Differentiated Case Management

Severely dysfunctional, conflict-ridden families need more careful screening, more intensive services, and closer judicial supervision than low conflict divorcing parents and children. Differentiated Case Management (DCM), a philosophy of judicial administration, is a valuable way of capturing this idea in shorthand. DCM starts from the “premise that cases are not all alike and the amount and type of court intervention will vary from case to case. Under this model . . . a case is assessed at its filing stage for its level of complexity and management needs and placed on an appropriate ‘track.’ Firm deadlines and time frames are established according to the case classification.”

Many courts use DCM in business cases, classifying them as expedited, standard, or complex.

This chapter discusses DCM for child custody disputes. To illustrate how the concept works in practice, the chapter will apply DCM to a hypothetical family, the Wilsons, created from a composite of actual cases. It will then provide some evaluation data for DCM programs in child custody courts.

The Wilson Family

Susan Wilson is a dentist and Michael Wilson is a police captain. They have been married for 19 years. They have two children: Justin, 10 years old, and Christina, 8.
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.iv

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.v

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.”vi The Florida Supreme Court’s Family Court Steering Committee submitted a plan for a unified family court in that state in June 2000.vii 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. Court-based programs show similar promise. They need to be expanded to serve all children who can benefit from them.

4. **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 *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 *pro se* advisor programs can be undertaken. Unbundled legal services can meet some of the *pro ses’* need for coaching and legal advice.

5. **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.


vi The Family Court Initiative: Mission, *available at*


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


Michael’s tension-filled job creates great stress in his relationship with those close to him, particularly with Susan. He often yells at Susan and the children. Michael gambles regularly (though he claims he is not a gambling addict) and occasionally drinks to excess. He and Susan have not been close sexually for many months.

Tension in the house has been palpable since Michael discovered Susan is having an affair with a former mutual friend. The affair began after Michael’s harsh and repeated criticism of Susan for excessive drinking and abuse of prescription drugs. The two have had a few violent incidents that arose out of shouting matches between them. Michael sometimes hits Susan after Susan criticizes him. Susan sometimes hits Michael first after he makes a negative comment about her, then Michael hits her back even harder. Neither has ever sought medical attention for injuries caused by the other. Michael’s violent behavior is not accompanied by any other manifestations of an attempt to control Susan’s life. He never threatens Susan with violence, and never tries to control her finances, her relationships with friends, and so on. The last violent episode was a year prior to the date Susan filed her complaint for divorce.

Justin and Christina were inadvertently exposed to two incidents of parental violence. Both incidents occurred when they returned home from school activities while a fight was going on. Both children were terrified.

Parents and children continue to live in the same house. Susan and Michael each blame the other for their marital difficulties. Michael is deeply remorseful about his role in the violence and the fact that the children have been exposed to it. Susan blames Michael for the violence and has little insight into her role in it. Both children express great love for their parents. Christina is withdrawn, depressed, and has spoken of suicide.
These problems are piled on top of a learning disability. Justin does not demonstrate any emotional problems at the moment, but his schoolwork has recently taken a precipitous decline. Justin is very protective of his mother, whereas Christina is not obviously aligned with either parent.

*Principles of DCM*

Susan files for divorce from Michael and seeks sole custody of the children. Michael wants joint custody. The family now comes to the attention of the local child custody court. How should a DCM-oriented court handle it?

- **Unified treatment** – a single judge and support team is assigned to the family, develops the family’s service plan, and ensures their compliance with it.

- **Screening** – court personnel take a family history, match family members’ needs with appropriate services, and present a service plan to the court for its approval.

- **Service plan** – service plans are tailored to the individual needs of parents and children. Low-conflict, less dysfunctional families are referred to less intensive, time-limited services such as traditional education and traditional mediation. High-conflict families are referred to education, mediation, and therapeutic services that integrate screening, violence awareness and safety precautions. Services are mandated if parents do not agree to attend them.

- **Case management and review** - a case manager is assigned to communicate with the family and service providers to ensure that the family meets court deadlines and attends mandated services. The case manager also informs the court if a change in the service plan is necessary because of a change in the family’s level of dysfunction or conflict (e.g. an incidence of violence, a suicide attempt by a
child). The court regularly reviews implementation of the service plan at status conferences. Firm deadlines are set and adhered to.

- Development of a parenting plan - the parents are given structured opportunities and forums to negotiate their own parenting plan. If that fails, a hearing is scheduled.

Graphically, the management of the Wilson’s dispute under a DCM system looks like the following:

**Unified Treatment**

The Wilson family should be assigned to a single judge, aided by a single services team, which supervises the family the entire time it is engaged with the child custody
court. “One judge, one support team, one family” is the central tenet of the unified family court. A DCM plan for child custody cases is, in effect, a subset of the unified family court concept.

Most child custody courts do not, at present, follow the one-judge, one-family model. The courts instead fragment the case of a divorcing family between different courts depending on the legal issue that the case raises. A recent survey found that unified family courts have been enacted on a permanent basis in 13 states. Reform activity to develop unified family courts has been reported in many other states. Florida, for example, has recently undertaken the task of establishing a model unified family court on the recommendation of a statewide interdisciplinary advisory committee.

In non-unified family courts, the same family problems can easily be raised in different cases in different courts, with conflicting results. It is entirely conceivable that Michael will seek an order of protection against Susan for domestic violence in one court that is authorized to grant such relief, while Susan will seek a similar order from a different judge in a different court in which she files her divorce action. It is also possible that a criminal domestic violence or child protection charge can be brought in one court while the divorce and custody action proceeds in another court. The judges may disagree, with the result that an appellate court will have to sort out the conflict. The children may be assigned lawyers in one court, but not in another. One court may order a forensic evaluation; another court may not, or might order a duplicate evaluation. Child protective services may be involved in one court proceeding but not in another.

The Colorado court system recently reported that as a result of a court structure that fragments family disputes between different courts:
“[F]amilies who face multiple court filings frequently find themselves appearing before several judges on several different dates. Consequently, judges who preside over each case are unaware that there are other matters pending before other judges … The absence of critical information too often results in judges entering orders that conflict with those of one or more judges in other cases involving the family… When family cases are resolved in court, families are generally required to undergo multiple assessment and complete treatment plans … These requirements frequently overlap, are duplicative of requirements in other cases, or conflict with the requirements in other cases.”

Fragmentation between courts is an irrational and inhumane way to treat families in crisis. Judge shopping within the same state in family cases serves no discernable social purpose. It reflects a court structure organized around the legal issues presented rather than around the problems of the parents and the children. Families have complex needs and interdependencies. Judges who oversee their reorganization need to know their histories, including what has transpired in court in the past, as well as be able to address all of their problems. The need for continuity and efficiency makes the single-court, single-judge system standard operating procedure for complex business cases in most court systems. The same need is even more important in the child custody court, where human relationships are at stake.

Lawyers and parents nonetheless worry that a single judge permanently assigned to the same family will wield enormous discretionary power arbitrarily, will have access to information that would not be admissible in court, and will fail to make distinctions
between civil and criminal family matters for burdens of proof and other procedural matters. These are important concerns, but they should not delay the creation of unified family courts. The risks that an overreaching and incompetent judge in a unified family court creates for a given family pales by comparison with the chaos created for families already in crisis by a court system that organizes judicial services by legal issue rather than by addressing the needs of families as a whole. No state that has created a unified family court has ever found the risks created by the one-judge, one-family system so pervasive that it had to reinstate a more fragmented system of judicial assignments. Appeals are available to remedy injustice in individual cases. Judicial selection and retention procedures can improve the quality of judges in a unified family court, and judicial education can help those judges make distinctions between the procedures in different types of cases.

There is no doubt that DCM plans and unified family courts call for sophisticated, committed judges who are experts not only in family law but in mental health, dispute resolution, social services, and case management. Unfortunately, judicial assignment to the child custody court tends to be at the bottom of the judicial prestige hierarchy. Many judges do not want to be assigned to the child custody court. Caseloads are overwhelming and judges have to deal with emotionally distraught parents all day. Many judges have no background or experience in family law let alone psychology or social services. Many view the child custody court as dealing with “non-legal” emotional matters. Newly appointed judges often are sent to the child custody court, and cannot wait to be replaced so that they can move up to auto accident and contract cases. They do not invest the time and effort necessary to become the experienced child custody court judges that DCM
requires. The difficulty of attracting and retaining excellent judges for the child custody court is just another manifestation of the problem that our society has in attracting and retaining other professionals who work with children – teachers, pediatricians, nurses, day-care providers.

There is no greater challenge for judicial administrators than attracting and retaining well-qualified judges of appropriate background and temperament for the child custody court. Judges assigned there should want to make a career working with families and children, and have the disposition to do so. Administrators need to create incentives for new judges to join the child custody court and afford them the professional respect and recognition they deserve. Perhaps judges in the child custody court should be paid more than those who deal with less emotionally and legally challenging matters such as auto accidents and contracts. In many states today, they are in fact paid less than other judges. Every experienced judge who leaves the child custody court should be viewed as a serious loss to the community, and administrators should explore what could have been done to keep her on the bench.

*Developing a Service Plan*

Screening the Wilson family and creating a service plan for it is a significant challenge. There is a great deal we do not know about high-conflict divorce involving children. Indeed, there is as yet little consensus about what constitutes a high-conflict divorce, with some believing it should include families that experience domestic violence, while others believe it should be limited to those involved in repetitive litigation.\(^{12}\) We do not know a great deal about how much overlap there is between the types of dysfunction and conflict that divorcing parents and children can exhibit.
The art and science of evaluating parental conflict levels, mental health, and risks to safety is in its comparative infancy. The available information is imperfect, and experts differ about how to interpret and apply it to particular families; any prediction about the future for human behavior is hazardous.

Recognizing the limitations of what we know and can know does not mean that DCM screening is impossible, just tentative. Essentially, families with higher service needs must be identified as early as possible after their custody dispute comes to the attention of the child custody court. As a starting point, those families can be defined to include those in which there are allegations or a history of:

- domestic violence
- child abuse or neglect
- repetitive litigation
- substance abuse
- mental illness
- suicide threats
- abduction threats
- children who refuse to visit a parent

The Wilsons qualify under several of these categories – domestic violence and substance abuse allegations being the most prominent. Their children, furthermore, are troubled, as the girl has contemplated suicide.

The child custody court has a structural problem in screening the Wilson family and devising a service plan -- the information necessary to classify the Wilson’s level of conflict and dysfunction is not necessarily available or reliable at the time Susan files her
divorce complaint. How is the court to learn about the violent incidents, Susan’s alleged substance abuse, and Michael’s gambling in order to create a viable service plan at the earliest possible moment? How can the screening process assess how Justin and Christina are coping with their parents’ conflict? Suppose the facts that result in the conclusion that the Wilsons need intensive intervention are contested (e.g., Susan denies Michael’s accusations about her substance abuse problems and Michael denies gambling and drinking). Susan may be reluctant to disclose Michael’s violence or her violent behavior for fear of embarrassment or retaliation.

Child custody courts have historically relied on contested pleadings (sworn, written allegations by parents) to identify the nature of the dispute between parents and on trials to sort out their validity. Reliance on what the parents present to the court without independent investigation and verification is not an adequate basis on which to screen and create a service plan. Parents (or their lawyers) determine what to include in the pleadings. Pleadings and parents’ allegations generally run a risk of both over- and under-disclosure. Some pleadings may contain truthful allegations of violence and dysfunction, but those allegations may also be false, overblown, or designed for tactical advantage, and will simply further inflame parental conflict. On the other hand, some victims of violence are reluctant to disclose what happened to them in court pleadings because they fear for their own or their children’s safety or because of their economic dependence on a batterer. Many parents do not have legal representation to help them draft an appropriate pleading. Previous or related court proceedings involving the family are not disclosed in most pleadings, nor are mental health or substance abuse problems always disclosed. The children are not consulted in pleadings drafted by parents and their
condition is rarely fully described in pleadings. Parents may have dramatically different perceptions of how well their children are coping that pleadings do not reveal.

Pleadings and the voluntary parental disclosures they contain are simply not designed to create a family history for diagnostic purposes. DCM screening and development of a service plan requires more detailed information than is typically contained in the information parents voluntarily present to the court. The court, however, generally does not conduct its own investigation of the family’s situation until it appoints a custody evaluator, a relatively late stage of the dispute resolution process discussed in Chapter XII.

DCM may thus require the child custody court to move to an inquisitorial model of fact gathering in which its staff proactively gathers the necessary information much earlier in the process of dispute resolution rather than simply relying on what the parents tell them. Fully functional DCM screening protocols must include dispute-resolution criteria (such as repetitive litigation), mental health criteria (such as mental illness and drug and alcohol abuse) and safety criteria (is either parent a danger to the other parent or to the children or to him or herself?).

At the very least, both parents should be required to fill out a detailed family joint history in writing, or separately if they disagree. The written form would be much like those used in a doctor’s office for a new patient, and request information about previous court proceedings, violent incidents, how the children are doing, and so on. Additional screening be required in some cases. Court staff may, for example, have to conduct confidential interviews with a parent to determine if family violence exists if the facts are in dispute. Screening may require the children be interviewed in selected cases to assess
their mental health. It may also require consultations of school records and consultations with key figures in the children’s lives, such as teachers.

Developing reliable and efficient methods to gather the information necessary to screen families for the purpose of developing a service plan in a DCM system is a major challenge for the child custody court. A fundamental problem with an extensive inquisitorial type of screening is that it may have to proactively gather information for hundreds of families. The expense of the screening process can be substantial. A screening protocol that can be administered in a reasonable amount of time with reasonable accuracy needs to be developed to identify which families need intensive intervention and which do not.

The task of creating an reliable, efficient screening protocol to help a child custody court develop appropriate service plans is not impossible. There are some screening tools now available to determine the existence of domestic violence between intimate partners that can be adapted and expanded. Repetitive litigant families should be relatively easy to identify, if courts have coordinated information systems that can identify a litigant’s history in the court system.

The information-gathering that is necessary for effective screening also creates legal concerns about when, how, and to whom information will be revealed. Lawyers for parents will no doubt be concerned about protecting their client’s rights during the screening process. The clients will have to disclose information to the screeners, and will be penalized for providing false or incomplete information. The screeners will also need access to records in other court cases involving the family, hospital records, school records, and so on that many lawyers may want to keep confidential. Lawyers will also be
worried about the screeners’ making recommendations to the court based on information whose reliability has not been vetted through the adversarial procedures of a contested hearing.

These are legitimate fears that need to be acknowledged and addressed. Judicial oversight of the screeners, and extensive training for them, will alleviate many of these fears. Conceptually, screeners would be asked to conduct a shorter, more efficient neutral evaluation of the family, similar to that typically undertaken at later stages of child custody litigation by a court-appointed custody evaluator as described in Chapter XII. Custody evaluators interview parents and children and routinely access collateral sources of information such as hospital and school records for their reports. No adversary hearing is required before the evaluator makes a recommendation to the court, though the evaluator is available as a witness if either parent contests the recommendations. A similar procedure could be created for parent contesting the recommendations of the screeners.

Procedures for DCM screening must satisfy due process of law. As a matter of fundamental fairness, and to ensure the accountability of the screeners, Michael and Susan must have the right to contest any of the recommendations for mandatory services made as a result of the screening process at a hearing before the court. The screening process can only result in recommendations to the court for a service plan. Those recommendations must be reviewed and approved by the court, which maintains authority and supervision over the screening process and the service plan.
**Mandated Services and Judicial Supervision**

The Williams will benefit if the court and the screening team have a rich variety of options to call on in developing a service plan. The options are extensive and might include:

- Supervised visitation for Michael (discussed in Chapter VIII).
- Appointment of a lawyer or guardian for Justin and Christina (discussed in Chapter XI).
- An expedited neutral forensic evaluation (discussed in Chapter XII).
- Individual therapy for either or both children.
- Family therapy.
- An educational program for the children in which Justin and Christina can learn about the legal process, and what they and their parents are experiencing (discussed in Chapter VI).
- Substance-abuse treatment for both Michael and Susan.
- Counseling for domestic violence victims for Susan, and perhaps for Michael.
- An anger-management program for Michael.
- A compulsive gambling program for Michael.
- An educational program specially designed for high-conflict families promoting parallel, as opposed to cooperative, parenting (discussed in Chapter VI).
- Mediation with specially trained mediators who take safety precautions and are especially aware of the problems of family violence to help Susan and Michael develop a parenting plan for Justin and Christina (discussed in Chapter VIII).
- A special master, if parental conflict continues (discussed in chapter VIII).
Not all of these services will be affordable or necessary. What is more important than the specific elements included in the service plan is that the court develop one that addresses the Wilsons’ dispute-resolution and therapeutic needs comprehensively. The court will have to make judgments about which of the available services best fits the family’s needs, and, if resources are limited, which are the most important. The parents must be able to pay for any of the services that are not provided free of charge. If mandated services are absolutely essential to the best interests of the Wilson children, or any other child, the court needs to make them available from taxpayer funds without regard to a parent’s ability to pay. Some of the elements of the service plan, such as supervised visitation, touch upon a parent’s legally protected interests, and require due process and a judicial hearing before being ordered, even temporarily, over a parent’s objection.

*Case Management and Review*

The service plan approved by the court must be implemented by careful monitoring and evaluation. Children must feel that the state, through its court system, is looking out for their interests; parents must feel that the plan is a rational progression toward resolution of their dispute. Children have a unique sense of time - a day can seem like a month and a month a year depending on their developmental stage. The court process should take place in accordance with the child's sense of time, not the adults’. In addition, the imposition and enforcement of time deadlines will help convince the Wilsons that the court system is serious about protecting their children and will hold them accountable for their welfare.
One way the court can achieve these goals is to appoint a case manager to supervise the service plan's implementation. The case manager will be responsible for regular conferences with the Wilsons and their lawyers to ensure that deadlines are met and to inform the court if they are not. The case manager can also recommend modification of the service plan to the court as they become necessary. Implementation of the service plan can also be improved if the court keeps the case on its docket for regular status conferences.

*Does DCM Work? A Report from Australia*

Research findings show that DCM can make a significant difference in the lives of highly conflicted parents and children, including those who have been victimized by violence. For example, the Family Court of Australia initiated a multi-disciplinary DCM program in 1998 called Project Magellan for managing custody disputes involving allegations of child abuse. The Project involved 100 families and a coordinated effort between Australian state and federal agencies and human services organizations. The Project’s findings on the incidence of child abuse allegations in child custody disputes are discussed in Chapter VIII. What is significant here is the DCM plan the family court developed to manage these cases that cross the borderline between child custody and child protection and how well it worked.

An earlier study of child custody disputes that included child abuse allegations established the baselines to which the cases in Project Magellan were compared. The earlier study found that these disputes took an average of five judicial hearings over a period of 18 months. The average age of the children involved was 4 years. Mental health staff considered more than one-quarter of the children to be suffering from serious
distress, which increased as the court process went on. Domestic violence allegations were made in addition to child abuse allegations in 40% of the families. Child protection services and the family court had significant difficulties coordinating their efforts on the children’s behalf.

In response to the results of the study, the family court created a steering committee to develop a new protocol to address the problems the study revealed. The result was a DCM system, including family group conferencing - a carefully structured form of mediation for families with violence in their histories. What happened?

- Child protection authorities created reports more quickly and provided much more relevant detail.

- Disputes were resolved more quickly (whether by private agreement, mediated agreement, or court order), with the average time to resolution falling from 17.5 months to 8.7 months.

- The number of court hearings dropped from an average of five to an average of three.

- A smaller number of cases went to trial (13% as opposed to 30%).

- Only 5% of the court’s orders, down from 37%, were the subject of further litigation in a one-year period.

- The percentage of highly distressed children in the sample dropped from 28% to 4%.

A similar DCM project, the Wisconsin Unified Family Court Project, reports comparable results to Magellan. So does a pilot program for child protection and welfare matters in
a Canadian court. Specialized domestic violence courts that integrate the handling of the civil protection orders and criminal domestic violence cases with DCM and therapeutic justice values show similar positive results.

In short, DCM works if implemented with commitment and energy. The child custody court can serve as the spoke in a wheel of services for the family and ensure that rights are protected and mandatory service plans adhered to. It can identify families in need of greater intervention and develop individualized family service plans that expedite and rationalize the child custody dispute-resolution process. These troubled and violent families can participate safely in mediation programs that allow them a greater measure of self-determination than the court process typically provides. The child custody court can coordinate community resources to provide help to parents and children. What is needed is the will and the way.
Endnotes for Chapter IX

1 Kaye & Lippman, supra note 124, at 163.


7 In re Report of Family Court Steering Committee, 794 So.2d 518 (Fla. Sup. Ct. 2001).


12 *For The Sake of The Children*, supra note 81, at 78.


14 See sources cited in *supra* note 357.


17 Brown, *supra* note 325.


