

DETERMINING "BEST INTERESTS" OF THE CHILD IN DIVORCE CUSTODY DISPUTES: A PROCEDURAL APPROACH

INTRODUCTION

In Vermont, as elsewhere in the country, marriages are dissolving in large numbers.¹ As families break up, child custody disputes arise between the divorcing parents. These disputes have increasingly forced the courts to decide which parent will retain custody.²

Vermont judges decide child custody disputes on the basis of the "best interests" of the child.³ The Vermont legislature has provided a list of factors for courts to consider when making their "best interests" determination.⁴ Nevertheless, the standard has been criticized for being inadequate, overly broad, and impossible to achieve.⁵

The legal method for resolving child custody issues can be viewed as having two parts: the procedural component and the substantive component. The procedural component encompasses: (1) the type of forum; (2) the participants, including the litigants, their representatives, the decisionmaker, and witnesses; and (3) the method of resolution. The substantive component consists of the legal rights of the parties and those legal principles used within the parameters of the decisionmaking process. While the two components are interrelated, they can be separated for analysis.

Recently, efforts to improve the application of the "best interests" standard have focused on the substantive component. A prominent example of this phenomenon is the legislative or judicial adoption of a presumption which favors or opposes a specific

1. The number of divorces, compiled by Vermont Department of Health, for the past five years are: 2,055 in 1978; 2,298 in 1979; 2,636 in 1980; 2,301 in 1981 and 2,620 in 1982. Telephone interview with David Jillson, Ph.D. from Vermont Department of Health, Burlington, Vermont (Nov. 28, 1983).

2. Gest, *Divorce How the Game is Played Now*, U.S. NEWS & WORLD REP., Nov. 21, 1983, at 40. Changes in parental roles and new attitudes about parenting are factors contributing to an increase in child custody disputes. *Id.*

3. VT. STAT. ANN. tit. 15, § 652 (Supp. 1983).

4. *Id.*

5. For a critique of the "best interests" standard and a suggestion for an alternative see, J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53-64 (1973) [hereinafter cited as *BEYOND BEST INTERESTS*].

custody disposition. Some presumptions presently in effect include: (1) a presumption in favor of joint custody,⁶ (2) a presumption against joint custody,⁷ and (3) a presumption in favor of the primary caretaker.⁸

The existence of a presumption may facilitate a speedy and predictable judicial resolution of the custody issue. According to this argument, a presumption in favor of a specified disposition gives the parties an indication of what the probable disposition will be. This predictability of outcome encourages parties to negotiate their own settlement, thus decreasing the emotional and financial costs associated with a judicial determination. The benefits derived from the adoption of presumptions accrue to the child as well as to the parties.

The existence of a presumption in favor of the primary caretaker increases the likelihood of a custody arrangement which safeguards the child's need for continuity. "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development."⁹ The parent who was the primary caretaker during the marriage is most familiar with the child's schedule and needs and, thus, most able to provide the needed continuity.

These substantive changes aimed at furthering the "best interests" of the child, however, do not escape criticism. Because a presumption favors a certain disposition, it lacks the flexibility to adapt to unique family situations. Moreover, a presumption does not always serve the child's "best interest." For example, the presumption in favor of the primary caretaker does not recognize the legitimate interest of a mature minor. The presumption fails to acknowledge the mature minor's ability to care for herself, as well as, her choice of custodian.¹⁰

6. For the results of a survey listing states with statutory presumptions in favor of joint custody, see Foster and Freed, *Child Custody and the Adversary Process: Forum Conveniens?* 17 FAM. L.Q. 133, 145 n.42 (1983).

7. See *Lumbra v. Lumbra*, 136 Vt. 529, 532, 394 A.2d 1139, 1142 (1978). "We do not hold that joint custody is against the best interests of the child as a matter of law. We rather presume that this is so . . ." *Id.*

8. See *Maureen F.G. v. George W.G.*, 445 A.2d 934, 936 (Del. 1982); *Burleigh v. Burleigh*, 650 P.2d 753, 755 (Mont. 1982); *Garska v. McCoy*, 278 S.E. 2d 357, 362 (W. Va. 1981).

9. BEYOND BEST INTERESTS, *supra* note 5, at 31-32.

10. This problem can be overcome by a judge who is sensitive to the problem. "When, in the opinion of the trial court a child old enough to formulate an opinion but under the age of 14 has indicated a justified desire to live with the parent who is not the primary

Changing the procedural component of child custody litigation represents another method of improving the application of the "best interests" standard. The procedural component is limited in that it cannot influence the predictability of outcome like the substantive component does. On the other hand, it is potentially more responsive to the legitimate interests of the mature minor, an area where the substantive component fails. Moreover, the procedural component can help to reduce the emotional and financial costs associated with judicial determination of child custody disputes.

In Vermont, the procedural framework for the child custody dispute is the adversary hearing.¹¹ This method has been widely criticized as being unresponsive and inappropriate for custody disputes.¹² The process is attacked for being too long and costly. Critics claim that the decisionmakers are not competent to decide delicate family issues,¹³ that there is no predictability of outcome, and that resulting custody dispositions do not achieve the "best interests" of the child.¹⁴

Accepting the "best interests" standard as the criteria for resolving custody disputes, this note will survey procedural approaches to determining these interests. The note will argue that the problems currently associated with Vermont's procedural component can be resolved. Accordingly, the note will recommend a revised method of resolving the child custody dispute in Vermont.

Specifically, this note will begin with an examination of the

caretaker the court may award the child to such parent." *Garska v. McCoy*, 278 S.E. 2d 357, 363 (W. Va. 1981).

11. VT. STAT. ANN. tit. 15, § 652 (b) (Supp. 1984). "The court shall not consider evidence relating to an issue of custody except such as is received in open court pursuant to the rules of evidence." *Id.*

12. "Although it is increasingly recognized that the adversary system is not really suited to the resolution of family differences, it remains as the structure within which intractable disputes have to be resolved. Its major defect, of course, is that it accentuates differences rather than diminishes them." COMM. ON THE FAMILY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY NEW TRENDS IN CHILD CUSTODY DETERMINATIONS 121-22 (1980) [hereinafter cited as *NEW TRENDS*].

The adversary system is viewed as being inappropriate for resolution of custody issues for a number of reasons. The process escalates conflict, obstructs communication and increases trauma. Adjudication of the custody issue is coercive, formal, costly and time consuming. Court processes run counter to the best interests of the children as they prolong the procedure and are fraught with bickering. Pearson, *Child Custody: Why Not Let the Parents Decide?* 20 JUDGES' J. 4, 5-6 (1981) [hereinafter cited as *Pearson*].

13. Pearson, *supra* note 12, at 6. See also Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 62-63 (1969).

14. Pearson, *supra* note 12, at 6.

current adversary process. A critique will be directed toward revealing its strengths and weaknesses. Second, alternative systems in Vermont and other states will be scrutinized. In conclusion, a model procedure will be suggested. It will reflect a synthesis of the most effective procedural methods of resolving child custody disputes in favor of the child's "best interests."

I. THE PRESENT SYSTEM: A CRITICAL ANALYSIS

A. *The "Best Interest" Standard and the Adversarial Process*

Under normal circumstances, society and the law presume that the parents, not the courts, are best suited to determine the child's "best interests."¹⁵ This presumption makes good sense. The family, a grouping of intimate relationships, safeguards the requirements of "[c]ontinuity of relationships, surroundings, and environmental influence. . . essential for a child's normal development."¹⁶ This presumption vanishes, however, when parents divorce and litigate child custody.

The traditional adversary hearing is the method utilized in Vermont to settle the issue of child custody. The parent, through his or her counsel, adduces evidence which demonstrates that parent's ability and the other parent's inability to provide for the child's needs. The judge, in light of the conflicting evidence, makes the ultimate decision: which parent will provide for the child's "best interests."¹⁷

One problem with the "best interests" standard is its suggestion that the child's "best interests" actually are determinable within the adversary system. The "best interests" standard implies that when divorce threatens the family structure and parents can-

15. It is a fundamental right of parents to determine custody without state intervention. Berdon, *Child Custody Litigation: Some Relevant Considerations*, 53 CONN. B.J. 279, 280-85 (1979).

To safeguard the right of the parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's need for continuity. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship as that between parent and child.

Id. at 284 (quoting J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7-8 (1973)).

16. *BEYOND BEST INTERESTS*, *supra* note 5, at 31-32.

17. VT. STAT. ANN. tit. 15, § 652 (Supp. 1984).

not agree on the matter of child custody the courts are able to act as surrogate parents and make comparable decisions. Legal and social science experts,¹⁸ as well as individual judges¹⁹ faced with making these decisions, believe otherwise.

The judge's decision is based on conflicting evidence from the parents, the child, family development experts, and well-meaning friends and relatives. This evidence is gathered and produced in a limited amount of time. Due to these time constraints, information essential to a "best interests" determination may not always be available to the court.

Even when all relevant evidence is considered by the court, the judge still may not be capable of making a "best interest" determination. The Vermont legislature has attempted to assist trial judges by suggesting "relevant factors" for consideration.²⁰ However, proper consideration of these factors would require intimate knowledge and understanding of the individual family dynamics and the ability to assess family and child development.²¹ Although the administrative judge makes an effort to assign judges experienced in matrimonial matters,²² there is no guarantee that the presiding judge will have the necessary expertise. Nevertheless, the Vermont Supreme Court has given the trial judge wide discretion in child custody adjudications.²³

18. BEYOND BEST INTERESTS, *supra* note 5, at 54.

19. See 3 C. DOUGLAS, NEW HAMPSHIRE PRACTICE: FAMILY LAW, §§ 245, 523 (1983). According to the author, an Associate Justice of the New Hampshire Supreme Court, "[a] judge in a domestic relations case assumes one of the most difficult roles in our judicial system. Dividing the wreckage of a family is a difficult and draining experience." *Id.* at § 245. In regard to child custody and family issues "[t]he author is convinced that such matters are best removed from the traditional adversary process." *Id.* at § 523.

20. VT. STAT. ANN. tit. 15, § 652(a) (Supp. 1984).

21. See *id.* This section lists four factors the court may consider: (1) the wishes of the parents, (2) the interaction of the child with other family members, (3) the child's adjustment to home, school and community, and (4) the mental and physical health of all individuals involved. *Id.* The first one, the wishes of the parents, is the only one which does not require the judge to have some behavioral science background for proper consideration.

22. The administrative judge shall specially assign superior judges to hear and determine contested divorce and custody cases, including hearings on contested petitions for modification of decrees and contested petitions for temporary orders. In making the designation the administrative judge shall give consideration to experience, temperament and expertise in matrimonial matters.

VT. STAT. ANN. tit. 4, § 73(b) (Supp. 1984).

23. "In awarding custody and in decreeing visitation rights, the trial court has wide discretion." *Senesac v. Senesac*, 135 Vt. 24, 25, 370 A.2d 214, 214-15 (1976).

Moreover, judges who lack knowledge of family and child development issues may draw upon their own experiences injecting an element of personal bias. "Most judges strive to eliminate personal bias and to protect the best interests of children; nevertheless, in some instances, the judge's tacit convictions help shape the resulting decision."²⁴ This potential for harm is increased because most members of the judiciary primarily represent only one socio-economic group.²⁵ The parties, on the other hand, represent a variety of socio-economic groupings. Because of these differences in backgrounds, judges, in making custody determinations, may be insensitive to the realities of life in groupings other than their own.

Another impediment to a "best interests" outcome through the adversary process is the procedure's divisive effect on the parties. Parents are characterized as opponents and the child becomes the prize. Pretrial negotiations are conducted by the parents' legal advocates, thus reducing the incentive for direct communications between the parties. The perpetuation of a communications breakdown between the parents disserves the child's "best interests" by prolonging the process and subjecting the child to a longer period of uncertainty.²⁶

B. *Judicial Options*

In custody disputes, the child's special interests in continuity and stability suggest the need for a swift decision. Every decision, however, should be based on information which is not always readily available to the courts. To remedy this problem the legislature has made certain options available to the courts which help judges collect evidence relevant to the issue of child custody.

Until 1981, the courts were able to order state agency personnel to conduct family investigations.²⁷ The parties had to consent to the investigation and had the right to cross-examine the individual who conducted the investigation and prepared the report.²⁸ Although the courts have lost the power to order state agency inves-

24. NEW TRENDS, *supra* note 12, at 45.

25. *Id.* at 46.

26. 3 C. DOUGLAS, *supra* note 19, at § 255.

27. *See*, VT. STAT. ANN. tit. 15, § 557(b)(repealed 1981). There is no legislative history available regarding reasons for the repeal. *Cf. infra* note 62. (Provides possible explanation for repeal).

28. *See*, VT. STAT. ANN. tit. 15, § 557(b)(repealed 1981).

tigations, judges retain the power to appoint expert witnesses.²⁹ These witnesses may be compensated either by the parties "in such proportion and at such time as the court directs"³⁰ or out of the court budget.³¹ The possible costs to the judicial system may inhibit the use of court appointed experts.

The courts are increasing their use of another aid available to them in resolving child custody disputes:³² appointment of a lawyer to represent the child's interests.³³ The court's decision to appoint counsel for the child, like the appointment of an expert witness, is discretionary. The statute authorizing appointment of counsel provides little guidance to the attorney concerning her role. The statute provides: "The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his custody, support and visitation."³⁴

While the statute requires the attorney to represent the child's interests, it does not specify which interests, nor does it instruct the attorney how she should determine those interests.³⁵ This may create a dilemma for the attorney. The attorney, to perform duties of the child's advocate, must choose either to defer to the child's expressed preferences or to make an independent determination of the child's "best interests." The first choice may be difficult or impossible to accomplish if the child is either young or inarticulate; the second choice may not be ethical.

The child's lawyer should not decide what constitutes the child's "best interests." "Such counsel are to act as lawyers, not as parents. They are to represent a child's legal needs by gathering and providing the court with information that it requires in order to determine the least detrimental placement."³⁶ Moreover, under

29. "The court may appoint any expert witness agreed upon by the parties, and may appoint expert witnesses of its own selection." Vt. R. EVID. 706.

30. *Id.*

31. *Id.*

32. Telephone interview with Trine Bech, Vermont practitioner (Aug. 23, 1983) [hereinafter cited as Bech]. In response to the question: "Do Vermont judges appoint attorneys for children who are the objects of custody disputes between divorcing parents?", Ms. Bech replied that the practice of appointing attorneys for the children is increasing.

33. *See*, VT. STAT. ANN. tit. 15, § 594 (1974).

34. *Id.*

35. *See id.* For a discussion of the problem of role definition for children's attorneys see generally, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126 (1978).

36. J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* at 112 (1979).

the present system the determination of the child's "best interests" rests with the courts. An attorney who makes such a determination risks violating the Code of Professional Responsibility.³⁷

The Vermont Supreme Court has attempted to flesh out the legislature's bare bones definition of the rule of the child's attorney. In *Lumbra v. Lumbra*³⁸ the court stated that the child's attorney "stands in the same relationship to the children and to the court as any other attorney representing his client. He may present evidence, cross-examine witnesses, and argue on the evidence on behalf of his clients."³⁹

In attempting to clarify the role of the child's attorney, the court has only further complicated the attorney's position. The attorney in *Lumbra* conducted an out-of-court investigation and then made written and oral recommendations regarding the children's custody to the trial court. The court, upon examining a record which did not indicate "under what theory this recommendation was taken by the trial court,"⁴⁰ noted that if it was taken as testimony regarding the welfare of the children, it was objectionable on several grounds:

37. Two ethical problems are likely to arise if the attorney decides to represent what she determines to be the child's "best interests." First, the attorney would be acting independently to make judgments with respect to decisions affecting the merits of the client's cause of action which is contrary to the CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1977) ("the authority to make decisions is exclusively that of the client") and EC 7-8 ("In the final analysis. . .the lawyer should remember that the decision . . . is ultimately for the client . . ."). See Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. FAM. L. 1 (1977-78). Second, a problem may arise if the child's attorney conducts an investigation to determine the child's "best interest" and then submits a report to the court. Under these circumstances, the parents have a due process right to cross-examine the attorney. By placing herself in a position of having to testify in her client's case the attorney violates the CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-9 (1977) which states that the roles of advocate and witness are inconsistent.

The recently adopted MODEL RULES OF PROFESSIONAL CONDUCT (1983) have not affected this potential ethical violation. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (1983) requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation" not the attorney's independent judgments. Moreover, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (1983) requires that even if the "client's ability to make adequately considered decisions in connection with the representation is impaired. . .because of minority. . .the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Finally, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7(a) (1983) prohibits an attorney from acting "as an advocate at a trial in which the lawyer is likely to be a necessary witness . . ."

38. 136 Vt. 529, 394 A.2d 1139 (1978).

39. *Id.* at 533, 394 A.2d at 1142 (1978).

40. *Id.*

A lawyer is prevented by ethical considerations from testifying in his client's cause. A.B.A. Code of Professional Responsibility, EC 5-10. To the extent the recommendation is based on the lawyer's out-of-court investigation, it constitutes hearsay. To the extent that the recommendation was testimonial in nature, the trial court's refusal to allow cross-examination violated the due process guarantees of the Fourteenth Amendment to the United States Constitution. If, on the other hand, the children's lawyer was making a recommendation on the basis of expertise, it was incumbent upon him to establish his expert status. Even had he done so, the elimination of cross-examination to test the expert's qualification and the basis for his conclusion would still have been violative of due process.⁴¹

Lumbra suggests that in order to comply with the Code of Professional Responsibility the child's attorney must avoid situations in which she may be required to be a witness on a contested issue in the case. Thus, the child's attorney should not submit an investigation report to the court, because submission of such a report will certainly result in the attorney being subjected to cross-examination by the parties. Instead, the attorney should represent the child as she would represent an adult client. This solution may be adequate when the child is capable of communicating her wishes for disposition, but it provides no solution when the child is too young to effectively participate in a traditional client-attorney relationship.

The Vermont courts can assist the child's attorney by exercising another discretionary power of appointment. The courts are authorized to appoint a guardian ad litem for a child if it is deemed "proper for the protection of the infant"⁴² On the

41. *Id.*

42. Vt. R. Civ. P. 17(b). The term guardian ad litem has different meanings in different states. For the purposes of this note, the term will refer to a layperson appointed by the court to represent the child's best interests during the legal proceedings. This note will not deal with guardians ad litem appointed under the Decedent's Estates chapter, Vt. STAT. ANN. tit. 14, §§ 3066, 2657 (1974 & Supp. 1984). Nor will it discuss appointment in other civil cases, Vt. R. Civ. P. 17(b), where a party is a child or incompetent, or appointments in juvenile court proceedings, Vt. STAT. ANN. tit. 33, § 653 (1981), except for purposes of analogy and comparison. See *infra* note 55 and accompanying text.

For examples of other definitions of a guardian ad litem and related discussions, see Davidson, *The Guardian Ad Litem: An Important Approach to the Protection of Children*, PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, 835-40 (1981).

other hand, a provision pertaining specifically to divorce proceedings clearly states that the appointment of a guardian ad litem is not required: "Notwithstanding the provisions of Rule 17(b), an infant party to any proceeding under this rule need not be represented by next friend, guardian ad litem, or other fiduciary, unless the court so orders."⁴³ This special provision, applicable only to divorce proceedings, reflects the draftperson's recognition that many divorce proceedings involve children. Perhaps, in an effort to discourage an unnecessary and mechanical appointment of guardians ad litem in all divorce cases, Rule 17(b) was enacted to distinguish divorce cases from other civil suits. In any event, the courts seem reluctant to utilize this power. Although appointments of attorneys for children are increasing, appointments of guardians ad litem are not.⁴⁴

The use of a lay guardian ad litem in conjunction with the child's attorney could have a significant impact on the system. In the problematic case involving young children, unable to articulate their own interests, the guardian can perform tasks which the attorney must avoid in consideration of ethical boundaries. Specifically, the guardian ad litem can conduct an independent investigation of facts relevant to the "best interests" of the child. The guardian ad litem can then direct the attorney in presenting the child's case.

In addition to gathering information through investigation, the guardian ad litem could compile this data into a report and submit the report to the court with recommendations regarding disposition. Not being an attorney, she would not run the risks of an ethical violation, as did the lawyer in *Lumbra*.⁴⁵ Therefore, the guardian ad litem could provide the court with relevant evidence, and also be available for cross-examination by the parties. The combined efforts of the guardian ad litem and child's attorney suggests an effective representation of the child's desire which simultaneously attends to the court's needs in determining the child's "best interests."

The guardian ad litem-attorney combination, however, under certain circumstances, may cause more problems than it solves. For example, if the represented child is an adolescent who insists on a

43. Vt. R. Civ. P. 80(b).

44. See Bech *supra* note 32.

45. See *supra* text accompanying notes 37 through 41.

specific custody disposition incompatible with what the guardian ad litem perceives to be the child's "best interests," combined representation may prolong rather than expedite the custody hearing. In this situation the custody issue is compounded; the dispute between the guardian ad litem and attorney-represented child is added to the primary conflict between the divorcing parents. The number of participants increases, the dispute escalates, and the procedure is further complicated and prolonged.

The courts may be reluctant to appoint guardians ad litem for a number of reasons other than the potential for conflict between the guardian ad litem and child. Although there is a provision for appointment of a guardian ad litem, the Vermont rule of civil procedure specifies nothing else.⁴⁶ The rule fails to provide such important information as: (1) the qualifications, (2) the responsibilities, and (3) the method of compensation of the guardian ad litem. Although the statute may be adequate in civil cases where parents can serve as the guardian ad litem,⁴⁷ it is insufficient in divorce cases where the conflict of interests prevents the parent from fulfilling the role. The rule's deficiencies probably discourage judicial appointments of guardians ad litem in custody disputes.

In conclusion, the child custody dispute is conducted in much the same manner as other types of disputes between litigants. Despite some modifications granting judges special powers, the adversary process is ill-suited to determine the child's "best interests." Ethical difficulties, and financial and practical considerations undermine any benefits derived from the use of experts, attorneys, and guardians ad litem. The adversary system subtly invites moral, social and psychological judgments by the judge and others enlisted in assessing the family situation. Its very existence for the purpose of resolving child custody disputes is contrary to the goal it is intended to serve.

46. See Vt. R. Civ. P. 17(b).

47. In most civil cases the parent can serve as the guardian ad litem. The parent, acting in the child's best interests, serves as the client in the client-lawyer relationship. The child's parent, by virtue of his or her relationship to the child, is qualified and requires neither a job description nor compensation.

II. OTHER SYSTEMS FOR DETERMINING THE "BEST INTERESTS" OF THE CHILD

A. Judicial Systems

1. Abuse and Neglect Proceedings

Devising a plan for modifying or reconstructing divorce proceedings so that they are responsive to the child's "best interests" requires examination of alternative methods of resolving similar disputes. In Vermont, similar procedures are used to determine custody in neglect-abuse cases and divorce cases. In both proceedings, the child's custody is disputed and the court's determination is based on what will serve the child's "best interests."⁴⁸

These two types of cases differ, however, in two significant ways. First, unlike parents in divorce proceedings, the parents in abuse and neglect proceedings do not choose to bring the dispute to court. Abuse and neglect proceedings are cases of uninvited state intervention. Second, it is possible that the disposition in abuse and neglect proceedings will have a more radical effect on family members. In some cases children are removed from their home and family; in a limited number of cases parental rights may even be terminated.⁴⁹ These differences between the two types of cases offer some explanation for the differences in the procedures.

In Vermont abuse and neglect proceedings an attorney is always appointed to represent the child.⁵⁰ In addition to the attorney, the court always appoints a guardian ad litem to represent the child's interests. This procedure has developed in a roundabout way. The applicable statute provides that the court, "on application of a party or on its own motion, shall appoint a guardian ad litem or counsel for a child who is a party to the proceeding"⁵¹ The implication is that appointment of one or the

48. VT. STAT. ANN. tit. 33, § 667 (1981), prescribes best interest standard for abuse and neglect proceedings. VT. STAT. ANN. tit. 15, § 652 (Supp. 1983), prescribes best interest standard for divorce custody disputes. Each lists four considerations, two of which are almost identical.

49. Possible dispositions in abuse and neglect proceedings range from court ordered family counseling to removal of the child from the custody of her natural parent and termination of parental rights. Severing a child from her natural family at the insistence of the state is a more radical change than the custody of the child remaining with one of the natural parents.

50. See *infra* notes 54-56 and accompanying text.

51. VT. STAT. ANN. tit. 33, § 653 (1981).

other would suffice. The Vermont Supreme Court, however, recognized that such an interpretation was inadequate. The court distinguished the respective roles and discussed the need for appointment of both attorney and guardian ad litem in *In re Dobson*.⁵²

An attorney can effectively argue the alternative courses open to a client only to one assumed to be capable of making a discriminating choice. The minor is presumed incapable and under disability, hence the need of a guardian ad litem to weigh alternatives for him. Yet a lawyer attempting to function as both guardian ad litem and legal counsel is cast in the quandry [sic] of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests. The counselling of minors called for by 33 V.S.A. § 678 is best provided by a separation of the roles of guardian ad litem and attorney.⁵³

Though the statute itself does not mandate appointments,⁵⁴ they are always made in abuse and neglect cases.⁵⁵ This is the result of the 1974 Child Abuse Prevention and Treatment Act⁵⁶ which requires states to provide representation to the child in judicial proceedings if the child's welfare will be affected. The state must provide the child with counsel in order to receive federal funds. Vermont has guaranteed its compliance with the federal legislation by letter from the governor.⁵⁷

The court hearing a neglect and abuse case has, in addition to the information provided by the attorney and the guardian ad litem, the contents of an investigation report prepared by a social

52. 125 Vt. 165, 212 A.2d 620 (1965).

53. *Id.* at 168, 212 A.2d at 622. The statute referred to in *In re Dobson* provided: "Whenever a minor is charged with a crime in any court and is not represented by counsel the court shall forthwith appoint a guardian ad litem to defend the interests of the minor. Whenever a minor is charged with a felony in any court, he shall be represented by counsel." VT. STAT. ANN. tit. 33, § 678 (repealed 1967). The statute pertained to counsel for children and was located in Chapter 13 Criminal Proceedings Against Children. As noted in the history section of the annotation, the subject matter previously covered by Chapter 13 is "now covered by Chapter 12 of this title." Chapter 12 contains VT. STAT. ANN. tit. 33, § 653 (1981), which, like the statute noted in *In re Dobson*, pertains to representation of minors and is the logical substitute for the repealed statute.

54. See VT. STAT. ANN. tit. 33, § 653 (1981).

55. Telephone interview with Patricia Derrick, District Court Clerk, Windsor Circuit, White River Junction, Vermont (Feb. 2, 1984).

56. 42 U.S.C. § 5103(b)(2)(G) (1976).

57. "In three states, a letter from the Governor has stated that although the statute does not make appointments mandatory, such appointments are in fact made in every case (Hawaii, Texas, Vermont)." Davidson, *supra* note 42, at 839-40.

worker from the Department of Social and Rehabilitative Services.⁵⁸ Thus, the options available only at the court's discretion in a divorce custody proceeding are mandatory in the neglect and abuse proceeding. Given the similarities of the two types of cases—the custody issues implicated, the use of the “best interests” standard, and the profound effect disposition can have on the child's life—the differences in their respective procedural approaches must be questioned.

While the neglect and abuse proceeding is designed to provide maximum relevant evidence and a more defined structure, it is vulnerable to some of the same problems which occur in the less structured divorce custody hearings. Difficulties common to both proceedings include: the undefined roles of the guardian ad litem and child's attorney;⁵⁹ the potential for ethical violations by the child's attorney; and the conflicts which may occur between the child and guardian ad litem.⁶⁰

Why two types of disputes, similar in nature, are not handled in a more similar fashion is not clear. One likely explanation is the federal funding incentive dependent on the state's guarantee of legal representation of the child and social worker investigation reports in abuse and neglect cases. Also, abuse and neglect cases require additional procedural safeguards because they involve uninvited state intervention and may ultimately result in such a radical disposition as termination of parental rights.

2. *Other States*

Other states' statutory schemes and judicial procedures used in determining child custody are largely variations of Vermont's. Ohio, in its rules of civil procedure pertaining to divorce actions, gives the court discretion to appoint a guardian ad litem and counsel when it feels it is essential to protect the child's interests.⁶¹ The

58. See VT. STAT. ANN. tit. 33, § 685 (Supp. 1984).

59. The child's attorney and guardian ad litem in abuse and neglect hearings are given no more guidance as to their respective roles than are their counterparts in divorce proceedings. Compare VT. STAT. ANN. tit. 33, § 653 (1981) with VT. STAT. ANN. tit. 15, § 594 (1974).

60. It should be noted that the absence of a definitive standard of qualification for the guardian ad litem and the potential clash between the child and the guardian ad litem may not be as important in the neglect-abuse proceedings. The required investigation and report by a state employed social worker in abuse and neglect proceedings may reduce the importance of the guardian ad litem's role.

61. See OHIO R. CIV. P. 75(B).

rules also allow Ohio courts to order an investigation of the family.⁶² This type of investigation is no longer available in the Vermont courts.⁶³ California also gives the court discretion to appoint an attorney to represent the "best interests" of a minor child in divorce custody disputes.⁶⁴ There is no provision for appointment of a layperson guardian ad litem in addition to an attorney.⁶⁵ The discretionary attorney appointment provision without a guardian ad litem provision is representative of the more typical state statutory scheme. In California, however, it may be less problematic, since parents must first participate in mandatory mediation.⁶⁶ As a result, fewer custody cases are likely to be decided in the courts.

New Hampshire courts have discretion to appoint an attorney to represent the children upon motion of the court or any party, but if custody or visitation is disputed, the appointment is mandatory.⁶⁷ Like California, New Hampshire does not have a provision for appointment of layperson guardians ad litem. Nor does it provide for court ordered agency investigations.⁶⁸

Even though New Hampshire requires appointment of counsel for the child in all disputed custody and visitation cases, the legislature has not provided the attorneys with sufficient guidance as to their roles and responsibilities.⁶⁹ Careful consideration of this system raises the same question recognized and discussed in the con-

62. See OHIO R. CIV. P. 75(D). Accompanying notes reveal that originally the investigation was mandatory if minor children were involved. The change to discretionary investigations was due to a finding that the investigations were not always needed and constituted a costly and "inordinate delaying factor." This may be one reason why Vermont repealed its similar statute.

63. See *supra* note 27 and accompanying text.

64. See CAL. CIV. CODE § 4606 (West 1983).

65. See CAL. CIV. CODE §§ 4600-4608 (West 1983 & Supp. 1984).

66. CAL. CIV. CODE § 4607 (West 1983), requires that contested issues of child custody or visitation be submitted to mediation. See *infra* notes 99-102 and accompanying text.

67. "If, at any time during the proceedings, whether before or after a final decree of divorce, custody or visitation of the children is disputed, a guardian ad litem shall be appointed." N.H. REV. STAT. ANN. § 458:17-9 (1983).

In New Hampshire the court which hears the custody dispute is the marital master program. Described as a "court within a court," this program was devised to alleviate the problems of an overloaded superior court docket. The proceedings are similar to those in a superior court. The major difference is that the decision-maker is not a judge, but rather an attorney with a minimum of five years practice of law and some experience in marital matters. For a more detailed description of the program see 3 C. DOUGLAS, *supra* note 19, § 521.

68. See N.H. REV. STAT. ANN. §§ 458-A:1 to 460:29 (1983).

69. See N.H. REV. STAT. ANN. § 458-17(a) (1979 & Supp. 1981). It should be noted, however, that the statute does allow the attorney to participate as any other party and to "utilize the services of others to aid him in representing the child." *Id.*

text of the present Vermont system: Does the attorney risk ethical problems by submitting an investigation report with recommendations for disposition?⁷⁰

Because of the absence of a clearly defined role for the child's counsel, New Hampshire attorneys proceed in whatever manner they perceive is best under the circumstances.⁷¹ One approach is to represent the child as if she were an adult client. In this situation the child has full party status,⁷² and traditional family roles take an unusual twist. By providing an attorney to represent the child's wishes, which actually may be contrary to the child's "best interest," the court gives the child rights and powers that she would not ordinarily possess. In divorcing families which work out their own custody arrangements, as in non-divorcing families, decisions regarding a child's upbringing rest where they are presumed to be best served, with the parents.⁷³

Devising a custody arrangement is a parental responsibility upon which the exercise of future parental rights and responsibilities depend. Divorcing couples who cannot agree on custody issues avoid this parental responsibility by placing the intricate decision with the court. Judicial resolution is difficult enough without the additional complication of the child as a third party represented by counsel advocating a disposition which may be contrary to the child's "best interests."⁷⁴

70. See *supra* text accompanying notes 37-41 for discussion of the problems associated with the attorney's submission of an investigation report with recommendations for disposition.

71. Telephone interview with Marilyn Mahoney, New Hampshire practitioner (Aug. 30, 1983).

72. "Full party status" in the context of this note is the representation of the child as if she were an adult, with the child directing the litigation. This interpretation of "full party status" is significantly different from that expressed in *BEYOND BEST INTERESTS*, *supra* note 5 at 65-67. The authors suggest that the child has a right to representation by counsel, but imply that it is the attorney who will decide what interests of the child she will advocate.

73. See *supra* text accompanying notes 15-16.

74. *But see* Foster and Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, *FAM. L.Q.* 133, 142 (1983).

A side effect or byproduct of independent representation of the child in custody proceedings is that this technique usually "cools down" the heat of bitter custody disputes. Those jurisdictions which mandate this procedure report that there is an increased incidence of settlement and that where settlement efforts fail the adjudication in court is less acrimonious [footnote omitted]. The parties and their counsel, when confronted with a competent advocate for the child's interests, tend to back off from selfish or self-centered positions and to become really concerned with the child's welfare and willing to forgo the "one-upmanship" or "face saving" positions they for-

The New Hampshire legislature's silence has forced the judiciary to define the attorney's role. The court views the attorney primarily as an advocate for the child's "best interests."⁷⁵ This viewpoint implicitly rejects the full party status approach. Although this judicial guidance is more definitive than the statute alone, it is still inadequate. The court directs the attorney to represent the child's "best interests" without providing an independent method for determining those interests.

3. *The Clodfelter Model*

Another model was suggested at the 1980 National Center for Child Advocacy and Protection Conference for Guardians ad Litem. Mark Clodfelter, from the State Department's Office of the Undersecretary for Political Affairs, suggested that the court appoints a guardian ad litem to represent the "best interests" of the child and an attorney to represent the guardian ad litem.⁷⁶ The guardian ad litem would be required to have specialized training which would enable her to perform the tasks necessary to ascertain which disposition would serve the child's "best interest."⁷⁷

Several problems encountered in previously mentioned methods do not exist with the Clodfelter model. First, the lawyer does not have to choose between advocating the child's wishes or welfare. There is no need to require an outside agency to conduct an investigation. The parents are able to cross-examine the guardian ad litem in regard to the report, and thus eliminate the necessity of calling the attorney as a witness. Finally, the roles of those involved are more defined.

The Clodfelter model, however, has problems of its own. The

merly adhered to, and to moderate their animosity. The interjection of a third party makes a world of difference.

Id.

75. See *Provencal v. Provencal*, 122 N.H. 793, 452 A.2d 374 (1982). The court examined the role of the child's attorney in New Hampshire custody proceedings and concluded that she serves primarily as an advocate for the child's "best interests." The attorney in the case had submitted a report concerning the child's "best interests." The court did not discourage attorneys representing children from conducting investigations and submitting reports. Moreover, the court recognized the parents' due process rights to review and challenge the report, but provided no guidance to the attorney to avoid being called as a witness in violation of EC 5-9 CODE OF PROFESSIONAL RESPONSIBILITY (1977). See *supra* note 37.

76. *A.B.A. Project Sponsors Debate Over Proper Representation of a Child*, 7 FAM. L. REP. 2087, 2087 (Dec. 9, 1980).

77. *Id.*

implementation of this model appears to be administratively impractical and financially prohibitive. Because it requires dual representation in every case, the cost of litigating child custody disputes would increase. The legislature would not only have to determine the qualifications of a guardian ad litem, but also would have to devise a method of insuring the availability of qualified individuals. It could either provide adequate compensation to individuals who act as guardians ad litem or organize volunteer training programs. Both require financial support. The volunteer programs, though less costly, might provide less qualified individuals and would depend on unpredictable variables of individuals' free time and good will.

This model's financial and administrative problems are not insurmountable. Additional costs could be charged to the parties in cases where they are financially able. If the parties are indigent, costs could be defrayed in other ways. For example, the legislature could authorize courts to utilize personnel from state agencies or community mental health centers as guardians ad litem. Alternatively, volunteer training programs could be funded by revenue raised through increased divorce filing fees. The financial burden associated with this model and the general unreliability of volunteer programs are two major considerations discouraging its adoption.

Another criticism of this model is that unless the guardian's recommendations coincide with the child's wishes there may be no representation of the child. While the criticism may be accurate, a lack of legal advocacy of the child's wishes could be beneficial. First, it would eliminate the child's dilemma of having to choose one parent over another. Second, elimination of the choice might reduce the possible isolation which can result between the child and the parent not chosen.⁷⁸

78. This policy of de-emphasizing the child's wishes is consistent with the current approach in Vermont, where the trial court is not bound by the child's preferences.

[T]he wishes or preferences of the child are not controlling factors in the court's decision upon the issue of custody, and the court is not bound by the child's preference. This is not to say that a trial court may not, in the exercise of its discretion, permit the testimony of a child upon the issue of custody if it feels that to do so would be in the best interest of the child.

Cameron v. Cameron, 137 Vt. 12, 14, 398 A.2d 294, 296 (1979).

4. "Special Judge" Model

Problems associated with the appointments of attorneys and guardians ad litem to represent children could be avoided by eliminating the appointments. Alternatively, modifying the judiciary could produce the benefits derived from these appointments without the attendant problems. Andrew S. Watson suggests that a modification of the judiciary by appointment of a behavioral science judge to sit with judges hearing child custody cases will promote the child's "best interests."⁷⁹

The underlying rationale for "special judge" appointments is that their presence will compensate for the legal judge's inadequacies and bring insights from the field of behavioral science to the decision-making process. According to Watson, the "special judge" model would have several advantages. First, the "special judge" would increase "the likelihood that all appropriate information relating to the child's disposition would be included."⁸⁰ Second, "[t]he presence of both legal and psychological experts on the bench would immediately begin to cross-educate the parties to the decision-making process."⁸¹

Watson's "special judge" model appears to be a hybrid of the traditional judicial system, not unlike Vermont's, and the English Magistrate Courts. In England, cases involving family matters are recognized as presenting unique problems which require special expertise for resolution. Because ordinary magistrates are viewed as unequipped to manage the special problems of domestic disputes, all juvenile and most family matters are heard by special magistrates. The special magistrates are required to have a background in behavioral sciences.⁸² The "special judge" model is a compromise between the English and traditional American systems.

Watson probably compromised because implementation of the English model was not practical. Judges would have to acquire an education in family and child development, a costly and time consuming endeavor. This slight variation of the English system provides a more feasible alternative.

79. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 79 (1969).

80. *Id.*

81. *Id.*

82. *Id.*

Watson's "special judge" model is merely the germination of an idea. The author does not provide sufficient information or explanation of how the model would function. The author fails to describe how these "judges" will accomplish their intended purpose. The definition of the "special judge's" role will determine the model's effectiveness.

If the "special judge" and the legal judge possess equal power to render joint decisions, a problem can arise: When they do not agree, whose decision should prevail? Should the "special judge" have overriding power by nature of her expertise regarding the delicate issues of child custody? Or should the "special judge" act only as an advisor and the legal judge's opinion prevail by nature of her legal expertise and the legal context of the issues?

If the "special judge" acts as an advisor to the legal judge, the role is analogous to that of the attorney or social service representative who submits recommendations for disposition. A "special judge" acting in this capacity must be available for cross-examination by the parties under their fourteenth amendment due process guarantees.⁸³ Thus, if the "special judge" acts as either an equal or an advisor to the legal judge, this model is as problematic as a model providing guardians ad litem and attorneys to represent the child.

Limiting the "special judge's" role to that of an inquisitor would promote the purpose of the model, but avoid the difficulties. The "special judge" could question the witnesses and the parties. The questions would focus on eliciting information which might pertain to the "best interests" of the child. The "special judge" would not render conclusions or recommendations, nor would she participate in case disposition. In this role the "special judge" could present psychological information in an efficient, though indirect, way.

B. *An Extrajudicial System: Mediation As An Alternative to Litigation*

Family mediation enables the parties to resolve child custody disputes without the use of litigation and adversary process.⁸⁴ Mediation can provide a quicker resolution of the issue. In mediation

83. See *supra* footnotes 27-28, 41 and accompanying text.

84. *Reports, Proposals and Rulings*, 5 FAM. L. REP. 2560-63 (May 15, 1979).

parents, not judges, determine the child's custody arrangements. This process is closest to the situation presumed by law and society to serve the child's "best interests."⁸⁵

Mediation is a relatively new approach to the resolution of child custody disputes. It is available in some states as a voluntary alternative⁸⁶ selected by divorcing spouses. In other states, it is mandated by statute.⁸⁷ Because the process of mediation is still in the developmental stage, divorcing couples are often unaware of its existence and, therefore, have generally failed to take advantage of the method. Due to its brief history, evaluations of the success of mandatory and voluntary mediation, while sparse, are promising.⁸⁸

Couples unable to resolve child custody disputes in Vermont can take advantage of the mediation process. Although there is no statutory provision for mediation services, there are mental health and legal professionals who are trained and practicing mediators.⁸⁹ Their services are offered through clinics or private practice. Currently, mediation services in Vermont have no connection with the court system.

Mediated resolutions of child custody issues provide numerous benefits to the parties, the child, and the court system. The parents will reap several benefits. First, they will not relinquish their right to raise their children as they choose. Inviting court intervention through the adversary process jeopardizes this right.⁹⁰ Second,

85. See Pearson, *supra* note 12, at 6-10, for a general discussion of why the adversary system runs counter to the "best interests" of the child and why mediation is better suited to serving the child's "best interests." See *supra* note 15 and accompanying text for discussion of society's presumption.

86. One example where mediation provides a voluntary alternative is Family Mediation Services, a private corporation in Minneapolis, Minnesota. This program works with the courts' pretrial diversion program. Another example is an experimental program in one county in New Jersey. See *Reports, Proposals and Rulings*, 7 FAM. L. REP. 2669 at 2672 (Sept. 1, 1981).

87. See ALASKA STAT. § 25.24.060 (1983); CAL. CIV. PROC. CODE § 4607 (West 1983); DEL. CT. C.P.R. 470.

88. See Pearson, *supra* note 12, at 6-10, for a detailed description of the Denver Project of family mediation and results regarding child custody resolutions. Fifty-four percent of the fifty-one couples who completed more than one session were able to reach an agreement. Seventy-five percent of the couples who were unable to agree through mediation still arrived at a custody arrangement prior to a court hearing. *Id.* at 7-8.

89. In Vermont, members of the Vermont Council of Divorce Mediation, a group of individuals from the legal and social science fields, have been trained as divorce mediators and are available on a private practitioner basis for resolution of disputes such as child custody.

90. BEYOND BEST INTERESTS, *supra* note 5, at 7-8.

with a capable, trained mediator, the parties will be able to negotiate face to face and on an equal footing.⁹¹ Eliminating attorney go-betweens increases direct feedback and clarification between the parties.⁹² Financial and emotional costs to the parties can be significantly reduced by avoiding the use of the judicial adversary system. Finally, there is some indication that agreements reached through mediation are less likely to require court modification than court-ordered arrangements.⁹³

Children benefit significantly when parents mediate the custody issue rather than battle it out in court. The elimination of the winner-loser situation should be better for the child's social and psychological relationships with both parents.⁹⁴ Mediated custody agreements usually provide more contact with both parents than do court-ordered arrangements.⁹⁵ A custody arrangement devised by the parties, the people who know the child's needs and their own capabilities, will better meet the "best interests" of the child than would an arrangement determined by a judge who may have little or no contact with the child.⁹⁶

The judicial system also benefits from the parents' choice to mediate. When parents pursue extrajudicial solutions to child custody disputes, court time becomes available for other matters. Extrajudicial resolution provides a double benefit because mediated disputes are less likely to return to the judicial system for modification orders.⁹⁷ Judges will welcome the reduction of this caseload involving difficult issues that they may not be trained to resolve.

In the past few years some states have adopted statutes mandating mediation of child custody disputes. The forerunner in this field is California, where a mediation statute has been in effect

91. J. HAYNES, *DIVORCE MEDIATION* 49-53 (1981).

92. Elimination of attorneys from the mediation process, however, is not required. The A.B.A. recommends that the mediator "inform the participants that each should employ independent legal counsel for advice throughout the mediation process." *STANDARDS OF PRACTICE FOR DIVORCE MEDIATORS* § I(A)(6) (Proposed Draft 1983).

93. Pearson, *supra* note 12, at 10.

94. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39(3) *LAW & CONTEMP. PROBS.* 226, 288 (1975).

95. Pearson, *supra* note 12, at 8-10.

96. Mnookin, *supra* note 94.

97. "Generally, the more cooperative the negotiation between parents at the time of the custody decision, the better the changes for constructive renegotiation as circumstances change." *NEW TRENDS*, *supra* note 12, at 89. Also, information gathered from other mediation centers indicates that mediation may result in lower recidivism. Pearson, *supra* note 12, at 10.

since January 1, 1981.⁹⁸ The statute requires mediation of contested issues of custody or child visitation and directs the court to provide the mediator. The individual who serves as mediator must possess minimum qualifications.⁹⁹ These qualifications, while extensive, do not require any specific training in mediation.¹⁰⁰ Nevertheless, the qualifications are equivalent to those of an individual who has received mediation training.¹⁰¹

Delaware has also instituted a mandatory mediation rule for resolution of contested custody or visitation issues.¹⁰² A comparison of the California and Delaware statutes demonstrates some variations from which a state implementing such a program might choose. The Delaware statute provides that the mediator be a member of the court's staff,¹⁰³ while California is more flexible in allowing a range of individuals who may serve if "designated by the court."¹⁰⁴ Although the two statutes vary in this regard, what they do have in common is that the court determines who will serve as the mediator.

A system of court-imposed mediation with court-selected mediators may undermine the parties' success from the onset. The parties have less incentive to make arrangements when the court will do so for them. On the other hand, if the parties choose the process and the mediator, they may feel they are more involved and in control. The parties' investment in the process in turn encourages their cooperative effort to make the process work.

The California and Delaware mediation statutes also differ in regard to the participation of the parties' counsel. In California "[t]he mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion

98. CAL. CIV. CODE § 4607 (West 1983).

99. *Id.* § 4607(b).

100. *See* CAL. CIV. PROC. CODE § 1745 (West 1982).

101. *Id.* This statute requires that the mediator have a master's degree in some field of social science which is related to counseling and the family. In addition to an educational degree, the mediator must have knowledge of both the court system used in family law cases and the effects of divorce on the children and the family. These are qualifications that every mediator should possess. Without specific training in mediation, the person serving as mediator may not be sufficiently skilled to aid the parties in negotiating an equitable result on equal footing.

102. "In all custody and visitation proceedings . . . a mediation conference(s) shall be held before a Court staff mediator No custody proceeding shall be scheduled before a judge until the completion of the mediation conference(s)." DEL. CT. C.P.R. 470.

103. *Id.*

104. CAL. CIV. CODE § 4607(b) (West 1983).

of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary."¹⁰⁵ Delaware leaves the decision of participation of counsel to the election of the parties.¹⁰⁶

In both California and Delaware, if mediation fails, the issues can be referred to the courts for resolution. Under these circumstances, the Delaware statute provides that "nothing said by the parties or other persons participating during the conference(s) may be used against them in subsequent proceedings in this court."¹⁰⁷ California's statute requires that the proceedings be treated as "official information"¹⁰⁸ as prescribed by the California evidence code.¹⁰⁹ The mediator in California has considerable discretionary power to make recommendations to the court based on information obtained during the mediation process.¹¹⁰

When the efforts to mediate a settlement fail, the court's access to information gained by the mediator during mediation should be limited. A policy where all information obtained during mediation is available to the court threatens the success of the mediation process. Parties who are aware that what they say during mediation may later be used against them in court may be reluctant to be open and honest. Moreover, to guarantee the due process rights of the parties "the court [shall] *not* receive a recommendation from the mediator, as to any contested issue on which agreement is not reached, unless . . . [it] guarantees the parties the rights to have the mediator testify and to cross-examine him . . . concerning the recommendation."¹¹¹

Hawaii is engaged in an experimental mediation program. This program was summarily decreed by the family courts of the state.¹¹² The experiment requires that one-third of all child cus-

105. *Id.* § 4607(d).

106. *See* DEL. CT. C.P.R. 470. Two other possible approaches are to require that each party have counsel but only for consultation purposes, or to require that the parties try to resolve the dispute without any attorney representation whatsoever. Participation of attorneys in the mediation process may remove some of the control from the parties and introduce elements of the adversary process.

107. *Id.*

108. CAL. CIV. CODE § 4607(c) (West 1983).

109. CAL. EVID. CODE § 1040 (West 1966).

110. *See* CAL. CIV. CODE § 4607(e) (West 1983).

111. *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479, 487 (1983). For a brief discussion of the same due process issue in regard to: (1) state agency investigators see *supra* notes 27-28 and accompanying text, and (2) investigations by the child's lawyer see *supra* notes 37-41 and accompanying text.

112. *Report from A.B.A. Family Law Section Annual Meeting*, 7 FAM. L. REP. 2669,

tody disputes be mediated, one-third be determined by the court investigation process, and the remaining one-third be left to the parties' choice.¹¹³ The results of this experiment will provide information which can be used to assess the comparative success of the two systems and the preference of parents in choosing one system over the other.

Whether mandatory or voluntary, the mediation process is more sensitive and responsive than the adversary system to child custody and visitation issues. The studies on family mediation, though limited, support mediation as a viable alternative to the adversary system.¹¹⁴ For example, couples participating in the process are positive about it. Even when a mediated agreement is not reached, couples are more likely to stipulate outside of court.¹¹⁵ Mediated contests result in lower recidivism than those litigated. Moreover, mediated agreements often include a clause providing for re-evaluation through mediation.¹¹⁶ Finally, mediation without attorneys can be significantly less expensive than litigation.¹¹⁷ Only one professional is involved at a cost of \$40.00 to \$50.00 per hour.¹¹⁸ The process requires an average of 5.6 to 8 hours.¹¹⁹ Thus, mediation is an economical, as well as practical, alternative to litigation.

While mediation may provide a better alternative for determining the child's "best interests," it cannot totally replace the litigation process.¹²⁰ Some couples are unable to reach agreement through mediation. Moreover, in certain family situations the court may be better equipped to determine the child's "best interests."

2671 (Sept. 1, 1981).

113. *Id.*

114. *Reports, Proposals and Rulings*, 5 FAM. L. REP. 2560 (May 15, 1979). In a report on the Family Mediation Association's Center at the University of Georgia School of Social Work, O. J. Coogler pointed out that the center never had a case go to arbitration because when the mediating parties reach the stage called "clearly defining the issues" they have always reached agreement. *Id.* at 2563. See Pearson, *supra* note 12 for a comparative analysis of couples choosing to mediate custody and those choosing to litigate the issue.

115. Pearson, *supra* note 12, at 7-8. Seventy-five percent of the group of couples who tried mediation and could not agree stipulated to custody arrangements prior to court hearing.

116. See *id.* for a sample mediation agreement clause.

117. Pearson, *supra* note 12, at 10; A. DAVIS, *MEDIATION . . . AN ALTERNATIVE THAT WORKS*, 5 (1983).

118. See, e.g., *Reports, Proposals and Rulings*, 5 FAM. L. REP. 2560, 2563 (May 15, 1979). These costs were quoted five years ago and may well be higher today.

119. Pearson, *supra* note 12, at 7.

120. *Id.* at 10.

Three of these situations recognized by the Connecticut Family Division of the Superior Court are:

- (1) cases involving children allegedly abused or neglected;
- (2) cases for modification which have a history of long, bitter conflicts and court appearances; and
- (3) cases in which either or both parents exhibit serious psychological problems.¹²¹

Any of these situations may necessitate state intervention to protect the child's "best interests." In most situations, however, mediation offers an effective method of resolving custody and visitation disputes and serves the "best interests" of the child.

IV. PROPOSED SCHEME FOR VERMONT

In the proposed system parties are required to mediate or negotiate child custody issues. In addition, adjudicated resolutions of custody disputes would be streamlined and available only on a limited basis. This proposed scheme is based on three fundamental premises. First, because the child is the innocent victim of the marriage dissolution, her interests should be the paramount consideration in the custody process. Second, the adversary system is ill-suited for determining what custody situation will serve the child's "best interests." Third, parents are the most capable decision-makers regarding questions about their children's upbringing. Grounded on these premises, the proposed system is designed to discourage reliance on judicial dispositions of child custody issues and to foster parental responsibility and decision-making.

Judicial resolution is discouraged by limited access to the courts. Divorcing couples with children will be required to try negotiating custody arrangements before a final divorce decree will be granted. However, not all couples will be able to negotiate a settlement on their own, and frustrations from such an impasse could have undesired results.¹²² The adversary system has become the established and recognized method of resolving child custody disputes. Divorcing couples have come to rely on the judicial system for resolution of custody issues; these expectations cannot be

121. *Id.*

122. See Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39(3) *LAW & CONTEMP. PROBS.* 226, at 288 (1975). "As a consequence of such extreme roles, however, more parents might separate without divorce and use force or other extralegal means to gain physical custody of the child." *Id.*

ignored. The system which has fostered society's dependence should not be entirely withdrawn.

The proposed system provides a practical alternative: a two stage process which emphasizes resolution at the first level. In stage one, couples must actively pursue a negotiated settlement. Although the parties are free to choose their method of agreement, the proposed system favors mediation.¹²³ Mediators must have specific skills and training and be state-certified.¹²⁴

Stage two, the judicial phase, is available only to those parties unable to reach agreement through mediation. The court will not schedule a stage two custody hearing unless the parties present an affidavit from their mediator. The affidavit documents that the parties participated in a minimum of three sessions, that the parties do not wish to continue the mediation process, and that a negotiated settlement in the next two sessions is unlikely. These cases are then given scheduling priority on the court calendar.

The stage two custody hearing differs significantly from the present system's hearing. It is structured to provide a swift and efficient disposition. In most cases the outcome will be based on information obtained solely from the family members. Hearing participants are limited to a judge, a "special judge,"¹²⁵ the parties, their counsel, and the children. An expert witness may be permitted under exceptional circumstances.¹²⁶

The judge's function remains unchanged. She hears the evidence, presides over the proceedings, and renders a decision. The parties have a more active role than they had in the traditional system. Each parent is allowed time to state a preference and rationale for a specific custody disposition. The parties' statements are developed through the questioning of the "special judge," whose responsibility is to insure that the court has the information necessary to determine which custody arrangement will serve the child's "best interests." The parties' attorneys act only as their cli-

123. See *supra* notes 84-97 and accompanying text for a discussion of the benefits of mediation.

124. State certification could be granted to those individuals who have completed a recognized mediation training program. Alternatively, the state could establish a list of qualifications as California has done. See *supra* note 102.

125. See *supra* notes 79-83, text accompanying and immediately following for a discussion of the use of a "special judge."

126. If the child has special needs expert testimony may be necessary. Under such circumstances, the parents would have to agree on who the expert would be.

ents' advisors and protectors of their procedural rights. If the child is willing, she may also state her interests and concerns. The child's statement would be developed by questions posed by the "special judge."

The main objective of the proceeding is to provide the legal judge with the information most pertinent to deciding the child's custody arrangements. An informal setting where those affected by the disposition are encouraged to participate will promote this objective. The "special judge's" skill in interpersonal relations and communications should help elicit input from the parties. A relaxation of some of the formalities of the present system can only further this objective. The parties and the child should find discussing the issues seated around a table in judge's chambers less intimidating than having to recite their position in the formality of the courtroom.

Costs of the proposed system should not exceed those of the present system. In many cases, they may be significantly less. The cost of the mediator,¹²⁷ divided between the parties, would be less than if each party were to retain separate counsel. If the dispute does proceed to stage two, limiting the use of expert witnesses and eliminating the appointment of an attorney for the child would further reduce costs.¹²⁸ Additional savings can result if the parties choose not to have attorneys present at the hearing. The only remaining expense is the per diem payment to the "special judge." As mentioned earlier, this cost could be charged to the parties, absorbed by the state, or the "special judge" could displace a usual side judge and receive her per diem allocation.¹²⁹

127. See *supra* note 118 and accompanying text.

128. The elimination of counsel for the child is based not only on economic considerations. Difficulties associated with the assignment of counsel and/or guardians ad litem outweigh their benefits. See *supra* notes 32-48 and accompanying text. The proposed system provides the child with the same benefits associated with representation by counsel. Foster and Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, 17 FAM. L.Q. 133, at 142 (1983). "A side effect of independent representation of the child in custody proceedings is that this technique usually 'cools down' the heat of bitter custody disputes." *Id.* Arguably, in the first stage, a skilled mediator can accomplish the same result. In the second stage, the special judge's questions, focused on the child's best interests, and the child's participation in the proceeding accomplish the same benefits as representation for the child.

129. VT. STAT. ANN. tit. 4, § 111 (1972 & Supp. 1984). This statute allows for the superior court to be held with a presiding judge and one or two assistant judges. This statute could be amended to allow for substitution of "special judges" in child custody hearings. The payment allocated for the assistant judge could be paid to the special judge.

CONCLUSION

In Vermont, the child's "best interests" are the court's paramount concern in deciding custody disputes between divorcing parents. In spite of this concern, the adversary system is not conducive to a "best interests" determination. Cases are decided by judges who have little or no expertise in the area of child and family development. The decision is then thrust upon acrimonious parties, neither or whom may be satisfied with the outcome. Although the future of all the family members is jeopardized by the present system, the child is the most likely victim of harms resulting from judicial limitations and disgruntled parties.

The adversarial mode of resolving custody disputes has been modified in Vermont, as well as in other states, to accommodate the unique nature of the dispute. Modifications compensate for certain inadequacies of the legal process. However, their benefits are neutralized or outweighed by attendant ethical and practical difficulties.

The delicate child custody dispute deserves a special process fashioned to meet its particularized needs. A new scheme for determining and serving the child's "best interests" can be fashioned by combining the best aspects of existing procedures. The first stage, a mediation process, encourages parental control and cooperation in deciding custody visitation arrangements. The second stage, a court hearing, is available only to parties who are unable to reach a cooperative agreement through mediation. This court hearing is informal and involves only family members and their representatives. Questions posed by a "special judge" help the court obtain the pertinent information in a short amount of time. This system promotes parental cooperation and family integrity while providing a cost-effective and efficient method of determining the child's "best interests."

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