FACE
Fathers' and Children's Equality

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TESTIMONY OF MARTHA M. QUIMBY
SUBCOMMITTEE ON COURTS
JUDICIARY COMMITTEE OF THE HOUSE
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Thank you for inviting me here today to testify concerning Senate Bill 432. I represent Fathers' and Children's Equality (FACE). FACE is an all volunteer, non-profit children's advocacy organization and a self-help and support group for non-custodial parents and extended families of non-custodial children.

We are organized in Pennsylvania, New Jersey, and Ohio. In Pennsylvania, we are organized in 47 counties. State-wide our help-lines receive an average of 12,000 requests for help during a year. In Central Pennsylvania, since FACE become active here, we have received 100 requests per month.

On march 28th of this year, I testified before the Joint Legislative Task Force on Domestic Relations Law. I expressed FACE's qualified support of Senate Bill 432 as part of a package of proposed changes to Title 23. We support mediation as the best means to settle the issues surrounding family dissolution. Some couples are able to negotiate and settle the issues themselves, and go before the court only to have their arrangement approved. We wish this happened in all cases, sadly this is not so. For those couples who cannot agree, the adversarial system in use in PA, more often than not, only worsens the situation for all involved, especially the children.

I have included with my written testimony, a graduate research paper recommending the use of mediation to settle divorce issues. The social research done in divorce settlement shows over and over, that both the participants who volunteer, and the

participants who are ordered by the court, to mediate their cases are more satisfied with the outcomes than couples who use traditional court processing. Studies by Kelly (California, 1983-85), Bautz and Hill (California & Kansas, 1982-85), Pearson and Thonnes (Colorado, 1979-81, and California, Conneticut, Colorado, Minnesota, 1981-83), and The State Justice Institute (Florida, Nevada, North Carolina, New Mexico, 1988-90) all have similar rates of satisfaction with the outcomes, approximately 70 percent for mediation compared to twenty to thirty percent for traditional court processing.

The individuals in Joan Kelly's longitudinal study who chose either mediation or court processing showed few initial differences in levels of marital conflict, the level of and difficulties with marital communication, or a unilateral decision to divorce. Put another way, those that chose to mediate were no less angry , or any more friendly or cooperative than those who didn't. Summary tables of her results published in 1989, and a copy of the discussion section from the journal article from which the tables were excerpted are also included with my written testimony.

When you study the tables, you will see that while both the men and women in both samples felt the mediator or attorney handled their case in a skillful manner, significantly more of the mediating sample rated the mediator as highly skilled than adversarial clients rated their attorney.. Mediating women, of all the groups, were most likely to feel that the mediation process helped them stand up for themselves, especially so, in financial affairs.

This longitudinal found a significant difference in the impact on the post divorce spousal relationship. Seventy-six percent of mediating women and sixty-two per-cent of mediating men believed that mediation helped them become more reasonable in their dealings with each other. With traditional processing, the percentages were twenty-nine percent for women and thirty-nine percent for men. In satisfaction with custody, there were no significant gender differences, seventy-two percent of mediating mothers felt the arrangements were beneficial to all the family members while only fifty-one percent of the other group felt all family members benefited with their custody arrangements. Mediators

were viewed as significantly more helpful in identifying useful ways to arrange custody and visitation. Those who mediated also felt that the mediation process itself increased their understanding of their children's psychological needs.

Bautz and Hill (1991) found that couples who used mediation missed fewer child support payments and mediating non-custodial parents saw their children more often than their traditional court processed counterparts. Another study, that dealt exclusively with identified high conflict parents, found that at two and three years post divorce, there was a marked decrease in expressed hostility and conflict with mediating couples (Johnson & Campbell, 1988).

None of these studies addressed the cost and length of time it takes to settle a case. The State Justice Institute (1992) undertook to address these issues, in addition to satisfaction with outcomes in four states. As I stated before, their satisfaction ratings were not significantly different than the others. The costs and time to settlement were not less for mediation, but neither was the cost or time greater. In all the books and journal articles that I have read, a bibliography is included with the package, none were opposed to mediation, the worst that could was said was that the results were no worse than found in the traditional court processing.

I have to ask, why then, doesn't Senate Bill 432 make mediation mandatory? California requires mediation, Washington requires parents to sit down together with a trained third party to work out a parenting plan which is then filed with the court. The only exception should be cases where there is prolonged violence and abuse in the relationship. But it should be up to the abused individual to opt out by requesting an exemption from the court. FACE strongly objects to the language in this bill that automatically exempts from mediation a case in which a spouse or child has been the subject of domestic violence in the past twenty-four months. Bevard County, Florida grants exemptions only when one or both parties have been ordered for counseling, social service agencies are involved in the custody case, or there is evidence of continued and

prolonged domestic violence. In Los Vegas County, Nevada, the presence of violence is noted, the court can still order mediation, however mediation is accomplished not face to face, but at a different time or place. Our objections are to both the exemption and language. There is no definition of domestic violence in this legislation. Will an allegation of abuse keep a case from mediation? "More allegations of physical and sexual abuse are made at the time of separation and divorce than at any other period. Research indicates that only about half of them appear to be well-founded. In one review of 9,000 disputes over custody and visitation, investigators discovered 169 allegations of sexual abuse. They determined that the abuse probably did occur in fifty percent of those cases, and did not in twenty-seven percent; they could reach no firm conclusion in the other twenty-three percent (Garrity & Baris, 1994)." Nancy Thonnes (1987), a sociologist who has conducted extensive research on the American way of divorce, and Leona Kopetsky (1991), a child custody evaluator, came to similar conclusions; a quarter of the allegations are false. No where in this legislation is there any remedy for the twenty-five percent of the cases where allegations of abuse are false. In fact in the total of Title 23 there are no remedies or recourse for that twenty-five or more percent of parents, overwhelmingly fathers, who are denied access to their children because of false allegations of abuse. And here again in this legislation the oversight is repeated. The solution, in the collective opinion of our organization, is to eliminate the language "shall not", substituting instead, language allowing the court to order mediation at a different time, or if there is evidence that the abuse is continued or prolonged to exempt the parties from mediation.

Mandatory mediation is important for another reason. "In what has become known as "parental alienation syndrome" one parent encourages a child to reject the other parent. This syndrome has no agreed-upon set of criteria, scientific research has not yet documented its existence, or completely described its manifestations. Yet it is very real. It occurs when one parent convinces a child that the other parent is not trustworthy, lovable, or caring -- in short, not a good parent. ... Over time parental alienation carries

very high risks; it can seriously distort a child's developing personality and later life adjustment. ... The sooner it is identified and appropriate interventions are implemented, the better are the child's chances of avoiding its worst long term effects (Garrity & Baris, 1994, page 66)." The traditional adversarial court process is not set up to identify or intervene when this destructive behavior occurs. Indeed the entire process of divorce in Pennsylvania supports and encourages it. "By its very nature, litigation determines blame and punishes guilty parties. ... A strategy of alienating parents is to convince an authority to pronounce them worthy and their ex-spouses bad parents (Garrity & Baris, 1994, 83)." ... If they lose, and if an allegation of abuse is involved, they rarely do, "the alienating parent is likely to escalate the conflict and the children are likely to remain in the middle of their parents battle (Garrity & Baris, 1994, 83)." Garrity & Baris (1994) who work exclusively with high conflict parents, say that even a well trained professional will have difficulty identifying parental alienation syndrome. During the first year after a divorce all parents express doubts about the ex-spouse's child rearing ability. However, there are signs that parental alienation is occurring, and there are questions that mediators can ask to aid them in identifying it. Attorneys and judges are not trained to pick up on the clues, nor do they spend much time with both parents. Mediators are trained and they spend time with both parents. If this legislation would be changed to allow the mediator to recommend court ordered counseling for one or both parents when serious alienation is occurring, the best interests of these at risk children would be served. Garrity and Baris (1994) relate an example from their practice with high conflict divorces. The mother of a nine year old girl was asked to name all her objections to visits between the girl and her father, she listed fifteen areas of varying importance. After discussing them, the therapist asked whether she would consent to visits once these fifteen obstacles had been cleared away. The mother was speechless. She could not say "yes" . She realized that when her complaints had been remedied, she would no longer have a legitimate reason to refuse visitation. Ultimately, for this mother, visits with the father were simply unacceptable

under any circumstance (67)." The current adversarial system, hearing the fifteen objections, would grant this mother primary custody, she will deny access, the police will not enforce the custody order, and the father involved will contact FACE, wondering what he can do in order to see his kids again.

FACE's final objection to this legislation as it is written, actually there are two, relate to the establishment and administration of mediation. The courts are to adopt "local rules regarding qualifications of mediators, confidentiality and any other matters deemed appropriate." FACE requests that the legislature establish state wide rules for mediation and the qualifications of the mediators. I am not a native Pennsylvanian, my experience as a teacher of political science was in a jurisdiction whose legislature was willing to establish ground rules in important matters for the entire state. It has always amazed me that Pennsylvania centralizes the bookkeeping task of issuing drivers' licenses and licenses plates but decentralizes the rules of court. Certainly, there is a greater number of divorces, and the pathologies may be more extreme in Philadelphia or Allegheny County than in Potter or Washington County, but the issues and pathologies are the same in all sixty-seven counties in the Commonwealth. There are commonwealth courts that refuse to release transcripts of divorce hearings, that alter the transcripts, that allow a judge to hear domestic relations cases on appeal from his hearing officer son-in-law. There is one county where a judge hears divorce cases in which is wife is an attorney for one of the parties. The word "on the street" is that whichever party gets to her first, wins the case. In a time when competition among attorneys is great, this arrangement certainly guarantees the income for this family! Not all courts are corrupt, there are judges, in our experience who are fair and open minded. The second concern is assigning to the Supreme Court the task of monitoring and evaluating the effectiveness of mediation. We have the recent example of our Supreme Court, a Supreme Court that most average citizens can't locate on a given day. We have in Pennsylvania, a Court system that even some members of this body chacterize as operating in the 19th century. Again FACE

wants the legislature to establish, by legislation, model guidelines for the all the Commonwealth Courts. When the system is to be evaluated, assign that task to the Joint Legislative Budget and Finance Committee, a group of Professional Evaluators and auditors who by definition will be independent and have no vested interest in the success or failure of mediation. Place in the legislation a minimum standard for the mediators. The Committee on professional licensure in both houses of this legislature is considering establishing standards/license requirements for marriage and family therapists and others. In the House, AB 1961. Allowing any attorney or therapist to enter this very delicate area of divorce mediation will not serve anyone's best interests, let alone those of the children whose interests Title 23 is designed to protect. One author had this to say about the training needed for mediators; "Psychotherapists and social workers, experienced in working with families are well suited for training as mediators. Lawyers or others with legal experience have much to offer, but skill in behavioral science is generally lacking (Coogler,.1978,75) The author went on to say that it was generally easier for one trained in the behavioral sciences to acquire legal knowledge than for the legally trained person to gain knowledge and a feel for behavioral science and counseling skills. This is a biased statement from a psychologist, however, as more mediation programs are adopted, more mediators are trained at the graduate level in both law and psychotherapy. The point I am making is that the Legislature, by law, should define for professionals trained in each of these fields, the minimum requirement in the other field necessary to be certified family mediators. At the very minimum, they should be required to be members of a professional organization for family mediators. We would also recommend that mediators be selected on a rotating schedule, rather than by the free choice of a domestic relations court officer or judge. Our members have been victimized too often by a custody evaluator who is chosen to evaluate all the cases heard by a particular judge.

In closing let me summarize, FACE supports divorce mediation, however, Senate Bill 432 is not adequate. Mediation must be made mandatory except for the most serious

cases of violence and abuse. The legislature should exercise leadership in establishing, by law, state wide guidelines for a mediation program and minimum qualifications and training for the mediators

Again, thank you for allowing me to appear here, I will now entertain any questions from the committee.

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Table 1. Satisfaction and Perceptions of Process Dimensions

	Mediation N = 82	Adversarial N = 154	
	Mean	Mean	F
Mediator/Attorney Effectiveness			
Case handled skillfully	5.29	4.80	4.52[a]
Helpful in proposing ways to resolve disagreements	5.26	4.65	9.54[b]
Not helpful in leading to workable compromises	2.16	3.44	32.39[c]
Helped me control angry feelings when necessary	4.88	4.41	3.86[a]
Empowerment in the Process			
More confident of ability to stand up for self	M 3.44 F 4.66	M 4.43 F 4.55	6.52[b]
Helped me assume greater responsibility in managing financial affairs	4.10 M 3.52 F 3.95	3.57	5.40[a] 4.00[a] (sex)
Helped understand spouse's point of view	3.49	4.03	5.81[a]
Mediator/Attorney Impartiality			
Favored spouse's point of view	3.16 M 2.84 F 2.39	2.28	20.29[c] 5.34[a] (sex)
Imposed viewpoint on me	2.40	2.97	6.88[b]
Focus on Issues			
Wasted time by not focusing on most important issues	M 3.38 F 2.88		4.39[a] (sex)
Impact on Spousal Relationship			
Helped to become more reasonable with each other	4.80 5.09 (t3-t3)	3.50 3.50	36.14[c] 53.44[c]
Worsened communication problems	2.35 M 3.67 F 3.17	3.93	39.85[c] 4.70[a] (sex)

Note: Two-way ANOVAS, by group and sex. Group F given unless specified.

[a]$p < .05$; [b]$p < .01$; [c]$p < .001$; M = male; F = female. (Sex) indicates a sex difference in the mean, as shown in the middle column. Items were answered on a seven-point scale, where 1 = very strongly disagree; 2 = strongly disagree; 3 = disagree somewhat; 4 = uncertain; 5 = agree somewhat; 6 = strongly agree; 7 = very strongly agree.

Table 2. Satisfaction and Perception of Mediated and Adversarial Outcomes

	Mediation N = 82		Adversarial N = 154	
	Mean		Mean	F
Satisfaction with Financial Agreements				
Not satisfied with property agreements reached	2.84 2.84	(t2-t3) (t3-t3)	3.33 3.31	3.80[a] 3.25 ($p = .07$)
Spousal support agreement was fair	4.75 5.03	(t2-t3) (t3-t3)	4.27 4.27	3.40 ($p = .07$) 6.57[b]
Equal influence over terms of divorce agreement	4.62		3.96	7.86[b]
Emotional Satisfaction				
Comfortable with spouse's settlement if my own	4.76		3.95	7.51[b]
		M 4.65 F 3.78		7.45[b] (sex)
Satisfaction with Custody and Child Support				
Custody and visiting better for everyone in family	5.53		4.59	8.30[b]
Child support not adequate		M 2.37 F 3.89		25.73[c] (sex)
Understanding of Child Needs and Issues				
Helpful in identifying ways to arrange custody/visiting	5.08		4.19	10.99[c]
Increased understanding of child's psychological needs	3.81		3.06	7.53[b]
Increased understanding of costs of raising children	4.35		3.31	12.43[c]
Overall Satisfaction with Divorce Process and Outcomes				
	5.17 4.97	(t2-t3) (t3-t3)	4.06 4.06	17.43[c] 10.54[c]

Note: Two-way ANOVAS, by group and sex. Group F given unless specified.

[a]$p<.05$; [b]$p<.01$; [c]$p<.001$; *M* = male; *F* = female. (Sex) indicates a sex differences in the mean, as shown in the middle column. Items were answered on a seven-point scale, where 1 = very strongly disagree; 2 = strongly disagree; 3 = disagree somewhat; 4 = uncertain; 5 = agree somewhat; 6 = strongly disagree; 7 = very strongly agree.

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clients believed the process was useful in this regard, compared to 28 percent and 20 percent, respectively, of adversarial men and women. In addition, mediation was more helpful to parents in increasing understanding of the dollar costs associated with raising their children than was the adversarial process. While respondents in both groups had to develop expense data, the emphasis in mediation on completing a realistic budget reflecting child-rearing costs of both parents may have contributed to this difference.

Overall Satisfaction with Mediated or Adversarial Divorce. On a separate, global measure of satisfaction, the mediation group was significantly more satisfied with the mediation process and outcomes than the adversarial group was with the adversarial process. At final divorce, 69 percent of mediation respondents were somewhat to very satisfied, compared to only 47 percent of adversarial men and women. There were no significant sex differences.

Discussion

The findings reported in this chapter consistently favor mediation as a method for reaching comprehensive divorce agreements when compared to the adversarial process. All but two of the eighteen significant group differences indicated that those in mediation had more positive perceptions of and greater satisfaction with their divorce experience. Men and women in the adversarial group did not report their divorce process as better, fairer, smoother, more empowering, or more satisfactory on any measure.

In this study, mediation spouses believed that the mediation process had a more beneficial effect on their ability to be reasonable and communicative with each other compared to adversarial respondents who used attorneys. Pearson and Thoennes (in press) and Walker (this volume) also report that a majority of mediation respondents thought communication had been somewhat improved. The respondents in the current study also perceived that the mediators had led them to more workable compromises. Whether these perceptions of improved communication will result in reduced conflict and enhanced coparental communication and cooperation postdivorce will be determined in future analyses. We have reported elsewhere (Kelly, Gigy, and Hausman, 1988) that the mediation intervention resulted in greater increases in cooperation between mediation spouses at time 2 than did the adversarial experience. Pearson, Thoennes, and Vanderkooi (1982) and Emery and Jackson (this volume) have also found small improvements in the parental relationship reported by mediation respondents. Preliminary time-3 analyses indicate that while mediation and adversarial clients do not differ in their level of anger at their spouses at final divorce, the mediation group reported less

conflict during the divorce, were significantly more cooperative, and perceived their spouses as less angry than did the adversarial group.

The absence of significant group differences on a number of crucial process variables begins to address some of the criticisms leveled against mediation by those who believe that divorcing spouses will be disadvantaged unless they have the legal representation inherent to the adversarial process. The questions assessing adequacy of information produced in the mediation process indicated that, in these particular mediation interventions, mediation respondents did not feel any less informed, unprotected, or heard than did the adversarial group; neither did they believe that their spouses had an advantage over them in the negotiations.

With the exception of child support agreements, the mediation group was more satisfied with all of the outcomes reached. Fairer spousal support, more satisfactory property agreements, and better custody and visiting agreements were more often reported by the mediation group, when compared to the adversarial group. There were no significant sex differences or interaction effects for these variables. The finding that the mediation group was significantly more likely to perceive that they had equal influence over the terms of these agreements compared to adversarial men and women suggests that the mediators did a competent job of balancing power and spouses' needs. Clearly, for some adversarial respondents, the presumed condition of equal power through legal representation was not met.

The overall finding of greater satisfaction among the mediation group with their divorce processes and outcomes is consistent with those of Emery and colleagues (1987a, this volume) Irving (1981), and Pearson and colleagues (1982, 1984, in press). The sex differences reported by Emery (1987b, this volume) were not replicated here on the items regarding custody and child issues, perhaps because mediation clients were not in a court setting, where issues of winning and losing are so highly focused. Further, custody and visiting arrangements were not the only issues being negotiated in this study. Our own experience with comprehensive mediation of all divorce issues suggests that cohesive, integrated agreements that address men and women's needs around multiple issues and that strive to reach mutually satisfactory agreements about property, support, and children are more likely to be perceived overall as balanced and satisfactory by both sexes.

Much opposition to mediation currently expressed by legal and political advocates for women derives from the belief that women are less powerful and knowledgeable than men and therefore likely to be disadvantaged in all types of divorce mediation. The findings of this study do not support these concerns. On no single items measuring process or outcome did adversarial women express more satisfaction or more favorable perception of their attorneys, their divorce process, or their agree-

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ments. Mediation women were significantly more satisfied than adversarial women on eighteen process and outcome items. Further, women in mediation were equally as satisfied as men with the overall process, mediator impartiality, adequacy and clarity of data, and various mediator techniques.

Mediation women did not believe that their spouses had an advantage over them and felt they had as much influence as their spouses in reaching the terms of their agreements. The finding that the mediation group rated their experiences as more empowering than the adversarial process in terms of enhanced responsibility for managing financial affairs, and was equally as effective for women as the adversarial process in developing confidence in their ability to stand up for themselves, lends further support to the finding that women in mediation did not feel disadvantaged. Perhaps more important, mediation women were more likely to be satisfied with their property, custody, and spousal support agreements than were adversarial women.

Similar to Pearson and Thoennes's findings (1984), in this study at final divorce, 74 percent of the women who completed comprehensive mediation indicated they would definitely recommend mediation to a friend; an additional 13 percent thought that they "probably" would do so. As reported elsewhere, an analysis of clients who terminated mediation indicated that women were sufficiently powerful to quit mediation for essentially the "right" reasons—namely, feeling overwhelmed and/or unempowered or perceiving their spouses to be impossible or too angry to negotiate a fair agreement (Kelly and Gigy, in press). Substantial numbers of these women expressed considerable satisfaction with the way the process worked but believed their situation did not warrant continuation.

A preliminary analysis of final divorce data indicates that higher levels of satisfaction with the process and outcome are significantly linked to general levels of cooperation between spouses as well as cooperation specific to parenting the children (Kelly, 1988a). This study has not completed the post-divorce data collection, which will address what specific dimensions of satisfaction, if any, directly result in greater compliance with agreements or lowered relitigation rates, as has been reported by Pearson and Thoennes (in press), or whether there are unique combinations of psychological, interspousal, and process/outcome variables that more reliably predict post-divorce behaviors.

As with all mediation research, these results should be viewed with some caution. This study could not utilize random assignment; the two groups are comparison, but not matched, control groups; the respondents were a voluntary, self-selected, predominantly white, middle- to upper-middle-class, and well-educated group. While objective and standardized measures were utilized, the data reported in this chapter are entirely self-report. The mediation intervention was offered in a particular jurisdiction (California), which has property, support, and custody laws that vary from other jurisdictions. Unlike previous studies of the efficacy of mediation within the court-connected sector, this mediation intervention was offered in the private sector for the resolution of all issues and disputes relevant to divorce. And finally, the mediators were well trained, competent in mediation, consistent in approach, and knowledgeable about legal, interpersonal, and psychological matters pertinent to divorce.

These cautions notwithstanding, the results reported converge in some respects with the work of Pearson and colleagues, Emery and colleagues, and Walker. Despite different measures, populations, models, and disputes being resolved, overlapping support is emerging that mediation may be a more satisfactory process for many divorcing couples and may lead as well to more positive post-divorce outcomes for adults and children.

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MEDIATION FOR DIVORCE

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Introduction

Western societies use the same adversarial system to settle divorces that is used to determine guilt or innocence in criminal cases. The parties present arguments to support their positions; each is allowed to withhold information that would undermine his case and encouraged to freely disclose anything to further his/her cause. A presumably impartial third party, judge or hearing officer, determines the truth and rules accordingly (Gardner 1986).

Until the 1950's and 60's, divorce was considered a crime, "indignities" having been committed by one party. If both parties were found to be guilty of marital misconduct, no divorce was granted (ibid).

Enlightened state legislatures have recognized that divorces are not caused by criminal acts, but by personality differences, etc. There has been a move toward alternative means of settling the divorce issues of property division and spousal support, and the custody, support and visitation of minor children.

Literature Review

Most divorces do not come before a judge; they are settled by negotiation between the parties with their attorneys. The settlement is then taken to a judge for perfunctory approval. The "no-fault" revolution has made divorce a matter of private concern, although, the state imposes substantial legal constraints in divorces involving minor children (Mnookin & Kornhouser 1979).

Mnookin and Kornhauser (1979) argue that the law should allow divorcing spouses broad powers to make their own agreements. The financial cost is minimized; both for the individual and the state; the pain of the adversarial proceeding is avoided; and any children benefit

when parents agree on custodial arrangements. Also, the potential for the "all or nothing" consequences of litigation is avoided.

Alternative Dispute Resolution (ADR), i.e., negotiation, mediation, rent-a-judge, and arbitration, is receiving increased support even in the legal and judicial communities (Nagel 1993). Vidmar (1984) in Ontario, and McEwan and Maiman (1986) in Maine, examined the effect that dispute characteristics and dispute resolution forum have on settlement outcomes and compliance. Vidmar's research led to his introduction of a concept he labels "degree of admitted liability." Cases go forward although the defendant admits to partial liability. Cases of admitted partial liability were more likely to be mediated (74%) than were the no liability cases (51%). This self selection for meditation forecasts better compliance with the case outcome, i.e., "They have already conceded an obligation..., and this should induce greater compliance." (Vidmar 1984) Although derived from studies in small claims courts, these findings contain implications for the divorce court.

Applying "admitted liability" to divorce, there should be a prediction that the less angry, friendlier and more cooperative divorcing spouses, i.e., spouses who are willing to assume partial responsibility for the divorce, would choose mediation over litigation. However, Kelly (1989) found by studying a self-selected non-random sample of 437 divorcing spouses that there were few discernible differences in levels of marital conflict and tension, degree of difficulty with marital communication, and the unilateral decision to divorce or the level of overall cooperation between those that chose mediation and couples that chose litigation. The significant demographic differences of the couples in Kellys study were age,

education, and presence of children. Couples who chose mediation were younger, better educated, and more of these couples had children.

Measurements of satisfaction with process and outcomes were taken at the end of mediation or six months into litigation, and immediately after the final divorce for both groups. Additional measurements are planned for one and two years following the divorce.

Mediators and attorneys were rated using a Likert-type scale developed during the course of this study. Mediators were rated more helpful in proposing ways to solve disagreements, in leading couples toward workable compromises. They were rated more effective in helping spouses to control their anger than were attorneys. On the issues of empowerment of the individuals involved in the divorce, the adequacy of information provided, impartiality, and having a favorable impact on future spousal relationships the mediators also received higher ratings.

On outcomes, those that chose mediation perceived their alimony amounts and child custody and support arrangements to be more fair and, especially with the child related issues, the mediated settlements were better for everyone in the family.

McEwan and Maiman (1986) used their own and Vidmar's 91984) research to conclude that consensus processes, especially mediation, are more conducive to compliance with settlements. Both studies used "money paid" in relation to "money awarded" to measure compliance in randomly selected small claims cases. In both studies, mediated outcomes were twice as likely to have compliance(100%) as were litigated cases (48%). Unfortunately, Kelly's data on satisfaction and compliance at one and two years following the divorce are missing so parallels cannot be drawn between compliance in divorce court and small claims court. Kelly's

final data will add much to the understanding of satisfaction and compliance with mediated settlements in the divorce court.

There are other issues in divorce other than satisfaction and compliance with outcomes. The foremost is "the best interests of the child." Defining a child's best interest continues to be beyond the predictive capacity of the behavioral sciences and requires interpretation of values about which society cannot agree (Mnoonkin & Kornhauser 1979).

Mnoonkin and Kornhauser (1979) argue that a negotiated settlement is desirable from the child's perspective because a child's future relationship with each of his parents is better ensured, and his existing relationship is less damaged by a negotiated settlement than one imposed after an adversary proceeding which necessarily has a winner and a loser. Negotiating parents will know more about a child and will have access to better information about the child than will a judge.

Informal processes assume flexibility, within the constraints imposed by the courts, and participation by the involved parties in the decision making. For Erlanger et.al. (1987), party involvement is considered good in its own right because control over decisions equates with taking responsibility for and complying with them. Compliance is a crucial issue in child support and visitation.

A series of in-depth interviews with the parties and lawyers in twenty-five informally settled divorces (by negotiation rather than mediation), and an examination of the court records pertaining to each, from Dane County, MI was the basis of Erlanger's (1987) study. In addition to the attorneys, forty-three divorcing spouses, thirty ttorneys, and four family court judges were interviewed to provide a

broad perspective on the dynamics of informal dispute settlement processes. This was not a random sample, and in some cases not all parties to a divorce could be interviewed, therefore the results are only exploratory.

Of the tewnty-five cases in the study, only eight were resolved in face to face negotiations between spouses with their attorneys, and in only six was there any cooperation at all during the discussions. In the other nineteen cases, negotiations were bitter or non existent, terms were secured through threats and intimidation, or pressure from attorneys or court personnel, and in each of the twenty-five cases, one party was critical of the outcome. In contrast to the Kelly study, Erlanger found only seven cases (28%) where both parties were satisfied. For most of the cases the settlement was not reflective of mutual agreement but of the relative stamina and vulnerability to the pressures of prolonging the dispute.

Attorneys are a part of the divorce process, even in mediated divorces. They often serve as mediators and the settlement is reviewed by an attorney for each spouse before finalization by the court. "In view of the crucial role of lawyers and the functions they perform, there is very little known about how lawyers actually behave in their role as divorce counselors" (Mnookin & Kornhauser 1979).

Research in the Groingnen District, Netherlands, as to what role attorneys play in a divorce was generally found to be applicable to legal settings as disparate as Germany, Scotland, Massachusetts and California (Griffiths 1986). This study on the role of attorneys was part of a larger study addressing the processes by which divorcing couples deal with custody and visitation. The specific question of this

study was: "How much can the role of lawyers and the corresponding costs be safely reduced?" (The Dutch divorce system is publicly financed.) Data were gathered through extensive interviews with both parties to 100 divorces which involved minor children. An attempt was made to obtain a representative cross section of the district. Each parent was interviewed after a first visit to an attorney and again about a year later.

Nine lawyers representing different personal characteristics, e.g., age, gender, professional practice size, income, and proportion of family

cases, were included in this study. Also included were representatives of a number of professionally involved third parties, e.g., clergy, school officials, family doctors, neighborhood policeman, and the six judges who handle most of the divorce litigation in Groningen and the adjoining district. Lawyer-client interaction was also observed by the researchers.

Griffiths (1986) found that Dutch divorce attorneys seemed to embrace the twin objectives of bringing about a reasonable settlement and keeping their cases out of court as much as possible. In their relationship with the client they use a mix of practical advice, social norms, authoritative legal pronouncements and technical advice, control of clients' access to legal information and procedural and formal control of the case to bring about a settlement that is both reasonable and realizable. Occasionally, their client control takes the forms of overt threats. Attorneys in this study did not consider the sociological and psychological aspects of a divorce to be a central part of their conception of their role in divorces. Griffiths stated an

inference that attorneys in the United States behaved in the same manner toward their divorcing clients.

Mnookin and Kornhauser (1979) suggest that some divorce disputes are "iatrogenic", that is, they are induced and created by the legal profession. They also contend that the net effect of participation of attorneys may be more disputes and higher costs without an increase in the fairness of outcomes. Beyond that observation, they agree with Griffiths that an attorney has a Janus-like role as advocate for his or her client and as co-advocate with the opposing counsel for what is a reasonable settlement.

Property, alimony and child-support can be reduced to monetary terms but distinctions among these factors blurred. Custody can be arranged in an unlimited number of ways, but custody and money, i.e., child support, are inextricably linked. Identified important determinants of outcomes in negotiated settlements, as opposed to mediated settlements of custody, include the preferences of the parents, the bargaining chips created by the legal rules that indicate court preferences if the parties cannot reach an agreement, the degree of uncertainty of a possible court settlement (e.g., when both parents are "good parents"), the costs and the parties respective abilities to bear them, and strategic behavior (i.e., bluffing and posturing) by the participants. These factors explain why most divorces do not reach the court room. The parties gain when they can agree on the distributional aspects of divorce; they can minimize transaction costs and avoid the risks and uncertainties of a court appearance.

The parties to a divorce are usually not repeat players in the judicial system, nor do they expect their case to set precedent for

their benefit if taken to court. They can be manipulated by their attorney in the ways found by Erlanger (1987). Even the dissatisfied 78% in the Erlander study accepted the negotiated outcome.

Mediated settlements differ significantly from negotiated settlements. The type of custody arrangement, number of missed support payments and degree of satisfaction were used to measure outcomes for children in three diverse areas of the United States. Bautz and Hill (1991) collected data from three counties in California (N=124, returned 49), one county in Kansas (N=223, returned 48), and eight counties in New Hampshire (N=500, returned 120). The returned surveys came from 141 women and 45 men. Educational levels ranged from completion of 6th grade to completion of post graduate work with the highest number having completed high school. There was a corresponding distribution of yearly income levels from $9,999 to $50,000. The questionnaires used in the three states were not identical, these results are not comparable across states. This inconsistency occurred, according to the researchers, because of the different laws in each of the states. California requires mediation in cases involving children. The mediators are trained professionals, either attorneys or behavioral scientists. In New Hampshire, mediation is voluntary and mediators are themselves volunteers who have 40 hours of training. Mediation is also voluntary in Kansas.

Denial of visitation by the custodial parent does occur following a divorce, but abandonment by the non-custodial parent also occurs. In post-divorce relationships where interference with visitation was a problem, mothers accused of this behavior perceived their relationship with the ex-spouse at the time of divorce or custody action

to be exceedingly stressful and fraught with anger. These cases were clearly more bitter from the outset. Mothers who were accused of denying visitation were more likely to report non-payment of child support. (Support non-payment cases exceed visitation interference cases; it is possible to conclude that non-support cases do not always involve visitation problems but visitation problems are more likely to have support payment problems. It is not necessarily a causal relationship (Pearson and Thoennes 1989). Parents who used mediation not only missed fewer support payments, but also saw their children more often and had a more harmonious post-divorce relationship with ex-spouses.

Both visitation and support problems appear to stem from conflict patterns between the parents. The implications for post-divorce behavior from Pearson and Thoennes (1989) underscores the importance of interventions and settlement processes that increase communication skills and reduce anger. Pearson and Thornnes (1989) used lay interviews with divorcing couples in Deleware, where there is separate mediated interventions for custody/visitation and for support to rate the couple's hostility level and lack of communication skills at the time of the divorce. Judges and lay people were asked to identify cases with potential contested child custody. The lay people were able to correctly gage the degree of both hostility level and lack of communication skills.

Given that a lay person has the ability to predict when a preventive intervention could be useful, New Hampshire has achieved success with the use of trained community volunteer mediators. The couples whose divorces were the mediated receiving child support regularly and had more post divorce relationships with their ex-spouses.

(Bautz and Hill 1988). The mediated settlement group returned to court less (12%) than did those who negotiated settlements (31%). If the task of family law is to dissolve a marriage without dissolving family relationships, cooperation of both custodial and non-custodial parents is needed to nurture the children. Mediation best accomplishes this (Bautz and Hill 1991).

The literature on dispute settlement, even the traumatic disputes surrounding divorce in the presence of great bitterness and anger, show that mediation leads to greater satisfaction and compliance with the outcomes. Given that continued payment of support payments and non-interference with visitation continue long after the final divorce the implications for adopting mediation as a mandated settlement process are evident.

The Current Case in Pennsylvania

Private mediation is an option for divorcing Pennsylvanians, as is negotiation. The overwhelming number of divorces are settled by negotiation. The divorce survivor members of Fathers' and Children's Equality (FACE) relate experiences of poor representation by attorneys whose primary objective seemed to be to avoid a court appearance. Although family law is a legal specialty, very few attorneys are family law specialists and very few are familiar with current case law on family issues. The Blue vs. Blue decision by the Pennsylvania Supreme Court in November 1992, overturned Ulmer vs Sommerfield, which requires a differerent standard of support for collge students, yet the support hearing offices were applying the mandated gudelines used for minor children to post secondary support. Spouses and their attorneys

negotiate settlements from positions they have taken rather than the issues important to all parties.

When spouses are unable to reach an agreement, custody and visitation are heard and decided by an impartial attorney serving as an officer of the court. The decision can be appealed to The Court of Common Pleas, however, in 99% of the cases the judge approves the hearing officer's finding, which discourages an appeal. Spousal support and property division are decided similarly in totally separate tracks. Child support is decided in another track, but must conform to the support guidelines mandated by the federal government.

The Proposed Option

The legislature should require mandatory mediation of all divorce issues concurrently, except for those cases involving abuse. The passage of the Federal Child Support Enforcement Acts of 1979, 1988, and 1989, with Pennsylvania's subsequent adoption of the blended income Melson Formula do not permit negotiation of support by the divorcing parties. However, property division, including disposition of the marital home, custody and visitation can be mediated. Shelter and food provided for children with support payments cannot be easily separated from the shelter and food provided by/for the custodial parent. Property division, i.e., the marital home, is intertwined with both spousal and child support, if the custodial spouse is able to stay in the house, a negotiable item. Therefore, all the issues of divorce should be mediated concurrently so that best interests rather than positions taken in a power play can be met in the best way possible for all parties.

Failure to reach an agreement by mediation would result in the case going directly to court, bypassing the current hearing officer. Before

the case would be heard in court, however, the spouses' attorneys would be required to file a brief containing his/her client's case. Also, the judge would have access to the mediation notes. All these documents would be made available to all parties.

Ideally, the court hearing these cases would be a separately constituted Family Court wherein the judges would have been selected for their expertise in family law and the behavioral sciences. An investigator with some accounting knowledge should be attached to the court since income and expenses are the basis of much contention in a divorce. (A policy option proposing the establishment of a Family Court, possibly appointed on a regional basis for less populated areas, will have to wait for another student of PAdm. 556.)

The advantages of mediation.

Mnoonkin and Kornhauser support settlements between the spouses, because of the cost savings and the avoidance of pain of an adversarial process. Bautz and Hill, Kelly, and Pearson and Thoennes have found overwhelming advantages and satisfaction with mediation. There are cost savings, avoidance of adversarial proceeding pain for the spouses, better cooperation of parents in the future raising of their children, empowerment of the parties in their own affairs, and better compliance with support and visitation. Kelly found that it does not take friendly spouses in order to have a successful mediation.

The disadvantages of mediation.

If there are any, it will be the additional cost of hiring and training mediators. The experience in California, Kansas, and New Hampshire and other states where mediation is used can be looked to for experience with costs. A nominal fee added to a marriage license and/or

a divorce filing could be earmarked to support mediation costs. The current cost of a divorce can begin at $150. The upper cost limit is what the parties can, or are willing to spend, which puts women, who often have fewer resources, at a disadvantage. If the costs of mediation are charged to the parties, there might not be any difference in the amount a divorce costs.

Lack of trained mediators is a second constraint. New Hampshire's volunteer mediators receive forty hours of training. Lancaster and Dauphin Counties already have Neighborhood Dispute Resolution (Dauphin) and Neighborhood Mediation Teams (Lancaster) which are affiliated with a national mediation organization that offers training. Attorneys and behavioral scientists, as in California, could be trained to serve as mediators.

The support for mediation.

Support for the passage of mandatory mediation could be sought from childrens' groups, parents' organizations and both men's and women's groups. According to Nagel, even the legal and judicial communities would possibly support this policy. FACE, Fathers' and Childrens' Equality, a fathers' group, is discovering while lobbying that as more of the legislators and their office staffs experience the Pennsylvania divorce process, support for change is increasing in the General Assembly. Such support is meager, but there may be a "window of opportunity" for mandatory mediation. On May 4, 1993, Senator Lewis introduced a resolution to have the Joint State Government Commission investigate the Domestic Relations Offices statewide.

The opposition and obstacles to mediation.

The opposition will come from women's and children's groups who perceive that women and children will fare less well with mediation than with the current negotiated settlements. However, the women studied by Kelly (1989) were more satisfied with the outcomes of mediation than were the men.

Opposition will also come from the legal profession, whose lucrative divorce practice fees will decrease, although not disappear totally, as mediated settlements are generally reviewed by each spouse's attorney before final settlement, and possibly an attorney appointed for the children.

The administrators currently employed in the divorce business for county government are a small segment of the population of each county, but aggregated in opposition to a statewide issue they might become a factor in the opposition.

Perhaps the greatest obstacle to overcome will be the individualistic political culture of Pennsylvania. Mediation subverts the legal marketplace; it takes divorces out of the winner/loser judicial politics and gives private individuals flexibility for their own settlements.

The campaign for acceptance.

The strategy will have to be education, education, education. The groups whose support will be needed are the same groups who will likely oppose mediation, women's and children's groups, so any additional support will have to be won one individual at a time. If the support and opposition were clearly delineated, the supporters could find allies among the groups for which this issue has low or no importance. Unfortunately, there were 39,971 divorces in Pennsylvania in 1990; one

for every 3.4 marriages. Every marriage is a potential divorce so there are few totally uninterested groups.

Education should focus on the benefits to all parties in the divorce, except perhaphs attorneys, in order to overcome the inertia of "the current system seems to work fine." What the campaingn for mediation really needs is a high profile politician or sports personage who has been through mediation or who has a relative who has suffered through a Pennsylvania style divorce and who is willing and able to speak out for the cause.

Women's and childrens groups succeeded in having mandatory support guidelines required in the states. There is almost no support for changing them, but non-custodial parents want guaranteed visitation and more shared parenting. They believe these are their due because of the required increased support they are paying. Mediation seems to encourage a climate where visitation and shared parenting can survive, if not flourish.

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