Chapter XIV

Consolidating The New Paradigm:

The Future of the Child Custody Court

“Judicial reform is no sport for the short-winded or for [those] who are afraid of temporary defeat…'When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop’”---Chief Judge Arthur Vanderbilt.¹

In the *Structure of Scientific Revolutions*, the philosopher of science, Thomas Kuhn articulated a theory of how new ways of thinking displace the old. Kuhn defines paradigm as the “entire constellation of beliefs, values, techniques and so on shared by the members of a given community.”² A paradigm is basically the accepted wisdom of a society as it pertains to one area of knowledge--it is the prevailing explanation for something. Paradigm also refers to particular problem situations that exemplify this framework and through which practitioners learn how to practice science.

According to Kuhn, normal science proceeds by elaborating a particular paradigm. When problem solving within a paradigm can no longer account for significant 'facts', a scientific revolution can occur, involving the birth of a new paradigm. Kuhn argues that changes in paradigms are not evolutionary, but rather a series of peaceful
interludes punctuated by intellectually violent revolutions that result in replacing one world-view with another.

Law and judicial administration are not natural sciences and Kuhn’s concept of paradigm shift may have become something of an overused cliché. It is, however, a valuable shorthand way to describe what has occurred in child custody courts since approximately 1980. In what for legal institutions is a remarkably short period of time, the paradigm of the child custody court has shifted from sole custody and adversary courtroom combat to mediation, education and self-determination that aims to involve both parents in the post-divorce life of their child.

What makes one paradigm more attractive than another is that its answers to the important questions of the particular field are superior to its rivals. The adversary system paradigm assumes that one parent is more important to the child’s future than another and that a court can identify that parent through courtroom combat. These assumptions do not meet the needs of parents and children in an era of mass divorce, gender equality, research establishing the importance of both parents in the life of the child and overcrowded courts. The conflict management paradigm, in contrast, assumes that parents, not judges or mental health experts, should determine how a child of divorce is parented, that both parents are important to the child’s future and that carefully structured interventions can encourage parents to place their children’s interests above their anger and pain. These assumptions have, in general terms, been validated by the available empirical evidence and experience since they have come into public consciousness. They also are more morally attractive than the assumptions of the adversary system/sole custody paradigm in that they appeal to the better instincts of people and parents.
Models for Interdisciplinary Coalitions

The child custody court’s paradigm shift to parental self-determination and responsible conflict management now has to reach all divorcing parents and children. It also needs to become a routine part of the way that the interdisciplinary practitioners in the child custody court practice their daily work.

Interdisciplinary coalitions that support the interests of children are the key to expanding and consolidating the paradigm shift. Lawyers and judges in particular need to reach out beyond their profession to create alliances to support continued reform, research and development. Judges, lawyers, mental health professionals and advocates for children must work together to create a more humane, coordinated child custody dispute resolution system that emphasizes planning for children and responsible conflict management.

Interdisciplinary coalition should strive to create continuity between the advice professionals give to parents outside the courtrooms of the child custody court and advocacy and parental behavior inside those courtrooms. The message lawyers should send to parents in their offices should be similar to that mental health professionals send to them: reduce your conflict and cooperate with each other if it safe to do so. Every attempt should be made to settle child custody disputes early in their life. Criteria should be established through research and development for cases that need more intensive interventions. The interdisciplinary reform coalition can support legislation and training of legal and mental health professionals to accomplish these goals.

Here are five forms interdisciplinary reform movements can take, from states of different sizes and different political climates:
California: California’s Center for Families, Children and the Courts is an interdisciplinary arm of the state court system that focuses on improving the quality of justice for children and families in court. The Center aims to bridge subject matter divisions within family law cases and facilitate the development of a unified family court. Its vast agenda of projects include mediation improvement, child support enforcement enhancement, family violence training, visitation access programs and improving resources for pro se litigants.

Connecticut: The Governor recently appointed a multi-disciplinary Commission on Divorce, Custody and Children, which examined available research, consulted with experts around the nation and conducted public hearings. Its comprehensive report on Connecticut’s divorce and custody system contains recommendations designed to increase the involvement of both parents in the life of divorced children and to reduce the delay, expense and stress of the custody dispute resolution system.

Florida: The Florida court system’s Family Court Initiative mission is “to provide families and children with an accessible and coordinated means of resolving legal matters in a fair, efficient, and effective manner. In addition to adjudicating disputes and providing alternative methods of dispute resolution, the Family Court Initiative will assist in meeting the needs of families and children involved in the court system by offering appropriate court-related services and linkages to community service providers.” The Florida Supreme Court’s Family Court Steering Committee submitted a plan for a unified family court in that state in June 2000. Shortly thereafter, Florida convened an interdisciplinary Summit on Redefining Florida’s Family Court in which the court’s stakeholders worked on the development of a model family court. In 2001, the Florida
Supreme Court adopted the recommendations of the Family Court Steering Committee and its vision of an integrated, humane approach to the problems of children in court.\textsuperscript{viii}

\textit{Idaho}: Idaho’s interdisciplinary bench and bar committee addressed the problems of children in high conflict divorces. The Committee’s work, an ongoing effort, developed a DCM plan for management of these cases and initiated an extensive judicial education effort.\textsuperscript{ix}

\textit{Oregon}: The Oregon Legislature established a Task Force on Family Law that invited all stakeholders in the family law system to sit together to discuss collaboratively how the court could be improved, with the proviso that all had to be willing to admit that they could be wrong and that there could be a better way for the court to operate than the participants had previously envisioned.\textsuperscript{x} The Task Force articulated goals and values that the court should serve and made detailed recommendations to integrate primary, secondary and tertiary prevention programs into a coherent pre-and post-filing in court prevention program. The Task Force has been a continuous source of helpful criticism and support for the evolution of the child custody court.\textsuperscript{xi} It recently articulated a plan and vision for a model family court.\textsuperscript{xii}

\textit{An Agenda for Consolidating the Paradigm Shift}

Here are thirteen goals that summarize the themes of this book and exemplify how interdisciplinary reform coalitions can consolidate and continue the child custody court’s continuing paradigm shift. All have been achieved in at least one state, indicating that they can be achieved in every state.

1. \textit{The child custody court’s structure should be unified and simplified.}

The child custody court should be part of a unified family court that addresses all
disputes involving parents and children regardless of the legal label that their dispute receives – divorce, domestic violence, child custody, child support, child abuse and neglect. The legal label placed on a family is often arbitrary and the problems that families present to the court are interrelated. The courts must treat families holistically, addressing both their legal disputes and the problems that underlie them.

The child custody court should be family-friendly. Parents and children in crisis should be able to gain access to a judge and support services in a single location and not be shuttled between different courthouses because different aspects of their disputes are heard in different courts. A parent who seeks an order of protection, for example, against a physically abusive spouse should not have to go to another court to get a divorce or a child custody determination.

Families should also not be shuttled between judges. Forum shopping for a favorable judge serves no social purpose. The court system should assign a single judge and a single support team to oversee all of the family’s disputes. That way, the number of times that family members have to tell their stories to different people is minimized and the court can develop and implement a service plan for the family. Parents should be able to access the support services of the child custody court without filing detailed motion papers and accusations of wrongdoing against each other. Exceptions to the one judge, one support team, one family principle should be circumscribed and carefully justified.

2. **Committed, Experienced Judges Should Staff the Child Custody Court**

The single most important factor that determines the quality of the child custody court is the quality of its judges. They are the court’s face to the public, the managers of its
multidisciplinary operations, and the decision-makers of last resort for parents and children.

For too long, the child custody court has been viewed as a judicial backwater to which rookie judges are assigned; the really talented try to escape as soon as possible to the higher status world of auto accident and business contract cases. This is a manifestation of the same point of view that pays lip-service to the importance of having well-qualified teachers and doctors who serve children and families, but fails to provide them with adequate resources and the honor and compensation necessary to attract the best and the brightest.

The child custody court should be the highest level of judicial service, not its lowest rung. Judges who serve in the court should want to be assigned there, and have the aptitude and background to serve in an emotionally and professionally demanding environment. Child custody court judges should serve a substantial period of time and be honored for their dedication. They should have opportunities for professional development and advancement. Children and parents, in short, need child custody judges who make a professional career of serving them.

3. The child custody court should make diversified education programs available to all divorcing parents and children.

The importance of educational programs to the child custody court cannot be overemphasized – they prepare parents for the turbulent experience of reorganizing their relationships with their children. Most parents are pro se. They need help in understanding the court process, how to manage conflict for the benefit of their children, and need information to access helping services. They need help in understanding what
the court system can and cannot do for them, and they need information to make responsible choices for their families.

Parents have responded well to court-affiliated programs; attendance at them should be a routine condition of divorce in every child custody court in the Country. They should be expanded so that every divorcing parent who feels he or she needs the help of a court to resolve a parenting dispute attends one.

Courts should design diversified education programs for different segments of the population of divorcing families. A one-size educational program should not, and does not, fit all. Some families are more conflict-ridden and dysfunctional than others and thus have educational needs different than those of lower conflict families. Short secondary prevention programs do many things well but they do not provide intensive education in conflict management skills or therapy. They should not be freighted with the unrealistic expectation that highly litigious parents will change ingrained patterns of acrimonious interaction because of a few short hours of lectures and discussion. Special programs need to be developed for that purpose.

Finally, the child custody court should foster primary prevention by encouraging schools to incorporate into their curriculums lessons about divorce, conflict management and the effects of parental conflict on children. Divorce has become a predictable event in the lives of American children. The earlier that future parents are exposed to prevention-oriented information and perspectives, the better.

For all children, the divorce of their parents is a time of difficult adjustment. For a significant number of children it is the beginning of a downward emotional, educational and economic spiral. Educational programs can help them understand their conflicting
emotions, develop coping skills and access helping services. Prevention programs based in schools for the children of divorce have consistently improved the functioning of those who participate in them.\textsuperscript{xiii} Court-based programs show similar promise. They need to be expanded to serve all children who can benefit from them.

4. \textit{The child custody court should develop special programs to meet the needs of pro se parents}

The child custody court can no longer operate on the assumption that a parent will have a lawyer. It needs to figure out ways to bring legal advice and information to people who cannot afford or who do not want the traditional full-service model of legal representation. The court needs to develop programs that educate \textit{pro se} parents about their legal rights and the nature of the court process. Educational programs can help. So can material on the internet. More extensive measures such as courses for litigants and \textit{pro se} advisor programs can be undertaken. Unbundled legal services can meet some of the \textit{pro ses’} need for coaching and legal advice.

5. \textit{The child custody court should make mediation with screening for violence and safety precautions available to all divorcing parents.}

Mediation is the dispute resolution process of choice for most divorce-related parenting disputes. It reduces conflict between parents and thus creates a better atmosphere for children to cope with the transitions that divorce requires. It encourages parents to reach their own agreement on a parenting plan rather than have a court impose one on them. Parents like mediation - it lowers the emotional and economic costs of resolving their disputes, and their children benefit from it.
Child custody courts should require that mediation become the rule, not the exception, for child custody disputes. Divorcing parents should be required to mediate before attacking each other in an adversary courtroom. Parents who have been the victims of domestic violence should be given the option of mediating with specially trained mediators and precautions should be taken to insure their safety. Mediation programs need to be adequately funded and supervised to insure that they do not substitute quantity of cases processed for quality of service.

6. The child custody court should create a plan for differential management of high conflict cases.

A small number of families are high conflict because of various interrelated indicia of serious family dysfunction – repetitive litigation, violence, substance abuse, mental illness etc. The court should develop an efficient way of identifying those families, and devising a services and case management plan that matches their needs. A high level of teamwork and collaboration between the court, court-affiliated services, counsel and outside agencies is necessary to create and implement a differential case management plan for a high conflict family, qualities the court should encourage in its personnel and those of the agencies and lawyers it works with. High conflict child custody cases should, in effect, be treated as child protection cases posing a serious risk to children and parents.

7. The child custody court should insure that high quality supervised visitation services are available to all families that need them.

Supervised visitation is the single best service for reconciling safety with a child’s need to have a continuing relationship with a violent or allegedly violent parent.
Professional supervised visitation services have proved to be of great value in preserving relationships between parents and children while reducing the risks of violence. As the number of family violence allegations in child custody disputes increases, so should the availability of supervised visitation services. Guidelines should be developed to identify which parents need what degree of supervision in their relationship with their children and how supervised visitation services should operate.

8. *The child custody court should insure accountability and quality control for court-mandated services.*

Ultimately, the child custody court is responsible for the quality of all of the services it mandates for parents and children. The court must thus create mechanisms to insure that its interdisciplinary non-judicial personnel—educators, mediators, mental health evaluators—who are central to its operations and the welfare of children understand their roles in the process, are qualified and accountable. Written rules need to be developed for:

- qualifications and training requirements for all court-affiliated personnel involved in the child custody decision-making process – educators, mediators, supervised visitation supervisors, evaluators, guardians, lawyers for children, special masters etc.
- the content and form of neutral evaluation reports.
- asserting and resolving grievances against all court-affiliated personnel.

9. *The child custody court should encourage lawyers who represent parents to incorporate conflict management and the welfare of children into their representation.*
A community’s lawyers set the tone for whether parents perceive the child custody dispute resolution process as an adversarial battle or as a family reorganization. The more that lawyers emphasize the need for responsible conflict management and planning by parents, the more likely they will follow that advice. The bar and the courts should encourage parents to view their lawyers as guides to conflict management, not simply as gladiators on their behalf. Lawyers should encourage their clients to listen to the advice of mental health professionals about how to best parent their children through the time of reorganization that divorce requires. The child custody court should encourage lawyers to attend educational programs on alternative dispute resolution and collaboration for the benefit of children. It should develop rules that require lawyers to discuss alternatives to litigation with parents and take the welfare of children into account in the advice they give to clients. It should encourage the development of law school courses that emphasize collaborative representation and the interdisciplinary knowledge necessary to represent parents and children in custody disputes effectively.

10. The child custody court should refine the role of the lawyer for the child.

The idea of appointing a lawyer for the child in custody disputes stems from humane and liberal impulses – the child’s perspective and voice should be heard in critical decisions that affect her life. Implementation of the idea, however, is highly conflicted because of ambiguity about whether the child’s lawyer represents the child’s best interests or the child’s preferences. The child custody court should eliminate the ambiguity so that the role of the child’s lawyer can be explained to parents and children with basic consistency. The court should assure that those it appoints as the child’s lawyer are adequately trained and compensated to perform their assigned functions,
which should not overlap those provided by other professionals in the child custody dispute resolution process. Written rules accomplishing these goals would be a large step forward. Child custody courts should consider creating a publicly-funded office of lawyers to represent children in custody cases.

11. The child custody court should view its mission as developing parenting plans, not custody orders

Legal language matters as it sets the tone and direction of the legal process for those who participate in it. The legal term “custody” inaccurately suggests that parents are jailers of children. The term “sole” custody inaccurately suggests that one parent is more important in the life of the child than the other. Both terms encourage parents to view the custody dispute as a contest for a possession. The child custody court should encourage legislatures, lawyers and parents to use more neutral language that encourages cooperative parenting such as decision-making and residence. They should also encourage parents in disagreement to submit detailed plans for day-to-day residence, decision-making and dispute resolution to the court rather than simply focusing on legal labels.

12. The child custody court should receive adequate funding

The child custody court needs adequate funding for its operations and innovations. Education and mediation programs tend to get short shrift when judicial administrators and legislators think about the court’s needs. They tend to focus on funding for more judges and lawyers for the poor to deal with an increasingly crushing caseload. These are important needs and interested stakeholders should support increased funding to meet them. Securing adequate funding for the operations of the adversary
system should not come at the expense of adequate funding for conflict management programs which are just as essential a part of the child custody court’s day-to-day operations.

Achieving adequate funding for mediation and education programs is not an impossible goal. Taxpayers, state legislators and foundations can be convinced they are good long-term investments in their children’s welfare, particularly if groups concerned with the welfare of children help the court in that effort. Hawaii, for example, has created an independent statewide children’s trust fund to distribute grants to fund primary and secondary prevention efforts to strengthen families with the aim of reducing child abuse and neglect. All states can undertake similar initiatives. Another possibility would be to raise marriage license fees and divorce filing fees to cover the costs of some of the necessary court services. If so, exceptions would have to be provided for people too poor to pay the increased fees.

13. The child custody court should encourage research and development to refine its operations for the benefit of the children of divorce.

How little we know about the effect of divorce on children, what kinds of custody arrangements are in their best interests, and how best courts can contribute to responsible parental conflict management is a symptom of how little we really care about children and families. Empirical research has had a major impact on the policies and practices of the child custody court in recent years. Nonetheless, there are significant gaps in our knowledge. We need more and better research. We need to validate, for example, what kinds of education and prevention programs have the most beneficial impact on divorcing families. The necessary empirical research combines many disciplines, is expensive to
conduct and should be coordinated so that limited resources are spent wisely. The need to do it is so pressing that the federal government, the states and interested foundations should consider creating a national institute to secure funding and to insure the quality of research needed as well to facilitate its wide dissemination.

Margaret Mead once said “Never doubt that a small group of thoughtful committed people can change the world. Indeed, it’s the only thing that ever has.” Such people have changed the nature of the child custody court in a very short period of time and have thus helped redefine the nature of the relationship between divorcing parents and children. We need to continue that effort and make the child custody court a place a community is proud of, not a dumping ground for families in crisis. Working together, we can achieve that goal. We owe our children that much.


viii In re Report of the Family Court Steering Committee, 794 So.2d 518 (Fla. 2001).


xiv HAW. REV. STAT. § 3052B-1 – B-7 (West 2001).

xv Quoted in TESLER, supra note 122, at 214.