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AN ARGUMENT FOR JOINT CUSTODY AS AN OPTION FOR ALL FAMILY COURT MEDIATION PROGRAM PARTICIPANTS

Joy S. Rosenthal, Esq.*

INTRODUCTION

As a lawyer, I have worked in New York City Family Courts since 1994. In the last few years, I have become increasingly attracted to mediation as a method of solving disputes within families. I studied community and family-based mediation, and, in 2006, began mediating custody and visitation cases for the New York City Family Court Mediation Program (“the Program”). Through this court-funded program, parents¹ who use Family Court to seek custody of or visitation with their children are offered free mediation services as a method of resolving cases instead of going to trial. Mediation helps the courts remove cases from congested calendars. It is also helpful to parents who wish to create their own agreements, a process which often results in their having more investment in the outcome. It creates a model for parents for their own future problem-solving. It creates an opportunity to make agreements that are more specifically tailored to that particular family’s situation. It allows parents a full opportunity to be heard—by each other, as well as by the mediator. It gives

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¹ I refer to parents because most people who petition for custody or visitation are natural parents. However, litigants may be grandparents or other caretakers. See N.Y. DOM. REL. LAW § 70(a) (McKinney 1988) (allowing either parent to apply for writ of habeas corpus to have such minor child brought before the court to determine issue of visitation and custody rights); see also *id.* § 72 (permitting grandparents to apply to the court for visitation where either or both of the grandchild’s parents are dead or in any circumstances which warrant the equitable intervention of the court).

parents a chance to step back and consider their priorities, and their roles in their children's lives. These actions all enhance the quality of the lives of the parties and of the children who are the subjects of these disputes.

In the spring of 2007, program mediators were told that judges and referees² in Kings County (Brooklyn) Family Court would no longer accept joint custody language in mediated Agreements. This was not mandated in other boroughs. This article gives some background of family court and mediation, examines the implications of this decision and suggests options that could be explored. The first section will provide a background on the structure and issues surrounding the New York City Family Courts. The second section is an overview of mediation and how mediation has been used in custody and visitation cases. The third section describes how custody determinations have been made, and the last section describes the tension between the court's need for efficiency and the concept of self-determination, which is central to the mediation process. Finally, I offer suggestions for the court mediation program to address this intrinsic tension. Woven throughout the article is a case study, which illuminates the mediation process.

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One of the first things I notice is the dynamic of the parties when they come in for a mediation session. Do they arrive together? Do they sit near each other in the waiting area? Do they talk to each other while they wait? Does one seem more nervous than the other? Does one seem to take charge? All of this informs me about their emotions, and helps me know where I should focus my attention.³

Maritza knocked gently on the door to the mediation office just a few minutes early to tell me that she was there. I heard Juan follow about 15 minutes later. Our offices and mediation rooms are on different floors. As we started down the hallway, I noticed that they both seemed to be in their late twenties. She was wearing a down jacket, and he was wearing a cloth coat that looked warm but not fancy. Maritza had a heavy backpack, Juan was not carrying a bag at all. They both looked

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² THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 4 (2006), available at http://www.abcnyc.org/pdf/famguide_ms.pdf (defining referees as being able to "hear and issue orders in custody, visitation, and foster-care cases" and judges as being "in charge of the hearing (trial)" and able to "listen to witnesses, examine evidence, and then decide whether the case has been proven").

³ In order to protect clients' confidentiality, the facts of this case study are a composite of several cases. The dynamics (including my own reactions) are absolutely as I perceived them in one particular case.

neat and well cared for, but not rich. I knew from their intake sheet that they had one son, Carlito, age 3, and they lived near each other (in the same zip code) in a neighborhood that is slowly becoming gentrified. Juan made a few corny jokes in the elevator, looking to her, but she wouldn't laugh. I led them to a small conference room on the sixth floor of the new courthouse, and asked a court officer to let us in. As always, I sat at the end of the table, and asked them to sit on either side of me.

When we began, I started by going over some preliminary issues. I explained that I was not there as a judge or a counselor, or an advocate for either one, but simply to help them have a conversation about the care of Carlito. One of the things I like about mediation, I told them, as I tell all of my clients, is that it gives you a chance to shape your and your children's future. You are the experts on your own lives. You know yourselves and your child better than a judge could ever know. This gives you an opportunity to craft your own agreement—one that is right for you. I went on to explain that the process is confidential, and that the only information the judge would have would be what would have been written in the agreement, if they came to one, or if they had decided not to come to an agreement. I went over the exceptions to that confidentiality, in cases of suspected child abuse or if I believed that someone else might be seriously harmed. I also explained that the process is entirely voluntary—that they could decide to end mediation and go back to court at any time. I asked them to sign an agreement that covers these considerations, and asked them to agree not to subpoena our records or the Mediation Program staff, and then we began.⁴

I asked them how things were going, and what their routine was now. It quickly became clear that there was tension every time they saw each other. Juan came to Maritza's home every other Saturday to pick up Carlito.

"You can't just show up when you want to," Maritza said. "You have to let me know when. We can't wait all day until you decide to show up."

"But I don't know what time I'm gonna wake up," Juan explained. "I have a right to see my son. When I come over to pick him up, you're always out. Even if I come on time!"

I asked Maritza what was it that bothered her about Juan showing up.

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⁴ The concept of confidentiality is key to the commitment to use mediation as an alternative to litigation. That concept has become compromised recently in New York by the Fourth Department of the Appellate Division. *Hauzinger v. Hauzinger*, 842 N.Y.S.2d 646, 647 (App. Div. 2007). In *Hauzinger*, a couple attempted divorce mediation, but it fell apart. The case went to litigation, and the husband subpoenaed the mediator to produce records of the mediation process in a divorce proceeding. *Id.* The mediator resisted the subpoena in a motion to quash, but the Appellate Division upheld the Supreme Court denial, determining that the mediator had to testify. This sent shock waves throughout the mediation community. *Id.*

"It's disrespectful," she said. "We can't just sit around. Carlito isn't my only child. I have things to do on Saturdays." Maritza had an older son whose father was not around. Malik was six, and Juan had helped her care for Malik when he and Maritza were seeing each other. Saturday was the day Maritza did most of the food shopping, cleaned the apartment and took the boys outside.

Juan acknowledged that he hadn't given much thought to the other things she might have to do. But he also wanted some recognition as a father, and felt that she didn't give it to him. Maritza blew up. "Things haven't changed all that much since you left, Juan," Maritza said, sounding exasperated. "And neither have you. You can be such a child!"

They talked about what respect meant and why it was important. They talked about what it would feel like to be respected, and what they could do to be respectful of each other. The tension in the room eased, and they both seemed to relax a bit.

I. THE NEW YORK CITY FAMILY COURTS

A. Overview

As part of the Unified Court System, each county in New York State has its own family court.⁵ New York City ("NYC") is made up of five counties (or boroughs). While some programs and administrative decisions affect the New York City Family Court System as a whole, each courthouse retains its own culture.

Family Courts have jurisdiction over cases involving child support, custody, visitation, abuse or neglect, foster care, terminations of parental rights, family offense (orders of protection), parent-teen (Persons in Need of Supervision, or PINS) and juvenile delinquency.⁶ Divorce, separation and annulments of marriages are heard in New York State Supreme Court, which is also a trial level court.⁷ Thus, parents who are unmarried must litigate disputes regarding their children in Family Court, while married parents must litigate divorces (and disputes regarding their children) in Supreme Court.

Family Court and Supreme Court are on the same judicial level. Cases decided in either Court can be appealed to the Appel-

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⁵ N.Y. FAM. CT. ACT § 113 (McKinney 1999).

⁶ *Id.* § 115 (McKinney 1999 & Supp. 2007).

⁷ The New York Supreme Court is the trial court of general, original jurisdiction. N.Y. JUD. LAW § 140-b (McKinney 2005). Even though Supreme Court shares concurrent jurisdiction with Family Court, "this jurisdiction is seldom exercised." JULIA VITULLO-MARTIN & BRIAN MAXLEY, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES 1 (2000), available at http://www.vera.org/publication_pdf/nyfamilycourt.pdf.

late Division.⁸ However, there is a huge discrepancy between the two courts. Family Court is a poor person's court.⁹ Most Supreme Court litigants tend to be middle class and a higher percentage of them are white, whereas Family Court litigants are overwhelmingly people of color.¹⁰ Nearly all litigants in Supreme Court have private attorneys, while in Family Court most litigants appear pro se or with court appointed attorneys.¹¹ Family Courts are terribly underfunded, thus Family Court judges hear many more cases than do Supreme Court judges.¹² Although filings have increased steadily,¹³ the number of Family Court judges in New York City (47) has not changed since 1991.¹⁴

Because the Family Court does not have jurisdiction over matrimonial matters in New York State, parties who come to Family Court for custody and visitation disputes are, by definition, unmarried.¹⁵ Some are former spouses seeking to modify a prior child

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⁸ N.Y. C.P.L.R. § 5702 (McKinney 1995) ("An appeal may be taken to the appellate division from any judgment or order of a court of original instance other than the supreme court or a county court in accordance with the statute governing practice in such court."); N.Y. FAM. CT. ACT § 1111 (McKinney 1998) ("An appeal may be taken to the appellate division of the supreme court of the judicial department in which the family court whose order is appealed from is located.").

⁹ Steven M. Zeidman, *Fund for Modern Courts*, 29 FORDHAM URB. L.J. 1906, 1908 (2002) (noting that New York's problem-solving courts seem to be "proliferating in urban Criminal and Family courts, the so-called 'lower courts' or 'poor people's courts,' courts that deal primarily with the poor and with people of color").

¹⁰ See OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 3-4 (2005) [hereinafter SELF-REPRESENTED LITIGANTS]; VITULLO-MARTIN, *supra* note 7, at 5 (stating that the results of 600 interviews conducted between 1998 and 1999, showed that the overwhelming majority (over 92%) of users of Family Court were African-American or Hispanic and only 7% identified themselves as white and less than 1% identified themselves as Asian).

¹¹ See VITULLO-MARTIN, *supra* note 7, at 13-14 (stating that nearly 61% of all Family Court litigants reported that they were proceeding without legal representation and that the percentages of litigants without legal representation in custody and visitation disputes were approximately 49% and 61% respectively).

¹² See SELF-REPRESENTED LITIGANTS, *supra* note 10, at 3 (stating that only 2% of the New York State Family and Housing Courts reported that they maintained records of the number of cases involving pro se litigants while 15% of the state's Supreme and County Courts reported that they maintained such records); *id.* at 2 (noting that 21% of self-represented litigants surveyed litigated in Kings (Brooklyn) Family Court).

¹³ Gladys Carrión, Acting Commissioner of the New York State Office of Children and Family Services (OCFS), Testimony to the New York City Council Committee on General Welfare 4 (Jan. 11, 2007), available at http://www.ocfs.state.ny.us/main/news/2007/2007_01_11_CommissionerCarrionTestimony.pdf (citing New York City Family Court statistics and stating that "filings of child protective petitions regarding child abuse and neglect increased citywide in 2006 by 63% (1,285 new abuse filings) and 163% (11,224 new neglect filings), respectively").

¹⁴ N.Y. FAM. CT. ACT § 121 (McKinney 1999).

¹⁵ See SELF-REPRESENTED LITIGANTS, *supra* note 10, at 7 (noting that when asked the

custody order, which may have been created in Supreme Court when they divorced. Most, however, had never been married, or at least not to each other. Occasionally, a custody case might involve a grandmother and a parent, or be between same-sex couples, but most often the litigants are a man and a woman who are the legal parents of the child. I have mediated cases where both parents were in their teens and still lived with their mothers. I have mediated other cases where one party was still married to someone else, yet had children with the other party. In some cases, the parents were divorced and had worked out an arrangement, but needed a modification of the divorce order to adjust child support arrangements.¹⁶ In my experience, parents in the Court Mediation Program have been diverse in educational background, income level, age, race and ethnicity.

The conditions in Family Court are horrendous.¹⁷ I have always felt that working there was to be on the front lines of crisis with residents of New York's poorest communities. This is reflected in the physical overcrowding, how litigants are treated, and in the low expectations of professionals toward its litigants.¹⁸

It is well documented that most people who appear in New

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purpose of their visit to Family Court, 36% of survey respondents answered to start a custody case, and 64% answered to appear for an ongoing case in which one of the issues in dispute was custody).

¹⁶ Supreme Court and Family Court often have concurrent jurisdiction for post-disposition or modifications of divorce orders, N.Y. FAM. CT. ACT § 461 (McKinney 1998), although in reality these cases are often brought in Family Court.

¹⁷ Joe Sexton, *Opening the Doors on Family Court's Secrets*, N.Y. TIMES, Sept. 13, 1997, at 1, 26 (stating that Chief Judge Judith S. Kaye's decision to open the doors of New York Family Courts to the public was intended to "help the public better understand the dire conditions in the court," and quoting Chief Judge Kaye as stating that "[t]he conditions of the courts do so much to undermine the experience of the people who work there and who come there"); VITULLO-MARTIN, *supra* note 7, at 17-18 (reporting that while most survey respondents did not report anything negative relating to the physical conditions of Family Court, inspection of the physical conditions by the report authors revealed the following problems: grungy waiting rooms and broken chairs which were "exacerbated by the long waits"; "bathrooms with broken urinals and toilets" but "cleaned three times a day" and "usually clean"; "nonfunctional water fountains" and others that while "operational produce a flow of water too weak to be usable or sanitary").

¹⁸ See Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 274 (2000) (describing a 20-year old client, litigating to gain custody of her younger siblings from what she believed was marginal foster care, who believed that the agency placed her siblings in an inadequate foster home because that was "'good enough' for these African American children" and that she, herself, was perceived as being "immature, meddlesome, and unrealistic" in wanting and believing that she could give a better home life for her younger siblings).

York City's Family Courts are poor people of color.¹⁹ According to the New York State Unified Court System's Office of the Deputy Chief Administrative Judge for Justice Initiatives (DCAJ-JI), 84% of self-represented litigants in New York Family and Housing Courts are people of color, and 83% reported a household income of under \$30,000 and 57% reported household income of under \$20,000.²⁰ Statistics of racial disparities are well documented for the foster care system, and the racial make-up of other types of cases heard in Family Court, including custody and visitation cases, seems similar. A study done in 1998 showed that:

In New York City, African American children were more than twice as likely as white children to be taken away from their parents following a confirmed report of abuse or neglect . . . one of every 22 African-American [sic] children citywide was in foster care, compared with one of every 59 Latino children – and only one of 385 white children . . . one of every 10 children in Central Harlem was in foster care . . . one of every four African American foster children remained in foster care for five years or more. Only one in ten white children remained as long.²¹

Professor Martin Guggenheim, under whom I worked at the New York University School of Law's Family Defense Clinic, has described it this way:

One cannot address the subject of children in foster care in the United States, and especially in New York City, without staring at a shocking truth of a system that a veritable Martian couldn't help but recognize to be apartheid. In fact, my most memorable story about the practice of law in the United States was told to me by Bob Schwartz, who is the head of the juvenile law center in Philadelphia. He had made a trip to South Africa during the apartheid era, and the trip was reciprocated with a person from South Africa coming to Philadelphia to visit the juvenile court there. And, after spending a day he turned to Bob and said,

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¹⁹ See, e.g., Jessica Jean Kastner, Symposium, *Beyond the Bench: Solutions to Reduce the Disproportionate Number of Minority Youth in the Family and Criminal Court Systems*, 15 J.L. & POL'y 941 (2007).

²⁰ SELF-REPRESENTED LITIGANTS, *supra* note 10, at 3–4.

²¹ Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 64 (2003); see also THE RACIAL GEOGRAPHY OF THE CHILD WELFARE SYSTEM: COMMUNITY IMPACT AND RESPONSE 3 (Dorothy Roberts, Leah Hill, Erik Pitchal eds., 2006), available at <http://law.fordham.edu/documents/int-2RacialGeography.pdf> (stating that “[t]he foster care population is disproportionately of color; 35 percent of foster children are African American (whereas African Americans constitute only 15 percent of the childhood population at large)” and “African American children have a median length of stay in foster care of 18 months, compared to 10 months for white children”).

"[w]here's the white juvenile court?"²²

Assemblyman Roger Green, addressing the New York State Assembly, proposed that the over-representation of African-American children in foster care was due to biases that occur at the point caseworkers first begin to investigate, and that racism and class bias continue to influence perceptions, expectations, and service delivery as children wend their ways through the child welfare system.²³

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As Juan began to understand better how much was on Maritza's plate, he said that he understood better why it was important to pick Carlito up on time. I wasn't sure whether it was really getting through or not, but at least he was voicing his assent.

As they talked, I learned that they had known each other since they were children—they'd grown up together in the same housing projects. They shared many of the same friends, and even had some other family connections. They both relied heavily on their mothers to help them care for the children.

Maritza was a full-time student at a local community college. Juan worked in the laundry at Methodist Hospital, including a shift every other weekend. She hoped to teach day care. He hoped to get his own place and pay his bills. He was struggling to pay child support.

Maritza had gone out with another guy in high school, and her older son, Malik, was born when she was just sixteen. Malik's father wanted her to have an abortion and left her when she refused. She continued to stay in high school after Malik was born, and continued to see Juan there every day. Juan had always been good with Malik, and soon he and Maritza were dating. They both graduated from high school, and Maritza put Malik in day care at Brooklyn College while she started taking classes there. Maritza became pregnant with Carlito during her freshman year, when she was nineteen.

It was obvious that Juan was still in love with Maritza. He had filed for custody, but still had ideas of them getting back together, of them spending time together as a family. Maritza was through with him, however. She was moving on—perhaps college had propelled her forward. She wanted to come to an agreement and get on with her life. She said that she knew it was important for her son to have a father, but she didn't want to have any relationship with Juan, herself.

One of my mediation mentors talks about "the Greek chorus," those well-meaning friends, siblings, parents and confidantes who tell people

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²² Symposium, *supra* note 21, at 72–73.

²³ *Id.* at 68 (noting that Assemblyman Green stated in a 1998 position paper to the New York State Assembly that there is a "likelihood that African-American children will be removed and placed in care without the provision of preventative services . . . [and] that 90% of all abuse and neglect reports involve neglect and not abuse").

what they should have done in mediation. I call them the "ghosts in the room." The parties' children should always be among those unseen voices. But the others can undermine the mediation process if they have a mentality of "you've got to get yours."

I was listening to find out who might be the members of their "Greek choruses."

Another question kept tugging at me. Why was this couple in court? What was blocking them from working out the issues on their own? She had filed for child support because he'd stopped giving her money when he'd been between jobs last year. He, like many fathers, had filed for custody in response. How hard was it going to be to work out an agreement?

New York City Family Court calendars are unbelievably congested. Nearly all litigants are told to come to court when the court opens at 9:30 A.M. They are not given specific appointments. It is not unusual for an attorney to appear on ten cases a day divided among different courtrooms on different floors of the courthouse. Nor is it unusual for judges to hear over 80 cases each day (sometimes just for administrative matters, sometimes for actual hearings).²⁴ With calendars like that, judges must hear whichever case is ready, meaning having all of the litigants, attorneys and witnesses present and prepared to appear.²⁵ As a result, litigants often must wait hours for their case to be heard, even if their case is only on the calendar for return of service—a chaotic system, at best.

Although Queens and Brooklyn Family Courts have moved into new buildings in the past few years,²⁶ both the Bronx and Manhattan courthouses are dilapidated, filthy and depressing. In the Bronx Family Court, for instance, litigants must often wait in line for hours to get into the building because the buildings' eleva-

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²⁴ See John Sullivan, *Chief Judge Announces Plan to Streamline Family Court*, N.Y. TIMES, Feb. 25, 1998, at B7 (stating that in 1962 when Family Court was established, the court reviewed 96,000 cases, but by 1997 the Family Court case load had increased to 670,000).

²⁵ Peggy Farber, *Family Court Fiasco*, GOTHAM GAZETTE (New York, N.Y.) (June 2000), <http://www.gothamgazette.com/article/children/20000601/2/110> (last visited Dec. 3, 2007).

²⁶ Anita Womack-Weidner, *New York State's Largest Courthouse Opens in Brooklyn*, BENCHMARKS: JOURNAL OF THE NEW YORK STATE UNIFIED COURT SYSTEM 1 (Fall 2005) (reporting that the Brooklyn Supreme and Family Courthouse was the state's "largest and most technologically-advanced courthouse" and quoted Kings and Richmond (Staten Island) Counties' Family Court Supervising Judge Jane Pearl as stating that the new facility "'raises the dignity' of both litigants and attorneys, especially the self-represented").

tors are routinely broken or being repaired.²⁷ Often, only one elevator is in use to carry roughly 3,000 people a day up to the court, where the courtrooms are on the 6th, 7th and 8th floors. If litigants are not present, their cases cannot be called. As a result, judges must adjourn cases, often for months at a time, delaying justice and litigants' day in court.²⁸ This all adds up to give the family courthouses the milieu of a welfare office rather than a representation of justice.

Once inside the courtroom, cases are often rushed or adjourned, if they are heard at all.²⁹ Cases may be adjourned for weeks or even months at a time, and litigants may be told to come back again and again. This is frustrating for those who have to work or have child-care responsibilities because they have to take a whole day off each time they must appear in court, and/or arrange for others to take care of their children. Parents have told me that they have used all of their vacation time for the year waiting in Family Court. One parent told me that she lost her job because of required Family Court appearances. What might have started out seeming like a simple matter may take months or even years to complete.

Most Family Court litigants appear either pro se or by court-appointed ("18-B") attorneys.³⁰ Although the U.S. Supreme Court declined to rule that parents have a constitutional right to a court-appointed attorney on non-criminal matters,³¹ the New York State legislature has granted parents the right to such attorneys in custody and visitation, neglect and abuse matters, as well as termination of parental rights.³² Parents in child custody and visitation

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²⁷ Leslie Kaufman, *At Bronx Court Family Court, Justice is Often Delayed by Broken Elevators*, N.Y. TIMES, Dec. 12, 2007, at B1.

²⁸ *Id.*

²⁹ See Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151, 1178 (2001) (arguing that the lack of adequate compensation and support provided to 18-B attorneys results in their refusal to accept new clients in the Bronx, Brooklyn, Manhattan and Queens which is in turn causing "hundreds of cases" to be "adjourned each week and, consequently, [the violation of] the constitutional and statutory rights of numerous parents in the Family Court system").

³⁰ N.Y. COUNTY LAW ART. 18-B (Consol. 1977) (providing for assigned counsel for indigent litigants in both Family Court and criminal proceedings); see also *id.* § 722(2) (referring to the statute under which lawyers are appointed to represent family court litigants).

³¹ *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 26-27 (1981).

³² N.Y. FAM. CT. ACT § 262(a) (McKinney 1999 & Supp. 2007); see *id.* § 261 (McKinney 1999) (stating as part of the legislative findings that "[p]ersons involved in certain family court proceedings may face the infringements of fundamental interests

cases may be appointed an 18-B attorney if they are indigent,³³ which is defined as over 125% of the poverty line.³⁴ Most working people are not entitled to court-appointed assistance. Although some unions offer Legal Assistance Programs, free legal services for custody and visitation cases are virtually non-existent for others.³⁵ Thus, a large income gap separates people who are eligible for a free, court-appointed attorney, and those who can afford to pay normal attorney's fees, which, at \$250-\$500 per hour, could add up to \$5,000 or \$10,000 per case.

To initiate a case, a person files a petition in the court's petition room, with the assistance of a clerk.³⁶ The clerk asks the petitioner questions to obtain a brief summary of the case, and then writes up the petition on his or her behalf.³⁷ The petitioner is then sent to an intake "part" (or courtroom) and waits to go before a judge who reviews the petition, decides whether to appoint an 18-B attorney or law guardian, decides on other preliminary matters, or adjourns the case for the petitioner to serve the petition on the opposing party. The judge may refer the case to the mediation program at this point. Judges and referees who are more open to mediation refer more often. Some screen out cases for domestic violence; others refer more and let the mediation program screen out cases that might be inappropriate.

Litigated custody cases can be frustrating for judges, who are asked to determine "the best interests of the child," in a dispute between two fit parents. "Best interest" factors include maintaining physical, financial and emotional stability in the child's life; the

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and rights, including the loss of a child's society . . . and therefore have a constitutional right to counsel in such proceedings").

³³ *Id.* (stating that the purpose of the right to counsel provision "is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under" the Family Court Act).

³⁴ Lawhelp.org/NY, <http://www.lawhelp.org/NY> (click on "Help") (last visited Jan. 28, 2008) (stating that to be within the 125% of the federal poverty line a family household of 1, 2, 3 and 4 persons cannot exceed a yearly income of \$12,762, \$17,112, \$21,462, and \$25,812 respectively).

³⁵ Here, I am referring to programs run by Legal Services of New York and other non-profits. There may be exceptions to programs that provide legal assistance to victims of domestic violence and those who are HIV positive, such as the Lambda Legal Defense and Education Fund, Inc. (www.lambdalegal.org) and the Sylvia Rivera Law Project (www.srlp.org).

³⁶ New York State Unified Court System, New City Family Court: Custody & Visitation, http://www.nycourts.gov/courts/nyc/family/faqs_custodyandvisitation.shtml#cv7 (last visited Jan. 28, 2008) (providing an overview of the custody & visitation process in New York Family Court).

³⁷ *Id.*; South Brooklyn Legal Services, Child Custody Proceedings in Brooklyn Family Court, <http://www.sbls.org/index.php?id=50> (last visited Jan. 28, 2008).

quality of the home environment; the child's wishes; each parent's past performance; the relative fitness and ability of each parent to guide and provide for the child's intellectual and emotional development; and the affect the award of custody to one parent would have on the relationship with the other.³⁸ Even where both parents are fit, the proceedings can be acrimonious and may lead to hours of court time tied up in mudslinging, or a series of accusations, founded or not, between angry parents.

In addition to the parents, children also have a voice in the proceedings. Children are assigned law guardians, who interview them and represent their interests in court.³⁹ Law guardians for young children (up to the age of about nine or ten, depending on their level of maturity) may substitute their judgment as to what they believe should happen.⁴⁰ Law guardians for older children must represent the children's interests directly.⁴¹

The Family Court mediation program was started in response to the chaotic nature of family court. The program is intended to better serve parents seeking custody and visitation by offering an alternative.

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Maritza was nearly an hour late the second time we met, a week later. Carlito was sick, she said, and hadn't gone to day care. Maritza had to wait for her mother to get home from work to watch him before she could come. She hadn't called but said that she would if it happened again. She was more distracted this time. It seemed clear that she was worried about Carlito. Juan seemed less affected by his son's illness, perhaps because he hadn't witnessed it himself, perhaps because his attitude in general seemed to be that everything would work out all right if they could just talk. I asked Maritza if she was worried and what worried her. She wanted to be a good mother. It was important to her for the child to be secure. She couldn't do anything if he wasn't okay. I asked if

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³⁸ N.Y. DOM. REL. LAW § 240; *Fletcher v. Young*, 722 N.Y.S.2d 100, 102-03 (N.Y. App. Div. 2001).

³⁹ Most children who are the subjects of child custody disputes in New York City are represented by law guardians from the Children's Law Center. Others are appointed 18-B attorneys. See also CROSS-BOROUGH COLLABORATION, THE BASICS: CUSTODY AND VISITATION IN NEW YORK STATE 8 (2002), available at <http://www.brooklynbar.org/vlp/booklets/69381CBCBasicCustodyrcb.pdf> (noting that in a custody dispute a child can be represented by either a law guardian or a guardian *ad litem* and, unlike a law guardian, a guardian *ad litem* need not be a lawyer even though he or she "will investigate the case and report to the judge" who can then "ask the guardian *ad litem* for a recommendation about custody and visitation" and "tell the Judge what s/he thinks is best for the child, regardless of the child's wishes").

⁴⁰ 1 THE JUVENILE RIGHTS DIVISION, THE LEGAL AID SOCIETY, PRACTICE MANUAL FOR LAW GUARDIANS 32-34 (2005) (on file with the New York City Law Review).

⁴¹ *Id.* at 34-35.

her role as a mother came first. Yes. What did she want for Carlito in the future? She wanted good morals, financial security, and for him to be able to get a good job. What did Juan want for his son? A good education, a happy life, and the ability to travel. Why were these things important to each of them? For Maritza, it was important to raise a child who would be ethical, who could support himself and never rely on public handouts, and who could contribute to society. Juan wanted him to enjoy the same things he had had as a child. He remembered good times taking trips with his family, and loved that feeling of belonging. That was, in part, why it was important to him that the three of them spend time with each other, so their son would feel that he belonged to a real family.

I asked whether they had ever talked about Carlito's education. They both wanted him to go to public school, they indicated that they would try Special Education if he needed it, and they clearly both felt it was important for him to graduate – at least through high school. Education was particularly important to Maritza, but they felt that they could make decisions together if needed.

I asked if they'd thought about his religious education. Maritza came from a more religious background and went to Catholic church each week. Juan had not been raised in the church, but was happy that Maritza wanted to raise Carlito as a Catholic.

Finally, I asked if something happened to Carlito, how would they make medical decisions? Again, they thought that they could work together.

"It's not the big stuff that we argue about," Juan explained to me. "It's all the little stuff."

By the end of the mediation session, Maritza had warmed up some. And indeed, they did seem to have similar values and attitudes about how Carlito would be raised. But she was still holding back, and I didn't know why.

II. MEDIATION

Mediation is one form of Alternative Dispute Resolution⁴² and has been used by families for many years. It is particularly well-established in California courts, where couples can attempt to mediate before trying their cases.⁴³

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⁴² "Alternative Dispute Resolution (ADR) represents a variety of processes through which potential litigants may resolve disputes." Alternative Dispute Resolution, http://www.courts.state.ny.us/ip/adr/What_Is_ADR.shtml (last visited Oct. 25, 2007).

⁴³ CAL. FAM. CODE § 3160 et seq. (West 2004) (mandating that "[e]ach superior court shall make a mediator available" within the context of custody and visitation disputes); see also George Walker, Family Law Arbitration from the Court Perspective (May 16, 2006) (unpublished paper prepared for the North Carolina Association of District Judges's Summer Conference), available at <http://www.ncbar.org/download/>

Parties meet directly with a neutral mediator, who guides them through a dispute resolution. The mediator helps them explore the issues, identifying each party's interests and the values underlying those interests, brainstorming options and coming to a mutually agreeable solution.⁴⁴ Once an agreement is reached, the mediator writes down the terms of the agreement. If the mediation is connected with a court program, the written agreement, once approved by the parties, is submitted to the court, which then so-orders it. At that point it becomes an enforceable court order.

The goal of mediation is not simply coming to an agreement. Agreements could be reached through strong-arming, manipulating, or coercion. These would not be considered mediated agreements. The goals of mediation lie in its underlying values of self-determination, voluntariness, impartiality, confidentiality, and safety.⁴⁵ The process is as important as the ends, or as Marshall McLuhan once famously said, "[t]he medium is the message."⁴⁶

Mediation is particularly well-suited to parties who have an ongoing relationship, such as family members. While the litigation process often exacerbates acrimony between parties, mediation seeks to assist parties to work together toward a mutually agreeable result.⁴⁷ That experience of working together provides a model for future conflicts that may arise, thus giving parties the example and tools they can draw upon under new circumstances. As a committee of experienced family law mediators wrote, "family mediation is a valuable option for many families because it can increase the self-determination of participants and their ability to communicate; promote the best interests of the children; and reduce the economic and emotional costs associated with the resolution of family disputes."⁴⁸

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familyLaw/walkerFamilyLawArbitrationMay16.pdf (providing an overview of ADR and mediation in the context of North Carolina family law).

⁴⁴ Bruce Blitman & Jeanne Maes, *Visioning & Coaching Techniques in Mediation* (2004), available at http://findarticles.com/p/articles/mi_qa3923/is_200405/ai_n9377119 (stating that some mediators characterize the process of having "the parties reframe their interests and needs in a way that will help them see what they have in common and what they might like from each other" as a "problem-solving approach" while others label this a "visioning" exercise).

⁴⁵ COMMUNITY MEDIATION SERVICES, *COMMUNITY MEDIATION TRAINING: A VALUE CENTERED APPROACH WORKBOOK* 16–17 (on file with the New York City Law Review) [hereinafter CMS TRAINING WORKBOOK].

⁴⁶ MARSHALL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 17–35 (W. Terrance Gordon ed., Ginko Press 2003) (1964).

⁴⁷ Norman Pickell, *In Family Law, How Is Mediation Different from a Settlement Meeting?* (2000), <http://adrl.com/adrl/how.htm> (last visited Dec. 3, 2007).

⁴⁸ MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATORS, Overview

The concept of self-determination is one of the cornerstones of mediation. It is the first standard listed in the American Bar Association's (ABA) *Standards of Mediation*, which states:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.⁴⁹

Members of the ABA, the Association of Family and Conciliatory Courts, and the National Council of Dispute Resolution Organizations recently created another set of *Model Standards of Practice for Family and Divorce Mediators*.⁵⁰ It, too, considers self-determination to be the first standard that mediators should follow.⁵¹ It states, "[a] family mediator shall recognize that mediation is based on the principle of self-determination by the participants[,] self-determination being 'the fundamental principle of family mediation' since '[t]he mediation process relies upon the ability of participants to make their own voluntary and informed decisions.'"⁵²

A. *The Family Court Mediation Program*

The New York City Family Court Mediation Program ("the Program") was established in March 2005 by the New York City Family Courts in collaboration with the Office of Court Administration Office of Alternative Dispute Resolution Programs.⁵³ They selected Community Mediation Services (CMS), a non-profit community dispute resolution center based in Jamaica, Queens, to

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and Definitions (The Symposium on Model Standards of Practice for Family and Divorce Mediation 2000), available at <http://www.afccnet.org/pdfs/modelstandards.pdf> [hereinafter FAMILY AND DIVORCE MEDIATORS STANDARDS].

⁴⁹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I: Self-Determination (American Arbitration Association, American Bar Association & Association for Conflict Resolution 2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductForMediatorsfinal05.pdf> (including other standards related to impartiality, avoiding conflicts of interest, competence, maintaining confidentiality, maintaining quality of the process, advertising and soliciting, fees, and advancing diversity in the practice).

⁵⁰ FAMILY AND DIVORCE MEDIATORS STANDARDS, *supra* note 48.

⁵¹ *Id.* at Standard I.

⁵² *Id.*

⁵³ Frank Woods & Amelia Hershberger, *NYC Family Court Moves to Integrate ADR Program: Establishes a Citywide Model*, N.Y. MEDIATOR (Albany N.Y.) Fall/Winter 2005, at 2.

provide court-based mediation services for all five boroughs.⁵⁴ The Program falls under the direction of the Citywide Alternative Dispute Resolution Coordinator, as well as CMS staff.

Judges and referees refer cases to the Program, which maintains offices in each of the five boroughs. The parties are then interviewed by the Program staff who screen for domestic violence, unwillingness to mediate, and other circumstances that would make them inappropriate for mediation.⁵⁵ The Program maintains a roster of certified mediators, who are assigned cases based upon availability and interest.

Mediators must apply and be interviewed by CMS staff to be accepted into the Program. Although there are no formal educational requirements, most are college graduates.⁵⁶ It is not necessary to have a law degree to mediate or to draft agreements, although CMS staff must approve all agreements. Mediators have to go through a twelve-hour specialized custody and visitation training as well as the basic thirty-hour mediation training certified by the Office of Court Administration, both offered through CMS.⁵⁷ They begin a thirteen-week apprenticeship period in which they first observe, then co-mediate, and then are observed by experienced mediators.⁵⁸

CMS trains its students in “values-centered mediation.” Fundamental to this approach is the concept that “people can gain meaning and value from conflict.”⁵⁹ This stems from the philosophy of psychiatrist and holocaust survivor Dr. Viktor Frankl, who wrote in his most famous book, *Man’s Search for Meaning*, “we can discover [the] meaning of life in three different ways: (1) by creating a work or doing a deed; (2) by experiencing something or encountering someone; and (3) by the attitude we take toward unavoidable suffering.”⁶⁰

Mediation gives parties the opportunity and the skills needed to work through conflict to find meaning by examining their own

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⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION, NEW YORK CITY BAR ASSOCIATION, REPORT ON MEDIATOR QUALITY 2 (2006), available at <http://www.nycbar.org/pdf/report/Mediator%20Quality%20Report%20Final%20%20June%2027.pdf>.

⁵⁷ COMMUNITY MEDIATION SERVICES, INC., APPLICATION FOR BASIC AND CUSTODY-VISITATION MEDIATION TRAINING 1 (October 2007), available at <http://www.mediatenyc.org/trainingapplicationOctober2007.doc>.

⁵⁸ COMMUNITY MEDIATION SERVICES, INC., APPRENTICESHIP, http://www.mediatenyc.org/e_appren.html.

⁵⁹ CMS TRAINING WORKBOOK, *supra* note 45, at 16.

⁶⁰ VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* 111 (Beacon Press 2006) (1946).

core values and those of the person with whom they are mediating. The attitude they take toward conflict (which has often become for them a source of “unavoidable suffering”) certainly affects their progress in the mediation process. Conflict is transformed from being a roadblock to a springboard for deep communication. This approach is especially well-suited for separated parents, who often bring their disappointment and mistrust of each other to the table ahead of their love for their shared child.

In a typical Family Court mediation, the parties meet with the mediator for up to three or four sessions, each lasting two hours. Because the process is voluntary, parties may discontinue their participation at any time. If they continue, they go through the stages of mediation: identifying issues, identifying underlying values, developing options, and finding areas of agreement.⁶¹

Once the parties come to an agreement, the mediator takes the regular steps of drafting a proposed judicial order. The parties review it, sign the final draft, and it is submitted to the court for modification or approval. If the judge approves the agreement, s/he signs (“so orders”) it, and it then becomes enforceable in court.

Because a judge must review the agreements, the Program must try to ensure that the agreements it presents are acceptable to the court. A judge generally wants to see that the parties intend to abide by the mediated agreement. For this reason, parties should be prepared to defend their agreement to the judge. Parties who appear to disagree about or contest the terms of the mediated agreement when they go before the judge for approval run the risk of having their agreement rejected.⁶² If this were to happen, the parties would be subject to the regular litigation process, where the judge would hold a hearing, giving parties an opportunity to be heard and would make his/her own binding determination.

There is an inherent tension between mediation and the family court system. Although self-determination is a goal of mediation, it is not a goal of the court system. Theoretically, it is not the mediator’s job to determine what can or cannot be written into an agreement. Parties can be extremely creative in preparing their agreements and shape them according to the needs of their particular families. At the same time, however, the mediator must be mindful of the law, and of what would be acceptable to the Court.

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⁶¹ CMS TRAINING WORKBOOK, *supra* note 45, at 21–24.

⁶² Interview with Catherine Friedman, New York City Family Court Citywide Alternative Dispute Resolution Coordinator, New York State Unified Court System, in Manhattan, N.Y. (Sept. 14, 2007).

The mediator must do reality testing with each party to help the parties decide whether each part of the agreement will really be viable.

For instance, in one case I mediated, the father agreed to pick the child up from the mother's home every Saturday at 11:30 A.M. However, upon further questioning, it turned out his work schedule made it such that this was impossible, and he was actually relying upon his younger sister to pick up the child. It wasn't until we brought the sister into the mediation process and got her agreement to be involved every week that the parties came to a resolution.

In addition, since Family Court is so overwhelmingly crowded, there is an exigent need for judicial efficiency. Judges will approve only those agreements that will stand the test of time.

B. The Child's Voice

Neither children nor their Law Guardians participate in the mediation process, so they do not have a direct voice in creating an agreement before it goes to court. Once an agreement is presented to the court the Law Guardian receives a copy and either approves it, suggests changes, or challenges it. At that point the process may be largely pro forma. In one case I mediated, the parents decided that the teenaged children would be split up—the girl would live with their mother, the boy would live with the father. The parents were in complete agreement, but I had no idea how the children felt, nor was I allowed to check with their Law Guardian before I wrote up the agreement. It seems to me that, at least in some cases, the Law Guardian should participate in the creation or drafting of the parents' agreement.

In the case of little children, it will necessarily be the adults who make the decision. A good reason not to include children in the process is that it could be harmful if they felt that they had to choose between their parents.⁶³ Another reason given is that one of the purposes of mediation is to help parents communicate better about their children with each other and to carry those skills outside of the mediation process. Parents often have conversations

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⁶³ Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 534 (1998) (noting that using "child preferences has been criticized because it requires that children choose between their parents, which may cause them to feel guilty, threatened, or pressured" and that various state courts have recognized that testifying in divorce proceedings can be a harmful and traumatic experience for children).

about their children that don't include the children. So mediation is an extension of that kind of conversation.

However, the courts obviously believe the child's voice is important because children are assigned Law Guardians to represent their interests in custody and visitation proceedings. One of the goals of custody and visitation mediation is to focus the parents more on the children and less on their own interests.⁶⁴ It takes a skilled mediator to keep the child's presence in the mediation room without direct representation.

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There was kind of a breakthrough in our third session. Juan asked Maritza why she'd stopped trusting him. "Remember at finals time?" he asked. "I used to come over and watch the boys for you so you could study. You wanted me to come over! We used to hang out together! What happened?"

"What happened?" Maritza exclaimed. "What happened? You don't know?"

Juan looked dumbfounded.

"I was getting ready to go out with my friends. You called and asked if I was home. I told my friends to go on without me, because you were coming over. Only you didn't come over. You sent your brother over with the papers to serve me! Saying you were filing for custody of Carlito. I couldn't believe it! You tricked me! I couldn't go out with my friends then – I was too upset. In fact, I didn't do anything with anyone for two days."

"But they told me I should file for custody."

"That's the problem. You listen to your family too much."

"I'm sorry, Maritza. Really, I'm sorry. I had gotten the papers, and the deadline was coming. I didn't want to give them to you because I knew it would change things between us. Really. We were getting close again. I liked helping you out. I didn't want to ruin that. But then I had to get the papers to you. I didn't know what to do."

"I can't believe I trusted you again."

This was quite a revelation, and we all sat still for a few moments. This showed Juan's immaturity, but he was honest about it. It explained why Maritza's body language had been stand-offish. It also explained why she was rejecting Juan, why she didn't trust him. Juan began to see things through Maritza's eyes at that point. Apologies are powerful, and his seemed sincere. It was at this point, at the end of the third session that they could really begin to work together. I hoped we would get a lot done in the following (and hopefully last) session. Maritza changed her attitude quickly and completely. She accepted Juan's apology, and began

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⁶⁴ DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 142 (Jossey-Bass Publishers 1998).

to laugh at his corny jokes. They immediately began to work on a visitation plan, including generous times for Juan to spend with his son. We decided that we would try to complete the whole agreement the following session, including addressing the issue of legal custody (or decision making). Although Maritza was clearly going to retain physical custody of Carlito, they'd had good discussions and seemed to have similar values overall, and I wondered what they would decide about legal custody.

III. DIFFERENT TYPES OF CUSTODY

Custody arrangements break down into two types—physical and legal.⁶⁵ Physical custody refers to where the child lives and how much time she spends with each parent.⁶⁶ The parent with physical custody at any given moment makes immediate decisions, such as the child's bedtime, what the child will eat and whether or not the child can play with friends.⁶⁷ The parent who does not have physical custody presumptively has rights to visitation with their child.⁶⁸

Legal custody refers to decision-making authority and responsibility about larger issues, most typically healthcare, education and religion.⁶⁹ These issues reflect the parent's values. Sole legal custody means that one parent has final say, whether or not s/he involves the other parent in the decision.⁷⁰ Split legal custody means that one parent makes decisions about some areas (e.g. religion and education) while the other has final say over other areas (e.g. medical decisions).⁷¹ It could also mean that one parent has custody of one child while the other parent has custody of the others.⁷² Joint legal custody means that parents must make large decisions together.⁷³

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⁶⁵ CROSS-BOROUGH COLLABORATION, *supra* note 39, at 7–8 (2002).

⁶⁶ *Id.* at 8 (stating that physical or “residential” custody refers to circumstances in which a child lives with one parent, but that parent “may or may not also have legal custody”).

⁶⁷ NEW YORK CITY FAMILY COURT, CUSTODY-VISITATION MEDIATION PROGRAM: PARENTING DEFINITIONS/COURT TERMS 2 (2007) [hereinafter PARENTING DEFINITIONS].

⁶⁸ *See id.* (outlining and defining custody and visitation court terms and the parenting rights that follow).

⁶⁹ *Id.* at 1.

⁷⁰ Paradise, *supra* note 63, at 537–38 (noting that sole custody “is the traditional custodial arrangement and it perpetuates the traditional notion that mothers, not fathers, are essential parents”); CROSS-BOROUGH COLLABORATION, *supra* note 39, at 7 (noting that “[t]he parent with sole custody is called the custodial parent” while “[t]he parent who does not have sole custody is called the non-custodial parent”).

⁷¹ PARENTING DEFINITIONS, *supra* note 67, at 1.

⁷² CROSS-BOROUGH COLLABORATION, *supra* note 39, at 15.

⁷³ Paradise, *supra* note 63, at 540 (stating that courts use joint legal custody “when joint physical custody is simply impossible, or when the children or parents refuse to

A. *Joint Custody*

The concept of joint custody has long been controversial in the United States, and New York courts have struggled with the concept. New York Domestic Relations Law provides that for cases involving divorce, separation or annulment of marriage or actions involving custody or visitation "there shall be no prima facie right to the custody of the child in either parent."⁷⁴ As the New York County Supreme Court stated in the late 1970s:

Joint custody is an appealing concept. It permits the Court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes. Joint custody allows parents to have an equal voice in making decisions, and it recognizes the advantages of shared responsibility for raising the young. But serious questions remain to be answered. How does joint custody affect children? What are the factors to be considered and weighed? While the Court should not yield to the frivolous objections of one party, it must give thought to whether joint custody is feasible when one party is opposed and court intervention is needed to effectuate it.⁷⁵

A few years later, though, the Appellate Division, Second Department, spelled out the circumstances in which joint custody might be appropriate: "[a]n award of joint custody is only appropriate where the parties involved are relatively stable, amicable parents who can behave in a mature, civilized fashion (citation omitted). They must be capable of cooperating in making decisions on matters relating to the care and welfare of the children."⁷⁶ This was further defined by the Third Department. It is well settled that "[j]oint custody involves the sharing by the parents of responsibility for and control over the upbringing of their children, and imposes upon the parents an obligation to behave in a mature, civilized and cooperative manner in carrying out the joint custody arrangement."⁷⁷ For these reasons, although an award of joint custody generally is recognized as inappropriate where the parties

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cooperate in joint physical custody situations" and that joint legal custody "affords more rights to the non-custodial parent than sole custody . . . [since] . . . the noncustodial parent may feel that he or she is more significant in his or her children's lives, and may, therefore, be more willing to accept emotional and financial responsibility").

⁷⁴ N.Y. DOM. REL. LAW § 240 (McKinney 1990).

⁷⁵ *Dodd v. Dodd*, 430 N.Y.S.2d 401, 402 (N.Y. Sup. Ct. 1978).

⁷⁶ *Trolf v. Trolf*, 510 N.Y.S.2d 666, 667 (N.Y. App. Div. 1987).

⁷⁷ *In the Matter of Drummond v. Drummond*, 613 N.Y.S.2d 717, 718 (N.Y. App. Div. 1994).

are so embattled and embittered as to effectively preclude joint decision-making,⁷⁸ “[s]uch an arrangement may be ordered . . . where both parties are fit and loving parents, possess a desire to share in the upbringing of their children and have demonstrated a willingness and ability to set aside their personal differences and work together for the good of their children.”⁷⁹

The concept and the reality of joint custody grew out of the context of equal rights for women, including the right to work and to be free from having full-time child-rearing responsibilities.⁸⁰ Men embraced joint custody because it gave them more rights than they had previously.⁸¹ Some authors have stated that by being more involved, non-custodial parents will be more likely to pay child support.⁸²

On the other hand, some feminists have criticized the concept of joint custody. One argument is that men who had little to do with their children are suddenly given equal say in how they will be raised.⁸³ Some advocates argue that it is bad for children to be raised in two different homes.⁸⁴

And yet joint custody has its proponents, precisely because it is based upon a value of equality between the parents. As Jo-Ellen Paradise stated:

The term “custody battle” is frequently used to refer to the process whereby a couple reaches a decision regarding custody. Such disputes pit parent against parent to determine who is better fitted to raise the children. The fact that a court purports to “award” custody suggests that, in the end, there are winners and losers. Joint custody, however, eliminates these emotional struggles, allowing both parents to “win.” Neither need demonstrate a higher degree of parenting skill than the other, and the children maintain significant contact with both—providing a more holistic life for them all.⁸⁵

Today, joint custody (legal, physical or both) is presumed in

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⁷⁸ Braiman v. Braiman, 387 N.E.2d 1019, 1021 (N.Y. 1978).

⁷⁹ Palmer v. Palmer, 637 N.Y.S.2d 225, 226 (N.Y. App. Div. 1996).

⁸⁰ Paradise, *supra* note 63, at 571.

⁸¹ *Id.* at 568–69 (noting that “[j]oint custody arrangements allow men to spend more time with their children, decreasing the likelihood that shallow father-child relationships, common to sole maternal custody awards will develop”).

⁸² *Id.* at 566.

⁸³ MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 149–50 (2005).

⁸⁴ Elizabeth Marquardt, Op-Ed., *When 3 Is Really a Crowd*, N.Y. TIMES, July 16, 2007, at A17 (noting that even in “good divorces,” children are forced to “grow up traveling between two worlds, having to make sense on their own of the different values, beliefs and ways of living they find in each home”).

⁸⁵ Paradise, *supra* note 63, at 524.

many states, including California, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee and Texas.⁸⁶ Although joint custody is not presumed in New York State, New York Domestic Relations Law Section 240 provides that the court:

must give . . . direction, between the parties, for the custody . . . of any child of the parties, as . . . justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent.⁸⁷

Professor Guggenheim argues that child custody disputes are not about the children at all, but serve the parents' interests.⁸⁸ Others have also seen custody disputes as resembling property disputes. As professor and noted family law scholar Andrew Schepard put it:

Custody of a minor child encompasses a broad set of rights including "possession" of the child and decision-making capacity with respect to the child's upbringing. It historically focuses on parental power, not parental responsibilities. The child is deemed to be "in custody" of the parents because the child has no independent rights.⁸⁹

In English common law, it was presumed that men would be awarded custody because of this ownership right.⁹⁰ In the late nineteenth century, American case law reversed this presumption in favor of the woman in a custody dispute.⁹¹ The "tender years doctrine" assumed that women were better nurturers of small children than men.⁹² This was the predominant case law through the late 1950s. The resurgence of middle class women into the work force in the 1960s led to courts trying different standards and ar-

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⁸⁶ *Id.* at 559–60.

⁸⁷ N.Y. DOM. REL. LAW § 240 (McKinney 1999).

⁸⁸ GUGGENHEIM, *supra* note 83, at 143 (arguing that "[t]he history of child custody disputes is the story of adults using the language of children and their rights to gain something for themselves").

⁸⁹ Andrew Schepard, *Cooperative Parenting After Divorce and Separation*, N.Y. L.J., June 4, 1977, at 3.

⁹⁰ Paradise, *supra* note 63, at 525.

⁹¹ *Id.* at 526.

⁹² *Id.* at 526–27 (stating that the tender years presumption that custody should be awarded to mothers "ultimately established a maternal preference in the twentieth century, where, absent a showing of unfitness, the mother automatically received custody of children below a certain age").

rangements to make custody decisions.⁹³

How do judges decide? Today practitioners operate under the “best interests of the child” doctrine, which compares the parents’ interactions with the child and siblings, the child’s adjustment to the parents’ homes, the child’s wishes, and the mental and physical health of all involved.⁹⁴ The best interests doctrine seems both fair and child-centered.

Yet there are problems with the best interests standard, too. It is applied unevenly, with some judges determining that some factors matter more and some not at all. It pits one fit parent against another, often with the child caught in the middle. Professor Guggenheim points out that “by relying on such an indeterminate standard, parents are encouraged to litigate their dispute with their ex-partner.”⁹⁵ He states that the number and intensity of contested custody cases has risen exponentially.⁹⁶ In addition, these cases last longer and are costlier to resolve. In divorce cases this means that the money which was meant for the child’s care, upbringing, and education is now going to parents’ attorneys.⁹⁷

One problem with joint custody, either as agreed to in mediation or as awarded by the court, is that if parents cannot agree on an issue in the future, they must come back to court to have the issue resolved by a judge or referee. As one family court judge put it, “while joint legal custody may sound like the fairest and best option, unless the parents can talk to each other and mutually reach decisions about their child, no matter how they may feel about each other, joint legal custody cannot work.”⁹⁸ Mediation is designed to help parents talk to and mutually reach decisions about their children.

Detractors from joint custody argue that people may come back several times to file violations or requests to modify custody and visitation orders. This may happen more often in family court where there are no filing fees and where most people represent themselves than in supreme court. Repeated filings, of course, clog up the judicial system, which cannot “micromanage” these disputes.

There is a sense among judges that, if people could handle

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⁹³ *Id.* at 529.

⁹⁴ GUGGENHEIM, *supra* note, at 152.

⁹⁵ *Id.* at 158.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Letter from Ann E. O’Shea, Judge, Family Court of the State of New York, to Parents [Litigants] (Sept. 14, 2007) (on file with the New York City Law Review).

their own problems, they would not have come to court in the first place.⁹⁹ I would argue, however, that people who use mediation to reach an agreement are more prone to take responsibility for their actions and to work things out with each other (albeit with the help of a third party) than are people who simply rely on an authority figure to make a decision for them. Parents who can mediate successfully are the best candidates for joint custody. Therefore, it is ironic that clients who have been through mediation are the very litigants who are barred from obtaining joint custody orders. Additionally, there is no evidence that people with joint custody as a result of mediated agreements come back to court more frequently than those granted joint custody by a judge.

Then there are, of course, the issues of class and race, which cannot be ignored in any discussion about New York City Family Courts. There is a general perception that the courts play a larger part in the role of the lives of the poor. Certainly that is reflected in the "apartheid" reality of who the family court litigants are. I do not imagine that the judges who came up with the policy not to allow joint custody in mediated agreements were overtly contemplating that people of a certain class or race could not handle the responsibility of such a determination. However, since we have a kind of *de facto* segregation among the Courts, the impact of what happens in Family Court is certainly felt more in poor, non-white communities than it is in the general population.

The Court's Alternative Dispute Resolution Coordinator, Catherine Friedman, Esq., suggested that judges might be more open to agreements including a provision for joint custody if they are well-thought-out and detailed. She referred to a Parenting Plan checklist, which had been given to Program mediators and which serves to remind the mediator to review the details of exactly how the parents will share time with their children, and how they will make decisions in the future.¹⁰⁰ While parties may find it hard to project what situations will arise, mediators know that the details are central to a good agreement. Certainly, lawyers know that it is in interpretation where the real basis for future disputes can arise, and that cases can rise or fall on the interpretation of one or two words.

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⁹⁹ Friedman, *supra* note 62.

¹⁰⁰ NEW YORK CITY FAMILY COURT MEDIATION PROGRAM, PARENTING ISSUES 1, 3-5 (developing the Parenting Plan by discussing various issues including communication between parents, communication with children, parenting time and visitation, sharing information about the children, decision-making, and parenting schedule) (on file with the New York City Law Review).

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As I was going into the last session, the Court mediation coordinator told me that the judges would no longer accept agreements that included joint custody. So when I sat down with Maritza and Juan, I explained that this was not an option. One of you could have sole custody, I explained. Or you could split custody, meaning one of you has final say in decision making about two areas, and the other has final say in decisions about the third.

"Come on, Maritza, let's split it," Juan said. "You take religion and education, I'll take healthcare. Come on."

The three of us all knew that if they did not come to an agreement about custody, the judge would grant it to her. She wouldn't budge. "I'll think about it," she said. I knew that this meant she would talk to her mother. "I can't decide it here, today."

"Is there any information you need that you don't have now?" I asked.

"No. I'll let you know."

All of a sudden, the balance in the room shifted drastically. I felt as though we were on a ship, listing heavily to one side, and were about to sink. Where the power balance had been more or less even—a conversation between them—now Maritza had all the cards. Juan was powerless. He was just waiting for Maritza to make a decision. He sat back in his chair, deflated—almost defeated.

Why were we here? I wondered. All of the stuff I'd told them about how they could shape their own agreement seemed to go out the window. Juan had no power to shape anything at this point.

In addition, Maritza wasn't even willing to let us in on the process, although I tried to draw her out to do so. She was holding the cards and wanted to retain that power. We continued to work on the details of the agreement, times for pick up and drop off, holidays when each parent would have time with Carlito, but it seemed more like an exercise than a process. Juan was quiet toward the end, and I could tell the realization that he had lost control was beginning to sink in.

A few days later Maritza emailed me and said that she would not agree to any kind of joint custody. It was clear that she had spoken to her Greek chorus. Because we'd met so many times, and because of budget limitations, I was not able to meet with them for another session. I wrote up the agreement to the extent I could, stating that the parents could not agree on the question of joint legal custody, and asked the court to make a decision. There was no doubt in my mind that it would be awarded to Maritza.

I couldn't stop thinking about this case for weeks. It seemed that mediation, which had so much potential to help these young parents, had the opposite effect. If they had just gone to court, Maritza would have been awarded custody, but Juan never would have been told that he

had the option of self-determination. Yet, we had held out a promise. We had told him that he could have some power to shape his own future, and that he might have more involvement in his son's life. We had told them both that we would help guide them through an experience of working things out, of making decisions together, of going beyond the positions they put on the table, and help them make choices based upon larger goals and values. And yet, that was not at all what happened. In the end, Maritza held all the power and she held it over Juan. The process had backfired.

IV. JOINT CUSTODY IN MEDIATED AGREEMENTS

Beginning in May 2007, Program mediators were told that they could no longer write agreements with joint custody written into them in Brooklyn. We were told that this was a mandate of the judges and referees who heard custody and visitation cases. It was only the Brooklyn judges who insisted on this, not the judges in other boroughs. It was, they explained, a question of judicial economy. Their thinking was that, if couples got along so poorly that they had to come to court to resolve their differences, it was clear that they could not make decisions together, thus they were not suitable for joint custody. To include joint custody (and therefore joint decision-making) was only to invite couples to come back again and again when any little issue arose.

The Program staff gave us suggested language, which at least one judge found acceptable.¹⁰¹ The suggested language looks like joint custody at first, but is in fact sole custody as given to the parent who has physical custody. It says:

Joint custody is awarded to both parents; physical custody of the child(ren) is awarded to the _____; both parents will share the responsibility for making major decisions about the child(ren)'s education, need for supplemental instruction from tutors or other specialists, medical care and treatment, need for therapy and counseling; religious training and extra-curricular activities; *both parents will have an equal say on these issues but acknowledge the possibility that they may not be able to reach a joint decision after reasonable negotiation and consultation, and in that case, the final decision will be made by the parent with physical custody*; each parent shall have access to information about the child(ren)'s progress in school, grades and [sic] will be permitted to attend school functions and meet with the child(ren)'s teachers, and have access to

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¹⁰¹ I was told that one of the most vocal judges on this issue was Hon. Paula Hepner, a well-respected and very thoughtful and experienced Family Court Judge. Judge Hepner declined several invitations to be interviewed for this article.

medical information and contact with the child(ren)'s treating physicians or therapists; in the event the custodial parent is incapacitated and unable to care for the child on a temporary or limited basis the custodial parent is to arrange with the non-custodial parent for interim care of the child(ren) as a first resort.¹⁰²

Although this language gives the non-custodial parent the opportunity to have more involvement than straight sole custody, it is not enforceable as a joint custody arrangement. The language suggested for sole custody is as follows:

Sole custody is awarded to the _____; the custodial parent will arrange for the non-custodial parent to be given access to information about the child(ren)'s progress in school, grades and deportment; the non-custodial parent will be permitted to attend school functions and meet with the child(ren)'s teachers; the custodial parent will honor the right of the non-custodial parent and child(ren) to communicate with each other without interference or monitoring by telephone, in writing or by e-mail during reasonable hours; the custodial parent will not schedule extra-curricular activities, lessons, trips or appointments at a time which will interfere with the other parent's right of contact or visitation; the custodial parent will arrange for the non-custodial parent to have access to medical information and contact with the child(ren)'s treating physicians or therapists; in the event the custodial parent is incapacitated and unable to care for the child(ren) on a temporary or limited basis, the custodial parent is to arrange with the non-custodial parent for interim care of the child(ren) as a first resort.¹⁰³

The above language promulgates a half-truth. The words "joint custody" are in the language, but the reality is that the person with final decision-making power has sole legal custody.

To disallow joint custody in a mediated agreement is in conflict with the goal of self-determination, which is one of the core foundations of mediation.

Did they think that poor people were more likely than rich people to come back to court? Perhaps—and perhaps this is true. There are no filing fees in Family Court, and because people tend to represent themselves rather than hire lawyers, it is a much cheaper process. Would judges have imposed such a rule if the cli-

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¹⁰² NEW YORK CITY FAMILY COURT MEDIATION PROGRAM DOCUMENT: SUGGESTED MEDIATION LANGUAGE, (on file with the New York City Law Review) (emphasis added).

¹⁰³ *Id.*

ents were middle class and white? It's hard not to entertain that thought.

Sometimes the judges are right. In one case I mediated, the father insisted on keeping primary custody even though he often left the child with the child's grandmother rather than letting the mother have the child more often. He was unwilling to move from his position, and they could not come to an agreement. But there are times when couples have a history of working things out, and of getting along. In those cases, I believe joint custody would be appropriate.

V. CONCLUSION

Joint custody should be one of the options available to couples that are divorcing, no matter how poorly they are able to co-parent. Joint custody is available to parents in New York City Family Courts in Manhattan, the Bronx, Queens and Staten Island. It must also be available to parents who mediate their agreements in Brooklyn. The mediative experience can be a model for joint decision making, and can serve to help couples overcome their differences by focusing on the larger picture, particularly on the needs of their children. This goal is idealistic, but once they have been through mediation, parties have listened to each other and worked together to arrive at mutually agreeable solutions.

This mediative process could also improve dialogue between judges and mediators, who also have a continuing relationship. They could apply the principles of mediation to work together to reach mutually agreeable solutions within the realities of the court system.

Family Court Judges have the incredibly difficult task of handling huge volumes of cases with few resources and often complicated facts. However, they must never lose their humanity. The great judge, Jack B. Weinstein, Senior Judge United States District Court of the Eastern District of New York, once wrote under the header "Empathy, Most Powerful Solvent":¹⁰⁴

Trial judges, as front-line representatives of the law, the human face of the law, cannot blink away the baleful effects in our criminal and civil litigations of sharp and growing socioeconomic differences. . . . The challenge to the judge becomes how we can most effectively minimize the inequalities while providing an ac-

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¹⁰⁴ Jack B. Weinstein, *Adjudicative Justice in a Diverse Mass Society*, 8 J.L. & Pol'y 385, 409 (2000).

ceptable minimum standard for all the people in all kinds of situations. . . .

The most powerful weapon we have is empathy. The leavening influence of regard for our fellow human beings and concern for their welfare does more than any practice, procedure, rule or statute to ensure equality in the courts and our administrative agencies. . . . We must try to open communication between the heart of the law and the hearts of those who seek justice from us. This goal requires not only that we act justly on a moral plane, but also that we make our reasoning understandable and, so far as practicable, acceptable to every level of society.¹⁰⁵

In other words, judges must be careful not to think of the people before them as "the other." They must be careful not to perpetuate a two-tiered system of justice. Each person before the bench must be treated as a neighbor, a friend, a relative. As Judge Weinstein stated later in the same article, it comes down to a familiar philosophy promoted by Hillel and Jesus Christ, and is also espoused by Professor Martin Guggenheim "*do unto others as you would have others do unto you.*"

Litigants who appear in family court are often the most disenfranchised members of our community. I believe the following suggestions will further the goals of mediation while acknowledging the economic and racial realities of an overcrowded court system:

1. Make sure that all mediators have a clear understanding of the definition of joint custody, in all its permutations.
2. Train mediators to do thorough reality testing for how a joint custody arrangement would work so they understand the level of detail that must be written into such agreements.
3. Develop a list of criteria or guidelines for the types of cases that are best suited for joint custody, taking into consideration, for instance: the history of the relationship; the pattern of decision making; whether the parties have similar values on the larger issues; the maturity level of the parties; and their ability to put the needs of the children first.
4. Analyze cases that return to court for modification of custody and visitation agreements to determine whether there are more modifications of agreements where joint custody is involved.
5. Hold a conference of judges in all five boroughs or other

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¹⁰⁵ *Id.* at 409-10.

jurisdictions to discuss when joint custody works best, and how they handle joint custody in mediated agreements.

6. Speak to parents who have written joint custody into their mediated agreements to determine how they are doing, and compare those outcomes with those without joint custody.
7. Give mediators more thorough training on the court process and require them to observe contested custody hearings.
8. Teach judges about the basic mediation techniques and philosophy so they can better understand the process and power of self-determination.
9. Hold a special meeting of Brooklyn Family Court Judges to meet with Brooklyn Program mediators to discuss the issue and decide together how to address the issue of joint custody in mediated agreements.
10. Set up a mediation session between Program mediators and Family Court Judges from all boroughs so that both sides may have an opportunity to explore their own values and those of the opposite party. This would also give both sides an opportunity to be heard, while working together to arise at a mutually agreeable solution that meets the needs of all parties. The possibilities for such solutions would be myriad.