

IMPROVING THE MENTAL HEALTH OF CHILDREN IN DIVORCE

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High-conflict behavior during divorce may have a more significant effect on children than divorce itself.¹ Children who witness their parents' high-conflict divorces suffer from preventable mental and emotional health problems at significantly higher rates than children from intact families or even divorced families where the parents exhibit low or no conflict.² While litigation often normalizes high conflict, collaborative law and mediation consistently succeed in severing it from the divorce process by promoting consensual dispute resolution and drawing on the unique skills of child specialists and mental health professionals.

I. THE EFFECTS OF DIVORCE ON CHILDREN'S MENTAL HEALTH

Children of divorce are at least twice as likely to develop preventable mental health issues as children from continuously married families.³ Approximately 25 percent of children

¹Webb & Ousky, *The Collaborative Way to Divorce: The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids—Without Going to Court* (2007) p. xiii; Moskovich, *The Smart Divorce: Proven Strategies and Valuable Advice from 100 Top Divorce Lawyers, Financial Advisers, Counselors, and Other Experts* (2007) p. 37.

²Kelly & Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives* (2003) 52 *Family Relations* 352-362, 353, <https://www.researchgate.net/publication/227618429_Children's_Adjustment_Following_Divorce_Risk_and_Resilience_Perspectives> (as of Apr. 1, 2017).

³Kelly & Emery, *supra*, p. 355.

and young adults from divorced families have serious emotional or psychological problems, compared to 10 percent from intact families.⁴ Divorce significantly increases the risk of “behavioral, internalizing, social and academic problems” as well as adjustment problems in children and adolescents.⁵ The greatest effects are seen in externalizing symptoms, including “conduct disorders, antisocial behaviors, and problems with authority figures and parents. Less robust differences are found with respect to depression, anxiety, and self-esteem.”⁶ However, even children who were doing well as adults believed they had been “permanently scarred” by their parents’ divorces.⁷ Children of divorce also experience “intolerable stress and loyalty conflicts” when caught in the crossfire of their parents’ disputes.⁸ Because children of divorce are so much more likely to struggle with mental health issues, divorce systems that reduce family conflict and offer support to children are invaluable.

II. THE LIMITATIONS OF LITIGATION

Courts are ill-equipped to tackle the mental and emotional health concerns families face during divorce. Litigation is driven by conflict, “fails to take into account current understandings of how people are wired, what they need in times of change, what children need during and after divorce, and how families change and restructure.”⁹ Similarly, “because our legal system doesn’t offer an adequate framework for addressing issues of the heart, it tends to emphasize only the items or expenses that can be listed on a balance sheet.”¹⁰ Since many negative emotions are never properly addressed during a litigated divorce, feelings of “disappointment, sadness, and betrayal” remain.¹¹ “Left unattended, these feelings can

⁴**Tesler & Thompson**, *Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life* (2006) p. 49.

⁵**Kelly & Emery**, *supra*, p. 355.

⁶*Ibid.*

⁷**Tesler & Thomson**, *supra*, p. 49.

⁸**Kelly & Emery**, *supra*, p. 353.

⁹**Tesler**, *supra*, p. 29.

¹⁰**Webb**, *supra*, p. 43.

¹¹*Ibid.*

magnify to the point where they pose serious impediments to reaching a settlement or maintaining a durable (manageable) agreement in the years after divorce.”¹²

Notably, because litigation publicizes private family matters, the exposure creates even more unnecessary stress and conflict. In most states, anyone can watch hearings and trials, courthouse records are posted online, and anyone can access court files by going to a courthouse.¹³ “All the personal dirty laundry and detailed financial data that were ever before the judge remain on the public record—information that none of us would want our neighbors, our children, or identity thieves to have access to.”¹⁴ In contrast, collaborative divorces are not on the record and “lawyers can ensure only the bare minimum that law requires to process the legal divorce goes into the court file.”¹⁵ Mediation privileges and confidentiality laws prevent private information discussed during mediation from being part of the public record. Protecting children’s privacy and their exposure to parental conflict during divorce, including the “embarrassing accusations and counteraccusations leveled along the way,”¹⁶ is crucial to minimizing harm caused by the divorce. Fortunately, collaborative law and mediation are systemically better able to address families’ mental and emotional health issues and privacy interests in divorce.

III. COLLABORATIVE LAW AND MEDIATION REDUCE CONFLICT AND IMPROVE CHILDREN’S MENTAL HEALTH DURING AND AFTER DIVORCE

The collaborative law and mediation processes empower families to be autonomous decision makers and highlight the unique perspectives and services that child specialists and mental health professionals can offer families during divorce. These holistic divorce models consider mental and emotional health issues that may be hindering case resolution. Collaborative law and mediation not only help parents manage their divorces more efficiently, but also teach them tools for long-lasting communication with each other and their children.

¹²*Ibid.*

¹³Tesler, *supra*, p. 31.

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶*Ibid.*

A. Collaborative Family Law

The collaborative method, pioneered by Stuart Webb in 1991,¹⁷ is at the cutting edge of modern divorces. The International Academy of Collaborative Professionals (IACP) has over 3,800 members from 20 different countries, and has quickly gained in popularity compared to the modest group of 50 members it had in 2000.¹⁸ Collaborative law is a form of alternative dispute resolution, or as many in the family law community prefer to call it, “consensual dispute resolution,” because collaborative law is far more desirable than the word “alternative” insinuates.¹⁹ Collaborative law should be the first choice for many divorcing parents because it addresses more than just the legal forces at play during divorces.

A “fully staffed” collaborative team consists of the two parties, their individual collaborative lawyers, two mental health professionals working as coaches, a child specialist, and a neutral financial consultant.²⁰ Each member of the team contributes expertise as necessary to meet the parties’ needs and resolve the case as efficiently as possible. The team commits to resolving the dispute outside the court system, and the parties sign a participation agreement that requires team members to withdraw if a dispute cannot be settled without going to court.²¹ Collaborative divorce is highly successful, with less than 10 percent of collaborative cases resulting in impasse and requiring the parties to hire separate attorneys and professionals for trial.²²

1. *The Child Specialist*

The child specialist is a “licensed mental health professional with particular training and experience in family systems, child development, and the needs of children during

¹⁷**Moskovitch**, *supra*, p. 51.

¹⁸**Cameron**, *The Growing ADR Community: Adapting for Culture, Language, and Families Around the Globe* (Spring 2010) 11:1 Collaborative Review: Journal of the International Academy of Collaborative Professionals 1.

¹⁹**Kuroda**, *Consensual Dispute Resolution – A Billionaire Chooses Collaborative Divorce* in Family Law Symposium Reference Book (Frank edit., 2016), p. 2006.

²⁰**Tesler**, *supra*, p. 41.

²¹**Webb**, *supra*, p. 6.

²²*Id.* at p. 7.

and after divorce.”²³ The specialist brings children’s perspectives to bear on the parenting plans and gives them an opportunity to express themselves without feeling divided loyalty to their parents. The specialist is an advocate for the children, works directly with them, and makes recommendations to parents regarding the child’s development and parenting plan.²⁴ Child specialists give children a voice so their input can be valued.²⁵ Typically, the specialist will begin by meeting with both parents to hear their perspectives and then meet with the children, unless the children are too young.²⁶ When discussing parenting plans in collaborative divorce, child specialists often prefer to use vocabulary like “parenting time” over legal designations like “custody,” emphasizing that it’s “family time, not a legal event.”²⁷ After the child specialist gathers information from the children, the specialist may debrief the team in a five-way meeting with the two spouses and two mental health coaches.²⁸

The child specialist in the collaborative process is in a better position to safeguard the interests of children than a child custody evaluator employed in court proceedings. The custody evaluator’s role is limited to “evaluation and recommendations.”²⁹ Evaluators observe children “like judges at an Olympic ice skating event,” but do not form relationships with them.³⁰ In contrast, the child specialist in the collaborative process will “assess the child, support the child in expressing his or her feelings and reactions to the divorce and other family issues,” and harness the information to help parents understand their child.³¹ The child specialist’s goals are “support and education.”³² Child specialists are in a unique position to give feedback to parents and the team to provide for the best interests of the

²³*Id.* at p. 90.

²⁴*Ibid.*

²⁵*Ibid.*

²⁶Tesler, *supra*, p. 131.

²⁷Nason, *Collaborative divorce can ease emotional, economic stress* (2014) <<http://www.cnbc.com/2014/05/01/collaborative-divorce-can-ease-emotional-economic-stress.html>> (as of Apr. 1, 2017).

²⁸Tesler, *supra*, p. 131.

²⁹Ross, *Collaborative Divorce: An Interdisciplinary Model* (October 2000) 2:2 *The Collaborative Quarterly* 15.

³⁰Kuroda, *supra*, p. 2015.

³¹Ross, *supra*, p. 15.

³²*Ibid.*

children³³ and act as consultants and helpers.³⁴ They can devote more time to focusing on the children and working with the collaborative team, rather than preparing for depositions, cross-examination, tests, and interviews that may be necessary in litigation.³⁵ Moreover, unlike the child custody evaluator, the child specialist does not formulate an official written report that can be read by the children in the future and potentially cause them emotional harm.³⁶

2. *The Mental Health Coaches*

In addition to addressing children's mental health directly, focusing on the mental health of parents can improve the way they co-parent and interact with their children and each other. The mental health coaches have "special additional training and experience in communication skills, family dynamics, and issues relating to healthy recovery from separation and divorce."³⁷ They provide "emotional encouragement, teach stress management and communication skills, explore parenting concerns, and help ensure that both partners' needs, concerns, and feelings are understood and expressed in constructive ways."³⁸ Coaches help parents discuss co-parenting concerns.³⁹ They are proactive and stay in regular contact during divorce to help manage and prevent problems before they can stall issue resolution and settlement.⁴⁰ Including mental health professionals and a child specialist on a collaborative team helps divide the workload by individualized skillset. It allows the lawyers to focus on the law and negotiating settlements.⁴¹

The mental health professionals and child specialists are not psychotherapists. They do not deal with "extreme emotional disturbances," but rather focus on "divorce-related changes and challenges."⁴² The work of the mental health professionals and child specialists is

³³*Ibid.*

³⁴**Kuroda**, *supra*, p. 2015.

³⁵*Ibid.*

³⁶*Ibid.*

³⁷**Tesler**, *supra*, p. 43.

³⁸*Ibid.*

³⁹*Id.* at p. 44.

⁴⁰*Id.* at p. 45.

⁴¹**Webb**, *supra*, p. 89.

⁴²**Tesler**, *supra*, p. 132.

confidential and ends with the collaborative divorce process.⁴³ Child specialists do not testify in any court proceedings subsequently brought if the collaborative process dissolves.⁴⁴

The structure of the collaborative team is flexible and can be adjusted to suit the parties' needs. While flexibility is one of collaborative family law's greatest advantages, the child specialist is often the first team member to get cut. Parents too-often decide to work in a lawyer-only model or include one neutral mental health coach or two coaches, but overlook the importance of the child specialist.⁴⁵ The decision to include a child specialist in the collaborative process is important as the specialist offers parents a neutral perspective on their children's needs and delivers unique insight as an advocate for the children.

While hiring a fully staffed collaborative team may be expensive, the process may be much less expensive than litigation because the team works together to get to the root of underlying emotional and mental health issues hindering resolution. A 2010 survey conducted by the IACP found that the average collaborative case ranges from \$17,800 (no children) to \$25,600 (cases with children subject to the legal process).⁴⁶ Several financial advisors interviewed by CNBC "suggested litigation may cost three times or more than the collaborative option."⁴⁷ Additionally, by investing in child specialists and mental health coaches at the beginning of the divorce process, parents are able to save on voluntary or court-ordered therapy later to repair fractured relationships.

B. Mediation

Mediation has "traditional roots" in family law,⁴⁸ and has a promising ability to reduce conflict and improve family relationships. An average of just five hours of custody mediation "led to significant and positive effects on parent-child and parent-parent

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵**Hansen et al.**, *The Child Specialist Role in Client Choice of Process: Focusing on the Children and Enhancing Value* (Spring 2013) 13:1 *The Collaborative Review* 13.

⁴⁶**Nason**, *supra*, *Collaborative divorce can ease emotional, economic stress.*

⁴⁷*Ibid.*

⁴⁸**Folberg**, *Resolving Disputes: Theory, Practice, and Law* (2005) pp. 413-14.

relationships 12 years later, including more sustained contact between fathers and children, compared with those in the litigation sample.”⁴⁹

Mediation is flexible, cost-efficient, and mindful of the needs of individual families. When mediators work with divorcing families, they encourage parties to address the mental health and emotional issues that are acting as barriers to resolving specific legal problems. Parties who choose mediation as their divorce model should consider hiring a mental health professional to facilitate family communications. Mental health mediators recognize the similarity of values between the fields of divorce mediation and mental health in that they “both provide an opportunity for change and growth; both support the values of autonomy, self-determination, and empowerment.”⁵⁰ Mental health mediators are often successful because they “bring to the mediation process an understanding of families and the dynamics of family conflict” as well as children’s needs in divorce.⁵¹ However, the role of the mediator is different from the role of therapist. “The mediator addresses psychological conflicts only as they present an impediment to the resolution of topical issues, such as property division, plans for the children, and financial support.”⁵² Focusing on conflicts only as they specifically hinder resolution allows mediators to tackle problems efficiently and help families reach their goals.

In addition to the success that mediation has had as a substitute to the court system, court-ordered mediation before hearings on custody and visitation disputes has proven to be a successful complement to litigation as well. Mandatory court-connected mediation offers an opportunity to expand participation in the mediation process and provides parties free or low-cost exposure to an entirely new dispute resolution process. A 2004 report published by the Judicial Council of California on court-connected mediation demonstrates “positive impacts on settlements and trial rate, disposition time, satisfaction and costs.”⁵³ “In the San Diego and Los Angeles programs, the incidence of trial was 24 to 30 percent lower among cases in the mediation program group than those in the control group.”⁵⁴

⁴⁹Kelly & Emery, *supra*, p. 360.

⁵⁰Folberg & Milne, *Divorce Mediation: Theory and Practice* (1988) p. 385.

⁵¹*Id.* at p. 388.

⁵²*Ibid.*

⁵³Folberg, *Resolving Disputes*, *supra*, p. 11.

⁵⁴*Ibid.*

The goal of mandatory mediation is to disrupt “the escalating cycle of conflict that so often perpetuates custody disputes and to shield children from the traumatizing consequences of repeated parental conflict over their care.”⁵⁵ The authority of the courthouse setting and law requiring the parties to participate helps parents confront their issues.⁵⁶ Court-mandated mediation draws “upon the principles and techniques of voluntary and non-court-related mediation” but can differ in significant ways.⁵⁷ For example, in family disputes in California, mandatory mediation is applied only over custody and post-separation access to children.⁵⁸ Parents are required to participate and the mediator “actively advocates a resolution that benefits the children involved.”⁵⁹ These mediators “employ strategic counseling tactics to release parental impasses and free people to move toward finding resolutions.”⁶⁰

When California adopted mandatory mediation in custody disputes in 1981,⁶¹ mediators were able to work with one or two families per day, parties were sometimes able to “walk in” on the day of the hearing, and could schedule an appointment to be held within two weeks.⁶² Today, mediation services through the court are overburdened. Mediators are pushed to oversee four cases per day, parties have to wait months to get appointments, and settlement rates have decreased to approximately 50 percent.⁶³ Because court-connected mediation services are overloaded, some courts only provide one- or two-hour sessions, which often do not allow enough time to accomplish mediation objectives.⁶⁴ Increasing the number of hours each mediator can work with the parties and expanding the process to last more than one session if needed for the parties to come to an agreement would improve these services.

⁵⁵Folberg, *Divorce Mediation*, *supra*, p. 207.

⁵⁶*Ibid.*

⁵⁷*Ibid.*

⁵⁸*Ibid.*

⁵⁹*Ibid.*

⁶⁰*Ibid.*

⁶¹Kuroda, *supra*, p. 2009.

⁶²Kuroda, *supra*, p. 2010.

⁶³*Ibid.*

⁶⁴Folberg, *Resolving Disputes*, *supra*, p. 450.

IV. ADDITIONAL WAYS TO ENGAGE PROFESSIONALS AND SUPPORT SERVICES TO RESOLVE CONFLICT

Even if parents do not choose collaborative law or mediation as their divorce model, they may still wish to explore options that reduce high-conflict and offer mental health support for their children. Many experts and services provide support to divorcing families, including minor's counsel, custody evaluators, co-parenting counselors, parenting coordinators, parenting mediators, marriage and family therapists, and applications that help families communicate and plan like OurFamilyWizard®. These tools help parents improve their communication with each other and their children and help them attain and sustain low-conflict relationships.

V. CONCLUSION

In 1850, Abraham Lincoln prepared notes for a law lecture where he gave his audience the following advice: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."⁶⁵ President Lincoln's words are still true to date, but there is much more at stake in family court than "fees, expenses, and waste of time." Parents are struggling to keep their families and relationships intact as well as protect their children from the psychological harm that is more likely to result from high conflict divorce. Collaborative family law and mediation can provide the support that parents need to better communicate with each other and maintain strong relationships with their children while investing in their children's mental health during and beyond the divorce process.

⁶⁵Ambrogi, *Abraham Lincoln's Notes for a Law Lecture* (2004) <<http://www.lawsitesblog.com/2004/06/abraham-lincolns-notes-for-law-lecture.html>> (as of Apr. 1, 2017).

ENDNOTES

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