

**The Matrimonial Commission**  
**New York State**  
**April 21, 2006**

"In all that is decent... in all that is just, the framers of our Constitution could never have intended that the "enjoyment of life" meant that if divorce came, it was to be attended by throwing the two unfortunates and their children into a judicial arena, with lawyers as their seconds, and have them tear and verbally slash at each other in a trial by emotional conflict that may go on in perpetuity. We have been humane enough to outlaw cockfights, dogfights and bullfights; and yet, we do nothing about the barbarism of divorce fighting, and trying to find ways to end it. We concern ourselves with cruelty to animals, and rightfully so, but we are unconcerned about the forced and intentionally perpetrated cruelty inflicted upon the emotionally distressed involved in divorce. We abhor police beating confessions out of alleged criminals, and yet we cheer and encourage lawyers to emotionally beat up and abuse two innocent people, and their children, because their marriage has floundered. Somewhere along the line, our sense of values, decency, humanism and justice went off track."

This is a quote by Attorney Sanford J. Berger from a Writ that was submitted to the Supreme Court of the United States of America on behalf of a client that was requesting protection from cruel and unusual punishment as guaranteed by the Eighth Amendment of the United States Constitution. The quote is included in the preface to Dr. Richard Gardner's 1989 book entitled Family Evaluation in Child Custody Mediation, Arbitration and Litigation. Little has changed since that time in the manner in which marriages are terminated and the way in which the resolution of custodial and access issues occur within the adversarial approach of the legal system. Despite other states that support, encourage, and even mandate mediation, New York State continues to harbor some of the most archaic matrimonial laws and methods to terminate marriages and resolve questions of just how two divorcing parents will continue to share the caretaking responsibilities of their children and renegotiate their relationships so that they can successfully become "business partners", in the business of raising their children successfully. The adversarial method of divorce, especially with respect to questions of access and custody, terrorizes families, impairs relationships, and has deleterious effects on both parent child relationships as well as the relationship between former spouses. The recovery of emotional functioning after divorce, parallels the recovery of functioning after the brain damage sustained upon experiencing a closed head injury. It takes three to five years to fully recover cognitive function after a head injury, and three to five years to recover emotional functioning after divorce; ten years when prolonged litigation is involved. Dr. Robert Emery, a psychologist and prolific researcher in the area of divorce and its impact on relationships within families, has described that the primary emotion experienced by divorcing couples is that of grief, over the multiple losses that are being sustained, with grief being characterized by an intertwining and cycling of love, sadness and anger. When unresolved love, sadness, anger and grief, motivates a divorced parent to repeatedly return to the legal/adversarial system, the recovery of emotional functioning after divorce may never occur.

The famous anthropologist Dr. Margaret Mead was once asked to comment on the marriage vows "till death do us part." She responded that the terminology was all well and good in its day when the average life expectancy was 36 years, but the vow was rather irrelevant in today's

society. When people live to be nearly 100 years old, the likelihood of changing spouses, partners, and confidants can be expected to increase and divorce is much more commonplace in today's society merely because people live longer. Fifty percent of children born to baby boom parents can be expected to experience divorce. Nearly 34 percent of children being born in the US are now born outside of marriage which is believed to be one of the reasons we have seen slight declines in the divorce rate recently. Divorce is commonplace. The termination of relationships is commonplace. Divorce needs to be deregulated as we deregulate other industries. New York State needs to adopt a no fault divorce law, one that will assist individuals who are terminating relationships to extricate themselves from the adversarial approach to divorce that has been demonstrated to cause both emotional as well as financial harm. I have been involved in families that have been attempting to divorce yet have been unsuccessful after three years, nearly \$300,000.00 being spent on fees, and still have not been able to resolve matters of divorce or custody. There is little hope for recovery of emotional functioning after a trauma of that magnitude.

The adverse impact of litigation in child custody matters is well documented in the child psychology literature. Dr. Robert Emery has completed some of the most insrumental research investigating the effects of litigation vs. mediation in contested cases of child custody. In controlled studies, where families were randomly assigned to either litigation or mediation, we find lasting positive effects of mediation as long as 12 years after custody and access disputes were settled. Families were enrolled in the research after they were unable to successfully resolve their disputes and had come to the point that they were willing to allow a judge, a total stranger, to tell them what to do with their own children.

Families enrolled in mediation, who took control of their own destiny and resolved their disputes in the course of mediation, lasting on average five hours, expressed greater contentment and were happier that they did what they did 12 years later. Both parents were more involved with their childrens lives than parents who litigated. Among parents who mediated , children were far more likely to spend time with the non-residential parent and have more frequent phone contact with them.

1) 28% of nonresidential parents who mediated saw their children at least once a week 12 yrs later in comparison to 9% who litigated.

2) In the litigation group, 36% of nonresidential parents had NOT seen their children in the last year compared with only 16% of nonresidential parents who mediated. Mediation increases contact with parents over time.

3) Among families who mediated fully 59% of nonresidential parents talked to their children weekly or more often compared to 14% of nonresidential parents who litigated. This increased contact did not increase conflict between the parents who mediated. They actually reported less conflict even though they had to deal with each other more.

4) In comparison with the families who went to court, among families who mediated, the residential parent said that the nonresidential parent discussed problems with them more and

participated more in the children's discipline, grooming, religious training, errands, special events, church and school functions, recreational activities, holidays, and vacations.

5) Even 12 years later, parents who had mediated, had more positive things to say about their ex partners than parents who litigated.

6) The outcome of mediation in terms of custody arrangements was not strikingly different from the outcomes of litigation, despite the fact that the litigation took more time, was more expensive and was more detrimental. While there was a slight increase in joint custody with mediation, most often the access schedule was one in which the mother assumed primary caretaking roles with both parents having access to their children.

7) The level of satisfaction expressed by both parents after mediation was much higher than litigation, especially with respect to fathers.

8) The number of changes in residence with mediation was higher 12 years later, without court involvement. This might suggest that the parents were able to develop a developmental perspective, and allow residences to change consistent with the development of the child, and without legal involvement.

This commission has heard previous testimony suggesting that the use of custody evaluations in divorce and child custody litigation is overused and often does not provide information that is beneficial in resolving custody disputes. While custody evaluations are clearly not therapeutic, they can be performed in a therapeutic matter. Often within the course of the non-adversarial custody evaluation, a custody and access schedule is agreed upon which empowers parents and frees them from the deleterious effects of prolonged litigation. Custody evaluations, like mediation, can provide parents with the sense of empowerment that is correlated with better psychological adjustment after divorce.

The use of guardian ad litem in adversarial court proceedings regarding custody disputes was to insure that the children's legal interests were represented. In some states, child advocates, child mental health professionals, psychologists, and clinical social workers represent the child's perspective much like a guardian ad litem to insure that the child's "best interests" are represented. The use of trained mental health professionals to represent children in custody disputes should be considered. The guardian ad litem must be aware and sensitized to the fact that when they represent their clients, who are children, the child's "best interests" might well conflict with the child's "preferences." A child's positive adjustment to divorce has been shown to be correlated with containing conflict, keeping the child from feeling that he/she needs to 'take sides', not asking the child to become involved in adult decisions (such as stating a preference of one parent over another to a law guardian) and maintaining a rather authoritarian stance regarding discipline with clear expectations and predictable patterns of discipline between both parents. Having a child in the position of being able to "call my lawyer" to complain about the parenting or discipline of a parent will often result in the child being over empowered, increase their anxiety and can result in asking a child who is incapable of the emotional sophistication, and who is not developmentally prepared, to become involved in adult decision making processes that they should not be involved in.

Given the very powerful findings on the positive impact of mediation in resolving child custodial matters, I would urge the Commission to consider mandated mediation as an alternative to the current methods of resolving custodial disputes. Mandated mediation for matters returning to court, as opposed to litigation, would also assist families in recovering emotional functioning after the trauma of divorce. It is clear that Mediation provides an enhancement to the current litigation procedures and should be considered the "treatment of choice" in resolving custody matters. I would also urge the commission to rely increasingly on the use of well trained mental health professionals in helping empower parents to make decisions during their most difficult times. New York State needs to promote and encourage safer ways to terminate relationships and resolve custodial matters through the use of mediation, collaborative law, and collaborative parenting as the most important adjuncts to our current litigation regulations.

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