

# THE EMERGENCE OF TRIAGE IN FAMILY COURT SERVICES: THE BEGINNING OF THE END FOR MANDATORY MEDIATION?\*

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Mandatory mediation has, since its inception in the 1980s, been at the heart of family court service agencies. However, changing times, more complex family problems, and a lack of court resources have created significant service delivery challenges. This article examines the emergence of variations of triage processes in family court service agencies as a response and contends that it is time to consider replacing the tiered service delivery model.

**Keywords:** *triage; mandatory mediation; differentiated case management; family court services; court-connected; family court dispute resolution*

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## I. INTRODUCTION

The proliferation of services for separating and divorcing families since the early 1970s has been nothing short of remarkable. Since the 1970 introduction of no-fault divorce in California, family courts and their related professional communities have moved steadily, if not swiftly, towards a philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation (Johnston, 2000; Schepard, 2004). Over the years this movement—combined with the growing number of challenges families bring with them to the court—has unleashed the creativity of professionals worldwide, resulting in literally dozens of distinct dispute resolution processes for separating and divorcing parents. These include multiple models of mediation; psycho-educational programs; collaborative law; interdisciplinary arbitration panels; parenting coordination; and early neutral custody evaluation to name just a few. Despite the tremendous overall growth, the number of processes in a given jurisdiction may be quite limited.

Many jurisdictions have court-connected family court service agencies and offer a continuum of services, e.g., parent education, mediation, custody evaluation, judicially moderated settlement conference and high conflict interventions. These services are traditionally offered in a linear or tiered fashion, where families begin with the least intrusive and least time consuming service and, if the dispute is not resolved, proceed to the next available process, which is typically more intrusive and directive than the one preceding it (Edwards, 2007; Johnston, 2000; Salem, Kulak, & Deutsch, 2007). Under a tiered service model, virtually all parents participate in mediation and in many jurisdictions are required by statute or administrative rule to do so (Tondo, Coronel, & Drucker, 2001).

In recent years, a handful of family court service agencies, including those in Connecticut, Arizona and British Columbia, have begun to explore variations of triage, or differentiated case management, as an alternative service delivery model. Triage proponents suggest a departure from the common practice of referring all parents to mediation. Instead,

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they contend that identifying the most the appropriate service on the front end may result in a reduced burden on families, more effective provision of services, and more efficient use of scarce court resources (Johnston, 2000). Triage proponents are not the first to suggest that some parents should bypass mediation. Advocates for battered women and feminist scholars have long argued that mediation is inherently unfair and may be dangerous for victims of domestic violence and that their participation should not be required (Hart, 1990; Grillo, 1991; Sun & Woods, 1989).

Mediation proponents disagree. They argue that triage will result in some disputing parents missing out on mediation and its important benefits. They say that there is no evidence that one can accurately predict who will succeed in mediation and who won't (Emery, personal communication, July 31, 2008) and that mediation should be mandatory for virtually all parents disputing child custody matters (Edwards, 2007).

This article examines the emerging debate between proponents of tiered services requiring mediation and proponents of triage in court-connected agencies. While there are sound arguments to be made for both service delivery models, I suggest that the time has come to discontinue the practice of requiring all parents to participate in mediation and for family court service agencies to fully explore the potential benefits of triage. Part II of this article describes the tiered service model and its focus on mediation; it examines the argument that mediation offers opportunities for self-determination, higher quality process and outcomes, and that the alternatives have negative consequences for families. Part III contends that triage systems—while very much works in progress—have the potential to deliver more effective services, create greater efficiencies and reduce the burden on families. Part IV examines the impact of resource availability on court service agencies and on the tiered services/triage discussion.

This article relies not only on existing literature, but also on my twenty years of experience working in and around family court service agencies as a mediator and administrator, trainer, consultant and a staff member of the Association of Family and Conciliation Courts. That experience brings many hours of conversation with court services staff members. These conversations provided observations and insights that are not often shared in publications or public forums.

## II. TIERED SERVICES

The tiered service model can include a range of processes (Deutsch, Schepard, & Salem, 2003; Edwards, 2007; Johnston, 2000). A typical sequence might begin with parents attending a 2 to 4-hour educational program to learn about the impact of separation and divorce on parents and children. Some programs also incorporate sections on communication skills or information about the legal system, and some jurisdictions have special sessions or programs for parents addressing issues such as high conflict or domestic violence. Although parents are generally encouraged to attend educational programs early in the process, court staff members report anecdotally that this is often not the case. Parents are subsequently referred to a confidential mediation process, with exceptions in many jurisdictions when there is an allegation of domestic violence. If mediation does not result in an agreement, the court may order a custody evaluation, with an evaluator conducting an independent assessment or investigation and in many instances writing a report and offering recommendations. The written report may be used as a basis for future settlement negotiations, either in lawyer-assisted negotiations or a judicially moderated settlement

conference. Alternatively, the court services evaluator may hold a meeting with the parties and their lawyers (if parties are represented) to review the recommendations and attempt to facilitate a settlement. If issues are unresolved through these or other available dispute resolution processes, a trial is conducted. It should be noted that these processes may differ, sometimes dramatically, across jurisdictions, in terms of available services, the service provider, and the rules and methods by which the services are delivered.

#### **A. THE PRIMACY OF MEDIATION IN A TIERED SERVICE MODEL**

Mediation has been at the heart of the tiered service model for nearly three decades. In family court service agency settings, mediation appears to have evolved during the 1970s, from both conciliation counseling and evaluative/investigative processes, as court counselors attempted to develop a method of helping parents end marriage with integrity, grace, and an opportunity to determine their family's future course (Brown, 1982; Folberg, 1974; Milne, 1978). By the early 1990s, child custody mediation was pervasive in U.S. family courts, as the National Center for State Courts estimated more than 200 court-based mediation programs in jurisdictions in 38 states and the District of Columbia (Thoennes, Salem, & Pearson, 1995).

More recently the number of services available has grown well beyond mediation and traditional evaluation and conciliation processes to include: conflict resolution conferences (Salem et al., 2007); non-confidential dispute resolution and assessment (Clarence Cramer, personal communication, July 31, 2008); early neutral evaluations (Pearson et al., 2006); special programs for high-conflict and chronically litigating families (Johnston & Roseby, 1997); collaborative law (Tesler, 2001); cooperative negotiation agreements (Hoffman, 2008); and parenting coordination (Coates, Deutsch, Sullivan, & Sydlik, 2004).<sup>1</sup> Some of these services, such as the conflict resolution conferences, early neutral evaluation and non-confidential dispute resolution and assessment, are designed by, and for, individual court service agencies. Others, such as parenting coordination and collaborative law, tend to be more available in the private sector as they are more costly to implement.

Despite the development of a multitude of new services, mediation remains at the heart of the family dispute resolution continuum and the tiered services model. There are several possible reasons for this. First, mediation is more available than other family dispute resolution processes. Numerous statutes and local court rules require mediation (Tondo et al., 2001) and, where this is the case, it has become the default process for all parents disputing child custody. Mediation is widely available in both the private and public sectors (Johnston, 2000). Court service agencies typically provide mediation services for a small fee or without charge, making it more affordable and thus creating greater accessibility for those with limited resources. As the number of self-represented litigants increase, mediators also play an increasingly important role helping disputants navigate the court process and helping the court manage its cases. An Association of Family and Conciliation Courts' survey found that 92 percent of family court service agencies offered mediation. The second most available service was custody evaluation at 69 percent. Parent education programs, which are comparatively simple to implement, were offered by less than half (48%) of responding agencies (Babb, Ferrick, & Grant, 2005).

In addition to the greater prevalence of mediation, a second reason for its popularity may be that research demonstrates that it achieves positive outcomes. When compared to adversarial processes, mediation results in faster settlement, greater levels of party

satisfaction (even when an agreement is not reached) and, importantly, improved post-separation family relationships (Kelly, 2004; Emery, Sbarra, & Grover, 2005). These outcomes generally have appeal to professionals and parents although, importantly, there are limits to the research on family mediation (Beck & Sales, 2001).

Finally, mediation appears to be more of an ideologically driven movement than most dispute resolution processes, resulting in a zealous commitment to the process and the field by its proponents. Because the ideals of self-determination, empowerment and collaboration are firmly embedded in the roots of the mediation process, it is viewed by some not merely as another mechanism through which to resolve disputes, but something entirely different. Indeed, one popular mediation orientation is based on its transformative capacity (Bush & Folger, 1994). Brown (1982, p. 8) states, “Mediation represents a *fundamental change and a new way of thinking* [emphasis added] about the resolution of divorce and family conflicts and disputes.” To some degree those associated with the development of parent education programs and collaborative law appear to me to demonstrate the ideological fervor with which many originally embraced the mediation process. Advocates of these processes tend to share the mediation community’s deep commitment to collaboration and its aversion to positional and adversarial processes.

The idealism and enthusiasm surrounding the mediation movement has helped to spur an entire industry, including myriad international, national, state and local professional mediation associations; a vibrant continuing education and training community; academic programs including degree programs, certificates, mediation clinics and a related body of scholarly work; and numerous books, journals and other publications (Milne, Folberg, & Salem, 2004). In more than twenty years of participating in and observing family dispute resolution (and having been a mediation idealist and enthusiast), I have witnessed passionate responses to many new ideas and processes; however, in my opinion, none have generated near the level of sustained and widespread activity and enthusiasm as mediation.

Mediation’s place at the heart of the tiered service model is important. Without discontinuing the practice of requiring parents to mediate, a true triage system cannot be implemented. Certainly the widespread existence of mandatory mediation presents one set of barriers to a triage system. It is also possible that the reluctance to let go of mediation’s central role in the family court dispute resolution continuum and tiered service model is in part fueled by the deep ideological commitment and extraordinary efforts expended by so many in bringing mediation to a place of prominence over the years.

## **B. THE CASE FOR TIERED SERVICES**

Central to support for a tiered services model is a common sense argument; namely that prior to participating in what some argue is often a destructive and adversarial litigation process, parents should have the opportunity—and some argue should be required—to participate in mediation, so that they may collaborate with one another and create their own agreement. Mediation, it is argued, is more appropriate than an adversarial process for resolving family disputes. It reduces acrimony and creates opportunities for better agreements through self-determination, which is ultimately better for children. On the other hand, alternatives such as custody evaluation and litigation drive parents apart and should therefore be options of last resort (see, e.g., Beck & Sales, 2001; Haynes, 1981; Milne et al., 2004).

## 1. The Importance of Self-Determination

If mediation is at the heart of tiered services, self-determination is at the heart of mediation. According to Welsh (2004), the notion of self-determination, anchored in party empowerment, was critical to support for the contemporary mediation movement that evolved in part as a response to the traditional adversary system that was criticized for mistreating litigants by depriving them control of their disputes. Hedeem (2005, p. 274) asserts, "The centrality of self-determination in the mediation community cannot be overstated."

The argument for the importance of self-determination that mediation offers is as follows: If parents are able to participate in mediation, they will be better able to fully explore options, truly hear one another, and ultimately be empowered to make their own decisions that determine their own future. Because parents know the most about their children and their own living situation, their decisions will integrate the needs of all family members better than determinations imposed by judges (perhaps based on the recommendation of another third party, a custody evaluator) or distributive negotiations orchestrated by lawyers. Having fully participated in the process, the parents will experience a greater sense of ownership and satisfaction with the outcomes. Because the agreements they make will reflect the parents' actual needs and interests, they will, therefore, be more enduring.

Research provides some support for this argument. In a review of earlier research of court-connected and private sector mediation, Kelly (2004) reports that across multiple mediation studies, clients indicated they felt heard, respected, and given a chance to say what they felt was important. They also indicated they were not pressured to reach agreements, were helped to work together as parents, and felt that their agreements would be good for children. Moreover, ". . . *parents using a more extended mediation process* [emphasis added] experience a decrease in conflict during divorce. . . are more cooperative and supportive of each other as parents and communicate more regarding their children" (Kelly, 2004, p. 29). Unfortunately, as discussed below, the trend in today's family court services agencies is towards reducing, not extending, time for mediation services (Edwards, 2007; Kelly, 2004) and that has its own consequences.

## 2. Alternatives to Mediation

Mediation proponents have, over the years, not only extolled the virtues of self-determination, empowerment and the mediation process, they have often helped make the case by drawing a clear and bright line between mediation and its alternatives. Simply stated, mediation is viewed as good for families and the traditional litigation process is not. This includes not only a formal hearing, but the entire process, including interventions such as custody evaluations that mirror the win-lose dynamic often associated with litigation. An example of the case against the litigation process comes from Haynes' landmark 1981 book on divorce mediation:

At present, when a couple decides to divorce, each party goes to an attorney who is trained in the adversary role. The two attorneys then represent one client against the other. Much of the decision making is taken out of the hands of the clients, as the attorneys engage in battle within the legal system. . . Lawyers represent their clients to the best of their abilities, regardless of the possible effect on the other party. Thus, they tend to push their client to win every possible advantage. This tactic provides the couple with another arena in which to battle out the issues

that led to the divorce, at the same time that they are trying to negotiate a settlement (Haynes, 1981, p. 5).

More than a quarter-century later, mediation advocates continue to offer similar critiques. Edwards (2007, p. 636–637) notes, “Critics point to the harm that engaging in adversarial tactics can bring—harm in the use of cross-examination on vulnerable witnesses, in the expense of engaging in prolonged discovery, and the ultimate harm created when there are winners and losers in each case leading to mounting distrust and alienation between parents.” Adversarial behaviors are purported not only to make the process of reaching agreement more difficult; they are considered harmful to children and to reinforce a negative dynamic between parents that may continue into the post-divorce relationship.

There is also research that demonstrates that parents are more satisfied with, and fare better in, mediation than in an adversarial process. In a study comparing court-based mediation and custody evaluation, mediation clients reported their processes were fairer, involved less pressure to make unwanted agreements, produced more satisfying agreements and gave them more control over decisions than those who participated in custody evaluations (Keilitz, Daley, & Hansen, 1992). In another study, 77 percent of mediating couples expressed satisfaction with the mediation process, while only 40 percent of couples reported satisfaction with the adversarial divorce process (Pearson & Thoennes, 1989). Emery and his colleagues found that 12 years following random assignment to mediation versus adversary settlement, mediation resulted in increased contact between nonresidential parents and children (Emery et al., 2001).

### **C. CONCERNS ABOUT TIERED SERVICES: THE CHANGING LANDSCAPE OF FAMILY DISPUTE RESOLUTION**

The case for tiered services requiring participation in mediation appears compelling. The opportunity for family self-determination seems to offer enormous promise for parents engaged in child custody disputes to maintain control of their conflict, work together and reach consensual agreements rather than engage in the win-lose tactics of traditional litigation. It seems reasonable to suggest that if mediation’s benefits are within the grasp of most parents, then they should be given the opportunity to reach for the brass ring rather than become subjected to the adversarial system. After all, parents don’t give up any opportunities by trying mediation. If mediation does not result in an agreement, lawyer-assisted or unassisted negotiations, custody evaluations, settlement conferences and perhaps other processes remain available. So shouldn’t even those parents most entrenched in conflict be required to try mediation on the chance that a breakthrough might occur and participation in additional processes and perhaps months of litigation can be avoided?

The main argument against a tiered services model requiring mediation is that the landscape has changed dramatically since mandatory mediation first emerged. The case for a tiered service approach is predicated on two important assumptions. The first is that court-based mediation fully provides for family self-determination, as described above, and second, that there is a clear distinction between the mediation process, and its potentially positive outcomes, and the negative impact of the alternatives, as described by Haynes (1981) and others. However, today’s circumstances do not support these assumptions.

## 1. Contemporary Court-Connected Mediation

There is a serious question as to whether court-connected mediation continues to deliver on the promise of family self-determination. Research suggests that mediation confers many benefits upon participants. “Nevertheless, empirical support for the mediation alternative falls well short of the long list of hypothesized benefits and. . . most research to date is flawed or incomplete in many respects” (Beck, Sales & Emery, 2004; p. 448). Commenting on Kelly’s (2004) review of family mediation research, Saposnek (2004) remarks, “Joan Kelly’s summary of the documented empirical research gives substance to what front-line practitioners have observed over the two and a half decades in the trenches: that it works, but not quite as comprehensively as we had hoped” (p. 37).

Furthermore, the times and conditions have changed in family court service agencies since many studies of court-connected mediation were conducted in the 1980s and 1990s. Today, many court-connected mediation programs struggle with growing caseloads, static or reduced staffing levels, and increasingly complex cases; they simply lack the resources to provide the five to six hours of mediation that yielded such positive long-term outcomes as those found in Emery’s study of mediations conducted in the late 1980s (Emery et al., 2001). With triage, on the other hand, there is potential to reallocate resources, avoid duplication of services, and create a more efficient service delivery system. The contrast in the public agency environment is illustrated by my conversation with a family court services supervisor in the early 1990s. The supervisor’s agency had identified a need for three additional court mediators/evaluators in order to keep pace with the growing number of referrals. In anticipation of having its staffing request reduced, the agency submitted a budget for seven new positions. Surprisingly, all seven positions were approved and the agency was *overstaffed*. Today, such an occurrence seems beyond the wildest dreams of court agencies.

Lacking sufficient resources, it is not at all clear that the mediation process in family courts today can embody, “the vision of self-determination that dominated the original mediation movement and inspired its broadly facilitative approach” (Welsh, 2004, p. 420). Hedeem, writing generally about court-connected mediation in the civil, criminal and family contexts, writes, “While it is commonly held that mediators are expected to “honor, protect, and nurture parties’ self-determination . . . [and] to ‘empower’ the parties, ‘enable’ them to be ‘ultimate decision makers’ and ‘satisfy’ them” (Welsh, 2001, p. 85), these expectations are not always realized in practice” (Hedeem, 2005, p. 275).

If mediators lack sufficient time to conduct mediation, it is simply not possible to honor, protect and nurture parties’ self-determination; to conduct a mediation process in which parties can fully express their views and develop their own agreements; to help parents work together; and to help them understand the impact of conflict on their children. And there is little disagreement about the lack of resources. In the previously noted AFCC survey, forty-eight percent of family court service programs surveyed reported increased workload for staff between 1998 and 2004; 39 percent experienced a reduction in direct service staff; 31 percent reduced administrative staff; and 24 percent reduced supervisory staff (Babb, Ferrick, & Grant, 2005).

Adding to the challenges of inadequate resources is that cases referred to mediation have become increasingly complex over the last quarter century. According to Saposnek (2004), “Compared to disputed divorce cases in the 1980s, contemporary disputed divorce cases. . . involve families with more serious and multiple problems, who use a plethora of public agencies. . . and disproportionately use the court’s resources . . . Mediation approaches and

techniques that worked quite well in the past often are inappropriate today” (p. 38). The complexity of cases, combined with lack of adequate time for mediation and the involvement of additional public agencies, make it that much more difficult for court-connected mediation programs to deliver on the promise of self-determination and empowerment. Edwards (2007) acknowledges the lack of time available for court mediators in California, and Kelly (2004) states, “With the trend to limit court custody mediation to one session, more difficult cases with multiple serious issues most likely will not be given sufficient opportunity to settle” (p. 29).

When constrained by time and challenged by families with multiple issues, mediators are faced with difficult decisions about the manner in which to conduct the process. One option is to become increasingly directive, making recommendations, predicting court outcomes and pressuring parties into agreement. It is not difficult to find anecdotes about such behaviors (see, e.g., Hedeem, 2005; *in press*; Welsh, 2004), including instances when the mediator virtually dictates the agreement terms or spells out dire consequences for the parties if they fail to settle. It is possible that this behavior is the exception and in and of itself it is not necessarily an indictment of the mediation process or the court-connected mediators. It may be that some mediators feel compelled to do whatever it takes to help parties reach settlements due to institutional pressures. Or an experienced mediator, recognizing that a facilitative mediation process is unlikely to succeed with a particular family, may shift to a highly directive process, taking the pragmatic view that it is more important to help the family resolve their issues than adhere to a particular mediation practice orientation.

It is difficult to identify research that chronicles these patterns of behavior. But behind closed doors, many court-connected mediators acknowledge that they cannot conduct a facilitative mediation process if they are to meet the expectations of their workplace. They express enormous frustration at being caught between a rock and a hard place as they are asked to deliver high quality mediation services in what they know to be a fraction of the time required to effectively do so, often with cases that are not appropriate for mediation. According to one veteran court mediator who requested anonymity, “In recent years, encouraging families toward self-determination and private ordering have taken a back seat. Mediation services, which are mandated, are adversely affected because administrators move their workforce toward evaluation services.” Another mediator and court services supervisor referring to the common practice of recommending settlements said, “The process is called mediation and we settle cases, but it certainly isn’t real mediation.”

Although empirical evidence is lacking to support this assertion, it does not seem to be a stretch to suggest that in all likelihood, court-connected mediation is frequently conducted without an opportunity for a thorough airing of concerns, for everyone to speak and be listened to and without an opportunity for a full exploration of issues. However justified or necessary, to the extent it exists, a highly directive process seems likely to alter the parties’ experience in mediation. Welsh (2004) notes Wissler’s (1999) findings that non-settling disputants in family cases have questioned the fairness of the mediation process when mediators move from suggesting options to recommending settlements and that, increasingly, disputants are claiming that mediators’ aggressive evaluation had the effect of coercing them into agreements.

It should be noted that there are multiple models of mediation, some focused on self-determination and empowerment and others more evaluative in nature (see Folberg, Milne & Salem, 2004). Kelly (2004) observes that there is no research examining the efficacy of different models, the purity of practices and their respective outcomes; thus

there is not clear evidence that a directive or truncated process would negatively impact the outcome and long term benefits. But under these conditions it seems reasonable to ask if the parties' degree of the self-determination, empowerment and commitment to the mediated outcome will remain as strong as in a process that offers sufficient time and resources to address what might be multiple issues and whether the full benefits of mediation can be realized. Mediation proponents conclude that they cannot:

Some mediation services can only offer the parents an hour or even less to resolve their differences. This is insufficient time to devote to the mediation process and to give the parents an opportunity to express their views fully and to reach a lasting resolution (Edwards, 2007, p. 650).

## **2. Today's Alternatives to Mediation**

If, as argued above, mediation is not delivering on its promise of family self-determination, it may nonetheless still be preferable to the traditional adversarial process, even if in an abbreviated format. For many years proponents of mediation have drawn a clear distinction between mediation and the litigation process. In efforts to help persuade courts, legislatures, communities and parents, mediation has been held out as a more humane, effective and appropriate choice than the only existing option, the litigation process.

Today, however, the comparables have changed and the dichotomy between the mediation and litigation process no longer applies. Mediation is not the only dispute resolution option; many family court service agencies have developed hybrid alternatives for parents for whom mediation may not be considered appropriate. Some of these processes, noted above, include nonconfidential dispute resolution and assessment, (Clarence Cramer, personal communication July 31, 2008), conflict resolution conference (Salem et al., 2007), and early neutral evaluation (Pearson et al., 2006). They are designed to bring parties together, provide an opportunity for them to speak for themselves, participate in decision making and reach agreements. Some may include recommendations by a third party, some incorporate an information gathering function, some are confidential and others are not, so these processes certainly differ from mediation. However, these processes incorporate elements of mediation, focus on children's and parents' interests and, to the extent possible, limit the divisiveness that critics associate with the adversarial process. Indeed, some of these processes may strongly resemble mediation as it is practiced in some jurisdictions and by some mediators in both the public and private sectors. Thus, the suggestion that everyone should participate in mediation takes on a different meaning when there are other services available beyond the adversarial litigation process, and perhaps better suited to the needs and character of the family.

Finally, it should be noted that the nature of the litigation process has changed over the last quarter century. Collaborative law (Tesler, 2001), cooperative law or cooperative negotiation agreements (Hoffman, 2008), unified family courts (Babb, 2008) and an emphasis conflict resolution advocacy (Macfarlane, 2008) have changed the way divorce and custody disputes are managed by lawyers and in the legal system. This is not to say that we have seen the complete demise of the proverbial scorched earth litigator, but there has no doubt been a sea change in the family law system and the attitudes of many practitioners (O'Connell & DiFonzo, 2006).

There has, over the last quarter-century, been a significant growth of, and blurring of boundaries between, dispute resolution processes. This likely creates significant confusion for consumers, a situation that itself requires attention. However, given the multitude of services and the changes in the nature of the litigation process, the distinction between mediation and the adversarial litigation process as the only available options simply does not hold. It therefore seems difficult to insist that mediation—or any single process for that matter—should be required of every family when there are many helpful and potentially more appropriate avenues available.

### III. TRIAGE

Triage processes, sometimes referred to as differentiated case management, are beginning to emerge in family court service agencies, including those in Pinal County, Arizona, Connecticut, and British Columbia. Although these programs operate differently, they share a common goal to match families to the most appropriate services rather than simply referring them to mediation. There is not sufficient space here to describe each model in detail; however some key distinctions (e.g., confidentiality, party choice in determination of services) will be highlighted.

In a triage system, parents may complete an initial screen and/or participate in an interview, and agency representatives then help identify the service they believe will best meet the needs of the family. The determination of services may be based on a combination of pre-determined criteria, clinical judgment and feedback from parents (Clarence Cramer, personal communication, November 13, 2008; Salem et al., 2007).

In Connecticut, the screening interview is confidential, after which family court counselors recommend that parties participate in mediation, confidential conflict resolution conference, an issue-focused evaluation or comprehensive evaluation. Parties who do not agree with a recommendation may contest it to the court; in practice, however, agency administrators report virtually universal acceptance of the counselor service recommendations (Debra Kulak, personal communication, November 7, 2008). Pinal County's orientation interview is not confidential. It results in the parties choosing between mediation and a non-confidential dispute resolution and assessment process. If the parties cannot agree, they participate in mediation unless it has been deemed inappropriate (Clarence Cramer, personal communication, November 12, 2009). British Columbia's process is confidential and is not directly linked to a dispute resolution or assessment process but is designed to better connect people with the most appropriate service (Irene Robertson, personal communication, November 13, 2008).

There are important due process and accountability issues that must be addressed by any agency developing triage systems. This discussion is not the focus of this article, however, it is important that those recommending services be accountable and that a reasonable and appropriate process be available to address the concerns of those parents who may disagree with a service recommendation or cannot agree upon a service together.

#### A. THE CASE FOR TRIAGE

The argument for triage in family court services rests largely on a need for systems that are more responsive to court services users while recognizing the increasingly limited

resources available to agencies. Triage proponents suggest a system that identifies the best match between a family and available service, rather than requiring mediation of almost all parents, will provide the most appropriate services, resulting in more efficient use of resources and reducing the burden on families. According to Schepard (2004), "The modern child custody court must carefully match available services with family needs and resources. It must use limited resources wisely by ensuring that families are not enmeshed in interventions they do not need" (p. 5).

### **1. A More Efficient Process**

The unfortunate reality is that triage systems are being implemented, at least in part, in response to the need for family court service agencies to improve efficiency due to resource limitations (Debra Kulak, personal communication, September 18, 2008; Lorraine Martin, personal communication September 18, 2008; Irene Robertson, personal communication, September 18, 2008). Administrators commonly report that an increasing number of cases, coupled with static or diminishing staffing levels in many agencies, have reduced staff time, created longer waits for services and forced many agencies to limit the amount of time staff may spend on each case.

Compounding this concern, parents often bring many more problems with them to court than custody disputes (Saposnek, 2004). Court services administrators report clients commonly also need services to address mental health and substance abuse problems, as well as services related to domestic violence services (Babb et al., 2005), issues that may not be appropriate for mediation. According to Johnston and Roseby (1997) almost half of those in court (about ten percent of all divorcing families) are high conflict families who cannot settle their disputes in a brief mandated mediation session and who consume a disproportionate share of family court service staff hours.

Triage has the potential to preserve precious resources by eliminating participation in some services (most often mediation) for those where success is unlikely. For this to occur, it must be acknowledged that for some parents mediation is simply not the most appropriate process. This is especially the case if other dispute resolution processes are available.

Agreement rates in family court service agencies are estimated at between 50–80% (Kelly, 1996), a relatively broad range which is possibly the result of the many ways in which mediation is implemented in the courts. Those parents who do not reach agreement in mediation likely include the high conflict families referenced by Johnston and Roseby (1997) and they will most often be referred to subsequent services. Arguably, referring those high conflict or multiple-issue families, who are unlikely to settle in mediation, directly to another service will eliminate duplication of services and provide more time for mediators to spend with parents who are more likely to succeed. Providing more time in mediation for some creates a greater opportunity for settlement, a stronger likelihood of self-determination and a more efficient system overall. Of course, research is needed to support this hypothesis.

There is, however, an important opportunity cost to this potential gain in efficiency and service delivery. Most court-connected mediators (myself included) can share anecdotes about the high conflict parents who experience what appears to be a miraculous breakthrough and resolve not only the substantive issues in mediation, but leave with the promise of an improved relationship and better long term prospects for their children as a result. These cases are the exception, not the rule. They are the cases we share with our colleagues,

the ones we could never have imagined would succeed. They lift the spirits of mediators who may well be subject to burnout in their jobs. But they are difficult; they require time for the mediator to develop a rapport, to help parents listen and understand one another, to help them focus on their children and shift from a confrontational to collaborative perspective. And at a time when fewer hours are available for mediation and the challenges seem greater, it is not unreasonable to expect these breakthroughs to become fewer and further between.

## 2. Reducing the Burden on Families

A second argument in support of triage is that it reduces the burden on users of family court services. Triage attempts to limit the number of services in which parents participate. In a tiered service system, if parents are referred to mediation and do not settle, they are often required to participate in additional, and increasingly intrusive, processes until matters are resolved. The more services necessary, the more trips to the court services agency and to court, and the more time and money are required of parents at a time when there is likely a scarcity of both. Among the challenges identified by court services administrators facing clients trying to access services were transportation, work schedule conflicts and poverty (Babb et al., 2005). Also, many courts do not offer child care and some programs assess user fees, creating additional expense for families.

There are many circumstances under which parents engaged in a custody dispute are likely to experience some level of dissatisfaction and frustration. If possible, court agencies ought not to add to their burden. The frustration parents may experience was expressed by a Wisconsin focus group participant who attended an orientation program, followed by mandatory mediation, without reaching settlement: “Why couldn’t they handle that in one appointment? I felt like I had to take off work twice for this and we have accomplished zip, and I’ve already taken off work twice!” (Lande & Nelson, 1991, p. 11).

In addition to requiring more time and perhaps money of parents, Saposnek (2004) suggests that mandating all parents to mediate could have additional negative consequences for families.

With the increase in multiproblem cases coming to family courts, we can no longer operate from a policy dictating that all cases should first try mediation, based on the outdated premise that all cases will benefit from it. In fact, it is very likely that for some cases, mediation will make things worse, perhaps increasing conflict, delaying resolution of conflict, and delaying the setting in place of needed coparenting structures for the safety and welfare of the children. Efficiently routing these cases into more relevant methods for conflict resolution could serve them and the court system well (p. 42).

Identifying the most appropriate process at the outset may not only save parents from repeated visits for multiple family court service processes and from potentially damaging delays; it may also help to mitigate the escalating polarization that can accompany repeated failed attempts at settlement through multiple processes. It is difficult to measure the impact on parents who may simply want what they believe is best for their children and are unable to agree, while everyone from the mediator to the judge is encouraging them—often quite strongly—to do so. Thus, these questions posed by Johnston warrant serious consideration: “Do some families have to fail successively at each level of service before they get

the kind of help they really need? Are there more efficient and less painful ways of matching families to the most effective kind of service?" (Johnston, 2000, p. 466).

## B. CONCERNS ABOUT TRIAGE SYSTEMS

Admittedly, a major flaw exists in the case for replacing tiered services models with a triage system: it is predicated on accurate, easy to administer, replicable methods of predicting the most appropriate service for each family. At this time no such method exists, but there is work that points us in the right direction. Johnston (2000) proposes a framework based on existing research that identifies the characteristics of parties most appropriate for a variety of dispute resolution processes. Further, since the mid 1980s, many victim advocates have insisted that one can accurately predict that mediation is inappropriate for victims of domestic abuse (see, e.g., Hart, 1990; Sun & Woods, 1989).

It is noteworthy that the argument for exempting victims of domestic violence from mediation is based on identifying specific traits of the victim (e.g., acquiescence to the batterer) and the batterer (e.g., manipulation and the exercise of power and control in the relationship) that are inconsistent with a mediation process based on collaboration, empowerment of both parties and open, honest communication. This does not necessarily mean that all models of mediation are inappropriate in all cases involving domestic violence; however it too suggests a logical framework for identifying processes which are unlikely to meet the needs of certain parents. Importantly, no research exists that clearly demonstrates that victims of domestic violence should not mediate, and at least one study suggests real benefits (Ellis & Stuckless, 1996) with appropriate cautions. Nevertheless, the logic of the argument against requiring mediation for victims of domestic violence, combined with advocacy efforts, have significantly influenced the practice of mediation (see., e.g., Girdner, 1990; Milne, 2004; Erickson & McKnight, 1990; Ver Steegh, 2003), practice standards, legislation and court rules (Edwards, 2007; Schepard, 2001; Tondo et al., 2001).

Similarly, empirical evidence in support of a triage is currently limited, but that should not prevent further exploration of such systems in order to improve service delivery. The empirical, clinical and social policy basis for Connecticut's Family Civil Intake Screen is based on a Johnston's framework noted above and is reported in Salem et al. (2007). The screen includes questions that address level of conflict, communication and cooperation, complexity of issues and level of dangerousness. Preliminary results of an evaluation of the Connecticut process are promising and include increased agreement rates, reduced rates of return for a second service (after participating in an initial service), a reduced number of child-related motions filed with the court, and an overall decrease in the number of services provided (Kulak, Pruett, VanderSluis, McKnight, & Francis, 2008). Connecticut administrators also report more efficient and effective service delivery positively impacting the agency and court overall (Debra Kulak, personal communication, November 13, 2008). While these results show promise, research in this area is in its infancy and the results of one evaluation in a single agency do not warrant claims about the effectiveness of triage beyond the specific study.

Another concern about triage systems, noted above, is related to the screening and referral system, specifically the potential to empower court staff to direct parents to participate in a dispute resolution process and to deny the parties access to a mediation process which would have otherwise been available to them. As triage systems evolve, agencies will struggle to balance new processes with resources, services and the existing culture of the local court system among other factors, all while addressing the interests of

multiple stakeholders. To reiterate, courts and agencies must be accountable; reasonable and appropriate avenues for those who may disagree with a service recommendation or cannot agree upon a service must be available. Courts and agencies implementing a new service delivery system must engage all stakeholders to develop a process that meets the needs of the community and protects the rights of the most vulnerable users of family court.

#### IV. THE RESOURCE ISSUE

If family court service agencies had sufficient resources this would be a different discussion, although perhaps not altogether so. More resources for mediation programs could reduce waits and provide adequate time to deliver quality mediation services. Under such conditions, it seems more likely that the promise of self-determination and empowerment, which served as the original impetus for mediation, might be fulfilled. If all parents could participate in properly conducted mediation in a timely fashion, the potential benefits to family well-being might justify requiring even the most conflicted parties to give it a try.

On the other hand it been suggested here that times have changed; that families who come to mediation are different now than in the 1980s; that the mediation process may not be most effective for families with multiple issues; and that requiring mediation could have negative consequences for some (Saposnek, 2004). With the advent of new processes designed to incorporate some of the desirable qualities of mediation while addressing the needs of these multiproblem high-conflict families, does it really make sense to send everyone to mediation, irrespective of available resources, when doing so may add to the families' burden?

There is no way to predict the future; however, the current political and economic climate does not suggest that we should expect an influx of funding into public sector services; thus it seems unlikely that we will see adequately resourced family court service agencies any time soon. It will take some resources, minimally in time and energy, to develop triage processes and additional services and some may suggest that this is merely a band-aid approach. And there is a case to be made for saying enough is enough, and for using the time and energy to organize and to demand more resources so that the users of family courts can receive the quality services they deserve. To do so, however, in the absence of concurrently pursuing more effective ways of delivering services seems unfair to the court service providers and the families they serve.

Triage systems have the potential to reduce the burden on families, deliver more targeted services and be more cost-efficient over the long term than a tiered service delivery model. Given the significant changes in the family dispute resolution field over the last three decades, it seems to be an option worthy of pursuit under any circumstances, but especially so when resources are becoming increasingly scarce.

#### V. CONCLUSION

Times have changed dramatically since mediation was introduced to family court service agencies in the 1970s. Mediation is no longer the only alternative to the adversarial litigation process, and litigation is no longer (and some would say never was) so adversarial. New processes have emerged to address the multiple challenges that families bring with them to court and new models of service delivery must be implemented to support effective use of these processes.

After 2 years of extensive study, examining “every facet of the divorce and custody determination process,” the New York Matrimonial Commission (Miller, 2006, p. 20) concluded: “Through early screening and identification of a wide array of dispute resolution options and direct linkages to services, courts could provide a more holistic response to the needs of families than is presently available.”

This holistic approach includes dispute resolution processes designed to integrate some of the collaborative aspects of mediation while creating more efficiencies for the court system. These processes are acceptable—and in some cases preferable—alternatives to a mediation process that in many jurisdictions is at severe risk of being unable to fulfill its promise in a court-connected environment. As demonstrated above, dispute resolution processes such as conflict resolution conferences and non-confidential dispute resolution and assessment, along with changes in the nature of the litigation process, have rendered the mediation/adversarial litigation dichotomy obsolete. Just as mediation evolved from court-connected conciliation and evaluation services to meet the needs of families at that time, so have these processes emerged to meet the needs of today’s families. The potential for triage is evident, if not empirically proven. Jurisdictions in which all parents are mandated by statute to mediation may face a challenge if they wish to move to a triage system. But the reality is that some systems have been triaging informally all along. Working under the label of the mediation process, some court-connected mediators may employ interventions that include information gathering, recommendations and pressure to settle, more closely resembling a custody evaluation or moderated settlement conference (Ricci, 2004; Salem et al., 2007). This pragmatic approach may work well for court services and individual families but it may also serve to confuse. There seems little likelihood that consensus will be reached on what “pure” mediation is any time soon. But perhaps it is time to consider acknowledging those processes that are being carried out under the name of mediation but that are clearly outside of the boundaries, blurred as those boundaries might be.

Finally, this article supports further exploration of triage in court services, but it should be acknowledged that the arguments here are, in part, based on a fundamental failure and a loss that accompanies it. The inability of state and local governments to adequately support services for families is driving the push for efficiency in the systems, which does not necessarily promise the best results. And under these conditions, whether it is the result of a triage system or a truncated mediation process, we lose the opportunity for the miraculous breakthroughs on the intractable disputes that mediation might provide for high conflict families.

New processes and ideas abound and it is exciting to look ahead to new research and developments as family court service agencies move forward. It is somewhat distressing, however, that what many have referred to as “the magic of mediation,” seems to have become a casualty of contemporary court-connected mediation.

## NOTES

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1. Conflict resolution conference is a confidential dispute resolution process developed and implemented by the Connecticut Court Support Services Division. It is more directive than mediation, and may include

information gathering and recommendations on the part of the family relations counselor. Non-confidential dispute resolution and assessment was developed and implemented by Family Services of the Conciliation Court of Pinal County, Arizona. It is a hybrid process that includes negotiation and encourages agreements but, if necessary, includes assessment, child interviews, collateral information gathering and recommendations to the court. Early neutral evaluation was developed in Hennepin County, MN, Family Court Services to encourage and influence early settlement. It is a confidential abbreviated process in which parties, accompanied by lawyers if represented, present their case to two evaluators who provide an early indication of their likely recommendation with the caveat that such recommendations are based on parties' ability to verify their claims and allegations. Collaborative law is an interest based negotiation approach to lawyer-assisted settlement negotiations that frequently incorporates mental health and financial professionals. Parties participate directly in settlement negotiations; lawyers withdraw if the case does not settle and proceeds to trial. Cooperative negotiation agreements (or cooperative law) are lawyer-assisted settlement negotiations that typically incorporate voluntary information sharing, interest based negotiation, direct involvement of clients, confidential negotiations, children's best interest as an essential ingredient and disincentives (not including withdrawal of counsel) to litigation.

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