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THE ROLE OF MENTAL HEALTH PROFESSIONALS IN CHILD CUSTODY RESOLUTION

"Legal training and experience are of little practical help in solving the complex problems of human relations."¹

As the number of divorces in the United States rises,² courts are increasingly called upon to resolve child custody disputes.³ From the outset of their involvement in custody resolution, courts have attempted to develop legal standards for resolving disputes with serious and complex mental health considerations. Today, in most jurisdictions, a dominant standard has emerged—the "best interests of the child" standard.⁴ According to this standard, the child's best inter-

² U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, at 79 (106th ed. 1986). Although data suggest that the number of divorces in the United States reached an apex in 1981, the preliminary data for 1983 suggest that the number of divorces is again rising. Id. at 81.
⁴ ALA. CODE § 30-3-1 (1975); ALASKA STAT. § 25.20.060 (1983); ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1986); ARK. STAT. ANN. § 34-2726 (Supp. 1985); CAL. CIV. CODE § 4608 (West Supp. 1987); COLO. REV. STAT. § 14-10-124 (Supp. 1986); CONN. GEN. STAT. ANN. § 46b-56 (West 1986); DEL. CODE ANN. tit. 13, § 722 (1974); FLA. STAT. ANN. § 61.13 (West 1985); IDAHO CODE § 32-717 (1983); ILL. ANN. STAT. ch. 40, § 602 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-1-11.5-21(a) (West Supp. 1986); IOWA CODE ANN. § 598.41 (West Supp. 1986); KAN. STAT. ANN. § 60-1610(3) (Supp. 1986); KY. REV. STAT. § 403.270 (1984); LA. CIV. CODE ANN. art. 146 (West Supp. 1985); ME. REV. STAT. ANN. tit. 19, § 752(5) (Supp. 1986); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1986); MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1986); MINN. STAT. ANN. § 518.17(1) (West Supp. 1987); MISS. CODE ANN. § 93-5-24 (Supp. 1986); MO. ANN. STAT. § 452.375(2) (Vernon Supp. 1987); MONT. CODE ANN. § 40-4-212 (1985); NEV. REV. STAT. § 125.480 (1986); N.H.
ests are of paramount importance in resolving the custody dispute. As a combination of litigation and psychology, the best interests standard has forced courts to consider the mental health of all parties involved in the litigation. This Note concludes, however, that because of the judiciary's lack of appropriate training in the subject of mental health, professionals in the mental health field should play a more significant role in either child custody litigation or, preferably, nonadversarial forms of dispute resolution, particularly mediation.

This Note is divided into three sections. The first section examines the standards which have been created to aid the judiciary in resolving custody disputes. These standards include the historical common law perspective, the tender years presumption, the primary caretaker rule, and the best interests of the child standard. The second section examines the limited role that mental health professionals currently play in child custody litigation and proposals for enhancing that role in the future. The third section describes mediation as an alternative to child custody litigation and analyzes its potential for integrating the mental health professional into the custody process in order to protect the child's mental health before, during, and after divorce proceedings.

I. Development Of Child Custody Standards

A. Historical Common Law Perspective

In 1923, the Connecticut Supreme Court of Errors summarized the common law perspective on child custody disputes, commenting that "the father, being a suitable person, is entitled to the sole cus-

7. See infra text accompanying notes 20-33.
8. See infra text accompanying notes 34-41.
9. See infra text accompanying notes 42-56.
10. See infra text accompanying notes 57-109.
11. See infra text accompanying notes 110-177.
tody [of the child] even as against the mother.” The bases of this rule were generally accepted social policies underlying the common law: the right of the man in the divorce action to custody of chattels, the child legally being considered a chattel; the father’s ability to teach the child a trade; the father’s role as an authority figure, enabling the child to be raised with proper discipline; and the reciprocal rights of father and child, wherein the child owes the father allegiance for support previously received.

In spite of the common law’s apparent absolute preference for males in custody disputes, the requirement that the father be “a suitable person” actually gave courts considerable flexibility in awarding custody. Among the factors which led courts to conclude that the father was not a suitable person was the belief that fathers were not as qualified as mothers to care for very young children. This belief eventually prompted courts to adopt the child custody standard known as the tender years presumption.

B. The Tender Years Presumption

The tender years presumption requires the court to grant custody of children “of tender years” to the mother, unless she is found to be unfit. To justify this standard, courts reasoned that only the

12. Pfeiffer v. Pfeiffer, 99 Conn. 154, 157, 121 A. 174, 175 (1923); see also Kelsey v. Green, 69 Conn. 291, 37 A. 679 (1897) (the father has the legal right to the custody of his children).

13. Cf. In re Thorne, 240 N.Y. 444, 148 N.E. 630 (1925) (child’s domicile was at issue). The patria potestas power, which can be defined as parental authority, can be analogized to the father’s general right to all chattels after the divorce.


15. See supra note 13.

16. Cf. In re Thorne, 240 N.Y. 444, 148 N.E. 630 (1925) (the role of the father as head of the family makes the child treat the father with the proper respect which therefore creates discipline).

17. Id. One court offered another rationale for the historical common law perspective. “[F]rom general experience, the natural and trained affections of the child attach to the father, and those of the father to the child.” Kelsey v. Green, 69 Conn. 291, 300, 37 A. 679, 682 (1897).

This proposition seems to be in direct conflict with the rationale of the tender years presumption, another standard which courts developed to aid child custody resolution. See infra notes 20-21 and accompanying text.

18. See, e.g., Pfeiffer v. Pfeiffer, 99 Conn. 154, 121 A. 174 (1923); see also Umlauf v. Umlauf, 128 Ill. 378, 21 N.E. 600 (1889) (calling father a man of “good character”).


mother can give the love and affection necessary to enable the young child to mature properly.\textsuperscript{21} Aside from the questionable validity of this presumption, there are several legal and practical problems connected with its use in resolving child custody disputes.

One apparent difficulty with the tender years presumption is that courts are not given any guidance regarding when a child is “of tender years.”\textsuperscript{22} One court tried to solve the problem of defining this phrase by stating that “obviously an infant in the suckling stage is of tender years, while an adolescent fourteen years of age or older is not . . . .”\textsuperscript{23} This definition is of little use, however, because it does not give guidance as to the presumption’s applicability to children between the suckling stage and fourteen years.

In addition to its definitional problems, the tender years presumption places the father at an unfair disadvantage in child custody litigation. Unlike the mother, who benefits from the presumption, the father must first prove that the mother is incompetent, and then must prove his own competence in order to prevail.\textsuperscript{24}

A series of United States Supreme Court cases involving classifications based on gender indicates that the unfairness inherent in the tender years presumption may be of constitutional dimensions. In Reed v. Reed,\textsuperscript{25} Stanley v. Illinois,\textsuperscript{26} and Frontiero v. Richardson,\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{21} See, e.g., Umlauf v. Umlauf, 128 Ill. 378, 21 N.E. 600 (1889); Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826 (1921). In employing the tender years presumption, one court found that even the “weakest of women,” such as those who may be indiscreet about sexual conduct, possessed this “mother love,” which entitled them to preference in child custody disputes. Freeland v. Freeland, 92 Wash. 482, 159 P. 698 (1916).
\item \textsuperscript{22} See Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (the concept of tender years is elastic).
\item \textsuperscript{23} Id. at 358 (syllabus) (reversing a custody grant to the father of a young child whose unwed mother was his primary caretaker).
\item \textsuperscript{24} Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. FAM. L. 423, 440 (1976-1977).
\item \textsuperscript{25} 404 U.S. 71 (1971). In this case, the Supreme Court invalidated an Idaho Code provision which gave men, in preference over women, the opportunity to be appointed administrators of estates. The Court held that the Idaho Code could not abridge the right of women to equal protection under the law unless there was a substantial reason for so doing. The Court concluded that Idaho’s reason for the code provision, reduction of the caseload on the judiciary, was legitimate; however, the means employed by Idaho to reduce the caseload were unconstitutional.
\item \textsuperscript{26} 405 U.S. 645 (1972). The Court struck down legislation which required a father who was not married to the mother when the child was born to surrender his child to the state, without a hearing, upon the death of the mother. The Court reasoned that, because unwed mothers, as well as men and women who had children while married, were given hearings to decide if they were permitted to keep their children, it would violate equal protection to force unwed fathers to surrender their children to the state without hearings.
\item \textsuperscript{27} 411 U.S. 677 (1973). The Court struck down federal legislation which allowed only
the Court considered legislation designed to reduce the judiciary's heavy caseload by means which discriminated on the basis of sex. While recognizing the usefulness of a reduced caseload, the Court used an equal protection analysis and held in each case that the purpose of the legislation was not substantially related to the discriminatory means chosen for its implementation. Therefore, the legislation was struck down.28

In State ex rel. Watts v. Watts,29 the New York Family Court seized upon the holdings in Reed, Stanley, and Frontiero and declared that the tender years presumption was unconstitutional.30 The court found that the presumption imposed a burden on the father which was contrary to the principles of equal protection because “persons similarly situated, whether male or female, must be accorded even-handed treatment by the law.”31 In reaching this conclusion, the court adhered to the Supreme Court’s reasoning, noting that one party cannot be presumed to be fit at the expense of the other merely to speed cases through the judicial process.32

The rigidity of both the historical common law perspective and the tender years presumption was often tempered by the recognition that the child’s best interest is the most important consideration in child custody cases.33 Some courts demonstrated their concern with the child’s best interests, along with the need to avoid the definitional and possible constitutional problems of the tender years presumption, by adopting the primary caretaker rule for resolving custody disputes.34

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male military members to receive dental benefits for themselves and their spouses, and which allowed only male military members to receive increased living allowances based on their marital status, on the basis of the fifth amendment's due process clause. The government claimed that this legislation was adopted to speed the processing of claims. The Court held that the federal government could not provide dissimilar treatment for male and female military members because the constitution recognizes a higher value than speed and efficiency.

31. 77 Misc. 2d at 183, 350 N.Y.S.2d at 290.
32. See, e.g., Stanley, 405 U.S. at 656.
C. Primary Caretaker Rule

The primary caretaker rule states that the parent who is primarily responsible for the caring and nurturing of the child before the divorce should be granted custody after the divorce, as long as the parent is found to be fit.35 A primary factor underlying courts' adoption of this rule is the desire to foster the child's psychological development.36 Courts do not wish to sever the close emotional relationship which developed between the primary parent and the child before initiation of the divorce proceeding.37

The primary caretaker rule circumvents the problems inherent in the gender-based standards of custody resolution.38 Although it is arguable that the primary caretaker rule is in reality a gender-based standard because the mother is usually found to be the primary caretaker, this inference ignores the increasing number of fathers who remain at home to take primary responsibility for the children.39 In rejecting the idea that the primary caretaker rule is merely a restatement of the tender years presumption, the Iowa Supreme Court noted the “[m]odern redefinition and adjustment of traditional parental roles has greatly diluted the strength of the inference” that only women are primary caretakers.40

36. The Garska court listed ten criteria to aid courts in resolving which parent is the primary caretaker. The primary caretaker is the parent who:
1) prepares and plans the child's meals;
2) bathes, grooms, and dresses the child;
3) purchases, cleans, and cares for the child's clothing;
4) supplies the child with medical care, such as nursing a child's wounds or taking a child to the physician;
5) arranges the child's interaction with friends;
6) arranges alternative care for the child, i.e., finding a baby-sitter or day-care center;
7) puts the child to bed, attends to the child during the night, and wakes the child up in the morning;
8) is responsible for the child's disciplining;
9) supplies the child with societal education, i.e., religious or cultural;
10) is responsible for teaching the child elementary skills such as reading, writing, and arithmetic.
37. Id. at 363.
39. See supra notes 24-31 and accompanying text.
Courts which invoke the primary caretaker rule assume that giving custody of the child to the primary caretaker is in the child’s best interests because of the close emotional relationship that has developed between the child and the primary caretaker. 41 The conclusion that the child has a close and positive emotional tie with the primary caretaker, however, may not be invariably true because it disregards the possibility that the child does not have a psychologically beneficial relationship with the primary caretaker parent. Therefore, while the primary caretaker rule is rationalized as being in the best interests of the child, most jurisdictions have retained the flexibility associated with the best interests of the child standard. 42

D. Best Interests of the Child Standard

The landmark case which adopted the best interests of the child standard as the sole criterion for deciding child custody is Chapsky v. Wood. 43 In Chapsky, the court reasoned that in awarding custody, “the paramount consideration is, what will promote the welfare of the child.” 44 A majority of jurisdictions have chosen to adhere to this reasoning and have incorporated the best interests standard into their statutory codes. 45

Although theoretically satisfying, this standard for resolving child custody disputes is difficult for courts to apply objectively. After attempting to define exactly what constitutes best interests, one court concluded that “‘best interests of the child’ is an example of a legal term having [no] peculiar meaning . . . .” 46 Clearly, courts employing the best interests standard continue to have a great deal of judicial discretion. 47 This discretion has been somewhat curtailed, however, by both statutory and case law, which have established guidelines to aid courts in making decisions regarding the child’s best interests. 48 These guidelines include stability of the environment

41. See supra notes 36-37 and accompanying text.
42. See supra note 4.
43. 26 Kan. 650 (1881).
44. Id. at 654.
45. See supra note 4.
47. See Price, “Best Interests” and “Material Change” Factors in Child Custody and Visitation Modification Suits, 46 TEx. B.J. 1228, 1230 (1983) (best interests is approached on a case-by-case basis).
48. Joint custody is seen by commentators as narrowing the broad scope of the best interests of the child standard. Joint custody is praised, however, as promoting the child’s welfare, Scott & Derdeyn, Rethinking Joint Custody, 45 OHio ST. L.J. 455, 470 (1984), the same thing that the best interests standard is designed to foster, see supra note 44 and accom-
in which the child will live, the relative “wholesomeness” of optional environments, the characteristics of the parent and child (not including gender), the general parenting ability, and the specific conduct of the parties during the marriage.

Several states have incorporated the list of criteria promulgated in section 402 of the Uniform Marriage and Divorce Act (UMDA) into their legislation for deciding best interests in child custody. Among the important criteria suggested by the UMDA for consideration in child custody cases is “the mental and physical health of all individuals involved.” Despite the critical, even decisive, importance of mental health in such cases, the judiciary seems ill-equipped to adjudicate that factor, at least as compared to the mental health profession.

II. LITIGATION AND THE MENTAL HEALTH EXPERT

A. Admitting Mental Health Expert Opinions

In the adversary process, mental health opinions are most often heard through the testimony of expert witnesses. In child custody cases, however, there is a dispute over the admissibility of expert opinion text. Statutory codes have also embodied joint custody as a preferred form for resolving the child's best interests. See, e.g., ALASKA STAT. § 25.20.060(c) (1983) (joint custody will be awarded only if it is in the child's best interests).

49. Price, supra note 47, at 1230.
50. Id.
51. Id. at 1230-31.
52. Id. at 1231.
53. Id. at 1231-32. One court summarized its consideration of best interests as follows:

[T]he best interest of this child lies in placing it in an environment in which it can have love, security, discipline, adequate care and attention and proper training, where relative stability can be maintained, and objective and positive influences may be brought upon her. The atmosphere must be as free of tensions, bitterness and hostility towards the other party as is possible under the circumstances. The child should be taught to love and respect each parent and the opportunities for its mind to be poisoned against either parent should be minimized.


54. UMDA, supra note 5, § 402.

56. UMDA, supra note 5, § 402(5) (emphasis added).
testimony of mental health professionals.\textsuperscript{57}

Courts that refuse to admit the expert testimony of mental health professionals at child custody trials\textsuperscript{58} emphasize that the mental health opinions of each expert will be in accord with the beliefs of the party who has retained the expert.\textsuperscript{59} Although expert testimony in general, if admitted, would most often reflect the litigants’ positions,\textsuperscript{60} courts that refuse to admit mental health expert testimony recognize that judges lack the ability and training to weigh the relative importance and probative value of conflicting psychological testimony.\textsuperscript{61} Courts have also taken the position that expert testimony of mental health professionals is unnecessary because judges are capable of evaluating the parties. In \textit{DiRusso v. DiRusso},\textsuperscript{62} the appellate court found that the trial judge did not abuse his discretion by refusing to order psychological investigation of all the parties to the litigation. The appellate court reasoned that the trial judge’s contact with the parties was sufficient to enable the judge to decide the custody issue without a psychologist’s aid.\textsuperscript{63}

Courts that admit mental health expert testimony in child custody cases, as well as courts that refuse expert testimony, acknowl-

\begin{itemize}
  \item \textsuperscript{57} See infra notes 58-73 and accompanying text.
  \item \textsuperscript{60} Id. There are two problems associated with accepting mental health testimony, however, and both are inherent in any trial which involves experts. First, the party to the litigation who can afford the most prestigious witnesses will have a more convincing case to present to the fact-finder. Galanter, \textit{Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change}, 9 LAW AND SOC’Y REV. 95, 103-04 (1974). Second, there will be an overproduction of mental health expert testimony from each litigant. See Watson, \textit{The Children of Armageddon: Problems of Custody Following Divorce}, 21 SYRACUSE L. REV. 56, 63 (1969). This overproduction would tend to increase the length of the trial and, therefore, it would increase a child’s psychological stress by leaving his fate uncertain for a longer period of time than if no experts were permitted. \textit{Id.} at 75, 77.
  \item \textsuperscript{61} \textit{Id.} at 893, 422 N.E.2d at 464.
  \item \textsuperscript{62} Id. at 892, 422 N.E.2d 463 (1981).
  \item \textsuperscript{63} \textit{Id.} at 893, 422 N.E.2d at 464.
\end{itemize}
edge that the mental health profession is a field in which judges have limited knowledge.\textsuperscript{64} It is the position of some courts, however, that mental health experts should be allowed to testify because their testimony allows judges to consider the mental health profession’s viewpoint.\textsuperscript{65} In \textit{In re Auer},\textsuperscript{66} the court held that expert testimony could be considered for whatever illumination it might add in identifying the best interests of the child.\textsuperscript{67} This position was further expanded in \textit{In re Gove},\textsuperscript{68} wherein the court held that it could not determine the mother’s fitness for custody purposes without a psychiatric examination.\textsuperscript{69}

Where courts do admit mental health expert testimony, that determination, which is made by the trial judge, will not be reversed on appeal unless it is clearly erroneous.\textsuperscript{70} If mental health expert testimony is admitted, it cannot be determinative on any issue but is, rather, advisory to the court.\textsuperscript{71} The court may not, however, totally disregard the expert testimony;\textsuperscript{72} it should be considered by the court as any other piece of evidence.\textsuperscript{73}

B. \textit{Independent Mental Health Investigation: Evidentiary and Due Process Requirements}

If parties in child custody litigation do not wish to offer expert mental health testimony, or if the court needs more information to clarify expert testimony already received, the attorneys may stipulate that the judge may order an independent mental health investi-

\textsuperscript{64} See Watson, \textit{supra} note 60, at 65; see also Howes v. Cohen, 42 Cal. 2d 91, 97, 265 P.2d 888, 892 (1954) (Traynor, J., concurring).


\textsuperscript{66} \textit{Id}.

\textsuperscript{67} \textit{Id}. at 90, 407 N.E.2d at 1037.

\textsuperscript{68} 117 Ariz. 324, 572 P.2d 458 (1977).

\textsuperscript{69} \textit{Id}. at 328, 572 P.2d at 462.

\textsuperscript{70} See Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973), where the court stated that opinion testimony will be allowed if it will aid the jury and is based on some special training. Admission of opinion evidence will not be a reversible error unless its admission was a manifest abuse of the judge's discretion. Admission of expert testimony causes reversible error when the expert is not qualified in the field in which he is offering an opinion, \textit{In re O'Neal}, 303 N.W.2d 414, 420-21 (Iowa 1981), or, when the testimony of the expert shows the method used to reach the opinion was unreliable. DuBois v. DuBois, 240 Ga. 314, 315, 240 S.E.2d 706, 707 (1977).


\textsuperscript{72} Mansukhani v. Pailing, 318 N.W.2d 748, 751-55 (N.D. 1982) (holding that the court cannot arbitrarily disregard expert testimony).

CHILD CUSTODY RESOLUTION

Reversible error occurs when a judge accepts an independent mental health investigation without receiving stipulations from both litigants' attorneys. The error is deemed reversible on two grounds: violation of the basic evidentiary right to cross-examine witnesses, and violation of constitutional due process through delegation of the judge's authority. These two grounds for reversal are the major stumbling blocks to greater involvement of mental health professionals in the resolution of child custody disputes in the adversary system.

1. Evidentiary Requirements. — If an independent mental health report is received by the court, an evidentiary problem arises because neither party has an opportunity to cross-examine the author. If the litigants' attorneys stipulate to the admission of a mental health report, there can be no argument on appeal that there was no opportunity to cross-examine the report's author. Therefore, the question posed by the evidentiary requirement of cross-examination is whether the evidence of an independent mental health report can be used by the court in making its final custody determination when no stipulation exists.

Two important interests exist in child custody disputes where an independent mental health report is present: the best interests of the child and the evidentiary requirement of cross-examination. While...

74. See Rea v. Rea, 195 Or. 252, 261-72, 245 P.2d 884, 888-91 (1952) (asserting that the judge can consider independent investigation if a stipulation exists); In re Goddard, 57 Or. App. 390, 644 P.2d 651 (1982) (citing Rea with approval); In re Jewell, 51 Or. App. 129, 624 P.2d 1092 (1981) (citing Rea with approval).
75. Watkins v. Watkins, 221 Ind. 293, 297, 47 N.E.2d 606, 607 (1943); see also Blue v. Brooks, 261 Ind. 338, 344, 303 N.E.2d 269, 273 (1973) (the trial court was to decide best interests, not a psychological expert); Truden v. Jacquay, 480 N.E.2d 974, 979 (Ind. App. 1985) (the parties agreed to stipulations allowing the court to interview the child, but the court cannot decide best interests exclusively on the child's interview).
77. Id. at 257, 245 P.2d at 886.
78. Williams v. Williams, 8 Ill. App. 2d 1, 130 N.E.2d 291 (1955). Cf. Rea v. Rea, 195 Or. 252, 245 P.2d 884 (1952). While due process is not mentioned, the Rea court stressed that there is a "time-honored rule, supported by constitutional mandate, that no court shall be secret and that justice shall be administered openly. The right to confront and cross-examine witnesses lies at the base of our judicial system." Id. at 257, 245 P.2d at 886. This implies that the due process clause is the constitutional clause that is violated in these cases.
courts consider both interests, they have consistently held that the right to cross-examine the author of the report supersedes the best interests of the child.\footnote{See, e.g., Walter v. Walter, 61 Ill. App. 2d 476, 209 N.E.2d 691 (1965); In re Rosmis, 26 Ill. App. 2d 226, 167 N.E.2d 826 (1960).} For example, in \textit{In re Rosmis},\footnote{26 Ill. App. 2d 226, 167 N.E.2d 826 (1960).} the Illinois Appellate Court considered both of these interests and concluded that the trial judge's deliberations must be limited to the record made in open court. Thus, anyone who renders a report to the court should be subjected to cross-examination.\footnote{See id. at 231, 167 N.E.2d at 829.} Subsequent to \textit{Rosmis}, the West Virginia Supreme Court of Appeals confronted a similar issue in \textit{Rohrbaugh v. Rohrbaugh},\footnote{136 W. Va. 708, 68 S.E.2d 361 (1951), overruled on other grounds, 161 W. Va. 332, 242 S.E.2d 248 (1978).} where the court held that if evidence which is improperly admitted is not used by the court in its final decision there is no reversible error.\footnote{Id. at 722, 68 S.E.2d at 366.} At least as far as these two courts are concerned, it can be concluded that if a judge receives an independent mental health report and uses it in his child custody resolution without a stipulation, he is depriving the litigants of their rights to examine the report's author in a courtroom setting, thus creating reversible error.\footnote{See supra text accompanying notes 82-85.}

2. Due Process Requirements. — A court that desires to use a mental health opinion, whether in the form of oral testimony or written reports, must also consider due process requirements.\footnote{87. See Deacon v. Deacon, 207 Neb. 193, 197-98, 297 N.W.2d 757, 762 (1980); Nelson v. Nelson, 180 Or. 275, 282-84, 176 P.2d 648, 651-52 (1947).} The problem raised by a due process analysis concerns the degree of emphasis that a court may place on a mental health opinion when making its final custody determination.

Courts have held that the judge, in his role as decisionmaker, may not overemphasize evidence provided by a mental health expert.\footnote{88. "Over-emphasize" is a term that courts have implied in their decisions, and they have given it various definitions. See, e.g., Mansukhani v. Pailing, 318 N.W.2d 748 (N.D. 1982) (court cannot arbitrarily disregard expert testimony); Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943) (judge need not allow the decision of an investigator to be binding on the court). One court synthesized various holdings and concluded that a court can consider expert testimony as it would any other piece of evidence, but such evidence cannot be determinative because it was offered by an expert. In re Dep't of Pub. Welfare, 376 Mass. 252, 381 N.E.2d 565 (1978).} Since due process prohibits the court from delegating its au-
thority to weigh evidence to a nonjudicial source,\textsuperscript{89} any court deciding custody based exclusively on mental health expert testimony at trial, or on evidence of an independent mental health report, violates due process and thereby creates reversible error.\textsuperscript{90}

As a result of the evidentiary and due process requirements, change in the traditional child custody litigation process by significantly enhancing the role of mental health professionals appears unlikely. Nevertheless, courts are recognizing their own inabilities in situations where child custody determinations must be made.\textsuperscript{91} One judge described child custody decisions as “agonizing”\textsuperscript{92}; another commented that he felt “anguished”\textsuperscript{93} when deciding difficult custody cases. For this reason, several commentators have suggested alternatives for resolving custody disputes which could be incorporated into the basic adversary process.\textsuperscript{94}

C. Proposals to Aid Courts in Resolving Child Custody Disputes Through Litigation

One proposal to combat the problems inherent in child custody resolution through the adversary process,\textsuperscript{95} which has been given much scholarly consideration, can be called the “special judge” model.\textsuperscript{96} In this model, a behavioral psychologist judge would be appointed to hear custody cases with a legal judge in order to promote the psychological best interests of the child, and to compensate for the legal judge’s inadequate psychological training.\textsuperscript{97} The chief asset of this model is the ability to bring the insight of psychology into child custody disputes, thereby eliminating the need for multiple ex-

\textsuperscript{89} See Rea v. Rea, 195 Or. 252, 277, 245 P.2d 884, 888 (1952).
\textsuperscript{90} Id.
\textsuperscript{92} Dodd v. Dodd, 93 Misc. 2d 641, 643, 403 N.Y.S.2d 401, 402 (Sup. Ct. 1978).
\textsuperscript{94} See infra notes 95-109 and accompanying text.
\textsuperscript{95} The problems involved in child custody resolution through the litigation process are the judge’s lack of training to weigh mental health testimony, see supra note 61 and accompanying text, the litigants’ unequal economic positions, see supra note 60, and the overproduction of expert testimony, see supra note 60.
\textsuperscript{96} See Watson, supra note 60, at 79. Dr. Andrew Watson is the proponent and chief advocate of this model. Dr. Watson refers to a modification of the judiciary to include behavioral science “judges.” Id. For purposes of this Note, this model for integrating behavioral scientists into that judiciary is termed the “special judge” model.
\textsuperscript{97} Id. See also supra notes 61 & 64 and accompanying text.
pert testimony. This model would also lead to a desirable cross-

education between courts and psychologists.

The law judge, however, may not desire the input of psychologi-

cal viewpoints during the trial or during deliberations because he or

she may feel equipped to handle the custody issues by virtue of expe-

rience in the field. Therefore, a major problem inherent in the “spe-

cial judge” model is that the behavioral psychologist judge could de-

velop into an adviser to the legal judge on psychological matters. If

the psychologist judge becomes merely an adviser to the legal judge,

the delegation of duty/due process problems previously raised in

connection with the introduction of expert testimony could arise.

Furthermore, if only two judges sit as a team to decide custody, a

difference of opinion between the two would render the court unable

to resolve the custody dispute. Thus, despite the advantages of the

“special judge” model, these two major disadvantages have pre-

cluded its acceptance as a viable alternative.

In a 1977 address to the Family Law Section of the New York

State Bar Association, Chief Judge Sol Wachtler of the New York

State Court of Appeals advocated a system which tries to eliminate

both of the problems inherent in the “special judge” model. Judge

Wachtler’s system may be called the “behavioral panel” model.

To incorporate the psychological perspective into custody determi-

nation, Judge Wachtler’s model calls for child custody disputes to be

resolved by panels dominated by trained behavioral specialists.

These panels would be comprised of psychiatrists, psychologists, and

members of the bar who have specialized in family law. Determina-

tions made by this panel would be binding on a court and subject

to limited review.

Another model which completely removes the judge from cus-

tody determination is the “informal panel” model. Under this

98. Id. at 75, 79.

99. Id. “The presence of both legal and psychological experts on the bench would imme-

ediately begin to cross-educate the parties to the decision-making process. Each would progres-

sively learn from the other the problems involved in judicial handling of these matters.” Id. at

79.

100. See supra notes 87-90.

101. Meyer & Schlissel, Child Custody Following Divorce: How [sic] Grasp the Net-


102. Id.

103. Id.

104. Id.

105. Id.

106. Id. The proponent of this view is Dennis Lynch, a matrimonial practitioner in Syra-
model, an informal panel would be comprised of a parent, a specialist certified in child development, and an attorney specializing in family law, with a youth of suitable age and discretion as an advisory member.\textsuperscript{107} With more members sitting on a panel, the likelihood of an equal split between the judges, which exists in the “special judge” model, is greatly reduced. These approaches, however, raise the same due process problems inherent in the “special judge” model, because a judge may not delegate authority to a nonjudicial source.\textsuperscript{108} It is also possible that neither the behavioral panel model nor the informal panel model has received judicial attention because the originators of these models did not develop any practical rules of administration, but merely stated their basic propositions.\textsuperscript{109} These two systems are important, however, because they present the kernel of the theory upon which a nonadversarial problem-solving process may be based.

### III. Mediation and the Mental Health Professional

Divorce and child custody proceedings are predictably stressful on most children\textsuperscript{110} because of fighting between the parents\textsuperscript{111} and the child’s fear of abandonment.\textsuperscript{112} This stress can manifest itself in a regression of the child’s psychological development.\textsuperscript{113} If fighting between the parents can be minimized, however, the child’s psychological development will probably be unhampered.\textsuperscript{114} Mediation, a nonadversarial process in which parents meet with a mediator in order to resolve disputes, is praised as being well suited for resolving the custody problems associated with divorce.\textsuperscript{115} Examination of the

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\textsuperscript{107} See \textit{Rea v. Rea}, 195 Or. 252, 277, 245 P.2d 884, 888 (1952); see also supra text accompanying note 89.

\textsuperscript{108} See supra note 101.

\textsuperscript{109} \textit{J. Wallerstein \& J. Kelly, Surviving the Breakup} 312 (1980). Wallerstein and Kelly initiated a long-term study of the effects of divorce on children and concluded that although the degree of stress varies depending on the child’s age and developmental stage, divorce is predictably stressful on most children. \textit{Id.}

\textsuperscript{110} \textit{Id.} at 37 (fighting between parents is part of the unsettling chaos for many children and adolescents).

\textsuperscript{111} See \textit{id.} at 312 (abandonment is especially a fear with preschool children); Wallerstein, \textit{The Overburdened Child: Some Long-Term Consequences of Divorce}, 19 \textit{COLUM. J.L. \& SOC. PROBS.} 165, 169, 172 (1985) (abandonment fear is common to children of all ages).

\textsuperscript{112} \textit{J. Wallerstein \& J. Kelly, supra} note 110, at 54.

\textsuperscript{113} See \textit{id.} at 316.

\textsuperscript{114} See \textit{Rigby, Alternate Dispute Resolution}, 44 \textit{LA. L. REV.} 1725, 1743-49 (1984);
mediator's role in mediation, inquiry into whether mental health professionals can or should serve as mediators, and appraisal of the arguments for and against mediation, leads to the conclusion that mediation is the best available forum for resolving child custody disputes. The nonadversarial setting of mediation, combined with the significant involvement of a mental health professional, allows for maximum protection of the child's best interests.

A. Role of the Mediator

The mediator is best described as a referee who is at the proceeding to ensure that the participants focus on custody issues such as visitation, support, and legal and physical custody, and do not become concerned with tangential problems. Mediation is generally selected to remove the parties from the adversarial process, thereby allowing the mediator to gain an awareness of the parties' feelings. However, just as in litigation, the mediator must always remember that the child's best interests are of paramount importance.

Although there is extensive literature on mediation, it is worthwhile to review briefly the theoretical functions of the mediator in order to assess the suitability of mediation in the child custody context.

The mediator basically performs five functions. First, through discussion with the parties, the mediator ascertains what issues are disputed and creates a list of problems to be solved, concentrating first on the most easily solved and gradually working toward the more difficult. The easiest problems are dealt with first because solving these problems gives the parties a more positive outlook when approaching the more difficult ones.

Second, the mediator reduces misunderstanding between the
CHILD CUSTODY RESOLUTION

This is never accomplished by imposing the mediator's will upon the mediating parties, but rather by constant reexamination of the parties' positions. The examination process reduces misunderstandings about the desires of each party.

Third, the mediator explores areas of compromise and finds areas of agreement. This is by far the most important job performed by the mediator. The parties presumably have entered mediation to solve their problems without exposing themselves and their children to the rigors of litigation. Each area of compromise or agreement in mediation leaves fewer issues to resolve in an adversary proceeding.

The fourth function of the mediator involves the emotional well-being of the parties. The mediator clarifies priority issues and does not dwell on minor details. He allows free expression of emotions, which is not permitted in a courtroom setting. It is naive to believe that divorce and the accompanying child custody battle is not an emotionally traumatic experience for many people. Each parent's fear of losing the child, even to the other parent, is one reason for the trauma. Providing an arena for the venting of these emotions allows the parties' true feelings and fears to be discussed, thus aiding the mediator in his decision as to which parent can better serve the best interests of the child. The mediator must appreciate the psychological impact of divorce and child custody resolution and must realize that many of the problems are emotional rather than legal.

Finally, the mediator constructs an agreement that can be submitted for inclusion in the final divorce decree. The mediation agreement can be incorporated into the final divorce decree because the evidentiary requirements associated with independent mental

122. Coombs, supra note 119, at 486.
123. Id.
124. Id.
125. Cf. Zumeta, supra note 121, at 437 (an agreement is reached only on issues that are no longer contested after mediation is completed); Coombs, supra note 119, at 478 (an agreement is reached on those issues which are no longer disputed); but see Stulberg, The Theory and Practice of Mediation: A Reply to Professor Susskind, 6 VT. L. REV. 85, 101 (1981) (if the mediating parties do not resolve all disputes, they forfeit all agreements that have been made).
126. See supra note 119 and accompanying text.
127. Coombs, supra note 119, at 486.
130. Coombs, supra note 119, at 486; Zumeta, supra note 121, at 437.
health reports\textsuperscript{131} are not present.\textsuperscript{132}

B. Who Should Serve as the Mediator?

Two professions generally qualify as mediators: lawyers and mental health professionals.\textsuperscript{133} Clearly, the legal knowledge of the lawyer-mediator offers certain advantages. Knowledge of the relevant law and exposure to the judicial process permits the lawyer-mediator to be aware of the kind of settlements that judges will usually accept for inclusion in the final divorce decree.\textsuperscript{134}

Nevertheless, there are also problems associated with the use of lawyer-mediators. When one party to the mediation has a weak argument, the lawyer-mediator’s adversarial training might cause him to favor the party with the stronger argument.\textsuperscript{135} Such bias might eventually force one party to submit to the other against his or her will.\textsuperscript{136} Forcing submission is forbidden by the Standards of Practice for Family Mediators,\textsuperscript{137} which provides that if the agreement reached is unreasonable, either party can exercise an option of returning to the adversary process.\textsuperscript{138}

Disciplinary Rule 5-105 of the Model Code of Professional Responsibility states that a lawyer may not represent competing parties to a controversy.\textsuperscript{139} This rule presents potential ethical problems for

\textsuperscript{131} See supra notes 79-86 and accompanying text.

\textsuperscript{132} The mediation agreement is similar to a stipulation, see supra note 76. Only issues that are not contested are included in the agreement between the parties, see supra note 125, which frees court time to solve other issues.

\textsuperscript{133} Zumeta, supra note 121, at 434. The mental health professionals who qualify as mediators include “psychologists, social workers, counselors, or persons with a graduate behavioral science background.” \textit{Id. See also} Pearson & Thoennes, supra note 115, at 502 (in the Denver Custody Mediation Project, the mediators were limited to mental health professionals and lawyers).

\textsuperscript{134} Coombs, supra note 119, at 491.

\textsuperscript{135} See Tomasic, \textit{Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement}, in \textit{NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA} 215, 226 (1982) (trainee mediators may resort to coercion); Cf. Coombs, supra note 119, at 492 (the lawyer-mediator runs the risk of exploiting one party in order to keep the mediation alive).

\textsuperscript{136} Coombs, supra note 119, at 492.

\textsuperscript{137} See \textit{Standards of Practice for Family Mediators}, 17 \textit{FAM. L.Q.} 455, 457-59 (1984) (if the agreement being reached is unreasonable, or if each party is not able to participate equally, the process will be terminated) \textit{[hereinafter Standards]}. These standards were approved with slight modification by the House of Delegates of the American Bar Ass’n on Aug. 8, 1984. The ABA Standards are set out in \textit{Standards of Practice for Lawyer Mediators in Family Disputes}, 18 \textit{FAM. L.Q.} 363 (1984).

\textsuperscript{138} See id. at 456.

\textsuperscript{139} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 5-105 (1979); Zumeta, supra note 121, at 437-38; Coombs, supra note 119, at 492; Comment, supra note 129, at 83.
lawyer-mediators. A lawyer does not, however, represent either party in mediation; the lawyer’s role at the mediation proceeding is merely that of a referee. The lawyer’s function is simply to aid the mediating parties in reaching an agreement. One commentator notes, however, that when the issues involved are so complex that the parties truly require separate counsel, the lawyer should not participate in mediation.140

The strengths of the lawyer-mediator are the weaknesses of the mental health-mediator. Since the mental health-mediator is unfamiliar with the law, mediation settlement agreements which would not withstand judicial scrutiny may be reached.141

Another potential problem for the mental health-mediator is the allegation of unauthorized practice of law.142 However, just as the lawyer’s participation in mediation does not constitute an ethical violation, this is not an actual problem because mediation is an extrajudicial process wherein the mental health professional acts merely as a referee between the two mediating parties.143 While there may be some legal issues involved in mediation, they are relatively simple and can be adequately handled by nonlawyers. Furthermore, such issues are typically deemed to be incidental to the role as a mediator, and therefore fall outside the unauthorized practice of law provision of the Model Code of Professional Responsibility.144

Expertise in dealing with emotional problems is the prime asset of a mental health-mediator. Judith Wallerstein and Joan Berlin

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140. Zumeta, supra note 121, at 438. The lawyer should not participate as a mediator in this situation even though the mediating parties are advised to procure outside counsel. Standards, supra note 137, at 459.

There are also confidentiality problems in mediation. These problems differ between the lawyer-mediator and the mental health-mediator. The lawyer-mediator may enjoy the traditional attorney-client privilege; however, to protect against any judicial difficulties, the lawyer-mediator often makes his or her clients sign a confidentiality statement.

The mental health-mediator is at a disadvantage because, while there has been a gradual acceptance of the confidentiality privilege, the status of the signed agreement is unsettled. Therefore, from a confidentiality viewpoint, the lawyer-mediator is preferable. Coombs, supra note 119, at 491, 493-94. The New York legislature recognized this potential problem, however, and drafted a statute which extends confidentiality to mediation proceedings. N.Y. JUDICIARY LAW § 849-b(6) (McKinney Supp. 1987).

141. Coombs, supra note 119, at 493 (without background to understand the legal issues, a mental health-mediator may create an agreement which is clearly contrary to what courts will accept).

142. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1978); Coombs, supra note 119, at 493; Zumeta, supra note 121, at 439.

143. See supra text accompanying note 119.

144. Comment, supra note 129, at 85-86.
Kelly, experts in the field of psychological problems associated with divorce, point to the importance of mental health professionals in child custody, commenting that “[m]any adults will need the skilled help of a neutral counselor or clinician who is well versed in the psychology of children and in the knowledge of the expectable effects of divorce on the child’s development and [on] the parent-child relationship.”

Therefore, the mental health-mediator, as compared to the lawyer-mediator, can better ease the emotional burden on both parents and child by minimizing the traumatic effect of a child custody resolution. Since the first four functions of a mediator mentioned above deal with the mental health of mediating parties, it seems that someone well trained in mental health should be integrally involved in mediation. This leads to the belief that mental health professionals should play a leading role in mediation.

C. In Praise of Mediation

Child custody mediation is an attractive alternative to litigation for several reasons. First, it allows the parties to vent emotions and discuss issues they deem to be important but which may not have been admissible at trial. This venting of emotions diminishes the trauma associated with child custody resolution, so that the parties can clearly discuss the important issues in their custody decision.

Second, the parties assume an active role in determining their own future through face-to-face discussion. Face-to-face contact leads to better communication skills between the spouses, which in turn leads to a greater ability to resolve conflicts after the divorce.

It is arguable that a winner and loser situation exists in mediation just as in litigation, because one party will get legal custody and the other will get visitation rights. Child custody mediation can, however, be viewed as ending the winner and loser situation be-

145. J. Wallerstein & J. Kelly, supra note 110, at 318.
147. Coombs, supra note 119, at 486; Pearson & Thoennes, supra note 115, at 498.
148. Comment, supra note 129, at 78.
149. Contra Scott & Derdeyn, supra note 48 (joint custody is an alternative to sole custody where both parents share the physical and legal custody of the child). In the Denver Project, 70% of the people who reached agreements in mediation opted for joint custody. Pearson & Thoennes, supra note 115, at 514.
150. Zumeta, supra note 121, at 435; Commission Recommendation on Child Custody, supra note 3, at 124.
cause, unlike litigants, mediating parties are able to decide what they feel is in the child’s best interests, instead of leaving that determination to a court with limited knowledge of the parties’ true desires.\textsuperscript{151}

Aside from the psychology-based reasons that support mediation as a method for resolving child custody disputes, there are pragmatic considerations as well. Although mediating parties are advised to consult with an attorney before making final decisions, the parties do not have to retain an attorney for extended periods of time. Consequently, costs for mediation are generally lower than those of conventional litigation.\textsuperscript{152} Moreover, resolving child custody issues outside the adversarial process allows divorcing parties to reduce the court costs associated with litigation\textsuperscript{153} because mediation is generally a more rapid process.\textsuperscript{154}

A problem with child custody litigation exists because the custody determination is usually included in the divorce litigation.\textsuperscript{155} Therefore, the final custody decision is bound to the conclusion of the litigation. This usually leaves the child’s fate uncertain for a significant period of time.\textsuperscript{156} Although speed should not be used as the sole justification for choosing mediation over litigation, mediation is a fairly rapid process, taking an estimated average of only 5.6 hours to reach a child custody settlement.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{152} Id. at 332; Pearson \& Thoennes, \textit{Divorce Mediation: An Overview of Research Results}, 19 Colum. J.L. \& Soc. Probs. 451, 477 (1985) (parties who successfully mediate save $380 over successful litigating parties); Pearson \& Thoennes, supra note 115, at 507-08. \textit{See also} Ioannou, \textit{Breaking up is Cheap to do}, Daily News, Oct. 19, 1986, Business, at 14, col. 4 (total expenditure in a divorce mediation is approximately $2,600 to $2,900 while retainer for a matrimonial lawyer in court is $2,500 for each participant).
\item \textsuperscript{153} See Note supra note 151, at 332.
\item \textsuperscript{154} Coombs, supra note 119, at 485.
\item \textsuperscript{155} See Rigby, \textit{Alternate Dispute Resolution}, 44 La. L. Rev. 1725, 1726 (1984) (since about 55\% of divorces today involve children, child custody becomes integrally tied to divorce litigation).
\item \textsuperscript{156} Silberman and Schepard, supra note 59, at 412.
\item \textsuperscript{157} Coombs, supra note 119, at 485. Commentators note that successful mediation clients move through the court system faster than their purely adversarial counterparts . . . . The average number of months between the initiation of proceedings and the promulgation of final orders is lowest for successful mediation respondents—9.7 months. In the purely adversarial [sample] . . . the average number of months between filing and final orders [is] 11.9 . . . months. Pearson \& Thoennes, supra note 115, at 507. \textit{See also} Ioannou, supra note 152, at 14, col. 4 (an average mediation takes between 12 and 15 hours).
\end{itemize}
D. Criticisms of Mediation

An often mentioned criticism of mediation is that only judges can competently decide what is in a child's best interests.\(^{158}\) While this is persuasive to the extent that judges, by their experience, have developed a certain degree of expertise in deciding child custody issues, it still ignores the important fact that judges have no background in the mental health field. A related argument against mediation suggests that, because the mediator may not follow guidelines previously established by courts, the mediation agreement may later be set aside by the court.\(^{159}\) If this argument is accepted, however, parties might never settle their disputes independently of the judicial system since judges would always be able to substitute their beliefs for those of the parties involved.

A problem may also develop where two mediating parties do not have equal financial bargaining power.\(^{160}\) One spouse may be willing to trade custody of the child for increased alimony later on in the divorce proceeding.\(^{161}\) In such situations, the parties should not be involved in mediation at all.\(^{162}\) If such parties are involved in mediation, the Standards of Practice for Family Mediators permits mediators to exercise their discretion to return the controversy to the adversarial process where the best interests of the child will be decided.\(^{163}\)

Another criticism of child custody mediation is that the parties do not disclose all of the pertinent information required to decide child custody, including financial records.\(^{164}\) One must remember, however, that parties to a child custody case are mediating because


\(^{160}\) The difference between arbitration and mediation is that in arbitration a neutral third party decides the issues, and in mediation a neutral third party facilitates negotiations between the parties and cannot make recommendations or decisions. Zumeta, supra note 121, at 434.

\(^{161}\) See Watson, supra note 60, at 59 (“it is amazing how custodial claims can be shifted by relinquishment of an appropriate number of dollars!”); See also Note, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra L. Rev. 407, 422-26 (1985) (a spouse may bargain away child custody for economic gain or loss).

\(^{162}\) Zumeta, supra note 121, at 435.

\(^{163}\) Standards, supra note 137, at 458-59.

\(^{164}\) See id. at 458.
each wants custody of the child. Through constant probing during mediation, a party will ferret out facts that the other party may not willingly acknowledge. This process leads to an appropriate decision as to which parent may better serve the child's best interests.

IV. CONCLUSIONS AND RECOMMENDATIONS

Despite the arguments against mediation, an increasing minority of state legislatures has developed statutory provisions which allow child custody mediation in lieu of litigation.\(^\text{166}\) The California legislature has gone so far as to mandate that divorcing parties participate in mediation.\(^\text{168}\) Case law in several states whose legislatures have not yet enacted mediation statutes allows parties to submit written agreements to the court.\(^\text{167}\) This suggests that written mediation settlement agreements, if submitted to the court, would be accepted.

States favoring mediation offer a response to the serious problem of overcrowded court dockets. As the number of divorces in the United States increases,\(^\text{168}\) courts will be hard put to resolve family disputes quickly.\(^\text{168}\) Child custody mediation is one way to decrease the burden on the judiciary and, simultaneously, to aid children by reducing the stress associated with custody resolution. Mediation is not, however, a solution for all custody disputes. Situations arise in which mediation is improper, such as where the parties are unwilling to negotiate,\(^\text{170}\) where the parties are unequally educated or have unequal financial resources,\(^\text{171}\) or where the issues are too complex.\(^\text{172}\)

A solution is available for those who fear putting too much power in the hands of a mental health professional with a limited


\(^{166}\) CAL. CIV. CODE § 4607 (West Supp. 1986).

\(^{167}\) See In re Weidner, 338 N.W.2d 351 (Iowa 1983). "'[T]he court may require the parties to participate in custody mediation counseling to determine whether joint custody is in the best interest of the child.'" Id. at 355 (quoting IOWA CODE ANN. § 598.41 (West 1983)). Cf., e.g., Faherty v. Faherty, 97 N.J. 99, 477 A.2d 1257 (1984) (arbitration agreement was incorporated into divorce proceeding).

Iowa also has a statute that allows the court to take into account any written agreement of the parties concerning property distribution. IOWA CODE ANN. § 598.21(1)(k) (West 1986).

\(^{168}\) See supra note 2 and accompanying text.

\(^{169}\) See Kubie, supra note 3, at 1197.

\(^{170}\) Zumeta, supra note 121, at 435.

\(^{171}\) Id.

\(^{172}\) Id.
knowledge of the law.\textsuperscript{178} Instead of choosing either a lawyer-mediator or a mental health-mediator, a joint disciplinary team comprising both professions could serve as mediators.\textsuperscript{174} The lawyer-mediator could be available to instruct the parties as to what the court is likely to accept. The mental health-mediator could ease the emotional pain inherent in divorce litigation while still ensuring that the mental health of the child is protected. This is the most effective alternative for integrating mental health professionals into the child custody resolution process.\textsuperscript{178}

In custody decisions, courts must realize that they are not dealing with chattels, as the common law viewed children,\textsuperscript{178} nor with adults who have developed the mental capacity to deal with many of the traumas of divorce. Courts are dealing with infants\textsuperscript{177} upon whom custody determinations may have lasting psychological effects. Courts should recognize that discretion is the better part of valor and should defer their decisions to trained mental health professionals who are aware of the complex emotional problems of human relations and the significant role that emotions play in the decisionmaking process. The most feasible way of accomplishing this is through the implementation of legislation which would remove child custody decisions from the adversary litigation process and place them in mediation.

\textit{Christopher Allan Jeffreys}

\textsuperscript{173} See supra note 158 and accompanying text.

\textsuperscript{174} Coombs, supra note 119, at 494.

\textsuperscript{175} An argument may be raised that the lawyer-mediator would be aiding the mental health-mediator in an unauthorized practice of law, \textit{Model Code of Professional Responsibility} Canon 3 (1978), but because mediation is an extrajudicial process, that argument is not tenable. See supra note 143 and accompanying text.

\textsuperscript{176} See supra note 14 and accompanying text.

\textsuperscript{177} See, e.g., Rubinstein v. French Hosp., 51 A.D.2d 563, 378 N.Y.S.2d 457 (1976) (applying a statute which states that people under 18 years of age are infants in New York); General Motors Acceptance Corp. v. Stotsky, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (Sup. Ct. 1969) (infant means any person who has not reached the age of contractual capacity).