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## CONFLICTING PERSPECTIVES

### *His and Her Divorce*

Discourage litigation. Persuade neighbors to compromise whenever you can. Point out that the nominal winner is often the real loser in fees, expenses, and waste of time.

—ABRAHAM LINCOLN

Child custody disputes present problems from a variety of perspectives. Although most disputes are settled out of court, high divorce rates and conflicts between unmarried parents make custody contests one of the most frequent sources of litigation in the United States.<sup>1</sup> Thus, custody disputes are expensive from the perspective of the public interest. The current standard for determining custody according to children’s “best interests” is a vague principle which, from the perspective of judges,

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<sup>1</sup> I use “divorce” as a shorthand term for divorce, marital separation, the breakup of cohabiting relationships, and the end of serious romantic relationships between parents who are not living together. Emotional reactions to dissolution and dispute are more similar than different across these relationship types. Currently, the law differs according to marital status, for example, unmarried couples generally incur no alimony obligation. However, the law is evolving. Common law marriage is being reinvented in countries such as New Zealand. Future couples who cohabit in marriage-like relationships increasingly are likely to incur the same legal responsibilities as married partners, including financial ones (Lind, 2008).

makes custody disputes almost impossible to decide. Custody disputes also are troublesome from the perspective of many lawyers, who find the cases emotional, demanding, and unrewarding. Fears about losing your children, legal expenses, public embarrassment, and the divisiveness of a court battle are some of the many problems with custody disputes from the perspective of parents. Finally, from the perspective of children, a custody dispute epitomizes perhaps the worst thing about divorce: Getting caught, or put, in the middle of a war between your parents.

### A DIFFERENT WAY TO DIVORCE?

What can professionals, parents, and society do to make divorce and custody decisions less devastating for children? Can we help to contain and control inherent emotional, interpersonal, and legal conflict? Can we protect children from being torn apart by their parents' disputes, and by the emotional chaos of divorce?

Together with a growing number of professionals and parents who have witnessed, or experienced, custody disputes at their worst, I believe we can do much to contain the turmoil of ending a marriage, of dividing a family. We can help parents to negotiate the terms of their divorce without exacerbating their pain and anger. Few divorces may be "happy" or "good," but parents and professionals can work to ensure that divorce is not as bad as it might be, especially for children.

I believe that we can effectively guide parents toward a more child-friendly divorce, but this is more than a belief. My research shows that a more cooperative approach to negotiating custody can benefit parents and children not only in the short term but even more so in the long run. As I summarize later in this chapter, and detail in Chapter 9, parents in my studies were assigned at random to either mediate or litigate their custody disputes. We followed these families over time and found that, 12 years later, an average of only 6 hours of mediation *caused* nonresidential parents to remain significantly and substantially more involved in their children's lives, to be better parents, and to be better coparents (Emery, Laumann-Billings, Waldron, Sbarra, & Dillon, 2001). One purpose of this book is to serve as a treatment manual for this evidence-based intervention.

### Alternative Dispute Resolution

Divorce mediation is a form of alternative dispute resolution (ADR) in which a neutral, expert third party helps parents to negotiate custody and perhaps financial arrangements as cooperatively as possible. The media-

tor meets together, and often separately, with both parents to help them to identify, discuss, and hopefully resolve their differences. Legally, the goal of mediation is to negotiate a settlement that forms the basis of a binding, legal agreement. Psychologically and emotionally, the goal is to help partners to preserve their parental relationship even as their marriage is coming apart.

Mediation is a focus of this book, but the research, psychological, and legal issues outlined here are relevant far beyond the mediation context. Innovative professionals have developed many new forms of ADR for divorce and custody matters in recent years, and the list of alternatives continues to grow (see Figure 9.6. p. 220). Most share common goals: helping parents to negotiate more cooperatively, to make their own decisions about what is best for their own children, to contain conflict, and to truly protect children's best interests. Collaborative lawyers, for example, work to negotiate a fair and principled out-of-court settlement, refusing to represent their clients in court if negotiations break down (Tesler & Thompson, 2007). Divorce educators, parenting coordinators, child advocates, custody evaluators who use their feedback to encourage settlement, cooperative lawyers, and others involved in divorce ADR use different means toward the common end of making divorce less difficult, particularly for children (see Chapter 6).

My "emotionally informed" approach to mediation, which I describe in detail in Chapters 7 and 8, also shares elements in common with family therapy, particularly the structural approach (Minuchin, 1974). A major conceptual and practical focus is redefining the boundaries of family relationships which invariably change as a result of divorce. Relationships do not end with a divorce; they are transformed, dramatically. Divorcing parents must develop new family roles and responsibilities not only in relation to their children but also with each other. In the context of negotiating a separation agreement, mediation can help parents to *renegotiate* rather than end their relationship.

Mediators do not try to promote reconciliation or attempt to resolve all of a family's emotional conflicts. A mediator's "license" to address emotional issues is limited according to the overriding objective of negotiating a separation agreement. Nevertheless, the concepts and techniques described here are relevant to family therapy and other interventions where a professional holds an unrestricted license for dealing with emotions. In fact, mediation can feel something like family therapy on "fast forward." Family relationships change rapidly, even if some of the changes are superficial by family therapy standards. Thus, a second goal of this book is to outline concepts and techniques that can be used by therapists and by legal professionals who work with divorcing parents in therapy, ADR, and other contexts.

## **An Emotionally *Unnatural* Divorce**

Even while encouraging a more child-friendly parting, professionals working with divorce and custody disputes must recognize parents' emotional struggles. Divorcing partners commonly are confused, perhaps overwhelmed, with emotions including hurt, pain, anger, fear, sadness, jealousy, and grief. In advocating for a less divisive divorce, we ask parents to do something emotionally *unnatural*. Doing so can take tremendous effort. It is *natural* to be hurt and angry—and to want to hurt back—when “happily ever after” becomes “I’ll see you in court.” When can you be angry if not when you discover that your spouse is having an affair, or just doesn’t love you any more? When can you be devastated, or out of control, if not when the mother or father of your children has found someone new who, they claim, is better than you as a lover, a friend, and perhaps as a parent?

In the middle of the emotional turmoil of divorce, mediators, collaborative lawyers, and other professionals concerned about the impact on children ask parents to contain their own, powerful emotions; to communicate with each other in a structured, businesslike fashion; to cooperate in rearing their children; and ultimately to retain control over their lives by making their own decisions about their children’s best interests. We urge parents to love their children more than they may hate their ex (Emery, 2006). If professionals want parents to divorce differently, we first need to understand their emotional devastation. Thus, this book’s third and perhaps most important goal is to detail the intense and complicated emotional and interpersonal dynamics of divorce from the perspective of parents, children, and the family system.

## **Real People**

ADR professionals work to help parents settle custody disputes in a simpler, less emotional, and more rational manner. Yet for many former partners, the parting is far from simple, unemotional, and rational. It is an emotionally charged morass, the height of irrationality. Divorce is very common today, but statistics obscure the extreme upheaval divorce often causes real people and real families.

I am a psychological scientist first and foremost; thus this book is evidence based. The various conceptualizations, interventions, and policies discussed here are backed by, or at least consistent with, state-of-the-art research from several disciplines, including psychology, sociology, law, and economics. However, I also am a practitioner, an active mediator, and a family and individual therapist. As a practitioner, I recognize that the complexity, emotionality, and irrationality of divorce can get lost in

empirical research, which necessarily focuses on simpler, quantifiable, and understandable aspects of the process. I therefore include case material throughout this book in order to enrich, enliven, and hopefully enlighten. In fact, much of this first chapter is devoted to case studies that illustrate central dilemmas in divorce and child custody disputes. These emotional quagmires explain how and why custody disputes create so many problems for parents, children, courts, and society. The cases also introduce key topics that I address more systematically in subsequent chapters.

## LOVE IS BLIND

Discovery, that is, uncovering of the facts of a case, is one goal of legal intervention in divorce and custody disputes. However, there are many impediments to uncovering the truth in custody disputes. One of the most important is that family members have conflicting perspectives on divorce and family life.

There is much wisdom in the truism “love is blind.” Love makes people see what they want to see, and believe what they hope is true. In a divorce, the blinders of love are ripped off. When former partners ask themselves, “What went wrong?” they often surprise themselves with complaints that they had only vaguely recognized in their marriage. When divorcing parents present the “facts” of their case to their attorneys, perspectives that already were in conflict can become dramatically polarized. The following case studies illustrate some of this conflict of perspective.

### The Case of Sheila

Sheila hoped that her separation would give her a new start at the age of 31. She married right after finishing college, a decision that seemed impulsive and blind in retrospect. Her sweet college boyfriend soon became a distant and cold husband. They had been lovers and best friends, but once they got married, their relationship changed. They became housemates who had sex on occasion. Sheila's life grew increasingly empty, lonely, and meaningless. When she got pregnant, she hoped that a baby would revitalize her marriage. But much to her disappointment, her husband showed almost no interest in the infant. Sheila drew new energy from her little girl, but when Sheila stopped working to stay home with her baby, financial pressures and her husband's frustrations mounted. At his insistence, she ended up returning to work long before she was ready.

Sheila resented giving up her daughter to day care, and she was doubly disappointed when her husband showed no interest in their

second child, a boy. She was determined to spend a few years at home now that she had two children, but money and her “laziness” became the topics of constant fighting. Sheila stuck by her decision not to work for 2 years, but as much as she loved being a mother, her marriage was in shambles. When she returned to work, it was with a purpose in mind. She would build up her income to the point where she and her two children could live on their own. She knew she had married the wrong man. She was frightened of divorce for herself and for her children, but the fighting and unhappiness were far worse. Sheila was convinced that staying married “for the children’s sake” was an excuse for making the safe, easy, and wrong decisions that she had made her whole life. She had no real husband, and her children had no real father.

It took Sheila several years to prepare for her move and to muster the courage to tell her husband that she was leaving him. When she finally confronted him, she was unsure of what to expect, but she knew it would be bad. He yelled, he screamed, he threatened. He refused to leave their home and said he would do nothing to support Sheila, or the children, if she left. Sheila was prepared for this. She had already rented a furnished apartment, had money saved in a secret bank account, and had spoken with a lawyer who assured her that her husband would have to pay support for the children, and perhaps support her financially as well.

After she moved out of the house, the fighting stopped for a while, but the begging started. Her husband was sorry. He loved her. He loved the children. Life was worthless without them. He pleaded with her to come back. But Sheila had not made an impulsive decision this time. There was no going back.

And then it happened. Sheila and her husband had been separated for about 8 weeks. They had no legal agreement, but had settled into something of a pattern where the children would spend each Saturday night and Sunday morning with their father. But instead of getting the children back one Sunday afternoon, Sheila got a call from her husband. He said that he had filed for sole custody of the children. He might settle for joint custody, but he planned on keeping the children at least until the following Saturday no matter what. He would return them on that day, but only if Sheila signed a joint custody agreement that allowed the children to be swapped between them each week. If she refused to sign the agreement, he would not bring them back. When Sheila screamed into the phone to return her children immediately, he hung up on her.

### **The Case of John**

Like Sheila, John had two young children who were the subject of a custody dispute. But his circumstances were very different otherwise.

John was very much a family man. He worked hard and his job was all right, but work was a means to an end for John. That end was his family. As soon as he left work, John headed for home, eager to see his wife and especially his children. John knew that his marriage was going through a rough patch, but he also knew in his heart that everything would work out. At least he thought he knew that.

John had gotten married and had children at a young age, but he knew that family life could be demanding. He expected that there would be hard times. Certain things bothered him, of course. His wife had been sexy and kind of wild when they were dating, but sex became infrequent and dull early in the marriage. Sex just about disappeared after his first child was born. John believed that it was wrong for him to complain about sex, so he just kept quiet and kept trying. His sexual advances were rebuffed far more often than not, and that left John feeling rejected too. Still, he kept trying. Besides, there was more to life than sex. He enjoyed his family, and loved playing with his children, especially his little boy, who was beginning to share John's interest in sports.

John was much more worried about money than about his family life. His wife worked some, even after the children were born, but from John's point of view, her working hurt as much as it helped. John felt that earning a good income was his responsibility. He had set a goal of having a nice house and a secure income by the age of 30, so the pressure would be off of everyone, especially him. Unfortunately, the economy worked against John. He was making ends meet, but he secretly felt like a failure. He sometimes saw his dreams as just that, dreams. He struggled to come up with new plans that would relieve the financial pressures, but nothing worked.

Still, John was far from giving up on his job, and he never considered giving up on his family. Then he got the shock of a lifetime. One day, out of the clear blue sky, his wife said that she was leaving him. John was shocked. Things had been rough at times, but nowhere near divorce. He begged, he pleaded, he promised anything, but his words fell on deaf ears. Within a few days, his wife and children moved out.

John was too stunned to do anything more than protest pathetically, but his objections had no effect. His wife had every move planned. Unlike him, she was not devastated. She seemed happy. She had a place to go, and money coming in from some mysterious source. John tried to pull himself together and figure out what was happening. Then he hit upon the explanation. His wife must be having an affair. He felt like an idiot. Why else would she do something like this? She had planned it all too perfectly.

John's anger at being used energized him into action. Within a few weeks after the separation, he got himself a lawyer and a plan. His wife could leave if that was what she wanted, but she was not going to take his children. He asked his lawyer to file for sole cus-

tody of the children. When his lawyer warned “possession is nine-tenths of the law,” John came up with another tactic on his own. He would not return the children after their next visit. He would keep them at least until he had a written agreement that protected his relationship with his children. After all, he was their father, and his wife had walked out on him with no cause. He had rights, and so did his kids.

## HIS AND HER DIVORCE

As you may have guessed, John and Sheila were married to each other.

Sheila and John shared a marriage for 10 years, yet they experienced and remembered their time together as if they led separate lives. As they faced their separation and their custody dispute began, some differences in their stories may have been deliberate distortions. There is strong motivation to portray yourself as a saint and your former spouse as a sinner, because of the high stakes involved and because extreme positions can be a strategic advantage.

Still, many differences between Sheila and John surely resulted from legitimately different experiences, perceptions, and memories. His “family time” on Sunday afternoons may have been “football time” to her. His sexual initiations may have seemed like unrelenting and unfeeling demands to her. To him, reaching out in the face of constant rejection perhaps showed his stoic desire to get close to his wife. He may have viewed his preoccupation with work as fulfilling his responsibility to his family. She may have seen him as being married to the job.

In her book *The Future of Marriage*, sociologist Jesse Bernard (1972) wrote that couples do not have one marriage, but two: “his” and “hers.” Each member of the couple experiences their union so differently that functionally there are two marriages. Nowhere is this provocative idea more evident than during divorce. As with Sheila and John, separated or divorced parents often have wildly different views about each other, their family roles, their marriage, and the reasons for its demise. “His” and “her” marriage results from differing experiences and perceptions. “His” and “her” divorce is a complete rewriting of those two versions of history. The revisions tell a new story, one that is consistent with the unhappy ending. Of course, each rewrite is also based on two very different views of how and why the marriage ended, and each rewrite serves two different purposes, his and hers.

Perhaps John was a cold and angry man who was as insensitive to his children as he had been to his wife. Or perhaps Sheila was a bored and self-centered woman who was unprepared for the realities of family

life and captivated by fantasies of an affair. It is tempting to conclude that the truth lies somewhere in between the two extremes, and it often does. But perhaps there is no “truth.” Even if some of John’s and Sheila’s actions can be established as legal facts, what a court determines to be true is unlikely to change John’s or Sheila’s perceptions of reality.

Even if they agreed about what happened to their relationship, for example, John and Sheila probably would disagree about why. Sheila might see her leaving as justified by John’s long history of cold and calculated manipulation, a power game frighteningly evident in his refusal to return her children. John might view his actions as justified by Sheila’s selfish disregard of his relationship with his children during their marriage and following the separation. Whatever the specifics, they both are likely to blame each other for past and present transgressions. Why? In addition to strategic advantages, the blame game is fueled by powerful emotional motivations. Here is one: anger is an easier and less painful (if less honest) emotion than the “real” feelings it often masks, including guilt, pain, fear, grief, or unrequited love (see Chapters 2 and 3).

### **His and Her Grief**

The case of Sheila and John illustrates yet another dilemma in divorce and custody disputes: Conflicting experiences of grief. Sheila and John experienced a very different type of loss when they separated. Metaphorically and emotionally, Sheila lost her marriage to a chronic, terminal illness. She knew for years that her marriage was dying, and this knowledge allowed her to prepare for its end—emotionally and practically. The actual separation undoubtedly was painful for her, but as with the death of a loved one following a long and trying illness, her pain undoubtedly was tinged with a degree of relief.

In contrast to Sheila, the metaphor for John’s loss is a train wreck. John knew something terrible had happened. His marriage was in the emergency room, in critical condition. But John could cling to the hope of a miraculous recovery. Miracles sometimes happen. And as bad as the outlook might be, no one could truthfully tell John there was no hope. John’s fantasies of reconciliation were fueled by his contacts with Sheila, especially her guilt-ridden attempts to be friendly. To John, these were signs of life in their marriage. What was final to her was far from final to him.

Even as he begins to accept the end of his marriage, John’s grief is likely to be much more erratic and intense than Sheila’s. Sheila anticipated the separation, and grieved for years beforehand. She also prepared practically for her new, single life, and looks forward to it with some hope. Perhaps he was blind, but John’s loss still was unanticipated.

He had little time to prepare for the separation, and he was forced to adjust to something that he did not want. The emotional roller coaster of intense and unpredictable grief is far from over for John, even after he begins to realize that his marriage really might be “dead.”

John and Sheila’s different places in their grief are yet another source of conflict between them. If he does not read her friendliness as a sign of hope, Sheila’s apparent absence of distress may make John wonder if she ever loved him—or if she is involved with someone else. While John is hurt by Sheila’s lack of emotion, Sheila is likely to be frustrated by John’s emotional devastation. She may wonder where his feelings were when they were together, or grow angry over his self-pity and foot-dragging. Neither understands why the other does not feel the same way that they feel.

### **His and Her Acceptance of the End of the Marriage**

John and Sheila illustrate another common “his” and “her” dilemma. They differ in their acceptance of the end of their marriage. Like most divorces (Braver, Shapiro, & Goodman, 2006), their decision to separate was not mutual. And as with conflict about their past, John and Sheila’s opposing desires for the future of their marriage greatly complicate their separation negotiations. They not only disagree about *what* custody arrangement they want, but they also differ about *whether* they want an agreement. Sheila’s push for a settlement collides with John’s hope for reconciliation.

John is likely to resist reaching settlement, or he may insist on terms that are clearly unacceptable to Sheila, for a very simple reason: He does not want an agreement, because he does not want a separation. To him, agreeing to a settlement means accepting the separation, and John does not want to accept the end of his marriage. He certainly does not want to hasten or facilitate its end by agreeing to some custody arrangement for which he is unprepared emotionally or practically. As a result, John is likely to become angry and uncooperative with professionals who try to help him reach an agreement, whether those professionals are therapists, mediators, judges, or even his own attorney. Anyone who pushes for a settlement is on Sheila’s side, trying to kill his marriage. (A client in John’s position recently called me “Dr. Kevorkian,” referring to the proponent of assisted suicide. For someone in John’s shoes, the analogy is apt.)

In contrast to John, Sheila is ready to “do business” in their divorce negotiations. She contemplated the end of her marriage for a long time, and she has thought a lot, perhaps unrealistically, about what she wants. Sheila may see some of John’s obstacles for exactly what they are: A refusal to accept the end of their marriage. But whether to end the mar-

riage is not a question that she wants to reopen. Even if she harbors some ambivalence, Sheila wants to conquer her uncertainty, not explore it. She certainly doesn't want to share her doubts with John. Doing so would only fuel his hopes—and his obstinacy. Sheila does not want to understand John's hurt and pain. She has been down that road before, repeatedly. She has felt the guilt often and long enough. Sheila wants to get this over with, and the sooner, the better. Unlike John, she therefore is likely to see professionals who push for a resolution as being reasonable and helpful. To Sheila, mediation is surgery not suicide. Mediation is a painful but necessary step toward making her life better.

For a great many couples, disputes over custody ultimately reflect conflict between "his" and "her" version of history, being in different "places" in dealing with grief, and opposing wishes for the marriage, in accepting of its end. Couples fight over their children, and they have legitimate concerns about the children. But when they fight about their children, they also often are fighting about whether or not to end their marriage.

### **Contesting Divorce by Contesting Custody: Some Research**

Evidence from my research, as well from other studies (Bickerdike & Littlefield, 2000), supports the perhaps provocative but central assertion that many custody disputes turn, at least in part (sometimes completely) on differences in the former partners' acceptance of the end of their marriage. In my studies, one month after settling their custody disputes in mediation or in court, in over 60% of the families at least one partner indicated that he or she felt that the couple should have tried to stay together longer. Both partners agreed that they were glad that they finally made the break in only about one-quarter of all cases. Remarkably and sadly, in a handful of cases *both* partners indicated that they were only going ahead with the divorce because it was what their spouse wanted (Emery, 1994).

Men were much less accepting of the end of their marriage than women in this sample of parents contesting custody. Over 40% of the men, versus less than 10% of the women, reported that they were going ahead with the divorce only because this was what their spouses wanted. Over half of the men agreed that they found themselves wondering what their spouses were doing; only about 15% of women did so (Emery, 1994).

This gap is not merely a reflection of gender differences in who initiates divorce. Available evidence does indicate that women initiate perhaps two-thirds of divorces (Braver et al., 2006). But the wide discrepancy in

my sample appears to reflect another gender difference. Men who do not want their marriage to end contest custody. Women who do not want their marriage to end probably are more likely to fight about money.

What would explain this gender difference? First, the partner who does not want to divorce becomes intransigent about reaching a separation agreement. Consciously or unconsciously, they hope to prevent or at least delay the end of the marriage. But, second, the tactic only works if this partner objects about something of great value to the estranged spouse. Otherwise, the spouse who wants to divorce simply would concede in order to move the negotiations forward. Third, because many men and women still adopt traditional breadwinner and caretaker roles in marriage, the delaying tactic is more likely to “work” for men who are uncompromising about custody and for women who refuse to reach a financial settlement. (Of course, the opposite pattern can occur when couples have nontraditional marital roles.)

When a husband does not want a divorce, disputing custody is likely to be a more effective means of blocking an agreement than disputing the finances. Why? Because of her greater investment in childrearing in a traditional marriage, a wife and mother is unlikely to make substantial concessions about custody even when she is eager to end her marriage. In contrast, she may be willing to compromise on finances, because she views economic hardship as an inevitable consequence of her decision to leave. Thus, when we examine a custody dispute sample, as in my studies, we find that more men than women do not want their marriage to end.

The opposite pattern is likely when a wife does not want a divorce. A traditional husband who wants a divorce may feel like a hypocrite contesting custody when his wife assumed the primary responsibility for childrearing. If so, he is likely to make concessions about that potential dispute. But women who do not want their marriage to end may find that they can successfully delay a divorce, albeit temporarily, by insisting on an extreme financial settlement, a threat to the breadwinner role.

Consistent with this reasoning about men (we only studied custody disputes, not financial disputes), a reanalysis of my mediation data found that husbands reported *more* coparenting conflict when wives were *more* accepting of the end of the marriage than they were (Sbarra & Emery, 2008). A creative Australian study also found that differences in the partners’ acceptance of the end of the marriage predicted parents’ failure to reach agreement in mediation. This effect held even after controlling for the couple’s level of anger. Furthermore, differences in acceptance also predicted less problem solving in actual mediation sessions (Bickerdike & Littlefield, 2000).

In summary, many divorcing partners object to the terms of a separation agreement, in part, because they object to a divorce. They contest

the end of their marriage by contesting a settlement. Thus, mediators and other divorce professionals must always consider the possibility that a dispute over custody also reflects a dispute over the future of the partners' relationship.

### **His and Her Children**

Sheila and John have conflicting memories about their past. They have conflicting feelings of grief. They have conflicting desires about separating. Given this, it is not surprising that they would be in conflict about the terms of their separation and its future fairness for themselves and their children. In fact, John and Sheila are likely to have different views on how the children are coping with the divorce. Sheila is likely to see the children as she sees herself: They accept the separation and are doing relatively well. John also is likely to see the children as he sees himself: They hate the separation and are emotionally devastated.

Each parent projects his or her own feelings onto the children. If no problems are apparent, John may argue that the children are hiding their feelings, protecting their mother, and defending against their terrible pain. Sheila may counter that the children's lack of reaction proves that they are doing fine. In fact, she may see them as *happier* now that they are no longer exposed to the daily tension, fighting, and unhappiness of the marriage. If the children are having obvious difficulties, John may see reconciliation as the solution, even if only for the sake of the children. To Sheila, the children's problems are proof of their need for stability. The children need a clear and stable custody arrangement—now.

Some of the parents' conflicting interpretations of their children's feelings and needs certainly reflect legitimate differences. Even impartial mental health professionals have difficulty discerning how children feel and what they want following their parents' marital separation. Still, intentionally or unintentionally, parents also are likely to project their own feelings onto their children, leading to a self-serving and somewhat inaccurate view of the children's needs. Once again, parents' differing emotions and projections mean that custody disputes often involve much more than questions about what is best for children.

### **The Children's Perspective**

Perhaps the central dilemma in divorce is that children have a third perspective, one that often conflicts with the views of *either* parent. The children's needs are supposed to be paramount, yet they frequently are forgotten, or manipulated, as a result of their parents' emotional turmoil. Too often, concerns about the children's needs mask an attempt to resist the end of the relationship, to gain the upper hand in negotiations, to

punish the other parent, or to satisfy one or both parents' own emotional needs. Too often, parents expect the children to side with them against their father or mother, rather than recognizing that the children's perspective differs from their own.

Some children do side with one parent or the other in a separation or divorce. In other families, loyalties are so deeply divided that different children end up allying with a different parent. However, from the children's perspective, the biggest problem typically is not choosing the right side but having to choose at all.

This is especially true in acrimonious divorces. Study after study shows that parental conflict predicts maladjustment among children whose parents have separated or divorced (Emery, 1999). A particular problem is when children feel caught in the middle between their parents (Buchanan, Maccoby, & Dornbusch, 1991). Most children do not want to be forced to take sides with one parent against the other. And as fervently as they may wish for reconciliation, children's foremost desire in divorce often is for their parents to stop fighting.

### **Conflicting Perspectives and Legal Justice**

Thus, there really are three conflicting perspectives on divorce: His, hers, and the children's. As is illustrated by the case of John and Sheila, it can be extremely difficult to determine which perspective is true—or right. Perhaps Sheila was emotionally abused, and she needs a strong advocate who will help her to fend off her misplaced guilt and stand up to John at last. Perhaps John was used and manipulated, and he needs a strong advocate who will help him to put aside his hopes for reconciliation and protect his rights as a father. Perhaps the children need their own advocate to represent their rights (whatever they may be) in this family dispute. Or perhaps one or both parents' hurt, pain, and anger is being played out in one of the few available forums: A legal dispute about the children.

A natural inclination when confronted with conflicting facts is to dig further to uncover the “real” truth. Our legal system and our sense of justice presume that, if only we dig deeply enough, we will discover one true and right side.<sup>2</sup> You are either guilty or innocent. In the pursuit of the truth, we revel in righteous indignation. Someone is lying. If we keep

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<sup>2</sup> A new legal theory, called “law and emotion,” holds the promise of better accommodating human emotion in the law. The law-and-emotion perspective holds that legal disputes and dispute resolution are fueled and biased by emotion, and the law should recognize and perhaps accommodate emotional influences. The law-and-emotion perspective is particularly relevant to family law. See the 2009 special issue of the *Virginia Journal of Social Policy and the Law*.

digging, keep confronting, and tear through the fabric of lies, we will uncover the deception, perhaps in a dramatic courtroom confession.

But perhaps there is no “truth” in many divorces. Perhaps much of each parent’s version of the truth reflects his and her perspective on their marriage, their parenting, and their divorce. Perhaps there is no ultimate right and no ultimate wrong in many divorce and custody disputes.

We might discover that Sheila was having an affair, for example, but we also might discover that John had been verbally abusive. Does the verbal abuse justify the affair, or does Sheila’s infidelity justify John’s denigration? Does either “fact” bear directly on the best custody arrangement for their two children? From the children’s perspective, does the conflict that is inherent in settling a custody dispute create more problems than it resolves? These are some of the substantive and procedural questions that confound legal intervention in divorce and custody disputes.

Advocacy, fact finding, and legal protection may be necessary, irrespective of the divisiveness of a legal battle, when one side clearly is the victim and the other is the perpetrator. Our legal system can ensure due process and protect the weaker party. This may be needed, especially in custody disputes that involve victimization in the form of serious family violence or dramatically unequal bargaining power (Johnston et al., 2005). Yet the same advocacy, fact finding, and legal protections may only polarize parents in other cases, cases where there is no ultimate truth but only conflicting emotions, wants, and perceptions. In these cases, adversarial maneuvering can turn conflicting perspectives into a family feud, a feud that ultimately is destructive to children, whose perspective on divorce is considered last in this chapter as it often is in custody disputes.

### **More Than Legal Conflict**

Whatever one’s view on traditional legal intervention or ADR, the difficulty of determining the accuracy of his, hers, and the children’s perspective on divorce leads us to three essential observations. First, much of the interpersonal and legal conflict that occurs in separation and divorce is caused by conflicts of perspective. Many disputes, including some formal, legal contests over child custody, involve conflicts over differing desires for the future of the marriage, differing experiences of grief, and differing projections onto the children.

Second, different family members have conflicting perspectives on their family, relationships, and the divorce, in part because of their different roles in the family and in the separation. Conflicting perspectives can be expected to be found between the partner who wanted the marriage to end and the partner who wants it to continue, between mothers and

fathers, and between parents and children. Conflicting perspectives also can be expected to be found between different professionals who represent one of the parents, the children, or the entire family in a custody dispute.

A third observation is that all of the adults involved in divorce and custody disputes can benefit from recognizing the child's perspective. The perspective of one or the other parent is the one traditionally taken by family and friends and by the attorneys who represent each parent. One partner typically *is* seen to be the injured party. One party *is* expected to win custody. Divorce often *is* viewed as the beginning of a family feud. From the perspective of children, however, past wrongs often are much less important than current conflicts, conflicts that disrupt their daily lives. Particularly because it has become so common, we need to find a way to make divorce less divisive for children, legally, socially, and psychologically.

### **MEDIATION VERSUS LITIGATION: 12 YEARS LATER**

So far, I have offered a clinical and conceptual overview of several key themes in divorce, child custody, and mediation, introducing topics that we consider in much more detail in subsequent chapters. The interested reader, or the skeptic, might want to know something about the evidence base for these observations, an issue that I also address at length in later chapters.

I developed a method of custody mediation based on the principles outlined in this chapter. Over the course of many years, a number of graduate students and I conducted randomized trials of this "emotionally informed" approach to mediation. We compared emotionally informed mediation with adversary settlement (usually litigation) among two samples of high-conflict families who had petitioned a Virginia court for a contested custody hearing. Parents were assigned (literally) at the flip of a coin to either try to resolve their disputes in mediation or to continue with the legal proceedings. Moreover, successive graduate students assessed these families over the course of 12 years after they had resolved their disputes in mediation, in court, or in whatever way they could.

Did emotionally informed mediation make a difference? Let me first offer an important disclaimer. Even when mediation is successful, parents are not happy. And why should they be? They just got divorced. Still, like many ADR professionals, I have always hoped that parents' (and mediators') efforts to put their children first at an extremely difficult time would pay off over time, as feelings and families begin to heal. I believed that, like the book title says, good mediation really could help many

families not only to negotiate agreements, but also to renegotiate their relationships. The research findings turned this hope into certain knowledge about what good mediation can do. Unlike what is typically found for social and psychological intervention, the benefits of mediation grew larger, not smaller, over time.

Twelve years after an average of only about 6 hours of mediation, nonresidential parents who mediated were much more likely to remain involved in their children's lives (Emery et al., 2001). For example, 30% of nonresidential parents who mediated (the coin came up heads) saw their children weekly *12 years later* compared to 9% of parents who continued with adversary settlement (the coin came up tails).

Of course, children move around, as do parents, over the course of 12 years. This makes it more difficult for many parents and children to maintain direct contact, so we also asked about telephone contact—and found even larger differences. Fully 54% of nonresidential parents who mediated spoke to their children on the phone weekly 12 years later, compared to 13% of nonresidential parents who continued with their contested legal dispute (Emery et al., 2001).

Of critical importance, nonresidential parents who mediated also were better parents, at least according to the ratings of a potentially tough critic: the residential parents (their exes). Twelve years later, residential parents who, at random, mediated instead of litigated rated the nonresidential parent as significantly better in terms of discipline, religious/moral training, participating in significant events in children's lives, and discussing problems with them. In fact, residential parents who had mediated rated the other parent as significantly better on every dimension of parenting we assessed (Emery et al., 2001).

Also of critical importance, we found *less* coparenting conflict between parents who mediated, despite their increased opportunities for dispute. (They had more chances to fight, because both parents remained far more involved in their children's lives in the mediation group) (Sbarra & Emery, 2008).

As discussed in Chapter 9, several other findings from this study are important to note, as are various methodological details, particularly cautions about whether the results generalize to other mediation programs (especially if the mediation is of dubious quality). Still, the research provides strong empirical support for an intervention based on the concepts outlined in this chapter, perhaps especially the view that custody disputes are about *parents'* emotional issues, not just children's needs. The insights and techniques behind these broad ideas, which I elaborate on throughout this book, are critical to emotionally informed mediation. I hope and believe they can be of value not only to mediators, but also to a range of professionals who work with divorcing and divorced parents.

## CHAPTER OVERVIEW

This chapter offered only a broad introduction to my conceptualization of the emotional and relationship dynamics of divorce and dispute resolution. The next four chapters delve into the psychological details. Chapter 2 suggests ways of understanding the chaos of emotions surrounding the time of divorce, particularly parents' anger and the emotions beneath the anger, including their hurt, pain, fear, longing, and guilt. Chapter 3 focuses on my conceptual model of grief in divorce (or for grieving any potentially revocable loss). Grief is probably the central emotional process in divorce, and the experience of grief differs in essential ways for the partner who leaves and the one who is left behind. Chapter 4 outlines my family systems conceptualization of divorce as renegotiating family relationships, and discusses how former partners who remain parents can successfully begin to redefine their relationship boundaries. Chapter 5 extends this view into the renegotiation of parent-child relationships and the triangular relationship between the child and both parents.

In Chapter 6, I review the complex and often vague guidelines that comprise the substance of divorce and child custody law. Chapter 7 introduces details of my "emotionally informed" model of mediation, focusing on setting the stage for mediation by developing clear policies and procedures, and on how to conduct the first, structured session (which is divided into five distinct phases). Chapter 8 describes how emotionally informed mediation works in the later sessions. The chapter uses case studies to illustrate key themes and techniques (e.g., focusing on issues not emotions, experimenting with parenting plans), and it also reviews the details involved in writing up a parenting plan. Chapter 9 provides the evidence base for my approach to mediation. This chapter summarizes evidence from about a dozen scientific papers my graduate students and I published on the families we randomly assigned either to mediate or to litigate their child custody disputes and assessed repeatedly over 12 years. To broaden the evidence base, the findings of other, key mediation studies also are discussed in this chapter.