

# COURT-ORDERED MEDIATION IN FAMILY DISPUTES: THE NEW YORK PROPOSAL

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## INTRODUCTION

Marital and family disputes have been an important focus for alternative dispute resolution.<sup>1</sup> Perhaps because divorce and custody disputes reveal the personal, human, and emotional aspects of conflict more visibly than other types of legal proceedings, attempts to resolve such disputes through the traditional legal process have proved remarkably ineffective.<sup>2</sup> Mediation of divorce and custody matters is a particularly promising method of achieving more expeditious, less hostile, and more enduring matrimonial and custodial arrangements.<sup>3</sup>

The mediation process offers to divorcing couples a neutral third party who will help the parties resolve their disputes. The mediator's function is to develop a mutually agreeable settlement by helping the parties to isolate points of agreement and disagreement, explore alternative solutions, and consider compromises.<sup>4</sup> Thus, mediation differs from negotiation where lawyers represent the parties and explore settlement possibilities while protecting the interests of their individual clients. It also differs from arbitration because, unlike an arbitrator, the mediator does not make decisions for the parties but instead attempts to facilitate the parties' decision making.<sup>5</sup>

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1. See generally O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS* (1978); J. HAYNES, *DIVORCE MEDIATION* (1981); D. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* (1983); Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. (forthcoming); Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911; Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1980-81); *Alternative Means of Family Dispute Resolution* (1982) (Study by A.B.A. Special Comm. on Alternative Means of Dispute Resolution, Family Law Section).

2. For a history of the legal tradition of the divorce process, see L. WEITZMAN, *THE DIVORCE REVOLUTION* 1-51 (1985).

3. See Coogler, Weber & McKenry, *Divorce Mediation: A Means of Facilitating Divorce and Adjustment*, 28 FAM. COORDINATOR 255 (1979); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984).

4. See generally Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1970-71).

5. Less "pure" forms of mediation sometimes permit the mediator to function as an arbitrator when no agreement is reached in mediation. See, e.g., O. J. COOGLER, *supra* note 1, at 23-29 (the "structured mediation" model). However, if spouses know that the mediator will

The mediation process is substantially different from the traditional approach to resolving disputes in this country. The conventional model for resolving domestic disputes posits an arms-length, adversarial proceeding with lawyers taking the lead and the marital partners playing merely a supporting role.<sup>6</sup> And even though actual litigation is the exception and settlement the norm, the ultimate resolution is often negotiated between disputing parties represented by professional champions.

The adversarial process exacerbates the trauma of divorce and separation of children beyond the direct impact of the family break-up.<sup>7</sup> Hostility generated between the parents in ensuing divorce negotiations or litigation inevitably takes its toll. The contest over custody and visitation may be even more traumatic. Children are often torn by loyalty conflicts as the parents fight directly over and about them.

The central quality of mediation, as Professor Lon Fuller has observed, is its attempt to "reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship."<sup>8</sup> The goal is to establish a workable solution and resolution that will meet the family's unique needs. Because mediation can aid the disputing parties to resume relationships with each other, it is particularly appropriate in resolving custody disputes, where divorcing parents often must have post-divorce contact with one another.

Divorcing spouses who can cooperatively resolve issues of custody and/or financial matters are likely to minimize the trauma that exists in divorce, improving their own emotional well-being as well as that of their children.<sup>9</sup> Additionally, in reaching a settlement for which they are responsible, they are more likely to adhere to the agreement, thus avoiding repetitive modification and compliance litigation.<sup>10</sup> Finally, mediation may be more expeditious than either traditional adversarial negotiation or litigation, thus reducing costs to

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function as an arbitrator, they may limit their disclosures of important information and may be less willing to negotiate. For that reason, mediators who function exclusively as mediators preserve the integrity of the process. Similar concerns justify keeping the mediation process confidential and precluding the mediator from making any recommendation to the court. *See infra* text accompanying notes 58-61.

6. Indeed, an important feature of mediation is direct, face-to-face engagement and discussion between the parties. The challenge for the mediator is to develop strategies to facilitate that interaction and to help them develop a set of shared premises on which cooperation can be built.

7. W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 307-09 (1954); D. SAPOSNEK, *supra* note 1, at 13-17; J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980).

8. Fuller, *supra* note 4, at 325-26.

9. J. WALLERSTEIN & J. KELLY, *supra* note 7. Proponents of mediation claim that it avoids the adversarial relationship and concomitant hostility that often characterize the traditional divorce process. Coogler, Weber & McKenry, *supra* note 3, at 258; Pearson & Thoennes, *supra* note 3, at 499. *See generally* M. DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES (1973); D. SAPOSNEK, *supra* note 1, at 17-22.

10. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 3 CALIF. LAW. 38, 41 (1982); Pearson & Thoennes, *supra* note 3, at 505.

the parties and burdens on the court.<sup>11</sup>

There are, of course, inherent dangers in the mediation process. Concerns vary depending upon whether mediation is voluntarily sought by couples seeking an alternative to traditional representation,<sup>12</sup> or whether it is imposed upon parties as part of a court-ordered mediation program.<sup>13</sup> The type and structure of the mediation model also affect these concerns. One issue is whether the mediating parties have reached a genuinely voluntary agreement or whether they have been victims of a coerced or uninformed settlement. Agreements can be the product of intense pressure from the mediator<sup>14</sup> or inadequate legal and factual information. A related problem is the possibility that the parties may perceive the arrangements they adopted through mediation to have been engineered by the mediator, or alternatively, they may believe that they have not had sufficient assistance in advancing their interests—the role that would normally be undertaken by their legal representative.<sup>15</sup> Any real or subjective sense of having been maneuvered into agreements will lead the parties to challenge or disregard their mediated agreements. Thus, the perceived advantages of mediation—long-term cooper-

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11. Bahr, *An Evaluation of Court Mediation: A Comparison of Divorce Cases with Children*, J. FAM. ISSUES 2, 39-60 (1981); McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke*, 19 CONC. CTS. REV. 73, 73-81 (1981); Pearson & Thoennes, *supra* note 3, at 507.

12. In its early development, private mediation was distinctly anti-lawyer in its focus. Usually, the parties were not represented by lawyers during mediation and did not consult lawyers during or after the process. Mediators tended to be mental health professionals and family counsellors. More recently, lawyers themselves have acted as mediators, and it has become standard practice for parties to have advice of independent counsel both during and after the mediation process. For a description of the various models of private mediation, see Coombs, *Noncourt-Connected Mediation and Counselling in Child Custody Disputes*, 17 FAM. L.Q. 469 (1984); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982); Winks, *supra* note 1; Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582 (1979).

13. A number of states have established court-connected mediation services for family disputes. See, e.g., CAL. CIV. CODE § 4607 (West 1983 & Supp. 1985); DEL. FAM. CT. R. 151, 464-70 (1985); FLA. STAT. ANN. § 749.01 (Supp. 1985); MICH. COMP. LAWS ANN. §§ 552.501-.535 (West Supp. 1985); OR. REV. STAT. §§ 107-755-.795 (1984). Individual programs are described in H. McISAAC, *THE FAMILY CONCILIATION COURT OF LOS ANGELES COUNTY IN ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* 111-29 (1982); A. Salius & S. Maruzo, *Mediation of Child Custody and Visitation Disputes in the Connecticut Superior Court* 28-29 (1982) (unpublished paper) (on file at the offices of the New York University Review of Law & Social Change).

14. In some instances, the mediator may in fact usurp the process and muscle the parties into an unhappy settlement. In other situations, where mediation is not confidential and the mediator may be called upon to testify or to make a report or recommendation to the court, agreements may be reached only because of the threat of an adverse report. See *infra* text accompanying note 67.

15. This concern may be alleviated if the parties are represented by counsel throughout the mediation. Such representation usually exists when parties are diverted by the court to court-ordered mediation services. Representation is also now common in private mediation as the result of numerous ethical rulings requiring a mediator to advise the parties of the advantage of seeking independent legal counsel. See Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 234-35 (1982); Silberman, *supra* note 12, at 119-23.

ation and durability of agreements—would unravel. Additionally, failed mediation merely draws out an inevitable adversarial fight and provides a possible delay tactic for one or another of the parties.

Permitting parties to choose mediation by private practitioners<sup>16</sup> is to some extent an easy social choice. Those parties who seek alternatives to traditional representation should be permitted to do so, and the role of the state should be limited to ensuring that consumers are getting complete information and that legal ethical norms are satisfied.<sup>17</sup> Whether the state should go further and provide or indeed mandate court-ordered mediation as part of its judicial processes is a more difficult policy choice.<sup>18</sup> And assuming that court-ordered mediation is desirable, numerous questions about the way a mediation program should be structured must be answered.<sup>19</sup> New York State's proposed custody bill,<sup>20</sup> which sets forth an integrated set of procedures for

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16. This "private mediation" has the advantage that its participants affirmatively and voluntarily seek an alternative to the traditional adversarial process. Parties do not usually have independent counsel at the time they enter mediation, although each may seek such independent advice during the process. See *supra* note 15. Private mediators usually undertake to adjust all of the issues permeating the matrimonial dispute including the question of the divorce itself, support and alimony, property division, and custody. Parties who seek private mediation must usually pay for it, and thus have financial incentives to reach an agreement through a process they have affirmatively sought.

17. Serious questions have been raised as to whether the parties in mediation have the requisite factual and legal information on which to base a real agreement, particularly where financial matters are at issue. Exploitation of the weaker party by the dominant party is feared. Potential conflict of interest dilemmas by the mediator are also perceived. See Crouch, *supra* note 15, at 240-46. However, various state bar ethics committees have provided guidelines for the professional and ethical practice of mediation—guidelines which serve to alleviate the dangers. See Silberman, *supra* note 12, at 108, 115-17. In addition, the American Bar Association's Mediation and Arbitration Committee of the Family Law Section has adopted Standards of Practice for Family Mediators, designed to ensure that "the mediator be qualified and impartial, that the participants reach decisions voluntarily; that their decisions be based on sufficient factual data; and that each participant understand the information upon which decisions are reached." STANDARDS OF PRACTICE FOR FAMILY MEDIATORS (1984), reprinted in 17 FAM. L.Q. 455 (1984).

18. Unlike private mediation which is paid for by the parties themselves, court-ordered mediation programs are usually financed with public funds. In California, the requisite funds were provided by increasing marriage license and divorce filing fees. However, those increased costs must be justified to the public by a showing that there are sufficient benefits to warrant such a program. In addition, to the extent mediation is not sought or consented to by the parties, it represents to some an unwarranted interventionist philosophy.

19. Those questions include whether mediation should be voluntary or mandatory, what issues should be diverted to mediation, whether the mediation should be confidential, whether the mediator should make recommendations to the court in the absence of agreement, what professionals should serve as mediators, and what the requisite qualifications of those professionals should be.

20. Senate Bill No. 5127 and Assembly Bill No. 7135 adopt the Law Revision Commission's Recommendation Relating to the Child Custody Decision-Making Process. For the complete Recommendation, which includes reasons for legislative action, the proposed legislation, and commentary on the provisions, see N.Y. Law Revision Comm'n, *Recommendation of the Law Revision Commission to the 1985 Legislature, Relating to the Child Custody Decision-Making Process*, 19 COLUM. J.L. & SOC. PROBS. 105 (1985). In April 1985, a two-day conference was held at New York University and Columbia University during which the Commission

resolving custody disputes, including court-ordered mediation, is a particularly good vehicle for exploring these questions.

## I

### THE CASE FOR COURT-ORDERED MEDIATION

Before turning to the proposed New York legislation, the justifications for court-ordered mediation should be explored. Unlike private mediation, court-ordered mediation is a less dramatic departure from the traditional adversarial divorce process.<sup>21</sup> By definition, court-ordered mediation is invoked only after the parties have brought their dispute to court.<sup>22</sup> Each party is being represented by counsel, and is aware of his or her legal rights. In this context, mediation is more of an adjunct to, rather than a substitute for, traditional adversarial divorce. Thus, although objections are often raised that mediation only resolves cases that private counsel would negotiate and settle in any event, court-ordered mediation in no way limits the negotiation or settlement options of the parties' private counsel. The mediation alternative is invoked only because a matrimonial or custody dispute has not been settled and a legal proceeding has been filed. Once a party asks the court to intervene in the parties' dispute, it is appropriate for the court to structure procedures for the resolution of the matter.

Family disputes, particularly when children are involved, provide the most compelling case for alternatives to adversary litigation.<sup>23</sup> Recent data show that parties who can reach voluntary arrangements in custody disputes do better emotionally and financially for themselves and for their children.<sup>24</sup> Thus court-ordered mediation programs adopt a process designed to achieve that end.

Not only does mediation open lines of communication between the parties and encourage joint problem solving, but it also creates in the mediator a professional role independent of loyalty and obligation to an individual party.<sup>25</sup> Because of their relationship with their clients and the emotions that attach to child custody issues, counsel are sometimes limited in their ability to convince a client of the desirability of settling a domestic relations matter.

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Recommendation was discussed. Public hearings on the Senate and Assembly Bills were held on November 7, 1985 and December 6, 1985.

21. See *supra* notes 15-16.

22. See, e.g., CAL. CIV. CODE § 4607(a) (West 1983 & Supp. 1985); OR. REV. STAT. § 107.765(1) (1984). The Michigan mediation statute is unusual in that the service is available to couples prior to the start of litigation. MICH. COMP. LAWS (West Supp. 1985).

23. See W. GELLHORN, *supra* note 7; Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. (forthcoming). See generally J. WALLERSTEIN & J. KELLY, *supra* note 7. Indeed, the serious concerns about the impact of adversarial divorce upon children blunt the more general criticisms directed toward various mechanisms used to induce settlement in other types of litigation. See, e.g., Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

24. See J. WALLERSTEIN & J. KELLY, *supra* note 7; Schepard, *supra* note 23.

25. D. SAPOSNEK, *supra* note 1, at 23-43.

The mediator is in a better posture than the parties' lawyers to question and challenge the positions a party takes regarding various issues in a matrimonial dispute. Additionally, the existence of mediation as part of the court apparatus may give the lawyers just the pressure they need to bring about the settlement of the dispute themselves.

Many critics of court-ordered mediation object to its coercive aspect. They argue that parties who want to mediate may avail themselves of the private sector market; court-ordered mediation is appropriate only if it is offered on a totally voluntary basis.<sup>26</sup> They also argue that the parties' resistance to mediation can significantly undermine mediation efforts. Since litigation is often postponed for a specified period of time while the case is diverted to mediation, unsuccessful mediation becomes a device to increase the expense and delay of the litigation. From that perspective, a court should offer mediation only when both parties seriously believe that it can be useful to them and voluntarily choose to participate in the process.

This argument, however, overlooks the fact that mediation may be helpful in convincing initially resistant parties that compromise and cooperation is both useful and possible in resolving their differences. Thus, exposing parties to mediation—even when they might not come forward themselves—may nonetheless promote a cooperative atmosphere between them. Moreover, research indicates that even when parties do not reach agreement in mediation, settlements are often reached by their lawyers outside of mediation but prior to trial.<sup>27</sup> Also, the general public is basically unfamiliar with mediation and the organized bar is unlikely to encourage its use. Thus, there is little sense in limiting mediation to those matrimonial litigants who request it.

Court-ordered mediation programs should encourage settlement of family disputes by exposing the litigants to a process which enhances the likelihood of agreement. Coercion into mediation is not a contradiction in terms; there should not be coercion in the mediation itself or in the agreement-reaching process.<sup>28</sup> But as long as the parties are not pressured into agreements in mediation and in fact reach solutions because they identify common concerns, it makes no difference that they did not "voluntarily" seek the process.

Finally, opponents of court-ordered mediation charge that it is exploitative of the party in a weaker bargaining position. More specifically, concerns about women economically disadvantaged in the divorce process often translate into opposition to mediation.<sup>29</sup> But women's inferior economic position in

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26. These criticisms were voiced at legislative hearings on Senate Bill 5127 and Assembly Bill 7135. Cf. MICH. COMP. LAWS ANN. §§ 552.501-.535 (West Supp. 1985).

27. Pearson & Thoennes, *supra* note 3, at 504.

28. Various mechanisms can be adopted to protect against such coercion. Providing confidentiality for communications in mediation and preventing the mediator from making "recommendations" to the court in the event of a failed mediation should alleviate fears about undesirable control or coercion by the mediator. See *infra* text accompanying notes 58-61, 70-72.

29. See generally Rifkin, *Mediation From a Feminist Perspective: Promise and Problem*, 2 LAW & INEQUALITY 21 (1984).

divorce and the failure of the substantive rules of maintenance and equitable distribution to remedy unfairness do not necessarily indicate that mediation is a hostile process. To the extent women are disadvantaged, they are most disadvantaged in traditional negotiation and litigation contexts.<sup>30</sup> While mediation does not cure the inequality in bargaining, it certainly does not exacerbate it. Indeed, in some instances, mediation may be an ameliorating influence. For example, in those situations where the parties are not represented by counsel, the mediator is the only intermediary and facilitator in the bargaining process. The mediator is aware of power imbalances and is in a position to confront and deflect them.<sup>31</sup> In other situations, when represented by counsel, the parties will have the same protection and guidance they have from counsel in traditional settlement negotiations, or litigation. Even if counsel do not participate directly in mediation efforts<sup>32</sup>—and many times they will be included—they will inevitably be consulted by their clients throughout the process and before any final agreement is concluded.<sup>33</sup> Finally, mediation—with its emphasis on whether a workable solution to meet the family's unique needs can be established, and not on who is right or wrong or who wins or loses—is likely to be more responsive to the needs of a "weaker" party. To the extent that mediation is designed to keep communication lines open between divorcing spouses, the process should be attractive to a party already disadvantaged by the present system's substantive rules.

## II

### THE NEW YORK STATE PROPOSALS

The New York Law Revision Commission has proposed legislation regarding the child custody decision-making process.<sup>34</sup> The bill creates a unified procedure for custody disputes in the courts of New York State with jurisdiction over such matters,<sup>35</sup> and includes a provision for court-ordered mediation for custody disputes.<sup>36</sup>

Interestingly, although the Law Revision Commission's recommendation was a response to former Governor Hugh Carey's request for a study on joint custody,<sup>37</sup> the proposal does not address the substantive standards for custody

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30. See L. WEITZMAN, *supra* note 2, at 310-318; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993 (1979).

31. D. SAPOSNEK, *supra* note 1, at 176-92.

32. Some mediation statutes expressly permit the mediator to exclude counsel from the mediation sessions. See, e.g., CAL. CIV. CODE § 4607(d) (West 1983 & Supp. 1985).

33. Indeed, in most instances, the task of drawing up the agreement will fall to the respective counsel. *But see* MICH. COMP. LAWS ANN. § 552.513(2) (West Supp. 1985) (agreement to be drawn up by "friend of the court" attorney or attorney for one of the parties).

34. For the full text of the Commission Report, see N.Y. Law Revision Comm'n, *supra* note 20.

35. *Id.* at 105.

36. *Id.* at 106.

37. N.Y. LAW REVISION COMM'N, 1982 REPORT OF THE LAW REVISION COMMISSION TO THE HONORABLE HUGH L. CAREY, GOVERNOR, ON JOINT CUSTODY IN NEW YORK STATE (1982), reprinted in 1983 N.Y. Laws 2210-27.

determinations.<sup>38</sup> Rather, it establishes a series of interrelated procedural provisions designed to encourage settlement of custody disputes at various stages of the judicial process. The proposed legislation offers three distinct pre-trial phases which encourage the parties to settle their dispute. Thus, the proposal sends a clear message to both the litigants and the bar that the state believes that parties who can reach voluntary arrangements in custody disputes do better emotionally and financially for themselves and for their children.<sup>39</sup>

Although mediation is the central and most controversial aspect of the bill, its other provisions should enhance the effectiveness of mediation. These three procedural provisions are judicial management, mediation, and evaluation.

### A. Judicial Management

The first step in achieving the "judicial management" goal<sup>40</sup> is to provide a "manager." The bill provides that a parent who commences a custody dispute must promptly notify the court that a custody dispute is pending. The case will then be assigned to a single judge. This requirement ensures that a single judge will exercise continuing authority over the entire custody matter.<sup>41</sup> In addition, the proposal instructs the judge to hold a conference with the lawyers and litigants within thirty days after the pleadings are closed to ascertain "whether it is possible for the parties to reach agreement on custody or a custody plan."<sup>42</sup> If reaching an agreement "within a reasonable time"<sup>43</sup> appears unlikely, the court must refer the custody dispute for mediation unless the court determines that "there is no reasonable possibility that mediation will promote settlement" or a party shows that "mediation will otherwise fail to serve the best interests of the child."<sup>44</sup> In addition to setting a schedule for mediation, the judge must also consider whether a family evaluation report should be prepared in the event mediation fails and must issue a schedule for such an evaluation. The judge must then also set a schedule for pretrial dis-

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38. N.Y. Law Revision Comm'n, *supra* note 20, at 106.

39. The Commission expressly affirms this premise in the recommendation accompanying the proposed legislation. *Id.* at 106, 119-21, 123-28.

40. Subsection (b)(1) provides:

(b) Pretrial procedure, judicial management and determination in custody disputes.

(1) A parent who commences a custody dispute or seeks custody in any other form of action shall immediately notify the court of the filing of the dispute or a request for custody as part of the relief sought. The chief administrator of the courts shall promulgate standards and administrative policies pursuant to subdivision (h) of this section setting forth forms and regulations implementing the obligations of parents under this section.

*See id.* at 131.

41. Since the introduction of this legislation, New York has effectuated general calendar reform to ensure that all cases are assigned to a single judge.

42. § 242(b)(3), (b)(4); *see* N.Y. Law Revision Comm'n, *supra* note 20, at 131-32.

43. § 242(b)(4); *see* N.Y. Law Revision Comm'n, *supra* note 20, at 132.

44. *Id.*



covery and fix a date for the eventual hearing.<sup>45</sup> Finally, if the custody dispute is part of a matrimonial action in which other issues, such as maintenance and equitable distribution need to be resolved, the court may separate out the issue of custody to ensure that the matter proceeds expeditiously.<sup>46</sup>

The Law Revision Commission designed this pretrial custody conference and scheduling order—reminiscent of the mandatory scheduling order required by Rule 16 of the Federal Rules of Federal Procedure<sup>47</sup>—to enable the judge to establish a “game plan” by which to manage the case. During the conference, the judge will stress the importance of an agreed-upon resolution and explore settlement possibilities with the parties. The judge will be able to assess whether the case is appropriate for mediation, and whether, in the event that mediation fails or is otherwise inappropriate, family evaluations should be ordered before the case proceeds to trial. The judge’s hands-on management of the case should reinforce the emphasis on reaching a settlement, as the important mediation component of the bill directs.

### B. The Mediation Provisions

The central procedural reform of the proposed legislation is the introduction of court-ordered mediation for custody disputes.<sup>48</sup> Like many other states’ court-ordered mediation programs,<sup>49</sup> only custody and visitation disputes will trigger mediation under the New York program.<sup>50</sup> To some degree,

45. Section 242(b)(4) provides that “the court shall also consider referral for a family evaluation report . . . and shall set a date for final hearing in the custody dispute.” See N.Y. Law Revision Comm’n, *supra* note 20, at 132. Section 242(b)(6) requires the court to “issue a written order setting forth the schedule for mediation, preparation of evaluation reports, pre-trial discovery, and the hearing in the custody dispute. This requirement may not be waived.” See N.Y. Law Revision Comm’n, *supra* note 20, at 132.

46. § 242(b)(5); see N.Y. Law Revision Comm’n, *supra* note 20, at 132.

47. FED. R. CIV. P. 16 (requiring the district judge to hold a scheduling conference within 120 days of the filing of the complaint).

48. See § 242(c); N.Y. Law Revision Comm’n, *supra* note 20, at 132-34. This section is discussed in the commentary to the Commission proposals. N.Y. Law Revision Comm’n, *supra* note 20, at 145-49 (commentary). For the reasons that the Commission recommended a mediation service, see *id.* note 20, at 123-28.

49. See, e.g., CAL. CIV. CODE § 4607(a) (West 1983 and Supp. 1985); OR. REV. STAT. § 107.65(1) (1984) (expressly providing that the mediator shall not consider issues of “property division or spousal or child support” without the written approval of both parties or their counsel).

50. The provisions of section 242 are triggered by the filing of a “custody dispute.” § 242(b)(1)-(b)(2); see N.Y. Law Revision Comm’n, *supra* note 20, at 131. “Custody dispute” is defined as “any action or proceeding between parents concerning custody, in a court of this state.” However, the mediator is directed to “help the parties reach agreement upon a custody plan that is in the best interests of the child.” § 242(c)(8); see N.Y. Law Revision Comm’n, *supra* note 20, at 134. “Custody plan” is defined as a “detailed plan for custody for a child, which may include provision for allocation of financial support of the child between parents.” § 242(a)(6); see N.Y. Law Revision Comm’n, *supra* note 20, at 130. Thus, although disputes over support will not trigger mediation, the mediation may include discussion about these financial issues.

such a limitation is artificial because issues of custody are often closely intertwined with the economic issues of property distribution, and spousal and child support. The bargaining and negotiation of the parties over economic issues affect, and may even dictate, the custodial arrangements. And although it is philosophically attractive to isolate the child's custodial arrangements from "money considerations," such separation will not occur as a practical matter.

Nonetheless, as an initial step, mediation for custody and visitation alone is justified. These issues are the most difficult ones for judges to decide, and often no firm legal principles exist to guide the decision. Judges are asked to decide custody and visitation on the basis of what is in the child's "best interests."<sup>51</sup> And more often than not such a determination involves a prediction of future behavior rather than a resolution of disputed facts about past events—a task more suited to crystal ball gazing than to traditional adjudication procedures. Finally, discretionary judgments about custody issues implicate value judgments that are better left, if possible, to the parties themselves.<sup>52</sup>

The New York proposal accepts the proposition that mediation efforts can most effectively be directed to custody and visitation disputes—the areas where lawyer and judicial competence is often limited—and therefore diverts only custody and visitation issues to mediation. It leaves the division of property and assessment of support to the traditional court processes, which are well suited to the needs of such determinations. Simultaneously, the bill recognizes the practical necessity of making viable economic arrangements for various custody plans. Therefore, although financial or child support disputes will not trigger mediation, the question of allocation of financial support for the child may be included in the mediation discussion.<sup>53</sup>

Under the proposed New York legislation, not all custody disputes are referred to mediation. The court is directed to "refer the custody dispute for mediation"<sup>54</sup> unless the court determines that "(1) there is no reasonable possibility that mediation will promote settlement of the issues in the custody dispute or that (2) mediation will otherwise fail to serve the best interests of the child."<sup>55</sup> Thus, the proposed legislation recognizes that not all cases are appropriate for mediation; therefore, the judge is given limited discretion in deciding whether to divert a case to mediation. Such control by the judge also limits the ability of parties to abuse the mediation process as a mechanism for

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51. See generally Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

52. See Mnookin, *Child-Custody Adjudications: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

53. Section 242(c)(1) provides: "Each judicial district shall provide, without cost, mediation services to parents in custody disputes to facilitate their agreement on a custody plan." N.Y. Law Revision Comm'n, *supra* note 20, at 132. For the definition of "custody plan," see *supra* note 50.

54. § 242(b)(4); see N.Y. Law Revision Comm'n, *supra* note 20, at 132.

55. *Id.*

delay. Moreover, the proposed statute does not confine mediation to those who request it, since initially resistant parties may develop an attitude of compromise and cooperation when exposed to mediation. In effect, the bill adopts a "presumption" in favor of mediation, but leaves room for a party who resists mediation to justify that position to the court.

Although objections have been raised that mediation not chosen voluntarily will not be effective,<sup>56</sup> there are no data to indicate that the outcomes of mandatory mediation differ significantly from the outcomes of voluntary mediation.<sup>57</sup> A more justifiable objection is that the agreements made in court-ordered mediation are not entered into voluntarily in a context of frank and open discussion. The proposed New York legislation attempts to create an appropriate atmosphere by ensuring that the mediation is confidential.<sup>58</sup> The bill provides that "mediation proceedings shall be private and confidential" and that all communications in the mediation "shall be privileged and inadmissible in any judicial or administrative proceeding,"<sup>59</sup> unless all parties otherwise consent. Such confidentiality attached to mediation will encourage free and candid discussion without fear that the mediator will be making recommendations or reporting to the judge in a formal or informal fashion. Although a mediator often will have obtained information about the parents and their children that could be useful to a judge who must eventually make a determination of custody or visitation, a mediator who has an obligation to report to the court or to make an independent recommendation will compromise the role of facilitator, and undermine the self-determinism of the parties. In true mediation, the mediator's responsibilities should be directed exclusively toward helping the parties reach a voluntary settlement, and that role is impaired if the mediator is an investigator or decision-maker for the court.<sup>60</sup> Thus, the New York bill has followed the lead of most states in providing a cloak of confidentiality for the mediation.<sup>61</sup>

### C. Investigation

The New York bill recognizes the importance of providing a judge who must decide a custody or visitation dispute with the data and expertise of independent social service and mental health professionals.<sup>62</sup> To that end, the

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56. See *supra* notes 26-28 and accompanying text.

57. D. SAPOSNEK, *supra* note 1, at 36.

58. § 242(c)(4); see N.Y. Law Revision Comm'n, *supra* note 20, at 133.

59. *Id.*

60. See generally Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984). Under statutes where the mediator is permitted to make a recommendation to the court, due process requires that the mediator be available as a witness to be cross-examined by the parties. *McLaughlin v. California*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (Cal. Ct. App. 1983).

61. See, e.g., FLA. STAT. ANN. § 749-01 (Supp. 1985); ORE. REV. STAT. § 107 (1984).

62. The Commission Report acknowledges the importance of professional expertise in guiding judges in making custody determinations. N.Y. Law Revision Comm'n, *supra* note 20, at 128; see also R. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION 11-44

proposed legislation also creates a court-ordered service for "custody investigations" or "family evaluations."<sup>63</sup> However, the premises underlying the "family evaluations" are quite different from those upon which mediation rest and the legislation is emphatic that the processes and goals of each are to be kept separate.<sup>64</sup>

In one sense, custody investigations or evaluations are merely another trapping of the traditional custody trial. The adversarial custody trial typically features social service and mental health experts who have relevant psychological and social data to be presented to the court.<sup>65</sup> However, those experts are usually allied with a particular party, and their testimony carries with it the biases of the advocate and a financial allegiance to the party on whose behalf they testify.<sup>66</sup> The New York bill, however, authorizes independent family evaluations by professionals who are not affiliated with either party. Thus, the bill attempts to provide valuable information to the court with a degree of impartiality. The family evaluation improves the quality of decision making in the traditional custody trial.

Although it would be misleading to characterize the provision for family evaluations as a "nonadversarial mechanism," such investigations do have a dramatic impact on settlement. Apart from yielding important data on which a judge may rely to make a custody or visitation determination, the investigation and report may encourage the parties to settle the case without proceeding to a full-scale trial.<sup>67</sup> But the promotion of settlement is not the fundamental goal of evaluations; aiding the court in an informed decision is. Moreover, there is a clear recognition that settlements reached in an atmosphere of fear of an adverse recommendation will not have the autonomy and resultant durability of agreements reached in mediation because they will have

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(1982); Gozansky, *Court-ordered Investigations in Child Custody Cases*, 12 WILLAMETTE L.J. 511 (1976); Litwack, Gerber & Fenster, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269 (1980).

Others have questioned the usefulness of the testimony of psychologists or psychiatrists in custody disputes. See, e.g., Okpaku, *Psychology: Impediment or Aid in Child Custody Cases*, 29 RUTGERS L. REV. 1117 (1976). Critics have also pointed to the potential for bias and the danger of particular value judgments when experts' evaluations are relied upon by judges. See Levy, *Custody Investigations in Divorce Cases: The New York Law Revision Commission Proposal in Perspective*, 19 COLUM. J.L. & SOC. PROBS. (forthcoming).

63. § 242(d); see N.Y. Law Revision Comm'n, *supra* note 20, at 134-35. Two types of evaluations are authorized under the statute. The more general family evaluation, which contemplates a basic family history, will be ordered upon motion by any party or the court's own motion and will be furnished without cost to the parties "if the court finds that preparation of the report may aid in its determination of custody." § 242(d)(4); see N.Y. Law Revision Comm'n, *supra* note 20, at 134-35. Supplemental psychological, psychiatric, and medical reports are also authorized under the statute, but only upon a showing of good cause. § 242(e)(4); see N.Y. Law Revision Comm'n, *supra* note 20, at 135.

64. N.Y. Law Revision Comm'n, *supra* note 20, at 143.

65. Litwack, Gerber & Fenster, *supra* note 62, at 282-93.

66. Cf. W. GAYLIN, *THE KILLING OF BONNIE GARLAND* 203-41 (1982) (describing role of psychiatrists in the adversarial system in making determinations of insanity in criminal cases). For the general shortcomings of party-aligned experts, see Schepard, *supra* note 23.

67. Levy, *supra* note 62.

been the product of the more coercive atmosphere of the dress-rehearsal before the trial.

Although the New York proposal envisions custody investigations as functioning in tandem with mediation,<sup>68</sup> the processes are kept distinctly separate under the bill. Section 242(d)(4) provides that the court may "upon motion by a party or the court's own motion order the preparation of a family evaluation report if the court finds preparation of that report may aid in its determination of custody."<sup>69</sup> Section 242(f)(5) instructs the court to receive the report into evidence and permits the court "to rely on the information and recommendations therein in its determination of custody."<sup>70</sup> But a mediator who has provided mediation services "may not provide a recommendation to the court concerning how the court shall determine custody, or conduct an evaluation without the consent of both parties."<sup>71</sup> Additionally, a mediator "may not provide information to any person who prepares an evaluative report in the same dispute without the consent of both parties."<sup>72</sup>

The role envisioned for counsel also highlights distinctions between the mediation and evaluation processes. Mediators are given significant control over the mediation process and may exclude counsel from the mediation.<sup>73</sup> Although counsel can be expected to review any mediated agreement before it is finalized in a formal settlement, the mediator controls the process, which, as noted earlier,<sup>74</sup> is confidential. In contrast, since evaluation is not a confidential process and will have its outcome reported to the court,<sup>75</sup> more formal procedures have been established to protect the rights of the parties and to

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68. N.Y. Law Revision Comm'n, *supra* note 20, at 151 (commentary) (custody investigations and mediation are designed to function "synergistically").

69. The "evaluations" will include data about the child, the child's relationship with parents, and the general family environment. More specific evaluations—denominated as psychiatric, psychological and medical—can be ordered when particular problems are observed. *See supra* note 63.

70. § 242(f)(5); *see* N.Y. Law Revision Comm'n, *supra* note 20, at 137.

71. § 242(c)(5). This provision explicitly rejects the option adopted in some jurisdictions, that permits the mediator to make a recommendation to the court regarding the resolution of the custody or visitation dispute. *See* N.Y. Law Revision Comm'n, *supra* note 20, at 133-34; *cf.* CAL. CIV. CODE § 4607(e) (1980). Where the mediator is permitted to make such a recommendation, due process has been held to require the right of the parties to cross-examine the mediator. *Cf. supra* note 60.

72. § 242(c)(4); *see* N.Y. Law Revision Comm'n, *supra* note 20, at 133.

73. Section 242(c)(6) provides that "[t]he mediator may, in his discretion, conduct mediation privately, without the presence of attorneys for the parties and the court appointed representative of the child, if any. The mediator may, in his discretion, meet with either party privately." *See* N.Y. Law Revision Comm'n, *supra* note 20, at 134.

In general, it may be advantageous to include counsel in the mediation process so that the lawyers' concerns are not raised for the first time at the end of the process. Indeed, the mediator may in fact facilitate settlement by forcing the parties to directly confront issues that have prevented agreement.

74. *See supra* notes 58-61 and accompanying text.

75. § 242(f)(5); *see* N.Y. Law Revision Comm'n, *supra* note 20, at 137. Such court-ordered custody investigations are common in most states. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 405 (1973).

accord counsel their traditional role in the adversary process.<sup>76</sup> Moreover, evaluation reports must be mailed to the attorneys for the parties,<sup>77</sup> and the person who prepared the report must be available to testify as a witness at the hearing and to undergo cross-examination.<sup>78</sup> Finally, the file of underlying data and information used in the preparation of the evaluative report must be made available to counsel on a showing of good cause.<sup>79</sup>

Under the proposed legislation, the mediation and evaluation services will be conducted by licensed mental health professionals who possess both a master's degree and at least two years of family-related professional experience.<sup>80</sup> Although the mediation and evaluation processes are kept separate,<sup>81</sup> the statute does contemplate that the mental health professionals who will provide these auxiliary services can—at least in different cases—serve as both mediators and evaluators.<sup>82</sup> This approach offers maximum flexibility in use of personnel. While lawyers can be mediators if they have two years' experience in family counseling or mediation,<sup>83</sup> they cannot conduct evaluations.

Similar flexibility is adopted regarding the type of mediation and evaluation service to be used in various courts. Section 242(g)(4) permits the chief administrator of the courts, acting in consultation with the administrative judge of each judicial district, to choose from among several alternatives in providing those services.<sup>84</sup> Options include the use of in-house court personnel, contracting with government and/or non-profit agencies to provide the requisite services, and the creation of a panel of independent qualified professionals to whom cases are sent.<sup>85</sup> In addition, courts in a judicial district or between judicial districts may contract to provide joint services.<sup>86</sup> The appropriate plan will be dictated by the caseloads, resources, and available services in each district.

76. Such procedures may be required by due process. See *McLaughlin*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479; *Falkides v. Falkides*, 40 A.D.2d 1074, 339 N.Y.S.2d 235 (1972).

77. § 242(f)(2); see N.Y. Law Revision Comm'n, *supra* note 20, at 136.

78. § 242(f)(6); see N.Y. Law Revision Comm'n, *supra* note 20, at 137. However, a written waiver of this requirement by the parties and their attorneys may be filed with the court.

79. § 242(f)(3); see N.Y. Law Revision Comm'n, *supra* note 20, at 136. The "good cause" requirement is imposed to avoid pro forma requests for the underlying data as a means of unnecessarily burdening the evaluation process. See N.Y. Law Revision Comm'n, *supra* note 20, at 153 (commentary).

80. § 242(c)(3)(A), (c)(3)(B), (d)(3); N.Y. Law Revision Comm'n, *supra* note 20, at 133, 134. Supplemental qualifications may be promulgated by the chief administrator of the courts. § 242(c)(3)(C), (h)(2)(L); see N.Y. Law Revision Comm'n, *supra* note 20, at 133, 141.

81. § 242(c)(3)(A), (c)(3)(B); see N.Y. Law Revision Comm'n, *supra* note 20, at 133.

82. See *supra* text accompanying notes 68-72.

83. N.Y. Law Revision Comm'n, *supra* note 20, at 151 (commentary).

84. Section 242(g)(1) charges the chief administrator, acting in consultation with the administrative judge of each judicial district with responsibility for establishing a plan to provide mediation and evaluation services for the relevant courts in each judicial district. See N.Y. Law Revision Comm'n, *supra* note 20, at 137.

85. § 242 (g)(4); see N.Y. Law Revision Comm'n, *supra* note 20, at 139; see also *id.* at 154 (commentary).

86. *Id.*; see also § 242(g)(4)(D); N.Y. Law Revision Comm'n, *supra* note 20, at 139.

### III FINAL OBSERVATIONS

Two important misconceptions about the New York legislation deserve mention. The first involves the relationship of mediation to joint custody.<sup>87</sup> Critics of joint custody attack mediation as joint custody in disguise.<sup>88</sup> Whatever the relative merits of sole versus joint custody, the proposed legislation does nothing to change the present substantive standard for custody in New York.<sup>89</sup> New York case law severely limits the ability of a court to order joint custody in the absence of an agreement by the parties.<sup>90</sup> The proposed statute does not alter that rule.

The parties may, of course, consent to any type of custody arrangement they desire, including joint custody. Mediation is merely a process which encourages the parties to arrive at some form of consensual arrangement. However, there is no "club" in mediation which forces the parties to reach any particular kind of agreement, or, for that matter, to reach any agreement at all. Because mediation under the New York bill is confidential,<sup>91</sup> the mediator has no coercive power over the parties to induce any kind of an agreement.

The equation of joint custody with mediation may grow out of the California experience. California's mandatory mediation program<sup>92</sup> does reflect a prevalence of joint custody awards, but California's mediation statute was enacted to implement California's earlier joint custody statute.<sup>93</sup> The New York

87. Joint custody may involve an allocation of residency for the child (joint "physical" custody) as well as shared decision making between the parents (joint "legal" custody). See Chambers, *supra* note 51, at 549-58. After the initial enthusiasm with the joint custody concept, see Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. REV. 523 (1979); Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641 (1982-83), and supporting data as evidence for its promise, see J. WALLERSTEIN & J. KELLY, *supra* note 7, at 308-11; Hess & Camera, *Post-Divorce Family Relationships as Mediating Factors in the Consequence of Divorce for Children*, J. SOC. ISSUES, Fall 1979, at 79; Ilfeld, Ilfeld & Alexander, *Does Joint Custody Work? A First Look At Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982); Steinman, *The Experience of Children in a Joint Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981), caution and criticism have set in. See, e.g., Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539 (1982); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn and the Judicial and Legislative Implications*, 16 U.C.D. L. REV. 739 (1983). Recent data have also raised questions about its viability. See, e.g., Kelly, *Further Observations on Joint Custody*, 16 U.C.D. L. REV. 762 (1983); Phear, Beck, Hauser, Clark & Whitney, *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, 11 J.L. & PSYCHIATRY 419 (1983).

88. A common attack on joint custody laws is that they further weaken the economic bargaining position of women, who are already disadvantaged in the divorce process. For a discussion of the link between custody and financial issues, see L. WEITZMAN, *supra* note 2, at 223-25, 240-43, 310-18.

89. The bill says only that the court shall set forth the factors it considered and its reasons for the custody decision. § 242(b)(7); See N.Y. Law Revision Comm'n, *supra* note 20, at 132; see also *id.* at 144 (commentary).

90. Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

91. See *supra* text accompanying notes 58-61.

92. CAL. CIV. CODE § 4607 (West 1983 & Cum. Supp. 1986).

93. In 1979, California passed a statute making joint custody the "favored" disposition in

proposal is quite different; it creates only the procedural framework for facilitating agreement between the parties and not the substantive guidelines for those agreements. Mediation as a process is as compatible with traditional sole custody and visitation arrangements as with joint custody.

The second misconception involves comparisons with New York's earlier failed experience with "conciliation courts."<sup>94</sup> However, the "conciliation court" experiment was directed toward reconciliation of the parties when a marriage was already over. Mediation has no such unrealistic goals. Notwithstanding those who charge it with trying to facilitate "happy divorce,"<sup>95</sup> mediation makes no such claims for itself. It does not and could not make the parents friends. However, it may well encourage disputing parties to resume a working relationship as parents of their children. Those modest goals hardly justify criticisms that mediation is the divorce counterpart of the child-saver mentality that failed the juvenile justice reform movement.<sup>96</sup> Unlike many of the interventionist techniques adopted as part of juvenile justice reform, mediation's first principle is a reliance on private ordering and parental autonomy. Self-determinism is the basic premise. Mediation returns the custody dispute to the parties' themselves, to "customize" the kind of arrangement that will work for them.

#### CONCLUSION

New York's court-ordered mediation proposal is part of a set of carefully crafted procedural reforms designed to improve the judicial system's approach to child custody disputes. Obviously, mediation is not without its limitations. But the present system does not work. Evidence exists that mediation helps parents develop custody arrangements for their children with less hostility and trauma than traditional negotiation and litigation. The proposed New York alternative is clearly worth a try.

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a custody dispute. *Id.* at § 4600.5. Under the California provision, when the parents agree to joint custody, there is a presumption that joint custody is in the best interests of the child. *Id.* at § 4600.5(a). In the 1980 version of the statute, joint custody could be awarded upon application by either party, and the court was required to give reasons if it denied joint custody. *Id.* at § 4600.5(b). Under a 1983 amendment, the court may still award joint custody upon application of either party, but the court is directed to give reasons for a grant or denial of joint custody only upon the request of a party. *Id.* at § 4600.5(c). In addition the 1983 amendment differentiates joint "legal" and joint "physical" custody. *Id.* at § 4600.5(d)-(f).

One year after passing the original statute favoring joint custody, the state legislature, recognizing the need for a procedural mechanism to help the parties implement such orders, enacted a state-wide mediation program. *Id.* at § 4607. Thus, California's mediation statute was designed to effectuate its joint custody law.

94. Act of April 27, 1966, ch. 254, § 8, 1966 N.Y. Laws 833, 836-40, *repealed by* Act of June 23, 1973, ch. 1034, § 2, 1973 N.Y. Laws 2903, 2904; McLaughlin, *Court-Connected Marriage Counseling and Divorce—The New York Experience*, 11 J. FAM. L. 517 (1971).

95. See Levy, *supra* note 67.

96. *Id.*