

# **Child Custody Proceedings Reform**

## **High-Conflict Custody Cases: Reforming the System for Children Conference Report and Action Plan\***

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The goal of this interdisciplinary, international conference was to develop recommendations for changes in the legal and mental health systems to reduce the impact of high-conflict custody cases on children. The participants in the conference wish to thank the American Bar Association Family Law Section and The Johnson Foundation for bringing us together to discuss this extremely important topic and for facilitating the creation of this conference report.

### **PREAMBLE**

High-conflict custody cases seriously harm the children involved. Children caught in the middle of high-conflict cases face perpetual emotional turmoil. They may become alienated from a parent or be harmed by exposure to domestic violence. Children trapped in high-conflict custody disputes may be at greater risk for substance abuse and educational failure. In addition, high-conflict custody cases drain court, family and mental health resources, take additional time, and create anxiety for all involved, from the legal and mental health professionals to the litigants and their families. Children suffer in an adversarial system that declares winners and losers and does not provide adequate support mechanisms for the parties.

High-conflict custody cases are marked by a lack of trust between the parents, a high level of anger and a willingness to engage in repetitive litigation. High-conflict custody cases can emanate from any (or all) of the participants in a custody dispute -- parents who have not managed their conflict responsibly; attorneys whose representation of their clients adds additional and unnecessary conflict to the proceedings; mental health professionals whose interaction with parents, children, attorneys or the court system exacerbates the conflict; or court systems in which procedures, delays or errors cause unfairness, frustration or facilitate the continuation of the conflict. High conflict cases can arise when parents, attorneys or mental health professionals become invested in the conflict or when parents are in a dysfunctional relationship, have mental disorders, are engaged in criminal or quasi-criminal conduct, substance abuse or there are allegations of domestic violence, or child abuse or neglect.

Family law is unique. Unlike cases in which the litigants never see each other after the judge or jury makes a decision, cases involving custody of children are never final and can continue throughout the child's minority. Civil and criminal laws may be involved. The goal of the family law system should be to give the parties the tools to restructure their lives after the immediate case. Central tenets of this system should be to reduce conflict, assure physical security, provide adequate support services to reduce harm to children, and to enable the family to manage its own affairs. To accomplish this, judges, lawyers and mental health professionals need to adopt new models for resolving family disputes that focus on the welfare of children.

These new models need to be supported by an increase in research on high-conflict families and the impact of conflict on children. We need to find ways to distinguish high-conflict cases from those in which the parents are able to manage their affairs without significant state intervention. We have too little information on the impacts of custody disputes, divorce and dispute resolution processes. From necessity, we too often proceed from anecdotal information and individual observation. Case management, intervention, education, and therapy programs need to be evaluated. Research and evaluation should be interdisciplinary and directed at developing and improving the new models and identifying successful strategies for lessening the harm caused to children from custody disputes.

These new models also need adequate financial support. Judges, lawyers and mental health professionals should work together to raise the status of courts that handle family matters and to ensure that these courts have adequate support and access to services for the families that they serve. Appropriate legal representation and mental health assistance should be available to all families without regard to income. Funding should be structured to ensure high quality, independent services.

The conference identified mental health professionals, lawyers and judges as those having the greatest power to influence the conduct of high-conflict custody cases and concluded that they should bear the primary responsibility for preventing or reducing conflict in high-conflict cases. High-conflict custody cases need a specialized approach. Judges, lawyers and mental health professionals should have special training in handling high-conflict cases. They must develop ways to work together under new collaborative models to more effectively identify and resolve high-conflict custody cases. They must remain sensitive to the need to encourage cooperative parents to resolve their disputes and not burden them with unnecessary intervention. They should provide information to parents about the legal process, the availability of conflict-reducing dispute resolution mechanisms, and the harm caused to children by parental conflict. These new models should hold all the participants in custody cases accountable for their contribution to increasing or decreasing levels of conflict, be sensitive to the rights and privacy of individuals and be prepared to intervene to the extent necessary to protect children.

A key element for the development and implementation of a model to address high-conflict custody cases is the collaborative efforts of the bench, bar and mental health professionals. Our report makes recommendations in specific categories to each of these

groups and is designed to stimulate action by articulating "operational principles" that can form the basis of policy and procedural changes.

## I. MENTAL HEALTH PROFESSIONALS

**Basic Principle:** Mental health professionals should take a proactive role in developing a community that supports responsible, healthy parenting and in developing resources and abilities to meet the needs of separating, never married, and divorced families.

1. Clarify Roles
  - a. Mental health professionals should ensure that the legal community and court are aware of and adhere to the ethical rules and standards promulgated by their mental health professional organizations concerning child custody evaluations and other custody related issues. Mental health professionals are obligated also to understand court-connected rules or standards of practice, if any, and to adhere to these standards in conducting these evaluations or investigations. If a conflict exists between standards, these should be discussed in joint meetings with court representatives.
  - b. The mental health community must be clear about and respect the role boundaries and responsibilities that are involved in the process of divorce and separation, distinguishing among roles of evaluator, therapist, parent coordinator, mediator, arbitrator and other professionals involved in the case.
  - c. Mental health professionals should, in collaboration with other service providers and attorneys, consider ways to conserve the family's available financial resources and time and prioritize and coordinate their efforts when recommending services. When multiple mental health professionals work with separated and divorced families, they should coordinate their roles in order to bring about the best outcome for the family and the child.
2. Improve Child Custody Evaluations
  - a. Child custody evaluations should be neutral and include evaluations of both parents and all children and be undertaken with the agreement of the parents and the children, if appropriate, or by court order.
  - b. A "child custody evaluation" is comparative and focuses on family relationships, parental capacities, and the needs of the children. In contrast, a "parental capacity evaluation" focuses on one parent. A "parental capacity evaluation" should not be confused with a "child custody evaluation." A "child custody evaluation" requires the voluntary or court-ordered participation of both parents and the children. A "parental capacity evaluation" can be conducted on behalf of one parent alone.

- c. Qualifications for child custody evaluators should be uniform and each state should have a court rule or statute establishing these qualifications. Mental health professionals should strive to develop national qualification standards.
- d. Child custody evaluators should have training and continuing education in relevant areas including the differentiation of different types of conflict; the impact of conflict on child and adult development and functioning; child- interview techniques; custody evaluation protocols; domestic violence; child abuse and neglect; substance abuse; and basic principles of child custody law and procedure are essential for neutral evaluators.
- e. If there are conflicting custody evaluations, the court should order that the evaluators meet and attempt to resolve their differences before they testify in court. Meeting structures that reduce conflict among professionals should be considered, such as using the child's representative to chair or a mediator to facilitate the meeting. If the evaluators are unable to resolve differences, they should report the reason(s) for their differences to the court.
- f. In reporting or testifying about their custody or visitation recommendations, mental health professionals should distinguish among their clinical judgments, research-based opinions, and philosophical positions. In addition, mental health professionals should summarize their data-gathering procedures, information sources and time spent and present all relevant information on limitations of the evaluation that result from unobtainable information, failure of a party to cooperate or the circumstances of particular interviews.
- g. Evaluation reports should be written in plain English.
  - 1. Avoid technical jargon.
  - 2. Accentuate positive parental attributes as well as negative ones.
  - 3. Avoid adding to the family's shame by stigmatizing or blaming parents or children.
  - 4. Medical diagnoses should not be used unless they are relevant to parenting.
  - 5. Legal terms should be used only when necessary.
  - 6. If making a recommendation to the court regarding a parenting plan, reports should provide clear, detailed recommendations that are consistent with the health, safety, welfare and best interest of the child.
- h. Evaluators should work with the courts to establish appropriate confidentiality requirements for custody evaluations.
  - 1. Before an evaluation is undertaken, the evaluator and the court should ensure that the attorneys and family members know who will have access to the report and who will be allowed to have a copy of the report.

2. Evaluators should consider whether, when and how they should share their observations and recommendations with the parents or children as a way of reducing conflicts. When feasible, evaluators shall consider meeting with the parents to share observations and recommendations rather than leaving that to the legal professionals and the court.
3. Treatment
  - a. Before treating a child involved in a custody dispute, mental health professionals should make good faith efforts to obtain permission of both parents, except for immediate needs in cases of emergency. If permission is not obtained, the parent must get a court order for treatment. Mental health professionals should make affirmative efforts to determine if a custody dispute is contemplated.
  - b. Mental health professionals involved in treating members of divorcing and separating families should describe their obligations of confidentiality to their clients and obtain adequate informed consent prior to beginning treatment.
  - c. Mental health professionals who are involved in treating members of a divorcing or separating family should get signed waivers of confidentiality to allow them to confer among themselves concerning issues of parenting and the child's interest and welfare. Such shared communication should remain confidential and not be revealed to the parties or their attorneys.
  - d. Children's therapists should be aware of the possible negative impact of their testimony on the therapeutic relationship. When required to testify, children's therapists should :
    1. assure that privilege has been appropriately waived;
    2. clearly indicate that they do not have the information needed to make specific recommendations regarding custody or visitation;
    3. explain that information they provide to the court on how the child may react to proposed arrangements can be based only on developmental needs or stated preferences of the child, and not on a comparison of the parents.

## II. LAWYERS

**Basic Principle:** Lawyers should take a proactive role in reducing conflict between disputing parents and promoting collaborative problem solving with parents, mental health professionals and the court.

1. The Lawyer's Responsibility to Promote Conflict Resolution
  - a. Lawyers should diligently exercise their counseling function in assisting their clients to avoid inappropriate conflict in dealing with custody-related issues, including the ways in which the parties and counsel pursue litigation. Lawyers should discuss with client parents the negative consequences of custody conflicts and

disputes on their children and should advise parents about the availability of resources to reduce conflict.

- b. Lawyers should discuss alternatives to litigation, such as mediation, with their clients.
  - c. As a general rule, lawyers should encourage their clients to cooperate with forensic custody and mental health evaluations.
  - d. Lawyers have a duty to realistically evaluate their client's case and not raise false expectations.
  - e. Lawyers should encourage early court interventions to identify issues in high-conflict cases and should refer clients to available resources and processes to help them resolve their conflicts outside the courtroom.
  - f. Lawyers should assist one another and the court in expeditiously determining the best interests of the child by cooperating in defining and limiting the issues, procedures, and evidence necessary to determine the best interest of the child.
  - g. Lawyers should maintain a civil demeanor and encourage their clients to follow their example.
  - h. Lawyers and parties should not use the media, child protective services, or other means to create or exacerbate conflict and should be sensitive to the child's need for privacy.
  - i. Lawyers should be trained in child development, child abuse and neglect, domestic violence, family dynamics, and alternative conflict resolution and be knowledgeable about cross-disciplinary issues affecting their high-conflict custody cases, such as competencies of other professionals and available community resources.
  - j. Lawyers should develop and participate in special continuing legal education programs for high-conflict custody cases and encourage law schools to incorporate interdisciplinary training in mental health and dispute resolution into the family law curriculum to improve lawyers' ability to reduce conflict in custody cases.
2. The Child's Representative
    - a. As a general rule, in high-conflict cases a child should have a lawyer or representative who is independent of the parents and their lawyers. In some limited circumstances a representative for the child may not be necessary, perhaps in cases involving very young children in which the judge believes that the child's interests are being properly considered by the parties, for example.
    - b. Taking into account lawyers' ethical rules, jurisdictions should define and describe the roles to be played by the different legal representatives of children, distinguishing, for example, between the role of a guardian ad litem and the child's lawyer.
    - c. Jurisdictions should adopt appointment criteria and performance standards for appointment of children's representatives.
  3. Ethical Considerations

- a. The legal profession should develop protocols for working with unrepresented opposing parties in high-conflict cases.
- b. The ethical rules should be revised to develop separate rules specific to the context of family law, particularly to include rules which promote achievement of the collaborative, cooperative principles set forth above.
- c. Mechanisms need to be developed that will allow independent representation of indigent parents, but prevent the inappropriate use of public funds to fuel conflict. Providing public funding for attorneys for indigent parents in custody proceedings creates an ethical dilemma in the context of high-conflict custody cases. On the one hand parents who need legal assistance and are indigent should receive it; on the other hand, when parents are paying their attorneys themselves, the cost of litigation can serve as a means for constraining conflict.

### III. THE COURT SYSTEM

**Basic Principle:** Courts should proactively seek ways of helping parents in a custody dispute protect or restore healthy relationships with their children and develop mechanisms for resolving disputes with each other in a timely manner in the best interests of their children.

1. Improve Case Management
  - a. There should be a timely identification and screening process that includes short assessment tools to identify high-conflict cases.
  - b. Courts should impose control and structure on high-conflict custody cases through the use of management tools such as pre-trial conferences.
  - c. There should be a quick and efficient calendaring system that prioritizes high-conflict cases.
  - d. Courts should have designated case managers and adequate technology and information management systems to link and track cases involving the same parties and to facilitate connection to community resources.
  - e. Courts should have a system for coordinating and monitoring the multiple claims, deadlines, services, and other litigation and resource requirements in high-conflict cases.
  - f. Courts should require the timely development and submission of plans from parents that, in a manner that seeks to preserve a meaningful role for both parents, describes the time each parent will spend with the child and the responsibility and system for making decisions about the child, consistent with the need for physical and emotional safety of parents and child.
2. Provide Services
  - a. The following services and programs should be available to all families, without regard to income, through the court or referrals:

1. Mediation.
  2. Custody evaluations conducted by a joint neutral evaluator appointed by the court who should serve throughout the case.
  3. Investigations, such as assessments of the child's home environment and education status.
  4. Education programs tailored to meet the needs of different families, such as a program that emphasized constructive parenting behavior and preserving safety for high conflict families.
  5. Parenting monitors, coordinators, or masters who are professionals trained to manage chronic, recurring disputes, such as visitation conflicts, and to help parents adhere to court orders.
  6. Group and individual mental health treatment with specific goals designed to help parents manage their conflict responsibly and ease the stress on the child.
    - i. Supervised visitation and transfer of the child from one parent to another.
    - ii. Drug and alcohol screening and treatment referrals.
    - iii. Domestic violence services.
    - iv. Trained children's representatives.
- b. Interventions and services should be carefully tailored to meet the unique needs of each individual or family. Issues that should be considered in developing a service plan are the level of intrusiveness of the services, the number of requirements being imposed, accountability for the adequacy of the service, and the parents' level of interest in the service.
- c. The court should disseminate objective literature to all parties involved in custody disputes on the laws and procedures involved. Parents and children should have a roadmap that explains the court system, what is expected of them and the roles of other participants. The courts should distribute information about community resources available to the family.
3. Appropriate Selection of Judges
    - a. Judges handling high-conflict custody cases should have specialized education and training on dynamics of high-conflict cases and effective ways to manage conflict.
    - b. Judicial assignment should promote continuity and tenure that assist handling high-conflict cases.
    - c. Judges should be trained in child development, child abuse and neglect, domestic violence, family dynamics and alternative conflict resolution and be knowledgeable about cross-disciplinary issues affecting high-conflict custody cases, such as competencies of other professionals and available community resources.
  4. Improve representation

- a. Judges should assist lawyers in maintaining focus and reducing conflict.
  - b. Judges should utilize appropriate sanctions for lawyers who file frivolous or bad faith motions.
  - c. Judges should take the initiative in maintaining civility and reasonableness in pleadings and interactions among counsel and the parties.
  - d. Courts should be empowered to appoint a lawyer or representative for the child in high conflict custody cases .
  - e. Judges and lawyers should insure that specialized education and training is required for all of the child's representatives in high-conflict cases.
  - f. Judges should determine if parents wish to proceed pro se and should provide additional educational materials to parents who chose to proceed pro se. If parents need counsel but are indigent, counsel should be appointed.
5. Structural Changes
- a. Courts should continue to explore ways to coordinate services, reduce fragmentation and provide continuity and consistency for a variety of family disputes through implementing new structures such as the unified family court model.
  - b. Procedures should be created to identify deficiencies of a custody evaluation report prepared by a court-appointed evaluator. There should be a presumption that the court will order only one evaluation, rebuttable through a separate hearing on whether a new evaluator should be appointed because of report inadequacies or other unusual circumstances.
  - c. Courts should develop procedures for expeditious and cost-effective procedures for examination and cross-examination of evaluators, such as telephone conferences; audio or video examinations; videoconferences; and scheduling of appearances.
  - d. Courts should work toward constraining costs and developing means of resolving custody cases that will be affordable for most parents.

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