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Consultants' Comments on the New York State Law Revision Commission Recommendation on the Child Custody Dispute Resolution Process

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As the consultants to the New York State Law Revision Commission for its Recommendation concerning the child custody dispute resolution process, we share significantly in the credit for and the criticism of the Commission's work. One goal of our effort was to focus attention on the needs of parents and children involved in divorce — needs to which the legal system must respond. Public hearings have sharpened that issue and even raised questions about basic premises of the Recommendation.[1] But the purpose of these Comments is to respond to some misconceptions that have arisen, by summarizing the philosophy and features of the Recommendation and briefly explaining the reasoning behind some of the major choices the Commission made.

I. A PHILOSOPHY OF DIVORCE AND CHILDREN

The Recommendation creates procedures to reduce parental conflict following divorce. The Commission was influenced by social science research which convincingly shows that continuing parental warfare after divorce hurts children educationally, emotionally and financially.[2] The evidence is persuasive that children are more likely to surmount the crisis that divorce creates for them if

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1. An earlier version of these Comments was submitted to the Assembly Judiciary Committee of the New York State Legislature which held public hearings on the Law Revision Commission's Recommendation in November, 1985.

2. The research is summarized in the Commission's Recommendation. See Recommendation of the Law Revision Commission to the 1985 Legislature Relating to the Child Custody Decision-Making Process, 19 Colum. J.L. & Soc. Probs. 105, 109-21 (1985) [hereinafter Commission Recommendation].

they have meaningful relationships with both parents following divorce, in a rapidly stabilized environment that allows parents to function effectively. This research emphasizes that divorce is not the death of the family, but rather an occasion for its reorganization.[3] The legal system creates the framework within which this reorganization occurs by providing procedures for parents to negotiate their differences and to resolve disputes.

The traditional and pessimistic view is that all the state can do for the divorcing couple is to decide controversies between them through classic adversarial procedures and to enforce their legal obligations to each other through coercive sanctions. This view depicts divorced parents as angry and irrational, largely motivated by spite and a desire to strike back at their ex-spouses. The goals of law reform, under this view, are to provide more certainty of outcome to the weaker party in the divorce and to reduce the transaction costs of enforcing legal rights to the maximum extent possible.

An alternative, more optimistic view underlies the Commission's approach to custody problems. It is based on the premise that a significant percentage of divorcing parents can, over time, be encouraged by procedural and educational means to develop business-like attitudes toward each other when the welfare of their children is at stake. For these couples, the state's role is to provide education and encouragement in reaching an agreement to manage the effects of their divorce on their children, as well as to resolve disputes that they cannot resolve themselves.

The Commission's Recommendation creates a procedural framework to distinguish carefully between parents who are capable of cooperating for the post-divorce welfare of their children and those who are not by giving all parents the maximum opportunity to resolve their conflicts without engaging in embittering adversarial combat. The adversarial process remains an option for those cases where parents cannot settle their disputes voluntarily. It is, however, an option of last, not first, resort.

II. Summary of the Commission's Recommendations

The Commission chose a composite of programs developed in

3. Compare Braiman v. Braiman, 44 N.Y.2d 584, 589, 378 N.E.2d 1019, 1021, 407 N.Y.S.2d 449, 451 (1978) (stating that divorce results in "the division in fact of the family") with Beck v. Beck, 86 N.J. 480, 488 n.3, 432 A.2d 63, 66 n.3 (1981) ("We reject the notion that divorce dissolves the family as well as the marriage.").

other states[4] as a model for its program of divorce management. Its program includes:

1. active judicial management of all parental custody disputes by assignment of a custody dispute to a single judge for all purposes;

2. confidential custody mediation conducted by well-qualified mental health professionals and lawyers;

3. custody evaluations for those cases which cannot be settled through mediation, to be conducted by mental health professionals with the same qualifications as those who conduct custody mediation;

4. local flexibility in creating custody mediation and evaluation programs, under the centralized supervision of the Chief Administrator of the Courts;

5. focused responsibility and authority in the Chief Administrator of the Courts to oversee the entire custody dispute resolution program in order to ensure high quality and statewide uniformity in delivery of services; and

6. a process of continuous review of the custody dispute resolution program by a statewide advisory committee of lawyers, judges and mental health professionals and an annual report to the legislature by the Chief Administrator of the Courts.

Together, these elements create an overall framework for child custody disputes that blends adversarial and nonadversarial procedures and gives parents every opportunity to resolve their dispute themselves. If they cannot, the framework ensures that the judge who must decide the child's future will be familiar with and fully informed about the family through a report from a neutral and qualified mental health professional not presumptively allied with either parent. If adopted, the Commission's program would give the state a variety of procedures for custody disputes depending on the severity of parental conflict. The program thus breaks the monopoly of the adversary process.

III. Comments on Controversial Choices

A. Joint Custody

The Commission's proposed statute[5] is entirely procedural. It

4. See Commission Recommendation, supra note 2, at 124-28 and sources cited at 124 nn.58-60.

5. See id. at 129-42 (text of proposed statute).

makes no change in New York's substantive custody law, nor does it alter the present power of a court to order joint custody over the objections of one or both parents.[6] Parents who, under current law, cannot be compelled by court order to establish a joint custody arrangement, cannot be compelled to do so under the Commission's Recommendation either. The Commission's Recommendation neither increases nor decreases the power of the courts to order joint custody.

Critics of the Commission's Recommendation argue that it will ultimately lead to more joint custody awards.[7] If so, these awards will be agreed upon by the parents voluntarily because of the programs of judicial management, custody mediation and evaluation, not because of judicial coercion through an order authorized by statute. The purpose of the Commission's program is indeed to encourage parents to recognize their continuing responsibilities to their children and to agree voluntarily on post-divorce decision-making and living arrangements in which both remain significantly involved with the lives of their children. The state's primary obligation is to protect the best interests of the children, which are furthered if parents voluntarily achieve the kind of functional post-divorce relationship just described. Mediation furthers such voluntary agreements and is as compatible with traditional sole custody and visitation arrangements as with joint or any other form of custody. The nature of the custody and visitation arrangements and the legal labels attached to them are for the parents to decide with the help of mediators and counsel; they are unaffected by the Commission's program.

B. INEQUALITY OF BARGAINING POWER BETWEEN MEN AND WOMEN

Some critics have expressed concern that the Commission's custody mediation program will disadvantage women in the

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6. See N.Y. Law Revision Comm'n, Report of the Law Revision Commission to the Honorable Hugh L. Carey, Governor on Joint Custody in New York State (1982), reprinted in 1983 N.Y. Laws 2209 (recommending no change in the substantive law).

7. For example, Myrna Felder, chairperson of the Matrimonial Committee of the Women's Bar Association of New York, said the following concerning the Commission's Recommendation:

> The Women's Bar is always concerned about any legislation like this that bolsters joint custody. The Women's Bar is not opposed to joint custody, where appropriate, but we are concerned that the language in this statute about mediation may create the impression in the court that joint custody is a preferable solution.

Johnson, Custody Mediation is Proposed, N.Y. Times, Apr. 25, 1985, at C12, col. 3.

divorce settlement bargaining process.[8] Surely, however, no one can object to the principle that before parents begin warfare that is highly likely to damage their children, they should sit down and discuss the problem with a skilled third party in a confidential setting. That is the essence of the Commission's Recommendation.

Specific criticism has been directed to the discretionary power the bill gives mediators to exclude counsel from mediation sessions. The underlying assumption is that women who negotiate divorce and custody arrangements without a lawyer's assistance will be disadvantaged because women are not capable of negotiating on an equal basis with their ex-husbands without counsel at their side.[9] However, that view mistakenly assumes that the parties necessarily have counsel in these actions.[10] Custody dispute settlement procedures must apply to all social classes, rich and poor. A significant percentage of custody disputes to which the Commission's program applies involves couples too poor to afford counsel at all. Women who are not represented by lawyers in custody and divorce disputes get more protection under the Commission's Recommendation than they currently have. They will receive at least the benefit of discussion, advice and evaluation from neutral, well-qualified mediators and evaluators in formulating their custody arrangements with their spouses. Under existing law, if they proceed pro se, they have no one to help them formulate custody arrangements or to protect their interests at all.[11]

Whether represented by counsel or not, all women — indeed, all parents — are afforded significant protections in the custody mediation process under the Commission's Recommendation, to ensure that informed agreements are reached voluntarily.

First, mediation is presumptive rather than automatic in all cases under the Commission's Recommendation. Parents will have

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8. The New York State Women's Bar Association, for example. See id. See generally Schepard, Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 Tex. L. Rev. 687 (1985).

9. For a general discussion of the relationship of counsel to mediation and inequality of bargaining power between spouses, see Schepard, Philbrick & Rabino, Ground Rules for Custody, Mediation and Modification, 48 Alb. L. Rev. 616, 637-38, 651 (1984).

10. In New York there is no constitutional right to counsel in divorce cases or custody disputes. In re Smiley, 36 N.Y.2d 433, 439-40, 330 N.E.2d 53, 56-57, 369 N.Y.S.2d 87, 92 (1975).

11. For a general discussion of the problems of unrepresented divorce litigants, see generally Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104 (1976).

an opportunity to convince the single judge assigned to their custody dispute that it is not suitable for mediation.[12]

A second protection is the scope of the mediation agenda. Property distribution and spousal maintenance are excluded from mediation under the Commission's Recommendation, as they are primarily issues that concern the relationship of parents to each other, not the relationship of parents to their children. Agreement on these matters will be formulated through traditional procedures. While we recognize that custody arrangements are part of a total package of matters that divorcing parents must resolve, the limited scope of issues on the table for mediation should give some comfort to those who worry that intimidated parents will give away the store to their dominating ex-spouses.

A third safeguard is the quality of the mediators[13] and their ethical obligations both to serve the best interests of children and to prevent one parent from dominating the other.[14] The better qualified the people who conduct and supervise mediation, the more likely it is that agreements will be voluntary and informed. Settlements reached through mediation will rapidly lose their most precious asset — credibility — if the program develops the reputation of favoring one sex or the other. We assume that mediators and the Chief Administrator of the Courts, who has overall supervisory authority for the program, will not want to see it fail.

A fourth control is the fact that the mediation is confidential, and mediators are barred from making a recommendation on custody to the court.[15] The requirement of confidentiality of the mediation process is designed to eliminate any "club" the mediator might use to induce parents to settle. If the mediator is allowed to make a report to the court, the parents may be coerced into accepting the settlement recommendation for fear that the mediator will make an adverse recommendation to the judge. In that event, the process stops being mediation and becomes something else —

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12. See Commission Recommendation, supra note 2, at 132, 145-46 (§ 242(b)(4) of proposed statute and Commentary). For further discussion of the standards under which a judge orders mediation under the Commission's Recommendation, see infra note 24 and accompanying text.

13. See infra § III(E) and accompanying notes.

14. See Schepard, Philbrick & Rabino, supra note 9, at 650-51, and sources cited therein.

15. See Commission Recommendation, supra note 2, at 133-34, 147-48, 151 (§ 242(c)(4)-(5) of proposed statute and Commentary).

perhaps a combination of evaluation and arbitration. The Commission's Recommendation recognizes that out-of-court evaluations and pressures to settle have their place as part of the overall state custody dispute resolution program, but must be kept separate and distinct from mediation if the program is to meet its goal of encouraging the maximum number of parents to settle custody disputes themselves.[16] Thus, under the Commission's Recommendation, parents are diverted to confidential mediation with custody evaluation conducted as a separate process, by separate professionals. A parent who does not want to reach agreement on any issue that arises in custody mediation for fear of compromising a position on other matters that divorcing parents must resolve need not be concerned that the mediator will retaliate by reporting the intransigence to the court.

In addition to this very limited intrusion of state-mandated, confidential mediation of the custody issue, parents also have the protection of involving their own lawyers in reviewing and approving any tentative settlement reached in mediation. Nothing in the Commission's Recommendation requires that mediators exclude counsel for the parents from the mediation sessions; mediators are simply given the option to do so.[17] We expect that mediator practice on this issue will vary, depending on the attitudes of the bar and its individual members toward the mediation program. Over time, lawyers and mediators will adjust to each other, under the watchful supervision of the Chief Administrator of the Courts and the judges to whom custody disputes are assigned. Even in those instances where mediators may find it helpful to exclude counsel for the parents from the mediation sessions, any agreements reached will only be tentative. Under the Commission's Recommendation, lawyers can be excluded only from mediation sessions and not from the agreement-making process. Nothing in the Commission's Recommendation prevents lawyers for the parents from reviewing tentative agreements reached in mediation before they are converted into formal writings signed by the parents. Indeed, mediators should be urged to insist that lawyers for parents conduct such review before final signature.

There are, then, a number of controls in the Commission's Recommendation to limit the possibility of unfair and coerced

16. See id. at 129-30 (§ 2 of proposed statute (Declaration of Purposes)).
17. Id. at 134, 149 (§ 242(c)(6) of proposed statute and Commentary).

agreements. These safeguards will not satisfy every critic and every angry parent, but they do exist. Mediation cannot assume the attributes of the adversary system and at the same time generate a change in public attitudes toward custody problems and how they should be resolved. We think that the Commission's Recommendation intelligently minimizes the procedural risks of unfair settlements being reached through custody mediation. Its balance of the competing interests involved is subject to continuous review by the Chief Administrator of the Courts and the program's Advisory Committee.

The underlying fear of many women's groups about the procedure of custody mediation is that the substantive law of divorce concerning property distribution, maintenance and child support disadvantages them. There certainly was merit in that fear in the past;[18] there may or may not be some merit to the fear in the present. (We have, however, moved significantly toward fairer treatment of women at divorce in substantive law in recent years with both general acceptance of the partnership theory of marriage as the fundamental principle of economic decisions at divorce,[19] and enactment of the equitable distribution law[20] and significantly strengthened child support enforcement mechanisms.[21]) If women continue to be disadvantaged by the substantive law of divorce, that disadvantage will continue whether custody disputes are mediated or not. We do not think children and parents should be deprived of the benefits of custody mediation until the day is reached when everyone agrees that the substantive law of divorce is fair in every detail.

C. MANDATORY VERSUS VOLUNTARY MEDIATION

The Commission discussed at great length whether mediation should be "mandatory" or "voluntary" before formulating its Recommendation and ultimately struck a middle ground between

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18. See generally Younger, Marital Regimes: A Story of Compromise and Demoralization, Together With Criticisms and Suggestions for Reform, 67 Cornell L. Rev. 45 (1981).

19. See N.Y. Consol. Laws Service, Session Laws 1980, Governor's Memorandum, Approval of Legislation, Ch. 281 (Governor Carey cites partnership theory of marriage as principal basis for his approval of the equitable distribution law).

20. See N.Y. Dom. Rel. Law § 236 (McKinney 1977 & Supp. 1986).

21. The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984). See Commission Recommendation, supra note 2, at 115-18.

the two. The Commission recognized that not all disputes are suitable for mediation and that parental resistance to mediation is one factor that undermines mediation efforts.[22] Since litigation is often postponed for a specified period during which mediation efforts proceed, unsuccessful mediation can increase the expense and delay of divorce litigation. From that perspective, it makes the most sense to offer mediation only when both parents seriously believe it can be useful to them, and to make it available on a purely voluntary basis.

On the other hand, mediation may be helpful in convincing initially resistant parents that compromise and cooperation are feasible means of resolving their differences. Thus, parents exposed to mediation — even when they might not come forward themselves — may reap the advantages of limiting their dispute by settling some aspects of it and thus promoting a cooperative atmosphere between them. Research indicates that even when parents do not reach agreement in mediation, settlements are often reached by their lawyers outside mediation, but prior to trial.[23] Based on this premise, every custody dispute should be submitted to mediation, no matter what the parents' attitude is toward the process.

The Commission took a middle road between these positions, emphasizing the role of judicial screening in integrating mediation into the traditional adversary process. The single judge to whom a custody case is assigned is instructed to order mediation unless no reasonable possibility exists that mediation would promote settlement of the issues in dispute, or if mediation would otherwise fail to serve the best interests of the child. This standard recognizes that not all cases may be suitable for mediation and that mediation can be used as a mechanism for delay. But the Commission also took the view that mediation should not be available only on a voluntary basis. Many people (and their lawyers) are not informed about the nature and benefits of mediation when a case is filed and believe that communication with their prospective ex-spouses is impossible. Overall, then, the Commission took the view that in most cases, it is appropriate to coerce parents into mediation so long as there is no coercion in the mediation process itself.

The Commission's standard runs the same danger as any other

22. See Commission Recommendation, supra note 2, at 145-46 (Commentary to § 242(c) of proposed statute).

23. See id. at 126-27.

discretionary test — depending on their views and values, judges will be more or less likely to order custody disputes to mediation. Discretion creates the danger of inconsistent and unfair application and the possibility that one parent or the other will seek to use the judicial screening function as a device to delay mediation. For these reasons the Commission's standard puts the burden on the parent resisting mediation to show the justifications for that position.[24] The general Commission rule is "when in doubt, mediate." The Commission's presumption for mediation is designed to discourage parents and their lawyers from making claims to remove themselves from mediation without serious basis. It should thus reduce forum shopping between mediation and litigation, and its attendant delay and expense, to the bare minimum possible. The presumption is also designed to encourage the judiciary to order mediation in all but the most obviously inappropriate cases, again reducing the probability of tactical maneuvering by parents to be in or out of mediation. As experience with and data about mediation are gathered, the Chief Administrator of the Courts may promulgate regulations to define further how judicial discretion to order parents to mediation should be exercised.

D. DOMESTIC VIOLENCE

Many involved in promoting better treatment of the victims of domestic violence are concerned that mediation is not appropriate for parents involved in such matters, because it assumes that the aggressor and the victim are in an equal bargaining position.[25] The Commission did not, however, entirely exclude from the mediation program custody disputes in which domestic violence may be an element. It recognized that domestic violence is a serious social problem. However, the Commission also felt that an absolute rule at this early stage of the mediation program's development that all cases in which domestic violence allegations are made are inappropriate for mediation would be too inflexible and would inhibit experimentation with promising approaches to aiding victims of domestic violence. The Commission was concerned that some parents might seek to avoid mediation altogether by alleging that their dispute involved domestic violence issues when none existed. Further,

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24. Id. at 132, 145 (§ 242(b)(4) of proposed statute and Commentary thereon).

25. See generally American Bar Association, Alternative Means of Family Dispute Resolution 363-474 (1982).

a significant segment of the community concerned with domestic violence feels that mediation can be an aid to parents and children after appropriate orders of protection are issued.[26] Here again, the Commission's Recommendation relies on the judge to whom a custody dispute is assigned for all purposes to make an intelligent judgment whether mediation is appropriate in a particular case.[27] Allegations of domestic violence should be a significant factor in that determination. However, before reaching any final categorical judgment that all domestic violence cases should be excluded from the mediation program, we need further research and evaluation focused on that issue. At a very early stage in the life of the mediation program, the annual report by the Chief Administrator of the Courts on the program[28] should address the interrelationship between domestic violence and custody mediation with recommendations for administrative regulations and, if necessary, statutory change.

E. QUALIFICATIONS OF THE MEDIATORS AND EVALUATORS

The Commission's Recommendation mandates that mediation and evaluation be conducted by licensed mental health professionals with master's degrees and at least two years' experience in working with families.[29] Lawyers can conduct mediation (but not evaluation) if they have two years' experience in working with families.[30] The Chief Administrator of the Courts is, by regulation, authorized to set supplemental qualifications.[31]

Concern has been raised that these qualifications are restrictive, that they carry a professional bias and that they will disenfranchise many people who currently conduct mediation or evaluation.[32] Some have argued that these professional credentials

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26. Id. See generally Bethel & Singer, Mediation: A New Remedy for Cases of Domestic Violence, *in* id. at 363. Nothing in the Commission's Program affects the statutorily authorized power of the courts to issue orders of protection, in appropriate cases, to protect victims of domestic violence involved in custody disputes. See N.Y. Dom. Rel. Law § 240(3) (McKinney 1977 & Supp. 1986); N.Y. Fam. Ct. Act § 446 (McKinney 1983 & Supp. 1986).

27. See supra § III(C) and accompanying notes.

28. Commission Recommendation, supra note 2, at 142 (§ 242(h)(4) of proposed statute).

29. Id. at 133, 147 (§ 242(c)(3)(A)-(C) of proposed statute and Commentary).

30. Id.

31. Id. at 133, 141 (§ 242(c)(3)(C), (h)(2)(H) of proposed statute).

32. Several mediation practitioners, including John Haynes, the author of Divorce Mediation (1981), testified to this effect at the hearings that the New York State Assembly Judiciary Committee held on the Commission's Recommendation.

do not ensure qualifications as mediators. They maintain that other individuals — therapists, family mediators and family counselors — should not be disqualified from conducting mediation. Others argue that the qualifications are too low.[33]

The Commission set its basic qualifications because family mediators are neither regulated nor certified by the state. Until they are, the Commission believes that the public is best protected by blending the publicly funded custody mediation program with licensing schemes already in existence for psychologists, social workers, attorneys and psychiatrists.

In formulating the qualifications for mediators and evaluators, the Commission also hoped to learn from the experience of the New York Conciliation Courts, in which too few people, with inadequate qualifications, were asked to perform the impossible task of reconciling people to marriages which were dead.[34] The Commission did not want to see that sad experience repeated. It thus recommended a program of highly qualified people to help parents engage in the more achievable task of divorce management. It will be up to the legislature to appropriate funds for the program to attract high-quality personnel, perhaps by raising divorce filing and marriage license fees and earmarking the funds for the Commission's program. Ultimately, the quality of the mediators and evaluators is the key to the program's public acceptance. The importance of professional training of personnel cannot be overemphasized. The Commission thus resolved all doubts in favor of higher qualifications.

IV. Custody Evaluations

The Commission also recommended that courts hearing custody cases have highly qualified, neutral mental health evaluators available to help them formulate custody plans for parents who cannot agree to such plans on their own.[35] To understand why, it is

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33. The position of the organized bar and professional groups representing licensed mental health professionals at the hearings of the Assembly Judiciary Committee was that the qualifications set by the Commission were, for different reasons, too lenient and that any attempt to dilute the qualifications from those proposed in the Commission's Recommendations would cause these groups to oppose the program.

34. See M. Wheeler, No-Fault Divorce 103-08 (1974).

35. See Commission Recommendation, supra note 2, at 134-37, 149-53 (§ 242(d) of proposed statute and Commentary).

important to distinguish sharply between the aims of custody evaluations and custody mediation. Mediation provides a neutral third party in a confidential setting to help facilitate parental settlement by making suggestions for custody plans, isolating areas of differences and increasing areas of agreement. The mediator has no coercive power over parents to induce agreement. In contrast, a custody evaluator is a court-appointed investigator who reviews the family situation in a non-confidential setting and makes a recommendation to the court concerning a custody plan which is in the child's best interests. The evaluator thus has coercive authority over the parents through the express or implied threat of an adverse recommendation to the court, while the mediator has none. The fear of an adverse recommendation may result in a settlement before or after the report is submitted to the court. Settlement promotion is *not*, however, the fundamental aim of evaluation; it is simply a side effect. The principal purpose of evaluation is to provide information to aid the court in rendering a careful, informed and just decision.

The custody evaluation is, in spirit and effect, a prelude to an adversary custody trial, the last resort when attempts at non-coerced settlements have failed. Many parents hire their own mental health experts to make reports to the court. The adversary model of dispute settlement implicit in each parent's selecting and paying his own expert inevitably creates suspicion that each expert owes his allegiance to the parent who chooses him. The taint of being a "hired gun" discourages many capable mental health professionals from becoming involved in custody evaluations.[36] Hired experts also create unjustified advantages for a parent with resources to pay for them if the other parent cannot.

The Commission believes that the child's best interests require that courts hearing custody cases make regular use of neutral experts not affiliated with either parent to give the court a fuller picture of the family's situation. Many courts already do so.[37] The Commission's Recommendation seeks to: (1) encourage courts that do not now use neutral evaluators to do so; (2) set qualifications and standards for these evaluators; and (3) codify procedures that assure due process (e.g., access to reports and underlying data, and

36. See sources cited in id. at 128 n.73.

37. See id. at 128 n.74.

availability for cross-examination) before admission of their reports. The Commission's Recommendation also directs the court to coordinate mediation and evaluation in a particular custody dispute in an effort to eliminate undue delay, which would further damage a child's sense of stability, already fractured by parental discord and separation.

V. Conclusion

At the Conference on the Commission's Recommendation at New York University and Columbia University Law Schools on April 25-26, 1985, experts conceded that the custody dispute resolution system currently in effect is inadequate and does not serve the interests of parents and children well. Delay in the resolution of custody controversies leaves children in emotional and financial uncertainty. Adversary procedures and an adversarial mindset encourage parents to use children as pawns in a larger game of divorce settlement chess, rather than to develop a stable post-divorce relationship with their children.

The purpose of the Commission's Recommendation is to promote informed parental settlement at every point in the case progression. First, the judge tries to settle the dispute at an early conference. If no settlement is reached, diversion to mediation will help parents explore settlement with a neutral third party who will seek options and alternatives which minimize the adverse effects of divorce on children. If mediation fails, an evaluation phase which provides in-depth information about the family through input from mental health professionals should also encourage settlement and, if required, an informed decision by the judge. The program is designed to provide both flexibility for local variation and centralized authority to ensure uniform quality of services rendered and periodic program review.

The Commission's Recommendation is the only coherent response to the problems of the New York custody dispute resolution system that has yet been formulated. It is thus a useful starting point for discussion of reform. Given the anger and emotion associated with custody disputes, it should not be surprising that the Recommendation does not satisfy everyone. No one is suggesting that the Recommendation is perfect. The burden, however, is now on the critics of the Recommendation to come forward with proposals that have a better chance of satisfying the needs of the children and parents of divorce.