

discerning children's best interests (Feller, Davidson, Hardin, & Horowitz, 1992; Mnookin, 1975; Shuman, 2002; Wald, 1976). By doing so, the courts have implicitly embraced the value that children's psychological well-being—their happiness—comes first and foremost on the list of their best interests. Alternative experts the courts instead might employ include accountants who have evaluated each parent's ability to provide for their children economically, educators who can comment on the parents' relative commitment to promoting success in school, religious leaders or philosophers who have assessed the quality of each parent's moral values and training, or perhaps dieticians who have evaluated each parent's preference for healthy versus convenience food. These suggestions may seem outrageous, but so is the idea that custody should be awarded to a parent who has an edge over another parent in promoting children's psychological well-being, particularly when the construct is ill defined or undefined.

We appreciate the terrible dilemma that the vague best-interests standard creates for judges, custody evaluators, and, of course, parents and children. We also believe that a mental health professional or other neutral third party or parties may be in a better position than a judge bound by rules of legal procedure to make recommendations about custody. However, we believe it is legally, morally, and scientifically wrong to make custody evaluators de facto decision makers in custody cases, which is often what happens because judges often accept evaluators' recommendations. As law professor Daniel Shuman (2002) recently summarized, "the role of mental health professionals in custody litigation is being transformed from expert as expert to expert as judge" (p. 160). Shuman went on to point out:

If society wishes to use mental health practitioners as experts in child custody cases, the law and science demand rigorous threshold scrutiny of their methods and procedures so that courts are informed consumers of this evidence. If society wishes to use mental health practitioners as judges in child custody cases, then social policy demands a public debate and legislative approval of this change . . . (p. 162)

We agree. Establishing panels of mental health professionals who would decide custody disputes would be a major procedural change in the law, perhaps an important one. However, we believe that there are simpler and likely more effective changes in policy that would improve custody decision making for children and divorcing families and simultaneously solve many of the problems faced by custody evaluators, lawyers, judges, and other professionals who now work with custody disputes. Our recommendations include (a) promoting parental self-determination through alternative dispute resolution and other means, (b) working to develop and implement clear custody standards, and (c) altering the practice of current custody evaluations under the best-interests standard.

RECOMMENDATION 1: ENCOURAGE ALTERNATIVE DISPUTE RESOLUTION AND PRIVATE SETTLEMENT

We believe that the best solutions to the problems posed by child custody disputes and unscientific custody evaluations involve changing the system of dispute resolution in ways that encourage parents to reach their own decisions about rearing their children following a separation (Emery, 1999b, 2004). Obviously, there will be fewer custody evaluations, and fewer cases that judges must decide, if more parents resolve their differences by deciding custody arrangements on their own. We also believe that encouraging private settlement is the best way to promote children's mental health in separation and divorce. If the research-based goals are to contain parental conflict, encourage cooperative coparenting, support both parents' authoritative relationships with the children, and preserve economic resources, then it seems reasonable to steer clear of something called "the adversary system," the method of dispute resolution embraced by the American system of justice (Emery & Wyer, 1987b). "Going to war" is not the way to promote peace, certainly not in a divorced family.

Over the last two decades, many legal and mental health professionals, and many divorced parents, have come to this same conclusion. As an alternative, they urge separated parents to determine their own children's best interests by grappling with and working out the difficult issues of residence and childrearing themselves. One important reason to do this from the outset of a separation is that parents ultimately must deal with custody decisions, parenting, and each other on their own. If a degree of cooperation in coparenting is the ultimate goal for promoting children's best interests, then it seems reasonable to hypothesize that a more cooperative approach like mediation, for example, will help parents achieve this outcome better than adversarial negotiations or litigation in the courtroom will.

More cooperative approaches to dispute settlement—those in which parents exercise a greater degree of control over both the process and the outcome than they do in the adversary system—include a range of options such as (a) *pro se* divorce, in which parents manage all legal matters on their own without the use of lawyers; (b) divorce education, usually involving court-mandated classes on parenting in divorce that encourage cooperative coparenting, even during settlement negotiations; (c) more informal, cooperative negotiations between parents and their attorneys, an approach that includes but is not limited to *collaborative law*, a new option invented by family lawyers in which both attorneys agree to represent their clients only so long as they negotiate in good faith and settle their disputes outside of court (Tesler, 2001); (d) family therapy and parent training, which, while not focused on resolving custody disputes, do focus on the importance of authoritative parenting and cooperation in coparenting for separated and divorced parents (Martinez & Forgatch, 2001; Wolchik et al., 2000); (e) divorce mediation, the most firmly established of the new approaches, in which parents

negotiate a settlement with the help of a neutral expert, usually a mental health professional or a lawyer (Emery, 1994); and (f) use of family coordinators, for that subset of high-conflict families that cannot participate in or benefit from any of the previous options (e.g., Coates et al., 2003).

The Example of Divorce Mediation

Importantly, research shows that some of these new approaches do help encourage private settlement, cooperative coparenting, and a long-term perspective on childrearing following separation and divorce. The evidence is strongest for divorce mediation, which has been studied more thoroughly than other legal interventions in divorce, although there undoubtedly is a need for more research on all types of custody-dispute-resolution procedures—perhaps especially on the adversary settlement process itself (Beck & Sales, 2001). A few randomized trials and a number of evaluations of large-scale programs have shown the following: Relative to traditional adversary settlement (attorney negotiations and formal courtroom litigation), mediation (a) settles a large percentage of cases otherwise headed for court; (b) possibly speeds the time involved in reaching a settlement, saves money, and increases compliance with agreements; (c) clearly increases party satisfaction with the process of dispute resolution; and, most importantly, (d) leads to improved relationships between nonresidential parents and children, as well as between the separated or divorced parents themselves (Emery, Sbarra, & Grover, 2005).

One of us has conducted a randomized trial of custody mediation and litigation, including a 12-year follow-up of the 71 families in the study (Emery et al., 2001). The study included primarily young, low-income parents, all of whom could be considered high conflict because they failed to reach a settlement on their own and were recruited into the study at the time that they filed a petition for a contested-custody hearing. Participants were randomly assigned at this time to participate either in mediation or in an evaluation by the court (adversary control group), and various tests were conducted to examine self-selection and attrition over time (neither of which proved to bias the study's results in any detectable manner). Among the major findings of an initial study and replication (Emery et al., 2001; Emery, Matthews, & Kitzmann, 1994; Emery, Matthews, & Wyer, 1991; Emery & Wyer, 1987a) were the following:

- Only 11% of cases randomly assigned to mediation appeared in front of a judge, compared with 72% of cases randomly assigned to the adversary-settlement group.
- On average, parents reported greater satisfaction with mediation than with adversary settlement on items assessing both the presumed strengths of mediation (e.g., “your feelings were understood”) and the presumed strengths of adversary settlement (e.g., “your rights were protected”).
- Reports of greater satisfaction were notably stronger for fathers than for mothers, apparently as a result of a ceiling

effect: Mothers almost always won in court and therefore generally were quite satisfied following adversary settlement.

- The pattern of results held not only immediately after the dispute resolutions but also in a 1.5-year follow-up and even 12 years later.
- Nonresidential parents who mediated were far more likely to maintain contact with their children. Thirty percent of nonresidential parents who mediated saw their children once a week or more 12 years after the initial dispute, in comparison to only 9% of parents in the adversary group. In the mediation group, fully 54% of nonresidential parents also spoke to their children on the telephone once a week or more 12 years later, in contrast to 13% in the adversary group.
- The increased contact between parents necessitated by greater nonresidential parent–child contact did not increase parent conflict; rather, conflict was somewhat lower in the mediation group.
- Among parents who mediated rather than continuing with the legal action over the custody dispute, 12 years later the residential parents reported that the nonresidential parents were significantly more likely to discuss problems with them; had a greater influence on childrearing decisions; and were more involved in the children's discipline, grooming, moral training, errands, holidays, significant events, school or church functions, recreational activities, and vacations.

These studies provide strong evidence about the potential for mediation to bring about improved family relationships after separation and divorce, even many years later. Still, while the study's internal validity is strong, its external validity can be questioned. The results of various other evaluations of mediation and adversary settlement help to support the generality of the findings, but an appropriate degree of caution is suggested by variation in the quality of mediation in different settings, the push in some court-based mediation programs to “get agreements” rather than focus on fostering positive postdivorce family relationships, and the general need for more research (Emery, Sbarra, & Grover, 2005).

The limited evidence on other legal and mental health procedures (e.g., divorce education, parent training) also suggests that encouraging parents to take the long view and work together as parents even in the middle of separation and divorce can benefit children, parent–child relationships, and coparents (Emery, Waldron, & Kitzmann, 1999). This is not to suggest that people should not feel hurt, angry, and bitter in the midst of separation and divorce, but instead that, if they have children, former partners who remain parents need to find a way not to act on their understandably painful emotions as they renegotiate their family relationships (Emery, 1994, 2004). Also, despite the proven benefits, it is important to acknowledge that mediation is not a panacea, and there may be a subset of parents for whom mediation is not indicated (e.g., families with a history of significant domestic violence).

The Deer-Does in Mediation

Neither John nor Jane Deer-Doe entered mediation with a sense of optimism, let alone a desire to be in the same room with one another. Their mediator, Dr. Cynthia Barnes, who also was a clinical psychologist and family therapist, was pleasant, calm, and clearly in control of the meeting, but she could not prevent the Deer-Does from erupting into an angry argument after only about 20 minutes. A tense discussion concerning their disagreements about the children exploded when John accused Jane of using the children to meet her own, limitless need for attention. Jane shot back, “It wasn’t me who had an affair.” In an angry, loud voice, John was retorting, “I never would have had to go outside the marriage if you . . .” when Dr. Barnes interrupted to ask to speak with each parent alone.

At first, Jane fumed during her caucus alone with Dr. Barnes, but she found herself in tears within a few minutes. “I just can’t believe I’m losing my marriage,” she said, “and now he wants me to lose my kids too.” She talked about her feelings of loss, grief, fear, hurt, and anger, not about problems with the custody arrangement. At one point, Jane even confessed that at times she longed to get her marriage back; John had, after all, been a good father and husband. But this revelation quickly led Jane back to John’s affair and the pain it caused her; she was becoming angry again when Dr. Barnes interrupted her.

Dr. Barnes offered that she recognized that Jane was in great pain in response to losing so many things, and that she needed to grieve. In fact, Dr. Barnes recommended a therapist for Jane to consult in order to discuss these issues. Yet, Dr. Barnes also pointed out that the goal of mediation was to preserve and protect the best part of Jane’s relationship with John—their children. She wanted Jane to think about ways they might be able to try to do that.

John was far less emotional when he met with Dr. Barnes alone. He clearly was very frustrated, but kept saying that all he wanted was to have time with his children and get on with his life. Dr. Barnes acknowledged John’s feelings, but suggested that maybe Jane—and maybe Isabella and Carlos too—were not as ready to move on as he was, especially in regard to his new relationship. She also obliquely suggested that John might want to slow down his current romantic relationship a bit for his own sake, as well. Her strong advice to John was to work on taking small but positive steps forward with the kids, and to focus on first rebuilding his relationship with them alone before including his new girlfriend in his time with them.

When the Deer-Does and the mediator got back together toward the end of their two hours, Dr. Barnes again acknowledged everyone’s difficult emotions, but pointed out how mediation was focused on trying to solve problems. She repeated her theme about taking small but positive steps, and to the parents’ surprise, they took one by arranging a plan for Carlos and Isabella to spend time with John for an overnight during the coming weekend. They agreed on very explicit details, not only for timing and transportation but also on what to tell the children about the plan and what to do if one of them grew distraught.

Jane and John did not work everything out in one mediation session, but they did discover a forum where they could bring their conflicts and try to sort them out. Mediation offered them an environment that accepted their painful emotions but simultaneously

encouraged them to put their own feelings on hold and focus on a plan for their children. Jane and John did not realize it, but this is exactly what they needed to do in a much bigger way, in order to move forward as parents and also as people in the coming months and years.

RECOMMENDATION 2: ADOPT A CLEAR CUSTODY STANDARD LIKE THE APPROXIMATION RULE

Our primary recommendation is to continue to develop practices and policies that encourage parents to reach their own, hopefully reasonably amicable decisions about residence and parenting, even when they are in the midst of separation and divorce. We view mediation as only one of a range of options designed to facilitate that goal. Our second recommendation is that state legislatures move to enact clear guidelines for determining custody in cases where the parents cannot reach an agreement. A fair standard that results in more predictable outcomes should reduce the number of contested custody cases, alter the need for and nature of custody evaluations, and as a result, we believe, help to reduce or at least not exacerbate conflict between separating parents. In short, a clear, determinative custody rule is likely to serve the children’s best interests in separation and divorce.

There is one proposal for a clear custody guideline whose potential we find particularly hopeful. The “approximation rule” suggests that parenting arrangements after divorce should approximate, as much as is possible, the respective involvement of the parents in childrearing during marriage (Scott, 1992). Parents who had equal or near-equal involvement during the marriage would maintain some form of joint physical custody after separation. Parents who divided their childrearing roles disproportionately during the marriage also would continue that arrangement. Parents who had agreed to change their roles over time, or who wanted a different postdivorce custody arrangement for whatever reason, would be encouraged to negotiate their own arrangements according to the primary, private settlement recommendation of those who have advocated for the approximation rule.

In our view, the most important advantage of the approximation rule is that it is a clear, determinative standard. Parents and their lawyers would know what to expect of the courts, and this knowledge would promote settlement. In custody disputes that are nevertheless litigated, the approximation rule would sharply limit the scope of the legal inquiry, as well as any custody evaluations that might occur. Rather than assessing children’s future best interests, under the approximation rule judges and custody evaluators would focus on the far clearer and far narrower question of each parent’s past involvement in childrearing.

No state has implemented the proposed approximation rule, so there is no evidence on its effectiveness. We note, however, that the American Law Institute (2002), whose model statutes