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BACKGROUND PAPER

**HIGH-CONFLICT SEPARATION
AND DIVORCE:
OPTIONS FOR CONSIDERATION**

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High-conflict Separation and Divorce: Options for Consideration

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EXECUTIVE SUMMARY

This discussion paper examines the issue of high-conflict divorce in light of proposals for reform made by the Special Joint Committee on Child Custody and Access in its 1998 Report and the federal government's response to that report. To set the context for viewing high-conflict divorce as a problem deserving government action, this paper examines the professional literature on the effects of divorce on children and adults, as well as the literature on the effects of high conflict on children whose parents are separated or divorced. It examines the various typologies or theories of conflict, looks at possible definitions of high-conflict divorce, and proposes a definition of "high conflict" that focusses on external markers such as re-litigation and domestic violence. It examines the law in the United States, England, Australia and New Zealand to see what efforts, if any, have been made in those countries to address high-conflict divorce situations. Finally, it proposes four options for consideration, ranging from moderate to radical, keeping in mind at all times the need for federal, provincial and territorial cooperation in this area of law.

Chapter One, Introduction, examines the proposals for reform in the context of high-conflict divorce proposed by the Special Joint Committee on Child Custody and Access and the federal government's response to the Joint Committee. The Special Joint Committee's report *For the Sake of the Children*, made several proposals for reform. These included that the federal, provincial and territorial governments should work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce; that high-conflict families should be streamed into an expedited process; and that the *Divorce Act* should be amended to provide explicitly for the granting of supervised parenting orders when necessary to ensure continuing contact between a parent and a child in situations of transition or when the child requires protection. The federal government's 1999 response, *Strategy for Reform*, set out basic principles for reform. It identified the importance of developing mechanisms to identify high-conflict divorce and to treat high-conflict divorce in a different stream. It stressed the necessity of consulting with appropriate experts from different disciplines, reviewing the professional literature on how to identify different conflict levels, reviewing legal responses in other jurisdictions, and identifying further research and criteria to assist in developing principles and criteria to guide parenting arrangements.

Chapter Two, Tracking the Effects of Divorce, draws in large part upon a literature review on high-conflict divorce conducted for the Family, Children and Youth Section, Department of Justice Canada (Stewart, 2001). The chapter looks at studies of the factors that lead to negative or positive adjustment for children whose parents divorce, and examines the connection, if any, between custody/access and children's adjustment. The chapter points out the limitations of these studies. However, it concludes that there are roughly defined risk factors that seem to lead to negative results for children in divorced or divorcing families, including ongoing parental conflict and hostility.

Chapter Three, Studies of High Conflict and Its Effect on Children, examines studies in the periodical literature about the negative effect that inter-parental conflict has on children. These studies generally indicate that families engaged in high conflict are more likely to have children with high levels of emotional distress.

Chapter Four, High-conflict Divorce: Theory and External Markers, attempts two things. First, it describes various theories of high-conflict divorce, in particular the theory that such couples are at an impasse on three levels: the external, the interactional and the intra-psychic levels. Second, it describes external causes of high conflict in divorce. These include the role of attorneys, mental health professionals and/or the courts in promoting conflict between the parties to the dispute; domestic violence; and the role that cutbacks in Legal Aid may have had in fuelling conflict within the court system. It also examines various definitions of high conflict offered by clinicians in the professional literature and by some American jurisdictions, such as the State of Idaho. It points out the problems associated with trying to obtain a definition of high-conflict divorce. Nevertheless, this chapter acknowledges the usefulness of external markers to recognize high-conflict divorce and proposes, with some exceptions, the external markers suggested by Stewart (2001).

Chapter Five, Interventions in High-conflict Divorce, examines the use and specifics of parenting plans in high-conflict divorces, particularly the need for a parent coordinator and a highly detailed and structured parenting plan. It examines the usefulness of divorce education programs and of mediation in high-conflict divorce, with some emphasis on Janet Johnston's model of "impasse-directed" mediation. It also briefly looks at the role of legal representatives for children.

Chapter Six, Foreign Jurisdictions, examines the legal and judicial responses to high-conflict divorce in other jurisdictions. The major jurisdiction examined here is the United States, where the State of Idaho has produced a mammoth benchbook for its judiciary to use in cases of high-conflict divorce. This benchbook includes a protocol for the judiciary to follow in such cases. In addition, the relevant law of the states of Oregon, Washington and California are examined, as are parent coordinator models, special masters and guardians *ad litem*. The laws of three Commonwealth jurisdictions, England, Australia and New Zealand, are also examined.

Chapter Seven, Options for Consideration, is just that. It presents options for consideration that are proposed in the spirit of multi-jurisdictional cooperation between the federal government, the provinces and the territories. The first option, the most moderate, makes suggestions for providing services to all divorcing couples, whether high or low conflict. These are that all hearings relating to a divorce proceeding generally be heard by the same judge; that special masters be available to investigate any controversy arising between the parties; that mandatory parenting education classes be ordered by the court; that mediation be ordered by the court; and that the court may appoint independent legal counsel for the child if it is in the child's best interests. The second option suggests limited guidelines that would define high-conflict divorce and would detail what should be included in parenting plans in high conflict situations. The third option addresses high-conflict divorce in a broad manner. It recommends that a judicial benchbook, modeled on the Idaho Benchbook *Protecting Children of High-Conflict Divorce* (Brandt, 1998), be created for use by Canada's judiciary. This benchbook would address high-conflict divorce in all its aspects, and should be created through the cooperative efforts of federal, provincial and territorial governments. A more modest variation of this theme is that a protocol for high-conflict divorce, again modeled on the Idaho Benchbook, should be created. The fourth option considers the creation of a separate statute that exclusively addresses high-

conflict divorce. It provides details of what a comprehensive legislative response by all governments working together would look like.

1. INTRODUCTION

In 1998, the Special Joint Committee on Child Custody and Access published its report *For the Sake of the Children*. Among the many issues that the Committee examined was that of high-conflict divorce. The Committee stated:

Unfortunately, a significant number of divorcing parents become locked in bitter and sometimes violent disputes over custody and access arrangements. These situations are truly dangerous for children, and the Committee examined the evidence carefully for ways to reduce conflict between divorcing parents, to the benefit of the children. Indeed, the principal objective underlying all the recommendations in this report is to induce as thorough as possible a shift from the current state of family law policies and practices, which all too often escalate conflict between divorcing parents, to a decision-making approach that reduces conflict (Canada, 1998: 22).

For example, Dr. Eric Hood of the Clarke Institute in Toronto testified that high-conflict divorce situations “are like war zones.” The children go back and forth between their fighting parents and “are afraid to tell the truth” (Canada, 1998: 123).

The Joint Committee’s report thoroughly examined the present *Divorce Act*. The report criticized the corrosive terminology used in the *Divorce Act*, such as “custody” and “access,” and proposed the language and expression of “shared parenting.” It recommended that all parents seeking parenting orders who could not agree on the terms of the order be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children’s developmental needs at different ages, the benefits of cooperative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order.

The report also recommended that divorcing parents be encouraged to develop a parenting plan setting out the details of each parent’s responsibilities for residence, care, decision-making and financial security for the children, as well as a dispute resolution process to be used by the parties. It recommended that divorcing parents be encouraged to attend at least one mediation session to help them develop such a parenting plan for their children. However, mediation and other non-litigation methods of decision-making would be structured to screen for and identify family violence. When there was a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution would be used to develop parenting plans only when the safety of the person who had been the victim of violence was assured and when the risk of violence had passed.

The Committee specifically examined the issue of high-conflict divorce, stating that some families seemed to get stuck in separation or divorce. It added:

[W]ith one parent or both intent on maintaining such a degree of conflict and tension ... it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces

is estimated at between 10 and 20 % of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses (Canada, 1998: 87).

Witnesses were divided over whether high-conflict divorce should include or exclude domestic violence situations. For example, one witness described a high-conflict family as one that “falls short of actual violence or assault but for whom, post-separation, a hostile relationship continues” (Canada, 1998: 87). The Committee concluded that options such as mediation were clearly inappropriate for some couples in high conflict. Alternative remedies had to be provided where necessary. The Committee wanted to improve the legal system’s response to high-conflict divorces without imposing any harmful restrictions on the cooperative majority. It said:

One of the options Members believe should be considered is a mechanism for screening out high-conflict divorces and treating them in a different stream. This would recognize the potential harm to children whose parents continue their conflict far beyond a reasonable adjustment period. The system should identify these families in order to provide protection for their children, who are at greater risk than most children of divorce. Once families are identified, their files should be “red tagged” or flagged in some other way, so that decision makers do not make determinations about parenting arrangements without knowing the full details of the case and the family’s history (Canada, 1998: 88).

Moreover, the Committee was concerned about “one alarming symptom of a high-conflict divorce: that a child may decide that he or she does not want to visit one parent or the other” (Canada, 1998: 89). The Committee believed that such a desire on the part of a child showed a serious problem that called for immediate intervention.

Accordingly, in relation to high-conflict divorce cases, the Committee made several recommendations, including the following.

That federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children.

That professionals who meet with children experiencing parental separation recognize that a child’s wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention.

That the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada.

That the *Divorce Act* be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a

parent and a child in situations of transition, or where there is clear evidence that the child requires protection.

That, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury.

As regards the issue of the “parental alienation syndrome”, given problems concerning the applicability of the concept, that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem (Canada, 1998: 89, 91, 110, 114).

In 1999, the Government of Canada responded to the report of the Special Joint Committee on Child Custody and Access (Canada, 1999). The government advised that its response was rooted in a number of framework principles. First, a key theme is the desire to focus on child-centred reforms that minimize the negative effects of divorce on children. Second, its response fully endorsed the Joint Committee’s emphasis on promoting coordinated multi-jurisdictional efforts while respecting the constitutional division of powers. In other words, all governments need to work together. Third, the Government of Canada committed itself to a holistic approach to family law reform. It endorsed the Committee’s key objective of reducing parental conflict. However, it acknowledged that conflict-free, cooperative parenting cannot be effectively enforced by the *Divorce Act* alone. Improving educational and social services to foster healthy interpersonal relationships is equally important. Finally, the response embraced the principle that “one size does not fit all”. The levels of conflict of separating and divorcing parents vary widely, as do children’s needs. As well, children undergo developmental changes over time. Hence, the government recognized the need for flexibility to meet the best interests of children. No single model of post-separating parenting is ideal for all children (Canada, 1999: 7-9).

Among the elements of the government’s strategy was managing conflict, and the need to focus on minimizing the negative impacts of divorce on children. The government acknowledged that the Special Joint Committee’s challenge to design a system to accommodate different types of divorce without penalizing families for their situations. The Government of Canada stated:

[Our] objective is to meet this challenge by attempting to identify the different levels of conflict that separating families experience and to develop specific responses designed with these levels in mind. This approach will include formulating specialized policies to deal with high-conflict families, concerns about inadequate parenting, and violent situations (Canada, 1999: 26).

The government addressed the issue of high-conflict divorce by agreeing with the Special Joint Committee’s recommendation to “work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce.” It identified the need to consult with appropriate experts from different disciplines, review the legal responses adopted by other jurisdictions, and identify further research and criteria to help develop

specialized principles and criteria to guide appropriate parenting arrangements. In particular, the government identified the need to follow up on the following possible high-conflict suggestions:

High-conflict family relationships can include: long-term, emotional disputes involving high degrees of anger and distrust; chronic disagreements over parenting issues; repeated use of unsubstantiated allegations of poor parenting; or a history of misuse of the legal system;

Where there are concerns about ongoing high parental conflict, arrangements should allow parents to disengage from their conflict and develop separate parenting relationships with their children;

As a general principle, where there are long-term, emotional, high-conflict parental disputes, alternatives to co-parenting arrangements requiring cooperation and joint decision-making may be in the child's best interests; and,

Parenting plans should be required to be very specific and should identify both inclusive and exclusive elements. Court orders for high-conflict cases should contain specific prohibitions that will assist in enforcing an order (e.g., that a parent must not remove a child from the care of the person charged with the responsibility to provide residence; that neither parent should interfere with any of the duties or responsibilities that each person has under the court order; and, that a parent must not hinder or prevent contact that a child is supposed to have under the order) (Canada, 1999: 29-30).

This paper is a first step in carrying out this work. It begins with a review of the professional literature concerning the effects of divorce on children and adults, and, in particular, the effects of high-conflict divorce on children whose parents are separated or divorced. It examines the various types or theories of conflict, and looks at possible definitions of high-conflict divorce. Suggested interventions in high-conflict divorces are reviewed, as well as the law and legal initiatives in the United States, England, Australia and New Zealand. Finally, four options for consideration concerning the law in this area are proposed.

2. TRACKING THE EFFECTS OF DIVORCE

In his literature review, Stewart (2001: 4) pointed out that in the 1960s and 1970s mental health professionals appeared divided about whether divorce had long-lasting negative effects on children, or was a benign or even positive influence on them. For example, Rutter (1981) concluded that a child's separation from his or her intact family is a potential cause for short-term distress, but is of little direct importance as a cause of long-term disorder. Also, Kurdek and Siesky (1980b) argued that children of divorce do not see themselves as inferior to children who live with both parents and do not see the divorce as having negatively affected their peer relations or marital aspirations.

However, studies that show divorce as a difficult transition period with relatively benign after-effects on children are a minority. The majority of studies indicate that divorce is an extremely difficult period for children, with serious immediate and short-term effects. These studies can be divided into three types: those which focus on factors contributing to, or which identify, the specific negative outcomes for children after their parents divorce; those which identify emotional, relationship and structural environmental factors that contribute to a positive outcomes for children; and those which explore the connection between custody and access arrangements and outcomes for children.

2.1 NEGATIVE ADJUSTMENTS AMONG CHILDREN AFTER SEPARATION AND DIVORCE

Studies relating to negative adjustments among children include the following:

Jacobson (1978) examined factors that affected the psychological adjustment of children within 12 months after the marital separation. She examined 51 children in 30 families, and found that the greater the amount of time lost with the father since the marital separation, the greater the maladjustment of the child in areas such as aggression and learning disability.

Peterson and Zill (1986) analyzed data from National Surveys of Children in the United States, gathering information about 2,301 children. These authors concluded that children were least depressed and withdrawn when they lived with both parents rather than only with the biological mother. The depressed/withdrawn score for children living with a single mother was especially high, especially for boys, and anti-social behaviour was higher among those living with mothers than those in intact families. However, girls living with single mothers were no worse-off than those living with intact, low conflict families. A child living with a parent of the opposite sex was especially prone to problem behaviour, according to Peterson and Zill.

Stolberg, Camplair, Currier and Wells (1987) examined individual, familial and environmental determinants of children's post-divorce adjustment and maladjustment. Environmental influences included physical changes in the neighbourhood (such as moving to a new neighbourhood), social skills required to meet new friends, and communication skills needed to express the increased anger that unwanted changes brought. Familial influences included marital hostility and poor child management skills that may lead to aggression in children. Comparing 87 divorced mothers and 47 intact families, the authors concluded that a child's life change events, such as moving to a new house or changing schools, are the most significant

determinants of a child's post-divorce maladjustment, followed by marital hostility and parent adjustment.

Kelly and Wallerstein (1977) examined, in 60 divorcing families, the visiting patterns of children with their non-custodial parent. In general, younger children between the ages of two and eight saw their non-custodial parent more frequently than did older children. Half of the older children aged nine to ten experienced erratic or infrequent visiting or no visiting at all. The response of the older children to the divorce was anger. The authors concluded that infrequent visiting correlated with a destructive visiting pattern.

Judith Wallerstein is one of the foremost experts on the effects of divorce on children. She was involved in a 25-year longitudinal study of the responses of children and adolescents to parental separation and divorce. It was based on interviews with 130 children and both parents. After 25 years, the individuals who were children in these situations spoke sadly of their lost childhood, their sadness and anger, and their yearning for someone to take care of them. This diminished nurturing and protection during their growing-up years was the legacy divorce left them. Half the young people in the sample were involved as adolescents in serious drug and alcohol abuse. Over half ended up with lower educational degrees than their parents had obtained. At adulthood, they feared that their own adult relationships would fail as their parents' relationship did (Wallerstein and Lewis, 1998). In a more recent book, Wallerstein concluded that the children of divorce suffer most in adulthood:

The impact of divorce hits them most cruelly as they go in search of love, sexual intimacy and commitment. Their lack of inner images of a man and a woman in a stable relationship and their memories of their parents' failure to sustain the marriage badly hobbles their search, leading them to heartbreak and even despair (Wallerstein et al., 2000).

Amato and Keith (1991a) examined 92 studies that compared children living in divorced single-parent families with children living in continuously intact families, according to measures of well-being. Many studies found that children of divorced families experienced lower levels of well-being regardless of scholastic achievement, conduct, psychological development, self-esteem, social competence, and relationships with other children. The authors examined these studies from three possible explanatory perspectives: that children of divorce often experience a decrease in parental attention, help and supervision; that divorce typically leads to a decline in the standard of living of mother-headed families, often falling below poverty level; and that conflict between parents before and during separation causes severe stress among children. The results of the meta-analysis suggested that children of divorce are handicapped by the absence of a parent and somewhat less strongly supported the belief that economic decline accounts for some of the negative consequences of divorce. The hypothesis best supported by the evidence was that family conflict is associated with a low level of well-being. In another meta-analysis on parental divorce and adult well-being, Amato and Keith (1991b) concluded, based on data from 37 studies, that outcomes associated with parental divorce include effects on psychological well-being (depression, low life satisfaction), family well-being (low marital quality, divorce), socioeconomic well-being (low educational attainment, low income, and low occupational prestige) and physical health. However, there were several qualifications to this finding, in

particular that the extent of effect in the literature is weak. In another meta-analysis of divorce studies, Amato (1994) concluded that children of divorced families exhibit more behavioural difficulties, more symptoms of psychological maladjustment, lower academic achievement, more social difficulties, and poorer self-concepts than children in intact families.

Rodgers and Pryor, in a review of more than 200 British research studies on the impact of separation and divorce on children, concluded that long-term disadvantages for children of divorced parents include growing up in households with lower income, leaving school with fewer educational qualifications, withdrawn behaviour, aggression and delinquency, health problems, leaving home when young, early sexual activity, depression and substance abuse. However, these problems are found only in a minority of persons whose parents have separated. They also emphasized that these poor outcomes are far from inevitable, and that there is no direct link between parental separation and the way children adjust. Although these outcomes are clear, it cannot be simply assumed that parental separation is their underlying cause (Joseph Rowntree Foundation, 1998).

Other studies have indicated that wives who have divorced bear a greater economic burden. In general, they are worse off economically than their former husbands are (Espenshade, 1979). Well-being decreases following divorce and increases following remarriage (Espenshade, 1979; Beuhler et al., 1985/86).

2.2 POSITIVE ADJUSTMENTS AMONG CHILDREN AFTER SEPARATION AND DIVORCE

These studies include the following:

In a 1980 article, Kurdek and Siesky evaluated the results of questionnaires given to 71 divorced single custodial parents and their 130 children. Generally, the parents' questionnaire focussed on: the parents' report of the amount of conflict preceding the separation; the parents' description of how the children were informed about the divorce; the parents' description of how they reacted to news of the divorce; the parents' perceptions of their children's present attitudes towards the divorce; and parents' views on possible strengths their children had acquired over the course of the divorce. The children's questionnaire, explored: the children's responses to definitions of "divorce"; the reasons for and acceptance of the parents' divorce; the children's descriptions of both parents; the perceived influence of the divorce on peer relations; the children's interactions with the custodial parent; and the children's attitudes towards marriage.

There were ten statistical tables in the article, some of which gave the children's descriptions of their parents. For example, Table Five assessed the relationship between the child's sense of blame for the divorce and the child's description of the custodial and non-custodial parent under the headings "positive", "negative", "positive and negative" and "neutral". Children who appeared to blame themselves for the divorce perceived their parents in a rather negative light. Tables Nine and Ten examined the relationship between the strengths acquired by the children as a result of their parents' divorce, and the children's descriptions of the custodial and noncustodial parents under the headings "positive", "negative", "positive and negative" and "neutral". In Table Nine, children who were seen as having acquired strengths as a result of the divorce also held more "positive" views of both of their parents. Table Ten examined the

relationship between specific child strengths i.e. “independence”, “concern for parent”, “discuss feelings” and “patience/compassion”, and the children’s descriptions of their custodial and noncustodial parent under the headings previously given. Nearly all the specific strengths mentioned were for children who expressed “positive” views of both their parents. The authors found favourable reactions and adjustments in children who defined divorce in terms of “psychological separation” rather than in terms of “marriage dissolution” or “physical separation”, shared news of divorce with friends, had relatively positive evaluations of both parents, and saw themselves as having acquired strengths and responsibilities as a result of the divorce (Kurdek and Siesky, 1980b).

Steinman, Zimmelman and Knoblauch (1985), in a study of 51 families with a joint physical custody arrangement, identified a list of factors leading to a successful arrangement. These factors were respect and appreciation for the bond between the children and the former spouse; an ability to remain objective about the children’s needs during the period of divorce; an ability to empathize with the point of view of the child and the other parent; an ability to shift emotional expectations from the role of mate to that of co-parent; and an ability to establish new role boundaries and show high self-esteem and flexibility.

2.3 THE CONNECTION BETWEEN CUSTODY/ACCESS ARRANGEMENTS AND CHILDREN’S ADJUSTMENT

Studies include the following:

Steinman (1981) studied 32 children living in joint physical custody arrangements over three years. The majority of the parents involved were generally satisfied with the arrangement, although the children were less satisfied. The children clearly stated that they preferred marriage to divorce, even if there was conflict between the parents. They generally found joint custody arrangements inconvenient. One third of the children showed a significant degree of psychological distress from the joint custody arrangement.

Steinman, Zimmelman and Knoblauch (1985) identified a list of factors found in families responding negatively to joint physical custody. These factors were intense, continuing hostility and conflict that could not be diverted from the child, overwhelming anger and a continuing need to punish the spouse, a history of physical abuse, a history of substance abuse, a firm belief that the other spouse was a bad parent, and an inability to distinguish one’s own feelings and needs from those of the child.

Luepnitz (1986) compared children’s adjustment for 43 families with sole mother, sole father or joint physical custody arrangements. All children with joint custody arrangements had regular contact with both parents, whereas half of the children in sole custody situations never saw the other parent at all. The majority of children in joint custody were pleased and comfortable with these arrangements. Families with joint custody engaged in much less re-litigation than families with sole custody arrangements. While not endorsing mandatory joint custody, the author concluded that it was reasonable to assume that joint custody at its best was superior to sole custody at its best.

In contrast, Kline, Tschann, Johnston and Wallerstein (1989), using a sample from a California county, found no significant differences between families with joint physical or sole custody arrangements.

In her review of some of these and other studies on joint custody, Lye (1999), who examined research on post-divorce parenting and child well-being for the State of Washington, concluded that the evidence suggests there are no significant advantages to children of joint physical custody. Neither does the evidence suggest significant disadvantages of joint physical custody or any other kind of post-divorce residential schedule.

2.4 ANALYSIS AND CONCLUSIONS

Stewart (2001: 11) argued that the above studies can be divided into four methodological types: psychometric evaluations, in which children whose parents have divorced are given a battery of tests to determine the link between divorce and the children's psychological profiles; longitudinal studies of large sample groups, in which all children in a geographical area are tested to draw a comparison between the profiles of children from divorced families and those from intact families; narrative studies, in which children are interviewed and describe how their parents' divorce affected them; and comparative studies, which compare the outcomes of children living in various custody/access arrangements.

Stewart noted the limitations of each of these types of studies:

A major difficulty with these types of research studies is the lack of consistent use of effective measurement tools. As a result, studies use a variety of measures, including psychometric tests and self-reporting. Similarly, samples are drawn from a variety of sources including large scale national surveys and small random samplings of clients who receive counselling... These disparities result in a research picture filled with inconsistencies and fluctuations with little accepted standards for replication... It tells us something is wrong, but the research is not sophisticated enough to be able to accurately list, from study to study, those precisely defined factors that contribute to negative outcomes for children (Stewart, 2001: 12).

Nonetheless, he concluded, despite these limitations, that these four types of research studies provide a picture of roughly defined risk factors that divorce sets off in families and that seem to lead to negative results for children (Stewart, 2001: 12-13). These risk factors include episodes of violence; ongoing inter-parental conflict and hostility; sudden and/or frequent moves of residence and schools; interruption of peer relationships; economic hardship; disruption of parenting routines and abilities, introduction of new adult partners; remarriage; loss of contact with the non-custodial parent; psychological maladjustment of one or more parents; and, loss of security and predictability. Collectively, these risk factors seem directly connected to a variety of negative outcomes for children. These include psychological disorders (depression and anxiety); feelings of sadness, loss and anger; under-achievement at school and in employment; social problems, including delinquent and deviant behaviour; a higher incidence of drug and alcohol abuse; poor parent-child relationships; and poor adult relationships, based on a lack of trust with a high incidence of early divorce.

3. STUDIES OF HIGH CONFLICT AND ITS EFFECT ON CHILDREN

This analysis is divided into two parts, studies of the effect of conflict on children in intact and divorced families, and studies on the impact of high conflict in children of separated or divorced families.

3.1 STUDIES OF PARENTAL CONFLICT IN GENERAL

Raschke and Raschke (1979) compared 289 grade school children from intact and single-parent families to test whether family structure made a difference in children's self-concept (i.e. the child's own attitude or feeling about himself or herself) and whether children who perceived greater conflict in their families would have a poorer self-concept. The authors found support for their proposition that while children are not adversely affected by family structure, such as living in a single parent family, family conflict *can* be detrimental to their self-concept. It was not possible to determine whether the conflict perceived by the children was verbal, physical or both, although both kinds of conflict were probably damaging to them.

Emery (1982) reviewed the connections between marital turmoil and behavioural problems in children. How one defined conflict, whether in intact or broken families, was a matter of controversy. Three theoretically relevant aspects of conflict are the form of the conflict (e.g. hitting, arguing, avoidance), the content of the conflict (e.g. sex, child rearing, money) and its duration. Both the amount and type of inter-parental conflict to which the child is exposed would seem to be important determinants of the effect of conflict on the child. Conflict that is openly hostile exposes the child to more, presumably problematic, parental interactions, as does conflict that lasts for a long period of time. Emery concluded, in part, that marital turmoil is more strongly related to boys' than girls' maladaptive behaviour, with the caveat that girls are likely to be just as troubled by marital turmoil as boys, but may demonstrate their feelings in a manner more appropriate to their sex role, by becoming withdrawn, for example. The age of a child did not appear to be an important determinant of the effects of marital turmoil. An especially warm relationship with at least one parent can mitigate, though not eliminate, the effects of marital turmoil on children. There was some evidence that changes in discipline as a result of divorce led boys, especially, to be less compliant with parental commands than children in intact families. Emery summarized that parents involved in conflict with each other are probably poorer models, are more inconsistent in their discipline, and place more stress on their children.

Camara and Resnick (1989) studied a sample of 82 families, including divorced and two-parent families. The study used a composite of inter-parental conflict made up of seven ratings: the degree of positive affect expressed by the father towards the mother, the degree of positive affect expressed by the mother toward the father, the degree of negative affect expressed by the father towards the mother, the degree of negative affect expressed by the mother toward the father, the degree of hostility and anger in the home, the extent to which conversations between parents were stressful or tense, and the degree of both overt and subtle conflict in the relationship. Even three years after the separation of the parents, there were significant differences in social behaviours among groups. Children from divorced families showed the highest levels of aggression and behavioural problems and the lowest level of pro-social behaviour and general

self-esteem. However, the results for both divorced and non-divorced families regarding conflict resolution were similar. Parents who reported their spouses using verbal attack, avoidance, or physical anger in resolving disagreements tended to have lower levels of cooperation and higher levels of conflict. The outcomes of disagreements were more likely to result in an escalation of the conflict. Parents who were able to compromise in resolving conflicts were more likely to cooperate on parental issues. Therefore, regardless of the level of conflict between the spouses, cooperation between the adults in their parental roles was associated with closer, warmer and more communicative relationships between children and their non-custodial parent in divorced families and between children and their mothers in non-divorced families.

Morrison and Coiro (1999) examined two hypotheses. When there is high conflict in a marriage, do children whose parents divorce exhibit a decrease in behavioural problems, while children whose parents have low levels of marital conflict during the marriage exhibit an increase in behavioural problems after divorce? Do children whose high-conflict families remain together show greater increases in behavioural problems than those whose parent's divorce? The authors used a sample of 727 children from data in the National Longitudinal Survey of Children and Youth (NLSCY). The authors used responses about the frequency that a spouse argued about nine topics, such as the children, money, chores and responsibilities. They found that prior reports of high levels of marital conflict had a large and statistically significant adverse effect on children's behavioural problems. Indeed, the adverse effect of frequent marital quarrels was greater than the deleterious effect of separation and divorce. However, there was no indication of a benefit to the children who left the high-conflict family. Furthermore, the greatest increase in behavioural problems was observed among children whose parents remained married despite frequent quarrels.

Conger, Harold, Fincham and Osborne (1998) conducted two studies to simultaneously examine direct and indirect links between marital conflict and child adjustment, incorporating children's perceptions of the family relationship in examining these links. In both studies, the hypothesis that marital conflict influences perceptions of parent-child relations was supported. Children who have witnessed inter-parental hostility appear to interpret parent-child conflict as more hostile and threatening than children who have not witnessed such conflict. The authors stressed, however, the need for longitudinal studies in this area.

Jekielek (1998) used data from a longitudinal study (the National Longitudinal Surveys of Youth) involving a sample of 1,640 children to examine the effects of marital conflict and marital disruption on children. The results suggested that both parental conflict and marital disruption are critical predictors of children's emotional well-being. The benefit of an intact family status for child anxiety and depression decreases as parental conflict increases. Parental conflict had a consistently significant negative impact on child anxiety and depression four years later, suggesting that parental conflict has enduring effects on child well-being. Children whose parents were in higher conflict in 1988 but had divorced or separated in 1992 scored lower on scales of anxiety and depression than children whose parents reported similar levels of high conflict in 1992 and stayed married.

3.2 STUDIES OF CONFLICT BETWEEN SEPARATED OR DIVORCED PARENTS

Shaw and Emery (1987), in a study of 42 separated mothers of low economic status and their school-age children, concluded that the level of parental acrimony was related to children's behavioural problems. The level of acrimony was measured by an "acrimony scale" consisting of 25 areas of potential conflict between separated or divorced parents, including visitation, custody, and general level of animosity. Parental acrimony was found to be significantly related to children's perceived cognitive competence.

Nelson (1989), using a sample of 121 divorced families, asked whether the type of custody predicted levels of hostility, conflict and communication between parents two to three years after the conflict. The purpose was to test the hypothesis offered by proponents of joint custody, namely, that joint custody arrangements would be predictive of more frequent communication between parents and of lower levels of hostility and conflict two to three years after separation. The finding was that, while joint custody promoted greater access to the children and therefore more parental communication, parents also experienced greater hostility and conflict in their relationship.

Mathis (1998) investigated why certain families seemed to fail in mediation and concluded that failure was approximately 75 percent higher in situations when one or both parents remained "undifferentiated" from the other and still thought of the other parent as "we" instead of "you and I." In other words, these parents often could not accept the dissolution of the marriage and still wanted active involvement with the other parent. The more differentiated parent, the one who had been able to establish a self-sufficient life after divorce, often resented the intrusion by the other parent and became less cooperative and more hostile.

Madden-Derdich, Leonard and Christopher (1999) designed a study to determine if high levels of conflict may be attributable to the difficult task for divorcing couples of being unable to relinquish their marital roles and still find effective ways to parent together. The idea is that the failure to establish relationship boundaries that clearly define the former partner as a co-parent but not as a spouse is a major source of post-divorce conflict. A random sample of 180 recently divorced couples was used. For both mothers and fathers, those who reported more ambiguous relationship boundaries with their former spouses also experienced a higher level of co-parental conflict. However, mothers' and fathers' views about the predictors of boundary ambiguity in the post-divorce period differed. For mothers, the level of emotional intensity toward the former spouse (i.e. feelings of love or hate) and power and control variables (e.g. financial strain) were predictors of boundary ambiguity. For fathers, however, only the level of emotional intensity towards the former spouse was such a predictor.

Johnston, Kline and Tschann (1989) examined the relative levels of communication and conflict between parents in litigating families who had been unable to settle their differences within one to four years after the legal dispute. A sample of 100 children was used. The Strauss Conflict Scale, comprising 18 behavioural items, measured parental conflict. The verbal aggression scale included insults, swearing, sulking, stomping out, doing something to spite the other, and threatening to strike. The physical aggression scale included throwing or smashing objects, pushing, slapping, kicking, beating up, and threatening with or using a knife or gun. Thirty-five of the children were in joint custody and 65 in sole custody at the follow-up. While there was no

clear evidence that children were better adjusted in either type of custody, joint custody was highly related to more frequent access. The authors found consistent evidence that children who had more frequent access were more emotionally troubled and behaviourally disturbed. Children who shared more days each month with each parent were perceived by their parents as being significantly more depressed, withdrawn and uncommunicative, and more aggressive. Older children were more enmeshed in parental conflicts. This was consistent with previous analyses which showed that as children develop the cognitive capacity for self-reflexive thinking and perceive the opposing views of their disputing parents, they become more vulnerable to acute loyalty conflicts.

In contrast, Bender (1994: 127) argued that even when parents are in high conflict, there is a case to be made for joint custody:

Research has shown that the relationship which the child had with each parent was much more influential in predicting successful adjustment outcomes, than was the quality of the relationship between the parents. Consequently, even if the parents are “warring” on each other, if both retain a relationship with the child, the child should be afforded the adjustment opportunities of good relationships with both parents.

Bender (1994) believed that detailed joint custody agreements, which left little or nothing to negotiate, actually tended to reduce stress and that both parents were likely to demonstrate high levels of cooperation when detailed agreements were written. He therefore stressed the importance of detailed joint custody agreements in high-conflict situations.

Ayoub, Deutsch and Maraganore (1999) examined the factors that contribute to the emotional distress of children in high-conflict divorce from the perspective of a guardian *ad litem* (GAL). Sample data from 105 children were collected from GALs, who are frequently appointed in high-conflict cases. High conflict was coded for the following criteria: a history of chronic and/or forceful domestic violence or parent-to-parent physical abuse; police or protective services involvement in domestic disputes; hospital visits for injuries stemming from violence, murder, threats of suicide, extensive degradation of one parent by another; and rigid inability to discuss the children and their well-being. Medium inter-parental conflict was coded for any of the following criteria parents are generally disrespectful, engage in name-calling and insult each other in front of the children, and parents are hostile toward each other but less deliberately (less pre-meditation and sadism) or less frequently than parents in high conflict. The study revealed that children in families with high marital conflict are more likely to have high levels of emotional distress. In the face of considerable marital conflict, exposure to child maltreatment alone does not significantly increase the child’s emotional distress. However, when coupled with the experience of witnessing domestic violence, the presence of additional forms of child maltreatment results in a significant increase of symptoms of emotional distress in the child.

Schmidtgall, King, Zarski and Cooper (2000) examined, in part, whether there was a relationship between parental conflict and the prevalence of depression for women who experienced parental conflict. The sample was made up of 52 female undergraduate students in a midwestern American university. The results indicated that perceived conflict in the divorcing family was related to symptoms of depression for women in their adult years. As ratings of perceived

conflict increased, reports of depressive symptoms also increased. However, the study noted that there were also other factors that contributed to women's symptoms of depression.

Johnston, Campbell and Tall (1985) used data on 80 divorcing families with 100 children to develop a typology of factors contributing to impasse in divorce. At the external level are unholy alliances and coalitions—the dispute can be solidified by the support of friends, kin and helping professionals. These unholy alliances and coalitions include extended kin involvement and tribal warfare, when the extended family (such as the spouse's parents) took it upon themselves to right the wrongs of the separation; coalitions with helping professionals, in which alliances with therapists and counsellors fuelled the fight; and involvement with the legal process where, for example, adversarial attorneys take on the case and engage in tactical warfare with each other. Interactional elements include the legacy of a destructive marital relationship, in which each spouse while married had come to view the other in limited, negative terms; and traumatic or ambivalent separations in which the ex-spouses view each other in a polarized negative light or seem to maintain an idealized image of the other and are engaged in a never-ending search for ways of holding together their shattered dreams. Intrapsychic elements include the conflict as a defence against a narcissistic insult, where the central reason for the dispute is to salvage injured self-esteem or more primitive narcissistic grandiosity; a defence against experiencing a sense of loss, to ward off the emptiness that came from relinquishing each other; a need to ward off helplessness brought about by the desertion of the other spouse; and disputes that were a defence against the parents' guilt over feeling that they could have tried harder to save the marriage. The majority of parents in this study presented traits of character pathology, some clearly having personality disorders. In these cases, the motivation for the dispute derived more from their enduring personality characteristics, such as a need to fight, than from the experience of separation or the needs of the child. The children in these families took on a magnified importance because their parents got a great deal of emotional support and companionship from them.

Whiteside (1996) conducted a review of the literature concerning the custody of children five years old and younger. He pointed out that many divorcing couples experience disagreement, tension and hostility, particularly during the first two years after separation. Yet, it is the interaction within chronically *high-conflict divorced* families that causes the most concern. These interactions are characterized by frequent arguments that are not effectively resolved, blaming, incidents of physical attack, denigration and sabotage of the other parent's relationship with the child, unclear boundaries, low parental esteem, and neglectful or rigid and authoritarian parenting styles. He argued that, ideally, studies should incorporate multiple dimensions of conflict, but many focus on only one aspect of it. The review considered various studies on the frequency of conflict, the content of conflict, the exposure of children to the conflict, the mode of conflict expression, and conflict resolution patterns. Some studies found that a higher incidence of conflict characterizes the post-divorce parenting of younger, as opposed to older, children, although given the small number of studies on this topic, it is difficult to evaluate the strength of this association. More important than the frequency of disagreements is the level of emotional hostility characterizing the disagreements. In general, researchers found that parents who engage in verbal attacks or physically violent behaviour against their former spouses risk a higher incidence of poor child adjustment. The review also considered the literature concerning the impact of parental conflict on children. One review of the literature concerning the impact of

marital conflict on children's functioning in married families concluded that children exposed to frequent and intense parental conflict experience a chronic stress level and may develop feelings of helplessness about their ability to positively affect events. Spousal conflict seems to be associated with certain negative emotional states in the parents, such as depression and anxiety. These emotional states may limit paternal and maternal abilities to be nurturing and responsive to their children. The author hoped that future research would shed light on the complex interrelationships between parental conflict, parental levels of individual psychological adjustment, parenting competence, and the child's psycho-social adjustment.

In short, the literature indicates that parental conflict is a major source of harm to children, whether the children are in intact families or their parents have separated or divorced. Children whose parents have separated or divorced where there is a high level of conflict between the parents display greater behavioural problems than children from low- or medium-conflict divorced families. However, serious questions remain. What causes high conflict between spouses? How does one differentiate between high- and lower-conflict families? The next chapter attempts to answer these questions.

4. HIGH-CONFLICT DIVORCE: THEORY AND EXTERNAL MARKERS

4.1 THEORY

Kressel et al. (1980), on analyzing nine completed mediation cases, discerned four distinctive patterns by which couples reached the divorce decision. These were the enmeshed, autistic, direct and disengaged patterns of divorce decision-making. This classification, in turn, was based on three interrelated dimensions: the degree of ambivalence towards the relationship, the frequency and openness of communication about the possibility of divorce, and the level and overtness of the conflict with which the decision was reached. Extremely high levels of conflict, communication and ambivalence about the divorce decision hallmarked the *enmeshed pattern*. The parties debated the pros and cons of divorce, often bitterly, agreed to divorce, and then changed their minds. They were unable to “let go.” Often, they approached mediation with grave reservations and gave themselves grudgingly to the process.

The *autistic pattern* was characterized by the absence of communication and overt conflict about the possibility of divorce. The direct conflict pattern was characterized by relatively high levels of overt conflict (although not as intense as that for enmeshed couples) as well as frequent and open communication about the possibility of divorce. A low level of ambivalence about ending the marriage characterized the *disengaged conflict pattern*. The authors argued that mediation might work well with direct and disengaged couples. For these two types of couples, there was an overall congruence of goals: to arrive at an equitable settlement. This was less successful with enmeshed and autistic types, because there appeared to be a fundamental divergence among the participants.

One of the foremost experts on high-conflict divorce is Dr. Janet R. Johnston. In a book that she co-authored with Linda Campbell, *Impasses of Divorce*, she examined conflict among a group of 80 divorcing families in California who were unable to reach agreements or were still disputing despite a mediated settlement or court order (Johnston and Campbell, 1988). Two thirds of the families were engaged in a legal dispute over custody and access, while the remaining one third were disputing visitation. Most of these parents felt a pervading sense of distrust or unease about the other parent’s capacity to care for the child. They also complained that the other parent refused to listen, talk, share or coordinate plans for the children. Many alleged outright neglect. Six cases involved serious allegations of sexual molestation and physical abuse.

The authors analyzed how the parties disputed. All the families were litigating, since mediators or judges had referred them. Outside the court, the dispute took various forms, ranging from resistance to the settlement of divorce matters, fear and avoidance of each other—along with refusals to communicate, personal distrust, and bitter acrimony—to angry confrontation, including threats and explosive violence. Physical aggression had occurred between three quarters of the parents during the preceding twelve months, as measured by the Strauss Conflict Tactics Scale. More than four fifths had been violent in the past. On the average, parents were physically aggressive towards each other once per month, and their children were present on two thirds of these occasions. However, the most common form of active disputing was verbal

abuse: insulting, belittling, and demeaning interchanges that occurred on average once per week, often on the telephone or at the time of transfer of the child from one home to another. Less than one third of the families had been separated within the previous twelve months and almost one half had been separated more than two years. Only 29 percent had been able to obtain a divorce decree. Asking why these parents could not settle their disputes and make stable post-divorce plans for the children, the authors developed the concept of the divorce-transition impasse. The inability to resolve disputes is seen as symptomatic of the family's resistance to change. Where there are chronic disputes, the normal trajectory of change and recovery that occurs during divorce is stymied. "The parents are unable to make use of the divorce to resolve issues within or between themselves and are frozen in the transition. In effect, the form of the custody dispute becomes their new pattern of relationship" (Johnston and Campbell, 1998: 7-12).

These impasses occur at three levels: the external, the interactional, and the intrapsychic or internal. At the external level, the dispute may be fuelled by significant others (extended kin, new partners or helping professionals) who have formed coalitions or alliances with the divorcing parties and legitimized their claims. At the interactional level, the dispute can either be a continuation of a conflictual relationship or the product of a traumatic or ambivalent separation of parents. At the intrapsychic level, disputes may serve to manage intolerable feelings engendered by the divorce (humiliation, sadness, helplessness and guilt) in psychologically vulnerable parents (Johnston and Campbell, 1988: 12; Johnston and Roseby, 1997: 5-22).

The authors constructed a different form of mediation approach to help these high-conflict families, combining a therapeutic and counselling effort in order to address the parents' motivation to fight, and to counsel them on the needs of their children:

While the need for premediation education, counseling, and therapy for high-conflict families has been acknowledged by a number of mediators, all have emphasized that it should be done in a separate setting, apart from the actual negotiations. We disagree and see counseling and mediation of a settlement for high-conflict families as the phases of one process. The understanding of the impasse, the parents' personality styles and the children's needs, gained in the counseling phase is invaluable for choosing negotiation strategies and building the actual agreement. Moreover, the process is better coordinated and expedited by having the same counselor-mediator in both phases (Johnston and Campbell, 1988: 198-199).

Johnston (1994) explained that conflict in divorce has three dimensions: the domain dimension, the tactics dimension, and the attitudinal dimension. The domain dimension refers to disagreements over divorce issues, such as financial support, property division, custody and access to children. The tactics dimension is the manner in which divorcing couples informally try to resolve disagreements, either by avoiding each other and the issues, or by verbal reasoning, verbal aggression, physical coercion and physical aggression. It can also refer to the way that divorce disputes are normally resolved by the use of attorney negotiation, mediation, litigation, or arbitration by a judge. The attitudinal dimension refers to the degree of negative emotional feeling or hostility directed by divorcing parties toward each other, which may be covertly or overtly expressed. The problem of measuring incidence of conflict is complicated further by the

fact that one party may perceive a specific domain of conflict, but not the other. The duration and developing pattern of each form of conflict is relevant to its characterization as either normal or pathological. For instance, higher levels of most types of divorce conflict are expected and relatively common at the time of marital separation and filing for divorce, and until the issuance of the final decree. On the other hand, post-decree divorce conflicts are sometimes considered to be intractable and indicative of pre-existing individual and family dysfunction.

One of the studies reviewed by Johnston (1994) was that of Maccoby and Mnookin (1992), who conducted a study of 1,124 families with 1,875 children recruited from divorce filings in two California counties. These researchers analyzed, in part, the amount of legal conflict over custody and visitation disputes. They estimated that 10 percent of families experienced “substantial” legal conflict and that 15 percent experienced a greater degree of “intense” legal conflict. They identified three types of co-parenting patterns three to four years after separation, generated by the presence or absence of discourse between ex-spouses (frequent arguments, undermining and sabotage of each other’s roles as parents) and the presence or absence of frequent attempts to communicate and coordinate their efforts as parents. These three patterns were high communication and low discord (called cooperative parenting); low communication and low discord (called disengaged parenting); and low communication and high discord (called conflicted parenting). The latter occurred in 24 percent of the cases. Over the three-year period, it was unlikely for conflicted parents to become cooperative. In sum, using different measures (legal conflict, hostility and conflicted co-parenting), their data indicated that one quarter of divorces were highly conflicted three and a half years after separation. Pervasive distrust about the other parent’s ability to care adequately for their child and discrepancies in perceptions about parenting practices generally typified the couples likely to be highly disputatious.

Johnston (1994) summarized other studies, including her own, that showed a high level of domestic violence in highly conflicted families. She argued that early clinical observations suggests that individuals in high-conflict divorces might be more likely to have severe psychopathology, personality disorders and substance abuse problems. However, the critical question raised by these studies was whether the manifestations of psychopathology represented ongoing personality or emotional disorders or whether they were probable reactions to severe stress, including that from divorce and legal disputes. Analyzing the literature concerning parental conflict on children, Johnston concluded that inter-parental hostility and physical aggression are moderately associated with more behavioural problems, emotional difficulties and reduced social competence in children, compared to non-conflictual families. In general, children who are exposed to physical aggression between parents are more symptomatic than those who experience non-violent inter-parental discord. This was even more pronounced in children who are physically abused.

Johnston (1994) tentatively concluded, while acknowledging the limitations of these studies, that inter-parental conflict after divorce (for example, verbal and physical aggression, overt hostility and distrust) and the custodial parent’s emotional distress are jointly predictive of more problematic parent-child relationships and greater child maladjustment. Court-ordered joint physical custody and frequent visitation arrangements tend to be associated with poorer child outcomes, especially for girls. However, she cautioned that this apparent association between

joint custody/frequent access and poorer child adjustment appears to be confined to the small proportion of families (about one tenth) of all divorces that are considered high conflict.

In assessing conflict-resolution procedures and programs, Johnston pointed out that mediation is a problematic remedy to high-conflict divorce cases. Mediation is the use of a neutral third party in a confidential setting to help disputing parties define issues and negotiate and bargain differences and alternatives. The assumption is that the mediator can contain and deflect the emotional conflicts of the divorcing couple and help them to become rational, focussed and goal-oriented. She cautioned that it is "... important to note, however, that the 'failures of mediation' have all the characteristics of high-conflict divorce" (Johnston, 1994: 176). She explains:

... it is difficult for families to arrive at some consensus when they have highly divergent perceptions of their children's needs and a pervasive distrust of each other's capacity to provide a secure environment. In sum, high-conflict divorcing families have often been identified by their failure to make effective use of mediation methods that rely upon a rational decision-making process (Johnston, 1994: 176).

Johnston argued that the more appropriate intervention in high-conflict divorce cases requires gaining some understanding of why the parents are locked into chronic disputes. Based on such understanding, therapists can devise focussed interventions aimed at the impasse, which helps the parents make more rational decisions. Moreover, therapists can help parents focus on the needs of their children apart from their own psychological agendas. This approach is called "therapeutic mediation" and has been most highly developed as a method called "impasse-directed mediation." This dispute resolution involves both parents and their children in a relatively brief, confidential intervention (15-25 hours). The strategy is two-pronged. On the one hand, parents are helped to develop some insight into their psychological impasse. On the other hand, parents are educated about the effects of their conflict on their children and counselled about how to protect their children from spousal disputes.

She presented key principles to inform social policy on minimizing high-conflict disputes, including that:

... custody arrangements should allow parents to disengage from their conflict with each other and develop parallel and separate parenting relationships with their children, governed by an explicit contract that determines the access plan. A clearly specified regular visitation program is crucial, and the need for shared decision-making and direct communication should be kept to a minimum. This fourth principle implies, therefore, that joint legal and joint physical custody schedules which require careful coordination of the child's social, academic and extracurricular activities are generally inappropriate for this special subpopulation of divorcing families (Johnston, 1994: 179).

Johnston and Roseby (1997: 5) reviewed the work in this field:

In sum, high-conflict parents are identified by multiple, overlapping criteria: high rates of litigation and relitigation, high degrees of anger and mistrust, incidents of verbal abuse, intermittent physical aggression, and ongoing difficulty in communicating about and cooperating over the care of their children at least two to three years following their separation. Probably most characteristic of this population of “failed divorces” is that these parents have difficulty focusing on their children’s needs as separate from their own and cannot protect their children from their own emotional distress and anger, or from their ongoing disputes with each other.

... The most serious threat... is... that these children bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own.

4.2 EXTERNAL MARKERS OF HIGH CONFLICT

Johnston’s work did not focus exclusively on the personal characteristics of the divorcing couples themselves to try to understand why they engage in conflict. She also argued that the actions of other persons—those engaged by the justice system itself—could fuel the conflict. Among these are attorneys who promote conflict between the divorcing parties:

Attorneys in particular have long been implicated for contributing to rather than resolving disputes, because of their advocacy role within an adversarial judicial system. Advising their clients not to talk to the other spouse, making extreme demands to increase the bargaining advantage, and filing motions that characterize the other parent in a negative light are all typical examples. Needing to show evidence of neglect, abuse, physical violence, or emotional or mental incompetence to win their client’s case, attorneys compose documents that are a public record of charges and countercharges, citing the unhappy incidents and separation-engendered desperate behaviors of the emotionally vulnerable parties, often out of context. The consequent public shame, guilt, and fury at being so misrepresented motivates the other party’s compelling need to set the record straight in costly litigation (Johnston and Roseby, 1997: 9).

Another component is the role of mental health professionals:

Some therapists, who see only one of the parties to the divorce conflict, encourage uncompromising stands, reify distorted views of the other parent, write recommendations, and even testify on behalf of their adult client with little or no understanding of the client’s needs, the other parent’s position, or the couple or family dynamics. Unfortunately, some courts are willing to give credence to this kind of “expert testimony.” In some high-profile cases, the parents’ mental health therapists squabble among themselves, playing out the parental dispute in a community or court arena (Johnston and Roseby, 1997: 9-10).

In this regard, Turkat (1993) pointed out that, in the context of mental health experts' custody recommendations, "for every competent professional evaluator, there may be many more incompetent ones." He argued that the ideal mental health professional for doing a custody evaluation should have significant training in the area of child development, training in psychopathology, years of experience as a practicing clinician, and should also make it clear to the court that his or her interpretations or recommendations are subject to error. Moreover, given that even the most objective impartial examiner may be subject to bias, one who is a "hired gun" for one of the parties to a dispute should not be allowed to give a custody recommendation.

Yet another player in fuelling the conflict is the court:

The role of the court itself can trap a family in a divorce time warp, not so much because of unwise decisions but because of the manner in which it renders its decisions... Its authority and judgment ... can have powerful symbolic meaning for clients who are emotionally distressed and dependent on others for their self-esteem. Not only is the court considered by many as a forum where the private marital fight is exposed to humiliating public scrutiny, but it is potentially invested by its clients with a quasi-divine moral authority.

From the client's perspective, the judge's decrees become dramatizations of who is right and who is wrong... It is especially important, if legal counsel or the judge suspects the parties are in court with a psychological agenda of obtaining a moral judgment, that court orders be clear and precise as to the basis for the decision. If they are unclear, they may constitute a permanent public record of inordinate shame and condemnation for some people (Johnston and Roseby, 1997: 11).

A recent report and action plan from an international conference on high-conflict divorce reiterated this position. High-conflict custody cases can emanate from all the participants in a custody dispute. This includes not just parents but also "attorneys whose representation of their clients adds additional and unnecessary conflict to proceedings; mental health professionals whose interactions with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict." (American Bar Association, 2000) This report recognized that mental health professionals, lawyers and judges have the greatest power to influence the conduct of high-conflict custody cases. Therefore, they should bear primary responsibility for preventing or reducing conflict in such cases.

Another external indicator of high conflict between spouses is domestic violence. Johnston and Roseby, in their book *In the Name of the Child*, (1997: 25-45), devote a chapter to an analysis of five types of domestic violence among divorcing families disputing custody. These types are ongoing/episodic battering by males, female-initiated violence, male controlling interactive violence, separation-engendered divorce trauma, and psychotic or paranoid reactions. Ongoing/episodic male violence seems to originate from the man and his chauvinistic attitudes. The man almost always initiates the violence, which is often precipitated by drug and alcohol abuse. Female-initiated violence seems to result from internal stress that causes the woman to become furiously angry in response to the spouse's passivity. Male controlling interactive violence escalates from mutual insults into physical struggles. The man responds by physically

dominating and overpowering the woman. Separation-engendered and post-divorce trauma is marked by uncharacteristic acts of violence related to the separation or such stressful post-divorce events as disputes over custody. Psychotic and paranoid reactions are violent acts generated by disordered thinking and distortions of reality that involve paranoid conspiracy theories.

The authors argue that no single policy or treatment intervention can suffice for all domestic violence families. For example, sole or joint residential arrangements should never be contemplated if a father is engaged in ongoing or episodic battering. Visitation with the father in such cases should be supervised or suspended. Unsupervised visits should be contemplated only upon the abusive father's cessation of violence and his successful completion of an appropriate treatment program. For some other types of domestic violence, it may be, that unsupervised visits can work, provided they are clearly structured. In general, however, the best prognosis for shared parenting is in family situations with no history of physical abuse in the marriage.

As Stewart (2001: 20) pointed out in his literature review, however, the five types of domestic violence described above can be problematic:

This list is designed to help clinicians differentiate between different types of divorce-related violence and is a tool in assessing the severity of violence when considering access issues. This type of differentiation has resulted in significant debate among professionals with some arguing that such distinctions undermine current initiatives to take all forms of domestic violence seriously.

One other thing that may fuel conflict is the decrease in funding of Legal Aid over the years. For example, in 1999, the Chief Justice of the Family Court of Australia pointed out that the limited availability of Legal Aid had been particularly damaging in the area of family law. He stated:

At a time of turmoil in people's lives, denial of legal aid puts additional pressures not just on the unrepresented person, but also on the other parties in the dispute, their legal representatives and on the Court. It inevitably increases the opportunity for delay and reduces settlement opportunities. For some, the sense of injustice that is caused becomes expressed against the former partner or their children, or the latter become pawns in the process. While violence is the most extreme manifestation, we also see heightened obstructionism and unwillingness to comply with orders or other post-separation agreements.... Before a matter goes to hearing, when opportunities to settle disputes often present themselves, it is understandable that individuals with a high level of animosity towards each other are unable to negotiate and possibly find a solution. There is no objective advice available to them (Nicholson, 1999b: 1-2).

While the Chief Justice's remarks may well be speculative, recent evidence supports the view that a lack of Legal Aid funding can frustrate the efficiency of court services. A recent study of litigants in person before the Family Court of Australia found that most litigants in person do not have legal representation because they cannot afford it. Moreover, just over one half of the litigants in the study sample were denied Legal Aid because of changes made to the Legal Aid guidelines in 1997. In addition, a significant minority in the sample had not bothered to apply for Legal Aid, because they had been told they were ineligible. Litigants in person were more

likely than the population as a whole to have limited formal education, limited income and assets, and to have no paid employment. Litigants in person were disproportionately concentrated in children's matters as opposed to property matters.

Dewar et al., (2000) pointed out that such litigants have many needs: for information, support services, court procedures, advice and support. Judicial officers and registry staff experienced high levels of stress and frustration when dealing with litigants in person, because of the litigant's lack of legal and procedural knowledge as well as the difficulty of holding a fair balance between the represented and unrepresented parties. Although matters involving an unrepresented litigant have shorter disposition times than when the parties are represented, service providers almost unanimously agreed that so long as they remained in the system, unrepresented litigants were more demanding of the time of the other parties and their legal advisors (Dewar et al., 2000).¹

In addition, a recent review of the Australian *Family Law Reform Act 1995* concluded that many applications brought by a non-resident parent against the resident parent for allegedly breaching a parenting order made by the Court were without merit and were made in order to harass the resident parent. In the majority of these unmeritorious cases, the father was unrepresented. This showed the importance of the gate-keeping role played by lawyers in keeping trivial complaints out of the system (Rhoades et al., 2000: 9).

The implication of these findings, in the context of high-conflict divorce, is that the unrepresented litigant is likely to cause delay in the court system, creating more opportunity for conflict to arise. Moreover, the lack of financial resources of the unrepresented party would contrast sharply with the financial resources available to a wealthier spouse, creating a power imbalance that could fuel more conflict.

Arguably, however, the most used typology of conflict within marriage is the Conflict Assessment Scale developed by Garrity and Baris (1994) in their book *Caught in the Middle: Protecting the Children of High-Conflict Divorce*. This scale sets out five levels of conflict, ranging from minimal to severe, as follows:

1. Minimal

- Cooperative parenting.

- Ability to separate children's needs from own needs.

- Can validate importance of other parent.

- Can affirm competency of other parent.

- Conflict is resolved between the adults using only occasional expressions of anger.

- Negative emotions quickly brought under control.

2. Mild

- Occasionally berates other parent in front of child.

¹ The Australia Family Court in September 2000 initiated a two-year project to review the Court's practices, procedures, protocols and forms to ensure that the needs of self-represented litigants are better addressed (Family Court of Australia, 2000c).

Occasional verbal quarrelling in front of children.
Questioning child about personal matters in the life of other parent.
Occasional attempts to form a coalition with child against other parent.

3. Moderate

Verbal abuse with no threat or history of physical violence.
Loud quarrelling.
Denigration of other parent.
Threatens to limit access of other parent.
Threats of litigation.
Ongoing attempts to form a coalition with child against other parent around isolated issues.

4. Moderately Severe

Child is not directly endangered, but parents endanger each other.
Threatening violence.
Slamming doors, throwing things.
Verbally threatening harm or kidnapping.
Continual litigation.
Attempts to form a permanent or standing coalition with child against other parent (alienation syndrome).
Child is experiencing emotional endangerment.

5. Severe

Endangerment by physical or sexual abuse.
Drug or alcohol abuse to point of impairment.
Severe psychological pathology.

Garrity and Baris (1994: 42-43) developed this scale of conflict using their extensive clinical experience with divorcing families and children experiencing inter-parental conflict, as well as research literature on fighting and violence in divorced and intact families. They caution that the scale is not statistically valid or reliable, but suggested that it may be useful as a guideline in formulating plans for visitation or other matters.

Stewart (2001: 20), in his literature review, talked to a number of professionals about how to define high-conflict divorce. Dr. Eric Hood, a psychiatrist involved with court-ordered family assessments at the Clarke Institute for more than 20 years, was skeptical of attempts to identify criteria to define high-conflict divorce. He viewed this as an attempt by mental health professionals to appear scientific when they had to appear in court to defend their reports. He noted, however, three external markers that indicate settlement problems: several changes in legal counsel, which may indicate that the client cannot take advice; the number of times a case has gone to court; and the overall time it takes for a case to be settled. Professor Nicholas Bala of Queen's Law School, was also wary of establishing fixed criteria for high-conflict divorce,

because it could lead to a labelling effect that would limit alternatives for intervention. Professor Bala argued instead that a range of interventions is necessary for the entire divorced population, including counselling and therapeutic resources available for parents and children; educational programs that teach parents and members of extended families about the hazards of divorce and conflict to children; a case management system by which one judge assumes judicial control for each case from start to finish; and supervised access and exchange programs when there is a history of violence.

In the state of Idaho in the United States, the Idaho Protocol for judges in high-conflict divorce cases states that a high-conflict case is one

... on a continuum where parental conflict is anywhere from (1) verbal abuse with no threat or history of physical violence, threatening to limit access of other parent, threats of litigation, ongoing attempts to form a coalition with child against other parent around isolated issues to (2) endangerment by physical or sexual abuse, drug or alcohol abuse, severe psychological pathology (Brandt, 1998: 33).

Markers for high-conflict divorce in this Protocol include petitions for temporary custody; protection petitions such as child protection and domestic violence orders; family dysfunction such as substance abuse; changes in attorneys; a child's refusal to visit a parent; and a parent's inability to separate a child's needs from the parent's needs. Another marker is divorce cases involving children from birth to age three, who warrant special scrutiny because of the extreme risk of psychological damage to these children of divorce (Brandt, 1998: 33).

An excellent Oregon study on approaches to high-conflict divorce in the United States advised that the Fulton County Family Division in Georgia uses an informal method of detecting high-conflict divorce by looking at the following factors: the presence of more than one child; younger children, which imply the potential for greater court involvement; intimate involvement of the extended family; child abuse; trauma; and whether one party was opposed to the divorce. Garrity and Baris's Conflict Assessment Scale was the tool of choice in Vermont and Idaho (Sydlik and Phalan, 1999: 2).

There are problems with many of the definitions of high conflict described above. As Stewart (2001: 43) pointed out in his literature review, while a number of clinical and empirical studies are clear about their conclusions regarding the danger to children of exposure to high conflict between parents

... they are vague and inconsistent about how to define high-conflict. One of the difficulties in these studies is the lack of baseline measures for the normal level of conflict one would expect in most divorcing families. Without an established baseline, it is impossible to accurately determine the exact level of conflict that can be defined as "high-conflict".

Stewart (2001: 43) therefore recommended:

In order to develop an accurate measure of what can be defined as high conflict, further empirical research is required. Such research, using large sample groups, should begin

by establishing baseline measures for the amount of conflict that normally exists in divorcing families as compared to intact families. Once this baseline is established, a second baseline of conflict levels can be determined for families characterized by the external and internal elements mentioned below.

Stewart (2001) argued that a high/low-conflict typology is more useful to practitioners than models that identify several levels of conflict. He therefore provided a model for high and low conflict that sets out, for each typology, external markers, individual and relationship characteristics, referrals to community resources, and key elements of the parenting plan. For high-conflict divorces, the typology of external markers and relationship characteristics are as follows:

1. External markers

- Criminal convictions.

- Involvement of child welfare agencies in the dispute.

- Several or frequent changes in lawyers.

- The number of times a case goes to court.

- The overall length of time it takes for the case to settle.

- A large amount of collected affidavit material.

- History of access denial.

2. Individual and relationship characteristics

- History of mental health difficulties, including depression, anger, withdrawal and non-communicative behaviour.

- History of violent and abusive behaviour.

- A tendency to vilify the other parent.

- Inability to separate the parent's needs from the child's needs.

- Rigid and inflexible thinking about relationships and child development.

- High degree of distrust.

- A tendency toward enmeshment rather than autonomy.

- A poor sense of boundaries.

- A high degree of competitiveness in the marriage and in the separation.

- The amount of verbal and physical aggression between the parents.

- A tendency to involve the children in disputes.

- A pattern of alienating the child from the other parent.

For the low conflict typology, the external markers and relationship characteristics are as follows:

1. External markers

- Ongoing disputes of items of daily routine.

- Use of supportive family and friendship network to limit conflict.

- Use of lawyers as last resort.

Few court appearances.
No criminal activity linked to custody dispute.
No history of violence.

2. Individual and relationship characteristics

Ability to separate child's needs from parents' needs.
Ability to validate the importance of the other parent.
Conflict is resolved with only occasional expressions of anger.
Negative emotions brought quickly under control.
Ability to not say certain things in anger.
Pattern of protecting children from angry episodes.
Child functioning improves after a period of adjustment.
Both parents can tolerate differences.
Ability to cooperate on child-related issues.
A resolution of personal issues.

Stewart (2001: 47) added that, beyond its practical application for developing parenting plans, trying to define criteria that contribute to high-conflict divorce situations might be of little use. The main difficulty with the adjective "high" is that it implies a specific distinction among various levels of conflict, when in fact conflict in divorce may be better thought of as a continuum that includes specific events and behaviours in a family leading up to and follow the decision to separate; the family and community resources available to help the parents and children adjust to changes; and the children's internal responses to these challenges.

For the purpose of this study, this paper generally accepts most of Stewart's external markers for distinguishing high-conflict cases from low conflict divorce cases: involvement of child welfare agencies in the dispute, several or frequent changes in lawyers, the number of times a case goes to court, the length of time it takes for the case to be settled, a large amount of collected affidavit material, and a history of access denial. However, one change is proposed to Stewart's list: domestic violence and sexual offences in place of criminal conviction. Any criminal conviction is too broad a criterion to qualify as a marker of high-conflict divorce. For example, someone convicted for simple possession of marijuana does not, by that fact alone, taint his or her divorce proceedings with the risk of high conflict. A more precise marker is needed, one from which a reasonable inference can be made that, by the fact of, or possibly allegation of, criminal misconduct, there is a reasonable likelihood that relations among the members of the family may be placed in conflict. For this reason, criminal misconduct in the form of a sexual offence or an act of domestic violence is selected as a marker.

5. INTERVENTIONS IN HIGH-CONFLICT DIVORCES

5.1 PARENTING PLANS FOR HIGH-CONFLICT DIVORCE SITUATIONS

Many jurisdictions have created statutory procedures in their equivalents to our *Divorce Act*, whereby the parents of children in a divorce action agree to a parenting plan in which the duties and obligations of parents for taking care of the children of the relationship are set out and must be followed by the parties. This is covered in more detail in the next section of this paper that examines the law in foreign jurisdictions. However, it is important for our purposes to note that experts in high-conflict divorce see a need for greatly detailed, highly structured parenting plans that minimize the possibility of conflict between the parents. For example, Ehrenberg and Hunter (1996) studied a sample of 32 separated or divorced spouses split equally between those who agreed on a parenting plan for their children and those who disagreed. Compared with parents who disagreed about parenting arrangements, ex-couples who were able to maintain mutually-agreed-upon parenting arrangements were generally less narcissistic, less interpersonally vulnerable, more empathetically inclined, less self-important, less self-oriented and more child-oriented. Arguably, if high-conflict couples are less able to agree on a parenting plan, then additional mechanisms are needed to ensure their compliance with the plan as well as to minimize the extent of their conflict when caring for the children.

Garrity and Baris (1994: 101-120) argued that high-conflict divorces necessarily have complex dynamics. Therefore, issues in high-conflict divorces cannot be resolved through mediation. An arbitrator in some joint-custody situations or a guardian *ad litem* in other situations may help resolve specific issues. However, in many high-conflict situations, no professional is appointed. Therefore, a parenting coordinator is needed in high-conflict situations, one who is experienced in problem resolution, mediation techniques, communication, the legal aspects of divorce, adult psychology, developmental psychology, and children's adjustment issues that are specific to divorce. The parenting coordinator would have the following responsibilities:

- Creating a parenting plan to contain or reduce interparental conflict.
- Ensuring execution of the residence and visitation arrangements specified in the divorce decree or in temporary orders.
- Monitoring visitation and mediating disputes between parents.
- Teaching parents communication skills, principles of child development, and children's issues in divorce.
- Exercising the power to modify visitation as a means of reducing conflict.
- Ensuring that both parents maintain ongoing relationships with the children.
- Acting as arbitrator (that is, final decision-maker) on any issue over which the parents reach an impasse (Garrity and Baris, 1994: 120-121).

These authors also produced a table that shows the role of the parenting coordinator for families experiencing three different levels of conflict: minimal/mild, moderate, and moderately severe/severe conflict. In cases of moderately severe/severe conflict, the table describes the role of the parenting coordinator as someone appointed in the divorce decree who adapts communication techniques to the nature of the impasse; modifies visitation to minimize conflict; recommends supervised visitation when necessary for a child's protection; recommends full evaluation of one or both parents when necessary (i.e. regarding alcohol use, substance abuse, severe psychopathology); ensures that the child will have contact with both parents; arranges for visitation and devises a communication plan for parental alienation; and meets as often as necessary, typically once a week (Garrity and Baris, 1994: Table 8-2 at 122).

Garrity and Baris (1994: 146) state:

High-conflict couples most frequently fight about the details of visitation, parenting approaches, and the exchange of information about their children. Modifying the way these elements of parenting are carried out can often minimize the children's exposure to conflict.

Therefore, they offered practical suggestions for minimizing conflict that can be set out in these parenting plans. For example, if both parents can drive, the parents should drive the children to each other's homes rather than have the other parent pick the children up. This way, one parent does not arrive at the door of the other parent; potentially rush the other parent's good-byes to the child. Another strategy is to have a written log, perhaps a small spiral notebook, that travels with the child. It can contain information about preferred or disliked foods, medications, and scheduled activities. This approach can be a useful way of exchanging information between parents who are likely to argue during the children's transitions. If the parents cannot contain their anger during transitions, a neutral drop-off point may become necessary. If conflict remains high, it may be necessary to change the visitation plan, by decreasing the number of transitions and substituting for them a longer visit. Less drastic than a neutral drop-off is the use of some public space, such as a library or museum, to exchange children. Insofar as possible, all exceptions to the basic visitation schedule should be set out in detail in writing. For example, the terms of holiday visits must specify exact times. When parents are unable to celebrate special events peaceably in each other's presence, it is best to hold celebrations, such as birthdays, in both houses. Ordinarily, children should be allowed to telephone each parent from the other parent's home and be assured of the privacy of the calls. The parenting plan should specify that parents will not be able to make up time for missed visits. Garrity and Baris (1994: 146-150, 155-161) provide an example of a draft parenting plan in a high-conflict situation.

The Idaho Protocol for judges to protect children of high-conflict divorce provides that a detailed shared-parenting plan should be included in the divorce decree. As a general rule, the higher the level of conflict between the parents, the more specific the shared-parenting plan should be to protect the children. It continues:

- F.1. To protect the children, the shared parenting plan in the decree should:
 - F.1.a. Be crafted in a manner which will reduce and/or minimize the opportunity for conflict between parents;
 - F.1.b. Maximize the time the children will spend with both parents, so long as parents (1) know and love the children, (2) are safe guardians of the children, and (3) are willing to parent; and,
 - F.1.c. Take into account the developmental needs of the children. The implications of those needs for the parenting plan differ depending on the level of conflict between the parties.

- F.2. To protect children, parenting plans may include some or all of the following provisions:
 - F.2.a. Requiring a written log which travels with the children, so that information about meals, medications, activities, etc., may be transmitted with minimal contact between parents and without children carrying messages.
 - F.2.b. Transfers which occur at public places, such as a restaurant, library or day care. If conflict continues to be a problem at transitions, supervised transitions may be appropriate.
 - F.2.c. Separate or alternating attendance at special events for the children.
 - F.2.d. Unrestricted private telephone contact between the children and the non-residential parent.
 - F.2.e. If communication between the parents permits, an opportunity for the non-residential parent to care for the children before arrangements are made with a third party.
 - F.2.f. If parental alienation is established, on-going, post divorce therapy with a neutral health professional may be appropriate.
 - F.2.g. Include a plan for resolving post-decree problems with and changes to the shared parenting plan set forth in the decree, including the use of alternative dispute resolution processes where appropriate.
 - F.2.h. Include, where appropriate, the appointment of a Parenting Coordinator to arbitrate disagreements which arise between the parties in regard to construction or implementation of the shared parenting plan. The parenting coordinator should have authority to make recommendations to modify the parenting plan (Brandt, 1998: 47-48).

Appendix A of this paper is a Parenting Plan Agreement Form found in the Idaho Benchbook on high-conflict divorce (Brandt, 1998: Appendix A at 9-13).

Stewart (2001: 45) suggested that for high-conflict families, the key elements of a parenting plan should be:

- minimal or no contact between parents;
- a great amount of detail with little flexibility left to parents;
- regular routines for children;
- a primary parent for decision making;
- access may be limited or supervised;
- any communication between parents is through use of a “communication book”; and
- use of neutral places for exchange of children.

This contrasts with the key elements of a parenting plan designed for low conflict families, which would have the possibility of joint and shared decision-making; the possibility of equal time with both parents based on the child’s needs; parenting plans that provide guidelines but allow for flexibility for the parents; and a focus on contentious issues, leaving most items for parents to negotiate (Stewart, 2001: 45).

In effect, these authors argue that in cases of high-conflict divorce there is a need for a highly structured parenting plan that would require a parenting coordinator to arbitrate disputes.

5.2 COUNSELLING AND THERAPEUTIC PROGRAMS FOR HIGH-CONFLICT FAMILIES

As Stewart (2001: 34-35) pointed out, the majority of therapeutic interventions reported in the literature are based on small, relatively untested programs. These are clinical initiatives developed from the experience of therapists and counsellors working with divorced and separated families. The small sampling of studies of various clinical programs for separated and divorced parents and children demonstrate several serious design problems. First, small-scale studies make it difficult to draw conclusions about how various models might work with larger interventions. Second, pre-existing family and social factors are usually not analyzed in these studies. Therefore, they do not examine in depth how these families function on a larger scale and how the children of these families function compared to other children in non-divorced families. Third, there is no attempt in these studies to identify the level of conflict in the families and determine how these therapeutic programs help children living through various levels of conflict. Fourth, there is rarely any follow-up of results, and when there is, it is brief. Finally, these small-scale studies do not factor in the effects of other events in a child’s life, such as changing schools, moving to another neighbourhood, missing friends and the remarriage of one or both parents. These clinical studies presume that the only factor that effects positive outcome for parents and children is the therapy offered. According to Stewart (2001), what is needed is

a comprehensive research study that begins with an inventory of pre-existing emotional and structural factors.

5.3 DIVORCE EDUCATION PROGRAMS

Stewart (2001: 38) pointed out that critics of divorce education programs caution against expecting too much in the way of either prevention or solution to divorce hostilities. Many education programs offer information only about the divorce process, options such as litigation and mediation, and perhaps about some of the associated emotional hazards for children. It is argued that the programs are not truly educational because they do not help divorcing parents learn new skills to deal effectively with their children in their new life situation.

There is some limited information about the effectiveness of parenting education programs. Arbuthnot, Poole and Gordon (1996) designed a project in which 3,658 families who had filed for divorce were mailed an educational booklet that spelled out the major effects of divorce and remarriage on children, and provided practical suggestions for eliminating or minimizing harmful effects, especially parental conflict. Although there were no immediate changes in inter-parental conflict, at the one-year follow-up these families showed more positive communication between the parents. Also, the non-residential parent tended to have greater access to the children than did parents in the control group. However, no conflict in these families was identified, nor was there any identification of stressful factors such as relocation or remarriage. Participants were streamed into this project not by applying any criteria, but on the basis of random sampling (Stewart, 2001: 38; Arbuthnot et al., 1996). Arbuthnot and Gordon (1996) also favourably evaluated a mandatory education class attended by 131 parents, which would appear to have lowered the exposure of children to parental conflict (see also Stewart, 2000: 39).

Geasler and Blaisure (1998) reviewed the status of court-connected divorce education programs in the United States. They pointed out the growing recognition that skills training is essential in parent education to promote effective parenting behaviour. They said that research by Arbuthnot and Gordon shows that skill-oriented classes are more likely to lead to parental behaviour change in co-parenting situations than more passive strategies such as books or lecturing. As a result of skill-based education programs, divorcing parents can increase their ability to choose forms of communication that lessen parental conflict, and these effects are retained at the six-month follow-up. Recent research indicated that overall effectiveness of parent education programs may vary according to the level of conflict that parents report; the timing of a parent's attendance at the divorce education program; or the content and teaching strategies used in the program. In a 1996 follow-up to a 1993 study that examined the influence of program attendance on rates of re-litigation six years after the divorce, only individual parents who initially reported high inter-parental conflict, triangulation of children, and low levels of adaptive parenting benefited from the program. They experienced a lower frequency of re-litigation than individuals in a control group in another county. An ongoing evaluation of the "Children in the Middle" programs provided a persuasive argument for teaching strategies as an important variable to consider when assessing the effectiveness of programs. "Children in the Middle" programs emphasize teaching and practicing skills, rather than presenting facts about a number of topics and leaving little opportunity for parental discussion or involvement. The authors concluded that a program focussing narrowly on skills development requires active parental involvement and can provide

opportunities for guided co-parenting skill development, that learning and using co-parenting skills has been shown to reduce the possibility of putting children in the middle of parental conflict, but that more research is needed in this area.

The Pre-Contempt/Contemnor's Group Diversionary Program in Los Angeles County has an educational program specifically designed for parents in high conflict. The goals of the program are to provide parents with information about the effects of divorce and parents' conflictual behaviour on children, about the law concerning custody and visitation, about the range of child-sharing plans available and the consequences of not complying with court orders, and about the skills needed to improve their communication and resolve conflicts. Judges who order parents to attend make all referrals to the program. Both parents are required to attend. Children are not included. Group sizes range from 25 to 75 persons. There are six sessions, each with a different theme. In the first session, the rules of conduct are established, and a presentation is made about the historical aspects of custody, the role of the different courts, and the emotional, legal and economic consequences of separation and divorce. The session ends with a video emphasizing the children's need for access to both parents. The second and third sessions focus on the needs of the children, the meaning of their symptoms of distress, their development and parenting-plan options. The remaining sessions provide information about conflict management and effective communication and feature role-playing exercises focusing on negotiation and mediation. Other than consumer satisfaction feedback, this program has not been systematically evaluated (Johnston, n.d.: 27-29).

From January to May 1997, three group cohorts totalling 143 parents attended this Contemnor Program. In the summer of 1997, 45 families who did not attend the program, selected according to the same eligibility criteria, were assigned to a comparison group. At a nine-month follow-up, it was found that both men and women who were in this program, compared to the baseline, were consistently more cooperative, expressed less disagreement with each other, and were more likely to have resolved disputed custody issues with their ex-partner. Also, domestic violence between the parents diminished to a negligible amount. However, there was no evidence that the Contemnor Program reduced litigation rates (Johnston, n.d.: 183-209).

McIsaac and Finn (1999) created a program for high-conflict parents for the Multnomah County Circuit Court in Portland Oregon. Modeled on the Los Angeles County Conciliation Court's Contemnor Program, this program was named "Parents Beyond Conflict." Groups ranged from eight to ten participants, with a total of 26 participants in three groups. They were referred to the program by a judge. The goal of the program was to increase parental empathy toward their children and to help them develop a greater awareness of how their behaviour affected their children. Thirteen of the families were ordered to attend by a judge after many court appearances. Each parent was sent a packet of information about the class, including lesson plans for each of the six lessons. Each lesson was two hours long. The presence of mental illness, alcohol or drug abuse or chronic violence precluded participation in the group. The participants were asked to buy copies of the two texts to be used in the class, *Joint Custody with a Jerk* and *Getting Past No*. The first class session established the rules, which included that members of the group would speak respectfully to one another and not speak disparagingly of the other parent. The course emphasized skill building. For example, participants were taught how to deal with problems at a hypothetical level and how to actively listen. All 26 participants

found the sessions “very helpful.” After two months, 13 of the highly conflicted parents constructively used the concepts taught in the class. However, the long-term benefits of this training still need to be established.

Baker-Jackson and Orlando (1997) explained the “Parents Beyond Conflict” workshop, used as an intervention in the Los Angeles Juvenile Dependency Court to address high-conflict situations referred to dependency court because of child abuse allegations. The workshop provides parents with information about the causes of parental conflict, the destructive impact of the conflict on children, and the developmental needs of the children and their behaviour under stress. Parents are taught techniques for improving their communications with each other. Techniques in managing anger are provided. Problem-solving skills are demonstrated and domestic violence issues are addressed. Role play is used. Between June 1994 and May 1996, 570 people attended the workshop. The responses by parents, attorneys, caretakers and the judiciary were favourable, with judicial officers and attorneys observing immediate changes in the behaviour of the parents toward one another after completing the workshop.

Kramer et al. (1998) compared “Children in the Middle”, a skills-based divorce education program, with “Children First in Divorce”, a commonly used divorce education program that is not skills-based. They assessed the results of surveys of parents who attended ten classes of these two programs over a two-month period. The authors found that, despite concerns that divorce education programs might increase the frequency and severity of domestic violence, all groups reported decreased violence over time, probably due to a normal reduction in anger post-divorce. Parents with better communication skills experienced a greater decline in domestic violence and experienced less conflict with the other parent, and exposed their children to less conflict. This suggested that teaching communication skills is desirable in divorce education programs.

In Canada, the Clarke Institute of Psychiatry in Toronto operates a “For Kid’s Sake” program. As its Web site² explains, the program is a novel group approach to helping parents and children manage post-separation conflicts. Some of the areas of conflict dealt with are disputes about the child’s time with each parent, differences in parenting styles, schooling and extra-curricular activities of the children, and children’s emotional and behavioural development. The program provides separate group experiences for parents and their children over a ten-week period. Parents at first separately attend a series of five group sessions. These sessions have a psycho-educational and therapeutic focus that helps parents better attend to and understand their children’s needs and to understand the difficulties in the parental relationship. Emphasis is placed on helping parents take responsibility for their own part in continuing the dispute. Parents then jointly attend another five sessions in order to negotiate a better parenting plan and/or resolve child-related issues (Clarke Institute of Psychiatry, n.d.).

Stewart (2001: 39) pointed out several problems with these kinds of studies. First, as with counselling programs, these studies do not begin from an established baseline that gives a picture of how the children and parents in these families are coping with divorce before any intervention takes place. Second, even in mandatory programs, there is no sense of the parent’s pre-

² http://www2.camh.net/CLARKEPages/family_court/for_kids_sake.html (accessed June 11, 2001).

intervention cooperation. As a result, even in mandatory programs, it is impossible to determine the parents' level of compliance. Third, there is no attempt to determine levels of conflict between the parents, so it is impossible to measure whether these programs are effective ways to reduce conflict in these families.

5.4 MEDIATION

In the early 1980s, divorce mediation was introduced as a popular alternative to the more traditional method of resolving issues of custody, access and support, which usually involved the courts. This was seen as a less expensive, less adversarial and more effective method of helping parents resolve their issues (Stewart, 2001: 36). In some American states, such as Florida, mediation is mandatory. Whether or not mediation works effectively in custody disputes is not known conclusively. For example, a study in Toronto compared couples who mediated custody to those who litigated without mediation. Only ten percent of mediated couples returned to the courtroom after two years with problems related to custody or visitation, compared to 26 percent of the couples who chose not to mediate (Vestal, 1999: 488). On the other hand, Pearson and Thoennes (1984) compared outcomes for 668 couples referred to mediation with 212 who used litigation to resolve custody disputes. Of the families who decided to pursue mediation, 60 percent reached some agreement about their issue, although 40 percent of these families reported a breakdown in the mediated agreement within one year. They concluded that further research was necessary on how to work effectively in mediation with high-conflict couples and on whether the oft-stated goal of mediation, joint custody, was actually a sustainable option for many families (Stewart, 2001: 37). Pearson and Thoennes (1986) also summarized the results of a large-scale empirical evaluation of mediation services in three court-based programs. It involved interviews with approximately 600 parents in several divorce dispute categories, one group consisting of parents who had divorced without formally contesting custody or visitation, the other group comprising those parents who disputed parenting or visitation and accepted mediation. The third group was comprised of parents who disputed custody/visitation, but did not try mediation. Mediation was associated with a high degree of user satisfaction. Those who had used it recently rated it most favourably. Over time (i.e. four to five years later), reactions were less uniformly complimentary, although still favourable. The authors caution, however, that although associated with some positive outcomes, mediation is not a panacea, especially with respect to its impact on children's adjustment.

Stewart (2001: 37) argued that these and other studies indicate a need for the pre-selection of mediating families. As with counselling and therapeutic programs, further study is needed to investigate how effective mediation works with families struggling with different levels of conflict. Other emotional and structural factors also need to be identified and considered to get an accurate picture of mediation's potential. Finally, long-term follow-up of these families is necessary. Because of the failure to follow up the studies, it is simply not known how many families who use mediation later return or give up and choose to litigate.

As noted, the usefulness of regular mediation in a high-conflict situation has been doubted. Johnston and Roseby (1997: 230-231) pointed out that mediation, as originally conceived, "is the use of a neutral, professionally trained third party in a confidential setting to help disputing parents clearly define the issues, generate options, order priorities, and then negotiate and

bargain differences and alternatives about the custody and care of their children after divorce.” They argued that “[m]ore than a decade of experience and a number of outcome evaluations have shown fairly consistent findings: 60 percent to 70 percent of mediated disputes result in agreements; of these, 40 percent to 57 percent are full or complete resolutions... But it is not clear that mediation results in significant long-term benefits, in terms of enhanced parent and family functioning.”

The primary indication for a successful outcome of mediation is parents who, with the mediator’s help, demonstrate the capacity to contain their emotional distress and focus on the children’s issues. However, as Johnston and Roseby (1997: 231) noted, “cases designated as ‘failures of mediation’ have all the characteristics of high-conflict divorce.... The failures have been described as enmeshed and highly conflicted couples who are ambivalent about their separation and have severe psychopathology or personality disorders.” They added: “In sum, high conflict divorcing families have largely been identified by their failure to make effective use of traditional mediation methods that rely upon a rational decision-making process.”

Johnston and Roseby argue that, in cases of high conflict between parents, a different kind of mediation—“impasse-directed”—is necessary. It differs from regular mediation in three ways. First, this approach brings together therapy and mediation. The rationale is that, until some of the underlying emotional factors that form the impasse between the parents are dealt with, the parents cannot make rational, child-centred decisions. Second, the assumption is that, because of the impasse, the parents have little ability to protect their children from their own personal or spousal problems. Hence, the goal is to educate and counsel the parents about the children’s needs and to use therapy to help the parents manage their family situations. Third, the goal of impasse-directed mediation is not the completion of the access agreement itself. The goals are to develop psychologically sound access plans, to help the family through its divorce transition, and to build a structure to support the parents’ and children’s growth and development (Johnston and Roseby, 1997: 233-234).

Impasse-directed mediation consists of four phases. In the assessment phase, parents are interviewed separately and observed in a structured setting with the child, in order to compile a detailed history and assessment of the family impasse. In the pre-negotiation counselling phase, each parent, in separate sessions from their ex-partner, is prepared for mediation by the counsellor, who strategically intervenes in the family impasse and attends directly to the child’s needs. In the negotiation or conflict-resolution phase, specific disputed issues are resolved and access agreements developed. Lastly, in the implementation phase, the counsellor remains available to each family on an individual basis for emergency consultations in the event of further conflict, and to help the parents interpret, monitor and modify their agreement (Johnston and Roseby, 1997: 233-234).

In terms of effectiveness, Johnston and Roseby (1997: 238-239) discussed two studies of high-conflict families referred from the family courts (with 80 and 60 participants, respectively) who received this treatment. About four fifths reached initial agreement and two thirds were able to keep or renegotiate their own agreements regarding custody and access and stay out of court over a two- to three-year follow-up period. A briefer consultation model has also been developed. A study comparing the longer model with the briefer model found that both were

equally effective at a nine-month follow-up in increasing parental cooperation and resolving disputes. They also suggested that brief, strategic intervention in high-conflict disputes might have greatest effectiveness when paired with vigorous court intervention early in the legal process. Impasse-directed mediation is most likely to benefit those who have experienced traumatic or ambivalent separations or those enmeshed in “tribal warfare” within the larger social network. It may not be sufficient for parents with severe personality disorders. Nor is it appropriate when serious allegations of domestic violence must be investigated.

Other authors have probed the difficulties of mediation in high-conflict situations. Mathis (1998) argued that parents with low differentiation (spouses not adequately differentiated from each other in order to function effectively as individuals) are poor candidates for mediation. Such couples seem to dispute for the sake of disputing. Calling these parents “couples from hell,” Mathis proposed that mediators should be more active with undifferentiated clients than with other types, should take firm control immediately, and should address the condition of poor differentiation first, before trying to settle anything under dispute. Parkinson (2000) argued that for mediating in high-conflict disputes (not involving physical violence or other forms of abuse) the mediator needs to intervene actively and with more careful structuring of sessions. She suggested various tactics the mediator can use in such mediations. The mediator should actively listen to the spouses, using not just words but body language such as a balanced and stable body position. However, she acknowledges as well that the mediator should not feel under any pressure to struggle on indefinitely. If no progress is being made, mediation should end. Vestal (1999) examined mediation and parental alienation syndrome (PAS), a controversial theory, in which children, through the disparaging of one separated spouse, become preoccupied with viewing one parent as good and the other as bad. The bad parent is hated and verbally maligned, whereas the good parent is loved and idealized. Vestal argued that mediators should be trained in how to detect PAS and how to deal with the dishonesty and deception of the parent who has, in effect, brainwashed the child. A mediation model to address suspected PAS in custody disputes must address four areas of concern: the need for mental health expertise; the assurance that the court will take swift judicial action when necessary to discourage stalling and deception by the aligned parent; the need to balance the power discrepancy felt by the rejected parent; and an ongoing process to monitor cooperation with court orders or agreed-upon steps in the mediation process. However, she also argued that mediation should be bypassed in cases of severe PAS.

Spillane-Grieco (2000) offered a case study of the use of therapy with one family experiencing high conflict, actually a father and a daughter, because the mother refused to participate. Using cognitive behaviour family therapy, communication skills and problem-solving skills were emphasized. For example, family members were taught to be specific, to phrase requests in positive terms, to respond directly to criticism instead of cross-complaining, to talk about the future rather than the past, and to listen without interruption. They were encouraged to think about what an event means to another person, to empathize. She concluded that, from this single case study, cognitive behaviour family therapy appears to be an effective treatment for high-conflict families.

The Group Mediation Model Program of Family Court Services of Alameda County Superior Court, California, is designed specifically for parents and their children who are entrenched in

custody and visitation disputes. It has operated since 1989. Mediators with training in group process developed this approach based on the belief that the group dynamic is a fundamental aspect of change. The idea is to allow each group to develop its individual character and then to make use of that dynamic in working with families. It emphasizes placing responsibility on the parents to recognize and find ways to resolve their disputes and overcome their inability to communicate with each other. The goals of the program are to help separated parents understand their children's needs and feelings; to help parents communicate with each other and make more effective joint decisions on behalf of their children; to help parents protect children from inter-parental conflict and from their own negative emotions and behaviour; to reduce excessive and destructive litigation over custody issues; to increase compliance with parenting plans and court orders that provide predictability and security for the children; and to provide peer support for children who are in the middle of their parents' post-separation disputes.

Eight families are seen simultaneously in this group intervention. Generally, families are eligible for the program if they have failed to reach an agreement after a minimum of two attempts in mediation, if the parents are in such disagreement over child rearing that they sabotage or undermine each other's relationship with the children, and if the children show signs of distress in reaction to the parental conflict. Some families are excluded, such as those in which there are allegations of child abuse that require investigation. Group members are required to sign a confidentiality agreement that, for example, guarantees that the information given in the group will not be used in court. The group meets weekly for a total of eight 90-minute sessions. For the first four sessions, co-parents are separated into two concurrently run groups of mixed gender. Also during the first four weeks, children between four and twelve years old meet together in a separate group. For the last four sessions, the parents' groups are combined into one large group and the children's group is disbanded. Bringing the whole family for group counselling sends the message that the problems they are having are everyone's concern and that everyone needs to be part of the solution.

The first session introduces participants to the group process and focusses the parents on the needs of the children. Parents are asked to describe their children in order to show how differentiated or attuned they are to the children. The second and third sessions focus on the parents' impasse and how it affects children. The fourth session prepares the parents for the combined group of the last half of the sessions and helps them clarify the goals they want to accomplish in the remaining sessions. The fifth session is devoted to detailed feedback about the children, with all the parents in one group. The strategy needs to be quite frank about the negative parts of each child's adjustment and behaviour that were brought out in the children's group. In sessions six to eight, the goals are for the co-parents to communicate with one another, solve problems and decide how they are going to do things better in future for the sake of their children. The leaders in these sessions repeatedly ask each pair of parents: "What one thing would you like to change to make things better? What can you do to make things better?"

In 1995 Johnston studied a sample of 39 separating and divorced families at impasse over custody who participated in this group mediation program. Parents and children were assessed at the beginning of the program and again at a nine-month follow-up. Litigation rates, use of family court service and the cost-effectiveness of this group mediation sample were compared to a sample of 49 separating and divorced families at impasse who did not receive the group

intervention. Compared to the baseline, at the nine-month follow-up, both men and women who received the group intervention were substantially more cooperative, expressed less disagreement with one another, and were more likely to have resolved custody disputes. Also, domestic violence between parents diminished to a negligible amount. Litigation rates showed significant differences at follow-up between those experiencing the intervention and the comparison group. For example, new client initiated filings for both custody/visitation and financial matters in the intervention group were reduced to one third the rate of those not receiving the intervention, and court hearings on custody/visitation were reduced to about one half the rate of the comparison group. However, the limitations of this study were pointed out, such as the small size of the sample, and deficiencies in the way subjects were selected for the intervention and comparison groups (Johnston, n.d.: 97-123).

In comparing the Alameda group counselling program and the Los Angeles group educational program discussed earlier, men and women in both groups reported, on average, improvement in each measure of conflict and cooperation used in the studies (Johnston, n.d.). They were significantly more cooperative, expressed less disagreement with each other and were more likely to have resolved the custody disputes with their ex-partners. Also, recent domestic violence between parents diminished over this period, from about two fifths to one tenth of families. The data suggested that, at the nine-month follow-up, participants in the Alameda program may have made more substantial gains than those in the Los Angeles program. On average, women in the Alameda program reported less violence and greater inter-parental cooperation, and men in the Alameda program reported greater parental cooperation, than did men and women in the Los Angeles program. Participants of both programs reported similar improvement in their own (and to a lesser extent their ex-partner's) ability to communicate with the other parent, their ability to protect their children from conflict, their understanding of their children's needs, and their understanding of their own role in the dispute. However, Johnston advised caution about these results. Without a control group and with the random assignment of families to the intervention and non-intervention conditions in both programs, there was no way of knowing for sure if the improvements attained at follow-up were due to the passage of time. With regard to litigation rates, the Alameda group showed significant reductions in new filings (about one third) and significant reductions (about one half) in custody and visitation matters at the follow-up versus the comparison group. In contrast, families who attended the Los Angeles educational program showed no reduction in new filings or court hearings (Johnston, n.d.: 243-252).

In concluding this discussion on mediation, Johnston (n.d.: 255) has the final word. She argues that the procedural organization of services to address high-conflict divorce rests on the principle that family courts should provide the least intrusive intervention into the private lives of families to ensure they will be able to care for their children. If families fail to settle through means such as parenting education and mediation, they are referred to progressively more intrusive educational classes, therapeutic interventions and, where all else fails, to co-parenting arbitration and supervised visitation. However, she asks: "Do some families have to fail successively at each level of service before they get the help they really need?" She proposes that future research on high-conflict divorce could explore a range of services. This range of services is set out below:

A Spectrum of Alternative Dispute Resolution Services for Divorcing Families and Proposed Criteria for When to Use Each Type

First Level

Parenting education after separation and divorce: Workshops, videos, literature, divorce adjustment groups for all parents and children with attention to special needs of never-married parents, ethnic minorities, and parents with infants and young children.

Second Level

Mediation and consultation: For parents in custody and access disputes, including brief issue-focussed mediation, and consultation and counselling with collaborative attorneys and therapists. Children not usually included. Content and process confidential from court.

Success is likely for parents who, with a mediator's help:

- have the capacity to contain emotional distress and focus on children's needs;
- despite anger, can distinguish children's needs apart from their own;
- have some history of parental cooperation;
- can acknowledge the value of the other parent to the child;
- obtain early intervention (in which cases it is likely to be especially effective); and
- are able to design access schedules and custody arrangements according to their individual needs.

Mediation and consultation are *inappropriate* for cases involving serious allegations of abuse, molesting, domestic violence, severe mental illness, substance abuse, etc.

Third Level

Specialized education, psychological interventions and assessments: For parents unable to mediate stable settlements.

Education and skill-building: Classes to explain laws about custody, domestic violence, contempt, psychological effects on children of conflict and violence, parallel and cooperative parenting; exercises to teach effective communication and problemsolving. Does not deal with specific child or family situations, hence confidentiality is irrelevant to court.

Appropriate for families who:

- lack knowledge about laws and procedures of family court;
- are overly dependent on litigation to make parenting decisions; and
- are deficient in communication and problem-solving skills.

Inappropriate when there are:

- serious allegations of child neglect and abuse, domestic violence, substance abuse or mental illness; or
- character disordered parents who tend to use educational information to further strategic advantage in litigation.

Therapeutic or impasse-directed mediation: Counselling about psychological factors that lock parental disputes and about the child's needs prior to mediating issues. Children included. Content confidential; only status report on progress goes to court.

Appropriate for families when:

- emotional issues keep intruding and disrupting mediation/negotiation;
- children show symptoms of distress and parents are unresponsive and preoccupied with their own pain or with the fight;
- parents are experiencing acute reactions to humiliation and loss inherent in divorce;
- there are traumatic separations; or
- there is "tribal warfare" (new partners, extended kin, and professionals involved in dispute).

Inappropriate or insufficient for:

- serious allegations and substantiated abuse and violence; or
- serious parental character pathology, substance abuse and mental illness.

Custody evaluation: Court appoints or parties stipulate child-focused evaluation, home-school study to investigate allegations. Children and collaterals included. Written report and recommendations to court.

Appropriate for families when there are:

- serious allegations of abuse, molesting, domestic violence, severe mental illness, substance abuse; and
- if allegations are substantiated, in which case the court must impose and monitor a protective custody and access plan.

Inappropriate:

- as a routine response to failed mediation and negotiation (consider a confidential child-focussed assessment instead); and
- when the facts are not in dispute (consider ongoing parenting and co-parenting help instead).

Fourth Level

Co-parenting counselling and arbitration: For parents who continue in high conflict despite mediated or court-ordered settlement. Variously called special master, wise person, custody commissioner, med-arb, this professional is appointed by stipulation of the parties or an order of the court to manage ongoing conflict, help co-ordinate parenting, make timely and flexible decisions, and case-manage with other professionals involved. Includes access to children or their therapists. Scope of arbitration authority is defined by stipulation or court order. Usually not confidential from court.

Appropriate:

- when entrenched custody conflicts and chronic litigation emanate from serious psychopathology, personality disorders and parenting deficits;
- to monitor potentially abusive situations;
- to support a parent who has an intermittent mental illness;
- to make timely decisions for infants and very young children; and
- to coordinate the care of a child with special needs.

Inappropriate for:

- a family crisis when problems are acute and temporary;
- when custody and access arrangements have never been established in the first place; and

- when there is “tribal warfare”, especially when professionals are disputing about the family.

Supervised visitation and monitored exchange: To provide protected parent-child contact and safe transfer of child by order of the court or stipulation of parties.

Appropriate when there is a high risk to the child or victim parent because of:

- ongoing high conflict and domestic violence;
- parental substance abuse;
- concerns about physical abuse, neglect or molesting of the child;
- a threat of or actual child abduction;
- serious mental illness of a parent; and
- as a temporary measure while investigation is proceeding.

Inappropriate:

- as a substitute for child assessment/custody evaluation by a mental health professional;
- as a substitute for therapy for the child or parent-child relationship;
- to quiet the fears of an accusing parent when allegations are unfounded; and
- when the child is chronically distressed and refuses parental contact.

Other specialized services needed to help foster parent-child relationships:

- reconnection/reunification supervision for non-custodial parents who have long been absent or never been involved with their children;
- parenting and co-parenting assistance in domestic violence families;
- therapeutic supervision when there has been a major violation of the child’s trust in the non-custodial parent; and
- protocols between court and professionals for the management of parent alienation cases.

The above services in the fourth level need to be closely coordinated with interventions provided by other juvenile and criminal court-related services (such as child protective services and probation services) and with community-based programs (such as mental health counselling,

substance abuse monitoring and treatment, batterers treatment programs, and domestic violence victims' advocacy, etc.) (Johnston, n.d.: 257-260).

5.5 THE CHILD'S REPRESENTATIVE

Many jurisdictions, for example Australia and California, have statutory provisions whereby a court may appoint a lawyer for the child or children. A recent conference report and action plan on high-conflict custody cases recommended that, as a general rule, a child should have a lawyer or representative who is independent of the parents and their lawyers. In some limited circumstances, a representative for the child would not be necessary, perhaps in cases involving very young children when a judge believes the child's interests are being properly considered by the parties. The report/action plan recommended that jurisdictions should define and describe the roles played by different legal representatives of children, so as to distinguish, for example, between a guardian *ad litem* and the child's lawyer. Jurisdictions should also adopt appointment criteria and performance standards for children's representatives (American Bar Association, 2000: 6-7).

5.6 CONCLUSION

In cases of high conflict, what community resources should be used to aid in custody disputes? Stewart (2001: 46-47) proposed a division of these resources according to his high/low conflict typology. For the external factors he placed in the high conflict category, families would be referred to the following community resources: mandated services to monitor child safety; counselling and therapy to help with issues of anger and loss; addictions services; and supervised access and exchange programs. Families who fall within the low conflict typology would be referred to mediation services, individual and group support counselling for parents and children, and parent education programs.

While there is some limited evidence that parental education classes and mediation classes may be helpful in high-conflict situations, the evidence is far from conclusive given, for example, the small samples used in the studies. Moreover, the kind of mediation prescribed by experts, such as Johnston, for high-conflict situations is not regular mediation, but a hybrid of therapy and mediation. In addition, mental health professionals who are not well trained or who allow themselves to become drawn into the conflict can become sources of conflict. To avoid this problem, the recent conference report and action plan for high-conflict custody cases proposed that mental health professionals, in adopting a proactive approach to this problem, should ensure:

- that the legal community and the court are aware of the ethical rules and standards promulgated by their mental health professional organizations relating to child custody evaluations and other custody issues;
- that the mental health community respects the role boundaries that distinguish evaluator, therapist, parent coordinator, mediator, arbitrator and other professionals involved in separation or divorce cases; and

- that mental health professionals collaborate with other service providers to consider ways to conserve the family's available resources and to bring about the best outcome for the family and child.

It also proposed methods to improve child custody evaluations and to ensure the confidentiality of treatment given the parents or child (American Bar Association, 2000: 3-5).

6. FOREIGN JURISDICTIONS

6.1 UNITED STATES

6.1.1 Idaho

Idaho appears to be the American state that has most fully addressed the problem of high-conflict divorce. In 1996, the Idaho Bench/Bar Committee to Protect Children of High-conflict divorce published a report to the Idaho Supreme Court and the Idaho State Bar Family Law Section (Mauzerall et al., 1997). The Bench/Bar Committee had been created and charged by the Idaho Supreme Court to “formulate concrete recommendations for financially feasible, practical and judicially relevant ways for judges to deal with high-conflict divorces involving children.” Subsequently, in 1998, a 222-page “Benchbook” on high-conflict divorce, not counting appendices, was published as a tool for judges. The chapters of this Benchbook discuss the impact of high conflict on children; the Idaho Protocol for judges to protect children of high-conflict divorce; the current law on custody and visitation decisions in high-conflict cases; special custody considerations in domestic violence cases; evidentiary issues in high-conflict custody and visitation cases; court practices and procedures when issuing custody orders in high-conflict cases; enforcement of custody and visitation orders; mediation, evaluation and special masters; interstate and international custody issues; and other custody issues. Five appendices provide samples of a parenting plan agreement, an order appointing a guardian *ad litem*, the findings of a special master, and hypothetical cases for group discussion (Brandt, 1998).

The Benchbook sets out basic principles for protecting children in high-conflict divorce. Among these are the following (Brandt, 1998: 7-15):

(B) Experience demonstrates and research documents that divorce is frequently harmful to children. The harm to children is exacerbated by high conflict. In the cases of divorce involving children, neither parental conflict nor the judicial process should cause additional harm to children.

(C) The level and intensity of parental conflict is the most potent factor in children’s post-divorce adjustment. Even expressions of anger between parents negatively affect children’s emotions and behaviors. Research findings indicate that children exposed to anger showed increased negative behaviors and effect. Exposure to conflict led to more aggressive responses in boys and more withdrawal in girls.

(D) Children of high-conflict divorce need protection from the potentially harmful effects of the adversarial approach used in the judicial system to resolve disputes between parents. The judicial system, lawyers, mental health professionals, schools and community services must collaborate to assist parents in developing a plan for ongoing caretaking of children.

(G) A parenting plan will serve the best interests of the children only if it will minimize conflict, maximize time with each parent where appropriate, and meet the child's developmental needs. Unresolved conflict hurts children, therefore, parents should be encouraged to work out their own parenting plans.

(J) Providing court-connected services is essential to protecting children of high-conflict divorce.

This Benchbook has, as its centrepiece, a Protocol for judges to protect the children of high-conflict divorce. This Protocol defines a high-conflict case as one:

... on a continuum where parental conflict is anywhere from (1) verbal abuse with no threat or history of physical violence, threatening to limit access of other parent, threats of litigation, ongoing attempts to form a coalition with child against other parent around isolated issues to (2) endangerment by physical or sexual abuse, drug or alcohol abuse, severe psychological pathology (Brandt, 1998: 33).

Markers for high-conflict divorce include petitions for temporary custody; protection petitions, including child protection and domestic violence orders; family dysfunction, such as substance abuse; changes in attorneys; a child's refusal to visit a parent; and a parent's inability to separate a child's needs from the parent's needs. Another marker is divorce cases involving children from birth to age three, who warrant special scrutiny because of the extreme risk of psychological damage to these children of divorce (Brandt, 1998: 33).

The Protocol also has other elements. It addresses the need for public information on parental conflict. In this regard, judges need to take a leadership role in providing such information on high-conflict divorce to engage public interest. It also addresses the need for parent education and family court services assessment. For example, all parents filing for divorce attend a Divorce Parenting Orientation that includes information about the impact of divorce on children. A standard curriculum for facilitators, developed by the Idaho Supreme Court Family ADR (Alternative Dispute Resolution) Committee, assures that parents throughout the state receive critical information about divorce and parenting. After the Divorce Parenting Orientation, parents unable to develop a parenting plan need to be ordered into mediation or be referred by the court for an ADR assessment (Brandt, 1998: 34).

As well, the Protocol sets out guidelines for determining custody and visitation in violent parent cases. These in turn incorporate the protocol developed by Janet Johnston for high-conflict cases involving domestic violence in California. One of these guidelines is that joint legal custody is generally not appropriate when there is ongoing high conflict and potential for violence between parents, since joint legal custody usually requires considerable ability to work cooperatively in joint decision-making. Legal custody orders that keep tension and hostilities high or that maintain the risk of further violence are contrary to the spirit and intent of a joint legal custody arrangement. A general guideline on access/visitation argues that a child's exposure to parental conflict should be limited. All arrangements for contact between a child and a parent should be carefully structured to limit the child's exposure to conflict between the parents and to ensure the safety of all present. Also, frequent transitions and substantial amounts of time with both parents

may not be advisable. There are also specific recommendations on supervised access and the assessment, treatment and representation of children (Brandt, 1998: 35-44).

The Protocol addresses alternative dispute resolution options for cases where parental violence is not present. For example, each judicial district must develop appropriate alternative dispute resolution options, as well as a core of mediators with specific training in high-conflict divorce mediation (Brandt, 1998: 44).

The Protocol addresses adjudication issues. As regards the scheduling/trial setting for high-conflict cases, the case needs to be given the earliest possible setting, in order to bring some closure to the legal battle. However, sufficient time needs to be allowed to permit the parties to exhaust ADR possibilities before the trial. If domestic violence or other considerations make ADR inappropriate, the trial should be held at the earliest possible opportunity. Generally, no custody/visitation hearings will be held before the moving party has attended the court-ordered Divorce Parenting Workshop or “divorce orientation” or “mediation class.” A divorce parenting orientation is available weekly to parents in each district. The order to attend the Divorce Parenting Workshop advises the parties that they will be expected to submit a parenting plan after the workshop (Brandt, 1998: 44).

There are two recommended models of court scheduling to protect children from high-conflict divorce, which recognize rural and urban court differences. They are as follows.

- (1) At the time of filing, parties are referred to the Divorce Parenting Workshop (available weekly), and within 30 days following the workshop they must file a temporary parenting plan. Parents must then file a final Parenting Plan within 60 days of filing the temporary one. If filing deadlines are missed, parties are ordered to case assessment or some form of ADR, and, if necessary, adjudication. Under this model, any trial setting would be 120-150 days following the date of the case filing.
- (2) Upon the filing of the Answer or other pleadings indicating that custody issues are raised, an order to file a Parenting Plan within 30 days is entered. If the Parenting Plan is not filed, the file is pulled and given to the judge, who orders a Status Conference (may be held by telephone). If the judge determines during the Status Conference that the children need protection and it is a high conflict case, the case is placed on the “fast track” and a trial is scheduled within 90 to 100 days (Brandt, 1998: 44-45).

Pre-trial orders and pre-trial conference issues are also addressed. In a high-conflict custody adjudication, the court should consider whether the children should have independent representation, either by a guardian *ad litem* or by separate counsel. The decision about which to appoint depends upon the decision making capacity of the child. The parties are encouraged to stipulate the appointment of an expert to perform a custody evaluation (including a psychological assessment of the parties and a home study), in lieu of hiring separate experts for each side. Even if other forms of alternative dispute resolution have failed or have been deemed inappropriate due to concerns about domestic violence, the presiding judge may consider

referring the case to another judge for a settlement conference focussing on the issue of custody. Also, in order to shorten the trial, the court may consider appointing a special master to conduct fact-finding on some or all of the issues (Brandt, 1998: 45-46).

At the trial or hearing itself, the judge should set the tone at the outset. He or she should make it clear to the parties and the attorneys that they are to present their case in a manner that reduces the level of conflict and hostility between the parties, and treats each parent with respect and courtesy. The judge needs to manage the trial to assure completion within the time allotted, in order to avoid having to finish it at a later date. If the judge doubts that the parties will complete their proof within the time allotted, he or she should limit the time each side has to present its case (charging cross-examination time to the side conducting the cross) (Brandt, 1998: 46).

The Protocol also sets out guidance for shared-parenting plans in high-conflict divorce cases. As a general rule, the higher the level of conflict, the more detailed the parenting plan should be (Brandt, 1998: 47-48).³

6.1.2 Oregon

The Oregon Judicial Department has produced an excellent overview of efforts in the United States to successfully intervene in high-conflict cases (Sydlik and Phalan, 1999).⁴

Under Oregon's family law statute, after the commencement of a suit for marital dissolution and before a divorce decree is granted, a court may provide for the care, custody, support and maintenance of minor children and for parenting time rights of the parent who does not have custody of the children. The policy of the State of Oregon regarding parenting is to: (1) assure minor children of frequent and continuing contact with parents who have shown the ability to act in their best interests; (2) encourage such parents to share in the rights and responsibilities of raising their children after they have separated or dissolved their marriage; (3) encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals if necessary; (4) grant parents and courts the widest discretion in developing a parenting plan; and (5) consider the interests of the child and safety of the parties in developing a parenting plan (*Oregon Revised Statutes* [O.R.S.], para. 107.095(b); s. 107.101).

Generally, in any proceeding to establish a judgement providing for parenting time with a child, a parenting plan must be developed and filed with the court. There are two types of parenting plan: general or detailed. A general parenting plan may include an outline of how parental responsibilities and parenting time may be shared, and may allow the parents to develop a more detailed agreement on an informal basis. However, it must set forth the minimum amount of parenting time and access a non-custodial parent is entitled to have. A detailed parenting plan may include, but is not limited to, provisions about the residential schedule; holiday, birthday and vacation planning; weekends (including holidays, and school in-service days preceding or following weekends); decision making and responsibility; information sharing and access; relocation of parents; telephone access; transportation; and methods for resolving disputes.

³ The specifics of a parenting plan in high conflict cases under this Protocol have already been discussed. See section on parenting plans as a form of intervention.

⁴ The author highly recommends this paper.

When a parenting plan has been developed, the court must review it. If approved, the plan is incorporated into the court's final order. When so incorporated, the parenting plan determines parenting time rights (O.R.S., s. 107.102, para. 107.105(1)(b)).

If the parents have been unable to develop a parenting plan, the court must develop the plan in the best interests of the child, while ensuring that the non-custodial parent has sufficient access to the child to allow appropriate quality parenting time and assuring the safety of all parties. The court may deny parenting time to the non-custodial parent only if the court finds that it would endanger the health or safety of the child. The court must recognize the value to the child of close contact with both parents, and encourage, when practical, joint responsibility for the welfare of such children as well as extensive contact between the minor children of the divided marriage and the parties. If the court awards parenting time to a non-custodial parent who has committed abuse, the court must make adequate provision for the safety of the child and the other parent (O.R.S., para. 107.105(b)).

In determining custody of a minor child, the court must give primary consideration to the best interests and welfare of the child. In determining the child's best interests, the court must consider several relevant factors, including the interest of the parties in, and attitude toward, the child; the abuse of one parent by the other; and the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of abusive behaviour against the parent or a child, and that a continuing relationship with the other parent would endanger the health or safety of either parent or child. If a parent has committed abuse, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse. In determining custody of a minor child, the court must consider the conduct, marital status, income, social environment or lifestyle of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child. No preference in custody is given either to the mother or the father. Following entry of a judgement, a court may enter *ex parte* a temporary order providing for custody of, or parenting time with, the child only if there is clear and convincing evidence that the child is in immediate danger (O.R.S., s. 107.137, s. 107.139).

Generally, even if one parent is ordered sole custody of a minor child, the other parent has the authority to: (a) inspect and receive school records and to consult with school staff concerning the child's welfare and education; (b) inspect and receive governmental agency and law enforcement records concerning the child to the same extent as the custodial parent may inspect and receive such records; (c) consult with any person who may provide care or treatment for the child, and to inspect and receive the child's medical, dental and psychological records; (d) authorize emergency medical, dental, psychological, psychiatric or other health care for the child if the custodial parent is unavailable; or (e) apply to be the child's conservator, guardian *ad litem* or both (O.R.S., s. 107.149, s. 107.154).

In any court order or decree granting custody of a minor child and parenting time or visitation rights relating to the child, the court must generally include in its order a provision requiring that

neither parent may move to a residence more than 60 miles further distant from the other parent without giving the other parent reasonable notice of the change of residence (O.R.S., s. 107.159).

The courts cannot order joint custody unless both parties agree to the order. When parents have agreed to joint custody in an order or a decree, the court may not overrule that agreement by ordering sole custody to one parent. Modifying a joint custody order requires showing changed circumstances, such that the modification is in the best interests of the child. Inability or unwillingness to continue to cooperate shall constitute a change of circumstances sufficient to modify a joint custody order. When one parent requests the court to grant joint custody of the minor children of the parties, and the other parent objects to joint custody, the court must direct the parties to participate in mediation in an effort to resolve their differences concerning custody. The court may order the parents' participation in a mediation program established by the court or as conducted by any mediator approved by the court. If, after 90 days, the parties do not resolve their differences, the court determines custody (O.R.S., s. 107.169, s. 107.179).

The presiding judge of each judicial district must establish an expedited parenting time enforcement procedure that may or may not include a requirement for mediation. The procedure must be easy to understand and initiate. Generally, the court shall conduct a hearing no later than 45 days after the filing of a motion seeking enforcement of a parenting time order. Remedies that the court may order include: (a) modifying the provisions of the parenting plan by, for example, setting out a detailed parenting time schedule; and (b) ordering either or both parties to attend counselling or educational sessions that focus on the impact of violating of the parenting plan on the children (O.R.S., s. 107.434).

The statute also addresses cases of abuse of children and former spouses, among others. "Abuse" is defined as: (a) attempting to cause or intentionally, knowingly or recklessly causing bodily injury; (b) intentionally, knowingly or recklessly placing another in fear of imminent bodily injury; (c) causing another to engage in involuntary sexual relations by force or threat of force.

Any person who has been the victim of abuse within the preceding 180 days may petition the circuit court for relief, if the person is in imminent danger of further abuse from the abuser. Imminent danger includes but is not limited to situations in which the abuser has recently threatened the petitioner with additional bodily harm. If this is proved, the court must, if requested by the petitioner, make an order that can include that (a) temporary custody of the children of the parties be awarded to the petitioner; (b) the respondent be required to move from the petitioner's residence; (c) the abuser be restrained from intimidating, molesting, interfering with or menacing the petitioner, or attempting to do so; and (d) the abuser have no contact with the petitioner in person, by telephone, or by mail except as described in the parenting time ordered. If the court awards parenting time to a parent who committed abuse, the court must adequately provide for the safety of the child and the petitioner. The order of the court may include that:

- (a) exchange of a child between parents must occur at a protected location;
- (b) parenting time be supervised by another person or agency;
- (c) the abuser be required to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or any other counseling program designated by the court as a condition of the parenting time;
- (d) the abuser not possess or consume alcohol or controlled substances during the parenting time and for 24 hours preceding the parenting time;
- (e) the abuser pay all or a portion of the cost of supervised parenting time, and any program designated by the court as a condition of parenting time; and
- (f) no overnight parenting time occur (O.R.S., ss. 107.700-107.718).

Finally, Oregon also requires that each judicial district must provide a mediation orientation session for all parties in cases when child custody, parenting time or visitation are in dispute. The orientation session should be designed to make the parties aware of what mediation is, the mediation options available to them, and the advantages and disadvantages of each dispute resolution method. In addition, each judicial district must provide mediation in any case in which child custody, parenting time and visitation are in dispute. Each judicial district must also have developed a plan that addresses domestic violence issues and other power imbalance issues in the context of mediation orientation sessions and the mediation of any issue in accordance with guidelines that include: (a) recognition by all mediators that mediation is not an appropriate process for all cases and that agreement is not necessarily the appropriate outcome of all mediation; and (b) the implementation of a screening and ongoing evaluation of domestic violence issues for all mediation cases (O.R.S., s. 107.755).

Oregon has developed a manual of guidelines for developing domestic violence protocols for mediation. This manual includes a description of domestic violence; examples of other power imbalances that may affect the parties' ability to engage in an informed and fair process; the applicable statutory framework; an outline for developing a domestic violence plan and protocol; resources, including organizations to contact and articles to read; and sample protocols and forms used by various courts throughout the state. Each plan should have most of the following components: a policy/mission statement, a description of mediation techniques that are available, screening procedures, criteria for deciding whether to mediate, procedures for the parties to opt out of or terminate the mediation process, a statement of ground rules covering the parties' conduct during mediation (such that parties are to refrain from hurtful language), a safety plan to assure the safety of all concerned, and continuing education for mediators (Oregon Judicial Department, 1999).

In the context of high-conflict divorce, Oregon has a local and state group looking into the topic of high-conflict parenting plans, including sample forms that will hopefully and eventually be on the Oregon Judicial Department Web-site.⁵

⁵ E-mail communication from Bealisa Sydlik, Family Law Senior Policy Analyst, Oregon Judicial Department, October 25, 2000.

6.1.3 Washington

Washington State's *Parenting Act of 1987* dispenses with the concepts of custody and access and focusses instead on decision-making and residential time (*Parenting Act of 1987, Revised Code of Washington*, c. 26.09). The Act begins by asserting that parents have the responsibility to make decisions and perform other necessary functions necessary for the care and growth of their minor children. The best interests of the child is the standard by which the court determines and allocates the parties' fundamental responsibilities. The best interests of the child are ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental or emotional harm. Mediation of the contested issues may be set before, or concurrently with, the settling of the matter for hearing. Mediation proceedings are confidential, and the mediator may interview the children if the mediator deems it necessary (*Parenting Act*, ss. 26.09.002, 26.09.015).

As part of a temporary maintenance or support motion, either party may request a domestic violence protection order or an anti-harassment protection order provided by statute on a temporary basis. The court may appoint an attorney to represent the interests of a children with respect to the provision of a parenting plan in an action for dissolution of a marriage or legal separation (*Parenting Act*, ss. 26.09.060, 26.09.110).

If a party fails to comply with a decree or a temporary order of injunction, the obligation of a party to make support payments or to permit contact with children is not suspended. An attempt by a parent, in either the negotiation or performance of a parenting plan, to refuse to perform the duties set out in the parenting plan or to hinder the other parent in performing his or her duties under the plan shall be punished by the court as a contempt of court. The court may order, in part, that the non-complying parent provide the other parent additional time with the child; pay to the other parent all court costs and reasonable attorney's fees incurred as a result of the non-compliance; and pay a civil fine of \$100 to the other parent. A parent found guilty of such contempt, if able to comply with the parenting plan but unwilling to comply, may be jailed for a limited period of time until the order is complied with. Each party is required to file a proposed permanent parenting plan with the court and attach a verified statement that the proposed plan is made in good faith. Where mandatory settlement conferences are provided under court rules, the parents must attend a mandatory settlement conference (*Parenting Act*, ss. 26.09.160, 26.09.18).

The statute sets out the objectives of the permanent parenting plan as follows:

- (a) provide for the child's physical care;
- (b) maintain the child's emotional stability;
- (c) provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
- (d) set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria set out in RCW 26.09.187 and 26.09.191 (see below);

- (e) encourage the parents to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
- (f) to otherwise protect the best interests the child (*Parenting Act*, s. 26.09.184).

The permanent parenting plan must contain provisions for the resolution of future disputes between the parents, the allocation of decision-making authority, and the residency of the child. A process for resolving disputes, other than court action, must be provided unless precluded or limited by *Revised Code of Washington*, section 26.09.187 or section 26.09.191 (the latter section is discussed below). A dispute resolution process may include counselling, mediation, arbitration by a specific individual or agency, or court action. In the dispute resolution process, generally the parents must use the designated process to resolve disputes relating to the plan, unless an emergency exists. A written record must be prepared of any agreement reached in counselling or mediation and of each arbitration award and a copy provided to each party. If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorney's fees and financial sanctions to the prevailing parent.

The parties have a right of review from the dispute resolution process to the Superior Court. The plan must allocate decision making authority to one or both parties regarding the children's education, health care, and religious upbringing. Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent. Where mutual decision making is designated but cannot be achieved, the parties must make an effort in good faith to resolve the issue through the dispute resolution process. The plan must include a residential schedule that designates in which parent's home each minor child shall reside on given days of the year, including holidays, birthdays and special occasions, consistent with the criteria in RCW sections 26.09.187 and 26.09.191 (*Parenting Act*, s. 26.09.184).

The court must not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW section 26.09.191 applies (again, see below for a discussion of this section), or when it finds that either parent is unable to afford the cost of the dispute resolution process. Otherwise, in designating a dispute resolution process, the court must consider all relevant factors, including differences between the parents that would substantially inhibit their effective participation in the process; the parents' wishes or agreements and whether any such agreements were made voluntarily or knowingly; and differences in the parents' financial circumstances that may affect their ability to participate fully in a dispute resolution process (*Parenting Act*, s. 26.09.187).

Any court rules adopted for the implementation of parenting seminars must incorporate certain provisions. In no case should opposing parties be required to attend seminars together. Upon a showing of domestic violence or abuse, which would not require mutual decision making under RCW section 26.09.191 (see below), or upon a showing that a parent's attendance at the seminar is not in the child's best interest, the court must either waive the requirement of completion of the seminar or provide an alternative, voluntary parenting seminar for battered spouses. The court may also waive the seminar for good cause (*Parenting Act*, s. 26.12.172).

The court must order sole decision making authority to one parent when it finds that a limitation is placed on the other parent's decision making authority by RCW section 26.09.191; that both parents are opposed to mutual decision making; or that one parent is opposed to mutual decision making and this opposition is reasonable, based on specific criteria set out in the statute. These criteria include the existence of a limitation under RCW section 26.09.191; the history of participation of each parent in decision-making; and whether the parents have a demonstrated ability and desire to cooperate with each other in decision-making (*Parenting Act*, s. 26.09.187).

The court must make residential provisions for each child that encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's economic and social circumstances. The child's residential schedule must be consistent with RCW section 26.09.191. Otherwise, the court must consider several factors. The factor with the greatest weight is the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions related to the daily needs of the child. Other factors include the wishes of the parent and the wishes of the child, if the child is sufficiently mature to express reasoned and independent preferences about the residential schedule, and the emotional and developmental needs of the child. The court may order that a child frequently alternate his or her residence between the parents' households for brief and substantially equal intervals of time only in certain circumstances, for example, if the parents have a satisfactory history of cooperation and shared performance of parenting functions, and are close enough geographically to be able to share these functions.

High-conflict situations are dealt with by RCW section 26.09.191. The permanent parenting plan must not require mutual decision making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in willful abandonment that continues for an extended period of time or has substantially refused to perform parenting functions; has physically, sexually or emotionally abused a child; or has a history of acts of domestic violence (defined by statute) or of assault or sexual assault which caused grievous bodily harm or the fear of such harm. The parent's residential time with the child must also be limited if it is found that the parent has engaged in the conduct described immediately above or has been convicted as an adult of a sex offence. Also, the parent's residential schedule must be limited if the parent is residing with a person who has engaged in this conduct. Generally, a presumption is created that a parent who has committed, or resides with a person who has committed, a sex offence places the child at risk of abuse or harm when the parent exercises residential time with the child. There are various provisions detailing how the parent may rebut this presumption. There are also provisions that set out in detail when the court may order supervised or unsupervised contact with the child. For example, a court must not order unsupervised contact between an offending parent and a child of the offending parent who was abused by that parent (*Parenting Act*, s. 26.09.191).

In addition, RCW section 26.09.191 provides that the court may preclude or limit any provisions of a parenting plan if any of several factors exist, including a parent's neglect or substantial nonperformance of parenting functions; a long-term emotional or physical impairment that interferes with the parent's performance of parenting duties; a long-term impairment resulting from drug, alcohol or other abuse that interferes with the performance of parenting functions; the

absence or substantial impairment of emotional ties between the parent and the child; “the abusive use of conflict by the parent which creates the danger of serious damage to the child’s psychological development”; and a parent withholding from the other parent access to the child for a protracted period without good cause.

The court may interview the child in chambers to ascertain the child’s wishes as to his or her residential schedule. The court may permit counsel to be present at the interview (*Parenting Act*, s. 26.09.210).

In 1999, the *Washington Parenting Act Study* was published (Lye, 1999). The goal of the study was to gather information about how parents seeking a dissolution of the marriage made arrangements for parenting, and how those arrangements operated after the marriage was dissolved. Parts of the study were based on focus groups with parents who had a court-approved parenting plan and interviews with professionals (e.g. judges, lawyers and psychologists) who had experience and expertise with the *Parenting Act*. The findings from the focus groups of parents included that parents found the civil justice system hard to access and utilize; that few parents exercise joint decision making; that many parents follow their parenting plans loosely; that parents are profoundly frustrated when an ex-spouse is uncooperative; and that domestic violence survivors find the civil justice system especially difficult to access and use, and often have parenting plans that they believe compromise their own and their children’s safety. The findings from the interviews with professionals included that they strongly supported the *Parenting Act*; that the process of getting a finalized parenting plan is especially difficult for parents, especially those who are *pro se* litigants (those who represent themselves); that joint decision-making does not work well; that mediation is useful for formulating parenting plans and dispute resolution, except in cases involving domestic violence; and that the *Parenting Act* fails to adequately protect survivors of domestic violence. A representative sample of about 400 approved final parenting plans found that three quarters of plans specify joint decision-making; that 45 percent of the plans provided for a primary residential parent and an every other weekend schedule of alternate residential time for the other parent; that only a handful of plans provide for more alternate residential time than every other weekend, including 50/50 schedules; and that nearly one in every five plans has no residential schedule, leaving that to be agreed between parents or between the parent and child (Lye, 1999: i-ii).

As well, no single post-divorce residential schedule was demonstrated to be most beneficial for children. So long as there are not high levels of parental conflict, there are no significant disadvantages to children of shared or 50/50 schedules. Neither are there significant advantages to children of shared or 50/50 residential schedules. Parental conflict is a major source of reduced well-being among children of divorce, and shared or 50/50 residential schedules have adverse consequences for children in high-conflict situations. Shared or 50/50 residential schedules and frequent contact between the child and the nonresidential parent do not necessarily promote parental cooperation. On the other hand, increased nonresidential parents’ involvement in their children’s lives may enhance child well-being by improving the economic support of children (Lye, 1999: iii).

This study concluded that the *Parenting Act* works well for most families in Washington State, that the Act’s policies are well supported, and that it is consistent with the findings of scholarly

research about post-divorce parenting and child well-being. However, the study suggested several areas in need of improvement. Among these were that parents need more information about, for example, good language to use on the parenting plan (many parents found the language in the parenting plan form confusing), about creative residential schedules, about what mediation means, and about which parents are or are not good candidates for mediation. The study also argued that the routine use of joint decision-making in parenting plans should be reconsidered:

Most parents do not adhere to the joint decision-making provisions in their plans, and most professionals believe these provisions promote conflict. Parents should be provided with more information about the intent and meaning of joint decision-making and should be encouraged to formulate individualized plans for decision-making rather than routinely adopting joint decision-making. Joint decision-making should never be approved for families with a history of domestic violence (Lye, 1999: v).

The study also recommended, in part, that the monitoring and enforcement of the parenting plan provisions be strengthened. For example, at the time the parenting plan is finalized, parents should be provided with clear information on how to report violations of the parenting plan and how to seek redress. The study also concluded, from the comments of the majority of the parents and professionals, that parenting classes are extremely valuable. However, it suggested improvements. For example, survivors of domestic violence should not be required to attend parenting classes, since they may attend such classes and find their abuser present. Specialized information should be made available to domestic violence survivors (Lye, 1999: vi-vii).

In the wake of this study, a Task Group of the Domestic Relations Work Group of the Washington State Courts was charged to recommend specific legislation and/or court rules to respond to the study. As regards parenting plan forms, the Task Group recommended that the parenting plan forms be revised. Recommendations in this area included enhancing the graphic design of the forms; providing comprehensive directions for completing the form in simple language; defining all terms in the forms, such as “joint decision making” and “custodian”; identifying those sections mandated by statute and which are optional; including a clear mechanism for dispute resolution, a review mechanism and an explanation of how to modify the plan; and providing parents, at the time the plan is finalized, with clear information on how to report violations of the parenting plan and how to seek redress.

Concerning the substance of the residential schedules, it was recommended that the circumstances be clarified in the form instructions regarding when 50/50 residential schedules are permitted. The Task Force stated clearly that 50/50 schedules should never be allowed in families with high conflict or a history of domestic violence. The Superior Court Judges’ Association should encourage each county to provide parents with information about agencies and individuals who can supervise alternate residential time and exchanges with children. Concerning alternative dispute resolution, the Task Group said that parents, attorneys, judges and facilitators need better information on the types of dispute resolution, when to use dispute resolution, and how to start the process.

With increasing caseloads, intensive early case management in family law cases could reduce the time required by the court to resolve high-conflict issues later. The Task Group recommended,

in part, that alternative dispute resolution be developed for parents that would clearly define counselling, mediation and arbitration, and would provide step-by-step information about when and how to invoke the dispute resolution mechanism in parenting plan disputes. It also recommended that early intervention regarding parenting issues should be piloted to obtain early interventions of high-conflict families, early parenting evaluations, early education about parenting during and after dissolution, and options for the development of parenting plans. Regarding domestic violence, the Task Group recommended, in part, that each Superior Court distribute an information packet for domestic violence victims, explaining their right not to participate in programs that may be dangerous to them, such as parenting classes and mediation with their abuser, and explaining how to opt out of those programs.

Concerning the issue of education for judges, attorneys and parents/litigants, the Task Group noted that parenting plans are extremely valuable and recommended that they be enhanced. The recommendations here included that the Superior Court Judges' Association should recommend that each Superior Court provide parenting classes in a variety of formats, such as at the courthouse or other locations such as community centers, and at times (e.g. evenings and weekends) more convenient for parents, and in different formats such as videotapes, DVD and the Internet. The classes should address the effects of divorce on the child and the role of the divorced parent. The Task Group also recommended the development of training curricula and continuing education for all professionals who work with children and parents during the dissolution of a marriage. These professionals include judges, attorneys, courthouse facilitators, guardians *ad litem*, parenting evaluators, parenting class instructors, mediators and evaluators (Washington State, 2000).

6.1.4 California

The California *Family Code* establishes the state's policy to assure that the health, safety and welfare of children must be the court's primary concern in determining the best interests of children when making orders regarding the physical or legal custody or visitation of children. It finds that child abuse or domestic violence in a household where a child resides is detrimental to the child. And it is the public policy of the state to assure that children have frequent and continuing contact with both parents after the parents have separated or the marriage is dissolved, except where it would not be in the best interest of the child (*Family Code*, s. 3020).

The court may order supervised visitation or limit a parent's custody or visitation if the court finds substantial evidence that the parent, with intent to interfere with the other parent's lawful contact with the child, made a report of sexual abuse that he or she knew was false at the time it was made (*Family Code*, s. 3027.5).

No person is to be granted physical or legal custody of, or unsupervised visitation with, a child if the person is required to be registered as a sex offender under the California *Penal Code*, among other offences, where the victim was a minor. Whenever custody or visitation is granted to a parent in a case in which domestic violence is alleged and a protective order or other restraining order has been issued, the custody or visitation order shall specify the time, day, place and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members (*Family Code*, ss. 3030-3031).

Custody should be granted, in part, in the following order of preference according to the best interest of the child: to both parents jointly, or to either parent. In making an order granting custody to either parent, the court must consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the non-custodial parent. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order. No presumption is created in favour of joint physical custody, joint legal custody or sole custody. The court and the family are allowed the widest discretion to choose a parenting plan that is in the best interest of the child (*Family Code*, s. 3040).

If the court finds that a party seeking custody of a child has perpetrated domestic violence against the other parent, the child, or the child's siblings within the previous five years, there is a rebuttable presumption that an award of custody of any kind to that party is detrimental to the best interest of the child. In determining if this presumption is overcome, the court must consider several factors, including whether the perpetrator has successfully completed a parenting class or a program of alcohol or drug abuse counselling, if considered to be appropriate by the court (*Family Code*, s. 3044).

If the court determines that it would be in the best interests of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding. If court-appointed counsel represents a child, the court must consider any statement of issues and contentions of the child's counsel at every hearing where the court makes a judicial determination of custody and visitation (*Family Code*, ss. 3150-3151).

The court must grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. Where visitation is ordered in a case when domestic violence is alleged or a restraining order has been issued, the visitation order must specify the time, day, place and manner of transfer of the child, so as to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members. If a protective order under Section 6218 has been directed to a parent, the court must consider whether it is in the best interests of the child to limit the parent's visitation to situations where a specified third party is present or requires that the visitation to be denied (*Family Code*, s. 3100).

In any contested proceeding involving child custody or visitation rights, the court may appoint an evaluator to conduct a child custody evaluation, in cases when the court determines that it is in the best interest of the child to do so. A court-ordered child custody evaluator must have completed domestic violence training as set out in the statute and additional training as set out in a rule of court (*Family Code*, ss. 3110, 3111). Rule 1257.7 sets out the training standards for domestic violence situations. These standards include twelve hours of in-person classroom instruction in matters such as the appropriate structuring of the child custody evaluation process (including maximizing safety for clients, evaluators and court personnel), maintaining objectivity and controlling for bias, and providing for separate sessions at separate times (as set out in *Family Code* s. 3113). Instruction must also be given on the unique issues in family and psychological assessment in domestic violence cases, such as the effects of exposure to domestic violence and psychological trauma on children, the nature and extent of domestic violence, the

influence of alcohol and drug abuse on the incidence of domestic violence, and understanding the dynamics of high-conflict relationships and abuser/victim relationships (California *Rules of Court*, Rule 1257.7).⁶

Also, in any pleading when custody and visitation are contested, the court must set the contested issues for mediation. Domestic violence cases are handled in accordance with a written protocol approved by the Judicial Council (*Family Code*, s. 3170). A rule of court sets out the standards of practice for court-connected child custody mediation services. A mediator's duties include using reasonable efforts to facilitate the family's transition and reduce acrimony by helping the parties improve their communication skills; focussing on the child's needs and areas of stability; developing a comprehensive parenting agreement that addresses each child's current and future developmental needs; and controlling for potential power imbalances between the parties during mediation. A mediator is also required to complete a minimum of 40 hours of custody and visitation mediation training within his or her first six months of employment as a court-connected mediator. Ethical standards are also set out. For example, these mediators must meet the standards of the *Code of Ethics for the Court Employees of California*; they must maintain objectivity, provide and gather balanced information for both parties and control for bias; and they must operate within the limits of their training and experience and disclose any limitations or bias that would affect their ability to conduct the mediation.⁷

It should also be noted that Janet Johnston, an expert in high-conflict divorce cases, has proposed guidelines for custody and visitation for cases with domestic violence in California. These guidelines have been incorporated into Idaho's Protocol for high-conflict families (Johnston, 1993). They are set out in this paper's later discussion of "Options for Consideration."

6.1.5 Parent Coordinators and Related Models

Johnston and Roseby (1997: 243-244) describe the "parent coordinator model" as follows:

This approach provides highly conflicted families with an appointed co-parenting coordinator to help the parents make ongoing decisions about their children over the long term.... This new kind of professional role has been developing in a number of jurisdictions across the United States and is variously named: *special master* (in California), *wiseperson* (in New Mexico), *custody commissioner* (in Hawaii), and *co-parenting counselor* or *med-arb* (in Colorado). The role of the guardian *ad litem* is being expanded to include this function in some places. Either a mental health professional experienced with custody matters or a well seasoned family law attorney may be used as a co-parenting arbitrator. The common distinguishing feature of this new species is that the co-parenting coordinator is usually, but not always, given some kind of arbitration powers by stipulation of the parties or by court order. In general, this is not a

⁶ Located at: <http://www.courtinfo.ca.gov/rules/2001/titlefive/titlefive.pdf> (accessed June 21, 2001).

⁷ See: California *Rules of Court*, Rule 1257.1, "Uniform Standards of Practice for Court-Connected Child Custody Mediation," effective July 1, 2001 [<http://www.courtinfo.ca.gov/rules/2001/titlefive/titlefive.pdf> (accessed June 21, 2001)].

confidential service, and the appointed person may need to report to the court if his or her arbitrated decision is challenged in court.

There are two co-parenting arbitration models. In the first model, the co-parenting arbitrator is called on to arbitrate only when the parents cannot settle a specific dispute. The arbitrator does not perform counselling or therapeutic functions for the family. In the second model, co-parenting coordinators act as the parenting counsellor, mediator or child therapist in an ongoing way, and exercise their right to arbitrate only when the parents fail to agree on a specific matter. Both models, however, share common elements. To institute a co-parenting arbitrator, an explicit written contract with the parents, their attorneys, and other relevant persons is drawn up, signed by the parties and filed with the court. The contract should include how the arbitrator is to be chosen or appointed and how the arbitrator is to be terminated; the specific domains in which the arbitrator is to make decisions and the limits of his or her powers; the methods of conflict resolution the arbitrator may use; the procedure for bringing an issue before the arbitrator for a decision; the permissible lines of communication by which the arbitrator may gather information; who pays for the services of the arbitrator and when and how; how and when the arbitrator's decision is to be made into a court order; and the procedure for challenging the arbitrated decision in court (Johnston and Roseby, 1997: 244-245).

As the Oregon briefing paper, entitled Interventions for High-Conflict Families: A National Perspective, explains:

Typically, the parent coordinator is a neutral third party, either a therapist, mediator, or attorney, who assists the parties in creating, maintaining, modifying and monitoring compliance with a parenting plan. The process is child-centered and typically not confidential; i.e. the parent may make recommendations to the court and testify. The parent coordinator may also perform an investigator function, meeting with therapists, schools, family members and others in order to understand the family's dynamics and points of impasse (Sydlik and Phalan, 1999: 18-19).

There is not yet a statutory framework for the parenting coordinator model in any state. Colorado appeared to be the only state that attempted to legislate this position, but the proposed legislation was withdrawn because of opposition by the state bar that too much authority was being given without adequate judicial review. In the proposed legislation, the parent coordinator role would have included developing the parenting time/shared visitation agreement, not just implementing it. The proposed legislation also would have allowed the court to appoint a parenting coordinator over the parties' objections if the court found that "the parenting issues in the case are complicated, that the parties demonstrate a pattern of high conflict, or that such other conditions exist to warrant the appointment" (Sydlik and Phalan, 1999: 19-20).

In Arizona, the Family Court Advisor (FCA) performs a function similar to that of the parent coordinator. Typically, the FCAs are mental health clinicians. Their fees are paid by the parties and range from \$75 to \$200 (U.S.) per hour. Judges rely heavily on the ability to refer parents with unresolved issues to the FCAs. The characteristics of the FCA role include:

- Appointed by court upon motion after finding that the case involves complex family dynamics problems requiring “speedy resolution” and involving “mental health and economic issues” crucial to the child’s best interests.
- Typically appointed for a two-year period.
- Ordered to make recommendations to the court about custody, visitation or access, and to make recommendations regarding daily routine, daycare/babysitting, transportation, medical/psychological care, visitation exchange procedures, activities of the child, vacation/holiday scheduling, schooling, discipline and other parenting type issues. However, the FCA cannot modify legal custody, make relocation orders, or substantially alter existing access schedules.
- The FCA recommendation becomes a court order unless parties object within 20 days; if there is an objection, the matter is set for a hearing.
- The FCA may use any dispute resolution method, e.g. mediation or arbitration.
- The FCA may interview and require participation of any person in the process.
- The FCA may require drug testing.
- In emergency situations, the FCA may immediately communicate with the court about his or her recommendations, and the court will enter an interim order.
- There is no confidentiality, i.e. the FCA may be required to testify.
- The FCA cannot communicate ex parte with attorneys except about scheduling matters.
- The FCA has quasi-judicial immunity.
- Fees are paid by the parties, according to the responsibility assigned (Sydlik and Phalan, 1999: 20-21).

6.1.6 Court-Connected Enforcement Models

Arizona has this kind of model. Under Arizona law, each county treasurer must establish an expedited child support and visitation fund consisting of monies received from court filing fees. The presiding judge of the Superior Court must use these fund monies to establish, maintain and enhance programs designed to expedite the processing of petitions filed pursuant to section 25-326 and to establish, enforce and modify court orders involving children. Under section 25-326, if a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended, but the other party may petition or request the court to grant an appropriate order (*Arizona Revised Statutes*, Title 25-412, Expedited child support and visitation fund). In Mariposa County, Arizona, when support orders are violated a parent may file a petition with the Expedited Support Enforcement Office. Within 15-45 days of filing, there

is an administrative conference with a Support Enforcement Officer (SEO), who makes recommendations to the court and who may be compelled to testify. If court-ordered visitation/access orders are violated, a parent may file a petition for enforcement with the Expedited Visitation Services Office. An Extended Visitation Services (EVS) Officer sets up a meeting with both sides, called a “para-judicial conference.” The EVS officer makes recommendations to the court within 48 hours. The court enters an interim order. Objections are required within 25 days. A caseworker may monitor compliance for six months. Non-court services that may be recommended by an EVS officer include exchange supervision, physical supervision, therapeutic supervision (for parental alienation reunification cases) and counselling (Sydlik and Phalan, 1999: 23).

In Michigan, Friend of the Court Offices were created throughout the state in 1919. Michigan enacted legislation to empower the Friend of the Court with authority to ensure compliance with support and parenting time orders. In a dispute involving the parenting time of a minor child, the Friend of the Court must act in one or all of three ways. First, he or she can apply a make-up time policy if a non-custodial parent is wrongfully denied parenting time by the custodial parent. Second, if the make-up parenting time policy is ineffective, the Friend of the Court can begin civil contempt proceedings, as a result of which the court, on finding that the parenting time order has been violated, must do one of the following: modify the existing order; order make-up parenting time; order a fine of not more than \$100; commit the parent to the county jail for 45 days for the first offence and 90 days for subsequent offences; and suspend an occupational licence, driver’s licence or recreational or sporting licence. Third, the Friend of the Court may petition the court for a modification of existing parenting time, unless contrary to the best interest of the child (Sydlik and Phalan, 1999: 23-24; Michigan Compiled Laws, *Support and Parenting Time Enforcement Act*, ss. 552.641-552.642).

Another court-connected enforcement model is the special master. The Oregon Briefing Paper states: “The special master is a more established form of neutral, third party decision maker employed to assist high conflict cases in a number of jurisdictions throughout the [United States].” The Briefing Paper adds:

Various forms of the special master role have been implemented in different jurisdictions, with some of them being more formal, expensive or time-consuming than others. The special master can function as an investigator and fact-finder on particular issues for the court, with his/her duties limited to making recommendations for the court.

The special master can also function as a case manager, performing many of the same functions as the parent coordinator position ... He/she assists the parties in creating and maintaining a parenting time plan, helping to tease out the day-to-day rights and responsibilities of each parent. The special master can also obtain releases from the parents to enable discussion with the therapists, school officials, health practitioners and family members. As a case manager, the special master may continue to have a longer term relationship with the family to supervise and monitor issues as they arise.

Sometimes a special master functions in a more formal manner with powers akin to those of an arbitrator. While the special master may initially make some dispute resolution attempts, if the parties cannot agree, the special master enters a binding decision which is

subject to review only for the abuse of discretion or for excessive use of powers, never simply because a parent dislikes the outcome. The procedure in such cases may have legal and procedural formalities, such as hearings, introduction of evidence, appearance of witnesses, making findings of fact and rendering a record (Sydlik and Phalan, 1999: 24-25).

In California, two kinds of statutory referees exist. Section 638(1) of the California *Civil Code* provides, in part, that a reference may be ordered on the agreement of the parties to try “any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision thereon” (*California Code of Civil Procedure*, ss. 638(1)). This is a general reference. The referee or master in this case is empowered to make a conclusive determination without further action by the court. Alternatively, a reference may be heard in part when the parties agree “to ascertain a fact necessary to enable the court to determine an action or proceeding” (*California Code of Civil Procedure*, ss. 638(2)). This is a special reference. The special master here makes advisory findings that do not become binding unless adopted by the court after an independent consideration. However, the recommendations are entitled to great weight. A court may not order parents to a special master over one party’s objections when one party objects and the reference is a general one, because it is an unconstitutional delegation of judicial power. However, if the reference is a special one, limited strictly to factual issues and the making of recommendations, the order may be entered even over a party’s objection (Sydlik and Phalan, 1999: 25; *Ruisi v. Theriot* (1997), 53 Cal. App. 4th 1197).

Oregon also has a statutory provision that authorizes an order of reference where the parties consent. However, where the parties do not consent, statutory authorization is restricted. In the absence of an agreement between the parties, a reference can only be made upon a showing that some exceptional circumstances require it (*Oregon Revised Code of Procedure*, s. 65).

6.1.7 Guardians *Ad Litem*

The Oregon Briefing Paper on *Interventions in High-Conflict Families* points out that guardians *ad litem* are increasingly being used in many states (Sydlik and Phalan, 1999: 26).

For example, the State of Washington provides, in domestic matters, that a court may appoint a guardian *ad litem* to represent the interests of a minor or dependent child when the court believes the appointment of a guardian *ad litem* is necessary to protect the best interests of the child in any family court proceeding. Family court services professionals may recommend to the court whether a guardian *ad litem* should be appointed.

Unless otherwise ordered, the guardian *ad litem*’s role is to investigate and report factual information to the court concerning parenting arrangements for the child and to represent the child’s best interests. Guardians *ad litem* may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties. If a child expresses a preference regarding the parenting plan, the guardian *ad litem* must report the preferences to the court, together with the facts relative to whether any preferences are being expressed voluntarily and the degree of the child’s understanding. The court may require the guardian *ad litem* to

provide periodic reports to the parties regarding the status of his or her investigation. The guardian *ad litem* must file his or her report at least 60 days prior to trial.

Generally, all guardians *ad litem* must comply with training requirements established by law. The administrator of the courts is required to develop a statewide curriculum for persons who act as guardians *ad litem*. The curriculum includes sections on child development, child sexual abuse, child physical abuse, child neglect, clinical and forensic investigative and interviewing techniques, family reconciliation and mediation services, and relevant statutory and legal requirements.

All information, records and reports obtained or created by a guardian *ad litem* are discoverable pursuant to statute and court rule. The guardian *ad litem* must not release private or confidential information to any nonparty except pursuant to a court order signed by a judge. The guardian *ad litem* may share private or confidential information with experts or staff he or she has retained to perform the duties of guardian *ad litem*. Any expert or staff retained is subject to the confidentiality rules governing the guardian *ad litem* (*Revised Code of Washington*, ss. 26.12.175, 26.12.177, 2.56.030(15), 26.12.180; Lidman et al., 1998).

6.2 ENGLAND

The current law governing the relationship of parents to children during divorce in England is the *Children Act* 1989, largely brought into force in October 1991 (*Children Act* 1989, U.K., c. 41). There are no specific provisions relating to high-conflict divorce. The philosophy on which the Act was built was that children are best looked at within a family and without any unnecessary intervention from the court (Sharp, 1998: 424). When the court determines any question relating to the upbringing of a child, the child's welfare is the court's paramount consideration.

When a child's father and mother are married to each other at the time of his or her birth, they each have parental responsibility for the child. If the parents are not married at the time of the child's birth, the mother has parental responsibility for the child, while the father has none unless he acquires it under the Act. He can do this by obtaining a parental responsibility order or by entering into a parental responsibility agreement with the mother. "Parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property. In any proceedings in which any question about the upbringing of a child arises, the court must have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child (*Children Act* 1989, ss. 1, 2, 3, 4).

The Act does away with the concepts of "custody" and "access." Section 8 of the Act sets out various orders that can be made in family proceedings. These include a contact order (an order requiring the person with whom the child lives to allow the child to visit or stay or otherwise have contact with the person named in the order); a residence order (an order settling the arrangements to be made about the person with whom the child is to live); and a specific issue order (an order giving directions for the purpose of determining a specific question that has arisen or may arise in connection with any aspect of parental responsibility for a child). There is

no presumption in favour of or against parental contact with the children. In making a section 8 order, the court considers a range of factors, including the child's physical, emotional and educational needs, the likely effect on the child of any change of circumstances, any harm the child has suffered or is at risk of suffering, and how capable each of the child's parents is in meeting the child's needs. Any parent or guardian of a child may apply to the court in family proceedings for any section 8 order.

When a court is considering making an order under the Act with respect to a child, it must not make the order unless it considers that doing so would be better for the child than making no order at all. In other words, there is a presumption against making an order under the Act. "The object was to avoid the making of unnecessary 'standard' orders, to limit the court to 'positive intervention' and to try [to] promote parental cooperation and agreement" (Sharp, 1998: 425). Subsection 11(7) of the Act provides that a section 8 order may contain directions about how it is to be carried out, may impose conditions that must be complied with by a parent of the child (among others), and may be made for a specified period of time, among other conditions.

A court considering any question relating to a child under the Act may ask a probation officer or some other person selected by a local authority to prepare a welfare report (*Children Act* 1989, s. 7). Section 16 of the Act allows a judge to make a family assistance order, which directs a probation officer or an officer of a local authority to make him or herself available to advise, assist or befriend anyone named in the order. However, the order can only be made in exceptional circumstances, and it must have the consent of every person named in the order, save for the child. Moreover, it can only have effect for six months or less.

In the context of domestic violence, the *Children Act* 1989 makes no mention of the term at all. As the recent report to the Lord Chancellor pointed out, when a court welfare officer's report is ordered under section 7 of the Act, the court may order periods of contact supervised by the court welfare officer as part of its decision making process. However, these orders do not provide a mechanism for long-term supervision of contact. The only other mechanism for professional supervision of contact is the section 16 Family Assistance Order, but given the limits on the issuance of these orders, they are of limited use in these situations. However, subsection 11(7) of the Act, discussed above:

... plainly provides the most scope for the protection of parents and children in cases where there has been domestic violence, but contact is nonetheless held to be in the interests of the child. Apart from directions about how a contact order is to be carried into effect (e.g. supervision, neutral handover points), the sub-section is apt for imposing conditions which must be fulfilled before contact takes place (Lord Chancellor's Department, 1999b: 86-88).

The *Children Act* Subcommittee of the Advisory Board on Family Law recently reported to the Lord Chancellor on the issue of parental contact in cases when there is domestic violence. The report recognized that steps needed to be taken to ensure that the issue of domestic violence, when it arises in contact applications, has been addressed. However, it recommended that, instead of amending the *Children Act* 1989, guidelines for the judiciary at all levels should set out the approach that the courts should adopt when domestic violence is put forward as a reason

for denying or limiting parental contact to children. The guidelines would take the form of a Practice Direction.

The recommended guidelines comprise nine sections. They require the court to give early consideration to allegations of domestic violence. They set out the steps to be taken where the court forms the view that its order is likely to be affected if allegations of domestic violence are proved. They require that, where the court orders a welfare officer's report in a disputed application for contact with the children, the order of the court should contain specific directions to the court welfare officer to address the issue of domestic violence. They set out matters that the court should consider in deciding any question of interim contact with the child pending a full hearing. They set out what findings of fact that the court should make at the final hearing of a contact application in which there are disputed allegations of domestic violence. They set out matters to be considered by the court where findings of domestic violence are made. They set out which matters the court must consider when it orders contact with the child where findings of domestic violence have been made (e.g. should the contact be supervised and, if so, by whom). They state that the court should take steps to inform itself about the facilities available locally to the court to assist parents who have been violent to their partners and/or children and, where appropriate, should impose as a condition of future contact that violent parents avail themselves of those facilities. Finally, they state that in its judgment or reasons the court should always explain how its findings on the issue of domestic violence have influenced its decision on the issue of contact. A tenth section, not part of the formal guidelines, proposes that all courts hearing applications in which domestic violence is alleged should review their facilities at court and should do their best to ensure that there are separate waiting areas for the parties in such cases and that information about the services of Victim Support and other supporting agencies is readily available (Lord Chancellor's Department, 1999b: 6, 54-59).

In addition to the *Children Act* 1989, certain provisions of the *Family Law Act* 1996, when proclaimed, will make further changes in the law affecting children. Generally, under Part II of the *Family Law Act*, an application for a divorce order or a separation order can only be made if the marriage has broken down irretrievably, the requirements of an information meeting have been satisfied, and requirements about the parties' arrangements for the future have been made. A party must make a statement that the marriage has irretrievably broken down, but before the marriage is considered to be broken down, the parties must for a period of generally nine months reflect on whether the marriage can be saved and have an opportunity to effect a reconciliation and consider what arrangements must be made for the future.

Before any party makes a statement that the marriage has broken down, the parties, generally, must attend an information meeting. The information meeting is designed to provide relevant information to the parties about matters arising under Part II and Part III of the *Family Law Act* 1996, and to give the parties the opportunity of meeting with a marriage counsellor. Regulations governing the information meeting must make provision with respect to, in part, the giving of information about marriage counselling, the importance to be attached to the welfare and wishes of the children, how the parties may acquire a better understanding of the ways that children can be helped to cope with the breakdown of the marriage, protection available against violence, and how to obtain assistance and mediation (*Family Law Act* 1996 UK, Part II, ss 3, 5(1), 7, 8).

In cases of hardship, the court may order that the marriage not be dissolved. However, the court may only make such an order if satisfied that the dissolution of the marriage would result in substantial financial or other hardship to the other party or to a child of the family, and it would be wrong, in all the circumstances (including the conduct of the parties and the interests of any child of the family) for the marriage to be dissolved (*Family Law Act 1996*, ss. 10(1), (2)).

The court must consider the welfare of the children in any proceedings for a divorce or separation order. The court must consider if there are any children of the family, and if so, whether, in light of the arrangements being proposed, it should exercise any of its powers with respect to them under the *Children Act 1989*. When it appears to the court that the circumstances of the case require it to exercise any of its powers under the *Children Act 1989*, that it is not in a position to exercise the power without giving further consideration to the case, and that there are exceptional circumstances which make it desirable in the interests of the child to give a direction, the court may direct that the divorce or separation order not be made until the court orders otherwise. For the purpose of deciding whether to exercise its powers under the *Children Act 1989*, the court must consider the welfare of the children as paramount. The court must have regard for a variety of factors. These include the conduct of the parties in relation to the upbringing of the child; the general principle that the welfare of the child is best served by his or her regular contact with those who have parental responsibility; and any risk to the child stemming from where, or with whom, the child is to live. The court may also direct at any time that the parties attend a meeting to obtain mediation (*Family Law Act 1996*, ss. 11, 13).

A number of information meetings were launched as pilots in order to study their efficacy, before Part II of the *Family Law Act 1996* was to be proclaimed. A 1999 summary of research in progress examines the different kinds of information meetings. One of the goals of the *Family Law Act 1996* was to protect children's interests by informing parents about the needs children have and about the importance of giving them clear age-appropriate information. An information meeting provided parents with leaflets for and about children. In some pilots a parenting plan was provided for those attending (Walker, 1999: 7). The parenting plan is designed partly to give information about the needs of the children, and partly to provide a pro-forma in which parents can record the arrangements they are making for the children. However, "The Plan is not enforceable by the Court, nor is it formally part of the legal process. Rather, it is a tool for parents" (Walker, 1999: 9). As one commentator stated: "For parents to fill in a parenting plan together, a certain degree of trust, civility and cooperation is required. As one mother pointed out, parents in conflictual relationships were unlikely to use the plan jointly as a negotiating tool" (Richards and Stark, 2000: 487).

Concerning the information meeting in the context of victims of domestic violence, lessons learned from the research included that training of the presenters of information must prepare them for addressing domestic violence as a subject and must promote awareness and sensitivity; women's refuges are suitable venues for such information meetings; and some women should be exempt from attendance because of their inability to go to the meeting without their husband's knowledge (Walker, 1999: 14-15).

In 1999, the Lord Chancellor announced that the implementation of Part II of the *Family Law Act 1996* was being delayed, because the interim results of the information meeting pilots had

been disappointing. Only 7 percent of those who attended the pilots had been diverted into mediation and 39 percent had reported they were more likely than before to go to a solicitor (Lord Chancellor's Department, 1999a). The Lord Chancellor's Advisory Board on Family Law disapproved of this decision, arguing that fair use had not been made of the findings of the information meetings as a whole (Lord Chancellor's Department, 2000). The government has recently decided to repeal Part II of the *Family Law Act* because research on the compulsory information meetings that were central to Part II of the Act failed to show that such meetings would be useful on a nationwide basis (Lord Chancellor's Department, 2001).

6.3 AUSTRALIA

The law governing divorce in Australia is the *Family Law Reform Act* 1995. Part VII of the Act addresses children. The object of that Part is "to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfill their duties and meet their responsibilities, concerning the care, welfare and development of their children." The principles underlying the Act include that, except where it would be contrary to the best interests of the child, children should have a right of contact, on a regular basis, with both their parents; parents share duties and responsibilities concerning the care, welfare and development of their children; and parents should agree about the future parenting of their children (*Family Law Reform Act* 1995, No. 167 of 1995 (Cth), s. 60B).

The *Family Law Reform Act* 1995 provides that each parent of a child has "parental responsibility" for the child, subject to court orders. Parental responsibility means "all the duties, powers, responsibilities and authority, which, by law, parents have in relation to children." A court may issue a parenting order that confers parental responsibility on a person or that may diminish the parental responsibility of any person (*Family Law Reform Act* 1995, ss. 61C, 61D).

The Act sets up a scheme for providing counselling assistance to parties with children. For example, a parent of a child at any time may seek the counselling facilities of the court. Or the court may order at any time that the parties to the proceedings attend a conference with a family and child counsellor to discuss the care, welfare and development of the child in order to try to resolve differences between the parties on these issues (*Family Law Reform Act* 1995, ss. 62D, 62E).

The Act also encourages the use of parenting plans. The parents of a child are encouraged to agree about matters concerning the child rather than seeking an order from the court. A parenting plan may deal with the person with whom the child is to live, contact between a child and another person, maintenance of the child, and any other aspect of parental responsibility for the child. There is no specific section relating to parenting plans in the case of high-conflict divorce. The plan may, on application, be registered with the court, provided that the court considers it appropriate to do so in the best interests of the child (*Family Law Reform Act* 1995, ss. 63B, 63C(2), 63E).

As in England, the Act does away with the terminology of "custody" and "access." Instead, a court may make a parenting order that addresses with whom a child shall live (called a residence order), contact between a child and another person (called a contact order), the maintenance of a

child (called a maintenance order), or any other aspect of parental responsibility (called a specific issues order). In proceedings for a parenting order generally, the court must order that the parties attend a conference with a family and child counsellor. A parent must not, contrary to a residence order, remove the child from the care of a person. A parent must not, contrary to the terms of a contact order, hinder or prevent a person and the child from having contact. A parent must not, contrary to the terms of a specific issues order, hinder the person caring for the child pursuant to that order. A court may issue a warrant for the arrest of an alleged offender to enable him or her to be dealt with under section 112AD of the Act for contravening the Act (*Family Law Reform Act 1995*, ss. 64B, 65F, 65M, 65N, 65Q).

In determining the best interests of the child, the court must consider several factors. These include:

- any wishes expressed by the child (taking into account the child's maturity);
- the likely effect of any changes in the child's circumstances (including the likely effect of separation from a parent);
- the practical difficulty and expense of a child having contact with a parent;
- the need to protect the child from physical or psychological harm caused by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, whether directed at the child or another person; and
- any family violence involving the child or a member of the child's family.

There are also provisions to resolve any inconsistencies arising from the issuing of a contact order, in instances when a state or territory has issued a "family violence" order (*Family Law Reform Act 1995*, s. 68E, Division 11, Family Violence).

Recently, the Australian government amended this Act. The court may now require a person who contravenes an order affecting children to participate in an appropriate post-separation parenting program designed to help resolve conflicts about parenting. It can also make a further parenting order that compensates for contact foregone as a result of the contravention. However, the court is required to take other action against the person if, with regard to the first contravention, the person has behaved in a way that showed a serious disregard for his or her parenting obligations, or if, with subsequent contraventions, it is not appropriate for the person to be dealt with by requiring his or her attendance at a post-separation parenting program (*Family Law Amendment Act 2000*, No. 143, 2000 (Cth), s. 60C).

The amendments also require those who give advice to people when making a parenting plan (family and child counsellors or mediators and lawyers) to explain in language likely to be readily understood by them, the obligations created by the plan, and the consequences that may follow if either of them fails to comply with any obligation (*Family Law Amendment Act 2000*, s. 63DA).

The amendments set out a parenting compliance regime in three stages. The first stage applies when a court makes a parenting order. The court has a duty to include in the order particulars of the obligations that the order creates and the consequences that follow if a person contravenes the order. If the person is not represented by a lawyer, the court must explain the availability of programs to help him or her understand their responsibilities under parenting orders. If a lawyer represents the person, the court may request that the lawyer help explain these matters to the person. Any explanation must be given in a manner readily understood by the person to whom the explanation is given (*Family Law Amendment Act 2000*, s. 65DA).

A person bound by an order (such as a residence order or contact order) who intentionally failed to comply with the order, or made no reasonable attempt to comply with it, is considered to have contravened the order. The amendment, however, allows a long list of reasonable excuses for contravening the order. These include that the person did not understand the obligations imposed by the order, or that the person breached a residence order or contact order in the reasonable belief that it was necessary to protect the health or safety of a person, including the child. The standard of proof is on the balance of probabilities (*Family Law Amendment Act 2000*, ss. 70NC, 70ND, 70NE).

Under stage two of the parenting compliance regime, a person who, without reasonable excuse, contravenes an order, may be ordered by the court to attend a post-separation parenting program to be assessed for his or her suitability for the program. If shown to be suitable to attend, the court may order him or her to attend the program. The court may also make a further parenting order that compensates for contact foregone as a result of the contravention. The provider of the program has the duty to inform the court if a person is unsuitable to attend a program. The provider must also inform the court if the person fails to attend the program or becomes unsuitable to take part in it. The Attorney-General of Australia is required to publish a yearly list of post-separation parenting programs (*Family Law Amendment Act 2000*, ss. 70NF, 70NG, 70NH, 70NIB.)

The third stage of the parenting compliance regime applies when, for the first contravention of the order, the court decides that the person has behaved in a way which showed a serious disregard of his or her obligations under the order, or that the person has, without reasonable excuse, contravened the order after the first contravention. The court has a variety of orders it can make. The court may order the person to enter into a bond. The bond may impose conditions, for example, that the person get family and child counselling. If the person has breached a parenting order, the court may vary the order. In making this variance order, the court must, in addition to the best interests of the child, take into account other considerations. For example, the court must consider if the person who contravened the parenting order did so after having attended, after having refused or failed to attend, or after having been found to be unsuitable for taking further part in, a post-separation parenting program. The court may also order a person imprisoned for 12 months or less, or until, during that time, the person complies with the court order. However, before sentencing a person to prison, the court must be satisfied that the contravention cannot be dealt with in any other way (*Family Law Amendment Act 2000*, ss. 70NJ, 70NM, 70NO).

A recently published three-year research project produced interesting results about the effects of the *Family Law Reform Act 1995*. There was no evidence to suggest that shared parenting had become a reality for children since the Act came into effect. Most respondents agreed that mothers continue to do the bulk of the care-giving work after separation. While parents were entering into workable and flexible shared-residence arrangements after separation, these arrangements were being reached without legal assistance and without any knowledge of the Act. The reforms had created uncertainty and confusion about the state of the law. While the new terms and concepts remained alien to the vast majority of separating parents, who continued to think in terms of custody and access, some non-resident parents believed the new shared parenting regime provided them with “rights” to be consulted about day-to-day decisions affecting the child. The concept of shared parenting also led some parents, particularly fathers, to believe that the law required the children to live half the time with each parent. These parents tended to respond with anger and frustration when advised that the Act did not require this. In addition, the lack of clarity in the legislation had provided fresh ground for disputes between parents. The research suggested that the reforms had created greater scope for an abusive non-resident parent to harass or interfere in the life of the child’s primary caregiver by challenging her decisions and choices. The concept of ongoing parental responsibility had become a new tool of control for abusive non-resident parents. This also meant constant disputes and an endless cycle of court orders (Rhoades et al., 2000: 1-2). A related consequence was an increase in the number and detail of specific issues orders qualifying and quantifying the resident parent’s authority and responsibilities. This could create even more areas of possible dispute:

Specific issues orders have now started to become more commonplace than in the early days following the coming into force of the *Reform Act*, and they tend to be much more detailed and differ in nature from the kind of orders made before the reforms. For example, orders are now used to delegate particular areas of responsibility to parents (for example, who will take the child to sport this week), and are sometimes used to impose standards of caregiving expected of the resident parent (one order reviewed provided that the mother must ‘ensure that [the child]’s school clothes are properly laundered’). Previously, comparable orders were used only to regulate long-term matters, such as to ensure that the resident parent forwarded copies of the children’s school reports to the non-custodial parent every year (Rhoades et al., 2000: 3).

The report also expressed concerns that the safety of children has been compromised. For example, when domestic violence was alleged, there was a trend away from suspending contact at interim hearings as the way of ensuring the child’s safety until trial, and towards the use of neutral hand-over arrangements as the preferred protective mechanism. The most common response in the post-*Family Law Reform Act* judgements to allegations of violence was to order unsupervised contact between the father and child using, for example, a collection point that did not require face-to-face contact between the parties. Supervised contact was used as a safety mechanism far less frequently than a neutral hand-over point. The post-*Family Law Reform Act* cases using supervised contact involved more serious levels of violence than those instances when supervision was ordered prior to the reforms. The research demonstrated that, unlike the situation before the *Family Law Reform Act 1995*, residence orders giving each parent equal time with the children were being made in contested proceedings and in circumstances where there was a high level of conflict between the parties. One of the most significant findings of the

research was the large increase in numbers of contravention applications brought by non-resident parents alleging breaches of contact orders. Many of these applications were without merit and were pursued as a way of harassing or challenging the resident parent (Rhoades et al., 2000: 6-9). Finally, interviews with parents suggested that unsafe contact orders were being made by consent:

Most of the parents we interviewed as part of this research had expressed concerns about domestic violence when their contact arrangements were made. We found that many women had agreed to contact arrangements that did not provide them with the level of protection they had wanted. Either they had felt coerced into agreeing to the arrangements by their lawyer (who in turn had advised them about the 'usual' approach of the Court at interim hearings to allegations about the father's violence), or they had believed that there was no other option the father would agree to and they had no resources or were unwilling to 'fight'. Many had agreed to unsupervised contact on alternate weekends with a neutral hand-over arrangement, although they had wanted supervised contact (Rhoades et al., 2000: 10).

The Family Court of Australia has recourse to in-house services for the resolution of disputes through mediation, conciliation and litigation methods. The Family Court has created case management guidelines to manage the flow of cases through the Court. There are three different management tracks: the Direct Track, the Standard Track and the Complex Track. The Direct Track is the procedural path for matters in which the issues in dispute are narrow, and for which the estimated hearing time is not more than one day. The Complex Track is for matters involving complicated issues of fact, law and evidence, in which the hearing will take six days or more. The Standard Track is for matters not meeting the criteria of the Direct or Complex Track (Family Court of Australia, 1997a).

Browne (1997), Principal Director of Court Counselling in the Family Court of Australia, pointed out that the Court strives for the timely application of alternative dispute resolution techniques to meet the needs of clients. Discussing Johnston's three levels of impasse in high-conflict divorce cases (internal, interactional and external levels), she argued that for the majority of cases the impasse could be overcome or prevented by dealing with the problem early. "Indeed, the resolution rates in the Family Court of Australia in relation to voluntary conciliation counselling and mediation and early court ordered conciliation counselling support the value of early intervention with agreement on at least one substantial issue being 73 to 74 percent." However, she recognized that in high-conflict cases different strategies are required:

These difficult cases require different strategies. These may involve group processes, a clinical management plan involving more than one counsellor or mediator and perhaps the involvement of extended family members and children. For the successful clinical management of these cases, it is essential that the reason for the impasse be diagnosed, as the type of intervention will vary accordingly. The other necessary feature in managing these cases is the early detection and diversion of potentially complex matters for the appropriate clinical intervention (Browne, 1997: 5-7).

In 1999-2000, the Court's case management continued to emphasize conciliation through primary dispute resolution. Only about 20 percent of matters filed proceeded to the litigation

stage; the remaining 80 percent were resolved through primary dispute resolution (Family Court of Australia, 2000a: 23).

Since January 1, 2000, the Family Court of Australia calls its primary dispute resolution services “mediation” services, instead of “conciliation” and “counselling”. This change was introduced to reduce the confusion for clients accessing the Court’s primary dispute resolution services. The Court is also introducing a streamlined assessment of cases in terms of their suitability for the various types of mediation it delivers. A major characteristic will be individual assessment and monitoring of cases. Those involving child abuse allegations will be managed to ensure liaison with relevant state welfare departments, with coordinated input from various professionals (Family Court of Australia, 2000a: 8-9).

The Court’s *Future Directions Report* recognized that the effective management of cases has required the identification of those matters that will best benefit from, or will require a particular type of, intervention, including judicial determination. It proposed changes to the case management system for expediting the process, such as a record kept by court staff, a Case Summary that would ultimately provide a record of agreed facts and identify contested facts by the trial judge, and that, when possible, would permit the same court professionals to deal with a particular issue. The report proposed reforms to reduce partisanship in the giving of expert evidence. It also proposed reforms to ensure greater compliance of orders for the preparation of trial. For example, trial dates would not be allocated unless there was compliance, so that no longer would the cost of expensive trial time be at risk if one of the parties failed to comply with orders for preparation for trial. The report also recognized that many families would benefit from ongoing assistance in the implementation of orders after the court proceedings ended, particularly in some chaotic families, and recommended the creation of a working party to consider the ways in which these families can be assisted in their ongoing parenting and in their compliance with court orders (Nicholson, 2000).

Most recently, the Government of Australia in May 2000, announced the creation of the Family Law Pathways Advisory Group, a high-level advisory group whose role is to assist the government in its efforts to maximize positive outcomes for families navigating pathways through the family law system. To frame its report to the government, this Group was seeking submissions on, among other things, how to help families minimize conflict. In July, 2001, the Family Law Pathways Advisory Group published a major report entitled, *Out of the Maze: Pathways to the Future for Families Experiencing Separation*. By its terms of reference, the Group was to hold to a vision of an integrated family law system that is flexible and builds individual and community capacity to achieve the best possible outcomes for families. It was required, in part, to formulate a set of recommendations on how to provide stronger and clearer pathways to early assistance to ensure people facing relationship breakdown are directed to services most suitable to their needs. It was also required to help families minimize conflict, manage change more successfully, and meet new obligations and commitments. The report envisaged an integrated family law system in which family members experiencing separation could easily and quickly identify and access help when needed. The system’s primary focus would be to support family decision making and family nurturing. Such a system would be responsive and coordinated. It would provide appropriate assistance to family members as early as possible. It would treat all comers fairly (Family Law Pathways Advisory Group, 2001).

The report saw this integrated family law system as having five key functions: education for the community and professionals; accessible information; appropriate assessment and referral at all entry points to the system; service and intervention options to help family decision-making; and ongoing support. These functions would sustain three types of pathways for families: self-help pathways; supported pathways; and litigation pathways. Families would move along a chosen pathway. The self-help pathway would suit parents who have a relationship that allows them to make decisions about parenting with minimal or no outside help. Parents on this pathway would need access to information about how to put their children first, how to share their parenting responsibilities and how to make their own decisions. The supported pathway would be needed by parents who are likely to experience difficulties but may, with appropriate support, manage their separation and parenting responsibilities. Parents on this pathway would be provided information about the system at the first point of contact and would be followed up by information and advice specific to the particular family. The objective—to engage both parents in non-adversarial decision making—may require a series of interventions addressing their relationship and parenting capacity before the parents are able to make an agreement. They might also use specific services, such as parenting education focusing on the children’s experience of separation and mediation. Litigation should be used as a last resort. The litigation pathway may be the appropriate pathway for parents who are not able to reach agreement at all, and for families where a quick resolution on issues of violence, child abuse or abduction is needed. For the relatively small group of separated parents who experience high-level conflict and have a very low capacity to manage their parenting responsibilities, the litigation pathway may be the most appropriate match.

In addition to information, parents on the litigation pathway may need legal advice, access to support services for some issues, legal representation, and support in negotiating legal and, particularly, court-related processes. For these families, the conflict is so entrenched that no amount of information or supportive intervention will bring partners to a result agreeable to both. The litigation pathway should be speedy. Delay in reaching a determination may only heighten the conflict and make more difficult their chances of moving into a manageable, if not cooperative, ongoing parenting relationship after the decision has been handed down. Ongoing support should be available after the final order is made, given that at least one of the parents involved may not support the determination. This is even more important if they have truly explored primary dispute resolution options without success. There is no value in referring these matters for further alternative interventions because a quick determination of the issues in dispute is needed (Family Law Pathways Advisory Group, 2001).

This report made 28 recommendations. These include:

- That a long-term community education campaign, with clear core messages and promoting the principles that underpin the family law system, be developed that would focus on the interests and needs of children and would reinforce post-separation parenting responsibilities (including flexible parenting models that work).
- That a national education package for schools, consistent with national education goals, be designed, to develop individuals’ capacities for healthy relationships, provide information

about positive parenting models and demonstrate that it is “OK” to look for help when difficulties arise.

- That all professionals and key staff working in the family law system adopt a multidisciplinary approach to resolving issues for families, and that priority be given to a number of strategies to support such a holistic approach. This includes developing a national code of conduct for lawyers practising in family law to reflect the principles outlined in the report. The code would include a commitment to actively promote non-adversarial dispute resolution and other good practices; maintenance of multidisciplinary education for family law judges and magistrates; development of a quality accreditation mechanism for all family and child mediators and counsellors; and adoption of a multicultural perspective by all professionals and key staff working with members of culturally and linguistically diverse communities, and indigenous communities.
- That coordinated, national, system-wide information is available to families experiencing separation and service providers, which describe the family law system and available services, and which contain key messages and information about pathways, be developed and maintained.
- That an appropriate template for first point of contact assessment be developed and implemented nationally to match the family with the most appropriate set of services to resolve difficult or outstanding issues. The template should have certain core features, be simple and easy for service providers and clients to use, allow customization for local applicability, and be based on agreed indicators and demographic information, including screening for violence and the possible need for child protection.
- That access to services for high-need groups be expanded, including services that specifically support children in separating families; services for men, specifically services that help them effectively co-parent their children after separation; services which support the capacity of vulnerable and disadvantaged people to access non-adversarial approaches; services for families experiencing family violence; services to support people with mental health problems; and services which meet the needs of indigenous Australians.
- That legal aid services be encouraged to continuously improve primary dispute resolution services, including family law conferencing; and that increased legal aid funding be provided to improve equity of access in high-need areas, that is: early intervention; domestic violence proceedings; family law disputes in which there are allegations of child abuse; and enforcement of contact orders.
- That innovative practices and service delivery models be further developed where necessary and made available nationally, including child-inclusive practices in family relationship services; flexible models for community-based mediation/conciliation/counselling services; children’s contact services; mediation-arbitration models; multiservice assistance to self-represented litigants at all courts exercising family law jurisdiction, and indigenous family conferencing models.

- That the role of the non-government sector in the provision of high-quality personal counselling be increased and ensure that counselling support is available at key points in families' contact with the system where emotional distress and the risk of conflict may be greatest.
- That responses to family violence be managed in accordance with the following principles: the safety of children and adults is paramount; where there is a dispute about an apprehended violence order, it should be resolved quickly and fairly; both applicant and respondent should have reasonable and timely access to legal assistance; and where there are children, parenting issues should generally be dealt with at the same time as the apprehended violence process.
- That nationally consistent protocols, supported by nationally consistent training about family violence and family breakdown issues, be introduced for practitioners (for example police, lawyers, court support, counsellors). When developing these for the indigenous community, specific cultural perspectives on family and community violence need to be considered, in line with the proposals and framework developed by the Ministerial Council on Aboriginal and Torres Strait Islander Affairs in September 1999.
- That, in cases of family violence and child abuse, where primary dispute resolution is not appropriate, processes be developed to expedite access to a court determination.
- That the development of clearly defined roles for, and responsibilities of, child representatives be given urgent priority, with adequate funding allocated to support implementation (Family Law Pathways Advisory Group, 2001).

6.4 NEW ZEALAND

The Act governing the custody of children in New Zealand is the *Guardianship Act*, 1988. An old statute, it contains no provisions relating to high-conflict divorce, save for provisions relating to domestic violence. "Custody" is defined as the right to possession and care of a child. "Guardianship" is defined as meaning the custody of a child and includes the right of control over the upbringing of the child. Generally, the father and mother of a child are each a guardian of the child. When there are disputes between them concerning the exercise of their guardianship, they can apply to the court for its direction, and the court may make any such order relating to the matter that it thinks proper. A child of, or over the age of, 16 years who is affected by a decision or a refusal of consent by a parent or guardian in an important matter may apply to a Family Court Judge, who may review the decision or refusal and make such an order as he or she thinks fit (*Guardianship Act, 1988*, Statutes of New Zealand, as amended, ss. 3,6, 13, 14).

On making an order of custody about a child, the court may, as it thinks fit, make such an order with respect to the access to the child by a parent who does not have custody of the child. A parent who does not have custody of the child may apply to the court for an order granting him or her access to the child. The court may also order that other relatives have access in certain circumstances. The court also may, on application by any person affected by the order of custody or access or upbringing of the child, vary or discharge the order. A person who hinders or prevents access to a child by a person who is entitled under a court order to access to the child

is guilty of a summary conviction offence. An order with respect to the custody of a child of or over the age of 16 years cannot be made unless there are special circumstances (*Guardianship Act* 1988, ss. 15, 16, 17, 20A, 24).

When it is alleged that a party to the proceedings has used violence against the child or a child of the family or against the other party to the proceedings, the court must, as soon as practicable, on the basis of the evidence presented before it, determine if the allegation of violence is proved. Where the court is satisfied that a party in the proceedings has used violence against the child, or the other party to the proceedings, the court must not make an order giving the violent person custody of the child, or make an order allowing the violent person access, other than supervised access, unless the court is satisfied that the child will be safe while the violent party has custody of, or access to, the child. In making the determination about the safety of the child, the court must consider several factors. These include the nature and seriousness of the violence, how recently the violence occurred, the frequency of the violence, the likelihood of further violence occurring, the physical or emotional harm caused to the child by the violence, the wishes of the child having regard to the age and maturity of the child, and any steps taken by the violent party to prevent further violence. If the court cannot determine that the allegation of violence is proved, but is satisfied that there is a real risk to the safety of the child, the court may make such an order as it thinks fit to protect the safety of the child. "Supervised access" is defined in the legislation (*Guardianship Act* 1988, ss. 16B, 16A).

A judge who has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for or is about to apply for custody of or access to the child, or to prevent any order of the court as to custody or access from being complied with, may issue a warrant directing any constable or social worker to take the child. The judge may also order that the travel documents of the child or of the person believed to be about to take the child out of New Zealand, be surrendered to the court. A person who takes or attempts to take a child out of New Zealand, knowing that proceedings are pending or about to be commenced under the *Guardianship Act*, or with intent to prevent an order concerning custody or access from being complied with, is guilty of a summary conviction offence. However, it does not constitute a contempt of court (*Guardianship Act* 1988, s. 20).

The New Zealand government is in the process of reviewing the laws about guardianship, custody and access. In a recent discussion paper, *Responsibilities for Children, Especially When Parents Part*, the government stated that its goals for child and family policy included enhancing the well-being of children, supporting parents in carrying out their responsibilities to their children, and providing a policy and legal framework to facilitate the range of ways in which parents and others carry out their responsibilities to their children. The discussion paper asks several questions, such as: should the terms "guardianship", "custody" and "access" be replaced in law by a broader range of orders for the courts to consider? Should the law reflect a more consensual approach to custody and access? Should the law encourage an emphasis on the ongoing responsibilities of both parents? How else can parents be encouraged to take greater responsibility for their children? For example, it asks for views on the use of "parenting plans," based on agreements between the parties and sanctioned by the court. Submissions to the government about its discussion paper had to be submitted by November 30, 2000 (New Zealand, 2000).

7. OPTIONS FOR CONSIDERATION

While options for consideration in this area of family law are many and varied, there are four major ones. Before discussing them, a brief comment is necessary about constitutional limitations. In this area of family law, the Government of Canada only has jurisdiction in matters of divorce. The provinces have jurisdiction over the administration of justice. Therefore, cooperation between those two levels of government is required to address all issues involving high-conflict divorce. Indeed, the federal government has endorsed the promotion of coordinated multi-jurisdictional efforts to ensure the well-being of children whose parents divorce. The author is exceedingly mindful of the limited jurisdiction that the federal government has in this area, and of the need to accord proper respect to the jurisdictions of provincial and territorial governments. This paper is meant to help all governments collectively consider how best to prevent, or minimize the effects of, high-conflict divorce.

7.1 OPTION ONE

The first option is to make no distinction between high-conflict families or low conflict families, but to ensure that there are mechanisms to address high conflict when it arises. In this way, high-conflict divorce situations are not stigmatized by being singled out for special treatment and are seen as just one end of a continuum of conflict in divorce. The components of this option would focus on changes that could affect, in theory, low-conflict to medium-conflict to high-conflict divorces. These components would include:

1. a unified divorce court that would ensure, as much as possible, that the same judge hears all issues related to a disputed divorce;
2. the ability to appoint a special master or referee to help resolve conflict issues;
3. the use of compulsory parenting education classes;
4. the use of compulsory mediation; and
5. the ability to appoint independent legal counsel for the child or children of the divorce.

To assist the spirit of cooperation among the federal government, the provinces and the territories, an outline of these components, to help promote discussion on these issues, is as follows:

1. Case management

When a proceeding for divorce is begun, all issues relating to the divorce shall be heard before the same judge, unless it is impractical to do so.

2. Special master

2.1 A special master [or referee] may be ordered by the court to investigate any controversy that arises between the parties relating to the divorce proceeding if the parties consent to the appointment of a special master.

2.2 If the parties do not consent, a special master [or referee] may be ordered by the court to investigate any controversy that arises between the parties relating to the divorce proceeding:

- on motion by one of the parties; or
- on motion by the judge, who has been assigned to determine the issues in the divorce proceeding.

2.3 A party may object to the appointment of any person appointed as special master if:

- the potential special master shows enmity or bias towards either party;
- the potential referee has formed or expressed an unqualified belief or opinion about the merits of the action; or
- the special master is related to, or is or has been in a business relationship with, one of the parties.

2.4 The special master shall decide the controversy and make a written report to the court within 20 days after receiving all the evidence related to the controversy.

2.5 The decision of the special master shall stand as the decision of the court, and may be reviewed as if made by the court.

3. Parenting education classes

3.1 Once a divorce petition is filed with the court, if the parties have any children, the court shall order that the parties attend parenting education classes.

3.2 Parenting education classes shall include in their curriculum:

- information about child development;
- information about how parental conflict affects children; and
- exercises focussed on skills to help a parent communicate better with, and resolve conflict with, with the other parent.

3.3 If there is a history of domestic violence or if domestic violence is alleged by one of the parties, each party shall attend separate parenting education classes at different times.

4. Mediation

4.1 If it appears on the face of the divorce petition that custody or access is contested by the parties, the court shall set aside the contested issues for mediation.

4.2 Mediation proceedings shall be held in private and be confidential.

4.3 The mediator has the duty to assess the needs and interests of the child involved in the controversy.

4.4 The mediator may interview the child if the mediator believes it is necessary.

4.5 If there is a history of domestic violence or if domestic violence is alleged, the mediator shall meet with each party separately and at different times.

4.6 The mediator may submit a recommendation to the court about the custody of, or access to, the child.

5. Independent legal counsel

5.1 If the court determines that it would be in the best interest of the child, it may appoint counsel to represent the child in the divorce proceeding.

5.2 The child's counsel shall ensure that the best interests of the child are represented.

5.3 Unless inappropriate in the circumstances, the child's counsel has the duty to:

- interview the child;
- review the court files and all relevant records available to both parties; and
- make any further investigation that counsel considers necessary to ascertain the facts relevant to the divorce proceeding.

In addition to these proposals, the following recommendations could be considered:

- That a study be conducted to determine whether litigants in person are increasing in divorce courts and, if so, what problems are caused by litigants in person to the parties involved in the dispute and to the court system, and what means might be used to reduce conflict in these situations.
- That courts consider establishing minimum training requirements for professionals ordered by the court to examine issues of parenting and access arising from the dispute, such as mediators, guardians *ad litem*, special masters, etc.
- That a study be conducted to empirically examine the concept of high-conflict divorce in all its dimensions, and that this study be used to establish a baseline to distinguish high-conflict divorce from the other levels of conflict that arise during separation and divorce.
- That a study be conducted to determine whether courts should create strategies for intervention to reduce conflict on an ongoing basis after the divorce proceedings have ended and, if so, what those strategies should be.

7.2 OPTION TWO

This option proposes to address high-conflict divorce directly through the use of limited guidelines. Again, these guidelines are proposed in the spirit of a coordinated, multi-jurisdictional approach among the federal government and the provinces and the territories, and are not intended to encroach on provincial jurisdiction in this area. It is more limited than the draft protocol set out in Option Three, below. It is more limited in that it does not create a special tracking mechanism for high-conflict divorce. However, it does attempt to define high-conflict divorce, using most of the indicators set out by Stewart (2001). Admittedly, other definitions of high-conflict divorce can be used, if the Department of Justice Canada and the other Justice ministries of the provinces and territories agree to do so. The guidelines link this definition to elements that should be set out in a parenting plan:

Guidelines in High-conflict Divorce Situations

1. High-conflict divorce means a divorce proceeding that has the following indicators:
 - (a) either of the parties has a criminal conviction for (or has committed or has alleged to have committed) a sexual offence or an act of domestic violence;
 - (b) child welfare agencies have become involved in the dispute;
 - (c) several or frequent changes in lawyers have occurred;
 - (d) issues related to the divorce proceeding have gone to court several times or frequently;
 - (e) the case has been before the courts a long time without an adequate resolution;
 - (f) there is a large amount of collected affidavit material related to the divorce proceeding; and
 - (g) there is repeated conflict about when a parent should have access to the child.
2. When the court determines that a divorce is a high-conflict divorce, any parenting plan approved by the court in relation to that divorce shall:
 - (a) be designed in manner that will reduce the opportunity for parents to engage in conflict;
 - (b) maximize the time that children spend with both parents, so long as both parents know and love the children, are safe guardians of the children, and are willing to parent; and
 - (c) take into account the developmental needs of the children.
3. Parenting plans for high-conflict divorce shall set out in detail the rights and obligations of the parents, including:
 - (a) a written log that travels with the children, so that information about meals, medications and activities may be transmitted with minimal contact between parents and without children carrying messages;
 - (b) transfers that occur at public places, such as a restaurant, library or day-care (if conflict continues to be a problem at transitions, supervised transitions may be appropriate);
 - (c) separate or alternating attendance at special events for the children;

- (d) unrestricted, private telephone contact between the children and the non-residential parent;
- (e) if communication between the parents permits, an opportunity for the non-residential parent to care for the children before arrangements are made with a third party;
- (f) if there is parental alienation, ongoing post-divorce therapy with a neutral health professional may be appropriate;
- (g) a plan for resolving post-decree problems with the shared parenting plan set forth in the decree, including the use of alternative dispute resolution processes when appropriate; and
- (h) when appropriate, the appointment of a parenting co-ordinator to arbitrate disagreements that arise between the parties in regard to the design or implementation of the shared parenting plan. The parenting coordinator shall have authority to make recommendations to modify the parenting plan.

7.3 OPTION THREE

This option addresses how to resolve issues arising from high-conflict divorces. There are two general possibilities here.

The first possibility is the creation of a manual addressing all aspects of high-conflict divorce. Such a manual would be modeled on the Idaho Benchbook, *Protecting Children of High-Conflict Divorce* (Brandt, 1998). The manual would be used by judges to educate themselves about high-conflict divorce in all its aspects, ranging from literature on the impact of high conflict on children, a protocol to be followed by judges in such cases, current law on custody and visitation in such cases, special considerations in domestic violence cases, mediation evaluation and special masters, etc. Such a manual would be lengthy, but would also be comprehensive and would possibly be the best means by which judges, lawyers and mental health professionals are educated about high-conflict divorce. Of course, this manual should be the result of cooperation among all levels of government across Canada.

The second possibility is the creation of a comprehensive high-conflict divorce scheme set out in guidelines. This approach would be less informative than a judicial “Benchbook” on high-conflict divorce. However, it would be more detailed than the one in Option 2, because it would address the issues of domestic violence and the fast-tracking of high-conflict divorce cases.

In this regard, it is suggested that a “Protocol on High-conflict divorce” could set out principles and guidelines on high-conflict situations. This protocol would be modeled, in large part, on the Idaho Protocol. The following is a suggested draft of this protocol for federal, provincial and territorial governments to consider.

Protocol for Judges to Protect Children in High-conflict divorce Cases

A. Definition of high-conflict divorce

High-conflict divorce means a divorce proceeding in which (a) either of the parties has a criminal conviction for, or has committed or has alleged to have committed, a sexual offence or an act of domestic violence; (b) child welfare agencies have become involved in the dispute; (c) several or frequent changes in lawyers have occurred; (d) issues related to the divorce

proceeding have gone to court several times or frequently; (e) the case has been before the courts a long time without adequate resolution; (f) there is a large amount of collected affidavit material related to the divorce proceeding; and (g) there is repeated conflict about when a parent should have access to the child.

B. Parental conflict prior to court filing: public information

The court's role as a representative of society and as an experienced "witness" to the damage of parental conflict to children can strongly influence the development and credibility of a public information strategy. Judges need to take a leadership role in providing such information. The primary purpose of providing public information is to engage public interest, concern and awareness critical to moving public education systems, churches and agencies to develop and fund classes, workshops, counselling and group services working with families experiencing high-conflict divorce.

C. Parent education and family court services assessment

All parents filing for divorce must attend a Divorce Parenting Orientation, which includes information about the impact of divorce on children and which may include skill-based teaching designed to help parents communicate with each other in order to reduce levels of conflict. After the Divorce Parenting Orientation, parents still unable to develop a parenting plan need to be ordered into mediation or be referred by the court for an Alternative Dispute Resolution assessment.

D. Guidelines for determining custody and visitation in violent parent cases

(These are based on the guidelines of Dr. Janet R. Johnston for domestic violence cases.)

D.1. Domestic violence is the use of physical force, restraint or threats of force to compel one to do something against one's will or to do bodily harm to self, cohabitant or family member, or the mother or father of one's child. It includes but is not limited to: assault (pushing, slapping, choking, hitting, biting, etc.); use of or threat with a weapon; sexual assault; unlawful entry; destruction of property; keeping someone prisoner or kidnapping; theft of personal property; and inflicting physical injury or murder. There may also be psychological intimidation or control in the form of stalking, harassment, threats against children or others, violence against pets, or the destruction of property. It is understood that, most often, evidence of physical abuse is not available. However, lack of corroborative data does not diminish the indications of violence available to the mediator/evaluator from reports by the victim.

Premises

D.1.A.1. Domestic violence is detrimental to children, regardless of their relationship with the perpetrator of violence. Children who have witnessed or overheard severe or repeated incidents of violence perpetrated by parent(s) are likely to be acutely or chronically traumatized and at risk for emotional, behavioural and social difficulties, including long-term victim or perpetrator roles. Children who do not directly witness spousal abuse are also negatively affected by the climate of violence in their homes and are likely to experience impairment of development and socialization skills. Even very young children and infants who are not thought to be cognizant of the violence can be negatively affected. For these reasons, children need to be protected from

witnessing threats of violence or actual physical abuse, and from exposure to a climate of violence in their homes.

D.1.A.2. Domestic violence is understood to be behaviour that arises from multiple sources, which may follow different patterns in different families, rather than a syndrome with a single underlying cause. Parent-child relationships are likely to vary with the different patterns of violence, and children of different ages and gender are affected differently. There are also different trajectories for recovery and the reconstitution of family relationships, and for the potential for future violence. For these reasons, domestic violence families need to be considered on an individual basis when helping them develop appropriate post-divorce parenting plans.

D.1.A.3. Domestic violence can occur in all cultures and ethnic groups. However, the interpretation of what constitutes violence and what is considered normal emotional expressiveness varies greatly among different cultural and ethnic groups. It is important to interpret the meaning of a behaviour within its cultural context whenever possible. It is understood that a client may behave in ways that the majority culture views as destructive or psychologically aberrant, but that at the same time may be consonant with the client's native culture. Whenever possible, it is important to provide culturally aware divorce court services staff who can "bridge" from one culture to another in interpreting domestic violence and helping families make appropriate custody and visitation plans.

D.2. Physical custody and residence

D.2.A. General guidelines

D.2.A.1. The absence of violence perpetrated by the parent, and the capacity of the parent to provide a violence-free home for the child, should be given considerable weight in determining timesharing and the child's residence. It is important to note that domestic violence often is perpetrated not by the parents but by "significant others" (e.g., new boyfriends or girlfriends, new spouses or extended family), and the potential for violence to occur in this wider domain needs to be considered. It is also recognized that physical custody awards should not be based on any one factor, and that informed clinical judgements are necessary in weighing and taking into account the circumstances of each child and family.

D.2.A.2. Adult victims of repeated or severe incidents of violence may have diminished parenting capacity when the violent relationship is terminated, as a consequence of the victimization. Therefore, prior to long-term decision-making regarding child custody and timesharing, the parent who was the victim would need the opportunity to re-establish competence and stability as a resident parent for a period of time, usually with the support and guidance of professional and peer counsellors.

D.2.A.3. When a victim of violence, for self-protection, leaves the home without the children, it should not establish a status quo in favour of the perpetrator of violence. It is understood that there are few resources available to parents with children who leave a violent relationship.

D.2.B. Legal custody

General guideline: joint legal custody is generally not appropriate when there is ongoing high conflict and potential for violence between parents, as it usually requires considerable ability to work cooperatively in joint decision-making. Legal custody orders that keep the tension and hostilities high or that maintain the risk of further violence are contrary to the spirit and intent of a joint legal custody arrangement. No legal custody arrangement should maintain a high level of continuous parental conflict or hinder the parents' ability to make appropriate and timely decisions regarding their children.

D.2.C. Specific recommendations

D.2.C.1. When there is both current *and* episodic threats of, and use of, violence, sole legal custody should normally be given to the nonviolent parent. In these cases, the non-custodial parent may be denied right of access to the child's medical and educational records, if such information would provide access to the custodial address and telephone number, which the custodial parent has the right (for safety reasons) to keep confidential.

D.2.C.2. When there is a history of domestic violence that is *not* current, nor both recent *and* episodic, there should be no presumption in favour of any particular legal custody arrangement. The options include, but are not limited to, the following:

- (a) An explicit division of legal custody decision-making rights and responsibilities can be awarded to each parent.
- (b) A court master (arbitrator) can be appointed to help parents make joint decisions under a joint legal custody order.
- (c) Parents may have joint legal custody provided they both have the capacity to make non-coerced, timely, cooperative decisions for their child, according to an arrangement that does not compromise their safety.
- (d) One parent may be awarded sole legal custody.

D.2.C.3. If it is determined that sole legal custody is appropriate for a particular family, the agreement should reflect the non-custodial parent's legal right to directly receive information concerning the child(ren)'s health, education and welfare. The agreement should include a provision whereby the custodial parent must inform the relevant health and educational institutions that the non-custodial parent has the right of access upon request to such information (excluding, if appropriate, the custodial address and telephone number). The non-custodial parent should also have the authority to consent to medical treatment on behalf of the child in event of urgent injury or illness.

D.3. Access/visitation

D.3.A. General guidelines

D.3.A.1. Limit the child's exposure to parental conflict. All arrangements for contact between a child and parent should be carefully structured to limit the child's exposure to conflict between the parents and ensure the safety of all present.

D.3.A.2. Frequent transitions may not be advisable. When there is ongoing conflict and reasonable fear of violence between parents, or the child shows continued stress reactions to transitions between parents, access arrangements that require the child to make frequent transitions between parents should be avoided. In the special case of infants and young children, which might require more frequent exchanges of the child, special provisions should be made to ensure the comfort and safety of the child and parent.

D.3.A.3. Substantial amounts of time with both parents may not be advisable. When there is ongoing conflict and fear of violence between parents, timesharing schedules that require the child to spend substantial amounts of time with both parents are not usually advisable. (In cases when a child appears to need more contact with a same-gender non-resident parent, more visiting time may be appropriate. In this situation, it may also be better for a sibling who is of different gender than the non-resident parent to share the same timesharing agreement, so that siblings can remain together on visits in order to support one another.)

D.3.B. Specific recommendations

D.3.B.1. Supervised visitation. This involves the use of a third party to transfer the child from one parent to the other, and to remain with the child throughout the visitation period.

Supervised visitation is recommended when there is indication of current use of, or an expressed threat of, violence. It is also recommended when there has been both recent violence and episodic or ongoing violence in the past. In these cases, the perpetrator should normally have supervised visitation with the child under the following conditions:

- (a) An explicit court order should detail the conditions of the supervised access. This should include the times for the visits, the places for exchange of the child, whether telephone contact with the child is permitted and under what conditions, who should supervise the visit or how the supervisor is to be chosen, and who should bear the cost of the supervision. Although it is recognized that the court shall determine who bears the cost of the supervision, it is strongly advised that the parent who has perpetrated violence should normally bear the cost.
- (b) The supervisor should be a responsible adult who can be expected to provide appropriate supervision for the visitation. In general, the specific supervisor and the role that this supervisor will play during the visits may be agreed upon by both parents or ordered by the court. The supervisor should be someone with whom the child will be comfortable. The place of visitation should be one in which the child feels comfortable and safe.

- (c) The removal of the requirement for supervised visitation should normally be made contingent upon cessation of the threats of, or use of, violence by the perpetrator for a period of time determined appropriate by the court, and by the order of the court, on the successful completion of an approved course of counselling for the person causing the violence.
- (d) In the event that supervised visitation under the above terms is determined to be necessary but is not feasible, then the access plan should gravitate toward protecting the child, in which case access with the perpetrator of violence should be suspended until such time that supervised visitation is available or determined to be no longer necessary.

D.3.B.2. Suspended visitation. Visitation should be suspended for a designated period of time with a perpetrator of current violence, or with a perpetrator of both recent *and* episodic or ongoing violence, under any one of the following conditions.

- (a) When there are repeated violations of the terms of the visitation order, which adversely affect the child. This includes occasions when the supervisor of visitation reports that the perpetrator of violence uses supervised time with the child to denigrate the other parent, or to obtain information about the whereabouts and activities of the other parent.
- (b) When the child is severely distressed in response to visitation.
- (c) In the event that supervised visitation under terms ordered by the court is determined to be necessary but is not feasible, then the access plan should gravitate toward protecting the child, in which case access with the perpetrator of violence should be suspended until such time that supervised visitation is available or determined to be no longer necessary.
- (d) When there is clear indication that the violent parent has expressly threatened to harm or flee with the child, or if the offending parent attempts to use the child to communicate threats of physical harm or death to the other parent. Such cases should then be evaluated and a recommendation should be made to the court regarding the conditions under which supervised visitations might be resumed, or whether all contact between the child and the offending parent should be suspended indefinitely or permanently terminated. If the evaluation determines that indefinite suspension of parent-child contact is appropriate, it should be made very clear in a court order what conditions would have to be met by the offending parent before resumption of supervised visitations would be reconsidered by the court. If the evaluation determines that reinstatement of parent-child contact is appropriate, any “in person” contact should typically begin with supervised visitation.
- (e) If a parent has a history of extreme violence or abusive behavior (i.e. murder, attempted murder, violent sexual assault, and severe child abuse or neglect), extreme caution must be taken with regard to the child’s contact with the violence-threatening parent. Any parent-child contact should be suspended until an appropriate evaluation is made to determine under what conditions supervised visitations may occur or whether parent-child contact should be permanently terminated.

D.3.B.3. Temporary supervision or suspension of visitation. Either supervised or suspended visitation may be appropriate for a brief period in either of the following circumstances: while fact finding takes place regarding serious allegations of domestic violence, or while the child is being assessed for serious symptoms of distress and/or reluctance to visit.

Suspended visitation, for a brief period, is appropriate following a traumatic episode of violence perpetrated by one parent, when the abused parent and child have sought shelter (e.g. in a battered women's shelter) and need respite. This period of respite should not be less than two weeks.

D.3.B.4. Unsupervised access/visitation. Under an arrangement for access between parents and children when there has been a history of domestic violence but the violence is not current, nor both recent and episodic or ongoing (as in the above sections on supervised and suspended visitation), the following provisions should normally be appropriate.

- The access arrangements should be explicitly stated in court orders (with respect to schedules, times, dates, holidays, vacations, etc.) that can be easily interpreted and enforced by police officers if necessary, and subject to contempt actions if the orders are violated.
- Telephone contacts initiated by the parents to one another or to the child should be at scheduled times only. The child should have unrestricted access by telephone to both parents.
- A restraining order should normally be in place preventing the parent who has perpetrated violence from coming near the other parent, including during drop-off and pick-up times with the child. The use of mutual restraining orders is generally appropriate only when there is evidence of actual mutual physical or psychological abuse.
- Transfer of the child should be at a neutral safe place, preferably with a third party present.

When there is considerable concern about the parenting capacities of both parents, and when one or both parties have perpetrated violence, the following may be appropriate.

- Temporary custody and visitation awards can be made contingent upon either or both parents obtaining parent counselling, and approved counselling for cessation of the violence. If there is evidence that drug or alcohol problems are contributing to the violence, then temporary awards should be provisional upon treatment for these problems also. If treatment and/or repeated attempts to improve parenting skills fail and the children continue to be at risk, referrals should be made to appropriate Child Protective Services.
- Temporary awards made with these provisos should be subject to appropriate review to ensure compliance with the terms of the agreement and the safety and well-being of the child.
- It may be appropriate to give more weight in the custody/access decision to providing the child with continuity in relationships with supportive "others" (such as teachers, peers, grandparents) and stability of place (such as neighborhood and school). A parent's need to make a geographical move for economic reasons is an exception to this.

D.4. Assessment, treatment, and representation of children

A. Specific recommendations

D.4.A.1. Children who show symptoms of fear, anxiety, persistent refusal to visit, and other distress in relation to visitation with a parent who is perceived to have perpetrated violence should normally be seen and assessed by Divorce Court workers, or by any counsellor, therapist, or advocate who is trained to interview children and who is prepared to talk with Divorce Court Services. The purpose of this assessment is to hear the child's concerns and recommend appropriate schedules to the court, including safeguards in the visitation plan that help the child feel more safe and comfortable with the arrangement.

D.4.A.2. Children who express strong wishes to "talk with the judge" and those who write letters and attempt to communicate with the court should normally be given the opportunity to talk to Divorce Court Services workers or to a legal or mental health counsellor who is trained to interview children and who is prepared to talk with Divorce Court Services. The purpose of interviewing children is to gain a greater understanding of the child's wishes and needs, and to provide the child with an opportunity to be heard. It should be made clear to both parents and the child that the child is not testifying, that a decision about custody and access is not the child's to make, and that the child does not have to choose between parents.

D.4.A.3. Children who have witnessed severe or repeated incidents of parental violence are likely to be acutely or chronically traumatized and in need of remedial psychological help. Their reluctance or refusal to visit a parent should not be seen as solely induced by an alienating parent. Whenever possible they need to be referred for psychological treatment, and each parent (whether victim or perpetrator) is likely to need separate collateral parental counselling as well.

D.4.A.4. It may be appropriate to appoint a guardian *ad litem* to represent the child's interests and concerns during the legal proceedings when there has been domestic violence and when the child is symptomatic or reluctant to visit.

E. Alternative dispute resolution options when parental violence is not present

E.1. Each judicial district should develop appropriate alternative dispute resolution options recognizing differences of resources and needs in each judicial district.

E.2. In all districts, a core of mediators should have specific training in high-conflict divorce mediation.

E.3. In all districts, mediation or other alternative dispute resolution methods would be utilized prior to contested proceedings involving the custody of children.

F. Adjudication

F.1. Scheduling/trial setting for high-conflict cases

F.1.A. The case needs to be given the earliest possible setting, in order to bring closure to the legal battle. However, sufficient time must be allowed in order for parties to exhaust alternative dispute resolution (ADR) possibilities before the trial. If domestic violence or other

considerations make ADR inappropriate, the trial should be held at the earliest possible opportunity.

F.1.B. Generally, no custody/visitation hearings will be held before the moving party has attended the court-ordered divorce parenting workshop or “divorce orientation” or “mediation class.” A divorce parenting orientation is available weekly to parents in each district. The order to attend the divorce parenting workshop advises the parties they will be expected to submit a parenting plan after the workshop.

F.1.C. At the time of filing, there are two recommended models to protect children of high-conflict divorce.

- At the time of filing, parties are referred to the divorce parenting workshop and within 30 days following the workshop, they must file a temporary parenting plan. Parents must then file a final parenting plan within 60 days after filing the temporary one. If filing deadlines are missed, parties are ordered to case assessment or some form of ADR, and, if necessary, adjudication. Under this model, any trial setting would be 120 to 150 days after the date of the case filing.
- Upon the filing of the Answer or other pleadings indicating custody issues raised, an Order to File a Parenting Plan within 30 days is entered. If the parenting plan is not filed, the file is pulled and given to the judge who orders a Status Conference. A Status Conference may be held by telephone. If the judge determines during the conference that the children need protection and it is a high conflict case, the case is placed on the “fast track” and a trial is scheduled within 90 to 100 days.

F.2. Pre-trial order/pre-trial conference issues

F.2.A. Appointment of a guardian *ad litem* or attorney for the children

It is recommended that in a high conflict custody adjudication the court should consider whether the children should have independent representation either by a guardian *ad litem* or by separate counsel. The decision of which to appoint depends upon the decision-making capacity of the child.

F.2.B. Appointment of an expert witness

The parties are encouraged to agree to the appointment of an expert to perform a custody evaluation (including a psychological assessment of the parties and a home study), in lieu of hiring separate experts for each side. If the parties are unable to agree on the appointment, the court should consider making the appointment *sua sponte* or may order any party to be evaluated by the other party’s evaluator. The order should address the admissibility of the evaluation as the expert’s direct testimony, without the necessity for the expert’s presence at the hearing (although either party could subpoena the expert to be cross-examined regarding the evaluation).

F.2.C. Referral to settlement conference or special master

F.2.C.1. Even if other forms of alternative dispute resolution have failed or have been deemed inappropriate due to concerns about the danger of domestic violence, the presiding judge may consider referring the case to another judge for a settlement conference focussing on the issue of custody.

F.2.C.2. In order to shorten the trial, the court may consider appointing a special master to conduct fact-finding on some or all of the issues to be tried.

F.3. Trial

F.3.A. The judge sets the tone at the outset of the trial or hearing. The judge makes it clear to the parties and the attorneys that they are to present their case in a manner that reduces the level of conflict and hostility between the parties and treats each parent with respect and courtesy.

F.3.B. The judge needs to manage the trial to assure completion in the time allotted, in order to avoid having to finish the trial at a later date. Invariably, lengthy interruptions result in new grievances and issues that the parties will want to bring before the court. It is recommended that if the judge doubts whether the parties will complete their proof in the time allotted, he or she limit the amount of time each side will have to present its case (charging cross-examination time to the side conducting the cross) to assure timely completion.

F.4. Interviews of children

Interviews of children need to be handled with great caution. Children normally love both parents and should not be placed in the position of having to choose one parent over the other.

G. Decree/parenting plan

G.1. A detailed shared-parenting plan should be included in the decree. As a general rule, the higher the level of conflict between the parents, the more specific the shared-parenting plan should be to protect the children. In cases involving domestic violence, see Section D. Guidelines for determining custody and visitation in high conflict and violent parent cases. To protect the children, the shared-parenting plan in the decree should include the following:

G.1.A. Be designed in a manner that will reduce and/or minimize the opportunity for conflict between parents.

G.1.B. Maximize the time the children spend with both parents, so long as both parents know and love the children, are safe guardians of the children, and are willing to parent.

G.1.C. Take into account the developmental needs of the children. The implications of those needs for the parenting plan differ depending on the level of conflict between the parties (see “Normal Visitations versus Conflict Visitations” in Garrity and Baris, 1994).

G.2. To protect children, parenting plans may include some or all of the following provisions:

G.2.A. Requiring a written log which travels with the children, so that information about meals, medications, activities, etc. may be transmitted with minimal contact between parents and without children carrying messages.

G.2.B. Transfers that occur at public places, such as a restaurant, library or day-care. If conflict continues to be a problem at transitions, supervised transitions may be appropriate.

G.2.C. Separate or alternating attendance at special events for the children.

G.2.D. Unrestricted private telephone contact between the children and the non-residential parent.

G.2.E. If communication between the parents permits, an opportunity for the non-residential parent to care for the children before arrangements are made with a third party.

G.2.F. If parental alienation is established, ongoing post-divorce therapy with a neutral health professional may be appropriate.

G.2.G. Include a plan for resolving post-decree problems with, and changes to, the shared-parenting plan set forth in the decree, including the use of alternative dispute resolution processes when appropriate.

G.2.H. Include, when appropriate, the appointment of a parenting co-ordinator to arbitrate disagreements that arise between the parties in regard to the design or implementation of the shared-parenting plan. The parenting coordinator should have authority to make recommendations to modify the parenting plan.

H. Post adjudication

All ADR options should be considered in post-adjudication proceedings.

7.4 OPTION FOUR

This option would create a separate statute, entitled the *Protection of Children in High-conflict divorce Act*. It would put several of the elements of the protocol outlined immediately above into statutory language, but in addition it would set out, in a preamble, a declaration of principles to set the context for the creation of the Act. Below is a draft statute modelled on this proposal. Because of jurisdictional variables, certain issues needed to ensure the effectiveness of this Act would have to be implemented by the provinces. For ease of convenience for the reader, the measures to be taken by the provinces are placed in brackets in this draft. The intent of this approach is to give a full picture of what a coordinated, multi-jurisdictional approach would look like. It is meant for the consideration of all levels of government and, it is hoped, it can help give them a clearer understanding of what a coordinated effort by all governments could achieve in this area of law.

The Protection of Children in High-conflict divorce Act

Preamble

WHEREAS research documents that the harm done to children as a result of divorce is exacerbated by high conflict;

AND WHEREAS it is recognized that in cases of divorce involving children, neither parental conflict nor the judicial system should cause additional harm to children:

DECLARATION OF PRINCIPLES:

This Act is based on the following principles:

- (a) children of high-conflict divorce need protection from the potentially harmful effects of the adversarial approach used in the judicial system to resolve disputes between parents;
- (b) the judicial system, lawyers, mental health professionals and community services should collaborate proactively to prevent or reduce conflict between disputing parents in a divorce proceeding;
- (c) the judicial system, lawyers and mental health professionals should collaborate to assist parents in developing a plan for the ongoing caretaking of children;
- (d) a parenting plan will serve the best interest of the child only if it minimizes conflict, maximizes time with the parent when appropriate, and meets the child's developmental needs; and,
- (e) parents and children need safety from threats, harassment and physical violence in order to provide and care for their children.

1.1. Title. This Act may be cited as the *Protection of Children in High-conflict divorce Act*

1.2. Definitions

“Domestic violence” means physical abuse, or sexual abuse, or the threat of physical or sexual abuse, used by one party in the divorce proceedings against the other party or against a child of the family.

“High-conflict divorce” means a divorce proceeding in which:

- (a) either party has a criminal conviction for [or has committed or has alleged to have committed] a sexual offence or an act of domestic violence;
- (b) either party has committed, or is alleged to have committed, an act of domestic violence;
- (c) child welfare agencies have become involved in the dispute;
- (d) in relation to the divorce proceeding, there have been several changes in lawyers;
- (e) any party in the divorce proceeding has gone to the court several times to resolve issues relating to the proceeding;
- (f) the divorce proceeding has been before the court for a long time without being resolved;
- (g) there is a large amount of collected affidavit material related to the divorce proceeding; or in which
- (h) there is repeated conflict over the issue of parental access to a child.

“Supervised access” means face-to-face contact between a parent and a child, being access that occurs:

- (a) at any place approved by the court where access can be appropriately supervised; or
- (b) in the immediate presence of any person approved by the court.

2. Parent Education Classes

2.1. The court, on its own motion or that of a party to the divorce proceeding, may determine if the divorce proceeding is a high-conflict divorce.

2.2. If the court determines that the divorce proceeding involves high conflict, the court shall order that the parties attend parenting education classes.

2.3. Parenting education classes shall include in their curriculum:

- (a) information about child development;
- (b) information about how parental conflict affects children; and
- (c) exercises focussing on skills to help a parent communicate with, and resolve conflict with, the other parent.
- (d) If there is a history of domestic violence or if domestic violence is alleged by one of the parties, each party shall attend separate parenting education classes at separate times.

3. Mediation

3.1. If the parents are unable to agree on a parenting plan for the children after attending parent education classes, the court shall order that the parties attend mediation presided over by a mental health professional who has received training in the resolution of high-conflict divorce situations.

3.2. Mediation proceedings shall be held in private and be confidential.

3.3. The mediator has a duty to assess the needs and interests of the child involved in the controversy.

3.4. The mediator may interview the child if the mediator believes that it is necessary.

3.5. If there is a history of domestic violence within the family or if domestic violence is alleged by one of the parties, the mediator shall meet with each party separately and at separate times [alternative: The court shall refuse to order mediation].

4. Fast-tracking the Trial

If the parents are unable to agree to a parenting plan after mediation, the court shall:

- (a) order that the trial to resolve all issues arising from the divorce proceeding be held as soon as practicable; and
- (b) order a temporary parenting plan after hearing evidence presented by the parties, to last until the court at the trial of the divorce proceeding orders a permanent parenting plan.

5. Legal Counsel for the Child

5.1. If the court determines that it would be in the best interest of the child, the court may appoint counsel to represent the child in the divorce proceeding.

5.2. The child's counsel shall ensure that the best interests of the child are represented.

5.3. Unless inappropriate in the circumstances, the child's counsel has the duty to:

- (a) interview the child;
- (b) review the court files and all relevant records available to both parties; and
- (c) make any further investigations as the counsel considers necessary to ascertain the facts relevant to the issue in the divorce proceeding.

6. Appointment of Special Master

6.1. A special master [or referee] may be ordered by the court to investigate any controversy that arises between the parties relating to the divorce proceeding, so long as the parties consent to the appointment of a special master.

6.2. If the parties do not consent, a special master [or referee] may be ordered by the court to investigate any controversy that arises between the parties relating to the divorce proceeding:

- (a) on motion by one of the parties; or
- (b) on motion by the judge who has been assigned to determine the issues in the divorce proceeding.

6.3. A party may object to the appointment of any person appointed as special master if:

- (a) the potential special master shows enmity or bias towards either party;
- (b) the potential referee has formed or expressed an unqualified belief or opinion about the merits of the action; or
- (c) the special master is related to, or is or has been in a business relationship with, one of the parties.

6.4. The special master shall decide the controversy and make a written report to the court within 20 days after receiving all the evidence relating to the controversy.

7. Contents of Parenting Plan

7.1. Any parenting plan approved by the court in relation to a high-conflict divorce shall:

- (a) be designed in a manner that will reduce the opportunity for parents to engage in conflict;
- (b) maximize the time the children spend with both parents, so long as both parents know and love the children, are safe guardians of the children, and are willing to parent; and,
- (c) take into account the developmental needs of the children.

7.2. Parenting plans relating to high-conflict divorce shall set out in detail the rights and obligations of the parents, including:

- (a) requiring a written log which travels with the children, so that information about meals, medications and activities may be transmitted with minimal contact between parents and without children carrying messages;
- (b) transfers that occur at public places, such as a restaurant, library or day-care (if conflict continues to be a problem at transitions, supervised transitions may be appropriate);
- (c) separate or alternating attendance at special events for the children;
- (d) unrestricted private telephone contact between the children and the non-residential parent;
- (e) if communication between the parents permits, an opportunity for the non-residential parent to care for the children before arrangements are made with a third party;
- (f) if parental alienation is established, ongoing post-divorce therapy with a neutral health professional may be appropriate;
- (g) a plan for resolving post-decree problems with, and changes to, the shared-parenting plan set forth in the decree, including the use of alternative dispute resolution processes when appropriate; and
- (h) when appropriate, the appointment of a parenting coordinator to arbitrate disagreements that arise between the parties in regard to construction or implementation of the shared-parenting plan. The parenting coordinator shall have authority to make recommendations to modify the parenting plan.

8. Allegations of Domestic Violence

8.1. When, in any divorce proceeding, it is alleged that a party to the proceeding has used violence against the child or a child of the family or against the other party to the proceedings, the court shall, as soon as practicable, determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether the allegation of violence is proved.

8.2. When the court is satisfied that a party to the proceeding has used violence against the child or a child of the family or against the other party to the proceeding the court shall not:

- (a) make any order giving the violent party custody of the child to whom the proceedings relate;
or
- (b) make any order allowing the violent party access to that child.

8.3. The court may order that the violent party have supervised access to the child if the court is satisfied that the child will be safe with the violent party during that access time.

8.4. In considering whether a child will be safe while a violent party has supervised access to the child, the court shall consider:

- (a) the nature and seriousness of the violence used;
- (b) how recently the violence occurred;
- (c) the frequency of the violence;
- (d) the likelihood of further violence occurring; and
- (e) the physical or emotional harm caused to the child by the violence;

- (f) whether the other party to the proceedings considers that the child will be safe while the violent party has access to the child, and consents to the violent party having access to the child;
- (g) the wishes of the child, if the child is able to express them, having regard to the age and maturity of the child;
- (h) any steps taken by the violent party to prevent further violence occurring; and
- (i) any other matter the court considers relevant.

8.5. If the court is unable to determine whether the allegation of violence is proved, but is convinced that there is a real risk to the safety of the child, the court may make any order it believes is necessary to protect the safety of the child.

9. Breach of Parenting Plan

9.1. A party who believes that the other party in the divorce proceeding is attempting to, or has failed to comply with, the terms of a parenting plan approved by the court, may, on notice to the other party, apply to the court for a finding that the other party breached the terms of the parenting plan.

9.2. If the court determines that the parent has not complied with the terms of the parenting plan, the court shall order:

- (a) if access has been wrongly denied by the non-complying parent, that the non-complying parent provide the aggrieved party additional time with the child equal to the time missed with the child as a result of the parent's non-compliance;
- (b) that the non-complying party pay the aggrieved party all court costs, reasonable attorney's fees and other reasonable expenses incurred in locating or returning a child; and
- (c) that the non-complying party pay the aggrieved party a civil penalty not less than \$100.

9.3. If the non-complying parent is presently able to comply with the terms of a parenting plan but refuses to do so, the parent shall be jailed for contempt of court until he or she complies with the order, but in any event for no more than 180 days.

8. CONCLUSION

This paper has attempted to discuss high-conflict divorce in all its aspects. It has examined, in part, the harmful effects of high-conflict divorce on children, theories about what causes high-conflict divorce, the use of external markers to identify high-conflict divorce, and the legal response in other jurisdictions to high-conflict divorce situations. It proposes options for consideration ranging from moderate to radical, with the full understanding that progress in this area of law can only be achieved through cooperation among all levels of government in a manner respectful of each government's jurisdiction. It is hoped that this paper will contribute to a thorough debate by all stakeholders about the ways in which our present legal system should be changed to prevent or minimize the harmful effects of high-conflict divorce.

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APPENDIX A: PARENTING PLAN AGREEMENT

**From The Idaho Benchbook:
“Protecting Children of High-Conflict Divorce” (Brandt, 1998)**

PARENT PLAN AGREEMENT

This parent plan is for Children of:
Mother _____
Father _____

COURT CASE NO. _____
Soc. Sec. No. _____
Soc. Sec. No. _____

The Child/ren of this marriage (or relationship) under age 18 are:

<u>NAME</u>	<u>DATE of BIRTH</u>	<u>PRESENT ADDRESS</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

We have crossed off the portions of this document where we do not have agreement or do not desire agreement. We have checked the boxes for a particular option where we have agreement.

1. RESPONSIBILITIES AND DECISION-MAKING

We each have a heartfelt and legal responsibility to provide for the physical and emotional needs of our child/ren. When our child/ren are scheduled to be with father, father is the ON-DUTY parent. When our child/ren are scheduled to be with mother, mother is the ON-DUTY parent. We agree that the ON-DUTY parent will make decisions about the **day to care and control** of our child/ren. Neither of us shall schedule activities for our child/ren during the time the other parent is ON-DUTY without prior agreement of the ON-DUTY parent.

We care about the well being of our child/ren. We realize we both are very important to our child/ren and they need each of us as an active parent throughout their lives. We respect each parent’s separate role with our child/ren. We will give our child/ren permission to love, and be proud of, the other parent. We shall put our **child/ren’s needs first** in planning their living arrangements. We understand that each child is an individual and may have different needs and that these needs will change as they grow older.

2. RESIDENTIAL SCHEDULE

We shall follow this specific schedule so our child/ren know what will be happening to them and when they will be with each other and with each parent.

Our child/ren shall have a home base with [] *mother* [] *father* [] *both mother and father* and have regular contract with the other parent as listed here (list days, evenings, overnights, times):

Mother shall be ON-DUTY and our child/ren will be with mother as follows: _____

Father shall be ON-DUTY and our child/ren will be with father as follows: _____

3. SUMMER RESIDENTIAL SCHEDULE (if different than residential schedule outlined on page 1)

During the summer, our child/ren shall have a home base with mother father both mother and father, and have regular contact with the parents as listed here (list days, evenings, overnights and times):

Mother shall be ON-DUTY and our child/ren will be with mother as follows: _____

Father shall be ON DUTY and our child/ren will be with father as follows: _____

4. HOLIDAY SCHEDULE

The holiday schedule specified below overrides the residential schedule after our child/ren are older than _____ years. When a holiday falls on a weekend (this does not apply to either Spring Break or Christmas Break), the parent who is “on-duty” for that holiday will be “on-duty” for the entire weekend unless specifically noted otherwise. If the holiday schedule results in our child/ren spending 3 weekends in a row with the same parent, we agree that the “other” parent will have the child/ren for the weekend following the holiday weekend. This will result in each parent having the child/ren for 2 weekends in a row.

On **MARTIN LUTHER KING DAY, PRESIDENT’S DAY, MEMORIAL DAY, AND LABOR DAY WEEKENDS**, our child/ren shall remain with the parent they are normally scheduled to be with that weekend through Monday at 7:00 p.m. unless noted differently in the “other” section on page 5.

Our child/ren shall spend **SPRING BREAK** with father in odd even numbered years and with mother in odd even numbered years. We define SPRING BREAK as the following time period:

Our child/ren shall spend **EASTER** Sunday weekend with father in odd even numbered years and with mother in odd even numbered years.

Our child/ren shall spend **MOTHER’S DAY** with mother and **FATHER’S DAY** with father each year.

Our children shall spend **July 4th** overnight to July 5th with father in odd even numbered years, and with mother in odd even numbered years.

Our child/ren shall spend **THANKSGIVING** from Wednesday after school until Friday Sunday at 7 p.m. with father in odd even numbered years, and with mother in odd even numbered years.

Our child/ren shall celebrate **CHRISTMAS** on December 24 from 9:00 a.m. until 9:00 p.m. with mother in odd even numbered years, and with father in odd even numbered years and be with the other parent from 9:00 p.m. on December 24 until 9:00 p.m. on December 25.

When any of our child/ren are school age they shall spend CHRISTMAS BREAK as follows:

5. TRANSPORTATION—CHILD/REN AND BELONGINGS

We shall arrive on time (no more than 10 minutes early or late) to drop off and pick up our child/ren. Because remembering is difficult for child/ren, we shall deliver our child/ren’s clothing, school supplies and belongings at the same time we deliver our child/ren. We shall return our child/ren’s clothing in a clean condition to the parent who purchased the clothing.

When our child/ren are scheduled to return to father, *father shall pick them up at (place)*
_____ *mother shall drop them off at (place)* _____.

When our child/ren are scheduled to return to mother, *mother shall pick them up at (place)*
_____ *father shall drop them off at (place)* _____.

6. FLEXIBILITY

Although our child/ren need living arrangements that are **predictable**, if something unexpected or unavoidable comes up, we shall give each other as much notice as possible. If we are unable to agree on a change to the schedule, this residential schedule shall be followed. If this results in the need for child care, the scheduled ON-DUTY parent shall make the child care arrangements and pay for the cost of child care.

7. COMMUNICATION

To keep our child/ren out of the middle of our relationship and any conflict that may arise between us, we shall not (A) ask them about the other parent - OR – (B) ask them to give messages to the other parent - OR – (C) make unkind or negative statements about the other parent around our children or allow others to do so. We shall treat each other with dignity and respect in the presence of our child/ren. We shall keep our conversations short and calm when exchanging our child/ren so they won’t feel afraid or anxious. We agree our children may have unlimited telephone access to each of us between the hours of _____ and _____.

During long separations from our child/ren, we will maintain frequent contact with them by telephone, letter, post cards, video or audio tapes, etc. We will encourage and help our child/ren stay in touch with the other parent by telephone, letter, etc. Before leaving, we shall give each other the address and phone number where our child/ren can be reached if they will be away from home for more than 48 hours.

8. SAFETY

We shall not operate a vehicle when under the influence of alcohol or non-prescription drugs when our child/ren are in the vehicle, or use these substances *at all* *carelessly* when ON-DUTY as parent. We shall not leave our child/ren under age _____ unattended at any time.

- Only _____ (names) are to be present when our child/ren are exchanged.*
- We shall not use, nor allow anyone else to use, physical discipline with our child/ren.*
- Only biological or adoptive parents (no stepparents) can use physical discipline with our child/ren.*
- All contact between our child/ren and _____ (name) shall be supervised by _____.*
- Neither parent shall allow our child/ren to be in the presence of _____*

9. EDUCATION

We shall instruct our child/ren's schools to list each of us and our respective addresses and telephone numbers on the school's records. We will contact our child/ren's schools to find out about their needs, progress, and special events including parent-teacher conferences. We shall also share information about our child/ren's school progress, behavior and events with each other. We will encourage and support our child/ren's efforts for further education such as college or technical training. Major decisions about our child/ren's education (such as which school they will attend) will be made by _____.

10. EXTENDED FAMILY

We recognize our child/ren will benefit from maintaining ties with grandparents, relatives and people important to them and we will help our child/ren continue to be with these people from time to time.

11. FINANCIAL SUPPORT

We understand that the Idaho Child Support Guidelines (ICSG) require each of us to contribute to the support of our children based on our respective incomes and that child support shall be set in accordance with these guidelines. Child support shall be paid until our child/ren turn age 18, or up to age 19 if they continue attending high school.

We understand that we may reach our own agreement regarding which parent will claim which children for tax purposes. However, if we are unable to reach our own agreement, the judge will assign the tax exemptions to one parent in accordance with the ICSG.

For income tax exemption purposes, father shall claim _____ (child/ren's first names) in odd even numbered years, and mother shall claim _____ (child/ren's first names) in odd even numbered years.

12. CHILD CARE

If occasional (not work-related) child care is needed by the ON-DUTY parent, we shall are not required to offer the other parent the chance to provide this care before seeking someone else to care for our child/ren. The ON-DUTY parent shall make any needed occasional child care arrangements and pay the cost.

Because the basic child support award does not cover work related child care costs, father shall pay _____% and mother shall pay _____% of the cost of work related child care. These costs shall be paid directly to the child care provider in advance. The work-related child care provider shall be chosen by _____.

13. HEALTH CARE

We each have a right to our child/ren's medical information and records, and we will communicate with each other on major health care for our child/ren. Major decisions about health care (such as the need for surgery) will be made by _____. The ON-DUTY parent shall make sure our child/ren take their prescription medicine. In emergencies, each parent can consent to emergency medical treatment for our child/ren, as needed, and we shall notify the other parent as soon as it is possible to do so.

Health insurance coverage for our child/ren shall be provided by father mother the parent that can obtain suitable coverage through an employer at the lower cost. In addition to child support, we shall share costs for our child/ren's health care which are not covered or paid in full by insurance (including the cost for health insurance premiums and deductibles, medical, dental, orthodontic, and vision care). These out of pocket health care costs shall be prorated between us in proportion to our ICSG incomes. Currently father's share is _____% and mother's share is _____%. Our shares of these payments shall be paid directly to the health care provider unless already paid. When the other parent has already paid the provider, our share shall be (1) reimbursed to the other parent 30 days after receiving the bill - OR - (2) 30 days after receiving proof of how much the insurance company paid on the bill, whichever occurs last.

14. MOVE FROM CURRENT RESIDENCE

We shall give each other as much notice as possible and at least _____ days notice when a decision to move is made. A move of _____ miles or more makes it difficult to follow the schedules in this Plan and requires a new agreement. We shall resolve the changes concerning our child/ren and have them made an order of the court before moving our child/ren to a new location of over _____ miles.

[] *This plan is being made with the knowledge that _____ is planning to move to _____ in the near future and this plan has been designed to accommodate that move.*

15. CHILD/REN’S OUT OF STATE TRAVEL

We shall not remove our child/ren from the State of Idaho without an advance written agreement by both of us. We shall include the date we shall return our child/ren to Idaho in our written agreement.

16. DISPUTES

Once this plan has been made an order of the court, we realize we must continue to follow this plan even if the other parent does not. When we cannot agree on the meaning of some part of this agreement, or if a big change (such as a move or remarriage) causes conflict, we shall make a good faith effort to resolve our differences through mediation before returning to the court for relief.

17. OTHER

Reasonable costs shall be awarded to the prevailing party in any action brought to enforce any terms of the agreement.

[] *Our child/ren will be legally and publicly known by the surname (last name) of _____.*

In this section, some parents also choose to include agreements regarding one or more of the following items: how child/ren’s birthdays will be celebrated, how holidays other than those specified in the holiday section will be spent, religion or religious training, provisions for or decisions regarding mental health care, allocation of costs associated with post-high school education, children driving or owning a motor vehicle, special family occasions, visits with/to extended family members (particularly grandparents), visits with/to stepchildren, or how the ‘on duty’ parent will help keep the ‘off duty’ parent involved in “special moments” of the child/ren’s lives.

[]: _____

[]: _____

[]: _____

18. DURATION

ONCE THIS AGREEMENT IS MADE AN ORDER OF THE COURT, this agreement shall be in effect until further court order. Any changes to this Agreement shall be made in writing, dated and signed by each of us. Until such written change is made an order of the Court, this agreement will govern any dispute. Our signed copies of this agreement (check all that apply):

shall be delivered to our case judge to be merged and incorporated into the divorce decree or entered as an order (at the discretion of the judge)

shall be delivered to our attorneys for their review

shall serve as our parenting arrangements until our divorce/modification is finalized by the court

_____	_____	_____
Mother	Father	Witness
_____	_____	_____
Date	Date	Date