation statutes cannot adequately address the general concerns raised by divorce mediation.

If the voiced concerns are addressed within a statutory framework, a mandatory mediation statute for divorce child custody cases might be a helpful tool for states without an already-formulated mediation scheme. Such a mandatory mediation provision might be necessary too if the intent is to implement a new way of handling divorce child custody cases. While implementing a mandatory scheme and figuring out how to handle domestic violence and disparities in power does not promise to be a quick process, there are advantages to starting the process now. While many states were quick to implement such statutes and pioneer the way in the world of divorce ADR, states currently examining such possible implementation have the added benefit of analyzing how the earlier states have continued to tailor their legislation to meet the problem areas discussed earlier.

Any statute establishing such a mediation framework for divorce child custody situations would have to take the following into consideration.

B. *Provisions Regarding Domestic Violence and Unequal Power*

Universally, the state statutes that discuss the use of mediation in family law cases have provisions designed to address the concerns surrounding the issues of domestic violence and disparities in power. The state systems described above show very different approaches to the possibility of mediation in situations involving domestic violence. Clearly, California’s system shows attempts to deal with domestic violence within the mediation framework. Delaware categorically prohibits the use of mediation in such situations.

Other states have made domestic violence provisions in their mediation statute. In some, the parties or court can ask to be exempted because of the presence of past violence in the relationship. North Carolina is an example of a state that expands the exemption clause to cover other “good cause reasons,” one of which is domestic violence.¹¹³

¹¹²Ann Hodges, *Dispute Resolution Under the Americans With Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1068-69 (1996). Though Professor Hodges’ analysis deals with dispute resolution under the ADA, the section quoted deals with mandatory versus voluntary mediation in general.

¹¹³See N.C. GEN. STAT. § 50-13.1(c).

The “good cause” provisions are typical of the vast array of statutory schemes falling in the spectrum between California and the “prohibition” states. Most of those states, regardless of whether their statutes establish mandatory mediation or discretionary mediation, have attempted to address the concerns raised by domestic violence by placing the decision of whether mediation is suitable in the hands of the court. This approach to the process also faces numerous opponents. As discussed earlier, some oppose the use of mediation in divorce cases because of the nature of the case. In circumstances where a court has deemed a situation ready for mediation, those opponents would continue to argue that the process of mediation itself fails to protect the interests of the parties, typically the wife.

C. *Quality Standards for Divorce Child Custody Mediators*

Whatever mediation schemes states develop, it is essential that mediators meet stringent quality standards. That need for standards grows exponentially when factors like those involved in divorce child custody are in play. Virginia is an example of one state that continues to be on the leading edge of mediator certification standards. Within the already-existing statutory mediation framework, provisions are made for certification of mediators. The Virginia statute provides that, in any case referred for mediation, the mediation is “to be conducted by a mediator certified pursuant to guidelines promulgated by the Judicial Council.”¹¹⁴ In order to become a certified mediator for family law cases in Virginia, an applicant must complete a rigorous program including training, observation, and practice.¹¹⁵ In addition to the basic training requirement for family mediators in Virginia, applicants must also complete specialized training on domestic violence issues.¹¹⁶ If the discretionary function of the court prior to referral were to be limited, as would be the case if mandatory mediation statutes were developed, even in states with thorough training such as Virginia, more training in how to identify imbalances in power or underlying issues of domestic violence would be essential.

D. *Do We Need Mandatory Statutes?*

Mandatory statutes are important tools to use in shaping the course of divorce child custody law. At the same time, the discretionary approach provides a funneling system at the court through which, hopefully, divorce cases with the most settlement potential are directed into mediation. That distinction between the mandatory and discretionary approaches to divorce child custody mediation is an important one. With the former, families, regardless of whether they reach an agreement or not, will be forced through a transformative process and hopefully come out on the other side with a healthier “non-relationship” in which to raise a child. If one’s concern is primarily about the effect of the adversarial divorce process upon all of the parties involved, especially children, the mandatory approach is preferable. If that approach is taken, it is essential that the process be designed in such a way so as to balance the

¹¹⁴V.A. CODE ANN. § 20-124.4 (Michie 2003).

¹¹⁵Judicial Counsel of Virginia, *Guideline for the Training and Certification of Court-Referred Mediators* (C)(4) (March 1999) available at <http://www.courts.state.va.us/tom/tom.htm> (last modified Sept. 25, 2003).

¹¹⁶*Id.* at (C)(6).

power of the parties and deal with issues such as violence so that the safety of the parents and children are not sacrificed.

Often, it seems that implementing mandatory mediation statutes in difficult areas of the law will counter the goals of outcome-oriented proponents while supporting the goals of transformative mediators; however, some find that mandatory mediation statutes, in the end, do not achieve the transformative process, instead “adopting the machine like qualities of the court, elevating the importance of settlement and downplaying the role of empowerment and recognition.”¹¹⁷ Such a statement, if correct, might indicate that discretionary statutes are better able to accomplish the goals of mediators; however, the goals accomplished by discretionary mediation are those of efficiency-driven mediators.

The discretionary approach tends to focus on the benefits of efficiency and judicial economy associated with mediation. Examples of this approach are the codes of Kansas and Colorado. By ordering mediation where it is likely to be successful, not only can courts potentially reduce the backlog in their dockets, but also provide a healthier process for the parties involved. Such an approach does not address the transformative goals envisioned by many proponents of mandatory mediation statutes, it merely incidentally effects the parties whose conflicts are less involved. Mediation in such situations still accomplishes the basic goal of avoiding the adversarial process; however, the parties who need most to break free from the adversarial system, those with the most emotionally laced problems, are left in the system.

Overall, efforts at mediation, even in what are traditionally adversarial “strongholds,” are admirable, and programs are experiencing tremendous success where used. Though the programs often flourish where attempted, severe resistance is often encountered when those who have favored the use of mediation in relatively simple situations as a means of improving judicial economy are asked to take a broader look at the benefits of such programs.

Implementing a mandatory mediation scheme is not the harbinger of doom that many suggest. The imbalances of power that opponents fear will be exacerbated in mediation are present in the adversarial system as well. The mediation process, however, is the only process that empowers the individuals, allowing them total input in the decision making process. That does not mean that steps do not need to be taken to ensure that parties are of equal bargaining power. Rather, those steps need to be taken *within* the mediation framework. In the same way, domestic violence is not a reason to prohibit mediation, it merely means that mediation must be done in a different way, ensuring that the physical and psychological health of the victim are the primary concerns.

VII. CONCLUSION

The adversarial process serves its purpose in our society; however, that does not mean that there are not better ways to handle specific cases. To that end, non-adversarial systems offer tremendous potential in civil litigation, in governmental relations, in neighborhood and family conflicts, and, especially, in divorce child custody cases. If mediation statutes are contemplated for the sole purpose of judicial

¹¹⁷Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 84 (2000).

economy, discretionary statutes are sufficient. For the true value of mediation to be experienced, however, a mandatory scheme containing safeguards for cases involving domestic violence should be implemented. Understandably, many mediators are leery of the effect that mandatory schemes have on the preferred voluntary nature of mediation. Divorce child custody cases, however, need mediation precisely because the conflicts involved are those for which parties are unlikely to voluntarily seek mediation.

With regard to the primary problem involved with divorce child custody mediation, domestic violence, mandatory schemes must make the welfare of the victimized spouse the fundamental concern of all involved. Whether that concern is manifested by creating specialized mediation procedures for domestic violence situations, as is the case in California, or whether there are categorical prohibitions that immediately remove such cases from the mediation framework, the physical and psychological welfare of the victim must be protected.

If mandatory schemes contain the appropriate safeguards, and the adversarial system continues to be available for situations in which those safeguards are triggered, the two most important goals of the divorce child custody process, protecting the individuals involved and providing the children involved with the best opportunity to recover from a traumatic experience, can be accomplished.