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PREVENTION STRATEGIES TO PROTECT PROFESSIONALS AND FAMILIES INVOLVED IN HIGH-CONFLICT DIVORCE

*Thomas E. Schacht, Psy.D.**

Recently, while consulting with an attorney on the defense of a multiple-murderer, I noticed a pistol inside the counselor's opened desk drawer. I commented empathically about feeling unsafe around violent criminals, but the attorney indicated that his concerns lay elsewhere—the gun was for his divorce cases.

In the divorce and custody battle of a billionaire and his multi-millionaire ex-wife, both of whom—as one might expect—are used to getting their own way,¹ both parties alleged physical abuse by the other. In proceedings to increase his \$12,000 per month child support payments, the billionaire husband testified that it only costs \$3.00 per day to feed his daughter. The ex-wife has gone through five teams of lawyers. A court-appointed psychiatrist has produced an 800 page report, which has been condemned by the ex-wife, who alleges improper influence of the physician by her husband during a lunch at his estate. Combined professional fees for the parties are estimated to be several million dollars, with no end in sight.

The above scenario brings to mind an anonymous park ranger's advice to anxious campers about how to protect themselves if confronted by a bear:

There are two schools of thought. One says you should stand perfectly still, avoiding eye contact, until the bear goes away. Other experts say the opposite—you should run the bear off by screaming and jumping and waving your arms. In my long years of wilderness experience, I've determined that both schools are right about half the time . . . it mostly depends on the bear.

I. INTRODUCTION

High-conflict divorce is a major social, economic, and public health problem. It is also a source of potentially overwhelming legal and interpersonal woe. This essay offers a potpourri of strategies for the protection of families and professionals who are at risk for various harms associated with high-conflict divorce.

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1. See Alex Tresniowski et al., *As Nasty as It Gets*, PEOPLE, Feb 8, 1999, at 65.

Following a brief review of the scope of divorce conflict, this essay parses specific prevention strategies into the standard clinical nomenclature of primary, secondary, and tertiary prevention levels. A primary prevention perspective seeks to minimize the onset of new cases of divorce, by methods to reduce causes and risk factors for divorce to enhance the capacity of families to fulfill their roles and endure adversity without resorting to divorce. A secondary prevention perspective assumes that a divorce is inevitable, but seeks to reduce the intensity or shorten the duration of a conflict by emphasizing methods for early identification and prompt intervention. Typical procedures include mechanisms for crisis intervention, public education, and increased availability of support services. Tertiary prevention assumes that a high-conflict condition exists. The goal is to institute aggressive measures to limit the morbidity, mortality, and residual impairment which may result.

II. EPIDEMIOLOGICAL SCOPE OF DIVORCE CONFLICT

The United States has the highest divorce rate in the world.² According to the United States Bureau of the Census, the fastest growing marital status category is that of divorced persons. The number of currently divorced adults quadrupled from 4.3 million in 1970 to 17.4 million in 1994, and the percentage of divorced adults in this same period climbed from 3% to 9% of the population.³ Although most social phenomena have multiple causes, some scholars argue that this increase is due especially to the proliferation of no-fault divorce laws.⁴

Divorce is associated with elevated risk for a range of psychological and physical ills in spouses and children. Post-divorce economic adversity is common, particularly in the case of women.⁵ Psychological and developmental risks of divorce are well-documented and tend

2. See 1991 U.N. DEMO. Y.B. (43rd ed. 1992).

3. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Pub. No. 20-484, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994 vi (1996).

4. See Paul A. Nakonenzny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477 (1995).

5. See Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-Being: A Meta-Analysis*, 53 J. MARRIAGE & FAM. 3 (1991); Gay C. Kitson & Leslie A. Morgan, *The Multiple Consequences of Divorce: Decade Review*, in NATIONAL COUNCIL ON FAMILY RELATIONS, CONTEMPORARY FAMILIES: LOOKING FORWARD, LOOKING BACK 150 (Alan Booth ed., 1991); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483 (1995).

to increase with the severity of interparental interpersonal conflict.⁶ Conflicting parents offer deficient models for impulse control, mood regulation, conflict resolution, intimacy skills, and interpersonal commitment. Psychological impairments to children arising from divorce may persist into adulthood, setting the stage for a transgenerational repetition of family dysfunction and psychopathology.⁷ Children of high-conflict divorce may lose a parental relationship entirely and may spend substantial periods of time without adult supervision, which increases the risk of delinquency, school failure, teenage pregnancy, violence, and substance use.⁸

A. Spousal Contributions to Conflict

Divorcing spouses are often expected to divide property equitably and to negotiate, collaborate, and cooperate over the long-haul in a post-divorce relationship with respect to their children.⁹ Despite the existence of some benign outcomes, the so-called "good divorce" is an oxymoron. For a variety of reasons which may operate at all levels of the biopsychosocial hierarchy, the context of divorce too often brings out the worst in spouses, their children, and the professionals who work with them. Intense hostility and/or bitter legal conflict accompany and prolong the divorcing process in up to one-third of cases.¹⁰ In these intensely conflicted cases, one or more parties conduct themselves in ways which are not merely aggravating, obnoxious, or mean, but rather

6. See, e.g., JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* (1997); K. Camera & G. Resnick, *Interparental Conflict and Cooperation: Factors Moderating Children's Post-Divorce Adjustment*, in *IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN* 169 (E. Mavis Hetherington & Josephine D. Arasteh eds., 1988); Lawrence Erlbaum et al., *Effects of Parental Divorce on Mental Health Throughout the Life Course*, 63 *AM. SOC. REV.* 239 (1998); Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 *J. AM. ACAD. CHILD PSYCHIATRY* 349 (1991).

7. Cf. Cathy Spatz Widom, *Posttraumatic Stress Disorder in Abused and Neglected Children Grown Up*, 156 *AM. J. PSYCHIATRY* 1223, 1226 (1999).

8. Cf. Micheal D. Resnick et al., *Protecting Adolescents from Harm*, 278 *J. AM. MED. A'SSN* 823 (1997).

9. In fact, most divorcing couples do handle this challenge and manage to negotiate their own circumstances and consummate a divorce without requiring formal custody evaluation or court adjudication. See ROBERT E. EMERY, *MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT* (1988); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

10. See JOHNSTON & ROSEBY, *supra* note 6, at 4; MACCOBY & MNOOKIN, *supra* note 9, at 141; Carol Masheter, *Post-Divorce Relationships Between Ex-Spouses: The Roles of Attachment and Interpersonal Conflict*, 53 *J. MARRIAGE & FAM.* 103 (1991).

which pose various palpable dangers—psychological, financial, legal, and even physical—to family members, professionals, and even uninvolved bystanders. The full range of risks includes physical, legal, and financial harm, as well as psychological damage. The most extreme risks include physical injury or death, mental illness, bankruptcy and impoverishment, limitation or outright loss of professional licensure, and incarceration.

Divorce conflict may be expressed in behavior designed to humiliate, punish, or avenge (such as self-destructively expending assets on attorneys to prevent the spouse from gaining them; physically injuring oneself to support a claim of spousal abuse; fabricating claims of sexual abuse of children; or seeking to legally change a child's name in order to erase any connection to the father). In addition to targeting each other directly, divorcing parents may transform a child into a relationship weapon by engaging in patterns of behavior designed to destroy the child's psychological connection to the other parent.¹¹ Fighting may serve as a distraction from the pain of divorce and may help to sever residual bonds of attachment and affection. Conflict agendas may also underlie behavior which is based on an extremely narrow and rigid view of the spouse or of marital relationships in general (such as may be found in cases of so-called parent-alienation, or which may occur when parents harbor extreme belief systems or belong to cult-like groups). Conflict agendas may sometimes be related to psychopathology in one or both spouses, particularly severe personality disorders, but also including a range of other conditions. Alternatively, in some cases an apparent emotional agenda is a sham, adopted in cold blood solely for the purpose of gaining strategic

11. Examples of such alienating behavior include:

Minimizing the importance of contact and relationship with the other parent; excessively rigid boundaries: rudeness, refusal to speak to or inability to tolerate the presence of the other parent, even at events important to the child, or refusal to allow the other parent near the home for drop-off and pick-up visitations; no encouragement for visits with the other parent; no concern for missed visits, and lack of empathy for child's distress at missed visits; no positive interest in the child's activities or experiences during visits; granting autonomy to the point of apparent indifference, *i.e.*, "It's up to you, I don't care;" overt expressions of dislike of visitation, *i.e.*, "Okay, visit, but you know how I feel about it;" refusal to discuss anything about the other parent, *i.e.*, "I don't want to hear about . . ." or selective willingness to only discuss negative matters; innuendo and accusations against the other parent, including statements that are false; portraying the child as an actual or potential victim of the other parents' behavior; demanding that a child keep secrets from the other parent; destruction of gifts or memorabilia of the other parent; and promoting loyalty conflicts (such as by offering an opportunity for a desired activity that conflicts with scheduled visitation).

advantage or tormenting the partner. Ideological agendas may stem from various philosophical, religious, or cultural origins, which can lend a fervid aura of righteousness to otherwise personal issues of divorce and child custody.¹²

Individuals involved in high-conflict divorces are not generally known for their listening skills, or for their ability to adopt a balanced, objective, and realistic outlook. Divorcing spouses may vacillate, causing the attorney to waste time preparing for a court battle that the client ultimately is not willing to undertake. Some clients instruct their attorney to fight every issue to the last, while making irrational demands that insure no settlement or agreement is possible. Goldstein¹³ cites the case of a paternity defendant seeking to escape child support obligations who was "appalled that the court had saddled him with fatherhood based on a mere 99.86 genetic probability. Why couldn't the courts see that there was a 0.14 percent chance that the father was someone else?"¹⁴

B. Professional Contributions to Conflict

There is a country saying that if a small town has only one lawyer, he will starve, but if a second attorney sets up shop, they will both prosper. The same may be said about other professionals who may be drawn into a "battle of the experts" by custody litigators. Whatever else it may, divorce in America is also an industry that supports numerous professionals who may benefit from divorce conflict. Accordingly, the professional involved in family law proceedings is at risk for being seen as, or for becoming, a vulture who creates or promotes stress and then profits from it. Indeed, there are some empirical data suggesting that involvement of lawyers is associated with different requests from divorcing partners and with different divorce outcomes.¹⁵

Professional standards dictate roles that emphasize conflict reduction and action in the best interests of the child.¹⁶ However, due

12. See PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* (1986).

13. See Charles M. Goldstein, *Dealing with 'Great Expectation': Metaphors and Strategies for Managing Problem Clients*, 17 *MATRIMONIAL STRATEGIST*, Feb. 1999.

14. *Id.*

15. See Maccoby & Mnookin, *supra* note 9, at 108.

16. See AMERICAN PSYCHOLOGICAL ASSOCIATION COMMITTEE ON PROFESSIONAL PRACTICE AND STANDARDS, *GUIDELINES FOR PSYCHOLOGICAL EVALUATIONS IN CHILD PROTECTION MATTERS* (1998); American Academy of Child and Adolescent Psychiatry,

to the pressure of personal issues, sometimes disguised as therapeutic zeal or vigorous advocacy, some health professionals lose objectivity and some attorneys apply "hardball" or "scorched earth" tactics¹⁷ against spousal opponents. Examples of such tactics include deliberate efforts to wear down and provoke opponents with repetitive legal motions, brutal discovery and other legal tactics to obstruct and delay proceedings and thereby inflate opponent's legal fees to impossible proportions; concealment or misrepresentation of assets or other relevant facts; character assassination; employment of unethical or "hired gun" experts; and deliberate distortions, mistruths, and false allegations of substance addiction, promiscuity, or abuse as a foundation for unjustified demands for restraining orders and severely restricted visitation. At worst professionals may become perpetrators of psychological or economic violence upon clients who may be too ignorant, confused, impoverished, or exhausted to protect themselves.¹⁸ In turn, professionals themselves may suffer a range of physical, psychological, or legal assaults, whose scope is limited mostly by the creativity, scruples, and resources of the individuals launching the attack.

Sheer economic competition among professionals may fuel conflict among their clients. The number of lawyers in the United

Summary of the Practice Parameters for Child Custody Evaluation, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1784 (1997); American Academy of Matrimonial Lawyers, *AAML Standards of Conduct in Family Law Litigation* (visited Jan. 20, 2000) <<http://www.aaml.org/boundsof.htm>>; American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994); Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation*, 32 FAM. & CONCILIATION CTS. REV. 504 (1994).

17. The term "scorched earth" is attributed to the strategy of burning everything in sight to achieve a military objective.

18. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 563 (1994). The authors distinguish effective legal representation from mere obnoxiousness and warn of the risks when attorneys identify with their clients' exaggerated conflictual goals:

Those lawyers who believe that "scorched earth" tactics are key to success in matrimonial litigation justify their "win at any cost" behavior on the basis of zealous advocacy on the client's behalf. In some cases this approach intimidates or wears down the opponent, resulting in victory for the offensively aggressive (and aggressively offensive) lawyer. More often, however, such tactics simply cause delay and divisiveness, increase expense, and waste judicial resources. Enlightened lawyers hold the view that courteous behavior is not a sign of weakness, but is consistent with forceful and effective advocacy.

Id. at 563-64.

States has nearly tripled since 1970. Similar increases have occurred in the numbers of mental health professionals. As a result of this expanded professional community, it is more common that opposing attorneys or experts will be relative strangers. The psychological principle of projection thrives on the ambiguity of anonymity. It is easier to misattribute base motives and misunderstand another professional who exists as little more than a name at the bottom of a document.¹⁹ Managed care restrictions have caused many mental health professionals to consider adding forensic work to their professional repertoire. In some jurisdictions, such as Florida, aggressive attorneys in search of billable hours prowl courthouses in search of divorcing clients. When a divorce action is filed, the attorney immediately contacts the spouse and offers representation. In some cases, the "Dear Potential Client" contact from the attorney offering services represents the first notice to an individual that his/her spouse is seeking a divorce. The letters reportedly range from tasteful queries on professional letterhead to lurid solicitations. This activity is sufficiently lucrative that, for a fee, third-party businesses now compile and disseminate names to lawyers on a daily basis.²⁰

Some lawyers and organizations have set up Internet web sites offering "how to" advice for individuals contemplating or engaged in divorce. Some of these sites offer advice about creating low-conflict relationships, collaborating in a divorce, benefitting from mediation, or working productively with an attorney.²¹ However, other sites trumpet political manifestos sometimes based on extreme views of men's rights or feminist ideologies. Some even hawk frank terrorist manuals for marital warfare.²² For example, consider the published advice of Bradley Pistotnik, a divorce attorney, to women contemplating divorce on the subject of "finding a psychologist to testify against your husband:"

19. See Robert W. Ritchie, *Civility in the Practice of Law: Must We Be 'Rambos' to Be Effective?*, TENN. B.J., Jan.-Feb. 1998, at 14, 16.

20. See National Post, *Divorce Lawyers Post Nasty Surprises* (visited July 6, 1999) <<http://www.nationalpost.com/home.asp?f=990706/21905.html>>.

21. See, e.g., Collaborative Divorce Training Institute, *Welcome to Collaborative Divorce* (visited Apr. 6, 2000) <<http://www.collaborativedivorce.com>>; *Divorce Without War* (visited Apr. 6, 2000) <<http://www.divorce-without-war.com>>; Coalition for Marriage, Family and Couples Education, *The Number One Predictor of Divorce* (visited Apr. 6, 2000) <<http://www.smartmarriages.com>>.

22. See, e.g., Americans for Divorce Reform, *Americans for Divorce Reform* (visited Apr. 6, 2000) <<http://www.divorcereform.org>>.

To ensure that you win your divorce, you will need a psychologist who will act as a counselor, friend, expert, and sword Seek counseling early in the game to establish the long-term counseling that is needed. If you see the psychologist for only a short period of time, the court will place much less credence in his or her opinion [P]sychological experts are no different from the experts discussed in the preceding chapter. They will sell their professional opinions and testify for one side or the other Even if you had an affair with a younger man, spent all of your husband's money on presents for your boyfriend, and are entirely at fault, you need a psychologist who will say that your behavior was acceptable and justified. A good psychologist will go to the grave backing up your case Find the psychologist whose clients have won the most money in their divorces. That reputation is a good indicator of the psychologist's ability to help you Remember, battered wife syndrome can be induced by verbal abuse. Surely your husband has verbally abused you at some point in your life. Perhaps he told you that you were fat or stupid, or attacked you in some other manner. The psychologist can pinpoint these attacks and arrive at a reasonable diagnosis Do not reveal your real plan to the psychologist Don't let the psychologist know what you are up to. Rehearse your plan only to yourself. Persuade the psychologist to believe in your case, and make him think that every single fact you give him is a fact he can use as your advocate. Most psychologists want to believe their patients; there is a strong tendency in mental-health counselors to believe the assertions of a patient until they are disproved. Still, never let down your guard, even if questioned by your psychologist."²³

Pistotnik also advised divorcing women to entrap their husbands by inviting them into counseling sessions where the husband's weaknesses, misbehavior, substance abuse, etc., are openly discussed.²⁴ Pistotnik observes that since the patient-therapist relationship technically is owned by the patient-wife, the husband is not entitled to any privilege, and the therapist can testify about his self-incriminating statements in court.²⁵ If the husband refuses to attend counseling, this may also be used against him.

23. See BRADLEY A. PISTOTNIK, *DIVORCE WAR: 50 STRATEGIES EVERY WOMAN NEEDS TO KNOW TO WIN* 161 (1996).

24. See *id.*

25. See *id.*

C. Allegations of Endangerment and Abuse

Abuse may cause divorce. Alternatively, divorce may cause abuse or may prompt revelations of previously concealed abuse. The stresses of divorce may also distort perceptions, resulting in minimization or exaggeration of concerns about endangerment or abuse. These issues are often very difficult to sort. Some courts unfortunately expect health professionals to determine not only the impact of abuse, but also to overcome problems posed by absent or equivocal evidence and determine whether or to what extent abuse allegations are true.

It is not clear to what extent the apparent occurrence of sexual abuse allegations in custody disputes reflects particular dynamics of the custody situation, or whether this is simply part of a broader demographic trend toward higher rates of abuse reporting. A recent empirical study of a large sample of consecutive family court cases for an entire year suggests that the base rate incidence of alleged sexual abuse may be as low as 2% of contested custody cases and less than 1% of all family court cases.²⁶ However, these statistics do not speak to the correlated issues of how frequently allegations may be false or of how often this issue may be raised and settled informally, which results in the issue never being litigated or appearing in court documents.

There is a common belief that false abuse allegations may be raised in custody disputes as part of an effort by one parent to gain leverage over the opposing spouse or to undermine the child's relationship with the other parent.²⁷ This belief is supported, in part, by observations that in cases of suspected abuse, there is a high frequency of custody dispute.²⁸ It is not surprising that custody disputes would occur in circumstances involving identified sexual abuse. However, the reverse question is not automatically answerable in the affirmative.

26. See Julia A. McIntosh & Ronald J. Prinz, *The Incidence of Alleged Sexual Abuse in 603 Family Court Cases*, 17 LAW & HUM. BEHAV. 95 (1993). When allegations of physical abuse were added, however, the figure jumped to 8% in contested cases and 3% overall. See *id.* at 100.

27. See, e.g., RICHARD A. GARDNER, *THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE* (1987); Arthur H. Green, *True and False Allegations of Sexual Abuse in Child Custody Disputes*, 25 J. AM. ACAD. CHILD PSYCHIATRY 449, 449-50 (1986). In a particularly nasty variation on this theme, the accusing parent attempts to gild the accusation with a professional aura, by raising their concerns with a treating clinician, knowing that the clinician will then have a legal duty to report the matter to appropriate investigative authorities.

28. See David P. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE, 27-45 (1987).

That is, the fact that custody disputes occur in cases of sexual abuse does not mean that the sexual abuse allegations were caused by the custody dispute.

Every state now requires the reporting of suspected child abuse, although professional knowledge and compliance with these laws is inconsistent. One study of a large sample of psychologists found that "protecting the child" was rated more highly than "upholding the law" as a determinant of whether to make a report of suspected abuse.²⁹ These professionals may confuse the professional duty to testify in accordance with the best interests of the child, which does not authorize breach of confidentiality, with the legal duty to report suspected abuse. Some professionals, caught up in the throes of a high-conflict divorce situation, appear to forget that such laws typically provide immunity from liability only for disclosures that are made under limited circumstances specified by the statute (such as reports made directly to police, human service authorities, juvenile courts, etc.). Unauthorized testimony in a divorce action, even when given in response to allegations of abuse or neglect, is not covered by immunity provisions of reporting statutes, which generally apply only to reports made to designated authorities. Thus, a recent New Jersey case found a psychologist liable for damages to a former patient whom she had counseled, along with her husband, for five years prior to a divorce, after the psychologist testified against the mother in a custody hearing, believing that her testimony was permissible because it was intended to foster the "best interests" of the child.³⁰

D. Violence

Violence in a divorce may be an expression of overwhelming psychological disturbance or it may be a calculated behavior designed to accomplish an instrumental goal. Mazur and Michalek argue that the interpersonal conflict associated with divorce causes an increase in male testosterone levels, which in turn escalates aggressive tendencies and increases the risk of relationship violence.³¹ Regardless of cause,

29. See Seth C. Kalichman & Cheryl L. Brosig, *Practicing Psychologists' Interpretations of and Compliance with Child Abuse Reporting Laws*, 17 LAW & HUM. BEHAV. 83, 88 (1993).

30. See *Runyon v. Smith*, 730 A.2d 881 (N.J. Super. Ct. App. Div. 1999), cert. granted, *Runyon v. Smith*, 744 A.2d 1209 (N.J. 1999).

31. See Allan Mazur & Joel Michalek, *Marriage, Divorce, and Male Testosterone*, 77 SOC. FORCES, 315-30 (1998).

the potential for physical, psychological, and economic violence before, during, or after legal proceedings arouses realistic fear that does not spare judges, court staff, attorneys, witnesses, and families.³² Harassment, intimidation, slander, exploitation, theft, fraud, character assassination, false accusation, abduction, stalking, and physical, psychological, and sexual abuse, as well as murder or murder-suicide are among the forms of violence that may occur in the context of high-conflict divorce.

Estimates of the prevalence of physical violence in divorcing couples range as high as 75%.³³ Professionals may be direct targets or may be harmed as the incidental victims of violence directed at their clients. While there are general data regarding assaults on clinical professionals, no breakdowns exist which identify the role of divorce as a precipitating or contextual factor.³⁴ Anecdotally, the *Boston Globe* in 1995 reported on the deaths of two Massachusetts divorce attorneys murdered by their clients' husbands, and noted similar murders and violent attacks in Florida, Chicago, New York, and St. Louis.³⁵ The American Bar Association conducted an unscientific fax survey of nearly 1500 of its Family Law Section members regarding their experiences with client-related violence. Of the 253 responding attorneys, 60% indicated that they had been threatened by and 9% had been victims of violence by opposing counsel's client. There is apparently less danger from one's own clients, as only 17% had been threatened by their own clients and 3% had been victims of violence perpetrated by their own client. Only 35% of the sample indicated they had never been threatened or victimized by anyone in the course of

32. See Dianne Molvig, *Violence and the Judicial System: Stemming the Tide of Violence in Our Courthouses*, WIS. LAW., July 1997, at 10, 12. Elsewhere, this spreading of conflict boundaries has been colloquially labeled "tribal warfare," reflecting the processes by which the emotional contagion of a marital conflict spreads to include significant others, extended kin, neighbors, attorneys, mental health professionals, and even judges.

33. See Camera & Resnick, *supra* note 6; Janet R. Johnston & Linda E.G. Campbell, *A Clinical Typology of Interparental Violence in Disputed Custody Divorces*, 63 AM. J. ORTHOPSYCHIATRY 190 (1993); Janet R. Johnston & Linda E.G. Campbell, *Parent-Child Relationships in Domestic Violence Families Disputing Custody*, 31 FAM. & CONCILIATION CTS. REV. 282 (1993).

34. For example, about 1.6% of physicians were victims of non-fatal workplace violence in the period 1992-1996. However, there is apparently no data indicating the extent to which the context of divorce contributed to these assaults. See American Medical Association, *Recent Murders Awaken Physicians' Safety Concerns*, AM. MEDICAL NEWS, Feb. 1, 1999.

35. See Peter S. Canellos, *Divorce Lawyers Reminded of Risks*, BOSTON GLOBE, Dec. 3, 1995, at 41.

their family law practices. Although the majority (74%) of surveyed attorneys indicated they had taken no special precautions to ensure their safety, some individuals described methods for managing the perceived risk of violence, including carrying firearms and hiding a golf club behind the office door.³⁶

E. Malpractice and Ethics Complaints

In addition to the potential for violence, professionals also face the threat of lawsuits for malpractice or complaints to professional ethics committees and licensing boards. In the current managed care climate, adverse impacts to credentials may also result in de-selection from managed care panels, which can destroy the economic viability of a professional practice. Published data on ethics complaints indicate that involvement with child custody poses a significant professional risk. In the most recent ten year period for which statistics have been compiled by the ethics committee of the American Psychological Association (1988-1998), child custody disputes have been the single most common context for complaints of inappropriate professional practice.³⁷

III. SOME PREVENTION STRATEGIES

A. Primary Prevention

Primary prevention seeks to minimize the onset of new cases of divorce, using public health methods designed to reduce causes and risk factors for divorce, and seeks to enhance the capacity of families to fulfill their roles and endure adversity without resorting to divorce. A primary prevention perspective might advocate the following measures.

36. See Kelly McCurry, *Family Lawyers Face Threats, Violence, Survey Says*, TRIAL, Feb. 1998, at 91 (1998).

37. Yearly statistical reports of the APA Ethics Committee are published in the annual archival issue of *American Psychologist*, usually in July or August. Each report includes a table which, among other facts, enumerates the numbers of cases arising in the context of custody disputes.

1. *Universal Broad-Based Health Insurance for Children*

A universal health benefit for children would remove payments for health care as an issue in divorce. This would also remove any incentive that economically stressed parents may have to identify their children as disabled in order to obtain funds for health care through the Social Security disability system.

2. *Parity for Mental Health Services to Family Units*

Recent insurance reforms place mental health benefits on a more equal footing with coverage for physical ailments. However, many health insurers do not recognize that the appropriate recipient for some mental health services should be the family unit rather than an individual family member. To correct this problem, legislatures should expand the concept of mental health parity to include reimbursement for services to couples and families. Health-insurance policies which limit mental health services to individuals should be discouraged by appropriate legal means. Consideration should be given to allowing families to pool the insurance benefit limits of all their individual members for the purpose of receiving family services. In light of overwhelming evidence that divorce is a significant public health problem, mental health services arising out of the context of divorce should be brought under a statutory per se determination of "medical necessity" under managed-care plans (which have tended to use such determinations as a specious pretext for engineering overall reductions in care).³⁸ Listing of a diagnosis in the Diagnostic and Statistic Manual of Mental Disorders of the American Psychiatric Association (DSM-IV) is often a prerequisite for various forms of reimbursement. For this reason, professionals should embark on appropriate research and political action to enable the psychopathologies of high-conflict divorce to be reliably identified and named in the standard diagnostic labeling system.

3. *Universal Family-Life Education*

Federal support should be offered to develop and implement curricula for education in the basics of parenting, interpersonal

38. See Douglas L. Leslie & Robert Rosenheck, *Shifting to Outpatient Care? Mental Health Care Use and Cost Under Private Insurance*, 156 AM. J. PSYCHIATRY 1250 (1999).

relationships, and domestic safety in the K-12 curriculum of every public school. Children are taught how to be safe from strangers and how to avoid drugs and sexually transmitted diseases, but they are not prepared for the role of parenting, nor are they equipped to know what to do if they are caught in the middle of a domestic violence crossfire.

4. *Increased Access to Family Support Service*

Every parent, married or not, should have access to a comprehensive spectrum of family support and divorce-prevention programs. Parent-training and consultation with parenting specialists should be available free of charge, as a form of life-long public education, accessible on relatively short-notice in most communities through schools, mental health centers, or partnerships between the two.

5. *Increased Marital Education*

It has been demonstrated that, as compared to controls, couples who participate in a Prevention and Relationship Enhancement Program (PREP) show significant improvement in conflict management, maintain higher levels of marital satisfaction, lower levels of aggression, and a lower divorce/separation rate five years after completing the program.³⁹ Such demonstrably effective premarital education should be provided free of charge through adult education programs located in public schools.

6. *Increased Study of Specialized Marriage Contracts*

Louisiana's 1997 covenant marriage option allows couples to choose between a standard marriage contract permitting no-fault divorce after a six-month separation and a "covenant marriage" that permits divorce only under condition of fault or after a marital separation of more than two years. Couples who choose a covenant marriage must also obtain premarital counseling.⁴⁰ Effects of this legal structure on divorce should be carefully studied and, if warranted by outcome data, specialized marriage contracts should be considered for adoption in other states.

39. See Scott M. Stanley et al., *Strengthening Marriage and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. REL. 392 (1995).

40. See Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 74-75 (1998).

B. Secondary Prevention

A secondary prevention perspective assumes that a divorce has occurred or is inevitable, but seeks to reduce the frequency, intensity, or duration of conflict through early identification and prompt intervention. Typical procedures include mechanisms for crisis intervention, public education, and increased availability of support services.

1. *Use the Educational System to Increase Support for Child Care*

The academic calendar in the United States is a vestige of an agrarian economy in which children were freed from school during the growing season so they could work on the farm. The typical 180-day academic calendar in the United States is among the shortest of all developed countries. In addition to educational inefficiency, a short school year also wastes expensive infrastructure by allowing school buildings to sit idle for long periods. Families stressed by the demands of single parenting and working hard to meet the financial burdens of sustaining two households would benefit from adoption by every community of an extended school year or even year-round schooling with integrated after-school childcare.

2. *Require Pre-Divorce Parenting Education*

Some jurisdictions, such as Connecticut and Utah, require that all divorcing couples participate in parenting education.⁴¹ This concept should be more widely evaluated with a national program of pilot projects, followed by outcome studies and wholesale adoption of standardized programs that demonstrate effectiveness. Pre-divorce parenting education should be defined as a preventive mental health intervention, so that programs may compete for public health research and program funds. Because mere exposure to information does not guarantee learning or implementation of knowledge, consideration should be given to offering parents the opportunity to demonstrate their learning by passing a test covering an approved curriculum. Any parent who fails to pass such a test or refuses to take it should have this fact weighed as a statutory negative factor against award of custody.

41. LINDA A. MOONEY ET AL., UNDERSTANDING SOCIAL PROBLEMS (2000).

3. *Study and Encourage Alternative Dispute Resolution as Appropriate*

If a little bit of litigation does not solve a problem, too often the solution is more litigation. The formality, expense, and adversarial procedures of litigation may accelerate conflict, and the legal system's focus on rights and procedural justice may not always recognize the resulting potential for iatrogenic harm. Reduction of family conflict and reduction of litigation are clearly in the best interests of children and families. For this reason, development and testing of effective alternative dispute resolution methods should become a national priority.⁴² Some data suggest that children of mediated divorces may adjust better than children of litigated divorces.⁴³ Unfortunately, the meaning of this data is unclear because of the potential for selection bias. The nation needs the equivalent of clinical trials, similar to those conducted by the National Institute of Mental Health on treatments for mental disorders, to evaluate which alternative dispute methods and systems are safe and effective for which families under which circumstances.

4. *Structure Legal Rules of Procedure to Reduce Children's Involvement in Parental Divorce Proceedings*

Involvement of children in parental divorce proceedings is generally psychologically destructive. Nonetheless, all fifty states permit children to become involved as witnesses in their parents' divorces, particularly as the children become older.⁴⁴ All states allow consideration of children's wishes in custody determination, sometimes codified in the list of statutory factors to be considered in a best interests determination. Failure of a judge to interview children of appropriate age regarding their wishes is potentially reversible error. Mental health professionals, either treating clinicians or custody evaluators, often act as proxies for children's testimony.

The potential for children's statements to become fuel for a family conflict can be reduced if rules of procedure explicitly permit interviews to be conducted in chambers, without presence of parents'

42. JOHNSTON & ROSEBY, *supra* note 6.

43. S. RICHARD SAUBER & LENARD MARLOW, *THE HANDBOOK OF DIVORCE MEDIATION* (1990).

44. See Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 *LAW & HUM. BEHAV.* 289, 291 (1996).

counsel or parents, but perhaps attended by a guardian ad litem and perhaps assisted by a court's mental health expert. Further benefit to children would accrue if the court did not keep a transcript or recording of a child's statements, or if such a record is kept, it were placed under seal and all parties were instructed by the court not to question the child about his/her statements. Absence of an accessible record precludes use of the statements in further litigation and also may inhibit adult guilt-induction or other forms of retaliation against a child.

5. *Make Infrastructure Improvements to Reduce Conflict Opportunity*

"Good fences make good neighbors." Basic infrastructure improvements should be instituted to reduce opportunities for harmful conflict. Every community that has a public school should also have a center where safe, supervised visitation, waiting, and transfer can be accomplished, if necessary, without the necessity for contact between conflicted parents. Every courthouse should have adequate security measures, including reasonable controls on access through secured checkpoints, weapon detection technology, secure office settings, and adequate numbers of uniformed bailiffs. Secured and separate waiting rooms can be helpful in putting distance between warring parties. Nothing is gained by a court or clinic schedule and physical arrangement that makes adversarial parties share the same waiting space, or that puts everyone with a domestic violence injunction hearing in the same courtroom or same waiting area at the same time. In severe cases, victims of domestic violence may be intimidated or overwhelmed by mere eye contact with the perpetrator. The option of a closed-circuit TV appearance may be useful in some extreme situations. Court calendars should be managed as efficiently as possible. Reduced waiting times can be helpful in managing tensions that contribute to anger and violence.

6. *Improve the Dialogue Between Courts and Experts*

When a court orders a custody evaluation, too often the resulting product is unfocused, overly expensive, excessively intrusive and psychologically traumatic, and insufficiently relevant to the unique issues presented by a particular family. This unfortunate outcome may occur, in part, because many courts order a "custody evaluation" as if this constituted a standard procedure, whose scope, direction, level of effort, and relevance to the proceedings at hand may be taken for

granted, and because many professionals are correspondingly willing to provide a "one size fits all" form of evaluation.

The usefulness of custody evaluations to courts could be improved if they were ordered in a two-phase procedure. In the first, or "scoping" phase, the expert would conduct a preliminary reconnaissance to determine which issues are likely to be the key issues for a particular family. Based on this scoping evaluation, a preliminary report is presented to the parties and the court for the limited purpose of identifying the likely agenda for a full custody evaluation. It is possible that the clarification achieved by a scoping evaluation will permit a family to proceed into some form of alternative dispute resolution. If not, then based on the results of the scoping evaluation, the second phase of a custody evaluation may be performed in a manner that increases the likelihood of producing a product that makes efficient use of the family's resources and is maximally relevant to the needs of the court and the parties.

7. *Embrace Therapeutic Jurisprudence*

Divorce may occur in the context of a host of other severe family dysfunctions that implicate multiple divisions of the legal system. For example, in addition to the divorce proceeding, a spouse may face an assault and battery charge in criminal court, and a child may respond to the divorce stress with behavior that results in referral to juvenile court. Although families are functional psychological units, the legal system tends to see all of these issues as belonging to separate individuals rather than to the family system. A mechanism for consolidation of cases, particularly if this could be accomplished in a system of specialized multi-disciplinary courts, would allow one specially trained judge to see the progression of the family and to approach the problem with sensitivity to family issues.

One mechanism for accomplishing this goal would be to create truly specialized courts, analogous to the mental health courts that have been established in Broward County, Florida and King County, Washington. These specialized courts offer alternative management of misdemeanor criminal defendants with mental illnesses. Cases volunteering for these courts benefit from improved processing time, improved access to mental health services, and (hopefully) lower rates of recidivism. These benefits derive from the legal equivalent or continuity of care by a multidisciplinary team which includes judicial, legal, and mental health professionals who follow a case from

beginning to end. The program is designed to coordinate services prior to, during, and after adjudication.⁴⁵ Congressman Ted Strickland (Ohio) has proposed pending federal legislation to support a pilot program to further develop and evaluate this concept. If this can be done for criminal defendants, why not for families?

The expertise and balance embodied in such a multidisciplinary court should allow an improved execution of the various incarnations of the best interests standard.⁴⁶ A best interests standard is laudable in principle but vague in execution. In divorce litigation it may operate as a license for warring spouses to claim that virtually anything is relevant to a determination of custody. It is also a double-edged sword for the judiciary. On one hand, a best interests standard allows exercise of wisdom particularized to the facts of a given case. However, the same standard also opens the door to error, bias, or to frank abuse of discretion. At worst, the latitude inherent in the best interests standard may allow a biased expert or judge to tyrannize or unfairly punish a marital litigant from behind the shield of the court's immunity. A multidisciplinary team may be better able than a single individual to resist the idiosyncratic personalized reactions⁴⁷ that may be evoked by outrageous and provocative behavior on the part of litigating spouses. A team should be able to better define the desired scope of a best interests evaluation in a particular case, allowing experts to more efficiently target their efforts to relevant as opposed to peripheral issues.

C. Tertiary Prevention

Tertiary prevention assumes that a high-conflict condition exists. The goal is to institute aggressive measures to limit the morbidity, mortality, and residual harm which may result. At this point, many cases are beyond therapy and beyond alternative dispute resolution.

45. See James D. Cayce & Kari Burrell, *King County's Mental Health Court: An Innovative Approach for Coordinating Justice Services*, WASH. ST. B. NEWS, June 1999, at 19; see also GORDON B. PLUMB & MARY E. LINDLEY, *HUMANIZING CHILD CUSTODY DISPUTES: THE FAMILY'S TEAM* (1990).

46. "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." United Nations Convention on the Rights of the Child, Art. 3, *opened for signature* Nov. 20, 1989, available in United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child* (visited Apr. 6, 2000) <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>.

47. Mental health literature also terms this "countertransference."

The following recommendations focus on measures that can be taken at legislative and policy levels to provide some protection in the worst cases of high-conflict divorce. Other interventions are also possible and sometimes undertaken (arming oneself, hiring a bodyguard, change of identity, etc.), but these are beyond the scope of consideration for this paper.

1. *Strengthen Anti-Stalking Measures*

Stalking and "obsessional relational intrusion" represent the dark side of close relationships.⁴⁸ High-conflict divorce offers a fertile environment for these behaviors, including the opportunity to raise false claims of victimization.⁴⁹ Stalking activities may include various forms of following, harassment, or intrusive communication, some motivated by distorted experiences of attachment or attraction, and others motivated by desire to harm, including the making of credible threats which place the stalked individual in fear of death or personal injury, or actual assault. Stalkers may show up at the residence, school, or work-place of their victims. A majority of stalkers may be mentally ill, and ordinary legal measures alone, such as restraining orders, may be ineffective.⁵⁰

In view of the additional harm that may accrue to children, consideration should be given to amending anti-stalking statutes to make stalking an ex-spouse, his/her new family, non-custodial children, or professionals (attorneys, experts) a potential aggravating factor in sentencing proceedings.

2. *Curb Abusive Marital Litigation*

It is time to get serious about application of sanctions for repeated and abusive litigation (which in itself may be a tool for stalking). Having a unified court system would help courts be more diligent in identifying unwarranted or frivolous motions or litigation, and in being more consistent in imposing sanctions for such conduct. Consideration

48. See William R. Cupach & Brian H. Spitzberg, *Obsessive Relational Intrusion and Stalking*, in *THE DARK SIDE OF CLOSE RELATIONSHIPS* 233 (Brian H. Spitzberg & William R. Cupach eds., 1998); Lawrence Erlbaum & Donna Schwartz-Watts et al., *Stalkers: The South Carolina Experience*, 25 *J. AM. ACAD. PSYCHIATRY & L.* 541 (1997).

49. See Michele Pathe et al., *Stalking: False Claims of Victimization*, 174 *BRIT. J. PSYCHIATRY* 170, 171-72 (1999).

50. See Paul E. Mullen et al., *Study of Stalkers*, 158 *AM. J. PSYCHIATRY* 1244, 1246 (1999).

should be given to developing a mechanism that would allow a custody decree to be finalized in such a manner that the issue could only be re-opened by the state upon appropriate motion of child protection authorities.⁵¹ The proposed Model Relocation Act adopted by the American Academy of Matrimonial Lawyers includes an example of sanction provisions.⁵² However, many sanctions may be of limited value in cases where the perpetrating spouse has adopted a kamikaze attitude and views sanctions as a self-destructive variation on the theme of "suicide by cop." Courts should also take seriously the criminal nature of making false complaints of abuse to authorities or introducing such into litigation, or of coaching a child to malingering. Analogy may be drawn to a recent case of first impression, *United States v. Greer*,⁵³ which upheld an upward sentencing departure/penalty enhancement for a criminal defendant who had malingered during a competency examination.

3. *Increase Options for Coping with Abduction Risk*

District attorneys may be reluctant to prosecute parents for abduction under harsh kidnapping statutes. For this reason it is important to insure the availability of alternative offenses such as "custodial interference"⁵⁴ that do not force a court to evaluate parental conduct under threat of unreasonably harsh penalty. In addition to standard measures such as supervised visitations, confiscating passports, and fingerprinting children, it is time to explore possible application of the advances of high-tech supervision of probationers and parolees to parents judged to be at high risk for abducting their

51. Perhaps it should be as difficult to initiate and obtain a post-divorce change of legal custody as it is for the state to terminate parental rights. Under the current system, the relatively liberal opportunity for an aggrieved non-custodial parent to initiate an action for change of custody allows spouses to become perpetual litigators.

52. Section 409 provides: "Sanctions for Unwarranted or Frivolous Proposal to or Objection to Relocation of a Child." American Academy of Matrimonial Lawyers, *Proposed Model Relocation Act as Adopted by the Board of Governors of the AAML* (visited Feb. 21, 2000) <<http://www.aaml.org/Model%20Relocation%20Act.htm>>.

53. 158 F.3d 228 (5th Cir. 1998).

54. See TENN. CODE ANN. § 39-13-306 (1997). "Custodial Interference" addresses interference with the custody of any minor or incompetent person by detaining or moving that person in violation of a court order or judgment. Prosecution for this offense is available only when the defendant is related to the individual in one of the familial relationships specified in the statute. See *id.* Voluntary return of the individual taken from lawful custody reduces the offense from a felony to a misdemeanor. See *id.* Return of the individual before arrest or issuance of an arrest warrant is a statutory defense. See *id.*

children. For example, a mother at risk for abducting her children could be required, during periods of visitation, to wear a device that will locate her position at all times via a global positioning link with a satellite that will prompt a law enforcement response if she strays outside prescribed boundaries.⁵⁵ Of course, while such an intervention would decrease the artifice of supervised visitation, it would not be effective against abduction risk in cases where a parent has the aid of accomplices.

4. *Extend Protections Against Intractable Violence*

Up to 20% of women seeking prenatal care report being victims of intimate partner violence.⁵⁶ Unfortunately, such violence has historically been treated less seriously than violence against strangers. The criminal implications of chronic partner or spousal violence are too often either ignored or are diagnosed and diverted into the mental health system, where effective treatment may be more of a myth than a reality.⁵⁷ A number of states have enacted statutes requiring health care professionals to report suspected cases of intimate partner violence, but research indicates most women are not asked about this problem, and most professionals are reluctant to make such reports over the objection of their patient.⁵⁸

Existing legal mechanisms for protection of families from chronic domestic violence may benefit from the addition of further legal options. In particular, Estes has outlined a case for extending the Supreme Court's recent *Kansas v. Hendricks*⁵⁹ decision to the civil commitment of a narrow class of psychopathic repeat domestic

55. With appropriate cooperation from law enforcement authorities, it might also be possible for children afraid of abduction by a parent to voluntarily wear such devices during visits as a form of reassurance that they can always be located by the other parent. Such devices may also be useful as a tool to monitor the location of stalkers on parole or probation and to insure compliance with no-contact orders.

56. See, e.g., Judith McFarlane et al., *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 J. AM. MED. A'SSN 3176 (1992); Julie A. Gazmararian et al., *Prevalence of Violence Against Pregnant Women*, 275 J. AM. MED. A'SSN 1915, 1918-19 (1996).

57. See NEIL S. JACOBSON & JOHN M. GOTTMAN, *WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS* (1998).

58. See Michael A. Rodriguez et al., *Mandatory Reporting of Intimate Partner Violence to Police: Views of Physicians in California*, 89 AM. J. PUB. HEALTH 575, 577 (1999).

59. 521 U.S. 346 (1997).

abusers.⁶⁰ In *Hendricks*, the court upheld Kansas' Sexually Violent Predators Act⁶¹ which provided for involuntary civil commitment of persons convicted of sexually-motivated violent offenses who suffer from a mental abnormality or personality disorder which makes them likely to engage in such acts in the future unless confined in a secure facility.⁶² This decision expands the power of states to confine individuals on the basis of dangerousness associated with a broader definition of mental disorder or abnormality than has typically been employed in civil commitment statutes. To extend the principles of *Hendricks* to civil commitment of psychopathic batterers, appropriate enabling legislation would be necessary. To meet the objections of critics of *Hendricks*, any such statute should meet the following conditions: (1) the statute should clearly describe the mental abnormalities which provide a threshold for application; (2) the statute should require scientifically valid predictors of future dangerousness;⁶³ and (3) some form of treatment should be provided throughout the period of confinement.

Another highly controversial option involves setting conditions on the procreation of chronic or domestic severe violence offenders. Infringement on the right to procreate occurs commonly as an indirect result of incarceration and/or capital punishment. For various reasons, however, a direct approach to this issue is far less common. Lykken has recently presented a scholarly case for requiring a license to be a parent.⁶⁴ In 1998, an Oregon appellate court upheld a condition of probation which ordered a man convicted of abusing his wife and child not to father any more children until completion of drug treatment and anger management programs.⁶⁵ On appeal the defendant claimed this probation condition represented an impermissible infringement upon his fundamental right to procreate and was imposed improperly due to absence of a "less restrictive means analysis." The appeals court upheld the probation condition, noting the establishment of a compelling state interest and the time limited nature of the restriction.

60. See David Estes, *Kansas v. Hendricks as a Paradigm for Civil Commitment of Repeat Domestic Violence Offenders*, 20 T. JEFFERSON L. REV. 167 (1998).

61. KAN. STAT. ANN. §§ 59-29a01 to -29a13 (1994).

62. See *Hendricks*, 521 U.S. at 371.

63. See VERNON L. QUINSEY ET AL., *VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK* (1998).

64. See David T. Lykken, *The Case for Parental Licensure*, in *PSYCHOPATHY: ANTISOCIAL, CRIMINAL, AND VIOLENT BEHAVIOR* 122 (Theodore Millon et al., eds. 1998).

65. *Oregon v. Kline*, 963 P.2d 697 (Or. Ct. App. 1998).

5. *Regulate Litigation and Ethics Complaints Against Court-Appointed Professionals*

Expert testimony from mental health and economic professionals is common in litigated divorces. Testifying experts are bound to make at least one party unhappy, and may achieve this result with both sides. Consequently, it is not uncommon for dissatisfied marital litigants to shift their aim from the ex-spouse to the expert. One proposed defense against this threat is the extension of judicial immunity to the expert.⁶⁶ While this may thwart litigation, under the current system it does not halt administrative proceedings resulting from complaints to professional ethics committees and state licensing bodies.

Any proposal to offer wholesale immunity to testifying experts must be weighed against the associated loss of accountability and risk of injustice. For example, application of a blanket immunity in the following situation would have allowed a gross professional malfeasance to escape accountability:

A mental health professional evaluated a child on request of a state human services agency. The evaluation was triggered by concerns expressed by the child's out-of-state non-custodial mother, who was enmeshed in a long-term severely conflicted relationship with the child's father. In the course of evaluating the child, the professional spent about fifteen minutes interviewing the long-term custodial father about the child's behavior. Subsequently, the mother sued for change of custody and the professional was called as a witness. He testified that the father was unfit, solely because he was in treatment for an affective disorder which, at one time, had required hospitalization. The expert totally discounted the fact that the father was presently enrolled in a full-time college program, earning excellent grades, and was living with a very supportive and competent extended family. Based on the expert testimony, the court ordered the child taken into the temporary custody of the state. The testifying expert, who operated a for-profit foster care program located at his personal residence, subsequently arranged for the child to be placed in his program, where the father's supervised visitation was subject to additional fees for "therapy."

66. See, e.g., *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Cal. Ct. App. 1990); *Lavit v. Superior Court of Arizona*, 839 P.2d 1141 (Ariz. Ct. App. 1992).

A superior alternative to blanket immunity for experts may be to develop balanced statutory structures linking expert immunity to desired behavior on the part of experts while providing some reasonable measure of liability to divorcing parties for unfounded allegations against experts. Elements of such a system might include the following:

1. Each state would establish a Custody and Child Abuse Evaluation Board or Commission to set standards for the credentials and conduct of experts involved in custody evaluations. These boards would be similar to existing agencies in some states which set standards for evaluation and treatment of sex offenders.⁶⁷ Ideally, the boards would draw major guidance from empirical literature⁶⁸ and from the work of professional organizations which have already published guidelines for professional involvement in child custody and child abuse cases.⁶⁹ Flexibility to respond to unique situations would be encouraged by assuring that the guidelines set by such a board would constitute a floor, not a ceiling, for professional conduct in child custody and abuse cases. If an expert encountered a unique situation which appeared to require a departure from established standards, there could be a mechanism for timely advance consultation and approval by a mechanism established by the board.
2. Experts who are suitably qualified, who are appropriately licensed or otherwise credentialed in the state in which the proceedings are held, and who have no history of a treating relationship or any other dual relationship with any of the parties, their attorneys, or the judge would be eligible for court-appointment to provide assistance in custody disputes.
3. Qualified experts who provide services under court order which represent a good faith effort to conform to the guidelines of the board or commission would be immune from criminal or civil liability, as well as from actions against their state licenses. However, judicial immunity would be extended only to those who are truly the court's experts—*i.e.*, selected and appointed by the judge to advise the court. While retaining final discretion, of

67. See, e.g., Tennessee Standardized Treatment Program for Sex Offenders, TENN. CODE ANN. §§ 39-13-701 to -708 (1999).

68. See, e.g., ROBERT M. GALATZER-LEVY & LOUIS KRAUS, THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS (1999).

69. See *supra* note 16.

course a judge may request consultation from the parties' counsel regarding selection of experts and allocation of responsibility for fees. Courts should consider creating an administrative mechanism to accept escrow deposits to cover the fees of appointed experts. Ideally an expert is selected who is acceptable to both spouses. However, judicial immunity should be linked to a position of neutrality. Thus, experts presented unilaterally by litigants and testimony from non-appointed treating clinicians should not be eligible for immunity.⁷⁰ Expert testimony from litigants themselves should also be ineligible for immunity.⁷¹

4. Since professional ethics codes generally acknowledge that state law takes precedence, and since the Custody and Child Abuse Evaluation Board guidelines would be developed to be compatible with professional standards, it will be difficult to develop an effective ethical complaint against a professional who conforms to the guidelines of his/her state. However, families would retain the ability to complain and seek redress for truly egregious conduct.

D. Financing Prevention

1. *Family Level*

Battles over children may represent interim tactics in a spousal war that is primarily about money. A view of children as interchangeable with property may be encouraged by attorneys who structure divorce negotiations around trading custody or visitation privileges for property concessions or similar prerogatives. From a psychological perspective,

70. A judge does not accept money from either side in a dispute. If an expert accepts money for services rendered unilaterally to a litigant, there should be some mechanism of accountability. The fundamental incompatibility of the roles of treating clinician and forensic expert is set forth in two seminal papers: Larry H. Strasburger et al., *On Wearing Two Hats: Role Conflict in Serving Both as Psychotherapist and Expert Witness*, 154 AM. J. PSYCHIATRY 448 (1997); Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 PROF. PSYCHOL.: RES. & PRAC. 50 (1997).

71. In *New Jersey v. One Marlin Rifle*, 725 A.2d 144, (N.J. Super Ct. App. Div. 1999), a husband in the process of a divorce was forced to forfeit his weapons after his wife filed a charge of domestic violence against him. *See id.* at 145-46. The charge was based purely on telephone calls during which he expressed his desire for contact with and custody of his daughter. *See id.* His estranged wife, who was a registered nurse, attempted to offer expert testimony regarding her husband's mental condition based on the fact that he had once taken an antidepressant medication. *See id.* at 146-47. Frighteningly, the court found her testimony unacceptable only on the narrow grounds that she lacked the requisite medical qualifications. *See id.*

the legal tactic of trading custody and visitation for money sets a stage for future resentment and does not prepare a couple for collaboration around future child-rearing tasks. Furthermore, it is morally offensive. Article 35 of the United Nations Convention on the Rights of the Child, 1989, holds: "States . . . shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."⁷² Consistent with this principle, legal measures should be taken to protect children from becoming commodities in the fund-raising aspects of a divorce.⁷³ Consideration should be given to creating sanctions for parties and ethical prohibitions for professionals that would ban any form of divorce-bargaining that trades child custody or visitation for property or money. Such bargaining is arguably a violation of a child's right not to be the subject of a financial transaction and should be prohibited on the moral theory that it represents an offensive vestige of the limited view of human rights that once tolerated slavery.

2. *Social Level*

The number of children in the United States who live in poverty is a national embarrassment. Social and health services to children and families, particularly those in poor and rural areas, are woefully under funded. For those individuals who have health insurance, marital and parenting problems are commonly excluded from benefit coverage, unless an individual is identified as the patient and given a psychopathological diagnosis. In addition to the currently available funding mechanisms, additional measures may include:

- Following the suggestion of Clark, in order to obtain a marriage license without proof of premarital education, a couple should endure a delay and pay a higher license fee, proceeds of which might go to a state Children's Trust Fund.⁷⁴

72. United Nations Convention on the Rights of the Child, Art. XXXIV, *opened for signature* Nov. 20, 1989, available in United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child* (visited Apr. 6, 2000) <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>.

73. Such bargaining may have deep cultural roots. In the United States, the relationship between parental rights and property law stems from English common law which supported the functioning of the family as an agrarian unit by assigning to parents the right to the services of their minor children. See BARRY NURCOMBE & DAVID F. PARTLETT, *CHILD MENTAL HEALTH AND THE LAW* 42 (1994).

74. See Charles Clark, *Marriage and Divorce*, 6 CONG Q. RESEARCHER 409 (1996).

- The states' interest in the harm associated with divorce may justify considering a tax on divorce. All property settlements in divorces could be subject to an estate tax, proceeds of which are dedicated to a Children's Trust Fund in each state. The tax should be graduated and should have a generous exemption to insure that it does not inadvertently harm those it is intended to help. In particular, it must be structured in such a manner that it does not constitute a bar to the courthouse door for those in financial need. Consideration should be given to allowing a substantial deduction for assets placed into irrevocable arms-length trust for the appropriate benefit of minor children. Under the tax law umbrella, concealment or fraudulent transfer of assets to avoid the tax or to deprive a spouse of a fair settlement should be criminalized, similar to income tax offenses, with enforcement handled through traditional law enforcement channels. This shifts a burden of enforcement and litigation off divorcing parents and places it into the hands of the government.

Current systems for encouraging child support payments include such measures as withholding driver's licenses or tax refunds. Governments should explore the possibility of treating an interruption in the flow of child support payments as an insurable risk.⁷⁵ Just as farmers can purchase government-backed crop disaster insurance, and residents of low-lying areas can purchase similar flood insurance, spouses should be able to purchase child-support payment insurance from the government in reasonable amounts. Such an insurance system would deprive the nonpaying spouse of an opportunity to pursue conflict with the ex-partner by manipulating support payments. In the event of default, recourse to the nonpaying spouse would be through the government insurance entity. Enforcement of financial obligations is thus separated from the dynamics of the conflicted relationship.

75. "States . . . shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State . . . and from abroad." United Nations Convention on the Rights of the Child, Art. 27(4), *opened for signature* Nov. 20, 1989, available in United Nations High Commissioner for Human Rights, *Convention on the Rights of the Child* (visited Apr. 6, 2000) <<http://www.unhcr.ch/html/menu3/b/k2crc.htm>>.