THE ECOLOGY OF CHILD CUSTODY CONFLICTS

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by

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We hereby approve the dissertation

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ABSTRACT

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This is a qualitative study of the psychological and social underpinnings of the family court system. The focus is on exploring the nature of mutual, reciprocal influence between parents in high conflict child custody disputes on the one hand and legal and mental health professionals working with them on the other. Ecological theory, in which psychological development is understood to occur within an extended social context, was used as a theoretical framework. The research methodology involved interviewing four individuals from each of the groups under study: parents, judges, attorneys, court mediators, and custody evaluators. Interviews were audiotaped, transcribed, and coded for purposes of analysis. Categories of experience were discovered and then subsequently organized in an effort to describe the ecological system. The unique potential contribution of this investigation is the integration of a psychoanalytic and systems theoretical perspective, phenomenologically informed, into the body of empirical studies and clinical experience.

The research findings suggest that litigants and professionals influence each other in complex ways. The nature of their interaction is shaped by conscious and unconscious

determinants. Powerful emotional responses of parents may impact each of the professionals they encounter in the family law system, engendering in those individuals reactions that vary on a range from empathic relatedness to empathic failure. The reactions of the professionals then have a secondary, reciprocal impact on the parents. The study explores the critical nature of transference and countertransference dynamics as these influence the outcome of cases in family court. Additionally, the study identifies the inherent characteristics of each cohort, related to their role and function in the family law system, that lead to the development of particular ways of perceiving and responding to one another. The dimensions of each of these are described, particularly in relation to the tension between conflicting pulls toward continued litigation on the one hand, and collaboration and resolution on the other.

To Mimi for her patience and support for this project, and for the love that helped me get through it.

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The twenty individuals who participated in this study made a significant contribution to the community and to the field of knowledge related to the psychology of family law. The four parents entrusted me with their personal, painful experiences in the hope that their story would help others understand what it is like to go through the family law system and help improve the process. They have my utmost respect for the struggle to be with their children and maintain their integrity. The judges, attorneys, mediators, and custody evaluators who participated each gave time out of very busy schedules in order to be interviewed for this study. I am grateful to each of them for their thoughtfulness, generosity, and willingness to risk discussing their work and especially the subjective aspects of professional practice.

aspects of professional practice.

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TABLE OF CONTENTS

CHAPTER I: INTRODUCTION

This is a study of family court processes from an ecological perspective. It is concerned with the impact of the interplay between legal and mental heath professionals working in the family court system on each other and the families they serve. The process of custody litigation is explored from the subjective, experiential perspective of those involved in it on a daily basis. The research is grounded in a phenomenological approach which strives to construct a model for understanding based on lived experience of the individuals involved.

The study: 1) understands family law processes as occurring within an interdependent, interactive ecological system; 2) examines elements of subjective experience of and interaction between individuals at various levels of the ecological system; and 3) seeks to develop some preliminary understanding of how subjective experience and interaction between individuals at different levels in the social system influence and are influenced by child custody disputes. This research applies a phenomenologically based, psychoanalytic understanding, as well as systems theory, to understand family court processes.

Background and Statement of the Problem

Over one million children a year in the United States experience the divorce of their parents (Maccoby and Mnookin 1992). Since most custody litigation occurs within the context of divorce, it is inextricably linked with, and often an expression of, the process of severing a marital relationship with all the psychological, social and economic sequelae attendant upon that rupture. During the divorce process, the very foundations of an individual's life are often in disarray as a function of anxieties related to a multitude of possible losses, including but not limited to primary partnership, children, home, income, and extended family relations. The majority of divorcing parents are able to work out custodial arrangements for their children without the intervention of the courts. It is estimated, however, that in about 10 percent of divorcing families the parents have a level of conflict and hostility that blocks their ability to reach agreement on their own such that they may continue to experience problems throughout the growing up years of the children (Johnston and Roseby 1997).

Within the emotionally charged climate of divorce, parents may fight intensely over the right to have their children with them. Not only are children the objects of deeply felt love and reminders of the sense of belonging in the nuclear family, but they often come to symbolize, for their parents, the integrity of the self and may serve as an antidote to perceived threats of disintegration of the self. Parents unable to resolve their conflicts on their own, or with the help of mediators and/or attorneys, may find their way into litigation over child custody. The individuals in these families, both parents and

children, are likely to experience deep frustration, intense sadness, and powerful rages.

It is critical to recognize that the nature of the stress on children whose parents are embroiled in custody litigation is often quite different from that of children whose parents divorce but who are able to reach agreement about custody and visitation. We now have a significant body of research consisting of studies investigating the normative impact of divorce on parents and children (Santrock and Warshak 1979; Wallerstein and Kelly 1980; Hetherington, Cox et al. 1982; Guidubaldi and Perry 1985; Wallerstein and Blakeslee 1989). Within this field a few studies focus specifically on the children of high conflict divorce (Garrity and Baris 1994; Johnston and Roseby 1997). The findings of these studies suggest that children of litigating parents tend to have significantly more adjustment problems, often taking the form of depression, anxiety and aggression-related conduct disorders, than do children from non-litigating families. While one study suggests that the experience of going through custody litigation may actually enhance the coping capacities of children (Wolman and Taylor 1991), the vast majority of clinical studies show quite the opposite: that children from families in which there are high levels of interparental conflict and hostility often have relationships with their parents in which they may be used as allies by one or both parents, feel caught between conflicting loyalties, become involved in role reversals, and experience troubled peer relations and social isolation. The people they most need to turn to - their parents - are often embroiled in their own painful experience and are seriously compromised in their capacity to provide their children the help required.

In reflecting on my clinical work with parents litigating custody issues and their children, I began to wonder about the nature of the interrelationship between the stresses and psychological problems commonly experienced by parents and children and the social and legal environment in which these disputes are handled. It occurred to me that certain repetitive patterns might reflect inherent characteristics of custody problems. For example, it became apparent, rather early in my career, that most custody conflicts were second order phenomena, or symptoms of underlying problems. The deeper issues behind court battles over custody and visitation are often unresolved grief connected with the loss of the marriage or a sense of being wounded, and more specifically of being shamed or humiliated by the other parent. What seems to occur in these situations is that parents are unable to adequately grieve the loss of their partnership or of their family as they knew it, or they are unable to tolerate the defilement they feel, and so they defend against the experience of grief by denying their contribution to the problem and projecting blame on the former partner. I later realized that parents in custody conflicts commonly had difficulty tolerating loss and often could not sufficiently tolerate the internal, private work involved in grieving. These parents were likely to look to the legal system for relief.

Despite many recent advances, most notably the ubiquitous shift to no-fault divorce and the use of alternative dispute resolution methods such as mediation, the family court system is fundamentally embedded in a culture of law dominated by an adversarial

process. The adversarial system is grounded in a conception of procedural justice which holds that justice is best served by each litigant presenting arguments in favor of his or her position and against that of the other side. The theory is that an independent finder of fact would, upon consideration of the arguments pro and con, be in the best position to determine the outcome of the case in relation to existing law. The system rewards individuals for articulating, and often exaggerating, problems they see in their opponent and encourages them to deny, obfuscate or minimize problems in themselves as a way of making, or at least strengthening, their case. This system may function well insofar as it ensures the rights of parents and makes custodial determinations when a decision needs to be made. However it may unnecessarily contribute to the focus of the parties being more on winning than on resolving problems affecting them and their children. Seen in this light, when families unable to reach agreement regarding parenting after divorce find their way into the family law system, a most unfortunate complementarity may follow: the culture of the adversarial system contributes to the tendency to focus externally, usually on the deficiencies in the former spouse, as opposed to looking at their own internal, often painful experience. The adversarial process, while protecting individual rights, thus works against fostering an introspective view needed for mourning the marriage and healing. If one takes as a model that certain normative tasks, such as grieving for the loss of the partner and nuclear family ideal, constitute the optimal adaptation to divorce (Wallerstein and Blakeslee 1989) then it may be understood how the adversarial process can exert a particularly pernicious influence on the most vulnerable individuals who have turned to it for relief from their experience of

desperation.

Clinical experience working with parents and children involved in custody litigation led me to apply an ecological perspective to thinking about the interaction between the legal system and families involved in custody litigation. When custody conflicts are seen contextually, within the ecological framework of the legal and cultural environment, their meaning is transformed. I came to see how the outcome of the dispute, as well as the experience of going through it, is shaped not just by individual (or even family) psychopathology, but by multiple levels of interacting factors, including but not limited to the legal system. Some of these factors are within the individual and family, and others within the social and legal systems. There are various levels of environment to which an ecological perspective directs one's attention. In relation to family court processes, these include not only the psychology of children and parents but also the broader social environment including factors in the extended family network, institutions in the community, procedures, rules, and judicial standards in the legal system, and even societal attitudes about children, divorce and custody. Additionally, in applying an ecological model one considers reciprocity or bidirectionality between the various levels in the system. In terms of families in custody litigation, not only does the court's ruling have an effect the manner in which the family functions but the functioning of the family may have an effect on the law itself, principally through effecting the subjective experience of the judge, attorneys and mental health professionals working with it.

Numerous researchers studying children of high conflict divorce have noted the unfortunate confluence between hostile, divorcing parents and the adversarial system (Duquette 1978; Maccoby and Mnookin 1992; Garrity and Baris 1994; Johnston and Roseby 1997; Galatzer-Levy and Kraus 1999). Authors of texts concerned with the methods and ethics of conducting court-connected mental health assessments or custody evaluations (Gardner 1989; Schutz, Dixon et al. 1989; Ackerman 1995) have also commented on the integral connection between the legal system, mental health interventions, and the impact of divorce on children and parents. Some other studies of an empirical nature which look at the different perspectives of legal and mental health professionals also make this observation (Felner, Terre et al. 1985; Zarski, Knight et al. 1985; Cumes and Lambiase 1987; Felner, Rowlison et al. 1987; Lambiase and Cumes 1987; Maccoby and Mnookin 1992; Lee, Beauregard et al. 1998). While each of these authors note to some degree the problems arising when custody issues are handled in an adversary context, none address the mechanisms through which this operates. In other words, there is generally agreement in the field that the adversarial system may negatively impact families disputing child custody but the specific dynamic mechanisms through which high conflict custody disputes interact with the social and legal context of the family court system is relatively unexplored. How does the nature of the legal system penetrate family members' interaction with one another and their internal, subjective experience? And as importantly, how does the subjective experience of families in custody disputes reverberate within judges, attorneys, family court counselors, and custody evaluators? Are there common themes and issues that

arise, either as a consequence of one another or concurrently, that shape the experience of any or all individuals in the system?

The Research Question

This study incorporates an ecological and phenomenological approach to explore and elucidate interactive processes that impact legal and mental health professionals, as well as parents, involved in the family court system. Using qualitative methods, its primary intent is to identify and understand mutual, reciprocal, and multidirectional influences between individuals in various roles within the system, as they are influenced by each other and by the children and families they serve. The study seeks to describe the nature of these influences as well as how they operate.

Specifically this study asks several questions, each of which is within the context of high conflict child custody litigation: 1) For each level of the family court system, as reflected through the experience of family law judges, attorneys, Family Court Service counselors, court appointed custody evaluators, and parents, in what ways is subjective experience influenced by interaction with any and every other level of the system? 2) What impact does the interplay between individuals at different levels of the system have on the perceptions, behavior, and decisions of those working in the family court system and those going through it? and 3) Are there reciprocal, multidirectional influences between judges, attorneys, custody evaluators, counselors, parents and children, and if so, how do they work?

The data for this study comes from semi-structured interviews conducted with judges, attorneys, family court service counselors, custody evaluators, and parents which explore their subjective experience in relation to the law, cultural norms, other legal and mental health professionals, parents, and children. Data gathered from respondents is analyzed using the constant comparative method of qualitative analysis (Strauss and Corbin 1990; Strauss and Corbin 1998). Chapter III presents the methodology of the study in detail.

This study does not test a particular hypothesis but seeks to explore its subject in ways that may lead to the development of hypotheses and theories of action. The analysis is directed towards identifying categories of experience, including similarities and differences, in individuals at various levels of the system and begins to consider how their experience might be resonant with the experience of individuals at any or every other level. The findings are considered through the lens of psychoanalytic thought regarding parallel process, loss, grief and narcissistic injury; as well as ecological and general systems theory.

Theoretical Framework

The ecological approach that underlies the perspective taken by this study is most clearly articulated in Urie Bronfenbrenner's The Ecology of Human Development: Experiments by Nature and Design (1979). This work had a profound impact on my thinking about litigating families as it further elaborated the person-in-situation

perspective in which I was trained as a clinical social worker. Bronfenbrenner's ecological model provided a structure to frame individual psychological responses within a legal, social and cultural context.

The ecological perspective, as described by Bronfenbrenner, views psychological and social processes as embedded within ever-widening circles of interaction. Ecological theory frames subjective experience and behavior within the context of the total social environment. The ecological perspective informs the psychological one, broadening it and giving it meaning, by seeking to understand the inseparable connections between individual psychology and, in the case of family law, the social, legal, and cultural environment. In child custody conflicts, this allows for an understanding of the psychological factors driving child custody conflicts within the context of both the immediate and broader social environment in which these conflicts occur. An ecological approach aims to incorporate explanations of how phenomena at various levels of the system interact to influence the outcome under consideration.

Levels of the social environment are conceptualized by Bronfenbrenner as a set of nested figures, like Russian dolls where the smaller ones fit inside the larger ones, each more encompassing level containing the more restricted ones. Emde, an eminent and prolific researcher in the field of infant development, applies this type of ecological framework to understand biological growth processes (Emde 1994). Emde argues that all life forms are characterized by a hierarchical organization of systems such that the

larger more encompassing systems contain and influence the boundaries of the ones contained within it. The context serves a crucial role in defining what something is and how it works. Meaning is contextual. The networks in which one exists shape one's perceptions, beliefs and behavior. Quoting Bronfenbrenner:

> . . . the macrosystem (also) undergoes a process of development and in so doing lends movement to all its composite systems down to the level of the person. Thus the members of a changing society necessarily experience developmental change at every psychic level - intellectual, emotional, and social . . . To corrupt a metaphor from Einstein's explanation of his Special Relativity Theory: development takes place in a moving train, and that train is what we may call the "moving macrosystem" (Bronfenbrenner 1979, p. 265).

In a reciprocal manner, the perceptions, beliefs and behavior of individuals exert an influence on the networks in which they are involved. In an ecological system a change in any part influences the whole.

One of the innovative and unique contributions of the ecological model is that the trajectory of human growth and development is influenced by events that occur in environments other than those in which the individuals involved are active participants, as when a child's life is affected by a decision made in a court of law. This seems common-sensical, but the implications of this way of thinking can lead to a

fundamental shift in the scope of one's understanding. Rather than the behavior of a parent or child, or a pattern of parent-child interaction, being understood solely as a reflection of one or more of the usual cohort of factors considered in psychological studies of children or parents of divorce, it may be seen as co-determined by the parents' understanding of the legal system and the forces that they believe will lead to the outcome they desire, a point articulated by the legal scholar, Robert Mnookin (Mnookin and Kornhauser 1979). A common example of this encountered in contested custody matters is the way in which one party feels compelled to respond to motions filed by the other, and along with the filing of papers with the court will behave in ways to substantiate their perspective or that they believe will achieve the desired outcome. The very functioning of the adversarial system exerts pressure on families to maintain a competitive and hostile stance, which has secondary effects on the nature of the quality of the interaction between parents, between each parent and the children, and ultimately within the minds and hearts of the children.

Significance of the Study

It is hoped that the results of this study will foster an understanding of child custody conflicts as a developmental process occurring within a specific context. Contextual understanding is critical from both the psychological and legal perspectives. From the psychological side, all too often the focus is exclusively on microsystem elements resulting in overly pathologized parents whose behavior is assessed without consideration of the impact of the legal system in contributing to the very reactions that

are then seen as signs of psychopathology in the parents. Additionally there is relatively little known about the impact of the unique stresses faced by families in custody litigation on mental health professionals in the family law field. From the legal side, attorneys and judicial officers would be better prepared to do their jobs if they understood the applicability to their roles of what psychoanalytically trained mental health professionals have learned: that working with individuals is a relational reciprocal process in which one's own subjective conscious and unconscious responses both influence and are influenced by the other. A dynamic understanding of reciprocity in custody matters could enhance the capacity of legal and mental health professionals to appreciate their own responses to families, as well as their impact upon litigants.

Knowledge of the role of context provides a window into the complex and interweaving forces that influence behavior, particularly with respect to behaviors that keep families locked in hostile conflict over extended periods of time. Understanding the interplay among the components of the ecological system can provide the framework for developing a more comprehensive model of the factors that shape custody litigation. This in turn could serve as the basis for increasingly effective psychological interventions, and as importantly, may suggest modifications in family law procedures that could play a role in the development of improved ways to protect individual rights *without* sacraficing critical opportunities to foster resolution and healing in the most vulnerable families.

CHAPTER II: REVIEW OF THE LITERATURE

Throughout the literature devoted to the study of divorce, from both the psychological and legal perspectives, there are observations of the unintended exacerbation of conflict resulting from the influence of the adversarial system on divorcing parents who are unable to reach agreement about how to end their marital relationship, split up their possessions and assets, and develop a plan for their children. The more well-balanced studies from the psychological literature recognize that due process and vigorous representation play a role in assuring protection of individual rights. The more well-balanced studies from the legal literature recognize the psychological dimension of child custody litigation. References in the literature to this phenomenon go back at least as far as 1952 where they can be seen reflected in comments by Justice Bernard Botein about how the hatred between the parties in divorce actions "infects" their attorneys so that "the most decorous of lawyers snap and snarl at one another" (Botein 1952, p. 144).

This theme was explored and reexamined at the more recent 1989 Wingspread Conference, a gathering of some of the most respected legal and mental health professionals in the United States sponsored by the American Bar Association. Participants in that convocation identified the "interactive chemistry of the key persons" as one of the most significant factors influencing the course of child custody disputes (ABA 1989). Included in this group of key persons are the child, parents, extended family, attorney for each party (sometimes for the child, as well), individual therapist for each party, judge, family court counselor, court-appointed investigator, and possibly others.

The conference proceedings reflect a recognition that the "key players" in child custody conflicts are not just individuals occupying various roles in the system that influence process and outcome for families but also the institutional and social context of divorce and child custody conflicts. These institutional and cultural factors include the court system and evidentiary rules, as well as societal and cultural attitudes toward divorce and custody matters.

Over the past twenty-five years, a substantial body of literature focused on the impact of divorce on parents and children has proliferated. Most of these studies, particularly the earlier ones, focused on the normative impact of divorce on children and parents, the various effects of sole and joint custody arrangements, and how parents arrive at one or another of these custody arrangements. Over the past decade, families in which the parental separation is fraught with difficulty, where there is a high level of conflict between mother and father, have become a separate although still small focus of study within the broader spectrum of divorce research. Some of this research has addressed the phenomenon of "interactive chemistry"discussed by the participants at the Wingspread Conference. For example, Johnston and Roseby (1997) discuss this phenomenon via a model that identifies three interactive levels of the social system: the internal level of individual psychological response, the interactional level of interparental and familial dynamics, and the external level of the extended family, community, attorneys and judges. The research concerning high conflict divorce suggests that the trajectory of the divorce experience may be very different for families engaged in custody litigation than it is in the

more common divorce experience where parents are able to end their marital relationship without having to resort to intensive court processes. Once child custody matters find their way into lawyers offices and courts of law, whatever psychological and social vulnerabilities the family has will interact with a range of other variables encountered in the family law system. While the dynamic relationship between the individual and other levels of the social system is recognized in the literature concerned with high conflict divorce, there are few studies, qualitative or quantitative, examining how this dynamic operates.

The present study further explores this problem through investigating the dynamic interaction of psychological aspects of the custody litigation phenomenon with family court processes as reflected in the subjective experience of key players at different levels of the social system. This literature review integrates the body of empirical studies in this field with elements of psychoanalytic and sociological theory to form a lens that can inform and deepen the questions asked of respondents in an effort to help elucidate areas of subjective experience that might otherwise remain inaccessible.

This chapter is organized into two main sections. The first half is prefaced by an overview of the history of how child custody disputes have been decided. It then moves on to present and critique empirical studies, both quantitative and qualitative, that have been done concerning the decision-making processes of judges, attorneys and mental health professionals in child custody litigation. The second half of the literature review is

prefaced by an overview of research investigating parents and children in high conflict divorce in order to identify the current state of knowledge about the unique characteristics and problems of this population. Since loss and rage are core emotional experiences of this group, psychoanalytic theory concerning loss, narcissistic injury and threats to the self are discussed next. This discussion integrates several theoretical perspectives used in this study to create a meaningful framework for understanding complex interactions among individuals at different levels in the social system. The first of these theoretical perspectives is the psychoanalytic theory of parallel process; second is the notion of the interactional field; third is general systems theory, particularly field theory and ecological theory; and fourth is the intersubjective perspective. Included within the broad conceptual framework of the interactional field and intersubjectivity are the concepts of transference and countertransference, in both their positive and negative connotations, as these operate unconsciously in shaping the dynamic interactions that flow up and down the systemic ladder. The chapter concludes with an integration of what is known and a statement of the place of the present research as an extension of existing knowledge.

The Historical Background of Child Custody Dispute Processes

The subjective experience of jurists, attorneys, and mental health professionals working in the family law field, as well as of individuals who are involved personally in custody litigation, may be more fully understood if placed within an historical context. The current attitudes and beliefs about the process of divorce and decisions concerning child custody are but part of a long chain of social and cultural responses to marital breakup and

childrearing. Historical beliefs and ways of thinking about divorce and custody may continue to play a role in shaping the reactions of individuals involved personally and professionally in the family law system. This is particularly the case because the history of divorce and child custody is intimately tied to conceptions of morality and to the ways in which relations between men, women and children are structured and organized in a society. The following review is not exhaustive but offers the reader an overview and basic understanding of the historical antecedents of the present day approach to divorce and child custody.

The history of the disposition of custody after divorce is a story told through understanding how prevailing rules or presumptions, rooted in the social structure of the time, have been applied. During most of recorded history children were regarded as chattel. In ancient Rome, they were considered the property of their father and were subject to being sold, or even killed, at his discretion (Derdeyn 1976). This absolute right of fathers to custody of children was carried on through the Middle Ages in Europe. The English Common Law regarded the father as the "natural guardian" of the child (Einhorn 1986). This was in large part grounded in the fact that the father was able to care for the children economically, which went hand in hand with the fact that women did not work outside the home and were prohibited by law from owning property. In exchange for his economic obligation to care for his children, fathers were entitled to the fruits of the labor of their offspring. This absolutist role of fathers was modified to some degree in 18th century England when the idea that fathers not only owned their children but had some

obligations to care for them was incorporated. The role of the state in child custody matters was given further definition in 1839 with the passage of Talfourd's Act, which gave the court the power to determine custody of children under seven and established in law the doctrine of 'parens patriae' (Derdeyn 1976) in which the state has an established role to look after the welfare of children

English Common Law was incorporated into the family law system in the United States. During and since the nineteenth century, disposition of child custody cases in the U.S. have been governed by a number of trends, reflecting the transition from an agrarian, rural society to an industrialized, urban one, as well as a dramatic change in the status of women and children (Derdeyn 1978). Women began to have the power to vote, own property and work outside the home. Children began to be seen as having a unique developmental status, and institutions and laws such as public schools and child labor laws were developed to protect them. The absolute right of the father to custody became more limited as custody of children could be given to a mother on a finding of paternal unfitness, often relating to behavior of a questionable moral nature such as adultery (Einhorn 1986). In fact, the awarding of child custody to one parent or another has often been linked to ideas or judgments about moral indiscretion on the part of one or both parents, with the "innocent" party being viewed as more fit to care for the children (Derdeyn 1976). In this vein, a finding of adultery against a parent was almost a guarantee of losing custody.

From the mid-nineteenth century through the 1920's there was a transition from the primacy of father custody to the primacy of mother custody. This trend was contained in a presumption which came to be referred to as the "doctrine of tender years" which held that even when parents were of equal ability, children (particularly young children and older girls) were better cared for by mothers than fathers (Derdeyn 1978; Einhorn 1986). The doctrine of tender years held sway in American family law courts well into the 1970's. It was challenged in part as the movement toward equality between men and women, resulting from the womens rights movement, had dramatic effects on sex roles and on how society regarded parental capacities of the different sexes. Subsequent to the development of the doctrine of tender years a competing principle developed which held that child custody determinations should be based on consideration of the best interests of the child. Derdeyn (1976, 1978) points out, however, that in practice the best interests of the child standard has often served as a cover for placing children with their mother since the commonly held view was that it was in the best interests of children to be with their mothers.

Since the 1970's a number of major changes have been incorporated into family law in the United States, including the elimination of fault-based divorce and the codification of gender-neutral custody laws. While it is often claimed that gender bias continues to influence child custody decisions, when it does so now it is in violation of the law. Derdeyn wrote,

> The weakening of the tender years presumption, the increasing concern about discrimination by sex, and the moderate decrease in emphasis on parental fault in awarding custody all herald a trend toward equalization of the struggle for custody between former spouses. An important effect of this equalization is that it requires judges to exercise ever-increasing freedom or discretion in each interparental custody decision (1976, p.1374).

Derdeyn argued further that the application of rules in which parental gender or culpability determined custody orders tended to "relieve judges of some of the extremely broad discretion they possess (and often dread)" (1976, p. 1374). In the 1972 case of Stanley v. Illinois, the U.S. Supreme Court opinion states, "Procedure by presumption is always cheaper and easier than individualized determination . . . (however) . . . it needlessly risks running roughshod over the important interests of both parent and child" (Derdeyn 1978, p. 173). One may understand how the decrease in rule-based governance goes hand in hand with generating a need for understanding the specific needs of the child and of the child's relationship with each parent.

The application of the best interests standard was explored by Kelly (1997), a clinical psychologist and researcher. She argues for the value of maintaining the best interests of the child standard in custody cases since it forces determinations to be grounded in consideration of each particular child rather than basing them on ideas about what all children need when their parents split up. On other hand, she notes the high level of

ambiguity in the concept of best interests, and illustrates how it may be used to buttress various conflicting opinions. Arguing for increased definitional precision and linkage between concepts of best interests with current research, as well as the importance of forging a dialogue that can yield information about how various considerations are to be weighted against each other, would, she claims, make for more informed and effective practice. Of particular note in light of the present research are Kelly's comments about the personal dimension in the interpretation of best interests. She maintains that it is the conscious and unconscious contents of the unexamined psyche that may exert a strong influence on the decision-making process.

The courts have increasingly turned to mental health professionals for assistance in understanding and articulating the needs of children whose parents are litigating custody. This has created new roles and new challenges for mental health professionals. Mental health professionals, having expertise in child development, family assessment, and assessment of psychopathology, have become increasingly involved in the fabric of the family law system since the shift to the best interests of the child standard in the 1970's. As one psychiatrist wrote, "Where amicable resolution of custody seems impossible, he (the child psychiatrist) must be willing to commit himself and his knowledge of child development, child rearing, and family living to the careful scrutiny of the court" (Benedek 1972, p. 327).

Other recent developments in family law reflect the trend toward a recognition of the

family as a psychological and social system that continues to exist after divorce. Over the past two decades the integration of court-connected non-adversarial or quasi-adversarial options for dispute resolution have become the norm in the family law landscape. The courts, attorneys, and mental health professionals have developed ways of working together more collaboratively so that the process of family reorganization after divorce is less likely to become further polarized through the machinations of the legal system. Examples of interventions that reflect a potential synergy between these two approaches are mediation (both confidential and non-confidential types[1]), settlement-oriented assessment and evaluation interventions, judicial case conferencing, judicial case management, and, most recently, special mastering.

Empirical Studies of the Interrelationships Between Legal and Mental Health Professionals

The following sections of this review discuss studies of judges, attorneys, and mental health professionals working in the family court system. Many of these studies are quantitative and report factors considered in reaching decisions and formulating recommendations in custody and visitation matters. Several of the studies explore the interaction between litigants and various legal and mental health professionals working with them.

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[1]See page 296 for further discussion of confidential vs. non-confidential mediation

Judges Perspectives

The judge is the ultimate decision-making authority in the ecological system in which child custody conflicts occur. In most states, and according to federal law, custody decisions are to be made by judges in accordance with the best interests of the child standard. Individual states vary in terms of how much, if at all, their code sections define the factors that are to be considered in deliberations about best interests. In all cases, courts have a great deal of discretion in deciding what to include and exclude in considering how to employ the standard. There may be many desirable aspects to allowing the court such broad discretion, particularly since it permits consideration of any factors deemed relevant, recognizing the impossibility of legislating the contingencies of each and every case, and fosters a focus on the specific needs of each individual child. At the same time, it is the breath and depth of their latitude that allows judges to suffuse the decision making process with their own values and opinions. In this light, one would expect that the personal experience of judges, including both conscious and unconscious reactions to individuals before them and the situations they represent, will to some degree influence the outcome of contested custody cases. There are no studies that address the unconscious factors that influence judges' decision-making processes in custody cases.

Lowery (1985) attempted to explore the process by which judges reach decisions in custody cases. Her research, however, did not actually examine the process so much as it uncovered what factors judges consider under the best interests standard. The sample consisted of fifty-seven judges and 23 commissioners, all male, in Kentucky. They

responded to a 54 item questionnaire in which they were asked to rate the relative importance of 20 items thought to be likely factors considered in arriving at child custody decisions. A rating for each item was made by each respondent along an 11-point rating scale. The findings suggest that judges rely primarily on a range of factors including: mental stability of each parent; each parent's sense of responsibility to the child; each parent's ability to provide access to schools; each parent's moral character; each parent's ability to provide continuing involvement in a community; and each parent's financial stability. A second group of factors was considered important but not as important as the first group. These secondary factors included: each parent's ability to provide access to other children; length of time each parent has had custody; physical health of the parents; and each parent's ability to provide a two-parent home. Of note is that differences were found between the judges' ratings and the commissioners' ratings of items. Lowery hypothesized that this difference may have been caused by factors such as the younger age of the commissioners, the fact they were appointed rather than elected, and their working part-time in the court in contrast to the full- time judges.

Another study of judges' beliefs assessed the attitudes of 59 judges in Louisiana (36% of the 175 who were included in the sample) (Stamps, Kunen et al. 1997). The authors sent questionnaires to all the judges in that state who hear custody cases (N=175) in which they were asked to respond on a five-point Likert scale indicating the degree to which they agreed or disagreed with each of nine statements assessing their beliefs regarding assumptions underlying custody decisions. The authors assessed judges' preferences for

maternal custody, joint custody, awarding custody to working vs. non-working mothers, awarding custody to single vs. remarried parents, placing children with the parent of the same sex, awarding custody based on sexual misconduct of a parent prior to the divorce, and linking visitation by the non-primary custodial parent to payment of child support. The responses showed substantial agreement among judges on seven of the nine questions. The two questions in which there was not substantial agreement were whether mothers who did not work were superior primary custodians and whether sexual misconduct of a parent prior to the divorce should be a factor in deciding custody. Of particular interest, aside from the apparent influence of the judges' moral beliefs on the process of deciding custody, is that the judges in the state of Louisiana showed a strong preference for awarding custody of young children to mothers despite the fact that the law requires that decisions be made in a gender neutral manner. Half the judges expressed opposition to joint physical custody arrangements despite the fact that in 1983 Louisiana legislated a rebuttable preference for joint physical custody (an assumption that it is in the best interests of a child to be in joint physical custody of his or her parents unless it can be demonstrated that this is not the case). These authors point out that the judges' beliefs were often maintained in spite of the fact that they were contradicted by psychological and sociological research findings. The authors conclude by noting that the attitudes of judges exert influence beyond decisions they reach in any particular case because their decisions in each case contributes to expectations that shape other cases. This operates specifically in terms of how a) attorneys become familiar with the beliefs of judges and may advise their clients to settle or fight based upon this knowledge, and b) mental health

professionals conducting court ordered custody evaluations may tailor their recommendations to conform with what they understand of the judges previous rulings, beliefs, and preferences.

In contrast to the Stamps research, a more recent study of criteria influencing judicial decision-making in custody matters found that judges are likely to consider factors congruent with findings from psychological research concerning post-divorce adjustment of children when these factors are included in the law (Sorensen, Goldman et al. 1997). Sorensen and his colleagues studied the outcome of 60 families referred by the Florida courts to a Guardian Ad Litem (GAL) program in which the guardian (a trained volunteer or legal professional) had prepared a written and oral report for the court including findings and recommendations for custody. The decisional criteria used by the GAL's were compared to decisions later reached by judges. Since all families in this sample were participating in the Guardian Ad Litem program, they were likely experiencing particularly high levels of interparental conflict, a limitation in terms of generalizability of the findings but a very useful group to consider in terms of the subject of the present study. The authors found that although judges relied heavily on recommendations from Guardians Ad Litem (following their suggestions in 96% of the cases when the recommendations were in favor of the parent who had already been consistently providing for the child's physical and emotional welfare, and 75% of the time in cases where the GAL had recommended a change in primary physical custody), factors identified in the psychological literature as having a particularly deleterious effect on children of divorce but not included in the law

were not considered by judges. Such factors included evidence of high levels of interparental conflict, a risk factor that has been consistently identified in the literature as a pernicious influence on post-divorce adjustment of children. Similarly, GAL recommendations for psychotherapy for a parent were often overlooked by judges even though such referrals were indicative of parental mental or emotional instability, another key factor identified in the psychological literature as influencing child adjustment.

Allegations of child abuse, spousal abuse, and parental substance abuse occur often in the context of child custody litigation. In an effort to determine the impact of such allegations on the judicial decision-making process, one study followed the outcome of 60 contested custody cases in Florida (Sorensen, Goldman et al. 1995). Of note, these researchers point out that judges and lawyers may not always be able to identify their decision-making process and may bias their responses in terms of what they believe are socially desired or expected answers. Unlike many of the other studies which relied on judicial self-report regarding the process of reaching a custody decision, this study used data from court records as well as interviews with family members conducted by Guardians Ad Litem. The findings of this study suggest that judges do not require substantiation of allegations of abuse or neglect in order to consider such considerations as relevant in their deliberations. Furthermore, when there were unsubstantiated allegations against fathers these carried more weight with the court than when there were unsubstantiated allegations against mothers. Substance abuse allegations appeared to carry no weight with this sample of judges. This final point could reflect judicial insensitivity to issues of substance

abuse, but could also reflect situations in which there were mutual allegations of substance abuse without a way of substantiating the allegations of either parent.

One study of family law judges in Florida attempted to identify criteria used by courts in reaching a determination regarding which of two litigating parents should have primary physical custody of the child after divorce (Sorensen and Goldman 1989). These researchers sent a questionnaire to all 344 judges who heard family law cases. Ninety-six (28%) responded. The judges used a 10 point Likert-type scale to rate the level of importance of each of 20 items linked to children's post-divorce adjustment as reflected in previous studies of judicial decision-making as well as in the social science literature regarding outcome for children of divorce. While there was relative homogeneity in the sample of judges who responded to the questionnaire, the results suggested that there is a great deal of variation in which criteria judges use as well as how much weight different judges place on the same criteria. Criteria related to considerations of stability and continuity in the post-divorce family were most highly rated. Interestingly, this study found that differences in demographic variables among the judges in the sample explained relatively little of the variance in responses. This may have been due to the overall homogeneity in the sample, however.

On an international level, a pair of coordinated studies (Cumes and Lambiase 1987; Lambiase and Cumes 1987) done in the Republic of South Africa shed some interesting light on the differential understanding of judges and social scientists concerning custody of

children after divorce. This was of particular interest in terms of the present research given the shared English common law roots of law the United States and South Africa. The first of these studies involved an analysis of legal principles underlying custody decisions made by the highest court in South Africa, the Appellate Division of the Supreme Court. While the authors note that only the minority of custody cases reach the Appellate Division, those that do become precedents which then guide the subsequent decision making function of the lower courts. The study found that often the legal principles identified in the Court's statements of decision are at odds with psychological theory concerning child development and family functioning after divorce. For example, the court found that in cases where one of the parents had been adulterous and so was held responsible for the family breakup, custody should not be given to the parent who is immoral or unfit. In contrast, the psychological literature suggests children are more well-adjusted living in divorced homes than they are in unhappy two parent homes. Other examples concern the reluctance of courts to move a child who has been in one stable temporary home environment since the parents' separation (social science theories balance childrens' need for stability with the benefit of remaining with their 'psychological parent') and that the court should award custody to the parent who has remarried and is living in a two parent home (social science literature points out the stressful nature of step-family life for children and adults, thus offsetting the potential benefits of restoring the two parent family model).

This case law analysis was followed up by the same authors (Lambiase and Cumes 1987)

with an empirical study using a questionnaire survey of judges and mental health professionals. The goal of the study was to ascertain whether or not the differences identified in the case law analysis were the same or similar to that which would be found by survey of the professionals involved. The sample consisted of twenty legal professionals (four judges and sixteen lawyers) and twenty mental health professionals (five social workers and fifteen psychologists). These researchers found that there was a great deal of overlap between the legal and mental health professionals understanding of the criteria used to determine best interests of the child. However, there were some differences. 'Best interests' was found to have two dimensions. The parent-oriented dimension consisted of considerations such as placing a child with the same sex parent, the wishes of the parents', and the parents' abilities to provide the child with a stable home in the community. The child-oriented dimension consists of the wishes of the child, the parents' moral character, and professional advice. These authors found that the mental health professionals tended to place greater emphasis on the child-oriented dimension while the legal professionals (judges and attorneys) emphasized the parent-oriented dimension. They write,

> Perhaps because the legal professional participates more in the world of the litigating adults, whereas the mental health professional's training, and medico-legal focus, is the child, a corresponding difference is found in the importance they give to the wishes of the child. (Lambiase and Cumes 1987, p. 129).

This interesting comment suggests how different perspectives in child custody litigation may be shaped by the interplay between the position one occupies within the ecological system, the perceptions one is able to have, and the thinking one is stimulated to do.

Three studies explored elements of the subjective experience of judges' responses to child custody conflicts. It was through asking open-ended questions that these researches were able to progress beyond the level of listing factors considered by judges in arriving at best interests and to begin identifying other factors associated with the process of judicial decision-making. This suggests that in order to understand the experience of judges in the ecology of the family law system, the researcher must ask questions that encourage judicial officers to tell their own stories, and then use the data of the judges' responses as the basis for even deeper questioning.

The extent to which the subjective experience of judges plays a critical role in child custody decision-making was highlighted by the work of Settle and Lowery (1982). Using a questionnaire designed to help explore the process by which judges make custody decisions, Settle and Lowery queried each of the state circuit judges and commissioners in Kentucky. The instrument used requested discreet responses to 20 Likert-type questions assessing the degree to which the judges relied on each of ten factors culled from a survey of state statutes regarding custody determinations. Additionally, the questionnaire had 34 more items, including 10 that were in an open-ended format designed to elicit responses that would provide some insight into the experience of judicial decision-making in child

custody conflicts. This study suggested that judges relied on many factors. The most highly ranked item on the survey was the importance placed by judges on the mental stability of each parent. Three means of assessing mental stability were noted: input from mental health professionals who had evaluated the parents, observation of the parents' behavior at the hearing, and the parents' testimony at the hearing. The next most salient factor considered by this group of judges was the 'moral character' of each parent. Included in this category were a wide variety of problems (many of which are at least as much psychosocial as they are moral problems) ranging from substance abuse, illegal activities, and spousal and child abuse to promiscuity, infidelity, and homosexuality. Analysis of the results suggested that judges, who tend to be older than commissioners, were more conservative in their approach to social problems. It was only in the judge's group that having a live-in companion, homosexuality, or fathers not providing for the family were identified as evidence of moral deficiency. Twenty-one percent of judges (compared to 4% of commissioners) identified infidelity as a moral problem to be considered in deciding a contested custody case. The authors noted a tendency for judges to become more "cautious, conservative and tradition-oriented" as they get older. They also noted that the judges' marital status, as well as number and ages of children, appear to exert an influence over decision-making in child custody litigation. The open-ended questions in the Settle and Lowery survey found two common themes reflected in the experiences of judges in deciding these cases. One was that this is the most difficult and time consuming area of law in which to practice. The second was that the final decision was often made, after taking everything into consideration, based on the judges "gut

reaction" to the individual case. The authors' wrote,

> They responded that they find it very difficult to ascertain which parent is more suitable as a custodian of the children and that they frequently feel helpless in making a really good decision. Many indicated that they feel they are not trained to make such a decision, and at times feel angry at the parents for putting them in the position of having to make such an important decision concerning a child (Settle and Lowery 1982, p. 137).

Similar sentiments are reflected in the observations of the English legal scholar, Michael King (1981). King calls for a realistic appraisal of the limits of law and courts to impact family problems. He points out that judges are dependent upon the skills of attorneys who present evidence and argument. The judges are subject to the same prejudices and influences as other citizens. He writes, "Courts are imperfect places for fact finding even if the facts are capable of being found" (King 1981, p.160). Christopher Oddie (1988), a circuit judge in England, offered additional insight into these processes in a paper entitled "The Psychodynamics of Courtroom Behavior." Recognizing that court cases are decided based on content of the evidence and applicable law, Oddie points out how much judges are dependent on assessment of credibility of witnesses from their behavior and demeanor, as well as on the degree to which their own responses might be triggered by the emotions and clarity of the witness. He argues that the ideal of objectivity in the administration of justice lies in many factors relating to the judge including the "character, commitment,

experience and his knowledge of human nature and of himself" (Oddie 1988, p.54).

The Sorensen and Stamps studies suggest the degree to which judges' decisions are shaped by the law rather than by psychological data illuminating the needs of children after divorce. This points to the need for further integration of solid research findings into the law since the judge's job is primarily to interpret and apply the law to the facts of the case as they are known, and not to create law or function as a clinician or psychological researcher. However, the Stamps study suggested that the personal beliefs and values of the judge were of greater influence in arriving at custody decisions than other factors, even when these were in conflict with family code sections. Related to this finding suggesting the degree to which personal factors influence judicial decision-making in custody matters, the Settle and Lowery study, as well as the Oddie research, draws in another dimension in demonstrating that the role of the emotional response ("gut reaction") of the judge to the litigants (engendered through observation of courtroom behavior and listening to oral testimony) may be a key factor through which each parent's mental stability is assessed by the court. Additionally, the Settle and Lowery study illustrates how much the personal experience and values of judicial officers influence their approach to deciding custody matters. The conceptual model of intersubjective conjunction and intersubjective disjunction, discussed below, may be a useful way of thinking about how the subjectivity of the judge interacts with that of the litigants and others in the family law system.

Attorneys Perspectives

Johnston and Roseby (1997) note a number of ways attorneys may become caught in the dynamics of high conflict custody cases. These include a wish to make a name for themselves in the legal community. They may also take advantage of an angry client's wish to punish if this is a way to challenge an existing law or legal procedure. Other problems, such as rivalries with opposing counsel and residual displaced anger having its source in the attorney's own divorce, may contribute to their entanglement in these cases. They write,

> In perhaps no other area of practice are legal and mental health professionals so much at risk for losing their professional objectivity, and becoming entangled with their clients, as in these high-conflict family situations. Some try to rescue their client in ways that are not possible or take on the fight as their own personal crusade. It is common for counselors and advocates to become ambivalent, covertly hostile, and personally involved in dealing with and representing their clients (Johnston and Roseby 1997, p. 10).

A qualitative study of the differential experience of attorneys and clients in divorce actions was conducted by Sarat and Felstiner (1995) in their book, "Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process." These authors apply the lens of interpretive legal scholarship to examine the roles of lawyer and client. They find them to be characterized by continually shifting alliances and struggles over the definition of the

issues and the strategies for handling them within the world of society, the court, and the law. Rather than seeing law as something separate from social interaction in general and from the context of divorce in particular, the interpretive view perceives law as woven into the fabric of how people live their everyday lives. Two vectors operate simultaneously: 1) law and lawyers shape social interaction and individual expectations and 2) the experiences of individuals interacting with lawyers and the courts give rise to modifications and developments in the law. In this view,

> We are not merely pushed and pulled by laws that exert power over us from the "outside." Rather, we come, in uncertain and contingent ways, to see ourselves as law sees us; we participate in the construction of law's "meanings" and its representations of us even as we internalize them, so much so that our own purposes and understandings can no longer be extricated from them. We are not merely the recipients of law's external pressures, but law's "demands" tend to seem natural and necessary, hardly like demands at all (Sarat and Felstiner 1995, p.12).

Sarat and Felstiner argue that litigation is a process of contesting meanings, and so sought specifically to deepen the understanding of the ways in which meaning is developed and power is shared in the interaction between lawyers and clients in divorce and custody matters. To this end, they followed one side of forty different divorce cases over a period of thirty-three months. For each individual case, they observed and tape-recorded

meetings between lawyers and clients. They also attended mediations, hearings, and trials. Additionally, attorneys and clients were interviewed separately about their experience with one another in the meetings that were observed. The lawyer-client pairs who were interviewed came from two cities, one in Massachusetts and one in California. The sample was non-random and may have been biased in terms of its reliance on less experienced lawyers, greater representation of female lawyers, and exclusion of the more emotionally disturbed litigants.

Their study made several interesting observations. First, despite changes in the law designed to remove divorce from the moral sphere and to eliminate blame and fault, the clients tended to focus on issues of guilt and blame in relation to their former spouse. The meanings they assigned to events tended to excuse themselves and justify their own behavior while projecting blame for the divorce on their spouse. These researchers suggest that since the lawyer is in a professionally distanced role one aspect of or motive in the clients' assignment of blame may be to enlist the loyalty of their attorney. They state,

> By projecting blame on their spouse, clients work to reinforce that loyalty, to penetrate the objectivity and reduce the social distance built into the traditional professional relationship. Their vocabulary serves to add sympathy to fees as a way to command their lawyer's energies (Sarat and Felstiner 1995, p.50).

Lawyers are faced with two equally difficult alternatives. If they ally with the client in

blaming the former spouse then they risk becoming involved in something about which they have no expertise, that runs contrary to the purpose of no-fault divorce, and wastes time and money. On the other hand, if they assume a challenging stance with respect to clients' attempts to enlist loyalty then they risk increasing distance and generating suspiciousness. The lawyers in the study tended to remain silent in the face of their clients' moral condemnation and blaming of the former spouse, resisted developing a shared version of the reasons for marital failure, and limited their comments to aspects of what was reported that was directly relevant to the legal process of the divorce. The lawyers deflected the clients' attempts to enlist their support for achieving some sense of moral vindication and tended to rely on situational explanations for the behavior of the former spouse. The authors found that lawyers and their clients appear to be operating in two different spheres, where the lawyers focus on the legal divorce and the clients focus on the social and emotional divorce. It is the attorneys' insistence on not participating in the clients' efforts to shape the meaning of the marriage and its demise that contributes to clients' experience of their lawyers not understanding them or caring about them. Sarat and Felstiner write,

> While lawyers say that behavior is more influenced by situation than by personality, insisting on that belief in the face of their clients' more personalistic construction of social relations may threaten their relationship; at the same time, ignoring it may threaten their ability to help secure a negotiated or stable outcome (1995, p.51).

They write further,

> The meanings constructed and the vocabularies of motive used in lawyer-client interaction in divorce respond to the distinctive characteristics of that social relationship. Lawyers deploy the resources of professional position; they emphasize their experience and the expertise that experience provides as they try to limit involvement in the client's social world. While this limitation gives power to lawyers' interpretations, it cannot guarantee acquiescent clients. By repeatedly expanding the conversational agenda, clients resist their lawyers' efforts to limit the scope of social life relevant to their interaction. As a result, they insure both the fragility of power in lawyer-client relations and the elusiveness that characterizes the meaning-making process. Thus, in divorce as elsewhere, law, and the images of social life with which it is associated, are deeply embedded in an unequal, yet volatile and conflictual, social relationship (p. 52).

Felner (1985) studied differences between lawyers and judges in an unnamed northeastern state in terms of their perceptions of several core issues in deciding between sole and joint custody. The issues investigated included attitudes and practices concerning different custody arrangements, as well as factors affecting custody decisions. These researchers compiled responses of 74 attorneys (80.4% response rate) and 43 judges (65.8% response rate) to a questionnaire that was sent to them. They found many similarities but also significant differences in the ways judges and attorneys think about child custody issues.

Further, judges and attorneys both differed from joint custody advocates. While advocates argue that it is in the child's best interests to be in joint custody because it preserves the relationship with both parents, which is arguably to the child's advantage from a psychological perspective, legal professionals commonly balanced this benefit with the detriment related to exposing the child to ongoing interparental hostility. Pointing out that joint custody advocates argue in favor of preserving the child's relationship with both parents and protecting both parents from the loss of their relationship with the child, judges and attorneys who responded to this survey tended to focus more on assessing the quality of the relationship between the parents and the maturity of each parent. In other words, unless parents were able to be relatively cooperative and to place the child's needs above their own, judges and lawyers were more likely to think in terms of sole, and in particular maternal, custody as best for the child. Most judges were found to believe that parents, particularly mothers, were motivated to obtain custody by genuine love of the child. At the same time a large number of "negative emotions" (including revenge and desire to gain financial advantage) were thought to drive parents, especially fathers, to fight for custody. These authors conclude their discussion by making the point that lawyers and judges seem open to replacing the traditional reliance on precedent with one based on assessment of individuals and families on a case by case basis.

The same data was subsequently analyzed again, by the same lead author (Felner, 1985), with an eye toward learning about the differential attitudes of judges and attorneys regarding the use of mental health services in custody litigation. Their findings suggested

that judges and lawyers attached relatively little importance to the opinions of mental health professionals and social science data. These researchers identify a disjunction between the orientation of mental health professionals attempting to understand and explicate the needs of children and parents on the one hand, and attorneys and judges whose work is governed by rules requiring client advocacy and due process. The ethical requirements on attorneys mandate that they advocate for the best interests of their clients (the parents). Ethical mandates on judges include requirements that they safeguard due process, weigh all evidence, and decide custody matters according to the best interests of the child. The data of this study suggested that attorneys are motivated to use mental health professionals in custody cases primarily if they believe such involvement will advance their client's case. The authors note the incongruity between the common assumption among mental health professionals that the purpose of custody litigation is to reach decisions about what is best for the child with the ethical mandates within which attorneys practice whereby they are charged with advocating for the best outcome for their clients. In terms of judges use of mental health services in custody cases, the data of this study suggests that they generally limit their reliance on such data by regarding it as one source among many, including possible discussions with the child, lawyer for the child, the child's teacher, pediatricians, and parents. Both judges and attorneys were suspicious about social science data. The basis for their suspicion lies in their perception that mental health professionals and social scientists often overreach in terms of how they present the validity and reliability of their findings and recommendations.

Felner's findings should be interpreted cautiously. The sample was limited to respondents fifteen years ago from one state in the northeastern U.S. Having practiced in Northern California for the past twenty years, I can say that there has been a steady progression toward greater integration of legal and mental health services in family court. It would be interesting to see the same instrument used more recently, and on the West Coast, to see what, if any, different response patterns might arise. Nonetheless, it is important to note the suggestion in the findings throwing light on the ways attorneys, judges and social scientists view their respective roles and regard (or disregard) each other's expertise. Felner's work suggests how the interplay between mental health professionals, lawyers, and judges in the ecology of child custody conflicts is influenced by the different roles each profession plays and suggests how each profession is guided by its own assumptions and ethics. Exclusive reliance on questionnaire data limited the ability of the researchers to understand the subjective experience of judges and attorneys relative to their perceptions of their own roles in custody conflicts, as well as how they experience mental health professionals and the relevance of social science data to the work of the court.

Lee (1998) explored lawyers' perceptions of mediation and assessment services. This research used a questionnaire survey of 161 family lawyers in Canada. The sampling method, which involved sending questionnaires to 336 lawyers, likely yielded a response set more favorable to mental health services than a more representative sample of attorneys would likely have provided, as it is not unreasonable to hypothesize that the subgroup of lawyers most interested in the topic would be most likely to respond. Bearing

this in mind, the findings suggest that lawyers assign value to methods of resolving child custody disputes other than litigation, particularly mediation and custody evaluation, while also viewing representation by attorneys as the best way to safeguard the rights of litigants. This suggests that even in a group of family law attorneys supportive of mental health services for litigants, their training and professional ethics inclines them to maintain a strong interest in the adversarial approach as this is related to their duty to represent their client to the best of their ability.

One of the limitations of the extant body of empirical research regarding attorney's views on child custody and visitation is that it relies primarily on survey and questionnaire data. There are few qualitative studies available. The Sarat and Felstiner work was the only example of qualitative research concerning attorneys and divorcing parents found in the literature reviewed.

Mental Health Professionals Perspectives

Lowery (1985) surveyed a group of 104 psychologists and social workers in Kentucky in an effort to learn the relative importance they assigned to a range of psychological and pragmatic considerations in the determination of custody. Interestingly, in an effort to not have the sample biased by responses from a small group of very experienced clinicians, she attempted to "tap the collective wisdom" by including in her sample both professionals who conduct child custody evaluations and ones who did not. The five most frequently relied upon criteria were: 1) quality of the parent-child relationship; 2) parent's mental

stability; 3) parenting skills; 4) amount of contact with the child by the custodial parent; and 5) parent's affection for the child. The two least relied upon criteria were: 1) availability of a two parent home and 2) keeping the child with the parent of the same sex. Perhaps as importantly as the identification of criteria most commonly considered by evaluators was the finding that there are three "dimensions" through which clinicians tend to organize their thinking about custody-related criteria. The first of these combines an evaluation of the parent as a person and his or her relationship with the child. The second dimension has to do with the distinction between biological vs. non-biological parents. Finally, the third dimension involves assessment of the secondary (extended family and community) social support system available to the child. Lowery noted that clinicians in this survey paid little attention to two key factors that research suggests are highly important ones in understanding the impact of divorce on children. The first of these is the interparental relationship, which may influence childrens' post-divorce adjustment insofar as it either supports or hinders continuity of the family as a social unit. The second factor is financial: clinicians in this survey gave relatively little significance to money. However, as Lowery points out, the economic status of the family, particularly for single mothers, has been shown to have a major impact on the adjustment of children.

A recent questionnaire survey of mental health professionals involved in evaluating child custody disputes suggested that while experienced evaluators tend to dislike the adversarial framework within which custody disputes are handled, many of them somewhat paradoxically tend to become embroiled in advocacy efforts in which they may

use their expertise to help attorneys and their clients win (LaFortune and Carpenter 1998). The authors of this study do not speculate as to the possible factors that could underlie this finding, even though they correctly identify it as a transgression of standards of professional conduct as specified in the newly adopted American Psychological Association *Guidelines for Child Custody Evaluations in Divorce Proceedings*. Perhaps this is related to the fact that their research was based on a sample of 165 respondents who came from five different states, all of which have court systems in which the norm is that parties hire their own experts whose findings are then examined in court by counsel through an adversarial process. This is markedly different from the model in many other states, including California, where a custody evaluator is primarily appointed by the court as *its* expert, a situation apparently preferred by evaluators in the states surveyed. A major criticism of these researchers is the fact that many of the assessment instruments commonly used in custody evaluations are either not well suited for child custody evaluations or not well validated. They offer a disturbing observation that regarding the variety of psychological tests currently in use, ". . . there is essentially no research which establishes that the validity of the signs upon which most custody evaluators depend do in fact predict better custody options" and "the validity of these measures is unestablished at best and seriously flawed at worst" (LaFortune and Carpenter 1998, p. 222).

One study addressed ways that custody evaluators may expand the range of alternative roles to help families reach settlement and thereby minimize the risk of becoming part of the adversarial process. Ash and Guyer (1986) found that evaluations are seldom used by

judges as an aid to making decisions since most families that are ordered into evaluation by a court reach settlement based on the evaluator's recommendations and do not require a court hearing. These authors, based on a study of evaluation process and outcome for 200 families ordered into evaluation in Michigan, found the fact that a family is sent to evaluation does not imply they will necessarily go to trial. They identify strategies for case resolution that have to do with how much the evaluator holds open the possibility of settlement during the evaluation. These strategies include shifting the focus from evaluation to mediation, diagnosing the nature of the dispute, "floating" possible resolutions during the evaluation sessions, and using interpretive interviews at the conclusion of the evaluation process. Such techniques lend support to the notion that evaluations may be useful as a tool for settlement during or after a child custody dispute.

Simons and Meyer (1986) used a case study approach to identify some of the stresses affecting child custody evaluators. Their work suggests that the role of being an evaluator is incongruent with the training of mental health professionals. The evaluator is faced with tolerating the experience of being seen by parents as intrusive. He or she is most likely to be perceived as an extension of the legal system and not as a therapeutic agent. Since the evaluator will be reaching conclusions about the dispute and making recommendations to the court, parents are less likely to be open and honest. This factor may contribute to role strain for the evaluator who, as a therapist, is trained to work within a relationship in which patients are more accepting of self-disclosure where they admit doubts and discuss the range of feelings more openly. Evaluators may come to understand the needs of

parents and/or children to be in psychotherapy but have no ability to enforce their participation in it. These authors argue that evaluators need to accept the unpredictability of families in custody disputes and the idea that some situations are unsolvable.

There was one qualitative study found in the literature search which focused on the identification of factors considered by mental health and legal professionals in defining best interests (Banach 1998). This study was of particular interest in the present review insofar as not only did it use a qualitative design but it included judges, attorneys, and mental health professionals. Using semi-structured interviews with legal and mental health professionals working in New York's dependency family court systems, the fifty respondents were asked to discuss the factors considered in arriving at a decision of what was in the best interests of a child. The results should be interpreted in light of the fact that of the 23 mental health workers involved only three had attained a masters' level of education. Their limited educational attainment level may have contributed to the author's finding of the broadness in the range of factors considered, as well as the extent to which subjectivity appeared to play a large role in the determination of best interests. Additionally, the bulk of the cases in the study were dependency, not custody, matters. This being said, the study found that the focus of decision makers tended to be guided by four principles: maintaining continuity with the primary caretaker, preventing future problems, preserving the family unit, and maintaining cultural identity. Within these guiding principles were factors at the level of individual cases that were commonly considered in the particular case: capacity of the parent to attend to the needs of the child;

history of abandonment, abuse, or neglect; judgment as to whether or not a parent could actually take care of the child; parental qualities such as capacity for nurturing, insight, stability, and reliability; untreated mental health or substance abuse problems; domestic violence in the home; social support available to each parent; parent-child relationship characteristics; presence or absence of child behavioral problems; and child's wishes. Finally, Banach identified a category of 'systemic factors' which referred to how long the family was known to the legal or mental health/social service system.

High Conflict Divorce: The Experience of Parents and Children

The literature concerning the psychological impact of high conflict divorce on parents and children is relatively minimal, particularly in comparison to the body of research focused on children of divorce and on various custodial arrangements. Johnston (1994) developed a theoretical model for understanding the dynamics of high conflict divorce. Within this model, separation-engendered conflicts (often involving feelings of humiliation, shame, and helplessness) can interact with pre-existing psychological vulnerabilities in some parents, making them more likely to experience hostility and interpersonal conflict. Intrapsychic conflicts may interact with destructive interspousal dynamics in the marriage and separation, resulting in one or both parents having negative and polarized views of the other. Within the grip of this experience, parents may become distrustful of one another and each may come to feel that he or she must protect the children from the insidious impact of the other parent. Johnston points out that when parental functioning and judgment are compromised by distress, as well as by ongoing criticism and undermining by

the other parent, then there may be very realistic reasons for concern about the impact on children. When this situation harms children psychologically, possibly causing behavioral or emotional problems, then a cyclic pattern may develop in which the problems in the children further fuel the interparental conflict.

In her review of the few studies looking at the impact of high-conflict divorce (those divorces characterized by intractable legal disputes, chronic interparental conflict over parenting issues, hostility, threats, and occasionally violence) on children, Johnston concludes that the psychological adjustment of the custodial parent is the best predictor of adjustment in children and finds that more frequent access to the non-custodial parent (as occurs in joint physical custody arrangements) was associated with less favorable outcome for children in this subgroup of the population. Additionally there was one study cited (Johnston 1994) which found evidence that in high-conflict families in which there was a history of domestic violence, girls tended to function better in the primary custody of their mothers than they did in joint custody arrangements. There was weaker evidence that the functioning of boys improved with increased access to their fathers, but the data suggestive of this finding was based on reports by fathers and teachers and was not supported by reports of mothers and clinicians' ratings. More frequent access to both parents for the children in these violent families tended to be associated with an increased incidence of interparental violence during exchanges of the children, which had further pernicious effects on the children. Johnston found that children of high-conflict divorce showed significant levels of disturbance on standardized measures of psychological

adjustment and that they were between two and four times more likely than the general population to have behavioral and emotional problems.

Johnston and Roseby (1997) define "divorce impasse" as referring to "whatever factors are blocking the divorcing family from resolving expectable separation conflicts and making the transition from an intact to a postdivorce family structure" (p. 6). They view divorce impasses as complex phenomena which are influenced by elements at each of three levels: individual psychodynamics, interactional dynamics between the parents and family members, and dynamics of the wider social system including mediators, evaluators, attorneys and judges. Individual psychodynamics of parents in high conflict custody situations typically involve people with psychological vulnerabilities. Psychometric testing with these individuals often suggests they lack a reliable means of problem solving, perceive things inaccurately, reason idiosyncratically, overly simplify their cognitive functioning, are hypersensitive to criticism, and are overly concerned with their own needs and points of view. It is the interaction of these vulnerabilities with the stressors of divorce that makes these individuals particularly prone to having serious problems in resolving custody matters. Johnston and Roseby maintain that divorce evokes feelings of loss and rejection. The feelings of loss tend to evoke anxiety, sadness, and fears of abandonment. The feelings of rejection tend to evoke feelings of inadequacy, shame, humiliation and failure. In this light, the custody conflict is seen as a way of warding off intolerable affects connected with the experience of loss and rejection through maintaining an intense involvement with the former spouse. They wrote, "The central

internal struggle in high-conflict divorces and entrenched custody disputes involves a high degree of humiliation and shame engendered by the divorce and the capacity of the individual to manage those feelings without losing face or an integrated, viable sense of self" (Johnston and Roseby 1997, p. 19). These authors do not explore the possibility that the unbearable feelings in a difficult divorce may be warded off not only by a frustrating attachment to the former spouse but by an intensive entanglement with the family law system.

Research findings on high conflict divorce are not homogeneous. In contrast to the work by Johnston, Wolman and Taylor (1991) found evidence on psychological testing that children of high conflict divorce were less disturbed than their peers who had undergone a more normative divorce experience. These researchers interviewed parents, children, attorneys and pediatricians, and conducted pre and post tests over an 18-month period with a sample of 43 divorcing families in Massachusetts. The sample was divided into families contesting custody and those not contesting custody. Results of the clinical interview data and psychometric testing with the 135 children in the study were conflicting. The clinical data suggested the children from families conflicting custody were severely stressed by their involvement in marital problems, role reversal with parents, feelings of powerlessness, disillusionment with parents, and cognitive dissonance in relation to parental lobbying. The empirical measures used in this study, however, found significant differences on several measures of adjustment where the children from the families contesting custody tended to be better adjusted than the children from the families

in which there had been agreement to custody. Specifically, post-test measures of the contested custody children suggested they had developed greater internal locus of control, had less separation anxiety, appeared to express less anger, engaged in fantasy to a lesser degree, and felt less guilt, rejection and loneliness. These surprising results, conjectured the authors, may be explained through resilience theory, i.e., destructive interparental conflict may actually contribute to children developing adaptive coping strategies.

The literature concerning parents and children in high conflict custody cases suggests that it is the internal, subjective experience of loss and shame which, from the individual psychological level, often is a salient part of the driving force behind custody litigation. The following sections of this review explore the theoretical literature concerning these experiences. It focuses on psychoanalytic theories accounting for loss, narcissism, shame, and rejection. Following the presentation of that material, the review proceeds to explore another body of theory which provides a way of thinking about the interplay between the individual psychologies of two people as it has been described in the psychoanalytic process. This includes the concepts of parallel process, transference, countertransference, and intersubjectivity. Continuing to build theoretical links in the chain of thinking that underlies the present research, the review then moves on to an exploration of theory that helps understand the place of the individual within larger social systems. This leads to a discussion of elements in general systems theory, and in particular, field theory and ecological theory. The integration of clinical theory and empirical research in this review reflects a perspective that these may constitute building blocks for a model that can

explicate the interconnections between psychological and social dimensions of experience that creates and shapes the family law system, and in turn are shaped by it.

Psychoanalytic Theory and the Interactive Chemistry of Child Custody Conflicts

At the core of the difficult divorce experience lies the subjective experiences of loss, wounds to one's sense of self, and threats to the integrity of the self (Johnston and Roseby 1997). While many individuals decide to divorce in the belief it severs the connection with their spouse, the ties between former partners endure beyond divorce. Duryee (1989) draws a connection between the nature of this tie and the need for a family court process that recognizes continuity in the relationship between former spouses. She wrote,

> . . . there is also a continuing tie after divorce between the ex-spouses that mitigates against supporting the win/lose conceptualization of conflict even in two-person families. The fact that one divorces a spouse does not erase the part of the psyche which chose that person for a mate at some time in the past, nor does it erase the period of one's history spent with that person. To make an enemy of a previous partner is part of not forgiving oneself for having made that selection and moving on; to be alienated from a part of one's personal history . . . (p. 83).

The on-going nature of these relationships is as much a truth in the normative divorce experience as it is in families where there is intense custody litigation. Gardner (1987)

identified the phenomenon of 'parental alienation' which sometimes is found in families litigating custody. In the parental alienation syndrome, a child or children become stridently allied with one parent and intensely resistant to any relationship with the other. Dunne and Hedrick (1994) studied sixteen families in which there was concern about one parent alienating the children from the other. They found a group of parents with intense dysphoric feelings which they blamed on their former spouse, deep narcissistic injuries, pathological defenses against feelings of loss, as well as a form of what some authors have likened to "sibling rivalry" between the parents. The authors wrote, "It should be underscored, however, that these motivations are often strikingly out of the consciousness of the alienating parent, many of whom were adept at coloring their motivations and behaviors in socially acceptable ways to themselves as well as to professionals." (Dunne and Hedrick 1994, p. 35). This suggests that there are unconscious factors which can disguise intense affect in these families. With this study in mind, as well as the work of Wolman and Taylor (1991), Johnston (1994), and Johnston and Roseby (1997), this review now presents the body of theory related to the underlying problems often found to be part of the psychological fabric of parents and children in custody conflicts.

Psychoanalytic Theory of Loss

In his classic paper "Mourning and Melancholia" (1917), Freud drew a distinction between grief or mourning, and what is now called depression. Mourning or grief is understood to be the normative response to loss of a loved person or a symbolic equivalent (home, nation, ideal, etc.). It is not considered pathological and is time-limited. While these same

characteristics may also describe the state denoted by the term 'melancholia', the two phenomena are distinguished by the fall in self-esteem that characterizes the latter. Freud maintained that in melancholia there is an unconscious aspect to the experience of loss of a love object while in mourning there is nothing unconscious about the loss: one simply grieves for the passing of the person who was loved. He wrote, "In grief the world becomes poor and empty; in melancholia it is the ego itself" (Freud 1917, p.155).

In a modern review of Freud's thinking about this subject, Lupi (1998) points out that ambivalence is ubiquitous in mourning and melancholia, and that the pain associated with mourning is more long lasting and intense when there were more hostile feelings in the relationship than loving ones. This may be a particularly important insight into part of the psychodynamic process for family members in high conflict custody litigation.

The role of anger in the normal and pathological mourning process, was addressed by Cerney and Buskirk (1991). These authors argue that while the ability to consciously acknowledge the emotion of anger may be difficult, particularly in grieving for the loss of relationships about which there are ambivalent feelings, it is an important part of the mourning process. They also identify varieties of pathological grief that may be engaged in due to their secondary gain value. These include grieving to ward off anticipated questioning by others of the authenticity of one's sadness about the loss, spitefully maintaining the grieving position out of a wish that the deceased will be punished for causing such a level of suffering in the mourner, and grief as the source of increased

vulnerability to physical illness. These authors also point out the tendency to repetitively maintain these forms of pathological grieving.

Adopting a Kleinian view of complicated grief processes, Anderson (1949) found neurotic illnesses among a group of post-war patients in a London psychiatric hospital to be attempts to cure or master depressive states that were intolerably painful. In his view, the ego can be so threatened by losses that it must use all its resources to protect itself from disintegration and loss of contact with reality. Underlying his perspective lies Klein's model of: 1) the infant's primitive belief in its own aggressive impulses being responsible for destruction of the breast, the symbolic provider of nurturance, love and security, and 2) powerful persecutory anxieties threatening to overwhelm the ego which arise as the result of introjection and projection of the infant's own aggressive impulses (Klein 1940).

A refined description of the psychology of loss is found in the work of George Pollack, a Chicago psychoanalyst. In explicating the phenomenology of abandonment, Pollack (1988) identifies several factors which, taken together, determine the likely impact of separation and loss on the individual. These include: when the loss occurred in the developmental cycle, prior emotional organization of the individual, circumstances of the abandonment, and available replacements for the person who did the abandoning.

Freud maintained that children and adolescents were incapable of grief in the sense that adults may experience since they were unable to tolerate the mourning process and accept

the finality of death. Bowlby (1960) countered this assumption and argued that depression is part of the normative process of mourning for both children and adults. He characterized grief as behavior including inertia, loss of purpose, and disorganization. He distinguishes between the level of depression understood as part of the normal range of affective experience and a pathological depression characterized by its intensity, which he suggests be referred to as 'depressive illness'. Bowlby notes that mourning is characterized by behavior, thought, and feeling which continues to be directed toward the person who has left or died. Additionally, he identifies four other characteristics of mourning, including: hostility (at the lost object, others or the self); appeals for help; despair, withdrawal, regression, and disorganization; and, finally, reorganization of behavior directed toward a new object. He notes the degree to which fluctuation in feeling states from one moment to the next characterizes the grieving person.

Wolfenstein's (1969) study of the responses of children and adolescents to death of a parent points out that of all circumstances in which one may suffer the loss of a parent, instances of object loss that are coupled with narcissistic injury are the most difficult from which to recover. Like Cerney and Buskirk, she describes children who experience a feeling of having suffered unjustly along with a desire to prove how deeply the inflicted suffering goes. She writes, "He may feel impelled to turn himself into a living and dying reproach" (Wolfenstein 1969, p. 433). She also illustrates how the experience of loss may be repeated endlessly through seeking out relationships that will be frustrating and which result in additional experiences of feeling left and abandoned. These are attempts to

repeat the original trauma in the hope that it will have a different outcome such that the deceased will finally be restored to life. Some cases of pathological mourning in her study showed a continuous attachment to demonstrable helplessness, which was a position maintained out of a hope that this would lead to a return of the lost parent to care for the child. Underlying this was an infantile sense of omnipotence which resulted in a lack of attention to indications in reality that would otherwise have shown that the wished for outcome was not going to occur. In a side comment, Wolfenstein notes that when a lover is absent but not dead the hope of reunification is easier to sustain. She comments also that the loss of a significant attachment figure for a young child may lead to a heightened valuing of material things in an attempt to compensate for feelings of deprivation and emptiness.

Threats to the Self and Narcissistic Injury

Psychological studies of difficult divorces and the psychology of parents embroiled in custody conflicts often note the extent of narcissistic injury to one or both parents as a factor which underlies much of the overt rage and contentiousness so commonly found in these families. Narcissism and narcissistic injury seem likely to be explanatory concepts that can help shed light on the interparental dynamics in custody conflicts. If this is a core element in the phenomenology of custody battles, then several questions arise. What are its dynamics? How is it experienced? Finally, what repercussions might it have up and down the intersecting levels of the social system?

While Freud did not regard narcissism with the same primacy he gave to the drives, his introduction into psychoanalysis of the concept of narcissism placed self-love and self-regard near the center of psychological development (Freud 1917). He maintained that narcissism was ubiquitous, biologically based, and originated in the infant alongside the sexual instincts. He theorized that the infant is first in a state of "primary narcissism," which is transformed secondarily into both love for others (object cathexes) and the ego ideal (which Freud identified later as the superego). It is in relation to the degree to which the individual maintains satisfactory relations with both these entities (relations with others and the ego ideal) that he or she may experience either a sense of well-being or of depletion. Particularly relevant to the present study is Freud's description of how energy or libido directed toward the self varies inversely with energy or libido directed toward objects. In his mechanistic model of the mind, the energy withdrawn from the self and given to objects depletes the ego, a state which may only be rectified through the ego being loved in turn. Extrapolating from this theoretical construct to the phenomenology of divorce, one may wonder what happens when the libidinal energy with which the marital partner has been invested is not returned, leaving one or both individuals to cope with the painful experience of rejection and loss. From the perspective of Freud's drive model, it is at that point that the ego must reclaim for itself (decathect) its energic investment in the love object. According to Freud's hypothesis, this may revive a state of ego inflation or megalomania, as the libido will flow back from the object into the ego, which may then, metaphorically, overflow. Obviously individuals vary greatly in their capacity to tolerate injury to their sense of narcissism. Freud's highly mechanistic view is

archaic when seen in the light of today's more fluid conception of the self. Nonetheless it seems Freud's pioneering contribution to the study of narcissism lays the foundation which later psychoanalytic thinkers were to develop. Unfortunately, Freud and his immediate followers did little additional work in the area of narcissism since they reasoned that individuals with narcissistic characters were incapable of forming a transference and so were impervious to analysis. The impact of damage to an individual's narcissism was left to be further worked out by Freud's later successors, most notably Heinz Kohut.

Kohut (1973) maintained that narcissism has its own line of development and that further progress in human understanding could be achieved through recognizing that narcissistic strivings (as reflected in needs for admiration, grandiosity, and control) are adaptive and can be valued rather than viewing them as signs of illness or regression. A full explication of Kohut's theory of narcissism and its treatment is outside the scope of this review and would take the reader far astray. However a few points are in order which can shed light on the topic at hand. This is particularly true given the recognition, noted above, that difficult divorces and custody conflicts are often driven by severe wounds to the sense of narcissism. For most individuals, the lowering of self-esteem and the threat to the sense of self-identity which normatively accompany divorce bring misery but are sufferable. However, for narcissistically vulnerable individuals, the experience of being left (and sometimes even of leaving), and of having one's children outside of one's direct presence or control, may seem unbearable. This affective state may engender narcissistic rage, the intensity of which derives from the underlying threat to the cohesion of the self.

Transition points in life, Kohut pointed out, will revive the period of formation of the self (Kohut 1973). If the early development of self was faulty, i.e., if it was damaged by inadequate mirroring from the environment or an inability to merge with an idealized self-object, then the pre-existing, archaic state of vulnerability will be repeated in subsequent transitional situations. This may result in narcissistically driven rage reactions when the omnipotence of a primitive grandiose self comes to realize that it lacks absolute control over the environment. Further, Kohut explained, if the rage continues then conscious and preconscious elements of the mind come under its sway. He wrote,

> The ego, furthermore, increasingly surrenders its reasoning capacity to the task of rationalizing the persisting insistence on the limitlessness of the power of the grandiose self: it does not acknowledge the inherent limitations of the power of the self, but attributes its failures and weaknesses to the malevolence and corruption of the uncooperative archaic object (Kohut 1973, p. 396).

In such cases, we may witness grudges, spite, revenge and carefully orchestrated vendettas. "The thirst for revenge . . . is provoked by some injury to self-esteem - a narcissistic injury such as contempt, ridicule, or conspicuous defeat, or events which in any case are experienced as such by the injured party" (Terman 1975). In other words, the stuff of which child custody conflicts are so often made.

The exploration of the relationship between certain types of narcissistic wounds, in

particular the experience of shame, and its relationship to the self as articulated by Kohut, was compellingly articulated by Morrison (1986). Within Kohut's theory, the self develops in a healthy way when provided with phase appropriate experiences of mirroring by an admiring selfobject and when the need for merging with idealized selfobjects is tolerated (Kohut 1977). When such critical developmental experiences are provided, the child is able to achieve a sense of cohesiveness, develop realistic goals, and have positive self-esteem. Morrison views shame as the experience of failing to achieve ambitions and goals, an inability or falling short of living up to "the-self-as-I-want-to-be," which he calls the "ideal self." He finds within Kohut's work numerous references to shame, humiliation, mortification, and lowered self esteem but little development of the concept of shame itself in relation to narcissism. Nonetheless, Morrison argues that shame and its vicissitudes is an important affect in both the narcissistic character structure and "normal" individuals. The threat from shame is abandonment and rejection (in contrast to guilt where the threat is from punishment). In contrast to guilt which is usually experienced in relation to a purposeful or voluntary act, shame is understood to arise in relation to an involuntary act. Morrison writes, "The referent of shame, then is the self, which is experienced as defective, inadequate, and having failed in its quest to attain a goal" (p. 351). Within the context of the psychoanalytic situation, Morrison notes that shame differs from guilt in that guilt seeks an outlet in confession and forgiveness while shame more often is carefully kept hidden and is worked through via acceptance.

Morrison's views on shame in relation to the self seems to fit well with the

psychodynamics of a significant group of individuals experiencing high conflict divorce and custody problems. A relatively high numbers of individuals in these situations suffer from various forms of personality or character disorder (Johnston 1994). In these cases we often encounter narcissistically vulnerable individuals who find it unbearable to adequately grieve for their losses and who may experience a profound shame in relation to not having lived up to their ideals of remaining married or successfully managing post-marital custody arrangements. They may look to their former spouse for the mirroring or idealizing function they wanted to have them serve in the marriage and become enraged about not having this provided for them in the ways they need. Furthermore, the experience of loss itself, of not being able to "make the marriage work," of being separated from one's children, may be felt as a deeply shaming experience.

Parallel Process

There is a body of theory within depth psychology which helps explain the interaction between individual psychologies. This includes the literature concerning transference, countertransference, intersubjectivity, and parallel process. These theories are of particular interest in the present study since they offer a lens for understanding conscious and unconscious interaction between individuals in the face of intense affect and deeply resonant levels of interpersonal experience. This review now proceeds to explore relevant dimensions of these theoretical models, beginning with parallel process.

The concept of parallel process was first discovered and developed in the study of the

training and supervision of psychoanalysts and psychotherapists. Clinical supervision occurs within a structure of relationships which, directly and indirectly, interact reciprocally with one another. Ekstein and Wallerstein's (1958) seminal and foundational contribution to the study of psychoanalytic supervision describes this matrix as "the clinical rhombus." Patient, therapist, supervisor and clinic administration are understood to stand in dynamic relation to one another in this model. Whatever occurs in one segment of the clinical rhombus cannot be fully understood without consideration of its relationship to each of the other three corners. They are linked through various permutations of what these authors coined 'parallel process,' in which problems or interactions in one sector of the rhombus (e.g., between patient and therapist) are expressed metaphorically and simultaneously in another sector of the rhombus (e.g., between therapist and supervisor). The basic idea here is that the supervisor may see reflected in the relationship between himself and the therapist aspects of the problems the therapist is experiencing in working with the patient. While Ekstein and Wallerstein focused primarily on how the patient-therapist relationship is reflected in the therapist-supervisor relationship, later writers expanded the concept of parallel process to include a further appreciation of how the nature of the interaction between supervisor and therapist can have its sequelae in the treatment situation between the therapist and patient (Gediman and Wolkenfeld 1980; Allphin 1987; Ricci 1995). It is this type of "echoing" of various relationships up and down levels of the social system that is of particular interest in this study of family law processes.

Gediman and Wolkenfeld (1980) wrote that "patient-therapist-supervisor interactions (are) truly triadic: a complex multidirectional network, or system, and not simply a unidirectional process with a set point of origin in the patient" (p.236). These authors argue that the theoretical roots of the notion of parallel process lie in Freud's conception of the repetition compulsion in which whatever is not remembered is enacted. In the case of supervision, what the therapist does not understand of the patient's communication is enacted in the relationship between therapist and supervisor. These authors describe the process as one in which the therapist communicates to the supervisor, "I cannot tell you in words what the patient is like, but I can show you and make you feel what the patient is like" (Gediman and Wolkenfeld 1980, p. 239). These authors develop this idea further and come to the position that parallel process is not just a phenomenon that occurs in the absence of the therapist clearly understanding the patient; it is the structural similarities of psychotherapy and supervision that make the two processes necessarily and inherently reflective of each other. In other words, since they are both helping processes they activate similar tensions and anxieties connected with giving and receiving help; since they are both processes that rely on engagement of the self they are both connected with issues of narcissistic vulnerability and regulation of self esteem; and since they are both processes that involve empathic understanding and identification with an analytic attitude they are connected with issues of feeling and thinking one's way into the experience of the other.

Allphin (1987) described the parallel process as "an unconscious effort to have the supervisor understand what is going on in the therapist/patient relationship." This may be

attempted through various means, including the therapist acting with the supervisor in ways 'parallel' to how the patient is being with the therapist; the supervisor experiencing what the patient (or the therapist) is experiencing; or the therapist treating the patient as the supervisor is treating him, or how he wants the supervisor to treat him. Ricci (1995) conceptualized the parallel process in terms of the "unequal pair" that mutually influence each other. He borrows from infant research to apply the model of mutual regulation of affect to the supervisory situation: supervisor and supervisee have a mutual influence on each other.

In this light, the modern conceptualization of parallel process is one that is truly bidirectional, looking not only at the ways the interaction between patient and therapist may be reproduced in the interaction between therapist and supervisor, but also understanding how the interaction of the supervisor and therapist influences the course of the work between therapist and patient. This may be akin to ways in which the interaction between members of the family influences the interaction between parents and attorneys, mediators, evaluators, and judges. Similarly, if the dynamic concept of parallel process proves useful for understanding bidirectional influences in family law cases, then one would also expect that the relationship between judges and the law itself, as well as between judges and lawyers, mediators, and evaluators, may have a resonating impact in the behavior and experience (conscious and unconscious) of parents and children.

Intersubjectivity, Transference, and Countertransference

A fundamental tenet of intersubjective psychoanalysis that the psychoanalytic situation is one in which there are two consciousnesses in the room, each being the source of his or her own meanings, and that the nature of their interaction is jointly determined. Thus, "psychoanalysis is . . . a science of the *intersubjective*, focused on the interplay between the differently organized subjective worlds of the observer and the observed. The observational stance is always one within, rather than outside, the intersubjective field . . ." (Atwood and Stolorow 1984, p.41). In this light, human consciousness is unique in that knowledge of it can only be known through self-reflective awareness. Subjective experience is characterized by a dialogue within an individual consciousness, shaped to varying degrees by one's anticipated or expected relationship to the consciousness of others but not to others in themselves. This is a critical conceptual link in the present qualitative study which seeks to explore the interplay of individuals at different levels of the family law social system through studying their subjective experience. In relation to psychoanalysis, the intersubjective perspective comes to be known through an understanding of transference and countertransference phenomena.

In the classical psychoanalytic use of these core concepts, transference denotes the projection of archaic libidinal urges onto the analyst while countertransference is viewed as the unanalyzed obfuscating interference of the analyst's responses to the patient's material. The concept of countertransference was subsequently developed and refined by the psychoanalyst, Heinrich Racker, who explicated a view of countertransference as a

most useful analytic tool (1968). Concordant countertransference, according to Racker, refers to the state in which the analyst is identified positively with the patient. In the concordant countertransference the analyst's relationship with the patient is imbued with empathy and sympathy. Lambert (1974), a Jungian analyst, writes about the concordant countertransference, "On this level, the patient and the analyst are in minimal tension over against each other and are in a state of maximal union" (p. 312). Central to his thesis is Lambert's observation that the analyst's capacity for concordance exists as a function of his own experience of having been handled well when he or she was in a state of dependence. Another form of countertransference phenomena identified by Racker, complementary countertransference, arises out of the plain fact that the interaction of analyst and patient is an inescapably human enterprise in which the unconscious of the analyst is likely to experience responses to internal object relations projected by the patient. In the complementary countertransference the patient relates to the analyst as a projected internal object which, in turn, may leave the analyst experiencing uncanny emotional experiences somewhat alien to him or her yet congruent with the experience of the patient's projected objects. Complementary countertransference is thus marked by the identification of the analyst with objects in the patient's inner world. As such, it is potentially the source of a great deal of useful information about the unconscious life of the patient since the analyst's developed familiarity with his or her own unconscious allows for the use of such inner experiences to help identify and understand these internal objects as they appear in the patient. Lambert makes it clear that complementary countertransference is to be distinguished from what he identifies as 'neurotic

countertransference' in which the patient's projections evoke responses from the analyst's own internal object relations.

Concordant and complementary modes of countertransference interact with each other in a dynamic manner. When in the position of the concordant countertransference, the analyst maintains the stance he or she needs to talk to the patient from a well of empathy and make interpretations the patient can use. When the patient feels sufficiently understood or supported, he or she may feel safe enough to attempt interacting with the analyst in ways that involve greater vulnerability, including negative or hostile projections. This can move the analyst into a complementary countertransference where he or she can experience the projection and "metabolize" it. The analyst can then show that he or she can handle the patient's material, and the patient, and not be destroyed or react to the patient in a way that seeks retribution. Lambert (1974) writes,

> The analytic predisposition of the analyst may lead to the patient's positive transference. This can activate the analyst's positive countertransference of a concordant type, which in turn leads to the patient's risking expression of his negative transference. This may be met by the analyst's complementary negative countertransference, which may be transformed by him into a deeper concordant countertransference. Gratitude for this can activate in the patient a deeper positive transference leading to therapeutic advance (p. 325).

The healing process is furthered when the analyst, based on his or her greater familiarity with the workings of the unconscious, is able to recognize the mechanisms of projection, identification and projective identification at work, see what they evoke in his own unconscious, and use this knowledge to help deepen his or her understanding of the patient. It is through the analyst's capacity to not respond to the patient's projected rage in a retaliatory manner (as would be the case in the unacknowledged, unprocessed talion response) that the therapy is furthered.

Only one paper specifically addressed the transference and countertransference dimension of clinical work with divorcing parents (Wallerstein 1990). In this paper, grounded in clinical supervisory experience over a number of years, Wallerstein argues that elements of the transference are shaped not only by early object relations but also by trauma associated with the divorce experience itself. The clinician working with this population is subject to a number of countertransference experiences (of the complementary type) which are particular to this work, including the urge to "take sides," fear of annihilation, repression or denial of fears of violence, and guilt about having too much in the face of the losses being experienced by the patient. The nature and extent of the pathology may be hinted at through the clinician's awareness of the countertransference. It is noted that this paper was written regarding countertransference reactions in working with a "normal" divorcing population and does not specifically explore the experience of working with families in high conflict custody litigation. There are no studies or theoretical papers found that are concerned with countertransference phenomena in working with this specific segment of

the divorcing population.

An intersubjective understanding of transference and countertransference concepts hinges on notions such as intersubjective conjunction and intersubjective disjunction. In the former, inner constellations of experience of self and other in the patient are relatively congruent with those of the analyst such that the analyst is able to assimilate the patient's experience in ways that are felt to be empathic. In the latter, incongruent central constellations of experience of self and other lead to the analyst assimilating the patient's experience in ways that change and distort the meaning being expressed by the patient. Atwood and Stolorow (1984) commented, "Patient and analyst together form an indissoluble psychological system, and it is this system that constitutes the empirical domain of psychoanalytic inquiry" (p.64). In this model therapeutic progress is made possible through a "decentering" process in which the analyst is able to respond not only from his or her own subjectivity but also from a recognition that one's subjectivity is always a single possible point of view among many.

These basic concepts in intersubjective psychoanalysis, as well as in the psychology of transference and countertransference phenomena, may be central and integral to understanding the experience of individuals involved in family court processes, particularly in that they might shed some light on the dynamic underpinnings of the 'interactive chemistry' between participants in the process. In other words, varied manifestations of transference and countertransference, as well as intersubjective states that enhance or

interfere with empathic connection, may be an unrecognized but salient influence on individuals in the family court system, beginning with the parents and children and continuing up through each level to the judge. These ideas may provide a conceptual link that for the first time and in a more complete way explains how the interactive chemistry actually works.

To sum up, mental health professionals interacting with parents and children as therapists, mediators, and evaluators in connection with the family court system certainly are faced with the daily experience of working within a context in which intense interpersonal struggles are played out. The indeterminacy of rules governing custody determination (Mnookin 1975) leaves judges and lawyers open to greater degrees of personal involvement than they are likely to have in any other legal arena. Taken together these considerations suggest that the notions of transference and countertransference, intersubjective conjunction and intersubjective disjunction, may be useful tools for understanding the experiences of judges, lawyers, and mental health professionals. The subjective experience of legal and mental health professionals working in connection with the family court system could be understood as being responsive to the congruence or incongruence with the inner psychological world of the parties with whom they are working, and vice versa.

To the extent that parties are able to come away from interactions with the various professionals involved in the litigation process feeling understood and helped, they may be

helped to resolve their conflicts and may even be assisted in developing internal psychological structure that helps them grow beyond the divorce or custody impasse. I would suspect, based on these considerations and clinical experience, that this could hold equally true whether or not the legal outcome is the desired one from the standpoint of the parties. At the same time, when parents feel misunderstood, and treated in an uncaring manner by a bureaucratic system, opportunities for development are thwarted and defenses are further consolidated. In this scenario, the fighting continues and court calendars overflow with these cases.

In order to understand the context in which this process plays out more fully, it is critical to pull back the lens from the intrapsychic and dyadic levels, and consider the broader social system. The focus needs to move back and forth between "micro" and "macro"levels. In order to incorporate this perspective, systems theory is a most useful tool.

Systems Theories

There are many parts of systems theory which help explain different aspects of social interaction. This review will focus on just three of these: general systems theory, field theory, and ecological theory. General systems theory provides the broadest underpinnings for the understanding of social interaction. Field theory and ecological theory can be seen as evolving out of the general theory and as having further explanatory power than the more general version. Each of these are links in the chain of theory as this

review moves from the level of individual and dyadic psychology to conceptualization of the interactive field and the mutual influence between individuals, families, and larger social systems.

General Systems Theory

General systems theory is an attempt to develop models and laws that are universally applicable to inorganic, organic and social systems of any kind (Koestler 1967). The theory was originally articulated by Ludwig von Bertalanffy (1968) as a means of furthering the capacity to understand the functioning of living things, whether these are cells, organisms or social groups. It stands in contrast to basic concepts in mechanistic, analytic science whose underlying principles are ones based on splitting up complex entities into component parts (e.g., cells in biological entities, atoms in physical ones) and studying those parts in isolation. Like many scientists influenced by Einstein's search for general laws explaining the behavior of matter and energy (the unified field theory), von Bertalanffy sought to explicate principles common to all biological and social sciences. He conceived of social science as focusing on the complex interactions of open systems.

Open systems are those entities, such as living organisms, which live in interaction with their environment (von Bertalanffy 1968). They are contrasted with closed systems which consist of entities that do not interact with or maintain active exchange between themselves and their environment. An example of a closed system is a chemical reaction that takes place in a test tube. An example of an open system is any living thing since at

its most basic level every organism is in interaction with its environment as it must take in nutrients and excrete waste products. Open systems have plasticity: they are dynamic, self-repairing wholes. General systems theory attempts to provide a model for understanding open systems in a universal way so that principles of behavior can be identified that help explain behavior regardless of the particular component parts or forces acting on parts of the system under study. Von Bertalanffy's work was an attempt to reconsider the nature of living systems and to differentiate it from the mechanistic model of physics that served as the paragon of scientific theory up to that point. Building on the work of the Gestaltists, von Bertalanffy identified axioms for the biological and social sciences that emphasized wholeness and organization.

In the systems view of von Bertalanffy, it is the whole, rather than the parts, that is primary. Ervin Laszlo, another systems theorist, writes, "The characteristics of complex wholes remain irreducible to the characteristics of the parts" (Laszlo 1972, p.8). Arthur Koestler makes the point with a brilliant analogy, "The attempt to reduce the complex activities of man to the hypothetical 'atoms of behavior' found in lower mammals produced next to nothing that is relevant---just as the chemical analysis of bricks and mortar will tell you next to nothing about the architecture of a building. Yet through the dark ages of psychology most of the work done in the laboratories consisted of analyzing bricks and mortar in the hope that by patient effort somehow one day it would tell you what a cathedral looked like" (Koestler 1967, p.9). This emphasis on the whole finds that basic structure and character of the system are maintained even when discrete parts are

exchanged for others (e.g., traffic deaths on July 4 holiday can be estimated for the group of drivers as a whole but this is not arrived at as the result of calculations of each driver's skill, type of car, etc.). Systems have openings for certain kinds of roles which can be filled by any number of different individuals. Whichever individual takes on a particular role will bring something of their individual nature to the role. This will contribute to shaping and reshaping the system yet the function performed by the system as a whole remains constant. The focus is on relationships and situations, not on particular events and component parts. In this model, systems as a whole are understood to be entities in nature that are goal oriented, self-maintaining and self-creating. They express a teleological drive toward organization. Again quoting Laszlo, "the systems view always treats systems as integrated wholes of their subsidiary components and never as the mechanistic aggregate of parts in isolable causal relations" (Laszlo 1972, p.14-15). From this perspective, one can think about individual child custody conflicts as manifestations of the ways in which the social system is organized. Rather than seeing the problem as reflecting pathology within the individual or family, the general systems view could lead to consideration of custody conflict as a creation or manifestation of the dynamism of the broader social and cultural system. Perhaps the family law system has openings for roles that it needs to fill and individuals with particular vulnerabilities self-select to occupy those roles.

Field Theory

Like von Bertalanffy, Kurt Lewin, who developed and explicated field theory in sociology, conducted his work in part in response to the individualistic, atomistic approach of the study of psychology and social relations in the late nineteenth and early twentieth centuries (Murphy 1966). Lewin, using a spatial metaphor, developed the concept of "life space," referring to the psychological space in which individuals live. The life space of the individual consists of the person and his psychological and social environment (Larson 1973). In this light, one must consider the context of behavior as a preliminary to any true understanding of individual behavior. The particulars of human behavior are understood most fully only after consideration of their general context (Larson 1973). Lewin (1951) expressed this perspective in the equation: B = F (P,E), or behavior (B) is a function of the person (P) and his or her environment (E). He wrote, "In this equation the person (P) and his environment (E) have to be viewed as variables which are mutually dependent upon each other. In other words, to understand or to predict behavior, the person and his environment have to be considered as *one* constellation of interdependent factors" (Lewin 1951, p.240). The life space defines the "field" in which human behavior occurs and in which it acquires meaning.

A number of corollaries were formulated by Lewin which help further explain his thinking about the interactive field. One of these is that objectivity in psychological research requires that the subjective experience of the person be considered as a variable. In other words, he distinguishes between the situation of the child as it is observable by the parents,

teachers or experimenter and the life space of the child as he or she experiences it. A second corollary emphasizes the social aspect of the life space, making the point that the social environment is as important as the physical one. A third points out the importance of the psychological atmosphere (e.g., friendly, tense, hostile) as it influences the behavior being observed. Another point is the importance that everything affecting behavior at any particular time should be included in considering the components of the field. Similarly, factors not affecting behavior should be excluded from the field. Finally, human development is understood to be a process or patterning of increasing differentiation: the individual becomes increasingly complex as the life space is divided into an ever increasing number of parts.

Lewin's model is critiqued by successors, including thinkers in the field of chaos theory, who express dissatisfaction with his attempt to impose regularity and predictability on complex systems which cannot be described in terms of analytical mathematical models (Back 1997). Thus, Lewin's famous formula, B = F (P,E), falls short of providing a model that can account for both empirical data tied to complex systems and mathematical predictions related to the elements in those systems. More specifically, Lewin's formula does not specify how the person or the environment are to be measured.

There have been many applications of Lewinian field theory in the social sciences and it might help illustrate his method to discuss one of them. Ronald Lippit, a colleague of Lewin's, sought to study the impact of the social-psychological environment. Two groups

of ten and eleven year old children, matched in terms of a variety of interpersonal characteristics, were assigned to either of two mask-making clubs. One group was organized along "democratic" lines where the members were encouraged by the adult leader of the group to work collaboratively and make group decisions. Members of the democratic group were free to choose their own tasks and partners for working on the masks. The other group was organized along "authoritarian" lines where the members were told what to do and with whom they had to work. Whatever the democratic group chose to do, the authoritarian group was told they must do. Lippit's findings conformed to expectations as predicted by field theory. The children in the two groups had dramatically different relationships with peers in their respective groups. In the authoritarian group, acts of hostile domination were thirty times more likely to occur. There were substantially more demands for attention and hostile criticisms in this group. In contrast, children in the democratic group had relationships that were more cooperative and less stressful. In an effort to show that the differences were not just the result of individual differences, one child from the authoritarian group was transferred to the democratic group and one child from the democratic group was transferred to the authoritarian group. The result was that the behavior of each of these children shifted such that they each took on the characteristics of the group in which they had become members. This experiment is certainly far from definitive in its results but may illustrate Lewin's statement that,

> The social climate in which a child lives is for the child as important as the air it

> breathes. The group to which a child belongs is the ground on which it stands. His relation to this group and his status in it are the most important factors for his feeling of security or insecurity. No wonder that the group the person is a part of, and the culture in which he lives, determine to a very high degree his behavior and character. These social factors determine what space of free movement he has, and how far he can look ahead with some clarity into the future. In other words, they determine to a large degree his personal style of living and the direction and productivity of his planning (Lewin 1951, p.82).

An application of field theory to the psychoanalytic situation was developed by Langs (Langs 1992). In this conceptual model, patient and therapist are considered to be subsystems within the supraordinate interactive field created by the relationship, or interaction, between them. Langs, who seeks to supplement rather than supplant "one person" psychoanalytic theories, attempts to avoid the problem of limiting the field solely to conscious elements by including both conscious and unconscious elements in the patient-therapist system. Building a conceptual model that encompasses conscious as well as unconscious experience allows the notion of the field to fit more neatly with non-systemic approaches to psychoanalysis. In Langs' model, the patient-therapist system is *the* fundamental system influencing the therapeutic interaction, and as such it is larger and more encompassing than either the patient subsystem or the therapist subsystem alone. Langs explains that incorporating a systems approach allows for conceptualization of two fields of force operating simultaneously: the systems dynamic and the psychodynamic.

Interestingly, the application of a systemic view of psychoanalysis brings the therapist into the consulting room in a deeper, more profound way since the fundamental concept of mutual influence from various parts of the system suggests that changes in the patient will both mirror and initiate changes in the therapist, and vice versa.

Ecological Theory

Ecological theory, as articulated by Bronfenbrenner (1979), also frames individual psychology and behavior within the context of the total social environment. The ecological perspective informs the psychological one, broadening it and giving it meaning, through explicating the formative links between individual psychology and the socio-cultural environment.

There are various levels of social environment which the ecological perspective considers. These include not only the immediate environment of the family, but factors in the extended family network, in the community and in the society as a whole. These levels of the environment are conceptualized as a set of nested figures, like the Russian dolls where each smaller one fits inside the next larger one. Each more encompassing level contains the more limited ones. The individual is contained within the family, which in turn is contained within the community, which is embedded in the culture.

There is general agreement in psychology and the social sciences that the environment plays a crucial role in affecting human behavior and development. However, in actual

practice and research much emphasis is placed on the individual while the environment is given relatively little, if any, consideration. This is where the ecological model becomes most useful as it provides a direction for understanding the complex ways that the individual interacts with the environment at various levels. The ecological model views individuals as integrated within relationships, and relationships integrated within broader, more inclusive relationships and institutions.

Bronfenbrenner identified four levels of social systems. He identified these as microsystem, mesosystem, exosystem and macrosystem. The usual target of study in psychology and the social sciences is the microsystem. Elements of the microsystem include the activities, roles and interpersonal relationships within a given setting. In the case of child custody issues, the microsystem would generally consist of the individual child or parent in the home setting. Following the microsystem level, the next layer of these nested social systems is the mesosystem. The mesosystem refers to the interrelationships between two or more settings in which the individual directly participates. In other words, the mesosystem refers to the interrelationships between two or more microsystems. Bringing this back to the subject of the functioning of the family law system, the mesosystem would consist of the interrelationship between the microsystems of parent/child relationship on the one hand, parent/attorney on another, and attorney/court on yet another. The next level, the exosystem, refers to one or more settings in which the individual does not directly participate but in which events occur, or in which events are influenced by, what happens in the setting containing the individual

person. The most straightforward example of the exosystem in family law is the manner in which events in a courtroom, into which the child never steps, may have a significant impact on his or her entire course of development. Finally, at the highest level of abstraction, one has the macrosystem. The macrosystem refers to consistencies that exist in society as a whole, along with belief systems or ideologies that underlie these consistencies. One example of a macrosystem influence on custody conflicts is the way in which divorce shifted from a legal process in which one party had to be found to be at "fault" to the ubiquitous "no fault" system that had taken its place in every state by 1985. Another example, even closer to the topic of the present study, would be the way in which custodial preferences developed at a societal level take expression more or less consistently in accordance with the prevailing views of children and of the relationships between men and women. At this time, the principle informing the adjudication of child custody disputes most consistently identified at the macrosystem level is the best interests of the child. However, at other historical points these decisions were governed by a conceptualization of children as property belonging to their father and more recently as innocents needing the tender and loving care that only mothers could provide.

In the ecological model one thinks about reciprocity or bidirectionality between various levels in the system. Additionally, the ecological perspective is a phenomenological one: the concern is to understand how the participants in the system are perceiving things and not with defining some "objective" reality. Seen in this light, ecological theory is consonant with an intersubjective perspective in which linked subjectivities are bracketed

by an integrated social and cultural matrix.

One of the innovative contributions of the ecological model is a recognition that the trajectory of human growth and development is influenced by events that occur in the exosystem or macrosystem levels (environments other than those in which the individuals involved are active participants). For example, a child's life can be affected by the chain of events set off by a major shift in the parents' workplace or by a decision made in a court of law. This seems common-sensical, but the implications of this way of thinking can lead to a profound broadening of the scope of one's understanding. For example, in the context of forensic consultation to the court in cases of contested custody of children, such a perspective allows for an appreciation of the way in which the psychological assessment of a parent, or of parent-child interaction, observed in the office or home visit, is influenced not only by the usual cohort of factors germane to custody work (physical, psychological, social and intellectual development of the child; psychological factors affecting each parent's capacity to parent; the fit between each parents' capacities and the needs of the particular child; and the nature of the child's psychological attachments) but by the parents' and childs' understanding of the legal system and the forces that they believe will lead to the outcome they desire.

A common example of the effect of the interactive nature of the ecological levels encountered in contested custody matters is the way in which one party feels compelled to respond to motions filed by the other, and along with the filing of papers with the court

will behave in ways to substantiate their perspective or that they believe will further a desired outcome. Elkin (1982)identified the influence of the broader social context on the divorce and custody decision-making process as one of the "missing links" in the practice of divorce. He commented, ". . . the way society views divorce will also affect clients, lawyers, judges, and mental health professionals who, themselves, are part of society and as much a captive of its misconceptions about divorce as anyone else (Elkin 1982, p. 60). The functioning of the adversarial system may, from this perspective, be understood to be embedded within a more inclusive social system by which it is defined and which it simultaneously defines. The inherent values and laws arising from this matrix underlie the adversarial system and may exert pressure on families to maintain a competitive and hostile stance. This, in turn, has secondary effects on the nature of the quality of the interaction between parents, between parents and children, and ultimately within the minds of the children.

Ecological Perspectives and Custody Conflicts

Several writers have commented on the interactions between divorcing families, mental health professionals, and the legal system. In a paper analyzing the interplay between custody conflicts and the respective roles of mental health professionals, lawyers, and the courts, Duquette (1978) argues that handling custody matters in the adversarial system offers the benefits of due process protections but ultimately drives the psychological processes involved in family dissolution into a more polarized state. He advocated the creation of attorney-mental health worker teams that would work collaboratively to

represent the child's interests in custody disputes. Of particular note in terms of the ecological perspective on child custody conflicts are Duquette's comments regarding the anticipated impact on attorneys, and the second order effect on the parents, of knowing that recommendations of the lawyer-psychologist teams will have a considerable impact on decisions made by the Court. He argues that knowing the likelihood that the recommendations will have an influential role on the Court would motivate attorneys to reach a negotiated settlement and avoid a full hearing on the matter.

In a related vein, Elkin (1982) argued that handling divorce and custody cases within the adversarial system tends to exacerbate conflict and polarize parents. He recommended that the court system focus less on decision-making and more on creating a context for supporting a process through which families could be helped to resolve the divorce crisis in the direction of preserving the relationship of the children to both parents. Like Duquette, Elkin argues for interdisciplinary approaches to resolving child custody and visitation matters. While recognizing that the law must provide a forum for deciding some cases, the emphasis in Elkin's recommendations was more on supporting self-determination of the parties than on having judges make decisions in these cases as a matter of course.

Duryee (1989) argues that the nature of the relationship between families and the courts is unique. In her view, the inherent interconnections between family members, i.e., the fact that the family is a system of interconnected individuals, suggests that the focus of family

courts should be on families as a unit rather than on the individuals who are their component parts. In contrasting family systems functioning with the courts, she uses anecdotal data to argue that

> The legal system assumes an adversarial, dichotomous relationship between the parties (and does not assume or expect any common underlying interests) which it then structures in various ways which preclude a systemic resolution. The strictures placed on the conduct of both lawyers and litigants operate to make it difficult for any of them to perceive the larger picture . . . court proceedings tend to reinforce what has gone wrong in the marriage, cementing the dysfunction into the future relationships, rather than reinforcing a path in the direction of reparation and interrelational justice (Duryee 1989, p. 83).

Over the past decade interdisciplinary studies bringing together law and the social sciences have begun to converge in some remarkable ways. This is illustrated most clearly by recent developments of alternative approaches to understanding the role and function of law as a kind of therapeutic intervention (Small 1993; Wexler 1993). This perspective, presaged by writing two decades earlier which outlined the possibility of using family law as a support system for families in crisis (Elkin 1982) has evolved into what is now called 'therapeutic jurisprudence.' Therapeutic jurisprudence holds that the development and application of the law should be driven not so much by the traditional legal model of judges reasoning from precedent so much as through consideration, within the framework

of due process, about how to use law as a tool to help or shape lives of the individual or the group. Quoting Wexler,

> . . . the law itself can be seen to function as a therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (principally lawyers and judges) may be viewed as social forces that sometimes produce therapeutic or antitherapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within important limits set by principles of justice, the law ought to be designed to serve more effectively as a therapeutic agent (1993, p. 21).

He goes on to state, "The key task is, of course, to determine how the law can use mental health information to improve therapeutic functioning without impinging upon justice concerns (Wexler 1993, p. 21).

Duryee (1989) illustrates the differentiation between perceptions of custody issues at different levels in the ecological system. She notes how court culture is designed to 'get at the truth' rather than developing a systemic awareness. In this light, attorneys only talk to their own clients and so may develop a myopic view of the case. Litigants are also often unable to attain a systemic view which may be one reason why they are in involved in a court battle. She goes on to discuss how family courts are unique in that decisions set the stage for the ongoing relationships between the parties, which means the court must predict the likely impact of its own decision on the family. Duryee writes, "This is an added wrinkle in working with systems - evaluating the effect on a system of the system

surrounding the system" (Duryee 1989, p. 84). Here we come back to Emde's conception of how larger, more encompassing, higher-order levels of social organization impose order on lower levels in the system (Emde 1994) and Bronfenbrenner's idea about the interrelationships between systemic levels being akin to nested Russian dolls. Duryee, as a systems thinker experienced in family court processes, recognized the interconnections between the child, parents, attorney, mediator and court officer. However, she stops short of exploring the mechanisms through which these interconnections are developed and shaped.

Summary and Conclusion

This review focuses on research regarding how judges, attorneys, and mental health professionals working in the family court system as counselors, mediators, and evaluators think about custody matters. Some of the literature reviewed describes aspects of the interplay between individuals at different levels of the system which the Wingspread Conference participants referred to as the interactive chemistry of the participants in the family law landscape. The data has provided findings identifying criteria considered in coming to a recommendation or decision about the best interests of a child, and how these criteria may interact with other factors. The review has also examined parts of psychoanalytic and social systems theory in a search for conceptual tools that will foster thinking beyond the findings of existing empirical studies to the nature of internal experience. The theory considered in this review can serve as a springboard for a deeper understanding of the psychological reactions of individuals involved in custody litigation

and suggests linkages between individuals and social systems. The theoretical considerations included in this review can form the basis for further questions that may yield a more comprehensive understanding of how individuals working in the family court system are impacted by family members litigating custody and by their interactions with other professionals they encounter in doing their work, as well as about the reciprocal influences of professionals working in the system and of the system itself on parents and children.

The studies reviewed suggest that the psychological experience of parents and children in this population is often characterized by one or more of the following: helplessness, loss, rejection, guilt, shame, humiliation, suspiciousness, and rage. Acknowledgement of these affects is often rigidly defended against, perhaps in part related to intrapsychic factors and perhaps in relation to pressures of being in an adversarial system in which there is reason to fear that exposure of vulnerabilities will lead to negative consequences. These defenses include denial, projection, and splitting. Psychoanalytic theory concerning loss, narcissistic injury, and shame suggests that individuals who are having this type of experience are also often experiencing low self esteem, despair, withdrawal, and ambivalence. They may be disorganized, fear abandonment, and appeal for help. Psychoanalytic theory concerning parallel process, transference, countertransference, and intersubjectivity suggests that the powerful affective experiences of individuals who are in custody litigation may have a significant impact on the thinking and emotional life of others, including those who are working with them as counselors, advocates, and judges.

The impact of psychological reactions of litigating individuals is likely to be particularly influential in a family court environment dominated by the best interests standard where decisions require individualized consideration of each case. Within this context, the personal experience, values and beliefs of judges, attorneys, and mental health professionals will exert a greater degree of influence than they would in a system in which decisions were arrived at through a more standardized, rule-based, methodology. Furthermore, the historical legacy of how custody disputes were addressed may continue to influence current decision-makers who might rely on preferences for maternal custody and moral judgments based on testimony having to do with adult sexuality, such as infidelity and homosexuality. The literature suggests that judges' views are influenced by factors including their age, years of experience, income, and whether they are working full-time or part-time. They tend to be suspicious of or unfamiliar with social science data and psychological input, and to rely heavily on their "gut reactions" to testimony and information presented by attorneys. The capacity for empathy with and understanding of clients may be a function of how similar or dissimilar the parents are to the judges and attorneys working with them, as well as how much they are able to participate in the legal process in compliance with the roles and rules of the court system. Systems theory suggests that there may be feedback processes which influence how litigating parents, attorneys, judges, and mental health professionals influence each other as the process unfolds.

Attorneys must function within their role as advocates for their clients. Their work is more

likely guided by factors related to winning their case and following due process than it is to reaching consensus or arriving at custody arrangements in the child's best interests. Attorneys may become personally involved in custody conflicts for a number of reasons, including professional ambition, rivalry with other attorneys, rescue fantasies, and unresolved issues from their own divorce. Like judges, they may also be suspicious of psychological input and social science theory, particularly when it claims certainty with respect to knowledge that is questionable.

Mental health professionals working in the family law system are not immune from infection by the conflicts with which they work. They are, like judges and attorneys, subject to the same pushes and pulls to take sides with one parent and reject the other. They are also likely to experience role strain, as the roles of evaluator and mediator differ markedly from that of therapist in which mental health professionals are trained. In the court, they are involved in situations in which they are not likely to be seen as helpers. Clients are likely to be less than candid in reporting critical information. Furthermore, the intense psychological atmosphere in which these disputes are addressed may exert a high degree of influence on the behavior of those being observed, making it extremely difficult to discern individual psychopathology from contextually-determined behavior that mimics psychological difficulties.

What has yet to be addressed in the field are the internal, subjective processes within the complex matrix of relationships that comprise the family law field. It is the study of

intrapersonal meanings, possibly discoverable through use of the conceptual tools of psychoanalytic and intersubjective perspectives, that may offer insight into the linked subjectivities within a systemic context. This is the subject of this study.

CHAPTER III: METHODS AND PROCEDURES

The purpose of this study is to explore and identify influences between individuals in various roles as they interact within the family law system. The study asks several questions, each of which is within the context of high conflict child custody litigation.

1) For each level of the family court system, as reflected through the experience of family law judges, attorneys, Family Court Service counselors, and court appointed custody evaluators, in what ways is subjective experience influenced by interaction with individuals at any and every other level of the system?

2) What impact does the interplay between individuals at different levels of the system have on the perceptions, behavior, and decisions of those working in the family court system and those going through it?

3) Are there reciprocal, multidirectional influences between judges, attorneys, custody evaluators, counselors, parents and children, and if so, how do they work?

Research Design and Methodology

The review of the literature shows that the overwhelming majority of studies in this area are quantitative in nature, relying on questionnaire data and presenting statistical analyses of the responses gathered. This approach has yielded instructive guideposts in terms of what factors are considered by judges, lawyers, and custody evaluators, and even to some degree how individuals in these various roles tend to perceive one another. However,

quantitative studies have particular limitations relative to the focus of the present research. A major problem with using questionnaire data is that rather than allowing a more full understanding of the substance and nuance of individual perspective, it forces respondents to answer in terms of the researcher's preconceived ideas of what their responses might be. Additionally, analysis of questionnaire responses is a method incapable of explaining the mechanisms underlying the interactive chemistry between individuals at different levels in the family law system. In order to reveal the process of influence as it unfolds one must use a different method: one that elicits descriptions of subjective experience. The research methodology must fit the question being investigated. For these reasons, this study relies on a qualitative and phenomenological approach to investigating these interactions.

Participants and Sampling

The individuals invited to participate in this study were people who occupy various critical roles at different levels in the family court system. They included family law judges, family law attorneys, child custody evaluators, Family Court Services mediators, as well as parents litigating custody. An exemplar sample was used in which respondents are invited based on their capacity to contribute a breadth of experience in a thoughtful way. Respondents were selected from a range of jurisdictions and counties in Northern California, mostly but not exclusively in the San Francisco Bay Area. The exploration of perspectives from different counties, each of which has unique rules and a unique court culture, may offer a range of different responses. Parents recruited consisted of both fathers and mothers.

Sample Size

The data analyzed in this study is the subjective experience of the respondents and not the general characteristics of a group or population. In other words, the purpose of the study was not to produce findings that are generalizable but to investigate experience in depth and to come to understand its nature as fully as possible. There was no control for demographic variables in this study. Respondents were selected with the goal of achieving variation in experience in the various social roles under study so that the interaction could be examined in detail from a range of perspectives.

In order to gather a range of responses and to fit within the confines of time for conducting the present study, a decision was made to include the responses of not less than four individuals from each of the selected groups being studied. This is to say that the study includes detailed interview data with at least four judges, four family law attorneys, four child custody evaluators, four family court service mediators, and four parents who were involved in child custody litigation. Using these numbers of individuals appeared to be a way of remaining faithful to the qualitative model that focuses intensively on a few cases while simultaneously allowing for selection of respondents that could represent a range of experience in the field. Incorporation of four respondents in each social role also allows for numerous vectors of interactive experience to emerge in the study.

Recruitment Procedures

There were distinct recruitment procedures for professionals and litigants. Professionals working in the family court system were recruited from individuals with whom the author has worked over the years or whom the author has met. An introductory phone call was be made to prospective respondents introducing the researcher and explaining the nature and purpose of the study. In some cases this contact will be made with individuals who previously agreed to participate in the research. In other cases the initial call was made to individuals who had not already agreed to participate but who were known to the author as people experienced in their role who would be likely to contribute thoughtful responses. The introductory phone contact verified that the person worked in his or her role for at least six months and that he or she is willing to participate in the research. The purpose of the study was then explained and any questions about it answered. The prospective respondent was then asked if they would be willing to sign an informed consent form which was read aloud over the phone. If they agreed then a time was scheduled for the interview to occur. Interviews were scheduled to allow time for preliminary analysis and comparison of each interview before proceeding to the next one. The protocol for the initial phone contact with legal and mental health professionals can be found in Appendix A.

Parents were recruited from a letter sent out to family law attorneys with whom the researcher was familiar. A copy of this letter is included as Appendix B. The letter asked the attorney if he or she knew of clients involved in custody mediation and

evaluation over the past five years, whose case was no longer active, and whom they thought may be willing to talk about their experiences. Inactive cases were defined as those for which there was no pending court date and the individual was not anticipating filing a petition with the court to get a court date. They were asked to contact clients who met the criteria for inclusion in the study and inquire whether they would be willing to be contacted by the researcher. The attorneys were asked to then let the researcher know of any clients who were interested. When an attorney provided a name and phone number, a call was made to that person and he or she was told about the nature of the study as described in the following paragraph. During the initial phone contact with parents a preliminary discussion was conducted in which it was verified that he or she went through custody mediation and evaluation, was not actively involved in custody litigation, and that he or she was willing to set aside an hour or two for an audiotaped interview. Cases mediated or evaluated by the researcher were excluded. The protocol for the initial phone contact with parents may be found in Appendix C.

Confidentiality and Anonymity

Due to the nature of the problem under study, a particularly critical issue in this research is confidentiality. Potential respondents were provided an explanation during the initial phone contact about the protections for confidentiality used in this study. These were that no respondent would be identified by name and that no information would be included that could allow others to identify individual respondents. If they

had further questions about confidentiality, potential respondents were provided a more complete explanation including that the audiotaped interviews would be transcribed and labeled with a code that allowed them to be identified only by the researcher. The transcribing typist was selected by, among other criteria, his ability to understand and honor the confidential nature of the study. Additionally, part of the criteria for selecting the transcriber was that he was not an individual who had a family law case in a California court within the past five years. The actual audiotapes have been locked up and will be destroyed within one year after completion of the research.

Data Collection

This study uses in-depth semi-structured interviews to collect data. Though an interview guide was used, the interviews was be carried out as a developing conversation following Mishler's (1986) approach to interview as discourse. This approach recognizes that context plays a significant, determinative role in the development and understanding of what individuals mean by what they say. Mishler describes the role of research as "to understand what respondents mean by what they say in response to our queries and thereby to arrive at a description of respondents' worlds of meaning that is adequate to the tasks of systematic analysis and theoretical interpretation" (Mishler 1986, p.7). To accomplish this task, he stresses the importance of creating precise transcripts of research interviews which are then coded and analyzed. The transcripts provide a record of the interaction between interviewer and respondent that illustrates how the meaning of what each says to the other is understood

and interpreted.

Interview Procedure

Each interview began with a reminder of the purpose of the study and a description of the nature of the interview process as written in the introduction to the interview guides (see Appendices D and E). Following this explanation, the researcher asked the participant to sign the Informed Consent, and then asked the first in the series of questions designed to help respondents describe their subjective experience. The interviews all took between one to two hours. They were be held at times and places most convenient for the respondents. These included their offices, homes, and the researcher's office.

In following Mishler's conception of the research interview as a form of discourse, the interviews did consist of a rigidly administered questionnaire. Rather, an interview guide was used which provides an outline to give some assurance that the discussion ranges over the topics relevant for the research project. This guide was used flexibly and functioned primarily as a tool to promote understanding. A basic focus of the actual interview situation, as opposed to the narrower issue of how to apply the guide, was to foster a relationship with the respondents so that they felt able to express, as fully as possible, critical aspects of their subjective experience. The interview situation was aimed toward creating a context in which the meaning of participants' words could be queried and clarified.

Topics of the Interview Guide

The topics that follow were used as aids in structuring the interview dialogue. The topics chosen were based on the author's interest in understanding the dynamic interaction in family court systems and on perceived gaps in the literature. Under each topic, open-ended probe questions were kept in mind to further elucidate the nature of the participants' experience. There were two interview guides to be used in this study: one for parent interviews (see Appendix D) and one for interviews with legal and mental health professionals (see Appendix E). The use of two complementary interview guides allowed the research questions to be more specifically tailored to the individuals being queried. The interview guides were developed in advance of starting the interviews, but as interviews are conducted and new material or insights emerged the ordering of the questions varied somewhat. Using the interview guide as an evolving tool conforms with the grounded theory approach.

Context. The purpose of this topic area is to orient participants to the study by encouraging them to begin discussing their experience from a subjective perspective. For the professionals involved, it begins with a request for responses that could fit into a straightforward job description while the probe questions were designed to facilitate respondents' focus on thinking about how they actually interact with families and other professionals in the court system. For parents in the study, the question was designed to stimulate their thinking about their subjective experience going through custody

litigation.

Psychological Climate. This section of the interview is designed to elicit data which describes the psychological dimension of respondents' experience when they work on family law cases (for professionals) or when they were going through litigation (for parents).

Interactional Dynamics. Questions that can be grouped under the heading Interactional Dynamics are ones that specifically probe respondents' experience of the interactive chemistry in custody conflicts. As opposed to the psychological climate questions which will likely yield data more suggestive of both overt and underlying emotional responses to doing this work, the interactional dynamic questions direct the dialogue to encourage participants to talk about their interactions with litigants as well as with legal and mental health professionals working in the family court system. Additionally, this topic includes a focus on understanding the respondents' experience of how their work is shaped by the macrosystem level as embodied in the law and bureaucracy of the family law system.

Values and Beliefs. The values and beliefs of respondents are another area of inquiry included in the interview guide. Some of the research reviewed suggests personal values, and beliefs about families and morality in particular, play a significant role in how custody disputes are addressed and decided. The probe questions are designed to

encourage participants to think about their own values relative to their experience working with others in the family law field or going through it themselves.

Reflections on the Interview. Finally, respondents will be asked to reflect on their experience during the interview process. Perhaps the focus on subjectivity will elicit thoughts, feelings, or different perspectives that can lead to additional or new insights about the interactive chemistry.

Data Analysis

The data for analysis in this study consisted of audiotaped interviews and written transcripts of those interviews. Following each interview, the tape was reviewed prior to transcription. A summary of the interview and an initial list of themes and concepts was made while listening to the tape. Additionally, notes were made after each interview and after listening to each tape in order to record impressions and thoughts of the researcher while gathering the data for this study.

As the transcripts were completed, these were reviewed and coded. Categories of data were developed. To the extent possible, these categories were identified in language taken directly from the respondents. This helped foster the use of language consonant with the expressed experience of the individuals in the study and assisted in helping filter the researcher's predetermined ideas. With each subsequent interview, the interview guide was reviewed for modification to reflect what was learned in prior

interviews; each interview being a springboard for additional knowledge about the dimensions of subjective experience. The process was one in which the study could grow organically to address preliminary findings by exploring them further. Successive data analysis with other interviews sought to identify additional categories that characterize subjective experience of the issues under study from the respondents' point of view. This process proceeded until there seem to be no additional concepts arising, a condition known as "saturation" of the categories (Strauss and Corbin 1990; Strauss and Corbin 1998).

The responses of each respondent were compared two ways. First, the responses of each member of a subgroup (there are four subgroups in this study: family law judges, attorneys, custody evaluators, and mediators) was compared to the responses of other members of their subgroup. This provided a means of learning about aspects of experience that are common and ones that are unique. The dimensions of themes, as reflected by the perspective of each respondent and by each subgroup, was described and then explored in subsequent interviews. Second, the themes discovered in each subgroup were compared to the themes discovered in each of the other three subgroups. Each theme was considered in terms of congruence or complementarity to see whether it could be usefully considered as part of an interactive field which could be described. The search for interactive fields involved consideration of: 1) interaction between subgroups, as well as 2) interaction between families in custody litigation and legal and mental health professionals.

Presentation of Findings

The findings of this study are presented in chapters four and five. The fourth chapter consists of five parts, each of which corresponds to one of the cohorts under study. Each of these parts begins with an overview of the experience with the family court system for the individuals comprising that group. Following the initial overview of the cohort is an explication of themes and conceptual categories discovered in the analysis, as well as the comparison of data across individuals within each subgroup. This was organized within three headings, corresponding to each of the three study questions: 1) the inner world; 2) perceptions of the family law system; and 3) perceptions of the impact of the family court system.

The fifth and final chapter places the findings of this study within the context of existing research and theory. The unique potential contribution of this investigation is the integration of a psychoanalytic and systems theoretical perspective, phenomenologically informed, into the body of empirical studies and clinical experience. This suggests that there may be an interactive effect between families going through custody litigation and the legal and mental health professionals working with them.

Reliability and Validity

The approach to reliability and validity in phenomenological research differs from that in quantitative investigations in the social sciences. Reliability and validity are both means of building confidence that the results reported in the study truely represent the phenomena under study. Within the scientific paradigms grounded in empiricism or rationalism, there is an underlying assumption that there is an objective truth that can be discovered through rigorous and creative research methods. While this is often taken as an unquestionable truth in the physical and social sciences, the fact is that it is itself an assumption. The idea that there is an objective truth which can be discovered through an empiricist or rationalistic approach appears from the vantage point of the late twentieth and early twenty first centuries to be a legacy of advances in science dating back to the Enlightenment of the 1600's. As argued persuasively by Kuhn (1996) and others, it appears that the notion of objectivity and absolutism in science may be as much of a chimera as it is a goal.

The concepts of reliability and validity in phenomenological research refer to ways of examining interpretations for their comprehensiveness and explanatory power. Packer and Addison (1989) identify four approaches to evaluation of research findings which provide alternative ways of attaining validity and reliability. None of these is absolute but all of them, taken together, enhance the likelihood that the conclusions of investigations in psychology and the social sciences are useful, not limited by gross conceptual errors, and not merely enhanced explanations of the researcher's naive idea

about the way things work. Their ideas are that interpretations of phenomena should be coherent, they should be related to external phenomena, they should be consensually validated by the interested or affected groups under study, and they should be assessed in terms of their relationship to anticipated or future events. A detailed discussion of each of these is outside the scope of this study but some explanatory comments follow in order to provide the reader with a grounding in the use and importance of these approaches to evaluation of interpretive research.

Coherence refers to the plausibility of the explanation offered: simply put, the degree to which it makes sense. The value of using plausibility as a validation procedure may be criticized based on the likelihood that interpretations may be proferred which are believable but which ignore disconfirming data. However, well-done phenomenological research not only seeks plausibility but in so doing will seek data that does not fit the theory, which challenges the scope of the narrative being constructed. In the present research, efforts were made to elicit disconfirming responses. Further, the "constant comparative method" of grounded theory (Strauss and Corbin 1990; Strauss and Corbin 1998), provides inherent countermeasures to reaching falsely coherent findings.

The relationship of an interpretive account to phenomena external to the subject of the study is a second validation procedure. The idea here is that the danger of developing self-confirming explanations inherent in a purely coherence-based approach can be

countered through relating findings to perspectives extrinsic to the study. This may occur through asking the person(s) who are the subjects of the study whether the researcher has adequately understood what they meant. This approach may be extended to encompass exploration of consensual validation with the individual or groups under study. Included in this validation procedure is the process of feeding back the researcher's unfolding interpretations to respondents and asking for their ideas about the usefulness and limitations of the narrative being constructed. Certainly agreement is no guarantee of correctness, but discussion of an interpretation with individuals who are likely to have a different perspective may produce better interpretations, particularly if they come to offer ways of understanding the phenomena under study which have an expanded comprehensibility that encompasses opposing points of view. In the present research the author will use his experience and network in the California family law community, public and private, legal and psychological, to present unfolding findings and to elicit feedback from judges, attorneys, evaluators, and mediators.

A third method of evaluation of qualitative research involves comparing one's findings with those of other researchers. While consensus is certainly not a guarantee of veracity, an attempt to work out differences, particularly in dialogue with those who have opposing views to the one's own, may foster productive discussion.

Study of the relationship of an interpretation to future or anticipated phenomena is a

fourth approach to validation. This does not refer to the ability of a phenomenological explanation to predict how individuals or groups will behave but is concerned, rather, with the usefulness of the interpretation for understanding and improving practice. Packer and Addison wrote,

> Interpretive research is itself a kind of praxis or practical activity, and its aim is not to describe the world in a detached manner but to act in the world, in an engaged manner. Interpretive inquiry has an emancipatory interest not an instrumental one; an interpretive account has the potential to emancipate people, to free them from practical troubles (p. 287).

In this light, "truth" is viewed as a product of our engagement in the world (Polkinghorne 1983). The underlying idea is that one strives to understand out of a concern with an issue or a problem. The involvement of the researcher is not a disinterested academic one. The investigator brings to the problem his or her own perspective and motivation. Rather than attempting to leave this out of the equation (a seemingly impossible task, anyway) recognizing and using the concern and perspective of the researcher provides a basis for understanding the nature of the study and its implications for helping people. Certainly the work of this author in the field is a powerful motivator to understand this hidden and poorly understood dimension that impacts and frames custody conflicts. Untold suffering of children and their parents may be avoided by development of procedures built on a more adequate understanding

of the ecological interdependence influenced by custody conflicts, the law, and the professionals working in this field.

Limitations of the Study

The data of the present study includes interview material only and does not incorporate observations of the behavior of respondents. In other words, this study relies on what people say about their experience and does not include a component that looks at what they actually do. It is recognized that self-report in which individuals describe what they do, in and of itself, may be insufficient and misleading due to the pressure respondents may feel to provide answers that are appropriate or socially desirable. To counter the possible tendency toward obfuscation of actual experience by the desire to provide socially approved responses, it would be useful to observe individuals working in the court and going through the family court process as their cases are being heard. Due to the limited nature of this study, however, this avenue was not explored.

A second limitation of the study is that it includes only individuals from Northern California, particularly the San Francisco Bay Area. Quite a different phenomenology can and likely would be revealed in different geographical areas, particularly more rural ones.

Finally, this study is limited in that the litigants included in it are ones who were represented by counsel. It is recognized that many of the individuals in California

family courts appear in pro per and do not have attorneys representing them. An arbitrary decision was made to include only parents who were represented and this constitutes a limitation.

Limitations of the study are more discussed at greater length in Chapter Five.

Protection of Human Subjects

Given the nature of this study, there was some risk to respondents which could have arisen from their experiencing personal distress in connection with the interview situation. Participants in community roles where reputation and concerns about bias are understandably and justifiably heightened may be reluctant to reveal ambiguity or prejudice in their personal experience. They may be harmed personally and professionally by breaches in confidentiality regarding the kind of questions being asked in this study. This is particularly true for judges, who may be vulnerable to repercussions that could impact their decisions should such information become public. In order to protect respondents in this study, strict measures regarding anonymity and confidentiality, as described below, were taken.

1. All information has been kept confidential with the exception of quotes that were used so long as they do not reveal or suggest the identity of the speaker.

2. No personal identifying information at all was published or reported.

3. Respondents were not identified as being from a particular city, county, or court. They were indentified by pseudonyms only. Any subsequent reports of this research, both verbal and written, will only identify the respondents geographically as being from the Bay Area and Northern California.

4. The audiotapes of interviews are being kept locked by the researcher for a period of up to one year, after which they will be destroyed.

5. The transcripts of interviews were made without any identifying information other than the designated pseudonym.

6. The transcriber was hired based not only on transcribing skills but also on his ability to understand the strict requirements regarding confidentiality. He was not someone who had a case of his own in family court within the five preceding years, nor was he someone who is anticipating have a case in family court.

7. Participants were informed of their freedom to discontinue participation in the study at any time.

8. Each participant was asked to sign an Informed Consent at the start of the interview. There were separate Informed Consents for parents (see Appendix F) and professionals (see Appendix G).

CHAPTER IV: FINDINGS OF THE STUDY

The present study was designed to investigate the experience of individuals in the family court system from an ecological perspective. The literature identifies the interaction among people in the system as one of the key variables impacting the process and outcome of child custody litigation but is relatively silent regarding the dynamics through which this influence is achieved. This study explores those interactive dynamics through an investigation of the subjective experience of individuals at multiple intersecting levels of the ecological system in the family law court: parents, attorneys, mediators, child custody evaluators, and judges. However, the current study goes beyond seeking to understand the dynamics of the court system as these influence litigating families. It aims also to expand the dialogue by looking at the possible influences of the subjective experience of parents on the legal and mental health professionals working in the system. Taking these together - the impact of the court on the litigant and the impact of the litigant on the court - the study seeks to explore whether the participation of individuals in family court is a dynamic, interactive, and reciprocally influenced process. In other words, parents litigating custody and professionals working with them in the courts may constitute a functional whole. If this holistic ecological approach is supported by the data, then the existence of mutual, reciprocal influences may be understood to shape the process of going through the family law system for parents while simultaneously influencing and creating the experience of working in the family law system for legal and mental health

professionals. Recognition of the extent to which litigants and professionals working with them are influenced by each other may help deepen our understanding of what is often seen simply as parental psychopathology or as institutional indifference, and may help develop ways of approaching these problems that are both more effective and humane.

A qualitative methodology was selected for this study since it is through the exploration of subjectivity, more than through statistical analysis, that the experience of how the family court system impacts people may be understood. The twenty participants in the study were recruited based on their belonging to one of the groups under study. Four individuals were recruited from each of the following groups: parents, judges, family law attorneys, Family Court Service mediators, and private sector child custody evaluators. All participants came from Northern California, predominantly the Bay Area but some from counties outside the Bay Area, as well. As the primary focus of this study is interactions between groups, the data reported will describe the findings within each cohort toward the end of being able to analyze how members of that group perceive their interplay with the other cohorts.

In this light, the research findings will be presented in accord with a design where each of the groups included in the study - parents, attorneys, judges, mediators, and custody evaluators - is presented in order in five subsections. Each subsection will begin with a summary of the relevant experience of the four members of that group. In the case of

the parent section only, these summaries include a description of the family situation as these are foundational, particularly for the reader who might not have experience in this field, for understanding the type of life situations that parents and the courts are dealing with in custody litigation. Following the initial summary at the start of each subsection, themes that arose in analyzing the interview data of the four individuals in that group will be presented. These are organized within three supraordinate categories which correspond to the three study questions: 1) the experiential world of those individuals with respect to their involvement in child custody litigation; 2) their perception of the family law system; and 3) the perceived impact of the family law system on their own work and/or personal lives.

The Parents

The parent group consisted of two mothers and two fathers. They were in their 30's and 40's. Two of the parents had two children, one had three children, and one had one child. These children were boys and girls, ranging in age from five to seventeen. Three of the parents were recruited through an initial and follow up mailing to twenty five family law attorneys with whom the author had worked in the past (see Appendix B). As these mailings yielded only three parents who were willing to participate in the study and who met the criteria for inclusion, one additional parent was recruited through a phone conversation with an attorney not on the mailing list. The parents were all individuals who had gone through custody evaluation, mediation, and litigation. Their cases were no longer active and they had started the process within the

last five years. None of the parents were individuals who were known previously to the researcher.

The recruitment effort was designed to find a number of parents who were reflective of individuals involved in high conflict child custody litigation. The definition of "high conflict" was left vague, referring to families having gone through mediation unsuccessfully and a subsequent custody evaluation. The recruitment effort was successful in that the parents who participated in the research were embroiled in conflict with their former spouse over the children. None of the parents could talk with their child's other parent without a painful confrontation ensuing. They either avoided them entirely or had a history of taking their problems to court. Two of the families had multiple court hearings over custody, visitation, and other issues. One of these had been told by the judge familiar with their case that they were one of the three most litigious families she had met in her years on the family law bench. In two of the families, interventions such as psychotherapy for parents and children, parenting classes, and classes for high conflict divorcing parents had been tried without apparent success. One of these families had a special master assigned to them by stipulation and order of the court. Two of the families had multiple incidents of involvement with the police coming to their homes to quell disturbances between the parents or to investigate allegations of child abuse. One of these exchanged their children in the lobby of the local police station. In the other family that had police involvement not only had the police been involved but Childrens Protective Services, as well. Parents in two of the

families had restraining orders against each other, and the parents interviewed reported that these orders had been violated repeatedly. The parent in the sample who had the least involvement with the court had a heart attack, which he attributed at least in part to stress, a short time after the custody issue was finally determined. Clearly, by any definition, this small group of parents had an unusually difficult experience going through divorce and met the criteria for inclusion in a "high conflict divorce" sample.

For the reader's benefit, a brief snapshot of the child custody issues for each of the parents who participated in this study will be presented. To preserve confidentiality identifying information has been eliminated or changed, and parents are only identified by the designations Parent-1, Parent-2, Parent-3, and Parent-4.

Parent-1: This father has two children, an adolescent daughter and an older latency aged son. The court case has been going on for five years. During that time, there were several mediation sessions at Family Court Services, two child custody evaluations, a string of attorneys, and numerous court appearances. Each parent has spent tens of thousands of dollars on their share of the litigation. The parents are unable to talk and for years exchanges of the children between them took place in the lobby of the local police station. During the course of the process this parent all but lost a relationship with his daughter, who had became her mother's ally and minimized her contact with him. He has no hope his relationship with her will ever improve.

Parent-2: This mother has three children ranging in age from 10 to 17. She moved out of the family residence, maintaining that her husband had a substance abuse problem. They initially agreed that the children could spend half the time with each parent. When she moved out she moved to a community about an hour away. She wanted the children to live with her and go to school near her while their father wanted the children to live with him and continue attending the same schools they had been attending. He was a life long resident in that community and his entire family lived there. Parent-2 had problems controlling her oldest child, who had become involved with drugs, and sent that child to live with the father on a full time basis. The case went to one session of mediation at Family Court Services and then into a custody evaluation. The evaluator recommended that the children live with the father and continue attending the schools they had been in near his house, and that they spend the majority of weekends with their mother each month. The evaluator also recommended that the matter be re-evaluated in a year with additional studies of both school environments. During the year, the children and parents were to be in psychotherapy.

Parent-3: This mother has a young daughter, now 5 years old. The parents had a brief courtship and a short marriage. They separated traumatically in the course of an argument during which he left her and the child, who was less than a year old at the time, in a city in Southern California. After the separation, Parent-3 came to believe that the father was physically and sexually abusing the child from the age of about 18 months old. In addition to their extensive involvement with family court - mediation, multiple custody evaluations,

special master, and court appointed therapists for the child - this family was also involved with Childrens Protective Services and the police (due to the abuse allegations). The abuse investigations were inconclusive and there was concern that the mother, who was the primary parent, was fabricating the abuse allegations. The child is now living in each home on an alternate week basis.

Parent-4: This father was in a long term marriage. He and his ex-wife worked together in a business they jointly owned and which was quite successful. They had two latency age sons at the time of the separation. The mother wanted to move to the east coast with the boys. The father agreed to this plan initially then changed his mind. They never went to Family Court Services mediation but went to private mediation over a 6 month period. This was not successful and was very frustrating for this parent as emotions were intense, the power struggle continued, and agreements were not reached. After mediation broke down, they each hired an attorney and litigated the matter. This made an enormous difference for Parent-4. He explained that his lawyer explained the process, outlined what decisions needed to be made, and walked him through what the range of responses would likely be from the court in relation to different things they might ask. Both parties then jointly hired a mental health professional to conduct a child custody evaluation. The father was very satisfied with the evaluator because he felt the evaluator did a wonderful job understanding the children and their relationships with each parent. The parents agreed to the evaluator's recommendation that the boys remain with him for two years and then move to live with their mother. Two months after the mother left California, Parent-4 had

a heart attack. He attributes this in part to the stress he experienced in the process. His illness increased his younger son's fears of abandonment that arose in response to their mother's relocation. In this case, the parents never actually had to appear personally in court over any of these issues.

The above synopses are presented to give the reader a feel for the situations of these four parents relative to their problems and experience in the family law system. The focus now turns to presentation of a number of common experiences or themes that were found in the interview data with the parents in this study. These will be presented as part of the three core categories: 1) the inner world of the parent in child custody litigation; 2) parents' perceptions of the family law system; and 3) impact of the family law system on the lives of parents and children. Each of these categories is multidimensional insofar as they are composed of the varied shadings of experience of individuals around the common issues or themes identified.

The Inner World of the Parents in Child Custody Litigation

The four parents in this study turned to the family law courts for help resolving child custody and visitation disputes they could not settle on their own. In so doing they entered into another world in which they hoped they would find a solution. Three of the four found the process highly frustrating. The fourth (Parent-4) found relief in the adversarial process and felt satisfied with the outcome. There were elements of their interaction with the family court system that each found helpful, but for the majority it

was an highly frustrating experience.

All four of the parents in this study were worried about either the physical safety, emotional welfare, or impact of the interparental conflict on their children and themselves. They showed varying degrees of awareness about the extent to which their own psychological reactions contributed to the creation or maintenance of the problems in the family but three out of the four felt that the family court system - in one way or another - had exacerbated the problem, rather than help find workable solutions. The frustrations with the court process involved the length of time it took to have issues heard and resolved, lack of enforcement of orders, the sense that the court did not take the time to adequately hear their case, the financial cost of litigation in family law, the lack of accountability for the professionals working in the system, and the sense that the court focused more on fairness between parents than on protection of children. It was difficult to tell how much emotion connected to the ending of the marital relationship and its sequelae were blending into and conflated with the experience in family court. In relation to the ending of their spousal relationships, each of the parents expressed some combination of feelings including profound loss, deep psychological wounds, anger, anxiety about how they would cope, and financial stress. When the personal experience of loss and the anxiety connected with the unknown met the family law system these two vectors seemed to work synergistically to intensify the experience of loss of control over the direction taken by their lives and the lives of their children. For two of the parents loss of control was in the background as they

described their experience using language incorporating images of devastation and death. They appear to have been severely stressed and traumatized, part of this originating in the divorce itself and part coming from their experience in the family court system. In the two more emotionally extreme cases, the devastation imagery was reminiscent of a holocaust and, as in the case of survivors of major catastrophic events, there was a need to testify to their suffering in an attempt to redeem themselves. In this vein, three out of the four parents interviewed seemed to need to tell their story and testify to the nature of the experience. They expressed a desire to have their story told through participating in this study so the problems in the court system would be more clearly identified, others would be spared the fate they met, and their suffering would not be in vain.

It must be noted that this research report makes no attempt to diagnose or categorize the parents according to some predetermined classification of mental health or illness. In keeping with the nature of this study it was decided to describe the experience of the parents (as well as each of the other cohorts included in the study) phenomenologically. From this perspective, the findings presented reflect the experience of the individuals included in this study through their own eyes. It is fully recognized that this may leave the study open to criticism for not considering the extent to which subjective experience may be shaped by "underlying psychopathology" and other such concepts. However, it was decided that a more valuable and respectful approach to understanding the phenomena under study was to maintain a stance of openness and curiosity that remains

as close as possible to actual lived experience.

The themes that comprise the interior world of child custody conflicts for the parents were extracted from analysis of the parent interview data. These phenomenological categories are presented below in the following order: 1) frustration and anger; 2) feelings of being overwhelmed and impotent; 3) shame, humiliation, and embarrassment; 4) the experience of loss; 5) fear and anxiety; 6) stress; and 7) gratitude. In addition, there is another experiential category which came to be named "making suffering meaningful," which appears to reflect a need arising from the experience of other emotions or an attempt to cope with them.

Frustration and Anger

Frustration and anger took different forms for these individuals but was the most prominent feature of their experience. The primary sources of frustration with the court system were the length of time required for the litigation process; feelings of bias; failure of the court to resolve the problem by forcing the other parent to behave more appropriately; perceptions of indifference on the part of mediators, evaluators, judges, and attorneys; and a sense that the focus of the court system was inappropriately on parents' rights rather than childrens' needs.

Parent-1 felt strongly about the frustration he felt in relation to the length of time it took to finish his case. He explained, "I think the biggest complaint, or I should say my

frustration over everything, was the length of time everything takes from filing date to conclusion."

The frustration of Parent-2 came from her experiences in working with the family court services mediator and the private sector child custody evaluator. She seemed to feel too quickly dismissed, perhaps even abandoned, by the mediator who met with her and her ex-husband. They were able to identify the problem, but she felt the mediator did not want to bother trying to help solve it.

> . . . We were, we were arguing and she didn't want to hear it. Well, I'm sorry that when you're in mediation you're going to argue [laughs]. You know, I mean, that's kind of what you do. I mean, you're going to – she's like, "Well, we're not getting anywhere. You guys are fighting." And, it's like, yeah, we're fighting and that's what you're supposed to help us with.

When Parent-2 discussed her experience in the evaluation process, her frustration took a number of forms. She felt the evaluator took far too long, was indifferent to her concerns, and did not do his job competently. She had alleged that her former husband had a chronic drug abuse problem. Based on her allegation the evaluator had both parents submit to random drug testing. The tests for both parents came back negative. She felt it was then that the evaluator began to believe she was not telling the truth and made up his mind about the custody matter. She insisted in the interview with this researcher that she

knew her former spouse was still using drugs based on her knowledge that he had chronically used them for years while they were married. Her frustration then focused on the evaluator as she felt strongly that he failed to do his job adequately in taking the drug test results as conclusive and not pursuing it further. She explained

> That's what we paid him *big* money for to find out who was telling the truth and who was lying. And, yeah, okay, so a drug test came back. One drug test came back, but we were both clean, so I made him out to be a big dope head. Well, how, why would you do that. Gee, I don't know. Why don't you look into it a little bit more? Why don't you do some of the work? You know, I'm *paying* you to do some of this. Why don't you go and sit out in front of his shop for one day. Take *one day* out of your time – you're, you're changing my whole life forever – take one day, sit down in front of his shop – see how many times he fires up a joint. You tell me then. Go talk to some of his friends. Act like you don't know what's going on. I mean, I was going to hire a private investigator. That's as far as it got because I'm basically having to defend myself. Why couldn't he (the evaluator) hire a private investigator to look into it?

She felt that her former spouse had prevailed and won custody of the children because he was successful in fooling the court, and that he was able to do so because the custody evaluator was indifferent to her situation. Furthermore, she felt humiliated in the process in that she felt she was labeled as a liar. Not only did she feel strongly that the evaluator

did not look into the drug allegations sufficiently and labeled her as the problem for raising concerns about them, but she felt he unfairly failed to talk to the individuals she wanted him to contact and only spoke with those suggested by the father. In the end, this mother of three believed the evaluation report was biased and incomplete. She was outraged by what she experienced as the evaluator's lack of sensitivity to the fact that his opinion was changing her life forever. Even in the face of this painful injustice, she decided not to challenge the matter further in court. The anticipated emotional toll of prolonging the process, as well as the substantial additional expense involved, led her to decide to live with the result.

Parent-3's frustration was directed primarily at the ways she felt the family court system places priority on parents' needs and desires rather than on the needs of children.

> I'm at a point where I don't know, I don't *know* what to do with the system because...[sighs] Julie (pseudonym) is going back and forth. She's still going back and forth. It takes me *over a day* to get her deprogrammed from being with her dad. She's whiny, she's clingy, she's manipulative, hugely manipulative. It takes *a while* to get her back. You know, and then *finally* towards the seventh or eighth day she's finally, you know, we're finally clicking, you know, finally connecting again and then she's gone. You know, that *cannot* be healthy for her. *It can't* be healthy for anybody especially for a child in the formative years . . . This is going to affect Julie for the rest of her life and it's going to be difficult for her for the rest

> of her life because she's had to do this thing because the court system is trying to be fair to both parents. *Fuck that.* They *need* to take care of the kid first. I don't care which parent they end up picking, but a child needs to be in *one house*.

Despite her insistence that the two home living arrangement is not good for children a few days after the research interview this parent phoned my office and left a message in which she explained she had been thinking about whether her daughter would be better off living primarily with her father just so she could live in one house. She wanted to let me know that their current shared physical custody arrangement is preferable.

Another source of frustration was the sense that the court was unable to enforce its own rules and stop the former spouse from behaving in ways that violated the court orders and harmed the children's relationship with their parent. Parent-1 explained,

> And, that was one of my biggest frustrations over the whole divorce. The court makes orders and they just, they're not followed. And, you come back to court over other issues and those, the issues about, you know, failure to follow, you know, the law, the rules and, you know, the orders to me are not taken seriously, and there's no sanctions. It's just kind of thrown to the side and they just move on to the next, you know, the next issue that you've brought up. And, it was just a big frustrating thing for a long time.

In this excerpt, one sees how the perceived lack of court enforcement is experienced as institutional indifference to the parent's plight. He feels his concerns are "thrown to the side" as the court "just move(s) on."

Feelings of being overwhelmed and impotent

Three of the four parents in this study felt a profound sense of impotence to effect changes with their ex-spouse. They were unable to reach agreement over many issues, particularly their children, and often unable to discuss parenting matters without serious arguments. When they turned to the family court system, they felt impotent and powerless in that arena, as well.

Parent-2 described this problem.

> I, I wanted to understand what I went through cause I didn't have a clue when I was going through it which I don't think most people do. They just, you're in so much shock anyway, and, and you're being told here sign this, do this, you know, write down this. You don't even know what you're doing because you really don't have control over it. The attorneys do and the court does. Everybody else does except for you and that's proven to me [laughs]. I mean, I sure had no control over it.

Parent-3 put it this way:

> This man (referring to her child's father) has manipulated the system from the beginning. He used it, he *uses* it. And, the system is allowing him to use it. He dragged out changing Julie's schedule, her time schedule. It took me over four years to get her to have a normal schedule.

Feelings of impotence led Parent-1 to ultimately talk about giving up. However, while he was hopeless that things would improve it was not at all clear that he was ready to actually cease the court fight.

> I mean, this is five years later and still orders are not followed. And, I pretty much just give up. I mean, they're not followed. I know nothing's going to happen. And, I just, pretty much, in my own mind just moved on from that.

At times the feeling of impotence was connected with an inability to protect the child. At other times it was related to an experience of not being able to get the other parent to be reasonable or to get the court to act so as to force the parent to do what was necessary for the welfare of the child.

Only Parent-4 did not express feeling impotent in the litigation process. In fact, he felt helped by it. His experience was that outside of litigation he was unable to effect change in

the relationship with his former spouse and within the mediation format. He felt that the level of emotion between the parents at the time made it impossible to work together productively. When mediation ended and the work moved into the litigation format his attorney oriented him about what to expect and it unfolded as he anticipated, so he felt a sense of empowerment and relief.

Another dimension of the experience of impotence arose from the experience of being excluded from chambers conferences between counsel and the judge. Parent-1 and Parent-2 both talked about the experience of being in court and having their attorneys go into the judge's chambers to work out a solution with the judge. They described feeling completely left out of the process and disregarded in terms of their ideas about how their children should be raised. Parent-1 stated,

> I mean, this is my life, this is what's going on with me. I want to hear what they're saying, I want to know what's going on cause *I know* what goes on in chambers. I sit in chambers myself (in his job) [laughs]. I know exactly what's being said, I know exactly what's going on before they go out. And, I know they wheel and deal and they da, da, da, da – they do their thing. And, I mean, my attorney would tell me pretty much what's going on, but I'm sure she doesn't tell me everything what they talk about. But, I do usually ask her and she pretty much tells me the judge said this, and the judge said that. The judge ain't going to let you have this, and the judge didn't do this, or the judge is pissed off cause you did that or

> something like that. But, I still – I find, I feel like I'm out of the loop when they go in there. Cause they may be in there for half an hour and you're just sitting in court going, 'What are they saying about me?' Cause you know they're talking about you.

It seemed that this situation could easily trigger paranoid thinking or aggravate an already existing problem. Parent-2 described the situation in a detached style using rote, mechanical language.

> They're going to walk in the back. You're going to sit there. You're going to feel like an idiot cause you're not going to know what's happening. They're going to come out. They're going to say, okay, it's time to go. You're going to leave, you're going to go out in the hallway and that's kind of it.

Perhaps this situation points to an essential problem facing custody litigants. They find themselves in a system where the power to make decisions about their family life, their relationships with their children, and their finances, lies in a process which is out of their control and from which they may be excluded when critically important decisions are made. Their status in the court, in the social order of the court system, can lead to being excluded from access to information concerning major decisions about their children and themselves. This may engender feelings of impotence and increase the overall sense of frustration. Only in the case of Parent-4, who felt unable to work with his former spouse

and welcomed intervention from the court system, was there a sense of empowerment and a decreased level of frustration.

Shame, Humiliation and Embarrassment

"The whole world knows how we are," explained Parent-1 in describing his embarrassment about the extent to which he and his former spouse cannot work together and their many court appearances. This same parent, later in the interview, discussed his reactions to the judge telling him and the childrens' mother that theirs was one of the worst cases in the county.

> Personally, it's very embarrassing. I hated to hear that. I mean, I told some of my friends that, but I don't tell it in a way that I . . . believe me, I don't think it's funny. I mean, it's, it's very embarrassing to hear that from a judge. I mean, I don't want to be, I don't want to be remembered as, you know, the worst [laughs], the worst case in the county.

He is describing the embarrassment and shame associated with being labeled as defective in some sense, perhaps even notorious. In a way, having the authority figure of the judge frame her comments in such a stark manner may have shocked him into thinking about the impact of the interparental behavior on the children. He went on to say, "But, when she put it that way it, it really, it, it bothers me because I know if it's affecting me and it's effecting the court the way she looks at that, it's probably affecting my kids majorly, you

know, in some way."

Other dimensions of the experience of shame and embarrassment were reflected in comments from both the mothers in the study. They were embarrassed and humiliated because they were not believed by either the child custody evaluator or Childrens Protective Services workers. They felt intense concern about their children and rebuked after expressing worries about them. They were put in a position where they felt labeled as liars and believed they were penalized in the custody litigation because they expressed their concerns.

Parent-2 described her humiliation in response to the evaluator, "I felt like he was saying you lied. You're lying because you're trying to get leverage here." Parent-3 explained,

> the more I *tried* to do what they wanted the worse I made it for myself and for Julie because it, it looked as though, in the end it looked as though I was manufacturing things when I *just* was ignorant and they didn't, nobody told me. I, I think a good part of it at the beginning was that I was so stressed with going through the divorce and dealing with my own emotions and the way that Julie's father was behaving that I, I didn't *have* the resources, the personal resources, to step back and go okay, let me figure this out. I *needed* someone.

In both the above examples, the parents' motives were questioned and they felt blamed and

humiliated. The issue of who was telling the truth and a need to be seen as credible loomed large for these parents.

Parent-1 recalled a dramatic courtroom scene when his wife's attorney accused him of lying.

> He stood up and called me a big liar and I was pissed. And, I jumped up, and I was really ticked off because he was sitting there calling me a liar in court. And, I know I was right. And, the judge said, "Calm down, calm down," and took him into the chambers with my attorney. My attorney told me that he got chewed out by the judge for calling me a liar in court. And, I took it, to me it was just totally inappropriate and I'm not going to sit there and let anybody call me a liar like that in court!

He was obviously indignant in response to this public rebuke and responded in anger with a commitment to vindicate himself in the public forum.

Loss

Parents litigating child custody matters are fighting to keep their children, usually in the aftermath of the loss of their relationship with their partner. They are, in effect, facing a second possible loss of as great or greater meaning as they are at risk of losing their children, or at least of losing significant time with them. The interviews conducted in the

present study suggested that the internal experience of possible loss related to the children was a powerful experience that ranged in form and intensity.

At one end of the continuum was Parent-1, for whom the loss of the relationship with his children seemed to take the form of mourning over the circumstances of their childhood. He wistfully described his ideal of how things could work with the children moving back and forth between two homes, and both parents communicating amicably to coordinate their care. However, the reality of their lives, as seen through their father's eyes, is quite different.

> My, my fantasy in life with, with the kids was always to have them be in a happy home and not have to be part of this whole picture. I wanted them – what I wanted was them, you know, when, to get their mom, be happy at their mom's, everything works out fine there. Come to me and have the same thing where me and their mom could get along and there's a very smooth exchange where the kids can feel comfortable at both homes, not feel like there's any stress. If we're both around each other not to have any, you know, any conflicts because it's totally the opposite. The kids walk on egg shells when we're around – when me and her are near each other - more my daughter then my son - cause they're afraid there's going to be an outburst. And, there has been a few exchanges of words, you know, with the kids around during an event and something happened and she says something and I smart something right back and, you know, words exchange and

> then we both go on our – but it's in front of the kids and it shouldn't be that way. And, they're stressed, they're upset, they're scared, you know, they're carrying messages, you know.

He went on to explain that he believes his daughter is probably so frustrated with both parents that she is waiting a few more years to be able to "tell me and her mom where to go."

For Parent-2 and Parent-3, the two mothers in this group, the sense of loss in relation to the children was graphic, direct, and overwhelming. Parent-3 described how her preschool age child was threatening to kill herself. In the face of fearing her child's suicide, she had to cope with the experience of being humiliated in her home by investigators who thought she was fabricating stories about her child's abuse. Rather than the support she needed to help handle her fears about what was happening to her child, she felt blamed. She went on to explain later in the interview what might be the cumulative effect on her from what she has been through.

> It's, it's really, really awful. I mean, if I had known what I was going to have to go through with all of this stuff, I wouldn't have had Julie. I mean, as much as I love her, I would not have had her with him. No way. He's manipulated this system, they're letting him do it, and Julie's not being taken care of. And, I'm being basically burned at the stake cause I'm a witch. You know what I mean?

It's that kind of thing.

This mother felt unable to care for her child and keep her safe. Not only is she feeling deprived of what she needs to protect her child but she feels persecuted for her attempts to do so. The experience has been so painful for her that she finds herself wishing she never had her only child.

Parent-2 described the experience of learning that she lost primary custody of her children in imagery evocative of a holocaust. "And, it was just a huge devastation. My family, me, my family – I don't, you know, I was like, I didn't – I was a zombie for a long time. I mean, that's exactly it. How do you make sense of it?" The words she chose - the huge devastation and being a zombie - evoke compelling images of a war zone. She saw herself as the living dead in a devastated internal landscape, unable to understand how or why this happened to her.

The feelings of loss expressed by the two mothers in the study, one of whom lost primary custody and the other who was forced to share it against her will, were very strong. The fathers' feelings of loss were more muted. Perhaps this could be explained through the fact that one of the fathers in this study (Parent-4) had been given primary custody and the other one was able to spend a great deal of time with his son. It was unclear whether the less powerful or more muted expressions of emotion in connection with this issue were simply not as compelling, whether the format of interviewing individuals only once made it

harder for some people to show the depth of their emotion about this issue, or whether these men had less access to or were less verbally expressive of their emotions.

Fears and Anxieties

One of the themes that continually surfaced in the parent interviews was that these were people facing multiple, intense fears and anxieties in relation to the family law system. Their involvement in the legal system had brought them into a world where they felt every move was subject to scrutiny. They did not know the rules by which they were going to be judged and were often ignorant of what was required to navigate the system. On top of this, they encountered this challenge at a particularly vulnerable time in life, when they were coping with possible multiple losses including partner, home, means of support, and children. They were faced with the possibility of numerous other losses, not the least of which was their relationship with their children. The person who once may have been the closest ally may have become their staunchest adversary through a process of filing declarations with the court attacking their character and ability to parent.

Parent-4 talked about his fear in terms of the experience first from the perspective of his younger son. He described how his child had to deal with his mother moving away and his father's hospitalization following a heart attack. Parent-4 talked more directly about his own fear, stating

> I think one of the reasons, you know, probably for the heart attack, I mean, besides

> genetic disposition was that the process was, you know, was *so* scary. I mean, I, I felt for a long time, even after the decision, unfortunately, the nature of the, the process, again, is that we had this evaluation. It 1) left open what we were going to do two years subsequently. It, (ended) with, actually (advising us) to do something that I wasn't, you know, happy about. And, 2) . . . she (still) could have gone to court . . . there was a long period over which it wasn't clear that my ex was going to *accept* the report.

Parent-3 described the fear she felt in an equally compelling way.

> I'm in a precari- I have been in a precarious situation, position, this whole case *because* I didn't know how to play the game. I had no credibility. It wouldn't have mattered what I said. I, I would have been perceived as the unbalanced, you know, mentally, mentally unstable mother who is trying to get back at her ex-husband. And, that is the way that I was treated by the police, *for sure*. And, that's the way I was treated by CPS. Very, very, very scary to have these people who have all of this power over your child's life being manipulated by their own emotions and their own prejudices and they don't even know it.

Parent-2 described enduring intense anxiety about defending himself and preparing his case, resulting in a chronic state of hypervigilence and sleep disturbance. He explained,

> I mean, it's, it's just a lot of work. A lot of work, you're tired. I don't sle—you know, you don't sleep very well. Just with all these things going through your head. Many times I'd wake up in the middle of the night thinking, 'Oh, I don't want to forget this.' I'd get up, I'd come running out. You know, (get) my little Post-It notes and write, scribble a note. You know, I used to have Post-It notes everywhere from all these little things, so I don't forget because you, you know, you can't remember everything. But, I used to wake up in the middle of the night all the time. Oh, I can't forget this, forget that. Get up and, you know, for whatever reason I would just wake up thinking of things . . .

Financial Stress

The anxiety related to involvement in child custody litigation was almost nowhere more apparent than in the ways these parents described the degree of financial pressure they felt. All four of the parents were impacted significantly by the expense incurred in fighting for custody through the courts. The protracted litigation and limited financial resources in the family (including extended family who were involved in helping pay the attorneys and evaluators) seemed to exacerbate the stress experienced as the result of other anxieties and losses. Even Parent-4, who was an established and successful business owner, felt stressed as a result of the money spent on attorneys and the custody evaluator. Money may be particularly important in its symbolic sense in which its lack may signify states of emptiness, worry, security, and competition, among other things. In the case of divorce, where assets are being divided and individuals are often forced to give up many of the

material comforts they formerly enjoyed, money can take on a powerful meaning. Parent-1 explained

> I think just the whole process itself was just frustrating because I just saw so much money, I mean, just myself I spent probably close to $35,000.00 in the whole divorce process - that's just myself. That's not what *she* spent. That's a lot of money. That is *a lot* of money. And, it's just, if I didn't have my family, my parents behind me, you know, financially to help me, I'd be bankrupt. I mean, there's no way I could have afforded it. And, my dad and mom were paying most of my attorney fees cause I just couldn't afford it. And, if it wasn't for that there's no way – I could never (have done it).

Parent-2 explained that the cost of another round of evaluation and litigation, which she estimated would cost between $30,000 and $50,000 over the next year, was prohibitive and that limited resources led her to conclude that she could not afford to continue to pursue custody. She felt forced to accept the evaluator's report even though she felt it was incompetent and biased. Parent-3 was unable to keep up with her attorney's bill and described the frustration she felt when the lawyer stopped responding to her phone calls, even when she left desperate messages at his office following her daughter's threat to kill herself. She recognized that the attorney is in business and needs to be paid for his work, but the need she had for help was of a different kind than what could be determined by her ability to pay. The lawyer eventually did return her call but, according to her only when

he realized she could sue him if he did not, and not before she was left with feelings of betrayal and abandonment.

Sometimes the stress related to money was focused on paying for the childrens' activities. This responsibility was conflated with resentment toward and competition with the other parent. For example, Parent-1 stated

> And, I have no problem paying for it and I will if – but, when she starts sneaking around and won't tell me anything, you know, and I have to find out when their games are, and I have to, you know, chase everything down, you know, then I don't, it's like 'why should I pay?'

The issue of money also arose in connection with parents' perception of attorneys. Even in some of the cases where the parents described a satisfying relationship with counsel there was suspicion that the lawyers were abusing their position in order to maximize their fees. For example, Parent-1 was talking about his attorney and commented

> And, I think attorneys – I have to say even my own probably can feed – you know, they're experienced enough, they've been in this career, this job long enough to know how to feed it to make it last longer. I mean, I know, I'm sure they do. They have their ways to kind of feed the case a little bit.

Parent-4 discussed his thoughts regarding family law matters where there is not a great deal of money to be made by the lawyers. He sees the problem as an artifact of a system driven by individuals seeking to focus on more lucrative cases.

> I think there's a tendency to even sort of stretch those [laughs], stretch those upwards or, or, or just not, or just make it as quickly as possible and get it over with, you know. Almost treat it as, you know, like it's pro bono. I mean, you know, make, you know, you know, you're going to make $2,500.00 on it. Who cares? And I, I understand the financial reality of that. I'm not, I'm not necessarily terribly critical of that because I think it's a problem with the system.

Gratitude

The array of psychological reactions that arose in the process of going through child custody litigation were not universally negative. In fact, each of the parents in this study described someone or something they encountered in the family court system that was helpful and for which they felt gratitude. The dimensions of the experience of gratitude included feeling that someone took the time to understand; a sense of connection with someone in a position of authority or power; professionals being responsive and making themselves available by talk; and a sense of fairness and justice being exercised in the court process. From the point of view of these parents in litigation, they often felt a sense of urgency that led them to reach out to the legal and mental health professionals involved in their cases. They were all aware of the fee incurred in phoning the lawyer and did not

want to incur it, but were desperate enough that they were willing to pay hourly rates often many times what they themselves earned in an effort to get help.

Parent-1 had heard "horror stories" about attorneys not returning clients' phone calls and thought it was "great" that his attorney consistently called back in a timely manner. He appreciated that if she was in court when he called her staff would tell him that she was unavailable then and arrange to have the call returned the following day. This parent also felt thankful for the way the evaluator did her job. He noted that she was detailed, thorough, and took her time. He stated, "I felt like she was interested and, and I felt she was interested and she was going to do a thorough job in which she was, you know, the task that she was given."

Parent-3 described having a therapeutic experience with the custody evaluator who did the second of the two evaluations in her case. She described the evaluator as "compassionate" and noted that she "had a big heart." She talked glowingly about her.

> She, she really put herself out. She really put herself *in* the case. That's something that I don't feel – I did not feel often – going through this process. *She* put herself into (it). I could really – she was really involved . . . And, this evaluator didn't make me pay for who I am. Other aspects of the system I *really* felt like I had to pay for who I am. I mean, I don't fit the mold. You have to, *you have to* experience yourself in order to experience me. And, I think there's a lot of people

> who are afraid to do that and I'm kind of there. I'm like, hey, you know, do it [laughs] you guys, that's why you're here. You know, you're *here* to experience yourself and I think the people who don't want to experience their selves, themselves, have a problem with me. I think people who are afraid of themselves have a problem with me. And the people who want to experience themselves really enjoy me.

This excerpt from the interview gives a flavor for how this parent needed and was able to establish a helpful connection with someone in the family court system who could maintain an empathic stance with her. She describes how someone who is "different" may engender hostile, unhelpful reactions from people working in the system who are unaware of their own psychological responses or who otherwise might need to maintain an excessive degree of emotional distance.

Parent-4 expressed gratitude for something very different. For him, it was the clear delineation of issues that needed to be considered and negotiated that was most helpful. The ambiguity of the mediation process was confusing for him, particularly in light of his emotional turmoil at the time. He needed and benefitted from his attorney outlining the range of problems he needed to address and resolve.

Making Suffering Meaningful

While the prior categories of experience in the inner world of parents in litigation are connected to various emotional states or experiences, the Making Suffering Meaningful category describes a phenomenon that is more of a psychological activity. In other words, while the other categories in this section are affects, this category has to do with what one may do with some of those painful affects identified. The extent to which these parents needed to tell their story, and the meaning to them of telling it, was surprising and appears to reflect a recurrent theme suggesting how parents may cope with the impact of child custody litigation on their lives.

Each of the four parents spontaneously talked about their desire to help others avoid the pain and frustration they experienced in the child custody litigation process. Parent-1 wanted to write a book about his experiences and stated

> I mean, unfortunately, I had to suffer, but that's life. That's just – things change because other people suffer, or deal with, have to deal with something before things change. So, somebody has to deal with it before something's going to change. I'm, unfortunately, one of those people . . .

Parent-2 commented, "You know, it's kind of like even though I went through what I consider something very bad and very negative the only way I can really turn that around for myself is to make the best of it and make the best for other people to learn from it."

Parent-3 explained

> I really appreciate being able to do this interview because I personally need an opportunity to do something with this experience. This has been very, very difficult and this is something good that I can do with this. You know, I think, I think if you can make a change for other people it, it, it makes it easier to tolerate the fact that I've had to go through it, so I really appreciate you wanting to talk to me. I really do.

It was striking that this theme figured so prominently in the interviews with the parents. It suggested that this frustrating and painful experience was healed in part through creating some meaning, some purpose, for the suffering experienced by the individuals who lived through it. Their comments suggest that to some degree they perceived their participation in the research interviews as a way of helping improve the family law system through sharing their experience and ideas about how things could be improved. They all hoped that through telling their story and talking about what it was like for them to go through the custody litigation process, their own pain would be transformed from something frustrating and awful into a useful contribution that would help children and other adults faced with similar problems.

Parents' Perceptions of the Family Law System

Parents' perceptions of the family law system and of the professionals working in it were influenced by their needs and expectations. This is to say that the emotional responses they experienced in the course of their interaction with the family law system seemed to be shaped in part by the intensity of their need and their ideas about how the court system and its representatives were supposed to function.

The four parents in this study expressed to varying degrees a sense that their child's other parent had a problem with behavior and/or values that they could not control and so the matter was brought to the court for resolution. Either their former spouse was not following the rules and turning the children against him (Parent-1), using drugs and deceiving others about it (Parent-2), possibly molesting the child (Parent-3), or trying to take the children away and move them to the east coast (Parent-4). There was a sense in which each parent seemed to need to justify his or her position in the custody conflict and to consolidate a view of him or herself as worthy, truthful, and "good." Conversely, the parents seemed to vilify the other parent. Some of the more emotionally charged responses of the parents to the interview questions were connected to experiences in which they felt they were not being believed by the court, evaluator, or other professional in the system. It thus seemed that the parents' personal, familial conflicts crossed a line, entered the court system, and acquired a moral dimension in which their family problems became matters of justice. They traversed the boundary between the personal and communal, and sought response to their strife within the

communal arena provided by the family law system. At that point, they needed the family court and each of its representatives to intervene in a fair way that would lead to an outcome that was not merely just, but also that would protect and help their children.

The Need for Justice and the Moral Dimension of Child Custody Conflicts

Parent-1 explained he wanted to make sure the process was "fair" for both he and his former wife. He appreciated that the mediator, evaluator, and judge had been fair to him, particularly since his expectation was that men are at a disadvantage in the family court system. His perceptions of the system seemed to continually return to two primary issues: 1) how long the process took, and 2) that the court does not enforce its own rules. Parent-2 complained that the child custody evaluator was unfair in that he interviewed people her former husband wanted him to contact but not individuals with whom she wanted him to speak. Even more important to her was the existential unfairness in that she felt her "job" as a stay at home mother had been taken from her while her ex-husband was allowed to keep his job as a worker and as a parent. Parent-3 explained that she picked her attorney because she had an intuitive feeling that he was someone who "believed in justice." The issue of rights came up repeatedly in the interview with this parent as she railed about the fact that her former spouse was able to exercise his rights even after depriving their daughter of hers. She asked imploringly, "And, how come he's still allowed all these rights with her when he *continually* violates her rights? How come he has these rights still when he's *obviously blatantly* ignoring

hers?" At the same time, Parent-3 felt the court was remiss in protecting the rights of parents at the expense of serving the child's needs. Parent-4 found the custody evaluation to be a very helpful part of his experience as he felt the evaluator was fair, objective, and helped frame the issues in terms of the needs of the children.

Parents' Needs and Expectations

In light of the their needs and expectations for justice, fairness, and a sufficient focus on the needs of the children, these four parents described a range of experience. Parent-3 focused on a lack of accountability that allowed professionals in the system to function with impunity so that their work was not held to an adequate standard of care. She perceived the family court system as driven by rigid rules that inhibit, or even interfere with, resolution of family problems. She explained, "I went into it thinking that the system was going to protect my child. What I quickly found out is the system is *far* more concerned with following its rules than protecting kids . . ." She went on to state,

> The way that the system is set up now, I find it ineffective, I find it at times inhumane and I think that the children are the ones who's rights are violated the very most simply because the parents don't know how to use the system. And, I think that's – the biggest problem is that children's rights are *not* looked at. I think that's the most *glaring* error. Children's rights are *way, way* down the list. The first rights . . . that are looked at and considered are the parents and it, it ought not

to be that way. I think that is *so* backwards.

The insights offered by Parent-3 went beyond her critique of the priority given to parents' rights to the nature of law itself. For her, the law is too emotionally distant to be able to address or contain the emotional responses people have when they are addressing child custody problems. The procedural rules of court and sanctions associated with their violation contribute, in her view, to a situation where the parties are focusing so much on avoiding saying or doing the wrong thing that they are unable to discuss or resolve the problems that brought them to court in the first place. She stated

> The law is so exacting it doesn't allow for people to be human. I mean, it, it, it's really, it's, it's a horrible irony that we have to follow these *laws* that really don't allow us to express what we need, or express in order to solve the problem. You know, and you, you can get a really good lawyer, a really compassionate lawyer – but they still have to go jump through *all* these hoops in order to do this one little thing. It, it – I think our, our *law*, the way the law is written is, it's *inane* in a lot of respects. It does not allow us to do what needs to be done in an effective and timely manner. It may ultimately get done, but in the meantime, you know, there's a lot of little kids who are just being hung out to dry. And, their needs are not being addressed because so and so was following this, they *have* to follow this. You know, if the attorneys don't follow it *they're* in contempt. Everybody's got

> this big, 'you're about to be blamed thing' going on. And, you know, everybody's covering their butts. It, it's – we're all so *afraid* we're not getting things done.

Observations of the family court system by Parent-1 resonated with this view of the personal nature of family problems and the need for the court to address or contain the emotions he was experiencing. For him, the way he felt treated by the court was a very important part of the overall experience, as if it existed as a separate dimension alongside the actual outcome of the hearing. He was dissatisfied with one of the judges on his case who he described as "grouchy" even though he ruled in favor of his position. He explained

> He was very grouchy, very – didn't really want to hear very much. He was very impatient. He ruled always in my favor, so the end result was fine, but I just didn't feel like, you know, here, here it's me going through this divorce and I'm asking for the court to help me go through this process because that's what I have to do cause it's not working, you know, the way I would like it to work . . . I come to the court and, you know, family law is a very personal thing. It's – there's a lot of emotions involved and it can become very heated. And, I think, I think it requires a judge who, you know, who's very patient, and doesn't have attitudes. I felt he had an attitude. My attorney told me he's been on, doing this for like several years and he lost his patience. He finally left and went to another court. But, that was one of things I just didn't like. Yeah, he ruled in my favor, but I didn't go out of

there feeling good about the court. Then we got the woman judge who was new to the family law, so it was nice to get a whole refresh. But, she was extremely patient. She let, she would let me speak, she would let my ex speak -- not just the attorneys. Cause I would always say to my attorney, Can I speak with the judge? I would like to speak. And, you know, my attorney would say, "Well, the judges don't really like that." And, I said, 'Well, that's nice. I'm glad they don't like it, but I'm the one who's coming to the court, and I'm asking for the court's time, and I think I want to – and I want to speak.'

These parents each seemed to have a strong need to feel heard and understood. Given this perspective, the mental health professionals working as court appointed child custody evaluators, who likely spent the most time listening to the parents, were the part of the system experienced as most helpful. The exception to this perception was Parent-2 who thought the evaluation was a disaster she could not afford to correct either emotionally or economically. The three other parents each saw their evaluators as taking time to get to know them as people and as parents, to understand their children, and to help decide problems in ways that focused on what the children needed.

Perceived Problems in the Family Law System

Throughout the parent interviews there was a dialectic between the parents' perception of the unresponsiveness and lack of understanding on the part of the legal and mental

health professionals on the one hand and the degree to which they were able to communicate and have their needs addressed on the other. Generally, these parents showed a deep appreciation for the individuals in the system, at any level, who responded to their concerns empathically and in a timely manner. They also appreciated instances when the system functioned in ways that provided help in identifying and safeguarding their childrens' interests. However, the parent interviews suggested that their perception of the family court system, and the individuals working in it, more often consisted of thoughts about how the system failed to do its job and meet their needs. It was as if the stakes were so high and the need for justice and fairness so great, that the parents had little or no tolerance for officials who made mistakes, showed an indifferent attitude, or failed to respond in a timely manner. For example, these parents saw their attorneys as motivated by money and a desire to elevate their reputation. This was true even in the cases of those parents who generally were satisfied with the help they had received from their lawyers. The idea that the attorneys were motivated more by profit than concern for the parents and their children came up repeatedly. For example, Parent-1, who was the most pressured of the four by the cost of litigation, had what he felt was a good relationship with his lawyer but still felt that the attorney was drawing the case out in an effort to continue to generate fees from it. At the same time, he seemed to feel that when he called his attorney and did not get charged for it this was somehow a sign of compassion or caring which he needed in the face of feeling distraught and alone. This was even true of instances he spoke with the lawyer's secretary when the attorney was not available. Parent-4,

probably the least financially stressed of the four parents, believed that it was difficult to get the attention he wanted from his attorney because his case was not one from which the lawyer would earn a significant amount of money. While he is a businessman himself who understands what he referred to as "economic realities," he also expressed a need for an ally who was not interested in his money as much as he was concerned about the children and about him.

Within this small group of four parents, the part of the family law system that was perceived as least helpful was the mediation component. This was true of all three of the parents who went through the Family Court Services mediation provided by the counties, as well as by Parent-4 who went through mediation in the private sector. The parents who participated in Family Court Services mediation felt that not enough time was spent with them, or that the mediator was indifferent, or both. The parent who went through private sector mediation saw this as not being helpful because the goals and structure were not clear. He did not know what he had to work on and could not make progress in an emotionally charged atmosphere with his former partner.

The Perceived Impact of the Family Law System on the Parents' Work and/or Personal Lives

These parents were clearly hurt, angry, and frustrated with their former partners. They had turned to the courts, and to the legal and mental health professionals working as part of the court system, out of life circumstances in which they could not independently work out

differences with their former partners. Unfortunately at times their experience in the court system only added to an already stressful situation and led them to become equally, perhaps even more burdened, as a result of their interaction with the family law court. Two of the four parents seemed to feel that their involvement with the court had truncated their capacity to resolve problems they had over custody and visitation with their former spouse.

A Sense of Institutional Unresponsiveness. Parent-2 described the mediation as one in which the mediator failed to help her former spouse consider solutions other than the one on which he was insisting initially and as not helping her present her options in ways that could have made them acceptable to him. Her comments reflected some sophistication in her understanding of the mediation method. She came away from the service feeling the mediator did not take the time to help resolve their dispute. She also felt the evaluator took too long and made untenable recommendations. In light of these problems, she pleaded that professionals working in the courts become more cognizant of the impact of their work on people's lives. She stated,

> Evaluators are, they are changing people's lives, they are playing God. And, I really don't think that the court system, that the attorneys, or the evaluators understand that. I don't think you guys know what impact you have with what you say, with what you write and that's powerful. It changes lives. You know, you guys play God and that's something that you better take pretty seriously

A number of comments were made suggesting that parents may feel the courts are ineffective and do not adequately stop the problems they are facing. These often were tied to perceived violations that had strong moral overtones. For example, Parent-3 asked, "How come he wasn't charged with abandonment? How come he didn't, how come the system didn't come down harder on him? I don't understand that." Parent-1 stated, "Orders are not followed. And, I pretty much just give up. I mean, they're not followed. I know nothings going to happen." He described the system as failing to address the most pernicious problems in his situation, noting that "they just go through the motions of what they have to do" and that "the courts are not strong enough." These parents lack a conciliatory framework in which they are focused on resolving issues in ways that are mutually acceptable and that achieve a sense of peace for their children. They see the former partner as someone who behaves immorally and who is deserving of punishment by the court. Their experience is that the courts fail to adequately address the problem which they feel powerless to handle on their own.

Each of the four parents was frustrated by the length of time their case took to reach resolution. The actual time involved ranged between two and five years. Two of the parents had no pending court filings but it was apparent in talking to them that they were in a court battle that would likely be resumed at some future time. At times, it seemed the parents connected their emotional state to the duration of the litigation but at others times the court system was blamed entirely for their frustration. Parent-4 explained,

> Well, factually it was, it was a divorce that occurred, the process for which began in the summer of '96 and ended in October of '98. I think that sort of speaks for itself. Everyone who goes through this probably ends up with the same, you know, same feeling which is – that speaks for itself [laughs] it took two years to get done. Yeah, it is a long time. It's a *painful* time. I mean, part of that's the emotion and all that that's going on, and part of it is that it's just *very* difficult to get good, objective advice. And, and perhaps it's hard to take it too because of the emotion. But, so, so the experience was, was a difficult one. The, the, obviously, the bulk of that process was the difficulty in determining custody.

Parent-1 also saw some connection between his state of mind and the length of time the litigation continued. He seemed to see this as a weaker link than did the parent quoted above. In his words,

> . . . in the back of my mind it's like, how can anybody spend that much, this kind of money for a case that's going to drag on for so long, you know, it just, in my mind you'd think that there was, there's got to be laws, or policies within the family law rules that the courts follow that allow things to go, maybe, quicker, or things to be filed earlier, or – I, I mean, I don't know. I just think *in general* the, the whole process just took too, too long. We're still dealing with things and we're going on six years. There are still some things that have not been resolved and it's, it shouldn't *be* like that. I just wish there was quicker timelines of things

> that maybe there should be some kind of laws in place that say, these things have to be filed, these certain things have to be done, you know. People think they file and in six months it's over. That's what some people believe.

Both these parents showed some insight into their situation, their comments reflecting an understanding that they had something to do with the extended time required for resolution of their custody cases. The other two parents showed little or no indication that they thought the length of time their case required was related to themselves at all. Rather, their frustration was directed solely at the court or the professionals working with it who they felt allowed situations to go on for far too long a time. They described having urgently needed relief from the court so that their children would be adequately protected, a terrible injustice would be corrected, or both.

Parent-2 was frustrated with the length of time the evaluator took to complete his report and then with his recommendation that they wait a year, conduct additional assessments and investigations, and then revisit the custody order. While she was cognizant that "most people are way too emotional" as they go through the family court process, she also complained bitterly about how the evaluator took so long, failed to investigate the matter adequately, focused on the wrong things (she was aghast that he included his opinion that she focused excessively on her appearance and she could not see the relevance of the projective testing - Rorschach ink blots - that was used), and recommended additional assessments and a re-evaluation in a year "because he could not make up his mind." She

stated, "We're talking about another year of drawn out emotions. And, I couldn't do it. When I found out I didn't get the kids, I couldn't, I couldn't go through that again."

Parent-3's frustration was directed at the courts. She explained, "The way that the system is set up now, I find it ineffective, I find it at times inhumane and I think that the children are the ones who's rights are violated the very most simply because the parents don't know how to use the system."

The protracted nature of how custody disputes make their way through court was thus a source of great frustration for each of these four parents. Another theme in the parent interviews that suggests how parents are impacted by involvement in custody litigation is one having to do with the way these individuals felt a need to constantly be on guard and live as if they were in a fishbowl. This experiential category was named "Living in the Shadow of Custody Litigation."

Living in the Shadow of Custody Litigation. The struggle to cope with powerful feelings of hurt, humiliation, and other painful affects, and a desire to avoid further embarrassment, led these parents to modify their day to day lives. In effect, the metaphor of the "battle" in custody battles was shown to intrude into the daily lives of litigants. These parents made comments reflecting the degree to which the lived as if they were under siege, wary of attacks from without and focused on defending their children and their position in the litigation. They became recorders of daily events, compiling information to support their

cases so they could either prove their position in court or defend themselves from allegations by their former spouse. They lived in the shadow of custody litigation, always on guard and documenting their lives in preparation for the next court date. Parent-1 explained,

> I mean, I documented everything I did. I wrote down every time an incident happened. I just took notes. And, because I knew sooner or later I might need it. You know, just a history of what's going on. If she does this, does that, does this. I just kept a log of everything, and, and I never, you know, I never did anything that was inappropriate. I just figured I'd deal with it through the court.

Parent-3 explained that she "constantly has to defend herself" and went to suggest the importance of documentation:

> Record everything. Take notes on *everything* no matter how minuscule you think it is take notes on everything. Make *sure* that *you* have documentation of what is done, why you did it, the way you did it, how you did it. Don't let anybody tell you you've done something. You be able to tell them what you've done.

Even Parent-4, who was less embroiled in the custody litigation process than the other three, felt pressured and stressed lest he do something that could be used against him in court. He explained,

> And, I felt, and the kids were generally with me during this period, and I felt like I had to be perfect. I felt as if any mistake I made was just going to, you know, any wrong decision, any, you know, everything was, was second guessed, and third guessed because it was going to come back to haunt me. I wonder if I'm not doing the right thing with the kids. Oh, my god, she'll, you know-(and use it in court).

There was one dimension of living in the shadow of custody litigation that was only addressed by Parent-3. This had to do with the impact on the parent of their attorney's strategic advice. In this case, the parent felt that the advice was helpful at times but that at other times following it inadvertently contributed to an exacerbation of the problem. She stated, "I've been told I *can't* do this, I *can't* do that. If you *do* this, this is how this is how it's going to come across. Now, that's come in handy a lot of times, but there's been other times, other situations when it's just like, you know what, this is perpetuating it."

Gratitude

Frustrations with the court system seemed to be counterbalanced to some degree when it was coupled with the experience of feeling understood, cared about, treated fairly, and regarded respectfully. Parent-3 felt relieved that the second child custody evaluator with whom they worked had compassion, "a big heart," and "put herself in the case." Parent-1 also felt relief that the evaluator and the mediator "listened" and were "very supportive." Parent-4 felt the evaluator on his case was successful in understanding the

family and the needs of his children. The interviews with these four individuals suggest that even though parents in custody litigation feel humiliated and ignored by the very system in place to help them, they may find some relief through the courts and individuals working in them.

Taken together, these phenomenological categories present a picture of a system that itself exerts a profound influence on parents, and by extension their children, when they turn to it for help. While there are islands of satisfaction and gratitude, for the most part the experience of the parents in this study suggests that individuals may file suit for relief of a traumatic family problem only to find themselves re-traumatized by an institutional process. The nature of the thematic elements identified thus far, through the eyes of the parents, suggests that their subjective reactions may have a profound effect on the legal and mental health professionals who work with this population. For it is the subjective world of custody litigants as they struggle with a range of intense emotional reactions including but not limited to anger, blame, shame, humiliation, competition, fear, and thankfulness that they bring to their encounter with legal and mental health professionals in the family court system. The data suggests that these emotional reactions are engendered not only by stresses in the family preceding their contacts with the courts but that they may be exacerbated by the influence of the family law system. Taking up the questioning style of Parent-3, "How does that happen? Is this the result of institutional organization? Individual psychology? Or some mixture of the two?" With these questions in mind, the focus of this research report now turns

to an exploration of the subjective experience of a number of legal and mental health professionals as they work in the family court system.

The Attorneys

The attorney group consisted of three women and one man. All were Certified Family Law Specialists, a certification requiring supplemental training and experience in the family law field, and all were from the Bay Area. Two of them practiced primarily in one county while the other two practiced primarily in each of two other counties. All four were in their 40's and 50's. The minimum number of years any of them had been in practice was thirteen.

The lawyers interviewed for this study were each known to the author from his work as a therapist, mediator, or child custody evaluator in cases where they were representing one of the parents. Two of the attorneys were individuals with whom the author had worked in the community on public policy initiatives or educational efforts within the family law field. The attorneys invited to participate in the study were selected based on the author's belief that they were experienced in a wide range of family law cases over many years, and that they were thoughtful, intelligent, and skilled at what they did. Their reputation in the community, confirmed by the nature of the author's contacts with them, suggested they would likely be sufficiently interested in contributing to professional development that they would donate the time to be interviewed. In recruiting the research sample, the four attorneys who were invited to

participate all accepted. For the purposes of this study, they will be referred to as Attorney-1, Attorney-2, Attorney-3, and Attorney-4. As with each of the five cohorts included in this study (parents, attorneys, judges, mediators, and custody evaluators), this section of the data is organized within three supraordinate categories: the inner world of the family law attorneys, attorneys' perceptions of the family court system, and attorneys' perceptions of the impact of the family court system.

The Inner World of the Family Law Attorneys

This section of the data presents the subjective experience of the family law attorney as seen through the eyes of the four lawyers interviewed for this study. It begins with a presentation of data bearing on what motivated these individuals to go into family law and/or why they practice in this particular field. Since the interview data was peppered with responses describing the stresses inherent in their jobs, the research report next presents interview data identifying the nature of the work-related stress experienced by the family law attorneys. In analyzing this body of data, it seemed that part of what made the job of the family law attorney particularly difficult was the role strain they experienced in their relationships with clients. The data suggests the existence of several types of role strain. These are conceptualized as a series of dichotomies: 1) zealous representation of parents vs. best interests of the child; 2) allying with the client vs. aligning with them; and 3) providing emotional support for the parent vs. helping them focus on the practical legal issues and strategies for achieving their goals. Each of these is presented in order. The report next turns to presentation of data

concerned with the nature of relationships between opposing counsel. This is a particularly critical dimension of the world of the family law attorneys as the quality of interaction between counsel appears to exert a significant influence on the outcome of custody cases. It appears to be an important element in the ecology of child custody conflicts. The four attorneys were queried about their ideas of success and failure in family law cases. Their responses to this series of questions are presented next. Finally, the section ends with a presentation of data relating to the attorneys' perceived need for self-reflection as this was highlighted in the course of these interviews.

Motivation

The field of family law offers relatively small renumeration compared to the lucrative salaries attorneys in other specializations command. What then motivates individuals to go into this field? Attorney-1 and Attorney-3 both explained that a significant part of their interest in practicing family law lay in a desire to help people in distress. These two lawyers talked about their enjoyment in helping individuals by offering constructive approaches to resolving complex family problems and educating people so they could avoid turmoil and strife. Attorney-1 spoke of her adoption of what she called a "social work approach" to her practice. Attorney-3 specifically described family law as "a helping profession." Attorney-2 did not overtly profess to developing a therapeutic approach but seemed to have one nonetheless. She jokingly referred to problems in her own family of origin she was unable to resolve but wished she could. She explained that she is trying to "fix every other family" since she could not fix her

own.

In addition to the desire to help and heal hurt families, other motivational elements were identified in the attorney interviews. Attorney-2 emphasized the part of her role oriented toward achieving justice for her clients. From her perspective, attorneys are motivated primarily by a drive to win their cases and triumph in court. A sense of aggression and power seems connected with winning in this sense which she described as proving "I'm the biggest baddest gorilla in the forest." This perspective was echoed by Attorney-3, as well, although in a more muted form. While she finds the greater satisfaction in helping clients reach settlement, she also enjoys taking a case to trial and winning. She described going to court, doing a good job, and winning as "a professional high."

Attorney-4 explained that the practice of family law is broad and interesting. He likes the variety of activities involved, particularly in relation to financial and psychological aspects of the practice. He enjoys the interaction with people and described family law as a "great thing for a voyeur." Attorney-4 became involved in family law initially because the cases were "easy to get" when he was starting out. For this lawyer, a critical part of his role lies in offering advise to clients about strategies and tactics, including counseling them regarding how to present themselves in mediation, evaluation, and the court. He believes also that a significant part of the lawyer's role is to function as a "mouthpiece" who "helps you put your best front on in public." In this

light he sees his role as helping people express their thinking and doing this in ways that make it "salable" to someone else.

Stress

The work of the family law practitioner is inherently stressful. The lawyers interviewed for this study talked about their work in ways suggesting that a significant part of the difficulty they experience involves managing strong emotions brought to the process by their clients. Since the decision to pursue a career in family law was most often motivated at least in part by an interest in helping others or healing hurt families, one can suppose that at least some of the stress the lawyers feel is related to their own wishes and needs to be helpful, particularly when these desires are met with frustration. The data suggests that this is the case.

Attorney-1 reported having sad feelings for the families she cannot help. For Attorney-2 the stress from this work came in the form of bearing witness to how people in custody litigation treat one another. She poignantly explained

> I watch people suffer . . . often at their own hands . . . in ways that seem totally unnecessary. . . I watch people do things to one another that are obscene. And so, I think it's made me very intolerant. And it's getting, I think part of my problem, and one of the reasons I am getting so hooked in is because my ability to fend this off, my ability to shelter myself from this, my reserves are, are running low, believe

me . . . There are chinks in my armor so the stuff is getting to me in ways that it shouldn't . . . Unless I find a better way to cope with this it will, it will hurt me.

With these words, this lawyer provided a perspective on the personal toll her work can take. She is repulsed, perhaps even traumatized, by what she has seen people do to one another in the course of custody battles. After years of doing this work she feels worn down by it. She recognizes that she is vulnerable, increasingly prone to becoming overly identified with her clients, and intolerant of opposing counsel and their clients because of how frustrated she is feeling in this regard. She is afraid she is going to be hurt. Her intolerance may be a means of distancing herself. In fact, she feels she may have to leave the practice of family law entirely unless she can find a better way to cope with this problem. As the interview progressed it became clear that over time she has become less tolerant and more judgmental. She expressed a wish to have order imposed, for the court to do something to punish anyone who transgresses the rules, including herself. This response appears to echo, in a sense, those parents who fantasize that the court can set things right by acting in such a way as to redress wrongs and make things work right in their lives.

Feelings of helplessness appear to be commonly found in the work of family law attorneys. Attorney-4 talked about his feelings of helplessness when his client maintains that his or her concern is for the welfare of the child but is really motivated by vindictiveness toward the other parent. He stated, "I have those feelings of despair,

like we're in this for a long time and it's never going to get better." Attorney-3 also described feelings of helplessness at times when she is faced with cases in which she cannot effect changes needed when a child's welfare is being harmed. She described one case in which the court accepted what she believed was a biased custody evaluation and the cost of litigating further was prohibitive for the client, resulting in a forced decision to accept the evaluation results.

Attorney-4 accepts that people yell at him as a displacement of the anger and frustration they feel as they go through divorce and custody litigation. He explained

> It starts off with a *very* long period of screaming at me because who else are they going to scream at? And, so, you know, I'm sort of the lightening rod for that, that stuff. And, I think I take it reasonably well, *but* you know it does – there is wear and tear on the system from that. Also, people don't yell at me who need sympathy. That's tiring too. You know, you're just hand holding and, you know, saying to people, 'Oh, yeah, it must be horrible,' and 'I know how you feel.'

He went on to describe a situation where he represented a bereft parent who was stalking her former spouse after he left her for a younger woman. In his comments he provides a glimpse of the difficulty generated by his clients' primitive emotional responses and how he needs to perform a multileveled function in which he is simultaneously an empathic listener, emotional container, and agent of reality. He

stated

> I have to hear about all this *injustice* and so forth and at the same time trying to say, *Stop that. Don't do that.* It's not good for you, you know, tactically it's a bad idea. But, it, it's, it's sort of, well, it's, it's difficult for *me* in the, in the sense that both I have to see all that raw emotion and somehow deal with it. And, it also *really* interferes with what I'm trying to do which is to get money for her.

In addition to the stressful nature of the work on cases, the attorneys interviewed for this study reported stress related to the quantity of cases they handle. They are engaged in a profession in which they must earn a living. While they are each quite experienced in the field, years beyond holding certification as specialists, none of them are lawyers who practice primarily with cases in which a great deal of money is involved. Since they do not have fewer cases that pay more money, they take on more cases that pay less. For example, Attorney-1 reported stress from the work load in her practice. She finds herself stressed by working conditions in which she is unable to give the time to every case she feels they deserve and still earn a living.]

The attorneys had various ways of coping with the stress. One of the methods described involved maintaining a psychological distance from the client and his or her conflict. Several of the lawyers talked about having to periodically remind themselves or their colleagues that "this is not my divorce." This statement came up repeatedly and

seems to be part of the "folk wisdom" used by family law attorneys to help cope with the stress of working with their clients. It seems to be an expression they use to cue themselves or others that they are too close to the case. Attorney-4 explained

> My, my clients are always saying to me, "*How* can you do this?" "*Why* do you do this? And, what I just say to them over, and over again, 'it's not my divorce, you know.' And, I'll say, 'I don't want you to take this badly, but I don't actually give a damn. You know, I'm going to do a good job for you, I *care* for you, and I, and I want things to go well for you, but I was never married to your husband and this stuff doesn't really affect me the way it affects you.'

Relationship with Clients

At the heart of the work of the family law attorney is the relationship with his or her clients. The attorney is the bridge between the client and the court. He or she helps navigate the waters as people who are coping with anger, frustration, fear, and a myriad of other experiences take the ending of a an intimate, personal relationship into the communal and public arena of the court. The narcissistic wounds from the failed marriage, fears of loss of children and of money, are stewarded by the attorneys into a matrix of dispassionate laws that are hoped by the clients to bring peace and/or assure fairness and justice.

In the course of working with her clients toward a just result, Attorney-2 finds what she

characterized as "an oddly intimate relationship." The dimensions of this interaction, as she described it, include her functioning as a "confessor," "traffic cop," "babysitter," "referee," and "parent." She explained

> To be a family lawyer you cannot be afraid of people and their feelings. And, you know, I, I – it cracks me up when I listen to a family lawyer say, 'You know, I wish these people wouldn't, you know, *cry* in my office.' *Well, then get the hell out of family law*. And, so it's important for me to be able to at least entertain the fact that, that my clients have their feelings. I don't want to take them on and I'm *not* a therapist. But, I also want to be respectful of the fact that, you know, they're having feelings, they're going through a very difficult time, they're frightened, they're angry, they're, you know, they're, they're sad, they're worried about money, they're worried about their children, you know, and whatever else was there. So, you know, I feel like part of my role, at the very least, is to be a listener.

In the face of the "odd intimacy" described above, a dimension of the attorney-client relationship reflected in comments by each of the attorneys interviewed, the job of the lawyers does not primarily involve providing emotional support. Attorney-3 and Attorney-4 gave voice to how clients' emotions constitute an interesting overlay for what is primarily an economic function. Attorney-3 explained

> Family law is a business deal. You figure out how to value and divide up the assets. And, you think about the tax consequences and that's what it's all about. But, the overlay on all that is an *incredible* emotional, sort of, *veil* that the parties bring to the case which may *very much* dominate how you can move forward with the rest of it because sometimes people are so hurt and angry, they can't focus, they won't do the tasks that need to be done, they'll do everything they can to shoot themselves in the foot to deal with it. And, or sometimes they're so angry they'll, they'll sabotage everything you try and do. And, I really try hard to work with them and, and help them on that . . . I tell clients that I am *not* a therapist. I really don't need to know a lot of what's going on...I don't need to know...you know, that you felt sad because he said, blah, blah, blah or for you to tell me every conversation you had this week with your spouse or your kids' father. Therapists are equipped to do that. I'm not. I tell them, 'It helps me a *little bit* to kind of know the emotional framework which got you to where you are now because it can help me understand how we can move forward and a little bit what's going on in this case,' but, you know, sometimes people will want to come in and they'll want to tell you things like...we didn't have sex for the last five years, and he watched porno flicks, and, you know, really a lot of stuff that, that I don't *need* to know at all.

The lawyers seem to agree in their perception of the law as something that needs to be worked with dispassionately and rationally in order to further the clients' interests. At

the same time, they all agree that clients in child custody cases tend to be experiencing strong emotions. The family law attorney is positioned at the boundary between the client's emotionality and the courts' reserve. If the attorney becomes too emotionally involved this can hurt the client's case. If the attorney is not sufficiently involved, the client is likely to experience them as cold and uncaring. This inherent tension was reflected in the data. Attorney-2 explained

> And so I, I feel like the people's marriages fail, you know, they have packed so much into their marriage that, you know, all psychic hell breaks loose. And, so I'm feeling like there is, there is much more *pain*, you know just sort of circulating in the atmosphere in a much more general way. And when you translate that into the context of a divorce which is an *incredibly painful process* it just – it feels sort of overwhelming. And, I think when you, when you, you impose that on a template of the system, the system is automatic in a way. The system says, and judges say, and I find myself advising clients, you know, I appreciate the fact that you have feelings around this, but the court doesn't care about your feelings. The court, and in a way the court *can't* care about your feelings because that's not what the *law* is about. The law is a creature of logos not pathos. And, so in a, in a circumstance where people feel *most* like they want their feelings to be validated and acknowledged and justified, you know, it's kind of like look, *we don't care* that she left you and, you know, took up with your best friend, and you know, said that your youngest child is ugly. *We care about where your W-2 is.* Where's your

damn 1099 form? The system will divide their property and make orders regarding their children, but the system will not, you know, will not fix their marriage, and will not make them feel better. The system, I find, often makes people feel worse. "*Why can't you say that he cheated on me? Well, tell the judge that, you know she, you know, she, she hit me.*" Because it's not relevant to the spousal support proceeding. I mean, it might be in some way, but, you know, when you're dealing with materia it's, it's not relevant. And, I have to say, you know, the judge doesn't want to hear it.

Another dimension of the attorney-client relationship involves the extent to which lawyers feel confident in their ability to understand the nature of the case. This is a complex issue since their contact with the individuals involved is usually limited to talking with their own client. They may see the other client in meetings with opposing counsel and may see both clients in court. They seldom, if ever, meet the children involved. Nonetheless, some attorneys apparently feel confident they have an understanding of their client's situation. For example, Attorney-2 described with conviction her belief that she has an objective viewpoint that gives her a clear view of reality in these cases. She explained

I feel like I have a certain amount of objectivity...and so when I encounter litigants who I feel are, particularly with children, who I feel whose behavior is so palpably inappropriate, or at least it feels that way to me, *I want* everybody else to see how

> inappropriate that is, that behavior is, or that, that conduct, or that, you know, that, that gestalt is. And, I want them all to side with me and say this is – we need, we need to, to circle our wagons and do what we can to insulate this child in the best we can from the *obvious* toxicant that's this particular person's parenting.

The data suggests an odd, self-contradictory perspective in which on the one hand this attorney experiences herself as the protector of children from "toxic" parents (an interesting concept in itself) while simultaneously recognizing that she is weary, vulnerable, intolerant, and more prone to form alliances with her clients in which she loses objectivity. Of note, she could not think of a single case in which she felt that the "toxic" parent was the one she represented. The closest she could come to this was to think about a case in which she thought "both parents sucked . . . and then it just becomes a question of who sucks worse." She seems to recognize that her clients may not be the best parents yet she did not reveal a judgmental attitude toward them. She reserved an indignant and punitive orientation for parents when they are on the other side in these cases.

In contrast to Attorney-3's position that she has some degree of objectivity, Attorney-4 maintains that the attorney usually cannot know the objective "truth" of the history of a case. He stated, "Most of us are, I think tend to be kind of agnostic about what's going on in the particular case cause how can you possibly know? You know, usually you think sort of the common place, the truth is somewhere in the middle." From this lawyer's

perspective, the situation is compounded by the fact that clients may not be forthcoming with their attorney. He noted that there are often significant pieces of information that clients fail to disclose to their attorney and that "they certainly don't tell you all the things they are feeling."

Role Strain in the Attorney-client Relationship

A number of phenomenological categories were identified which suggest that role strain is a salient dimension of the subjective experience of family law attorneys. Their work puts them at the interface of several vectors: their clients' emotion, the law which holds that child custody matters must be decided according to the best interests of the child, their client's wish for them to be loyal advocates, and the need to maintain focus on strategy and outcome, particularly in regard to financial issues. The dimensions of role strain can be conceptualized as a series of dichotomous subtypes, each of which will be addressed in order. These are: 1) zealous representation of parents vs. best interests of the child; 2) allying with parents vs. avoiding becoming aligned with them; and 3) providing emotional support for the parent vs. helping them focus on the practical legal issues and strategies for achieving them.

Zealous representation of parents vs. best interests of the child. A theme that arose repeatedly in the attorney interviews was the inherent tension between two imperatives: the extent to which these attorneys felt obligated to carry out their ethical mandate to zealously represent their client on the one hand versus how they attempt to incorporate

considerations regarding the best interests of the children in custody cases on the other. Family law practice is unique in that clients may hire attorneys to accomplish things that can be damaging or hurtful to the children involved. The attorneys attempt to press for their client's position while avoiding representations that lead to poor results for the children who may be used as weapons or bargaining points in the dissolution process. Managing this tension was a stressful part of the attorney-client relationship for each of the lawyers involved in the study, although it was manifest in different ways and to varying degrees. It seems important to note that the four attorneys who participated in this research were an enlightened group in that they were not only aware of this tension but defined their practice in part in relation to consideration of it.

Each of the four attorneys maintained that they would not represent a position they thought was harmful to a child. If the client insists, they will each suggest they find a different attorney. When asked how they knew that a particular client position was damaging to a child, the four attorneys described different ways of thinking about how they get this information. They also had different ideas about how much confidence they could put in their assessment of the needs of children of parents they represent. For example, Attorney-1 believes she has an obligation to look out for the best interests of their children when she represents a parent in a custody case. However, she recognizes this may at times be problematic for a number of reasons. She rarely sees the children and recognizes that the information she gets may be skewed as it comes solely through her client. She described feeling handicapped in her ability to develop a more "objective" or

impartial view of the children's needs. Based on her strong values about protecting children, her position on the issue of parents desires vs. children's best interests was more extreme than the other lawyers interviewed. It seems to put her in a grey area where she may not be protecting her client as fully as other attorneys might protect theirs. Specifically, when this attorney described her role in cases where she has concerns about the capacity of her client to function as a parent, she believes she must not interfere with the evaluator and the court seeing and understanding the client's limitations. In effect, when she believes that children are at risk with her client, she seems to shift her role from one where she is functioning primarily as a client advocate to one where she acts more as an officer of the court. However, she does not abandon her advocacy role entirely. Rather, she develops an accommodation in which she balances children's needs with client's wishes by viewing her role as one in which she safeguards her client's right to parent to the extent he or she is capable. Attorney-1 explained

> I feel very strongly that, that representing my client shouldn't keep my client from acknowledging to the court who they really are and what they really have to say. In other words, I think it's really not right to stand in, to use myself to keep the court from seeing who this person really is. So that if my client has aspects about them that in – if I were making a judgment I wouldn't think it was the best parenting style walking the face of the earth, I wouldn't tell them to keep that from the court. I don't think that's right. I think that the court has a right to see how the family really operates . . . If the court has to be involved in the family system

> then they have a right to see exactly where these people are coming from and make their own decisions . . . I think that you have to have – if you're going to participate in the system then you have to treat it – you have to then become part of it. And as part of it, as sort of, as an officer of the court it would be, it would be and in issues having to do with children it would be, it would be capricious of me to think that I knew better (than the judge) what's in the best interest of the children or the parents for that matter.

Attorney-1 seemed uncomfortable when responding to questions about this issue. As a caring person and experienced professional she realizes she walks a thin line, or even crosses a line, in terms of sometimes not representing her client in the best possible light so that she can work in ways that conform with her understanding of what is best for her client's children. I noted that later in the interview Attorney-1 took a different position, one more in line with a mainstream view in which she described her role as follows: "My job is to represent that mother or father and to protect their right to parent as they define it which is almost always at least 50/50 if not, you know, primary custody or sole physical custody."

At the other end of the continuum from Attorney-1, Attorney-4 explained that he considers it part of his job to counsel parents about how to present themselves. In reference to clients who hire him because they are seeking a specific percentage of custodial parenting time, he explained

> Well, the first thing I would say to a person like that is, 'You can come in here and talk about percentages, but *don't you ever* say that anyplace else. *Don't you* say that to Family Court Services, *don't* say that to the judge. Tactically, that is a mistake. Don't do it.' A lot of people will get that. You know, they, they sort of appreciate tactical thinking.

In part the tension experienced by family law attorneys may be related to the pull to help and counsel people versus the need to stay more true to the advocacy aspect of the lawyer role. Attorney-1 described her struggle to balance helping people in distress with what she knows about the practice of law and her role as a lawyer. She rejected the personal criticism sometimes levied at her by colleagues in which she has been told she should abandon her social work approach to her clients. However, she also recognizes a need to maintain balance so that she is not overly identified with her clients and still can function effectively in presenting their case in the most favorable light. Attorney-2 commented on this issue, stating, "You know I am a lawyer and I am trying to do, I am trying to do the job of law, but at the same time I am having to, to contend with and contain people's feelings."

Attorney-3 is a more litigious lawyer than the others, which is to say she seemed more comfortable with the idea of taking custody cases to court, yet she also described the ways in which concern about children led to a moderation of her zealous representation of clients. This lawyer acknowledged what appears to be the case with each of the

attorneys interviewed: personal values play a significant role in shaping the limits of what they are willing or unwilling to do for their clients. She explained

> I perceive my role as *zealously* representing my client. My client is either the father or the mother and not the child in custody cases . . . I represent parents in custody cases and trying to achieve to a certain extent what they want, but always modified by what I think personally is reasonably achievable and comports with what I personally feel comfortable with. There are certain situations where a client might want something and I can't represent them in trying to achieve that. If I feel that a parent wants something that is totally unreasonable, for example, if a mom were to say, "I don't want dad to have *any* time with this child. I hate his guts and all I want to do is make sure he never sees the kid." If, if I, if dads not a child molester, if dad seems to be a reasonable person, I personally don't think I can go forward with a representation like that because: A) I don't think it's achievable; B) I don't think it's in the best interest of the child which is my own personal bias; and C) I don't want to take a position in the legal system that I think is so off the wall it's going to label *me* as a person who will pursue off the wall results.

The attorneys who participated in this study all had to contend with the dilemma of balancing advocacy for their client's position with their own values about what is best for children. None of them indicated they would proceed with attempting to obtain a result that their client wanted if he or she felt it would likely damage the children

involved. However, the attorneys varied in their level of confidence to know how any particular outcome would be for the children, as well as in their ways of conceptualizing their role in helping parents present themselves to the rest of the family court system. Part of the role of the family law attorney seems to involve maintaining a closeness with their clients while also having sufficient distance to be able to see their problems from a perspective that is less embroiled in the conflict. It is to the problem of attorney alignment that this report now turns.

Allying with parents vs. avoiding becoming aligned with them. In addition to the tension between dispassionate law and raw emotional reactions in custody cases, each of the attorneys interviewed talked about the problems that ensue when counsel has trouble managing the tension between zealously representing their client and identifying too strongly with their client's position. In the parlance of family law practitioners, this intense identification is referred to as becoming "aligned" with the client. Alignment, in this context, refers to a process in which a lawyer can become identified with his or her client to a degree that adequate professional boundaries and focus are compromised. Attorney-1 offered a plain language definition of alignment as one in which the attorney "can't see the forest for the trees and really believes that every perception of reality that their client portrays to them is actually fact." This phenomenon and its consequences was most clearly described by Attorney-3 who stated

> I think it makes, tends to make you somewhat ineffective if you, if you get too identified with your client and you become so aligned with them that, that you assume everything they say is correct. Or your, you lose your objectivity is a very bad place to be. But, there is something that happens between attorneys and clients. And, it happens not just in custody parts of the case. It happens in the whole case . . . you tend to...and, and I don't know the exact meaning of alignment, but you tend to really take your clients side. I mean, and I don't know whether that's, it must be some sort of natural thing that for the most part happens with attorneys.

This lawyer seemed to be suggesting that alignment may be a phenomenon created at least in part by the nature of the interplay between lawyers and clients within the family law system. That is to say, alignment may occur not simply as a function of a problem with the attorney but may in fact reflect something essential about the attorney-client relationship in family law cases such that attorneys are more vulnerable to it than they might otherwise be. In effect, the problem, or at least aspects of it, may be more systemic than personal. Attorney-3 wondered insightfully, "What would happen if the other person had come in and talked to me first? Then I'd be aligned with that person instead of on this side. How's that work?"

The pull toward alignment is tempered by the attorney's knowledge that in child custody matters the law is that the case will be decided according to the best interests of the child.

"I somehow have to not let my zealousness for representing (a parent) totally screw up what I happen to think is in the best interest of the child," explained Attorney-3. She resolves this role strain by looking for a way to "mesh" what her client wants with what is in the best interests of the child. She simultaneously recognizes that if the other parent in the case had walked into her office first, she would be representing his or her position as being in the child's best interests.

According to Attorney-4, some attorneys appear to be more vulnerable to allying with clients than others. He explained that everyone is vulnerable to it at some time or other, but there are some lawyers who routinely have that problem. He noted that particular circumstances in which lawyers may develop this problem are cases in which they are representing the weaker of the two parties and there is "a particularly nasty person" on the other side, as well as cases where the parties' situation resonates with something in the life of the attorney. At times, this problem takes on dimensions related to gender, as Attorney-4 described what he called "the White Knight phenomenon" in which a male attorney is to take care a female client who is seen as poor or weak. Attorney-1 noted a related phenomenon in which some female attorneys are prone to become overly protective of male clients and to take a particularly aggressive stand in their representation of them. Thus, the dynamics of attorney-client alignment may have some rootedness in emotions related to gender and power, as well as to the attorney's personal responses and experiences as these resonate with what his or her client is experiencing.

The attorneys made some comments about how they protect themselves from becoming aligned with clients. Attorney-4 described times when he feels furious with the other party. He is able to use his awareness of these intense emotional reactions as a signal of some underlying problem in the case. Several of the attorneys commented that when they realize that alignment appears to come into play and that the attorneys are becoming polarized, they remind themselves and their colleagues that "this is not our divorce." Attorney-1 explained, "There are certain mantras that we all use. 'I didn't marry this guy.' 'I didn't pick this woman.' 'I didn't choose to have a child with them . . .' Just repeating that to yourself if you can take a break, you know, go to the bathroom." The data suggests that the ways attorneys protect themselves from alignment incorporate high level psychological defenses where their identification with the client is weakened so the lawyers can perform their role without getting overly entangled emotionally in the conflict between the parents.

Providing emotional support for the parent vs. helping them focus on the practical legal issues and strategies for achieving them. Each of the four attorneys commented in one way or another on the dichotomy and tension between performing the work of representing people in family law cases and the emotional context of family law practice. The emotional response of clients presents unique challenges and can sometimes interfere with the lawyer's ability to do his or her job as an advocate, strictly defined. For example, in relation to one of his cases Attorney-4 explained

I often tell my clients right out that your, your emotions are important, how you feel about all this stuff really matters, but *I don't give a damn*. That's not *my* job. My job is to be sort of cold and calculating about this. And, so I'm going to do that, and you're going to do this and it's just important for us to recognize that we're both doing these things and that we, we try to work *together* on it. And, then – and I tell them that they are *going to have to* deal with things in a business like way even though they don't want to. That things are going to have to be translated into dollars when that doesn't seem right. That, that you might, you might have to *trade* some important emotional issue for money. And, that's not very nice, but that's just what we have to do and, so *you* express your emotions, you have all those feelings and so forth, but I'm going to keep telling you when I think they're interfering with what you're doing and fight with you about that and try to keep you under control. And, most clients will say, "Yeah, okay. I understand. That's a good thing." But, but then they forget that and it's, you know, it's hard to, it's hard to keep it up and, so, you know, we have the conversation over, and over, and over again. There are some people who can't even understand that concept, of course, and who are just, just out there. Just awash in their emotions and unable to concentrate and all. But, that's, that's actually not that, that common. Those are pretty extreme.

Attorney-3 stated

> Your client wants to feel that you're on his or her side. And, that's one of the problems perhaps of the *adversarial system* in dealing with families is there are sides rather than – you know, maybe it would be most ideal if what we could do to resolve custody cases is all sit down in a room with some mental health professionals, and the clients, and, and the attorneys and kind of work out a solution. But, because there are sides it sometimes, and depending on the anger of the people, your client wants to feel like you're on his or her side and, and so there's that feeling of, you know, I'll have sometimes have people...say, "Well it didn't feel like you *fought* hard enough for me." There's that tension of trying to be reasonable, fight hard enough for your clients, so they feel supported and protected, keep in mind the best interest of the child, not act like a jerk in front of the judge – there are like lots of different roles that you're playing and it, it is, to a certain extent, does create some tension for the attorney.

In relation to this issue, Attorney-4 recalled an incident in which he was fired by his husband-client for being "too friendly" to the wife in an informal meeting held with the other attorney and both parents to reach settlement in the case. He surmised that he might have made an empathic comment to the other party in response to her concerns about their daughter.

The concern that clients have about wanting their lawyer to be loyal to them can be addressed in part through the use of the chambers conference. However, as noted in the parent interview data, clients are highly suspicious of what occurs in chambers and may, rightfully, feel that when they are excluded from chambers discussions they are being treating in a patronizing manner. Attorney-4 explained that chambers conferences can suspend the loyalty issue in that they keep clients in the dark regarding how attorneys are approaching the matter with the judge. In effect, the chambers conference frees the lawyers from the need to demonstrate loyalty to the client. They can then work toward resolution of the issues in dispute in a more straightforward manner. Attorney-4 sees this as a paternalistic approach but one that is "right" since it ultimately is oriented toward reaching settlement and getting his client the most he can expect. In describing one such conference he reported

> We just didn't tell them (the clients) about the friendly conversation. [laughs] They would probably be, be shocked by how friendly our conversation was and how *neutral* our conversation with the judge was. That, that the other lawyer and I are both trying to solve the problem in the same way rather than going in and arguing and one of us winning.

For the attorneys, their roles with different clients requires they advocate for a range of positions. They must continually argue for different outcomes and clearly cannot have the personal involvement in each of these issues as the clients do. In order to do their work,

they need to maintain a certain level of psychological distance from the intensity of the clients' wishes and needs, even when these are highly compelling. Attorney-4 stated

> For most of us, we have to represent a man one day, a woman the next day, a support seeker one day, a support *payer* the next day -- *maybe*, maybe the same day, maybe on the same calendar. You know, I might be down in the court on two cases where I'm arguing absolutely the opposite points of view in the two cases.

He went on to describe one situation in which he represents a father with cancer in one case with a particular attorney on the other side. Attorney-4 has another case in which the same attorney is on the other side, but in that case Attorney-4 represents the mother and the other lawyer represents the father. He explained

> Every time one of us makes some sort of an argument about something having to do with our pathetic client dying of cancer the other guy says *wait a minute*, you said *yesterday* in your case where you were on the other side – and it's been a, sort of an interesting thing where we sort of *challenge* each other with that and we're, we're always rather consciously talking about how...we really can see the other guys point of view.

Attorney-1 identified alignment with clients as the chief complaint she had about some of her colleagues. In response to questions about how she personally experienced the

alignment phenomenon, Attorney-1 explained that she is unaware of it and that it would be difficult to discover through a process of self-assessment. She stated, "I'm absolutely human and I'm very much on the side that I'm on, but I, I'm always asking myself, 'Am I missing something?'

Each of the attorneys discussed alignment as a problem in their colleagues but only Attorney-4 was able to identify a case in which he had become aligned with his client. Attorney-1 described a process where the attorney needs to be on a side but maintain a state of distance in the relationship, or perhaps even simply keep in mind that their clients' position and perceptions may not be the only way to understand a situation. In her own words

> I don't stay neutral. I don't pretend to stay neutral. But, I don't block out reality. And, the reality is there's more than one to see things. But, yes I think I'm, I think there's – the line here is partisan versus co-opted.

Attorney-1 went on to introduce the idea that "we do our best lawyering for clients we don't like," explaining that this helps assure that attorneys "don't get enmeshed and present just a cool, rational, calm argument to the court." She goes on, "The reason you do your best lawyering for the clients you really don't care about much is you really don't have the emotional charge behind getting it the way they want it." It sounds as if a part of what makes the alignment occur is that the attorney sees part of

herself in the client in a damaged, hurt form and wants to help or assuage that part. She explained

> Something about what's going on in their life rings a bell in my own life and then I have to realize that it's, this is not my life. This is their life . . . What happens is the wall breaks down, I think, that separates your life from others and, and now it's really you – even if it wasn't your real life. I mean, it doesn't have to be something that literally happened to you. But, something that rings a, a chord in you. If someone were to, if someone were to accuse my client of being a bad person because she had an abortion. That would be such an emotionally charged accusation for me – there's nothing bad about people who, who, who need to decide that. That is something they need to do. It isn't, you know, that should not be a pejorative.

The family law community is a relatively small one. The same attorneys see each other day after day in court. They can be arguing on opposing sides of the same issue in front of the same judge on any given day. They learn to see and appreciate the point of view of many individuals. However, their clients want and expect them to take their side, believe in it, and fight for justice for them. Attorney-4 pointed out that loyalty problems can develop when parties feel that attorneys are overly friendly with one another. He explained

> You know, the fact of the thing is that we're all colleagues. We see each other over and over again, you know, we're, we're constantly kidding around, constantly acting as though we like each other which is an intensely disloyal thing to do to your own client. And, sometimes they bring it up. Sometimes they don't bring it up. Clients will come to me and say, 'I want to fire my lawyer because he's too friendly to my husband's lawyer.'

Relationship and Interaction with Opposing Counsel

The relationship between attorneys appears to be a key variable affecting the outcome of child custody cases. The attorneys in this study noted their appreciation for opposing counsel being collegial, respectful, and forthright. It seems that this type of relationship between opposing counsel is much more likely to focus on reaching settlement or trying a case in a manner that avoids unnecessary expense and pain. On the other hand, when the attorneys feel that opposing counsel is unresponsive, overly aggressive, or engaging in obfuscation, they are likely to take a much more counter-aggressive stance. For example, Attorney-2 shared her deep respect and gratitude for some of her colleagues. She described having a highly successful experience in a case due to having built a relationship of trust with opposing counsel. She explained

> I think having the ability to trust my opposing counsel *implicitly* made a huge difference cause I not only trusted his word, I trusted his judgment. When he said

> he was going to do something – and I trusted, I trusted his sort of ability to administer the case in a way that made sense. He said he was going to do something and he did it. You know, he had, he had reasonable theories, he had reasonable, you know, I could *definitely*, you know, we could talk about things, you know, if x then y . . . I mean, it was really sort of a, a holistic experience of him as somebody I could trust and work with in a way that *really felt* designed to help our clients.

Attorney-4 emphasized the critical influence on the case resulting from the selection of counsel. He explained

> I tell people that one of the most important events in a case is when the other side hires a lawyer. Cause the identity of that lawyer tells you a lot about what's going to happen in the case. So I tell everybody from the beginning that my relationship with the other lawyer is *really* important to how this case comes out.

Attorney-1 expressed satisfaction with her relationships with opposing counsel, noting that most of her interactions with them are positive, collegial, and oriented toward settlement. While in more limited respects Attorney-2 is satisfied by her interaction with opposing counsel, she also complained bitterly about them. From her perspective, the lawyers she worked with earlier in her career were more oriented toward settlement and promoting good relations between counsel. However, she found the attorneys she

opposes since she became more experienced and successful to be more aggressive, less competent, less ethical, less settlement-oriented, and more litigious. With this way of seeing other attorneys who oppose her in these cases, her stance toward them is a highly frustrated and aggressive one. She explained

> What I'm finding now, for the most part, I want to run the majority of my opposing counsel over the *tractor.* I am appalled at the number of my colleagues who don't know what the hell they're doing and believe that they do. Who, who do work that is sloppy, who, who draft and file pleadings that are incoherent. And, it's much harder and more time consuming to respond to a pleading that is done poorly than one that is done well. A great many of my colleagues *can't write*. They cannot, they cannot write their way out of a paper bag. It is so offensive. I find that they are willing to abuse the process, I find that they are so identified with their clients that, you know, they don't, they don't see the forest for the trees. I have a couple of opposing counsels I think that are just abject sleaze balls. Who, I think, outright lie.

Successes and Failures for Family Law Attorneys

The attorneys had differing ideas about what constituted "success" and "failure" in their work. This section presents their ideas about each of these experiential categories.

Success. The dimension of success that came up more than others for these attorneys had to do with the concept of winning cases. This seemed particularly true in cases where the stakes were high, as in ones in which a child might have otherwise lost a relationship with a parent. All except Attorney-1 were focused on achieving victory, so long as it was not in conflict with their values about protecting children. Attorney-1 appeared to be the most child-focused of the four lawyers in the sense that she described putting the childrens needs above those of the client. She explained that even when her client won the case, the fact that the child lost a relationship with a parent made the case less than successful.

For Attorney-1, success takes the form of helping her clients manage their emotions while navigating through negotiations and the court system. She does not view success in her work as simply getting her client what he or she wants since this may not coincide with a decent resolution for the children involved. In fact, for Attorney-1 it seemed that the antithesis of success involved winning a case through vanquishing her opponent when the relationship between a parent and child was lost in the process. She stated, "I'm not liking that I've represented this woman and these kids are still not seeing their dad. So, now I'm questioning: 'Am I the best counsel for her because this is what she wants and I'm doing it for her?'

For Attorney-2 the question about success led her to describe a case where there was a respectful, collegial interaction with opposing counsel which included respect for each

other's clients. She trusted her client and opposing counsel trusted his client. Each attorney had not just a good relationship with their respective clients, but had a lot in common with them and trusted their instincts. It seemed that this constellation of factors contributed to setting a tone of relative safety where her client was not in fear of attack. In effect, a supportive context was created for doing the work. Interestingly, in this particular case a problem developed between Attorney-2 and her client in which the client questioned her loyalty. Unfortunately she did not recall the nature of the specific problem, but did remember that it was resolved between them. After this, she reported her client made an offer that was agreed upon and which allowed the case to be settled.

Were there psychological underpinnings of what played out, consciously and unconsciously, between the attorneys and their clients that led to the resolution of this case? One can wonder if the problem in the attorney-client relationship was a displacement of the client's loyalty struggles with her former spouse. Did working the problem through at the attorney-client level allow the client to do the necessary psychological work in the ostensibly safer relationship with her own attorney, which then freed her to work things out differently in the world? One can wonder about the dynamics between the lawyers as male and female. Were they able to contain and metabolize the projections of the clients reflecting their ideas about how men and women relate to one another? Alternatively, could the resolution have reflected suspicion on the client's part that a respectful, cooperative relationship between counsel could not be trusted and represented a form of betrayal? In fact, even though Attorney-2 explained that she and the

other attorney would talk "off the record" when there were questions about what was going on in the case she did not feel this had anything to do with her client experiencing her as disloyal. The data does not provide the answers to these questions but it suggests that there was a confluence of factors in the attorneys and the clients which led to success in the case. The data does suggest that a container of communication and non-inflammation was held by the attorneys while the clients were self-reflective and did not project threatening aspects of their own experience onto the other parent.

For Attorney-3, the concept of success in family law cases is related more to what the parents do than it is to the efforts of the attorneys, courts, or anyone else. She cited a case in which the evaluator recommended that the mother be permitted to relocate out of state with the child. Attorney-3 tried the case and the court did not go along with the evaluator's recommendations. The child was not permitted to relocate with the mother. Consequently, the mother decided to not move away. The parents went on to resolve some of the polarization that arose in the litigation. They were eventually able to co-parent their child in the same community. From the perspective of Attorney-3, this case was a success since the child ended up with both parents actively involved within the same community.

For Attorney-4, the question about success led him to describe a case in which he was able to win in a difficult, complex court case where a mother had turned the older child against the father and then wanted to move out of the area with both their children.

The attorney was able get a custody evaluation in which the evaluator pointed out that the mother had succeeded in alienating the daughter and would likely alienate the son if she were permitted to move with them. The court found that the children could not move with the mother.

Failure. The conception of "failure" from the perspective of the family law attorneys was also explored. Failure was not defined for them in the interview protocol. Each attorney was simply asked to describe a case that from their perspective had been "a failure." The responses suggest that the dimensions of failure in family law cases, from the attorneys' perspective, cluster around personality variables in individuals that are not adequately corrected by the way the family law system functions. In this vein, excessive narcissism, abuses of power, bias, and other such problems may interfere with the ability of the court to understand and fairly adjudicate clients' concerns.

For Attorney-1, the question about failure led to thoughts about two cases. The first was one in which the court delegated authority to a "special master" who crowned herself with a heady title and ran the case to ruin through an overly autocratic approach. The second type of failure identified from the perspective of Attorney-1 was a type of case in which the family court system, primarily through the child custody evaluator, labels individuals ("especially hard to deal with females") as having a personality disorder. Her concern was with instances where the family court system obtains a diagnosis for a parent and has an attorney on the side of the other parent who

argues aggressively for protecting the child from the excesses of the diagnosed parent. In effect, what she is describing are cases in which a mental health professional diagnoses a parent and the diagnostic category is reified by the attorney for the other side. Subsequently, the relationship between the child and his or her diagnosed parent may be truncated on the basis of a non-nuanced understanding of the diagnosis without adequate attention paid to concurrent attachment issues. In such cases, the court may remain blind to the child's love and need for the labeled parent. She stated movingly,

> Well, you know it's a little kid. That's where it really hurts. Where it's little children who really, you have good other evidence that they are very bonded with this woman who has a personality disorder and the court just rips time away from them hand over fist. Years of supervised visitation, years. Not months, not transitional. Years of supervised visitation with one supervisor after another saying, you know, there's no reason for this situation . . . (the system says) No. (And then there is) More . . . Years more. Or supervisors saying, you know, she's pretty whacked out, but the kids kind of know it and they've got, you know, and the little boy just needs more time . . . (the system says) Nope. No more time.

Attorney-1 went on to describe another factor that contributed to the failed case: that the evaluator was well-respected by the court. Despite her belief that the evaluation was biased against her client the weight placed by the court on the evaluator's recommendation made it impossible to do anything to change the result. This lawyer

concluded her comments about this particular case with an acknowledgment that the mother was a difficult person but that the situation was, in her words "doomed" given how the matter was handled in the court system.

Attorney-3 also described a high conflict child custody cases that, in her view, was a "failure" due to the unquestioned reliance of the court on the opinion of the custody evaluator. In her case, she felt helpless to get the court to address issues affecting a child which were not identified by the custody evaluator. She used this case to illustrate her view that the family court system may be driven by professionals who can be biased in a case for one reason or another but who may have relationships with others in the system, or whose opinions are not questioned by others in the system, resulting in their work not being scrutinized on its own merits. When this occurs the cost of litigating sufficiently to correct the situation may be beyond the means of the parent and so can result in acceptance of the situation recommended even though there is no sense that it reflects what is best for the child or that it was arrived at in a fair, impartial manner. In this situation, Attorney-3 experienced an analogous sense of impotence and helplessness that Parent-2 described. She explained

> I mean, we could have gone to trial on it, but it was one of those situations where...the people didn't have – it's *very* costly to try a custody case and, and it's, it's – once you go down that road to *evaluation*, chambers conference, trial, it can cost people thirty, forty thousand dollars on a side and that's, that's a *lot* of money

> and these people didn't have that much money . . . you could see that if you deposed or crossed examined the mental health professional you were not going to get anywhere with him. You know, it's not – trials are not like TV Perry Mason. You, you very rarely get that situation where somebody goes, "*Oh, yeah counsel got me on that one*," you know. It's – everybody is going to be defending their own position and, and it's *hard* to sometimes to get the court to see that maybe that isn't quite right – what is in the custody evaluation. So, so that one was a *real* discouraging case for me – very discouraging.

Attorney-2 attributed "failure" in a case to the tenor established by her opposing counsel. She stridently accused him to being "an asshole," "on a holy crusade," and characterized him as incompetent and uninformed about the facts of the case and the law. Her contempt for him was palpable in the research interview even as she maintained that it was he who was entirely responsible for the problems generated in the litigation. She denied being "allied" with her client "in that weird, loaded way that the word gets used." She felt powerless and that the behavior of the other attorney was out of her control. She believed the parent on the other side in the case was hurt and angry, but denied that this parent's experience had any influence on her own reaction to the case.

The question about failure in family law led Attorney-4 to talk about a case in which a mother had succeeded in her efforts to turn a latency aged child against the father. A

large number of mental health professionals had worked on the case in an effort to address the problem but there were no indications any of the interventions attempted had made progress. His client was fearful of assuming total responsibility for the child, so the idea of taking the child from the mother was not a possibility. This lawyer described the case as "pretty agonizing." He fears there is nothing he can do to help his client and considers the possibility of advising him to give up the idea of having any relationship with the child.

Need for Self-Reflection

At the conclusion of the interviews, each lawyer was asked what it was like to participate in the interview. Attorney-1 noted that it helped her realize that her work would benefit from more of a self-assessment of her work as cases come and go. She was struck by the fact that she was unable to think of a single case in which she had been overly aligned with a client yet she could not believe that it did not occur. This seemed important to her as it suggested there may be a blind spot in her perception of her work. She stated humorously, "I want to go interview all my opposing counsel and get the names of the cases where I have gone totally over the top." Attorney-2 felt that the interview highlighted a conflict for her which she described as the "bifurcated self" in which she is both an attorney and a human. She stated, "I don't think we are encouraged to bring our entire selves to the practice of law. I think we are encouraged to leave our feeling selves, our emotional selves, at the door in the courtroom." The interview invited her to carry some of her emotional self, at least conceptually, into her

practice. She commented at the end

> No one talks about this. Cause if you look at us as a culture – you know, family law is in, in and of itself a *very* intimate community. We are very small. And, we are all on top of each other all the time. And, I will tell you that we are one big dysfunctional family. And, I think it's really important that somebody talks about, you know, the dynamics between counsel, and the courts, and the system, and the law.

Attorney-3 explained that she enjoys her work and likes to talk about it. For her, talking about the work makes her think about it, which helps improve her capacity for doing the work well. Surprisingly, though, she then commented that she had not thought before about what her emotional responses are to the cases on which she works. Attorney-4 enjoyed talking about his work and commented that he thought it is "good to examine it now and then."

Attorneys' Perceptions of the Family Law System

The attorneys in this study reflected various perspectives about how the family law culture and its requirements play a part in shaping how custody and visitation disputes are addressed. They were asked to describe their perceptions of and interactions with parents, Family Court Services mediation, evaluators, and judges. Their responses suggest how much the lawyers appreciate the need for the court to set limits and make decisions in

these difficult cases. At the same time, they are aware of the family law system determining the flow of information on which decisions will be made by parents and by the court, and how the system is impacted by tension between formal rules and decorum on the one hand and the subjective responses of individuals working in the system on the other.

Parents

The attorneys in this study had different ways of thinking about the motivation and needs of parents they represent in child custody conflicts. For the most part, in response to questions about how they perceive parents in custody conflicts, these attorneys talked about the level of fear, hurt, and anger they witness, and how parents behave based on those emotions.

The experience of Attorney-1 with the parents she represents is that they are often very angry and frustrated with the divorce process. She described them as fearful of the court and of their future, particularly their financial prospects. Attorney-1 holds the view that divorce is a part of a process of restructuring or reorganizing a family. From this perspective, the parents are faced with a myriad of psychological, social, financial, and other issues that must be addressed and resolved. A critical task faced by divorcing parents is maintaining for children, to the extent possible, a sense that they have two full parents.

Attorney-2 explained that parents "pack so much" into their marriages that when they fail "all psychic hell breaks loose." She has noticed a deterioration in social structure over the years which has, she believes, resulted in more serious psychopathology in the parents she sees in her practice. Attorney-3 asked, "How do you get people past that feeling of vindictiveness and anger? Because I think it is a key element in getting people to try and be civil to each other around their kids."

Attorney-4 explained

> I would guess that . . . people who have real strong emotions are going to express the emotions through the children. And, my view is that most custody fights are not about the kids. That, it's, it's *really* about the relationship between the parties, or maybe even about money. And, and I don't mean money in just the simple sense of child support, like 'I want the kids, so I don't have to pay child support.' But, you know, 'If she, if she's going to take my retirement plan, I'll take the kids.' Something, something like that. Nobody would ever say that expressly, but the *really* – they're, they're fighting about the thing that they think the other person is *really* vulnerable on. You've really hurt me by ending the marriage, by threatening to take my pension away, by throwing me out of the house, by saying that I'm a spousal abuser. You've, you've hit me where it hurts. Now, I know what you care about. You care about the kids, so I'm going to, and, you know, here's the phrase they use, "I'm going to go for custody." I mean that doesn't exactly sound like a child-oriented plan. But, but people say that all the time.

> They say, 'I want to go for custody' or 'He is going for custody.' That is the phrase that is just used over, and over, and over again. And, it's, it's warfare. It's not something else. And, people, people will say all the time things like 'best interest of the child,' but it's usually a tip off that that's *not* what they have in mind. You know, so if people really have the best interest in the child in mind, in my view, they're never going to use that phrase. Because it's sort of a given. You don't have to, you don't have to brag about it. It's – there are people who, whose views of what's good for them and what's good for the children are pretty, pretty much in sync and appropriately so. And, then there are others who can't tell the difference between what they want for themselves and what the kids ought to have. And, you know, that's, that's expressed *usually* by men in saying 'I want fifty percent.' You know, that's the other tip off for me. When they use numbers there's something going wrong. But, I want, *I want* fifty percent. I don't think I've ever had a case where that was about the kids.

Mediation

In California courts a disagreement about child custody is defined simply by each party checking a different box on the Judicial Council form they submit to the court and serve on each other. Parents who complete the requisite form in this manner must attend mediation before a judge can hear their case. The social policy goal behind the mandatory mediation law is to give parents an opportunity to resolve issues in a non-adversarial manner and to relieve crowded court calendars by creating an alternative forum for

dispute resolution. However, within the mediation format, the context of the family law system exerts a particular influence on how parents participate in the process. Attorney-1 explained,

> "You don't see a mediator till you've rev'd up and that's an expression that I don't use lightly. Everybody's rev'd up to file a motion and to ask for things and then the other side asks for other things and you don't have agreement. It's only then that you see a mediator. You don't walk into that mediator on a neutral footing looking for help and suggestions to make your life better. You're already actively in the adversarial system because you have filled out papers and written declarations and gotten friends to support your point of view and you've talked about it incessantly with all your friends and your attorney and you're about three thousand dollars invested."

The perceptions of mediation in the family court system by Attorney-2 is one colored by a sense of respect for the work done by the Family Court Services mediators based in a recognition of the difficulty of what they do. However, she explained that her orientation is to get the best result for her client. Consequently, if she believes the mediator is doing what is best for her client she is satisfied but if he or she is not, then she gets "frustrated and cranky." This orientation seemed to extend to child custody evaluators, as well: when their recommendations accord with her client's desired outcome she feels more satisfied. When they do not she may accept their reasoning but

also is likely to complain about incompetence or bias in the process.

Attorney-4 valued the collaboration between counsel and the mediators in Family Court Services. He pointed out that the FCS counselors in his county view attorneys as allies rather than adversaries. He expressed appreciation about the way in which information is gathered and used by the FCS mediators, particularly since "if you just had two lawyers, (nothing) would get decided." He believes the mediators have a great deal of experience but not much time to work on individual cases.

Child Custody Evaluation

For these attorneys, the child custody evaluation process can be a very helpful tool but it has difficulties attached to it, as well. All of the attorneys agreed that it is incumbent on counsel to not interfere with the evaluation procedure. Specifically, there was concern about attorneys and child custody evaluators talking "off the record" in ways that could influence the outcome of the evaluation. Attorney-3 described what she called "folk wisdom" known to attorneys about which evaluators see what kinds of cases in particular ways. The attorneys do their best to get evaluators selected who have biases that are most likely to match the needs of their clients in a particular case. Two of the four attorneys described cases they worked on in which the evaluator was well known and respected by the courts but had produced what appeared to be a biased evaluation. In some of these cases the attorneys were unable to have the recommendations overturned by the court in large part having to do with limitations on

the amount clients could spend for litigation.

Attorney-3 complained about bias and other problems in some evaluations she has received. She expressed concern that custody evaluations are done in "a little, closed atmosphere" and a wish that there could be some sort of review panel or something of that nature so evaluators could have access to additional input on their cases. In addition to the bias problem, she also noted that some evaluations raise serious issues but fail to adequately address them. She added that some evaluators are, as some of the parents' fear, unable to see what is really going on with the other parent who may be "able to hold it together" through the evaluation phase. Finally, some evaluators who are very experienced can become "cocky" and maintain a belief they can "take on everything." The latter comment echoed the experience of Attorney-1 who reported that a well-respected evaluator who had completed a report she thought was biased challenged her, going so far as to say, "Don't take me on on this. You won't win."

Bias in custody evaluation reports was also a problem for Attorney-2. While she reported being satisfied in general with the process and results of custody evaluation procedures, she was bothered by a small number of cases in which there appeared to be blatant bias on the part of the evaluator. She was reluctant to talk more about the matter as it was occurring in a case that was ongoing at the time of the research interview.

Attorney-1 expressed an interest in having the child custody evaluator be more of a part of the settlement conference process that takes place after the evaluation report has been submitted to the court. Her idea is to have the judge, evaluator, lawyers, and parents meet together to discuss the evaluation report and attempt to reach agreement. She believes that evaluators usually do not want to be involved after they submit their reports and that often the parents (at least the one who the evaluator did not recommend in favor of) do not want any further involvement by the evaluator either.

Attorney-4 was the least interested in child custody evaluation reports. His experience is that they fail to add much to what is already known about the case and that things the evaluator writes about the parents in the report are subsequently often used as ammunition for the parents to fight with one another. He also explained that families sent to custody evaluation are often so troubled that little can be done to help them. The situation "is not resolvable. They need personality transplants." From his perspective evaluations are done "because we can't think of what else to do." They can be useful in limited ways in terms of orienting a new lawyer or judge to the case, as well as sometimes serving as a springboard for other interventions that can actually help the clients, such as the appointment of a special master.

The Courts

The attorneys interviewed reported having relatively little contact with judges in custody trials since the way the system is set up only a very small percentage of cases

ever get as far as a hearing or trial. Rather, it is the specter of the court that exerts influence in these cases and pushes parties in the direction of reaching settlement. In terms of actual experience in court, the attorneys mostly distinguished between their experience with judges in the formal court setting and what happens outside the courtroom, particularly in chambers conferences. Attorney-3 described positive, respectful experiences with judges in open court but noted that at times chambers discussions reveal bias and narrow mindedness. She stated,

> I'd say...win or lose my experience with the judges has been pretty positive. That I felt that they have been attentive, patient. I think most of them tend to realize this is a *very*, serious decision, and it's a hard decision for them to make. And, so in the trials, I've, I've had positive experiences. Occasionally, in *chambers* conferences where, I think, judges let it hang out a little bit more, I've had some *very annoying* – I, I can remember one judge who – a psychiatrist had written a *very* long report in a *very* complicated case involving a, a mom with – who is an alcoholic and a tough case. And...it was tough from many, many respects including the fact that the other attorney – that she and I tend to...tend to easily get irritated with each other. And, and I think from the get go she was angry and upset about the report, but when the judge saw it he said, 'Tsk, what's this guy get paid by the word for writing this kind of stuff?' And, you know, that kind of reaction from a judge – I mean, is just *really* discouraging. And, and there are still some judges around that are not very sophisticated when it comes to custody

> cases. I think it's getting better and better because we're getting more educated – people that are more educated in family law on the bench, but, but there are still people that shoot form the hip and people who all think that mental health professionals are a bunch of hocus pocus, and so they don't really want to pay too much attention to what they say in the reports. And then there are also those judges who have *favorites* among the mental health professionals who will see a report and – one judge said to me once in a report that I thought actually was *very, very* biased against my client and the judge said, "Well, this is a great report." He said, "I can see where your client might not like it very much, but you're not going to bring a dog and pony show in here to overcome this report." And, and so there are all kinds of attitudes from judges in chambers that are somewhat discouraging at times. But, that's, I don't think that's run of the mill. But, for the most part...I find the judiciary O.K. to deal with.

Attorney-1 mirrored this sentiment, bemoaning the loss for the integrity of the system when attorneys and evaluators talk informally with judges and cultivate relationships that may interfere with the impartiality of the court.

For Attorney-2, her satisfaction with judges was directly related to their level of enforcement of the rules. She was very impatient with transgressions of rules and wanted violators punished. For her, judges functioned like parents: when someone broke a rule she wanted to see that they were held accountable by the powers that be.

She explained, "I want the judges to say, 'Well, you're not going to pull that shit in my courtroom and here's what happens when you do.'

Attorney-4 had a somewhat different view of the judges' power but one that also recognized the necessity for someone in the system to hold the authority to make decisions in these tough cases. For this lawyer, 'it's a good thing that somebody has that power because it's what makes us all behave.' He believes that the power of the judge is both exhilarating and frightening. It is exhilarating in that the court makes a decision that is final and frightening in the degree of power it holds.

Attorney-4 pointed out most all the judges he has worked with over the years are sincere and caring in their approach to resolving custody disputes. Even though they may be limited by ability level or point of view, their caring about the work generally leaves opportunities to work constructively with them. One of the frustrations he noted in dealing with the court is that he and his opposing counsel may know the case much better than the judge, yet the court is the one to make the decision. He explained

> You know, I can have spent hours, and hours, and hours *learning* about something and then the judge after hearing about it for ten minutes makes the decision. And, in a certain sense that just can't be right. And, so it can be, it can be *really* maddening when you can't get the judge to either *see* what you think is right, or take the time to figure it out. And it's, it's very frustrating. It can make you very

angry.

Attorney-4 also cited the threat to the integrity of the system that can result from judges showing overly friendly attitudes toward particular lawyers in court. He noted that the confidence of litigants can be shaken when judges make it apparent in court that they know one attorney and not the other, such as occasionally is demonstrated by calling the lawyer by his or her first name.

The Law

Each of the attorneys was asked whether they had practiced in other fields of law and, if so, how they would compare the practice of family law to the others. Attorney-1 and Attorney-4 had practiced in other fields of law. Each of the attorneys had varying ideas about some of the differences between family law and other types of law.

Attorney-1 explained that family court is a "court of equity" in which court rules applied rigidly in other forms of law are more relaxed and bent in favor of helping people reach settlement. She stated,

> You can do equity or you can do the law and family court is a court of equity and very few of the rules including court rules that apply in other areas of the law are hammered home in the courtroom the way they would be in other areas of the law. So, it's very consumer friendly. It really bends over backwards to be consumer

> friendly and not to punish clients for the sins of attorneys and not to throw a case out as can happen in civil law. You can lose your right to pursue your case because some statute of limitations was missed. I mean, there is some of that in family law, but not as much of it. It's not rule oriented. It's people oriented.

In this sense, Attorney-1 seems to be describing a way that the application of law in family court is more humanized with an emphasis on helping people reach agreements. She differentiates it from the mechanical application of rules that characterizes other types of law. She was not a strong advocate of the use of court to resolve family disputes but saw a definite function for it even if only to "get the persons attention so they will play the game."

Attorney-2 described the law as "brutal." She explained that the law could be more forgiving and fluid, but for how attorneys make use of it. She views lawyers as using the law to get things for their clients and to win their cases.

Attorney-3 identified the utility of the family court system in helping families by creating rules and establishing some predictability but also questioned its ability to be adequately flexible in meeting the needs of developing children. In particular, she noted that a party is required to show a change in circumstances in order for the court to have a statutory basis for issuing an order for a modification of custody. The changing developmental needs of children are not viewed as constituting a change in

circumstances, however, so that custody ordered issued when a child is, say 12 months, are not necessarily going to be modified by the court when the child is five or even fifteen.

The Perceived Impact of the Family Law System

The lawyers showed a deep respect for the function of the court in helping set limits and resolve family problems. At the same time, they expressed an appreciation for the ways the court system does not and cannot adequately address the family problems brought to it. This was manifest in two dimensions: 1) the function of the court in creating structure and enforcing limits, and 2) limitations of the court as a tool for resolution of family problems.

The Function of the System in Creating Structure and Enforcing Limits

Attorney-1 and Attorney-3 both discussed the need for the law in situations where parents are unable to resolve custody problems they cannot work out on their own. In contrast, Attorney-2 holds a perspective infused by a a reward and punishment orientation. She feels the courts function well when they punish individuals who do not follow the rules and vindicate those who do. She expressed frustration with judges when they allowed other attorneys and litigants to behave poorly and felt a sense of satisfaction when they enforced the rules.

> I like judges who enforce the rules. And I like judges who punish malfeasors. I like judges who, who identify and recognize bad behavior and they do it in a way that is immediate, and that is specific, that is out loud, and that there are consequences from, from their recognition. So, when I have an opposing counsel who is behaving badly, who is not prepared, who is not following the rules, who's getting me off my time I want and can now expect one of my sitting judicial officers to say *bad lawyer.* And, by the way, you've been bad and I'm going to *punish* you for being bad. I have a very draconian approach to, to the way that the law is supposed to be administered.

The interview data suggested that this attorney not only wanted limits and enforcement of violations by others but that she wanted it applied to herself as well. It was as if she needed to know that the court would provide containment for everyone, including herself. She explained that she thinks about the judge as a parent and attorneys as adolescents. In this way, she seemed to feel that justice would be served, the process would be fair, and everyone would be held accountable for their behavior.

Attorney-4 believes the system is working well in sorting through the problems of the people who come to it and making decisions about them as needed. He acknowledges that there are many problems in the family court system but maintains that "the problems in the system are not *nearly* as striking as the problems in the marriages that are coming to the system."

Limits in Application of the Court System to Family Problems

Attorney-1 gave voice to a view of the law as functioning in such as way that it limits the ability of individuals to create settlements that work best for them. She is an advocate of collaborative law, an alternative legal practice model that stresses attorneys working together with clients to find workable solutions to problems that would otherwise be litigated. In collaborative law each parent hires his or her own attorney but the attorneys and parents (and others as necessary) commit to working cooperatively toward a solution without going to court. Attorney-1 expressed a preference for avoiding court but confidence in her ability to use it when necessary. She stated

> To me the system, the system is – I'm happy to use it. I think I use it well on your behalf, but I don't – that isn't my preference for, for how best to facilitate the restructuring of a family unit when children are involved, especially when children are involved . . . The court has certain judicial mandates built into the statutes that force property to be divided in a certain way and, you know, and all that legal rigmarole then impacts what might otherwise the ability to be the ability of the parties to structure a financial settlement that works for them . . . If you do the kinds of things during a divorce that raise the level of anxiety and antipathy towards the other person what it, how many more years is it going to take to calm that down and develop a parenting plan that will allow your children to be whole? I don't think divorce is, you know, is necessarily a negative, necessarily has a

> negative impact on the developing child any more than going to school at Berkeley High versus some small Christian school in the valley. There will be impacts, but they don't have to be negative given the right support system and I just think that the cost of litigating in the court system and the, and the emotional investment that you make is just counterproductive to getting on with the, the real work that needs to be done and that's with the children.

In relation to how the court system is actually used by attorneys in these cases, the perspective of Attorney-3 is that the intervention of the court is necessary in some cases but her desire is to use it in a "nice and clean" manner so that obfuscation, delays, and personal attacks on clients and opposing counsel are avoided. She enjoys cases that are well litigated, even when she loses. In her own words

> I *hate* a case where, where the attorneys get in what I call a pissing match and are making all kinds of little snide remarks to each other. And, it happens. There are attorneys...that...that are sort of known for that kind of behavior and if you know they're on the other side of the case it's kind of [sighs], you know, you have to deal with that. I tried a case a year ago, a move away case, against an opposing counsel who was an *absolute* delight. It was a *very, very* tough case with some *very* sort of unpleasant issues that were raised in the custody evaluation which created some very uncomfortable cross examination in trial, but *both* of us did it as what I call a clean case. We asked the hard questions when they had to be asked,

> but we didn't do it with, what I call, an edge in your voice. There are some attorneys that can ask a question, "And, isn't it true that you struck the child on June 9th?" And, other attorneys will dramatize it, you know, tremendously. "And, isn't it *true* Mrs. So and So that you *struck that child* on--" It's bad enough to do a custody case without making it worse by making it a drama. And so, that's, that's how I see it. So, and, I'm sure this other attorney would agree with me that it was a – we did it as a nice clean case.

Attorney-2 gave voice to the way in which the application of court procedures can paradoxically protect client's interests and stifle more direct and workable approaches of settling disputes. She explained that she holds the rules of confidentiality inviolate and that they are the basis for the work she does. However, the rules also generate guardedness since "if you disclose the wrong thing it can get used against you . . . or your client." She pointed out that the primary tool used by lawyers is words and that the practice of law can become "an exercise in perennial circumspection." There is so much "obfuscation that goes on in this process that sometimes, you know, you just miss the whole point." The rules thus constrain communication. The attorneys must be protective of what they say to whom, even when the information they have could help settle the case or address the problem if it were shared with others in the system. Attorney-2 stated further

> You know, we're so busy dancing around and jumping up and down about being absolutely careful and precise about how we answer Interrogatory No. 17 that we've missed, you know, the whole big, big picture, the big point of what's going on.

The Judges

There were four judges comprising the group interviewed as part of this research. Two were women and two men. Two of them had been on the family law bench for over 10 years and two had served between two and five years. Only one was not a career bench officer. Two were Superior Court judges and two were family law commissioners working by appointment of the Presiding Judge of the Superior Court. Litigants must stipulate, or agree, to have a commissioner hear their case. Superior Court judges are either appointed by the Governor or elected by popular vote. One of the judicial officers had recently left the bench when this interview was conducted.

The judges were recruited through acquaintance of the researcher. They were known through having testified in their courts, participating in meetings for various legislative initiatives, or from their work with the Family Law Bar. These four judges work in courts ranging over the Northern California area. Five judges were invited to participate in the research. One was too busy but four agreed to be involved. One of the judges was from a county that required approval from the Presiding Judge to participate in the study. The author applied for permission to interview mediators and

judges from that county, which was granted. To preserve confidentiality, identifying information has been eliminated or changed, and judges are only identified by the designations Judge-1, Judge-2, Judge-3, and Judge-4. Consistent with preceding parts of the research report, this section of the data is organized within three supraordinate categories: the inner world of the family law judges, perceptions of the family court system, and perceptions of the impact of the family court system.

The Inner World of the Family Law Judges

This section of the research report focuses on presenting the findings reflecting the subjective experience of the family law judge as seen through the eyes of these four individuals. It begins with a description of the nature of the judges' job as they conceive of it. Next the focus turns to looking at the motivation to work in family law, something many of their colleagues find to be of limited interest and questionable value. The values of the judge seem to play a critical role in this work and these are discussed in the next section. The work of the family court judge can be quite stressful and the nature of this stress is then presented. Particular stresses include the need for self-protection from the court bureaucracy, as well as danger and fears of violence from litigants. Since a core piece of the judge's role is to make decisions, this aspect of the work is examined in greater detail. It was found that the judges had some approaches to handling decision making in common and some that differed greatly. Much of this was related to their ideas about power, authority, families, and the law. Some special issues are considered from the vantage point of these four judicial

officers: the judge's role in working with children directly and the judge's role in working with litigants representing themselves (pro per litigants), a phenomenon that has proliferated greatly over the years as increasing numbers of parents are appearing in family law courts without representation by counsel. Finally, as with the other cohorts in this study, data will be presented illustrating how the judges conceived of success and failure in their work.

The Nature of the Work

The work of the family law judge is complex and demanding. They are responsible for applying the law to cases involving child custody and visitation, child support, spousal support, property distribution, guardianships, adoptions, and domestic violence. Since the present research is focused exclusively on the psychology of high conflict child custody and visitation issues, the report will focus on the parts of the judges' responses concerned with those issues.

The family law judge represents most vividly the societal response to the suffering of parents and children when the parents are in the process of dissolving their marriages or parenting their children after separation or divorce. Their role in these cases is imbued with a great deal of discretion as they are charged with applying the law according to the best interests of the child. Their workplaces are busy bureaucracies with limited resources in which they face, day after day, streams of angry, sad, and scared people who bring their cases to the court in the hope of obtaining relief and justice. The problems they address

are not narrowly related to divorce and custody, but include consideration of a range of social problems that impact the lives of children and parents including but not limited to substance abuse, psychopathology, family violence, poverty, work stress, and childcare issues. The judges preside over the communal forum where personal complaints are heard and decisions are made to address, to greater or lesser degrees, the problems in the families that come before them. Excerpts from the interviews with the judges provides a flavor of their work more clearly. Judge-1 explained

> There's just too many problems . . . for one person to manage . . . some situations are out of control . . . maybe the child's been molested or it's not clear, or the child is present when a mother was choked, choked almost to death, or the child was present during the drug raid or a serious case of domestic violence where the mother was placed in the hospital or whatever it is, or the mother was arrested for drugs and the father has five kids now he has got to take care of and he's got to work and there's not enough money and someone's going to be on the streets. You maybe deal with one of those, but when you have six or seven people out there, and all absolutely completely needy, and they are looking at you as their last hope, or at least it certainly does feel that way, and in some respects I think it is. And you actually care about these people, and I think most judges do. I know I certainly do.

Judge-4 stated

> More and more we are left with the cases that just really are very demanding in time, and attention, and, and a lot of cases that are totally unsolvable, that there is just no good answer for. Cases where the two parents added together don't make one whole parent. You know, how do you structure something to give this child what he or she needs?

Each of the judges interviewed in this study expressed an overriding commitment to making good decisions and doing the best they can for the children and parents in their courtrooms. They differed markedly, however, in the extent to which their approach reflected a stricter, administrative approach to the business of the court as compared to a more family-focused, problem-solving orientation. They also differed in the extent to which they seem troubled by their decisions, the degree to which they worry about cases after hours, and how much they see themselves as pivotal in finding help or providing relief for the families in their court.

Motivation

What motivates people to become family law judges? Once they are in that role, what keeps them going? What do they find rewarding in their work? These questions were not the focus of this study but some of the comments made by judges shed light on them and may help explain in part some of what they bring to the ecology of child custody conflicts.

Judge-3 reported he feels he is "cut out" for this work since he is more effective in a neutral position than he was as an advocate when he worked as a practicing attorney. He explained that as the overall body of law has become more complex, he has come to appreciate that the scope of family law is limited; it is a small enough body of law that he can maintain mastery of it. Judge-2 enjoys being the decision maker and likes how family law requires knowledge of a wide variety of subjects. He also enjoys the humor that comes out of the interaction with litigants in the court. Judge-3 came to the practice of law in midlife and worked with children prior to attending law school. Family law allowed her to integrate her interest in children and families into her work as an attorney before becoming a judge. Judge-1 was bumped into family law by more senior judges who did not want the assignment. She ultimately decided that family law was critically important and committed herself to it. She decided she would attempt to organize her job so that she could "make a difference" and embarked on a number of projects to enhance court services and improve the functionality of the court. She explained, "The projects have really been my way of being able to do this job because if I just had to do it, you know, where you pick up the case and move it from here to there and you don't accomplish anything it would have been too depressing." She found a way to make the work satisfying and to enjoy her job.

Values

The values that the judges described bringing to their work seem to be of two types. First there are those related to the ethos of justice and the law including things such as rights to

fairness, openness, non-bias, and equal consideration. Not surprisingly, each of the judges referred to these values as part of their approach to family law cases although they differed in their ideas about how to concretize them in the work. For example, Judge-1 revealed a particularly strong belief in the value of maintaining open communication so litigants are informed of what is being communicated about them to the court. She explained

> If I was a litigant, I wouldn't want an attorney or the mediator to be saying something about something involving my case to the judge making a decision which I don't know what's going on. If he was thinking that I am unstable I wouldn't want him to tell the judge but not to tell me. That's the kind of information that I would want to know because I would like to try to at least explain to the judge that I am upset about the care of my children, that that doesn't make me unstable or whatever it is. I'd like to be able to clarify whatever conception of me that mediator or that attorney or that whoever it is who has talked to me has. You don't have an opportunity to do that if you don't know what's been said.

Other values appear to be of a more personal nature, being grounded in the judge's individual beliefs or life experience. The two types of values may be difficult to discern but they seem to exist simultaneously. Examples of the latter are contained in Judge-4's statements, "I just think that court has an obligation to the kids to see if they can get things calmed down" or "I assisted people in using the system because part of my

philosophy is, you know, particularly in custody and visitation cases, that we should get those cases into court as soon as possible" or "(The role of the family law court should be to) help the family win as a whole." Similarly, they are reflected in Judge-3's statement, "I personally feel no matter how bad my decision is that people are better off with a decision than they were without one."

Stress

The stresses inherent in doing this work became apparent at many points in the judge interviews. For some it took the form of recognizing the gravity of the responsibility and experiencing pressure to avoid mistakes. Judge-1 explained

> I personally feel it definitely is stressful because you don't want to make a mistake. If you make a mistake you can really make a big mistake. And you can place a child in harm by mistake and the child could be hurt, the child could be killed, the child could be abducted. Some, one of the parents could be killed. These decisions, which we have to make quickly can have really serious consequences and that has a lot of stress. We try to get it right. There really isn't a whole lot of room for error. You just feel anxious, especially when there's too many, there's just too many problems, (more than) one person can maybe manage.

This judge referenced a colleague who had told her once that every case is like a rock in a sack: no matter what she does with them, eventually they will pull her down.

Judge-2 identified a number of stresses. These included the large number of cases, limited time to make decisions, inadequate information on which to base decisions, and lack of resources relative to other courts (particularly civil and criminal). He stated, "I think it's just the workload. Just the case after case. Huge calendars every day." One of the differences between the family law court and other courts is that in family law the judge will have many cases on the court's calendar at any given time and must hear them all. In contrast, jury departments are assigned one case and the judge will try that case from start to finish. When that case is complete, another will be assigned. Judge-2 explained

> Here in a family law assignment you're under fire every day. Every morning I've got, to start out with, you know, fifteen to twenty cases on the calendar that have to be dealt with, you know. So, I've got to spend an hour, hour and a half going through the files trying to see what's coming. You, you just, you don't get any respite from that.

Judge-3 described the volume of cases in family court as both "the damnation and salvation of the position." He explained

> The salvation being that you, you do them, you decide them and you go on to the next day. And, you don't have time to look back particularly. So, while it's a big burden, it also to some extent insulates you from worrying too much about what you did yesterday cause you've got today's cases to do, you know. So, it's a, to

> some extent, it's a, it's a saving, saving – it protects us from stewing too much over these things. (The downside is) I never look up. When I get off the bench for a recess of fifteen minutes, I end up down the hall signing ex parte orders for the people coming in trying to get temporary restraining orders. Another judge did family law for years and when he got off family law, he used to come back and talk to me and he says, you know, I have to bring my newspaper from home because when I get off the bench for a recess, I have nothing to do. I mean, in family law he never had to worry about that. So, it's a, it's a pretty constant pressure.

A dimension of the judges' stress that arose repeatedly in these interviews had to do with the limited time available to get the work done. The problem was described by the judges as one that exists concurrently with and as a function of the large caseloads they move through the court system.

Judge-1 stated

> There's just a ton of cases and I get headaches, really really pounding headaches because you only can process so many families. It's not like we can tell them to go home and come back another day. They're there. Someone has to provide some kind of service to them.

Judge-4 made it even more clear. "When you're dealing with five custody cases a day,

and you have about ten minutes per case there have to be some bad orders." She went on to explain that the ten minutes per case came out of her own personal time and that the actual amount of time allotted by the court was five minutes or less per case.

Judge-3 explained

> It's frustrating from my standpoint that I don't have more time to spend with cases, even in the settlement conferences. The settlement conferences, we set one every half hour, so, you know, if, if they all show up, and they all show up on time, I don't have more than thirty minutes with each case, and that just isn't really enough to – if, if, if they've settled everything on their own except one thing, maybe it's time to get into one thing fairly well. But, it's not for a case of any size – I don't have the time to do it. But, what I really enjoy is every now and then getting a big case and setting aside the whole afternoon, or the whole day, and, you know, spending real time with the attorneys and putting together an agreement. That, that's real fun. But, we don't get, we don't get that amount of, that luxury of time very often.

Judge-2 reported sometimes having twenty minutes per case, and occasionally even more if a good number of the cases on the court's calendar reached settlement that day. Judge-4 attempted to make up for the time shortage problem by meeting with parties and counsel in chambers where the effort would be directed toward spending an hour or two where

they would work towards settlement. She claimed, "One thing that the court could do for people was to give them time" then added, "It almost killed me."

Another dimension of the stress on judges related to incompetence on the part of attorneys as well as overly aggressive lawyers who used the court as a forum for dramatic presentations. Judge-3 explained the problem.

> I have a lot of frustration with lawyers who are being part of the problem instead of part of the solution and I see an awful lot of that . . . Time after time after time I, you know, I see cases where there's, there's good legal work that needs to be done to get these people through this process and it isn't happening. You know, they're screwing around, screwing around and they may well be doing it because that's what their clients want them to do. So, maybe my criticism is, is unfounded at times, but a typical situation is: they will come in and we'll have a hearing on support. And, these people have gigantic debt and they, they need, you know, somebody needs to work out how the debt's going to get paid *as well as* the support. I can't do it on a twenty minute calendar. The only one that can do it is the attorneys. They need to sit down, and they need to answer some tough questions and maybe the answer on some of these debts is they aren't going to get paid. But somebody needs to decide that so they're not always working at cross purposes and stuff. And it just doesn't get done. So I make a support order that makes no sense. I make it cause the law requires it to be made but it doesn't make

> sense for these people unless it's accompanied by a lot of orders about who's going to pay the debts and who's going to do other things along the way and I can't make those orders because I don't have time to get into all the details. And, you know it takes lawyers to go off in a jury room, and sit down with the parties . . . and work through these tough things. Instead, they've got somebody grandstanding in the courtroom doing no good for anybody. And, I just get tuckered. And, there's nothing I can do about it much. I, I make, I say nasty things on the bench and sometimes I put them in written orders, but there's really a limit to what I can do about that. I can't sit up there and say, 'Look, Mr. Jones you really need to get another lawyer who will do something productive for you instead of all this negative stuff' because (it may be) just what Mr. Jones wants is this lawyer grandstanding in the courtroom, so I don't know.

Self-protection. Some comments made by the judges reflected concern about a need to be self protective and, perhaps equally so, to protect the judicial process. For example, Judge-4 described bench officers as a group focusing on "watching their own tails." Another example of this self-protective phenomenon was illustrated in comments made by Judge-1 in discussing those few instances where she has interviewed children. This judge explained that she would never meet with a child in chambers without the attorneys and a court reporter present. She recognizes that she does not know the child or the family, that if she fails to take reasonable precautions of this nature someone could say the child indicated she spoke inappropriately with him or her or somehow felt coerced by the judge.

Judges may also have to use their judicial power to protect themselves from personal attacks in court. One of the judges described an incident in which an attorney whose children had gone to school with his - who knew that he was not a practicing Christian and that he did not own guns - argued in court that the judge was biased against his client who was a fundamentalist Christians and owned guns. The judge told him in open court that his behavior was inappropriate and afterwards warned him to never do that again.

Danger and fear of violence. A frightening and ever present danger for family law judges is the threat that the frustration and pain of litigants will boil over into violence directed against them. At one point, Judge-4 needed to alter her daily routine to avoid a stalker and had a special police unit assigned to her. Judge-1 commented on this concern.

> I'll be stressed about, you know, whether these people are ready to kill me, you know, because they're so...unstable. I'd be more, it, it, it makes, that, that makes me worried about this department because it can happen anytime. It can be somebody who's case you saw eight years ago and who is still ruminating about some decision you made regarding their car, you know. I've had like three times where the protection unit calls you up and says, you know, you've gotten threats made against you.

Power and Authority

For Judge-1, the power in her role lay in her ability to muster resources and facilitate a collaborative, team approach to solving problems. She does not see herself as a powerful, intimidating person yet is aware of the way her power can be experienced by others in her courtroom. She stated

> A lot of people are scared of me. And, I'll just tell them, I'm not very scary. You know, I'm not. You know, I just want to try to get the information to try to help you to see, to raise your children the best you can and to do what's best for your child. And, I mean, it's always amazing to see, like, a man who's my age shaking when he's talking to me. I'd say, 'Wow, don't worry. Just tell me your story.' I mean, but it's, its, it, it's – I, I forget who I am, you know, vis-à-vis how they might perceive me because I just perceive myself one way and I don't perceive myself as a very intimidating person. And, so to see someone actually shaking when they're trying to talk to me, or not being able to get it together because they're so intimidated it's sort of...strange because I don't perceive myself as someone who'd be intimidating to talk to. I'll tell them, you know, just, you know, don't worry. Just tell me what, what it is that you want me to do. What's your, what's your concern, what's your problem? I'd want someone to do that to me.

This judge described yielding the executive powers of the court very lightly. Her

approach involves setting limits on courtroom behavior for people who become too agitated, and doing this in a non-reactive and non-punitive manner. She tries to maintain flexibility in her approach to how her power is used in the court. Judge-1 explained

> I've never held anyone in contempt. I have had some people go to jail after a hearing on an order to show cause regarding contempt, but not somebody coming into court and they blow off. I would just tell them to sit down, just sit down and calm down. We'll call your case again. My experience is overwhelming if you tell people that, they just apologize. I tell them, 'I just can't hear cases like this. When you are so emotional that I can't even, don't even understand what you are trying to tell me. You've just got to calm down. It's just too much. Too much for all of us.' So, they'll sit down and you let them go the end of the calendar, let them wait for an hour. Not to be punitive, but just (because) we can't have everybody acting like this in front of all the other people. And then you know I just call the case and almost always they say 'Your Honor I'm just really stressed.' But somebody else, if you took that same person they might . . . just say that this is a bunch of BS. Somebody else would just slam them and just throw them, have the bailiff arrest them for disrespect to the court and that just takes a person who is already a wreck and just adds to it. I don't know if you are accomplishing anything. Maybe it makes that judge at that moment feel good because the litigant is not getting away with something, but I don't think it serves any purpose.

Judge-2 talked about the impact his power has on people in the courtroom and how judges need to contain the feelings associated with being treated by others with deference and respect. He stated

> People are pretty respectful, generally . . . they know who calls the shots. I mean, obviously they do. They know who can make a *big* decision . . . The battle for any judge is not to let that go to your head, you know. You've heard of black robe fever? Black robe fever is, you know, attributable mainly to, to new judges. You know, you're a judge all of a sudden and you can do no wrong. That type of thing. I think, as you, you know, go on and become more experienced, hopefully that goes away. You just realize, you know, you find that you've made some mistakes over the years, and whatever, and hopefully you, you become a little more modest. Because it's a, you know, it's a very heady feeling to, to know you can make all these decisions about people. I mean, the joke is, you know, you have more, you have all this power here and then you go home, you know, and your wife, and kids, and everybody else is pulling at you there. They're not, they're not deferring to you there necessarily, so, so that's pretty healthy.

Judge-3 seemed to minimize or deny his power on the bench. He acknowledges that litigants and attorneys likely believe that he yields a great deal of power in the courtroom but he does not see it in the same way. His power is "a matter of maintaining the ship on a field." For this judge, the greatest power in the position lies in how he administers and

allows time to be used in the court.

Judge-4 keenly felt the sense of power and authority that came with the role. She stated

> Did I ever have a sense that I had power? You betchya. Because when you walk out in the morning the bailiff says, 'Everyone rise,' you know. And, there was a deference that I got from people just by virtue of the fact that, you know, I, I was a bench officer in the court . . . At the beginning I was slightly uncomfortable with it, and then I became more comfortable with it

Alongside considering the exercise of judicial authority, another dimension of this phenomenon is its limitations. Judge-4 articulated some of these limits in family law cases when she pointed out that "people have to buy into the solution or it's not going to work. You can't just pronounce this is the way it's going to be and have it work." She offered an example of having ordered a parent into substance abuse treatment as a condition for having unsupervised visits with the child, only to learn that the parent complied with the order but in fact completely wasted the time she was in care. The experience suggests that the effectiveness of the judge will grow in relation to their ability to work directly with the family to solve problems and formulate solutions that are likely to be accepted and followed.

Making Decisions

At the heart of the judge's assignment is the need for him or her to be the one person in the family law system who makes a decision when other avenues for conflict resolution have been unsuccessful. The comments of the judges illustrate how they struggle with the need to gather information, sometimes being forced to make decisions with little or questionable data. They earnestly attempt to make the best decisions they can while recognizing that the decisions they reach are possibly at times the wrong ones. Additionally, the judges' insights show that there are some decisions they are asked to make for which there is no law to guide them and possibly no right or wrong answer.

Gathering information. Fundamental to any decision making process is, obviously, the quality of information available on which to base the decision. For family law judges, the information comes from a variety of sources. They receive pleadings that have declarations attached to them. These documents tell them what the parties want them to do. The declarations may or may not give the litigants' perspective on the background and nature of the problem in any detail. In counties where Family Court Services mediators provide recommendations to the court, judges may also have some recommendations which are usually limited to what the mediator was able to glean from his or her meeting with the parents. In rare cases, judges have a child custody evaluation report. When they do, and the report is well done, they may have a great deal of information about the children and parents which can be used to guide their decision making process. However, with or without these sources of information, judges rely

heavily on their observations of the manner and behavior of litigants in the courtroom.

Judge-1 described her ability to witness anxiety, sadness, depression, and anger while sitting on the bench. If she has particular concerns based on her observations she may refer the family to a mental health worker attached to her court. She noted that at times she might make observations of courtroom behavior which lead her to make decisions which differ from the recommendations of the mental health worker. For example, she recalled a case in which a litigant did not deny allegations that he was selling drugs but instead stated that the allegations could not be proven. This suggested to the judge that the allegations were in fact true and her ruling reflected this observation. Judge-4 takes note of litigants in her courtroom in terms of "body language and just the way they handle themselves, just the way they see the problem." She noted

> I guess one of the things that I do is let the parents ramble on and on in court. And, I'm sure my bailiff and clerk sit there and think, *oh, my lord*, you know – what is this all about. But, I have found that sooner or later one or the other of the parents will say something that gives me an idea of a way that that case could be handled temporarily.

Judge-2 stated, "You do what you can do. You pay attention to how people act." He reported that he uses recommendation reports from Family Court Services mediators as a "starting point," and that he will ask litigants what they think about the recommendations.

If one or both disagree, the judge will hear their objection and then consider whether or not there might be some way to address the concern raised in his orders. Judge-3 noted that custody evaluation reports may be misleading in that they sometimes provide a more charitable picture of litigants than what the court might see for itself when the person takes the stand in those rare cases that come for a hearing after the evaluation is completed.

All four judges commented on the familiarity they develop with cases when the same individuals repeatedly appear in front of them. The court seems to adopt a perspective on these parents so that when they come to court in successive times there is a sense of who they are, what the nature of the complaint is going to be, and how seriously it is to be taken. Judge-2 explained

> Now, the fact that we stay in the same job for years perhaps and have the same people come back makes it a lot easier because then you're familiar with the people and sometimes people are very *memorable* here, and so when things come up it isn't the first time we've seen or heard them. So, that makes it easier. I mean, there's no question that it's helpful to be in the same assignment as a family court judge for some years. And, then you, you know, you get a *take* on people and, and you know, for example, if somebody just files papers every other month or something you're going to know that, that type of thing. So, that's really helpful and that somewhat assists with the lack of information.

Doing my best. The judges interviewed for this study emphasized their effort to make the right decisions, particularly in cases where the safety of children was an issue. They showed respect for litigants' situations and strove to imbue their work with fairness and openness. At the same time, they each recognized that their decisions are fallible. These judges struggle to do the best they can while working in an environment where they are required to make many decisions in very little time, handling many cases simultaneously, often lacking information needed to arrive at decisions with confidence, and sometimes compelled by law to make a decision even in the absence of the required data. Judge-4 stated,

> Did I make some bad orders? You betcha. I'm sure I made some awful ones, but I think I made more good ones, more good orders than bad orders cause I really tried to listen to what the parents are saying . . . Short of it being a safety issue you just have to do the best you can. You know, and as I said, the only way that I ever came up with of getting some feeling in cases was, you know, to let the parents talk and to see what they said."

In response to questions about her degree of confidence in decisions, Judge-4 explained

> There were some cases where I was totally clueless, really, really clueless. There were a few cases even after an evaluation I was really clueless – and, and those are cases where there's really no solution. The rest of it, I think, went a lot on just my

> gut reaction to the situation . . . mostly to the parents . . . through how they behaved in court or in chambers conferences . . . very subjective.

Judge-2 recognizes that there is no law to guide many of the custody and visitation decisions that come into his court. He offered an example of parents arguing over whether their child should be exchanged between them at 6:00 p.m. or 6:30 p.m. His approach to this and other similar disputes is to send the parents outside the courtroom with the directive to find a solution. If they return without having reached agreement, he is willing to pick one or the other alternative and make it an order so that the matter is finally settled. In addition to sending the parents out with the expectation that they will resolve the issue they brought to the court, another way that the judge may attempt to cope with a lack of clarity in the decision making process is to inform parents of his intentions, that he is trying to decide what is best. Judge-2 explained

> I can't always get everything right, okay. I mean, I may make a wrong decision based on either I have some preconceived opinion, or, or I have the wrong information . . . But, what I can try to do is have the right attitude in here and, and, you know, I, I, I thought that my attitude that I try to communicate when I'm out there is, you know, I'm, I'm kind of like the uncle, or whatever. I mean, I want to do right here, you know, I, I tell people I'm, I'm going to try to do right. I, I send in a lot of people – I'll be saying twice, three times a week, 'You're the parents, I want you to decide. I mean, you know, I, I don't, I don't want to decide this

> issue. I want you to get together and decide' – that type of thing. I try to be courteous to everybody, and, and let people know that we're trying to do the right thing.

In these cases where it is so difficult to find enough information and to feel confident in one's decisions, the attitude and manner of the judge, how he or she is perceived by the public, takes on critical importance.

Persona of the judge. Each of the judges understood that how they are perceived by the litigants and others in their courtroom played an important role in protecting the integrity of the court and its ability to issue orders likely to be seen as credible and respected, even when they were disliked. They did this through their efforts to make it clear that they were interested, concerned, impartial, fair, and reasonable. This effort was reflected in the comments by Judge-1, quoted above, when she described the need to allow people to respond to things that might be communicated to the court about him or her by a mediator or attorney. At another point in the interview, she stated that she attempts to disclose what she is thinking before she makes a ruling so that the parties "can explain to me why that thought is wrong." All four of the judges described how careful they are to avoid contact with individuals outside of court in which there is discussion of any cases they are hearing.

Pro Per Litigants

The ways judges are perceived by litigants is a particularly important matter for individuals who are not represented by counsel. These people lack the kind of support and assistance an attorney can provide in helping them understand how to use the court system and how it works. The judge is then in a more immediate relationship with the pro per litigant. While judges are limited in the extent to which they can assist "pro pers" in court, each of the judges interviewed indicated that they do try to help out to the extent they can without violating their role as neutrals. Judge-2 explained

> Litigants representing themselves don't always know *exactly*... what they want. They don't always phrase the *issue* very well, so you have to kind of cut through that. I mean, we get some pleadings here that don't tell you much of anything. And, so the judge has to kind of get through that and help people to, to make sure we know what's going on.

Judge-1 and Judge-3 both noted the proliferation of pro per litigants and described adaptations they have made to help. Judge-3 explained how legal jargon is limited in its usefulness and only arouses more suspicion and doubt.

> If you say, well, look, you know, due process requires that we give him some notice, or her some notice – due process is a technical, legal word. They think you're just giving them mumbo jumbo, so you can't say that. So, you say, 'Well,

> you know, we don't like to let you surprise him anymore than we would let him surprise you.' I mean, that's the technique I use anyway to try and get through to them that they're being treated equally, but that it's not a drop-in center.

He explained further

> I think judges in family law tend to kind of set up little litanies that kind of let people in on where we're going to go. When I start a hearing, I'll say 'All right Mr. Jones, this is your motion. You filed it, so I'll start with your evidence,' just so the other side doesn't wonder why I started with the other side. And, you know, you do little things along the way to kind of let people in on why you're doing what you're doing, so they don't get too paranoid about that.

Judge-1 described how in the absence of attorneys the responsibility to assure that litigants are heard falls on the court. Litigants in family court, she noted, particularly unrepresented ones, are frightened and often do not understand how the system works. She explained that she always remains calm and feels it is sufficient to occasionally raise her voice but never to the point of yelling at people.

Interviewing Children and Adolescents

The four judges had a range of ideas about interviewing adolescents but none of them were willing to interview children. Three of the four judges interviewed for this study

spoke about the possible negative impact on children of being interviewed in chambers. They clearly wish to run the court in ways that are as protective as possible of children whose parents are fighting over custody of them. Only Judge-2 seemed enthusiastic about interviewing teenagers and expressed confidence in his ability to use such interviews to help make decisions that would be in their best interests. He did not believe that teens would be adversely affected by talking with the judge in their case so long as he was skilled at getting them to reveal their custodial preference indirectly. Furthermore, he indicated he would only interview them if the parents stipulated to his talking with them alone in chambers. The other judges had either interviewed adolescents in rare situations or not at all, and each of them had strong reservations about interviewing children and adolescents. Judge-1 explained that she is not trained to interview minors and that it would be arrogant to think that her training as an attorney would allow her to interview a child or an adolescent for a few minutes and have as good or better an understanding as someone who was properly trained for this work. She has the therapists and mediators talk with minors instead of doing it herself. She maintains a view that all such interviews in the context of custody litigation can be traumatic for children and adolescents. Judge-4 reported that she had only seen one child in chambers, a young adolescent, and vowed to never do it again after recognizing the limits of her training in interviewing children and considering the impact on the child of the judge making a decision between the two parents after having spoken with the child. Judge-3 expressed strong feelings about parents bringing children to court in an effort to have the children talk to the judge about their preferences. He explained

I tell them in open court, in public, I tell them both – any parent that would call a kid to testify in a custody dispute involving the child I would consider that to be such a breach of parental judgment that I couldn't possibly find in favor of that parent, so, go to the Court of Appeal if you don't like it. Nobody's ever done it. So, I've *never* had a child testify. Occasionally, I'll have lawyers that will say (they) have a stipulation, but the condition of the stipulation is one of the parents is demanding that I talk to the child. I'll talk to the child if it produces an agreement. I don't usually talk about the case. We talk about baseball and football and stuff. But, I will talk to the child. Once in a while, and this hasn't happened more than a couple times in twenty years, I have *felt* that talking to the kid would help and I've done it. I have attorneys tell me that the child *needs* to talk to you. This is an unusual situation and I don't usually accept that from the attorney, but if I have an evaluator tell me that I will probably talk to the child. And, over the years maybe I've talked to a dozen or something like that. But I, I feel that talking to me is too stressful. The kid should *stay out* of these disputes usually to the largest extent. There's any number of ways for me to find out what the kid's desires are: through the evaluator, through the mediators, you know any number of other ways other than testifying, or other than coming in here. But, but I will see them. I don't think there's much to be gained from it and I think there's a great deal to be lost. And, one of the things that I tell parents is – if I go back in chambers with that child, and then I come back here and rule in favor of one of you the other one's going to think 'the kid sold me out.' That won't be true. I will tell you in advance

> it won't be true, but you're going to believe it no matter what I tell you. And *that's* why I won't see the child. Because if I see the child I'm, I'm setting the kid up for a bad experience and I don't want to do that. Most parents understand that. And, I'll tell them that in open court sometimes.

Collaboration Versus Independence in Decision-making

The judges emphasized to varying degrees their decision-making role as part of a collaborative team effort and their sense of themselves as making decisions more independently. Judge-2 described the judges job as being either an umpire (in the cases where there are jury trials) or the one who makes the decisions (in the family law cases). He enjoys making the decisions and does not find it particularly stressful. He stated

> I know someone has to do it and I am willing to do it, and it doesn't distress me that much, and someone has to do it and it, it's me. It's just a personality thing, I think. I don't know why I could tell you from my background why I prefer to be in a decision making role rather than just an umpire role.

Judge-2 explained that he does not second guess himself and he does not think about the families after they leave the court. Judge-4 views herself as more a part of a decision making team than as the one individual responsible for the decision. She seemed most allied with the Family Court Services mediators and thought of herself as part of a team rather than as someone wanting or needing a great deal of power over others in a

hierarchical fashion. She explained, "I have a more egalitarian view of people. I mean, I don't think that I am any more important in that court than some of our really good mediators. You know, they do as much good work as I do, and maybe *better* work, actually, with families than I do." In a related vein, Judge-1 described an alternative, collaborative decision making model she developed in which she sees herself at the center of a hub of professionals including attorneys, mediators, evaluators, and others. Each of these individuals carries a portion of the work load and feeds information to her that assists in the decision making process. She sees herself as a colleague of these other professionals and as working on an equal level with them. The judge's role in this model leaves her responsible for, in her words, "bringing closure" by which she means making a decision based on a view that "we don't know everything there is to know about this but we do have some good information and based on what information we have, this is the way it is going to be."

Isolation and Neutrality

Despite their differences in the degree of collaboration and independence in decision making, each of the four judges seemed fairly isolated in their work. This appears to be part of the nature of the job in that they need to maintain distance from other individuals, particularly attorneys, in the community. The relative isolation appears to be purposive in that the judges limit their own behavior so that they remain neutral and unbiased, and maintain the appearance of being non-partisan. Numerous comments reflected this aspect of their experience. Discussing her experience of the isolation that comes with the

position, Judge-4 noted that she did not socialize with any of her attorney friends while she was on the bench. In addition to cutting off social contact with lawyers, she also found that the court culture, particularly its demanding nature and a competitive environment, contributed to further feelings of isolation.

> Being on the bench is extremely isolating and it's very high stress. There is not a lot of interaction between the bench officers because they're so busy, and, and also these people that are in the family law department, well, I admire everyone of them, but they aren't friends of mine. You know, they aren't people that I have a history with, or that I'm comfortable with. Everyone is pretty intent on watching their tail, and, you know, not doing anything wrong. And, so if you're separated from your non-judicial pals, now, and don't have really good friends in the court, it's, it's a very touchy existence.

Judge-2 reported that he is "not a close personal friend" to any of the attorneys. He explained, "At a certain level if you become too close as a personal friend you can't handle their cases anymore, so . . . you know, I don't do that." Judge-4 explained, "I don't see lawyers outside of court. I mean, I stay away from them."

The judges also seem to lack the "odd intimacy" that the attorneys may develop with clients. In responding to a question about whether any version of the kinds of alignment that occurs with attorneys and parents happens for the judge, Judge-1 commented that she

does not have "that kind of connection" with litigants. She stated, "If I have any sense of an alignment because I knew them in any way, I would just disqualify myself in a second. I wouldn't even think. I would just immediately get out of the case."

In some respects, the greater distance in the relationship with litigants may fit the judge's personality and reflect a defensiveness that helps them do their work. In this regard, Judge-3 commented that

> I don't think I'm as good as they are at sitting across the table eyeball to eyeball with people and dealing with those kind of problems. I'm better off two steps up where I can make orders [laughs] and things like that . . . I, I'm okay working with lawyers, dealing with settling cases at that level, but that's a lot easier than the people who have the open wounds on their own self rather than just their representatives.

The Judge's Family

In the face of their professional isolation, family appears to take on a greater significance for the judges. Not only does it help meet their needs for affiliation and support, it also appears to ground them in their work so that they have a basis for understanding the problems of the families that come into their courtrooms. Judge-2 explained

> I mean, I think it's very healthy to, to be a person with a wife, or husband and, and

children. You know, where you have a little more insight. I mean, we, we've had some family law judges who, who *didn't* have kids. And I think it's hard. It must be harder for them. It really must be. Your kids keep you modest, you know. When, I mean, when they become teenagers. You can only, you know, you realize you can only do so much.

Judge-1 stated

I think that if I didn't have my own family, and my own children, I wouldn't want to do this job because that sort of grounds me, you know. I have a long term marriage and I know all the things that go into *having* a long term marriage and what, you know, the compromises one has to make along the way to make everybody, everything work. And, so I know sort of like how kids feel at different ages in their lives, so that when a thirteen year old says, "I don't want to see my dad for the weekend," it might not be related to him. He probably doesn't want to see the mother either, you know. [laughs] He doesn't want to see either one of them. And, it's not related to any alienation or anything. It's just they want to be just with their friends, and, so I know what it means. I mean, I know what these parents are going through. It's a whole lot more complex situation. So, I've had a lot of experiences myself just in trying to raise my own kids to make me know that this is not an easy job, you know, to try to raise children. And, and I can appreciate the struggles and what it means to, to work all day and then rush to the

> child care center and, and try to get everything, get the homework done and get everybody to school on time.

The life experience of the judge, particularly in their family life, gives a basis for empathy with litigants they would not likely have in other courts of law. Judge-3 explained

> These are things that I've gone through in my own life. I mean, I have kids, I have property. I, I don't pay support, but, you know, I buy food for my kids and things . . . The decisions that these people are going through, the stories I hear about what their kids are doing or not doing and so forth. I, you know, I've been through all of that. If I was sitting listening to a burglary trial – I had my house burglarized once, but I just don't think I would feel the same kind of connection with parties to a criminal case or a civil auto accident case or something like that. It just is a, you know, there's more empathy from that standpoint

Success and Failure

In an effort to further differentiate their goals and ideas about what they are attempting to accomplish in their role and how they understand themselves to be working towards those ends, each of the judges was asked to talk about a case that was "successful" and one that was a "failure." While recognizing that such categories are simplistic in the sense that work performed by individuals can be expected to have elements of both success and failure rather than exclusively one or the other, the intention in asking the question this

way was to further understand the judges' views of their goals and of the dynamics of how the family court system actually works.

Success. Judge-1 was instrumental in building a family court in which all court cases regarding children and families - including child custody, support, guardianship, domestic violence, adoptions - are administered by the same court. The idea behind this unified family court approach is to allow the court to work in a holistic way toward meeting the needs of families. In bringing together all the court services which involve children, situations are avoided in which the same family might have cases in different courts which can lead to fragmented responses and conflicting orders. Judge-1's response to the request that she identify a successful case was one in which the integrated approach of the unified family court worked well. The case could have been handled simply by the court granting a domestic violence restraining order. However, when the facts of the case became known to the court, other factors that would be impacting the four children were identified. The father was the family breadwinner and on his way to jail for a domestic violence conviction and the mother had a drug problem and needed treatment. The mother could not receive welfare for the children due to a criminal conviction. The grandmother was available (and in court the morning of the hearing) to take guardianship of the children. The court responded to the multiple family stresses and was able to address the needs of the family including support, guardianship, drug treatment, therapy for the children, and supportive services for the grandmother/guardian. Judge-1 explained

If you think about what I *could* have done in the normal court – that was a restraining order case – he was going to prison. All I *had* to do was to say, 'your restraining order was granted.' Period. Then I could kick the file out and have just said, 'Case is done.' And it would have been done. And, I mean, in any other court that's what would have happened. The case would have been done. But we're trying to go beyond moving a file from here to there and accomplishing, from my perspective, very little. Because a restraining order is the least of the problem. I mean, most of the problem is that, you know, she had no means to support herself because she didn't have any income. She has four kids who have witnessed a lot and there's no counseling, and they can't afford any counseling. She's got aid problems, so she can't get money from the government. And there were a whole lot of things that had to be done and these people don't have the wherewithal psychologically because most of the time they're just *so* completely shattered that they can't move from A to B, let alone, you know, 'Now, I want you to go, you know, two weeks from now to this department and try to fill out these complex guardianship papers,' and they are complicated, and, and then – that's just too much to expect of people. And then 'I don't know where you're going to find the money, but all your children really do need therapy, and if you could, you know, get them' – they're trying to figure out food on the table, and they're supposed to try to figure out how to pay for four kids in therapy? So, I think that that was a really good case in that we, at least in my mind, helped move that child forward and those children forward as much as anyone's going to do in a

positive way on one small case, a domestic violence restraining order case.

From the perspective of Judge-1, the factors that contributed to success in this case were the court thinking broadly and inclusively about the needs of the family. The issue before the court, namely the single domestic violence restraining order matter, was used as an entry point through which the court was able to enter the family system. The family was viewed as a whole unit with multiple needs. Understanding and identifying those needs allowed the court to assemble and link the family to a variety of needed programs including social service, mental health, and financial aid.

Judge-4 thought of a successful case in a somewhat similar way to Judge-1. In her case, the parents were disputing custody of their child and both had a history of drug problems. Their child had developmental deficits and was not receiving the testing and other services required. The judge appointed an attorney to represent the child. The attorney took an interest in the case, arranged for the child and parents to receive the services they needed, and involved a grandmother who was able to back up both parents. In the opinion of Judge-4 the case was a success because the attorney for the child was a good match with the family, the Family Court Services mediator was persistent and took a strong problem-solving approach, and the parents were ultimately able to work together for the child and take advantage of opportunities offered to them. The judge contributed to the successful outcome by managing the case through a series of chambers conferences with parents in which they would talk about how things were working. In these conferences the court

monitored progress, provided encouragement, and arranged for resources in the form of payment for the attorney who represented the child.

Judge-3 identified a successful case in which he made an order that opposed the recommendations of the Family Court Services mediator. A high school student was caught in a power struggle between his parents over whether or not he could go on a school trip that involved traveling by plane for several hours. The mediator had recommended the child not be permitted to go on the trip. The judge ordered that he could go but did this in a way that considered both parents' concerns. The boy was required to complete certain school assignments while on the trip and to keep a journal about what he saw and did. This journal was be given to the judge after he returned. In this case, the judge believed that his problem-solving approach allowed him to develop a more inclusive solution than the one the mediator had recommended.

Judge-2 was unable or unwilling to identify a successful case. He explained that his criteria for success is to "come up with a decision that will allow the children to have a good relationship with both parents no matter what their timeshare might be." However, he reported that he never hears how things work out after families leave the court, and so does not know to what degree the cases are "successes."

The responses of these judges suggest that at least one way to think about success in family law cases from the perspective of the bench officer is that the needs of the children

and family are individualized. The successful cases are not the ones that are simply moved through the system. The ones that stand out as successes are those in which there is some particular interest that grabs the attention of the court and, as a result, the judge comes to understand the needs in the family. He or she is then able to use their position in the family law system to bring together resources that address those needs most effectively. The judge can bring in other legal (e.g., an attorney for the child) and mental health professionals, as well as link the family to appropriate agencies and programs. The judge also may use him or herself to lend support and guidance to the parents in ways that encourage their responsible behavior and that sets limits on irresponsible behavior.

Failure. Judge-1 explained that, in general, "failure cases" are ones where there is a lack of information on which to base the court's decision. In the case she cited, she made a judgment based on what appeared to be the child's stated wish, as well as one parent's rigid and overly controlling behavior in the courtroom. Based on that assessment, she allowed an adolescent child to move and live with his other parent. The move resulted in the child getting into trouble and having to return to live with the parent who had primary custody initially. In this case, it seemed the court lacked information about how the child's developmental status and needs led her to make the choice she expressed. The court also did not have information about the background of the parents and about the relevant family dynamics.

Judge-3's thought about failed cases led him to think about ones where he has lacked

sufficient information on which to base an order but makes a detailed order anyway. He stated "On occasion, I have leaped into cases and tried to do things without knowing the whole story and discovered that I probably just made things worse instead of better." He later explained that lawyers have more flexibility and more time to get to know their client's case, so the settlements they can work out can be ones that are more in line with the needs of the family.

Judge-4 considered a case a failure in which her decision to change primary custody of a child from one parent to the other led to a rapid and intensive escalation of the litigation in which the family was further disrupted and the children's functioning deteriorated. She felt the court's intervention made the family worse than it would likely have been otherwise. One of the problems that made the case as damaging as it was, according to Judge-4, was that the parties had hired highly litigious attorneys who argued for what their clients wanted but did not help their clients focus on what was best for their children.

The question about failure in family law cases brought to mind for Judge-2 a situation in which he had interviewed an adolescent in chambers and decided she should be able to move to another state with her mother. The child moved, started acting out and was arrested, and then was brought back to live with her father again. The case was a failure because "it turned out to be a big mess when she went back there."

For this group of judges it seems the question about failure cases led to thoughts about

cases where the court lacked sufficient information on which to base the decision but a decision was made anyway. Additionally, the response of judge-4 illustrates how sometimes a court decision can lead to an escalation in the custody battle, particularly when the attorneys involved are litigious types. In the case cited, the court's intention to improve life for a child, which was the basis for the decision, led to a deterioration in the child's quality of life as he became embroiled in intensified litigation following the court's decision.

Judges' Perceptions of the Family Court System

Parents

The four judges in this study showed a range of understanding regarding the experience of litigants in their courtrooms. Some revealed insightful and empathic perspectives that matched well with the data provided by parents indicating the nature of their experience in court. To one degree or another, the judges showed awareness of the fear, sadness, confusion, and anger that the parents brought to the custody litigation process.

The observations of Judge-1 and Judge-4 reflected the experience of litigants as revealed in the comments of the parents in this study. Judge-1 and Judge-3 highlighted how much more difficult the experience of going to court is for parents who are not represented by counsel, particularly since they lack understanding of how the court works and what needs to be done to get what they want or need.

Judge-3 explained

There's a gigantic amount of frustration in those cases because they don't know what they're doing, they don't know what to ask for, they, they don't know how to work through the system very well. There is a limit to how much we can do because I can't be their lawyer and their judge at the same time. It just doesn't work that way. I can't advise them – I do advise them *some*, but there's a limit to how much you can do of that. And, there's *a lot* of frustration – *I feel* a lot of frustration with the pro per cases. That they're people who need help. Years ago when somebody came in without an attorney I just assumed they were without an attorney because they wanted to frustrate the system. That's not true anymore. People don't have lawyers because they can't afford them. There's still a few of them that are doing it to frustrate the system, I guess, but – and I think, to some extent, the phenomenon may feed on itself when you see that most of the other people don't have lawyers, I guess more and more people feel, well, if they can do it I can do it. And, they're not stupid people. They're successful in whatever they do outside of the courthouse. They just don't know the process, and there's a limit to how much time I have to explain it to them. And, there's great, great frustration in that. It's very, very difficult. That's not true of all. Some of them have a pretty good handle on what they should do. Some of them do a pretty good job of it. Occasionally, they do a better job than the lawyers do.

However, for both represented and unrepresented parents, the emotional reactions they bring to the family court system can be powerful. For example, Judge-4 noted, "A tremendous amount of anger and hostility. A feeling of being totally misunderstood. Sort of the inability to look at the whole picture. And, that's probably true of, of any aspect of the family law case, is that people tend to focus on minute details."

Judge-1 showed some understanding of how the positions that litigants take in court reflect the stress they are experiencing in relation to a divorce. She stated

> These are really intelligent people that will take these positions, you know, that – all kinds of things. I mean, it just, when you go through these divorces you have such a hard time that you start to see things, I think, in a way that I wouldn't necessarily think is fair from my perspective. I don't think, I don't think this has to do with intelligence here. I think this has to do with emotion. You know, and only after you've been able to move away from it for a few years (do you get more perspective).

At the other end of the continuum is Judge-2 who maintains that most of the people he sees in court are "good," "trying to do the right thing," and not particularly angry. He sees them as respectful towards him and willing to go along with what he says. He explained that many people work out the issues related to their children, and reported that most of the parents he sees in court are not there for matters other than custody and

visitation problems.

Judge-3 echoed the sense of Judge-1 and Judge-4 with respect to the level of fear and confusion litigants can feel in the family court system. He stated

> Well, a lot of them are dealing with, with – fear may not be the right word because they aren't *physically* afraid of being injured, but they don't know the system, they don't know what they're doing here, they don't know how to act. I'm talking about the ones that aren't represented. Of course, all of them have the down side of whatever issue they're here on – getting the kids taken away, getting a support order that's too high, or too low, losing the house. I mean, these are pretty, pretty monstrosity kind of issues for people, so first of all they've got that fear of, of losing the case whatever the issue happens to be. And, if they don't have attorneys then they have the additional fear of what do I do next, how do I get what I want to get, how do I act, what do I do next?

At the same time, Judge-3 commented that often parents who find their way into family court are individuals who do not take responsibility for themselves. He opined, "People who don't want to take responsibility for their own acts are what fill up our courtrooms every day, unfortunately." He explained that the parents may be trying to have the court overlook their irresponsibility or "let them get away with it." He explained

> You know, you get the, the parent that is a major doper, but somehow thinks the court's going to overlook that. Or, they can cry on somebody's shoulder and somehow get away with something like that. You see a lot of that in custody disputes.

Attorneys

In those custody cases where the parties are represented by counsel, much of the judge's interaction with them is indirect, through the attorneys. From the judges perspective, when lawyers are involved they play a pivotal role in how the case moves through the court, whether or not it is settled, whether litigants calm down or become more agitated, and whether the needs of the children are recognized or obfuscated. The judges in this study each made comments reflecting a sophisticated understanding of the attorneys' role, particularly in that they recognize how the parameters of the lawyers' work can be shaped by the often complex demands made on them by clients. However, the judges also maintain that part of the lawyers' job is not to simply represent what their clients' desire but to work with the parents so they focus on things that will move the case toward resolution, including trying to accomplish what is important for the family, helping them ask for things that the court can actually do, and providing enough information so that settlements can be reached. It seems that the judges keenly understand the limits of what the court can offer. They expect that experience will allow attorneys to learn what these limits are and how to practice within them. The judges become frustrated when the lawyers' behavior reflects an ignorance of those limits and when they fight for their client's

position regardless of the impact on the children.

The comments of Judge-3 reflect well the judges' frustration with attorneys who litigate when they should be focusing on settlement, and who may be caught up in their client's demands in ways that interfere with their ability to work productively on the case.

> Occasionally, I see lawyers that don't know what they're doing. But, that's, that's a smaller percentage. And, there's a lot of frustration in that. I have a lot of frustration with lawyers who are being part of the problem instead of part of the solution and I see an awful lot of that. I think I'm too quick to criticize the lawyers because I don't know what is being demanded of them by their client out in the hallway or back in the office when they talk. And, so I have to rein myself in a little bit sometimes because I don't, I don't really know enough to be critical. But, time after time after time I, you know, I see cases where there's, there's good legal work that needs to be done to get these people through this process and it isn't happening. You know, they're screwing around, screwing around and . . . they may well be doing it because that's what their clients want them to do.

Judge-2 maintains that attorneys can serve many useful roles in custody litigation, particularly orienting parties toward reaching agreement and examining custody evaluation reports for omissions and bias. He expressed frustration with incompetent attorneys who do not make their arguments clearly, take excessive time pursuing relatively minor points

in a case, and fail to understand that they should work towards reaching solutions for the parties that are mutually acceptable. He explained

> The best attorneys, by my standards, are the ones that try to get things settled. The, the attorneys on their own who are more mediators, who realize that in this process, you know, there are no winners or losers sometimes, but they want to try to work things out. And, they can work with other attorneys and not tick off other attorneys. I mean, those are the ones that you tend to like the most. The ones that come in here as if it's a civil case, or you're just trying to beat down the other side – first of all, it doesn't work very well be-, because – see, the one thing about family law as compared to other types of law is that, that often you end up with something in between the various positions. In other words, you know, if you're, if you're, if you're having a plaintiff's case in a tort case you want as much money as you can possibly get for your client, you know. It's not like a middle ground. You think, well, you know, we don't – you know, you just want to grind down the other side perhaps. Whereas if you're talking about custody and visitation issues there's going, you know, it's never – it's hardly ever going to be a hundred percent for one parent and zero for the other unless there's something, you know, really wrong. So, it's a matter of how you're going to work this out and I think the best family law attorneys realize that. You're just going to have to work this out. You know, my client wants something, and this has to, you know, this is maybe the, the minimum or something, but we're going to try to work this out – what's going to

> work. So, so what's the, the most helpful are the attorneys that, that realize that they're part of the process and they're actually helping their client by getting their client to compromise because it's better for the kids if the parents are making their own decisions. And, and at the other end the ones that are just fighters...they're not that effective because the judge can see that, you know. Then you just want to sometimes you just want to do the opposite of what they're arguing because they're being unreasonable.

The data suggests that what the judges want from the attorneys is something that can be at odds with what the attorney and/or client are seeking: usually a victory or some sort of exoneration or punishment with strong moral overtones. In fact, the comments of Judge-2 suggest that the court may be inclined to punish lawyers who are "fighters" when they frustrate the settlement process.

Judge-3 went so far as to say that trials are almost always a reflection of a mistake by the attorney who should have helped the client reach settlement earlier in the process. He explained that attorneys take many cases to trial when it ends up only getting their client less than he or she would have had otherwise. Asked why he thought this occurred, Judge-3 explained

> Part of it is sort of cultural, I think. You know, the attorney's there to win or lose – to win. Part of it may be just not understanding how the system works, not

> really thinking it through. Just not...and that may be a lack of experience to some extent, or it may be a lack of good sense, or it may be a lack of just, just thinking the process through about, you know, how to do the best you can for your client. And to some extent it may be the client . . .

The comments of Judge-1 and Judge-4 reflected some ways they believe attorneys can interfere with the process of reaching resolution in these cases. Judge-1 noted problems when attorneys occasionally complicate the case unnecessarily by filing excessive discovery motions. Judge-4 explained that lawyers may insist that judges respond only to issues raised in the pleadings and so restrict the court's ability to address problems in the family. She pointed out that when there are attorneys involved in a custody case, the approach they take will often determine the outcome of the case. She explained

> I think, that the impact on the families, and the impact on me were completely governed by whether they were what I termed good family law attorneys or whether they were, you know, strong advocate attorneys. And, the ones who were really strong advocates there's no doubt they came in and got a result, you know, end of story. But, I think the really good attorneys, even if they were the only attorney in the case, would work to educate both parties.

This perspective on how attorneys influence the outcome of custody cases was also noted by Judge-3. He reported

> When we look at a, when we look at our calendar, we don't look at how many cases we have. We look at who the lawyers are, 'cause that's how tough the case is going to be. Whether we've got the lawyers that can settle people down and settle cases or do we have the kind that stir people up.

Judge-4 was a proponent of using attorneys to represent children in these cases. While this is not the focus of this study it is important to mention that the appointment of counsel to represent a minor in custody and visitation cases is one tool that the court has to protect children and to assure that there is someone involved in the court process who is there specifically to look after the needs of the child. Judge-4 stated

> I think that the most effective way that I found to deal with some of these really great problem cases was to appoint an attorney for a child. And, if it was the right attorney and if it was a really interested attorney, they could do some really good word about mediating family disputes, sort of protecting the kid. And, once there was a, an attorney for the child in a case I frankly didn't worry so much about (what) the parents were talking about, or arguing about, or heckling each other about.

Mediation

The format for mediation available through Family Court Services, i.e., whether it is "confidential" or "recommending," differs from one jurisdiction to the next in California.

The difference is that in counties with "confidential mediation" the mediator meets with the parents before they go to court and tries to assist them in settling their dispute. If they do not settle, the case is heard by the judge in the absence of any communication about the case from the mediator to the judge. The exceptions are cases where an issue of child endangerment arises. In counties with "recommending mediation" the mediator also meets with the parties prior to their court hearing. However, if no agreement is reached in mediation then the mediator writes a report to the judge or testifies in court regarding what he or she thinks should be done. Some of the judges participating in this study came from "recommending" counties and some from "non-recommending" counties.

The four judges were all highly appreciative of the mediation services provided by the Family Court Services department in their respective counties. This was true regardless of whether they were in a recommending county or non-recommending county. In both non-recommending and recommending counties, the judges described the work done by Family Court Services mediators in superlatives such as "wonderful" and they were said to "perform miracles" in some cases. In the recommending situation, the judges relied on the work of the mediators to get information about parents and children, and to obtain ideas about how to adjudicate their cases. In these counties the judges particularly liked that they were able to get additional information and to get it quickly, even on the same morning or same day, from the mediators. Judge-3 said

> I mean, we get, we get quality input instantly almost. I mean, instantly by

> comparison with full evaluations, or probation reports, or long term kinds of studies. And, that's what we need because for the cases that are brand new cases, we've got the parties that are in their most volatile state. They've just separated, and everything's falling apart in their lives, and they're doing a lot of dumb things and they're very difficult for us to handle. And, they (Family Court Services) are handling them for us to a large extent.

There were some ideas expressed by the judges regarding Family Court Services mediation that reflected wishes for improved services. For example, there were concerns that recommendations were sometimes offered without any background information to show the court how those recommendations were reached. There was concern about the limited amount of time mediators were able to spend with families. There was also concern that services offered were limited to mediation and were not as inclusive as they had been in years past. Additionally, in at least one of the jurisdictions there was concern about the mediation department suffering the effects of inadequate staffing, burnout, and isolation from the community.

Child Custody Evaluators

The judges all agreed that child custody evaluation reports could be helpful insofar as they offered background on the family, insights into how and why people were behaving in the ways they were, and recommendations for the court to consider about what should be done. Additionally, the judges reported that the majority of cases sent out for evaluation

settled after the report was completed.

Judge-3 stated

My favorite evaluator is the one that I send a case up to him and it's resolved because that's sort of what we hope the evaluation's going to produce – is not only a better understanding of the problems in the case, but also a solution that everybody can live with, hopefully.

Judge-2 also expressed appreciation for the ways evaluation reports can lead cases to settlement. He explained that it saves him from having to make the decision in these cases, too.

> A lot of times when you have a well thought out evaluation and then you have those recommendations, a lot of times the people just accept them. And, that's fine. That's very helpful to me because then I don't have to, to do it.

The judges had very little contact with the evaluators unless it was limited contact in those rare instances the evaluator was called to testify in their court. All the judges expressed a wish that the evaluators would be available for questions during the settlement conference process. In this way, the judge could have the custody evaluator's opinion about any suggested or requested changes to the recommendations before they became a court

order. The judges generally seemed to place a great deal of confidence in the evaluators' recommendations, noting that they had spent much more time with the family than the judge.

There were also some concerns expressed by these judges about child custody evaluations. Certainly one concern that was raised repeatedly was the amount of time they took to get done and the cost to litigants. Judge-1 explained that she rarely used child custody evaluations for these reasons. The judges noted that the evaluations are generally only available to people who can afford to pay for them. Judge-3 remarked that sometimes evaluation reports are written in ways that try to make either or both parents "look better" than they really are. This can lead to problems later in court in that it might encourage a troubled litigant to pursue their goals for the case in a custody hearing in a way that would not have likely occurred if the report had been more realistically written. Judge-3 also noted that when evaluators make recommendations that the situation should be reviewed after some period of time and after the parent(s) complete certain things, this can set the stage for additional conflict over whether or not the conditions laid out in the report were satisfied. Judge-4 opined that too many cases are sent out for complete custody evaluations when in fact what they really need is a limited assessment of a particular issue. Finally, Judge-3 explained that it is helpful for evaluators to have some understanding of the law and to make their recommendations true to the facts of the case and not bent to fit a misunderstanding of what the law requires.

The Law

The judge in family law faces a different legal landscape than judges working in other areas of the law. One of the major differences is that the law regarding custody and visitation is minimal. Most cases are argued based on facts rather than on legal authority and precedent. Judge-1 explained

> The attorneys themselves are less likely to present the kind of points and authorities that they present in a civil case. In a civil case we'd have research which would quote all the applicable cases. Most of the family law papers you get are much more fact driven. You know . . . it's he did this or she did that. They set it out in a factual context. There's very little law that's presented to the court. And so it's sort of the nature of the business where the facts drive the cases because if someone says he was arrested last week for methamphetamine it sort of draws up the question of who is going to have the child next weekend. Unless there is another fact that she was too.

Despite the law being "fact driven" in these cases, the judges strive to maintain some of the basic rules of courtroom procedure and decorum. Most notably, they insist on adherence to rules designed to assure fairness and justice including giving notice and avoiding ex parte communication. Judge-1 described her belief in adhering to procedure in cases.

In the end (evidentiary rules are) what grounds us in our decision. Because if you just do what you think feels good or you think at that moment feels right you won't have any bearings at all as a judge. So I think you must do your best to make sure that the procedure is maintained. For instance, today a very experienced attorney came in and has a difficult case and decided he would just come in with no papers. (I said) 'No, you can't do that.' He said 'I know but they are both here and I am here and I can't come tomorrow and this is really important and we got to take care of it today.' I said, 'I am sorry . . . you have no papers. You can go downstairs, you can write them, you can draft them, you can do whatever you want and I'll put it on calendar, but I am not going to start hearing cases that no one can tell me what issues to expect as you talk them out in court because that would mean that we are really not running a court anymore we're just running a drive-thru service and here's your decision of the moment.' Without even anyone having *any* notice! Even in an ex parte (matter)you have an opportunity look at the papers and see what they say, to sit down and read them before you have to answer to what the allegations. And here this person is just going to tell when they are standing there. I don't think that's fair.

Judge-2 stated

We joke in family law that you throw the rules of evidence out the window but you really don't. I mean, we're supposed to follow the rules of evidence, but we are

> allowed to consider evidence by declarations in a lot of contexts . . . on the morning calendars, for example, all the evidence is by declarations under oath. But still there are rules. You know, we have attorneys who just *attach* a bunch of stuff to declarations. Well, you know, declaration means it's under oath. It doesn't mean you can attach any piece of paper that you happen to have: a police report, or this and that. So, I mean, the rules of evidence, despite what we joke about, the rules of evidence *do* apply and the judge does have to be sensitive to that if the other side objects.

It is noteworthy that from the perspective of Judge-2 the court must be sensitive to fairness in the application of the rules of evidence *if the other side objects* and not otherwise. This may become particularly worrisome in cases where one side is in pro per and the other is represented by counsel.

Judge-3 commented on the need for holding to the rules and related their application to maintenance of a sense of decorum in the court. His comments reflect the perspective of someone who has been involved in this work for many years and who has witnessed and been part of the evolution of family law courts. He stated

> I'm an old man and I go back to the days when it was, there really was litigation going on in family law. I mean, the Evidence Code mattered and things like that. And, I don't see, the whole family law process is trending toward social work

> rather than law to some extent. And there's a *ton* of things – mediations and evaluations being (two) of them – you never used to do that kind of stuff. We'd put on trials when we had custody disputes. But I look at a courtroom as being a courtroom and it should be handled as a courtroom and not the waiting room of the local CPS office or something. And, so I may be a little bit more rigid in that regard than some of my colleagues are, I don't know. I'm not sure of that. I think most, I mean, none of us, none of us permit too much of that kind of nonsense.

Although not abandoned, rules for presentation of evidence in family court are held more loosely than in other types of court. These courts recognize clearly that their charge is to look after the welfare of children in these cases and they are pressed between the demands and wishes of the parents (and sometimes other adult family members) and the information they can gather regarding the needs of the children. The judge has power to make orders and hold people in contempt for violations of the court's rules and orders, but the family law judges vary in how they carry out these functions based on their ideas about people, families, and their conceptions of the helping process. The comments of the judges reveal that there is a range of how much they see their role as adhering closely to the rules of court versus the degree to which they bend or suspend the rules - particularly when one or both parties are not represented by counsel - and take on more of a problem-solving approach intended to address the often serious issues that surface in their contacts with the parents in court. Judge-4 took an expansive view of the role of the court in family law cases. For her, the court's job is to look after the children and to focus on finding

solutions that work for the family, even if it means suspending the rules of courtroom procedure to some degree. She explained

> My approach was to expand the court's role. It wasn't that I ignored what was in the pleadings. I dealt with that, but I probably dealt with what was in the pleadings in a more expansive way. And, I just have this philosophy that if these people could get intervention early on rather than later that it'd be better for everybody. And, is that – did that turn out to be true? No. I don't know whether it was or wasn't . . . Occasionally, when someone was represented by counsel they would say, well, that issue is not before the court, Your Honor. So then I would back off, you know. But, the reality is in family court at least forty percent of the people that would come before me were not represented by anyone, so that gave me great license to misbehave, I guess. But, but these people were – didn't know how to get back into court, you know, or didn't – they had no legal training, so they would have no idea what options were available to them, you know, or what they could expect the court to do for them, or, you know, that kind of thing. And, so there would be a lot of those cases where I probably went farther then would be appropriate. You know. That *would* be appropriate. I'll amend that. That would be *appropriate* if everyone was represented by an attorney who could advise them . . . When you have two pro per's that are just sort of at sea, you know, what do you do, just make an order? 'Okay, you'll have joint legal and physical custody, and you'll have the kid on alternate weekends and that's the end of it.' You know,

> when there are all kinds of unsolved problems that, you know, there were some cases it was real obvious that the parents didn't give beans about anything so I, you know, wouldn't do that so often in those. But, in cases where they were really trying to search for help, or needed help, I would try to, I would go beyond. I mean, if they just came in on a custody visitation schedule, I might order them into co-parent counseling or something, so that would be the license that I would take whereas in a case where they were represented by attorneys that would be one of the issues that they'd bring up (because) I knew that they would be getting information from someplace else.

It is noteworthy that in addition to the ways courtroom procedures may be applied loosely in family court in custody cases, in some ways the law constrains the judges from applying more flexible approaches to the resolution of problems. This is particularly true in relation to support and property division issues which can have a substantial impact on how custody and visitation matters are brought to the court. Judge-3, noting that it is incumbent on lawyers to reach settlement when they can, explained that once the case comes into court he can be limited in the possible remedies that can be applied. He stated

> Lawyers have far, far more flexibility in how they resolve cases than judges do. It's, it's the case all the time that I'm in here in settlement conferences and we talk about settling a case in a certain way and if they go out and try the case, I couldn't make that order.

Judges' Perceptions of the Impact of the Family Law System

Discerning the judges' understanding of the impact of the family law system is a more subtle undertaking than with parents and attorneys. The judges interviewed as part of this study each showed a deep appreciation for the level of responsibility they carry in their work. In part because of the concern they have, they are aware of and focused on the limitations of what the court can achieve.

The judges generally avoided overt criticism of the court process, yet from their vantage point the judges clearly perceive some of the problems in the structure and function of the family law system. They were articulate about having inadequate resources, being understaffed and having to see too many people in their courts each day, as well as about attorneys who are poorly prepared or who contribute to the conflict. They explained the challenge and frustration of having to work with insufficient information and limited resources while they must make decisions that have far reaching, even life changing, implications for individuals in their courts and their children. The judges' comments reflected their recognition of how institutional problems impact the lives of people they serve. They wanted to avoid delays, to address sometimes pressing needs of the litigants, and above all, to protect children. The courts seem keenly aware of the overwhelming problems faced by litigants, although their comments reflected varying degrees of psychological insight and understanding.

Perceptions of Impact on Litigants

Judges' perceptions of the impact of the court on litigants may be gleaned, in part, through consideration of their desire for institutional change. For example, Judge-1 felt a strong need to be creative with ideas and programs to improve how the court functions. She sought a way to counterbalance a sense of inertia, a feeling perhaps of impotence that she as the judge and the court as an institution were unable to adequately address the needs of families coming for help. One can speculate that a level of personal frustration could be linked to observations of institutional unresponsiveness or even failure. The rationale for the unified family court established by Judge-1 is that it minimizes problems that existed in the past in which a number of families that had cases in various different courts were given conflicting orders from each of the courts that could have been at cross purposes, may or may not have made sense for the family, and may not have addressed the needs of the family adequately.

The development of the unified court into a program with a high level of collaboration and collegiality between mental health and legal professionals suggests that this judge may have also been perceiving problems in the hierarchical nature of the organization. She appeared to be trying to humanize the role of the judge, to take steps toward facilitating the evolution of the position from one in which she was isolated at the top of a pyramid where she handled all the responsibility on her own, to one where she was more like a player-captain on a team.

Like the other judges, Judge-4 decried the lack of information for the work she had to do. She attempted to compensate for this by spending additional time with families until she felt she had enough information on which to base a decision. Unlike Judge-2 and Judge-3, who welcomed child custody evaluations as a way of obtaining more information, Judge-4 was wary of the cost to the parties involved and explained that it was not something that could be done in many cases that could have benefitted from it. More than evaluation, she preferred to appoint an attorney to represent the child since she felt this would give her the sense that someone was looking after the child when the parents were unable to do so adequately.

From the perspective of Judge-4, the court's ability to make orders that solve family problems was necessary but limited in terms of what it could accomplish. She explained that the court has the capacity to end a particular dispute but that unless some of the underlying problem is addressed the dispute may simply shift from one issue to another. This judge, like Judge-1, attempts to tailor her interventions to the needs of the family as a whole rather than limiting herself to deciding between the positions taken by litigants in each case. At times, her ability to work in this way is constrained or prevented by attorneys who insist on a more legalistic approach to the matter. At other times, the parameters of what can be accomplished from this perspective are defined by limited resources. Judge-4 explained

> We should have mental health people on staff that we could refer families to. We

> should have a couple evaluators on staff that could immediately see a family and, you know, come up with some good, right off the bat plan for them that is going to be non-detrimental. So, while we can offer some services we have nowhere near the number of services that, I think, families need.

The four judges were all aware of the inadequate resources devoted to the family law court and what this meant in terms of the limitations of what they could provide in the face of great need. Judge-2 commented on the status of the family law court in a social system that delegates the lion's share of its resources to criminal matters.

> One of the main challenges is just the work load here. That, as, as a general proposition the family law courts are not given the resources of other aspects of the court system. And, so, generally judges are required to handle pretty large calendars and make a lot of decisions without being able to spend as much time on them as they should have. That, that's a constant problem with family law courts throughout the state.

Judge-4 placed what happens in family court within a broader context, stating

> It's not just the courtroom, or being a family law judge. It's the court politics, it's what's going on on the state level, you know, it's it's just, it's a whole bunch of things and the courtroom is only part of it.

In light of these limitations some of the judges explained their vision of an ideal family court. Judge-4 stated:

> In the best of all possible worlds, I think that there would be teams that worked in the family law court, and there would be a psychologist, maybe a CPA, there'd be the judge, there'd be some attorneys and that they would sort of work with the family, and work with the whole family system. And, yes, I do think that therapy is, or family counseling, or co-parent counseling is the way to handle a lot of these problems, but it's problematic from a financial point of view. People resist it for whatever reason. And, so I think it's, it's not always available.

Alongside the focus on the need for increased institutional resources and responsiveness, the judges recognize that parents must do their part, as well, in searching for workable solutions to their problems. Judge-4 explained that central to her view of dispute resolution in these cases is the motivation and flexibility of the parents. She explained

> I think that the couple, the parents, have to have some desire to still make things work. You know, if they're in the complete blaming the other person mode, you know, they – my experience has been that they sort of throw up their hands and say, well, what good will it do? It's his fault, or it's her fault.

Except for those cases that return to court repeatedly, the judges seldom learn the impact

of their decisions on parents and children. Judge-2 emphasized the need for a decision in cases, explaining that in some cases even a wrong decision was better than no decision. The matter was simply one that, from his perspective, needed to be settled one way or another. The parents were unable to reach agreement so it fell to the judge to make the call. The judges each noted that some of these cases are "unsolvable" and, in the face of this reality, they attempt to contain or manage the problem through whatever mechanisms they have available to help protect the children from the fallout of their parents' conflicts.

Perceptions of Impact on the Judge

Elements of the judges' perceptions of the impact of the family court system on themselves was the most difficult piece to discern from their comments. Even in the interview with Judge-1, who was very open in discussing problems and innovations in her court, it seemed difficult for her to talk in the research interview about the power of the judge and the feelings aroused by being treated deferentially.

The sensibilities of Judge-4 led her to extend herself on many levels, including spending more time with families than was allotted by the job and broadening the scope of the court's role in custody and visitation cases so that the needs of family, particularly the children, could be addressed in a manner that was more likely to yield changes that actually made a difference. Her commitment was palpable during the interview and it was obvious that this judicial officer was a person who cared deeply about people. However, she seems to view herself as an outsider relative to the other judges and the court

bureaucracy. She appeared to suffer from feelings of isolation and loneliness related to not feeling included in the judges group while having to discontinue her friendships with the other family law attorneys who had constituted her community over the years she was a practicing lawyer. She seemed most allied with the mediators in the court and, like Judge-1, saw herself as part of a team rather than as someone wanting or needing to be invested with a great deal of power.

The judges generally seemed reluctant to talk candidly about the personal dimension of their work. Yet at times, the impact of the family law court on the judges was more personal and presented challenges to their ability to do their work. This appeared at times to take the form of a reaction of repugnance to certain litigants. The judges were hesitant to discuss this aspect of their work, however Judge-4 made some comments about what must be a common experience that most every judge faces from time to time. In describing her response to some individuals she explained that "it was hard for me to step back . . . and in a very short time separate out that sort of visceral reaction to this guy from the facts and the issue that was just before me." Judge-4 commented further on this issue

> In some cases I would feel myself developing a bias like, that guys a jerk, you know, or agh, she's a shrew. You know, and so I had – my problem – or my, the problem I can identify that I had with the litigants was to try to not let their personalities seep into my decision making. You know, my personal reaction to

them as people. And, I mean, some of them I didn't like a whole lot.

Another dimension of the judges perception of the impact of the system on them had to do with their considerations of the relative status of family court judges compared to other judicial assignments. Judge-2 explained that there is a seniority system that determines the order in which judges can select working in various courts. Few judges want to work in family law because, according to Judge-2, "people know how hard it is and they know the workload is heavy." For this judge, the lack of desirability of the position is part of what attracts him to it, since it means he is unlikely to be "bumped" by another judge who has more seniority. Despite the relatively low status, this judge feels happy with his role.

> To *me* it's, it's the, you know, one of the best jobs, and one of the jobs that is the most deserving of, of respect for anybody that wants to do it. I mean, I, I have a high – I always had a high opinion for family law judges, so I'm happy to be one.

The Mediators

Four Family Court Services mediators comprised the group interviewed as part of this research. Three were female and one male. Each had worked in other fields of mental health practice prior to beginning their mediation careers. Earlier in their professional lives they had worked in settings including child protection agencies, adolescent counseling programs, hospitals, private psychotherapy practice, probation departments, and sexual abuse treatment programs. The minimum number of years since they began

working as a mediator was 14, the maximum over 20. This was clearly a well seasoned group of professionals.

The mediators interviewed work in two Bay Area counties. In both jurisdictions, the mediators' job involves meeting with parties in advance of a scheduled court date in an effort to help them reach settlement outside the courtroom, eliminating the need for a judge having to hear the case. One county utilizes a "confidential" mediation model and the other uses a "recommending" mediation model.

As with the other groups of professionals interviewed for this study, the mediators were recruited through acquaintance of the researcher. As the Family Court Services mediators are often involved in making referrals of families for child custody evaluations and other interventions such as psychotherapy, co-parent counseling, and special master services, they were each known to the researcher for many years through discussions of cases they had referred. Additionally, one of them had been involved in making a professional presentation with the researcher at a conference a number of years ago. Four mediators were invited to participate in the research and all four agreed to do so. Two of the mediators were from a county that required approval from the Presiding Judge before they could participate in the study. The author applied for permission to interview mediators and judges from that county and it was granted prior to scheduling the interviews.

To preserve confidentiality, identifying information has been eliminated or changed, and mediators are only identified by the designations Mediator-1, Mediator-2, Mediator-3, and Mediator-4. Consistent with preceding parts of the research report, this section of the data is organized within three supraordinate categories: the inner world of the mediators, perceptions of the family court system, and perceptions of the impact of the family court system.

The Inner World of the Mediators

The mediators are mental health professionals whose work is done within the bureaucracy of the court. The integration of mental health services in general, and mediation in particular, is still a relatively new phenomenon in California courts. The incorporation of mediation into family courts in California followed the shift to "no fault divorce" by less than ten years. The mandatory mediation law that became effective in 1981 created a statutory requirement that each county provide mediation services for family court litigants whenever there is a dispute over custody and visitation issues brought to the court. As with any new enterprise, the early years were characterized in part by idealized visions of what could be accomplished as well as resistance to implementation. Mediation was seen initially as a panacea for families coming to the court with difficult custody problems. Initially there were "turf issues" between legal and mental health professionals as many lawyers worried that mediation would cut into their livelihood. Judges had to

adjust to a new arm of the court that was more focused on mental health issues and family reorganization than it was on the strict application of the law. Mental health professionals working as mediators had to learn to differentiate between psychotherapy and the use of clinical skill to help parents reach agreement, as well as adjust to the requirements and procedures of the courts.

The twenty years since mandatory mediation started reveal a maturation process in which expectations were tempered by realism, legal and mental health services in the courts have become increasingly integrated, and Family Court staff have developed and refined their skills for doing this work. The following two sections of this report focus on exploring some of the factors that led these individuals to work in the field of family mediation in the court and how they conceptualize the work they do.

Motivation

Mediator-1 was trained as a mental health professional and an attorney although she never practiced law. She went to law school with a plan that when she finished she would have a career representing children. She took a mediator's job at Family Court Services while waiting to pass the Bar exam, and found a niche there. She feels satisfied that even though she never represented children in court as an attorney, her work allows her to, in fact, represent children. Along the way she came to appreciate many aspects of her role in Family Court Services, particularly what could be characterized as the excitement and grittiness of working "in the trenches." She commented on the her job:

> I worked in child protective service for years before I came here, so I've dealt a lot with really strong emotion and with people who are angry and fearful and I like it. It's kind of real. It's a lot more real than a lot of others things I could be doing. I hardly ever feel afraid of other people, or fearful that things will happen in my office . . . Most of the time I *really* like what I'm doing. I like the process and I like the realness of it. I like the depth of it. And, we're not doing therapy, but we're certainly talking nitty, gritty issues and emotions . . . I like seeing a variety of people and I like working all kinds of problems. I like seeing people from different cultures or who have different ideas.

Later in the interview, she explained further

> . . . Even though I get tired and, you know, get cranky sometimes when I do feel overworked . . . I really do like my job. And one thing I have to say is that after all these years, I have never been bored on this job. And, I think that's fantastic. I don't think too many people have a job that doesn't get boring. My job doesn't get boring.

Mediator-2 came to this work through a very different route, finding a connection between her childhood experience and what drives her in the work. She stated

> I spent my whole childhood trying to figure things out. And, and as an adult, I'm

> still figuring things out all the time. Because once I can figure something out, and I understand it in, in some way then I don't have to worry about it anymore . . . And, I find it interesting. So, that draws me here. The *real* reason I got this job was a job came up, and I needed the money, and I had a mortgage, and it was something I could do. Certainly, I've been divorced. I've lived through some of these things that make, which make me uniquely qualified. But, I'm not necessarily drawn to it for that, you know, I've had enough of that. But, I do like figuring things out, yeah.

Mediator-3 and Mediator-4 described having felt isolated while doing individual and family psychotherapy. They spoke of how much they enjoyed the variety and eclectic nature of working in the court. For example, Mediator-3 described how much he enjoys the mix of activities in his job and how his role involves working with an entire social system. He stated

> You see people, you make an assessment, you write a report, you submit it to the court, you interact with the attorneys – there's a lot of sort of jockeying around, negotiation, a little bit of flexing here and there and then it goes to court and the judge ultimately is vested with the responsibility for making the hard decision and I like that. I like, I like having to deal with more than one piece of it. I like the idea of being able to interact with the whole system in a funny sort of way starting with parents, then moving up to the attorneys, and then the courtroom. And, I,

> actually, really enjoy testifying too. It's sort of the icing on the cake because there you have to really prove your mettle. You know, you have to be able to organize your thoughts, you have to be able to, you know, save all of the hyperbole, you have to be able to weed out any kind of personal issues you may have with the, with the case and that sort of thing in order to, to present intelligent kind of court testimony for the court to use in the decision.

Mediator-4 reported that she "loves" working at the intersection of the fields of law and mental health. She went on to describe some of the more personal reasons she is drawn to this work.

> My parents did divorce when I was very young, so there is that piece that I'm sure I'm re-working on some level. But, then there's always been this focus on kids that I've always had, that I, I, you know, want to work with kids one way or another, so that's my focus for a number of reasons . . . That's where I focus. So, those are my two, you know, personal reasons, that I'm aware of, for, for being in, in this work. The other, the other interesting piece, that's my personal one, is that I've always liked being behind the scenes. Maybe a little bit manipulative. You know, as a kid I did marionettes on strings. You don't see me. I work the marionettes. And, there's something to that in this, both in the working with people and manipulating to try and, you know, shift them into focusing differently. And, then certainly in the courts, you know, trying to get some impression or

something across to judges without being too much a focus of what's going on.

The Work of the Family Court Services Mediator

On the simplest level, the Family Court Service mediators in both confidential and recommending counties try to help parents reach agreement when they bring disputes over custody and visitation issues to the family law court. As noted above, confidential and recommending counties may be differentiated as follows: in counties with confidential mediation programs the mediators make no recommendations to the court if the mediation does not produce an agreement, while in counties with recommending mediation the mediators provide the judge with information and recommendations when parents are unable to arrive at an agreement. The work of the mediator involves socializing parents to the mediation process, often beginning with an effort to educate or convince parents that it is better for them to resolve their custody problems with the mediator and avoid taking the matter to the judge for a decision. Mediator-2 explained

> When they come in, I'm trying to talk them out of that stance of coming to the court to get a decision. I am trying to say to them, look, let's talk here. Let's, let's slow this down. Let's look at this. I bet you can do this yourself. I bet you don't need to be here. I mean, I don't say those words, but that's generally where I'm coming from. You know, a judge makes a decision based on what? *On what*? Law. You know, which is *impersonal*. (Also on) what they (the judge) had for breakfast, their own life experience, what *they* think is right, how they have lived

> their lives – you know, where do they get the right? – I mean they get it, of course, because of the position they're in. Why do people give that power away? They shouldn't be doing that is my feeling, so I work very hard to get people *not* to do that.

One of the unique features of the Family Court Services mediator role is that the people doing the work are mental health professionals functioning within a legal bureaucracy. This arrangement makes for a rich and interesting mix of ideas and perspectives. However, it also generates tension at times. One dimension of this tension was related to the ways they conceptualized their work as having a therapeutic outcome, i.e., one that leads to change in family dynamics and toward healing for children and parents. Three of the four mediators differentiated between helping parents reach agreement on paper, something which they saw as a superficial measure of "success" in the mediation process, and allowing for or fostering a shift in perspective. The exception was Mediator-3 who believes that to the extent the mediator pursues therapeutic goals with the parents he or she dilutes the work they need to be doing. The other three revealed an appreciation for the ways that change can occur on deeper levels for individuals in the mediation process. The mediators tend to see the goals of the court more limited, where the focus is on settling or deciding the issues before the judge. The interviews suggested that the court is perceived as not necessarily understanding the underlying dynamics in the families that create and maintain these disputes. Related to this problem is another tension resulting from the mediators experiencing the courts as showing disregard for their work, or worse

still, failing to understand what they are doing. As was clear in the interviews with the judges and lawyers, they rely heavily on the work of the mediators and respect it greatly. However, it seems that from the mediators point of view, there is unevenness in terms of whether or not judicial officers and attorneys understand and value the work they do with families. From the mediators' perspectives the lack of understanding of their efforts seem to lie in two dimensions: 1) the extent to which they work toward reaching agreement in the dispute versus more far reaching therapeutic change; and 2) the extent to which the court does or does not make use of their expertise. The data relating to each of these two kinds of tension is discussed in turn

Reaching agreement vs. changing lives. Mediators may feel pressured at times to have a high success rate reflected in parties reaching agreement on paper and cases not returning to the judge. At the same time, however, mediators may believe that even if they are successful in getting the parents to agree, unless there is some shift in one of the individuals or in the family dynamics, the agreement may be meaningless once the parents leave the courthouse. The comments of Mediator-2, who referred to mediation as "a deeper kind of work" than just reaching agreement on paper, illustrated this tension. She stated

> I *have* to get something in writing. I *have* to get a plan for the children. So, I try to do those two things. But, the one that *I'm* most interested in is if I can get them thinking in a different way, get them focused in a different way and problem

solving somehow in a way that, that works for them.

Mediator-4 pointed out that a court's decision may not solve the underlying problem in families. She explained that litigants may adhere to the overt requirements of the order (e.g., going to anger management classes or co-parenting counseling) while resisting any more meaningful change. "People can pay lip service to (interventions the court orders) but it's not going to really be effective if they don't want to. If people don't want to follow a court order then they won't."

The concept of helping people genuinely change their thinking or perspective was one that was mentioned repeatedly in the mediator interviews. It seems to be a key element in the way mediators think about their work. Mediator-1 described her work with parents as "intimate" and stated, "I'd like to take them some place else. I'd like to introduce them, you know, there's another door over here, let's try this door." Mediator-4 talked about "helping people redirect some of their energy." Mediator-2 explained "you shift enough that you can get to some sort of truth."

Only Mediator-3 expressed a more cynical view of the matter, pointing out that married couples can be in therapy for years working on issues that have far fewer ramifications than what divorcing parents are struggling with when they come in for a single hour long mediation session. He stated

> . . . the idea that we in such a short period of time under somewhat strained circumstances, meaning the parents are forced into this system often times kicking, that we can blithely believe that we can somehow orchestrate peace, love and understanding with some sort of an agreement that's going to be honored, and is going to be successful, I think it's nonsense. I think that we as clinically trained people, and as experienced mediators, have to buy into the idea that a good portion of the people we see are not going to be served if pressured to reach agreements with the other party. Obviously, if they reach agreements this is a nice thing, but it has to come from them. It can't come from us – and that's the piece.

Two of the mediators talked about the process of change as something that resides more in the client than in anything the mediator does or does not do. In this situation, they described the mediation process as one that facilitates the unfolding of the resolution residing in the mediating parties. Mediator-2 attributed success in mediation to the mediator not interfering in the parents' process. Mediator-3 stated "I think that they have that with them, but it has to be freed. They have to be made to feel safe enough, so that they can acknowledge it."

Mediator-1 recognizes the limits of what can be accomplished but sees the intervention as possibly starting or contributing to a process of change that will continue long after the mediation is complete. She stated

They're coming to us is a beginning of the process. I don't, I don't think we're *the* process. I think especially in the court mediation that we're the *very* tiniest beginning of a process that they're going hopefully go through for years, and years, and years and work at. Cause we often see people who have tiny babies, and small infants and they have ten, fifteen more years to work on this, so if a family comes in and sees me once or three times . . . what we can do together in that two hours in the morning is *so* tiny compared to the fifteen years coming up. It's, it's like a little tear in a bucket. It's, it's not much.

Mediator-4 explained

I think that if there's anything that we contribute it is some education things. You know, being able to move in where they are and, and, you know, help them see something or know of some services, or think differently about their needs at a particular time. Finding a way to work with them so they can hear something. Reducing anxiety by your own demeanor or working with people and being nonjudgmental, you know, so they can tell you whatever they need to tell you and you can work with that. If people are determined to fight they probably are going to do so, but if you can, you know, wedge in anywhere, I mean, I think there's an, a *really* important piece of the people working in the field can play with their...with their willingness to, you know, stand by people in crises through a period of time and try to contain them and all the things that are going on

emotionally, so they can move forward.

The amplification of Mediator-4's response, her explanation of what she meant by "stand by" and "contain," shed even more light on the nature of this work.

> 'Stand by' means really – it, it's not always easy to be with, with people who are very distressed, who are very angry, who, who are very hostile. I think you can continue to work with them and not just throw them out, or say I've had enough, or, or end the session, so that you can stay in the room with angry people and try and let them say what they need to say, but then set some limits on, on what they're, how they're expressing themselves and redirect that energy. So, 'stay with' to me, I suppose, is tolerate and work with people even though they are directly hostile and angry *with you* – and they are. 'Contain' means, I think, when people are in crises they lash out all over the place and they're so anxious and upset that they can't focus. And so to me that means trying to redirect them or help them to get services that are needed or in a way try and work through some of the various things that are going on to redirect them to be able to move forward in their lives so they do not remain stuck in this pocket of intense emotional stuff.

Mediator-2 explained her belief that everyone who comes to court has something that has yet to be heard. An essential part of her job involves careful listening so she can identify that idea or feeling the litigant needs to have acknowledged.

I have to hear each of them. And, I guess when I say that what I'm saying is there's something specific they want me to understand. And, that's probably true of every single person who comes in here. There's something that hasn't been heard before that, you know, either by the other parent, or by anyone else who's listening to them and, and I know that. And, I look for what that thing is. What is it that you've been saying over, and over, and over again that nobody's heard, and I try to figure out what that is. And, you just do it by very careful listening. *Very* difficult.

She also noted that flexibility helps avoid obstacles to reaching agreement.

Also, whenever I come up against a wall with someone, I go around it. I just shift. I go some other direction. I don't keep banging on the wall.

Mediator-1 explained

For some people it's trying to get a more rounded picture that this person isn't really a monster, that this, this woman isn't really a useless slut, you know, that, that there was something that they liked and trusted in this person before and that...that might even be there some place under all the wreckage. A lot of wreckage. And, you see people sometimes almost recognizing each other again. It's almost like they've been running around wearing masks for a long time or

> something and all of a sudden they go, "Oh, yeah. Yeah, I remember you back in 1978" something like that . . . So, I think sometimes reminding people of who they are and who the other person is and having them sort of get that, round out the picture. I think that the biggest thing is when people can let go. I mean, Judy Wallerstein says this all the time and it's true. When they can stop thinking so much about themselves and more about their children. And, that's the crucial point and for many people that doesn't come for a long time, you know.

Mediator-3 expressed a radically different perspective on this work. While he acknowledged that some litigants immobilized by anger or hurt may leave mediation feeling there is some hope for talking and resolving their problems, from his perspective the mediator detracts from their own effectiveness by focusing on the interparental relationship dynamics. He explained

> This is task oriented. We're trying to figure out what to do with the children either temporarily or on a long term basis. And, if we allow parents to explore the other issues we don't do our job. We don't get that piece of work done because almost always the parents, one parent, has left the relationship and the other parent is still kicking and screaming about it cause it was unfair, or it was unjust, or it was unanticipated or whatever. And, so you have that dynamic . . . And, I think that this is where some of my co-workers make a mistake. They sort of open the doors and they allow all of this, these emotions, to rush out. And, and I, it's not to say

> that those emotions aren't important, but they're not important *here* if they skewer the point of the meeting.

Making use of the mediators' expertise. The mediators' comments reflected a range of thoughts about how their work is perceived and used by the courts. At one end of the continuum is the sense that the work of the mediators is highly valued by the courts and that a richer, more effective approach to families evolves from the combined efforts of the two professions. Mediator-4 explained

> There's a sense of working together, and trying to understand and do what's best for clients, and respect each others' thoughts, I find, and respect each others profession. I find it very, very helpful and often tap into the judges and ask them to really help and educate . . . It's very helpful.

At the other extreme is a sense of feeling alienated by the court. For some this is felt to be a painful and frustrating aspect of their job, particularly when they have worked in the courts for years and believe their efforts are disregarded by judges who are new to family law or whose manner of holding the power of the judicial role is seen as arrogant. Mediator-1 stated

> The case loads are much heavier, the violence is much increased, things are much tougher than they were years ago. And, I get really ticked off when it seems like

> the judges don't think that we have anything to share with them. I think we do. And, I also believe very strongly that the judges have pretty much no comprehension of what we are doing. I don't think they have a clue what we do. I don't think they understand what we do in mediation, and I don't think that they understand what we do with our *day* professionally. And, I think that's a *terrible* lack. I think it's terrible. I think we have a much better idea of what the judiciary does than the judiciary has of what the mediators do.

She went on to explain her experience that this is more true of some judges and not at all true of others. Her belief is that judges would have more respect for the mediators if they understood more of what they actually do.

This experience was echoed by Mediator-2 who feels that she begins the work with parents and wants the judges to do a good job finishing the job when it is passed along to them. She wishes the judges gave greater recognition to her competence and expertise, and made greater use of the information she is able to gather about the family. She stated

> I have the feeling in this court that people don't understand what we do. They don't get it. And, in fact, they don't really want to get it. And, they don't really need to get it. But, it's really important what we do. I mean, I think it's really important. You know, when things go right, and you can get someone to settle something, you've impacted a child's life. I think it's *really* important.

Mediator-3 described the sometimes ignored piece of the court consulting with the mediator prior to making decisions in these cases. For example, he described judges making terrible errors through granting ex parte requests for changes in custody based solely on litigants' declarations, without talking with the mediator who was familiar with the family and their situation.

Values

The values of the mediator exert a salient influence on shaping the goals and process of their work. While to some degree the values of the role are circumscribed by the courts, at another level the mediators are professional people who bring the values and ethical codes of their specific professions (i.e., psychology, social work, and marriage family and child counseling each have their own codes of ethics), as well as their own beliefs and values to their work.

Values connected to children and families are particularly influential for mediators. Mediator-1 explained that her work is strongly influenced by her beliefs and values. She expressed a strong commitment to a universal definition of family in which people who care for each other - whether they be two mothers, two fathers, grandparents, whatever - constitute the family unit. Her values about children also influence her work. Mediator-1 related the values she brings to the work about children to her own childhood deprivation. She feels children should be cherished and that they should have "more than the minimum" of what they need to feel safe and flourish.

Values derived from life experience inform one level of the work mediators do. At another level are the values that originate from experience doing their jobs. Usually, these include sensitivity, patience, fairness, and others. Mediator-2 described what she brings to the mediation work, stating,

> I'm very much in there with my own life experience and what I know about kids from having my *own* children, and *also* from work I've done with children. And, just things I know, developmentally, about kids. But, I think I'm very much in there with how I see things, and what I think works and what doesn't work based *a lot* on experience. And, I'll say that to people. *In my experience*, so that if they say, well, no in their experience something else, I, I can be open to that. But, no, I'm very much in there with who I am.

Mediator-3 attributed some of his activity as a mediator in relation to his values about how people should be held accountable for their behavior and what should be done when they behave hypocritically and self-righteously. He explained

> I think that our job is to, to be gentle sometimes, and to be fair as we can, but also to tell it like it is. There's been a rash of, this is labeling. Now, when parents don't do their, when they don't take care of business down at school we have found that they have ADD as do their children. I've had two moms come into this office probably, well, since summertime, two moms came in and said, 'Oh, the

reason I didn't get them to school on time, or the reason they don't do their homework when they're with me, or the reason I didn't know that they had these assignments is because I have adult ADD that's why.' So fucking what? Do your job, you know. I have ADD and I'm mediating your case, you know, I mean, what, what does that mean? What it means is everybody's looking for fucking scapegoats for not doing what they're supposed to do. And, if I feel that that's happening, you know, I feel like I've got to call it, call it out. In the old days we felt that if somebody filed a petition, you know, if somebody filed a petition and they wanted a change in the order that somehow there should be some change . . .that somehow we were supposed to do something different, or, or make some sort of an adjustment. And, I'm thinking, you know, if the old situation is the best thing going *who cares* if they drop $5,000.00 on a retainer? If it, if the situation doesn't warrant a change then don't recommend a change. But there was, I think . . . under this umbrella heading of being fair to all people, being, you know, understanding and fair, and you know, doing what they want to do to some extent so they don't feel cheated by the system. I think that you cheat them by giving them what they want if it's not coming from a good place. And, and I think it's my job to, to let the court know when I think that's happening.

Certainly one of the values articulated by the mediators in this study was that they should be fair in their work with parents. This was a particular challenge for the mediators, in a way it is not for the judges or attorneys, since the mediator's work puts them in direct

contact with the raw emotion of the litigants and their role is to be a neutral in the process. The judges' role generally insulates them from direct contact with the powerful psychological reactions of litigants. The attorneys have direct contact with the client's intense emotion but the attorney is an advocate for his or her client and so does not and cannot maintain impartiality. However, the mediators (and child custody evaluators) work intensively with the families and are required to be fair and unbiased.

Limits of Family Court Services Approach

The Family Court Service mediators described having learned to work more effectively within the court system, including understanding at deeper levels what the courts want and need, how to meet the needs of the court more effectively, and how to work with the courts in ways that help attorneys and judges more fully and realistically comprehend what they can and cannot accomplish in relation to meeting the needs of children and parents involved in custody and visitation disputes. Their comments illustrated their awareness of the limitations of this work in two dimensions: 1) not all individuals can benefit from mediation, and 2) mediation is a brief intervention that leaves many questions unanswered.

The mediators described a process of developing diagnostic skills in relation to making a determination of who can benefit from mediation and who cannot. It seems generally recognized at this point in its development that mediation is not an intervention that is useful for all individuals. While the value of self-determination has always been a cornerstone of the mediation approach, over time the idea that families are in the best

position to make the decisions that will govern their own fate has come to stand alongside a realistic understanding that some people cannot effectively utilize a facilitated decision making approach. In some cases, the welfare of children cries out for a judicial decision so that the fight between parents is stopped and there is some measure of structure and organization provided for the children. Mediator-3 explained

> When we first began – there was – it was implied certainly by our director and *among* ourselves we felt that it was essential to really do *everything* in our power to get an agreement. This was considered a victory. And, if we were forced to make a recommendation somehow we had failed. And there was a tremendous amount of pressure. There are still people on the staff who will sit with a family for two or three or four hours *hoping* that they will agree to things. And . . . it is reassuring for me to know that it's not my lack of skill that prevents a lot of these families from reaching agreements, but rather it's something about them that prevents them from looking at the picture a little bit larger, or being able to see the value of the other parents role in the children's lives. Narcissism is, is so prevalent in the people who come through here. The thought of giving something up for the good of the whole is so alien to them that they can't negotiate, they can't, they're impaired, they're unable.

Mediator-4 explained

> There's times that people have to be told, 'This is it. You have to do this. You have to move forward.' You know, when they can't make decisions and won't make decisions, it does help, you know, (if someone can say), 'This is it. That's the end of that. You got to do this.'

A second dimension of the limitations of Family Court Services mediation lies in the inclusiveness and reliability of the reports and recommendations that mediators in recommending counties offer to the judges. The mediators comments reflected both the insight they gain from their work with families which they share with the court as well as their awareness of the limits of their knowledge about the litigants. Since they spent relatively little time with parents, and less if any with their children, they seemed to understand and appreciate the fallibility of their impressions. Only Mediator-4 reported that she routinely sees children. The other three see children occasionally. Mediator-3 articulated the limits of knowledge from his position

> People have these lives and we see this little piece and sometimes it's dressed up, and it's fluffed up, and it's glamorized, so we like them. We see them in their best light. But, I think that there's a whole bunch of stuff that goes on that we never have a clue about. We can just sort of take what we have and try to do the right thing with what we have.

Stress in the Work

The work of the Family Court Services mediator can be highly stressful. A great deal of this stress comes from working with large numbers of emotionally distressed litigants for relatively brief periods of time when the dispute between the parents often clouds their perception of their childrens' needs. Additionally this work takes place within a court bureaucracy that generally focuses more on making decisions and orders more than it does on providing clinical services designed to heal hurt families.

At times the mediator may start to feel overly engaged in the wrangling between the parents. Mediator-1 described her response to sitting with parents who are engaged in what is clearly a repetitive pattern of arguing that they have done many times before. She stated

> There are some days when I feel sort of 'smusched,' and sort of small and tired. But, usually I don't *finish* a mediation feeling like that. That usually comes at some point in the process and I pull myself back up and, you know, I'll say, 'Oh, I'm getting very small. I need to not do this.' Or, 'I'm getting caught up in this thing and I don't want to be caught up in this thing.'

Sometimes stressful reactions are elicited by parents who seem to not really care about their children but who are arguing for custody or time with the children as a strategy to reduce or eliminate child support. Mediator-1 noted that in relation to this type of parent,

"It's hard not to get irritated. It's hard not to have a personal response to that and start defending the kids and fighting with (the parent). It's *very* difficult." Mediator-3 explained how he sometimes faces his own powerful emotional responses to litigants, stating,

> There are people who come in here – *I despise*. I mean, they are the most repulsive people. But I don't let that prevent me from giving them time with their kids, you know. Some people just really rub me the wrong way, but I, I separate that out. Now, if I think that their behavior or their pattern of behavior can have a negative influence on the child I'll say that in the report.

He seems able to separate his personal responses from his role so that he is able to be fair and to support children maintaining relationships with both parents. He also does not let the fact that he has a negative personal response to a parent interfere with his informing the court that there is a problem with his or her capacity to function as a parent.

Mediator-2 described the cumulative effect on her of doing the work. She reported that she has an intense level of involvement with the parents she sees and that their emotional reactions are so powerful that she "can't hold it." She explained

> That's why I forget in the afternoon who I see in the morning because you *can't hold it*. You know, I'm not in their family [laughing] for god's sake. I have to get

> in and get out . . . It's very stressful and by about July of every year, I'm a total basket case. You know, you *can't* keep doing that kind of work and not pay a price. I mean, the emotional investment is intense. And I'm pretty good with boundaries, and I'm pretty good at, you know, letting it go, and it's not my family, and I don't *worry* about them, and I'm not – I don't foster the dependencies, you know, I sort of watch myself for – I don't really care. In the end, I don't really care [laughing]. You can make whatever decisions you want to make. It's just that if I can be helpful to you, I will.

Mediator-3, commenting on the level of disturbance he sees in some of the parents, stated, "You just, no matter what the custody order is, you *just know* in your heart that it ain't going to work out. And, that's *the hard part*, that's the hard part." He also referred to "becoming numb" to the "tremendous amount of psychopathology" in the parents that come through the court.

The stress related to the cumulative effects of working with parents embroiled in custody litigation can take a number of forms. For Mediator-3 there appeared to be a level of counteraggression directed toward parents who he determined were narcissistically damaged and who were hypocritically arguing for their childrens' best interest while covertly indulging themselves in carrying on the fight with their former spouse. He stated

> When I see the kind of, you know, this kind of malicious, you know, sort of self

> serving stuff that just sweeps the kids up in a drag net – I don't have any compassion for these people. I really don't. And, I think they should take their lumps, however those come.

For Mediator-4 the stress of the job comes from the demands of the pace at which one must perform as well as the nature of the problems in the families. She explained

> The emotional intensity of, of, of *this* setting is much more demanding, and pressured, and fast paced than private practice . . . because the turnover's so quick, and judgments that you're required to make, or the assessments of people's functioning have to be so much quicker. You know, you have very little time to try and, and help formulate a plan that really affects kids life, so you have to be very, very quick and you're meeting many, many deadlines. You're meeting deadlines that have to do with the clients own agenda and various deadlines in my work and, of course, the demands of the court – court dates and those deadlines set up by the legal system . . . The times when there are very difficult situations for clients are hard. It's hard to put it all together, and to think it through, and to, to formulate what you need to do in a brief period of time, so it feels stressful. And, when there's too much to do, as in any, any job, it feels not overwhelming, but you just wonder how you can get through it all. But, for the most part, I think I do this work because I like the interaction, and the complications, and the, and the pace of it. (But) it takes its toll. I know by the end of the week, and I'm not *alone* in

saying this, I don't want to answer the phone, I don't want to talk on the phone at home. The weekend's, *my* preferable weekend is to carve out some space, which is not realistic with a family, where I would be totally alone for recharging. But, it's – you know, it takes its toll and I think everybody who works in this field could say the same.

Mediator-4 explained also

> The more intense the clients emotions are, whether they have depression or anger or whatever, the more it draws out of, it sort of wipes out, or, or draws out the energy from, from the person doing the work . . . They (the mediator) may come out needing to, I need to say, take a break, think of something else, find a way to shift gears to get out of the having been locked in that intense cabin of those people's lives.

Coping with the stress of the work. Given the difficult nature of the job they perform what do mediators do to cope with the stress? The comments the mediators made in relation to this issue suggested that some ways that mediators defend against overwhelming stress are adaptive and some are maladaptive. The adaptive reactions are those that allow the mediator to gain some psychological distance from the work without sacrificing their empathic connection with the parents and children they are seeing. For example, Mediator-1 described paying more attention to how she is feeling and to the

source of her feelings, being aware of her own vulnerabilities, and using her self knowledge as a tool to understand her clients when she is feeling stressed. Mediator-2 described how she questions herself to understand why she is feeling angry when she begins to feel that way toward a parent in the session. She explained that she often does not think about her own reactions to parents but that she simply immerses herself in the work, as if she unconsciously loses herself in her job. She stated, "I am concentrating on working on a job. I'm doing it. Now clearly a lot of it's going in to me because I'm so tired afterwards. You know, it's seeping in somewhere, I'm just not feeling it." A number of the mediators mentioned humor as a way of coping with the stress. Some talked about the need to set limits with parents who appear to be abusing the process by arguing incessantly and not making honest attempts to resolve differences and settle disputes. All of the mediators talked about using their co-workers as a source of support, including clinical consultation and comradery. The four mediators in this study came from Family Court Service departments where there had been a great deal of stability among staff over many years. They all seemed to appreciate the enduring connections they had formed with their colleagues and with others in the family law community. In this respect the mediators seem to be, as a group, the most stable, least variable cohort of individuals in the family court system.

Maladaptive reactions are those that give the mediator the needed psychological distance at the expense of maintaining empathy with the family. This was noted through denial, insensitivity, judgmental attitudes, malaise, or overtly hostile behavior. It is reflected in

punitive wishes revealed in statements such as, "If somebody is a complete jerk they should pay their dues," a haughty indifference as suggested by comments like, "I no longer fear what clients think about me" and "They need to be dressed down in a public forum like the courtroom . . . when they come in there and pretend they are concerned about the best interests of their child."

Success and Failure

As with the other groups of individuals included in this study, the mediators ideas about what constitutes success and failure in their work were used as a lens to help understand how they think about the family court system and their place in it. In general, success was associated not so much with percentages of agreements reached but with helping parents shift perspective and become more flexible in their approach to the problem that brought them to court. Failure was linked to poor outcomes for the children, such as losing a relationship with a parent, or developing a pattern of delinquency.

Success. None of the mediators included in this study defined success in their work in terms of the number of agreements they are able to help parents reach. In fact, it was only Mediator-2 who specifically identified reaching agreement as one of the criteria for successful mediation. For the most part, the mediators conceptualize success as a process of helping parents shift from rigidly held, hostile positions where they are focused on the

problems with their former spouse to positions where they start to more realistically perceive the other parent as a real human being and are able to distance themselves from the conflict enough so that they can begin to focus on the needs of their children.

Mediator-1 explained, "I think success in mediation comes when people start shedding their old skins. It's when people begin to stop playing the old tape. They begin to realize that there is something else than what they've been doing." Mediator-2 reported that many people reach agreement but she does not know whether or not the intervention was successful since she seldom hears back from people unless they come back to her again for help with their problems. She stated, "I know that we get an agreement. I don't know how meaningful that agreement is. I don't know, it's hard for me to judge how deep it goes and how it affects behavior outside of here." Mediator-3 believes his work has been successful when parents who come into the office immobilized by hurt and anger, and then leave with some hope that they will be able to talk and work things out to some degree. He explained

> I would define success is if they leave the office feeling not necessarily better, but reassured. Reassured that, that it's not as awful as they think it is because those people who say, well, I hadn't thought about it that way, or, you know, I probably shouldn't, you know, leave all those emails calling her a whore . . . You know, when people say that, when they have these moments where they think, yeah, that was inappropriate or really *I have* contributed to the problem. I think those are my

success stories . . . even though those may be cases where I am writing a recommendation that covers the whole schedule.

Mediator-4 had trouble recalling the successful cases, noting that she likely never saw them again. She explained that in her view " . . . Success would mean getting the parents to be able to focus a little differently from their own needs and, and, you know, focus on the children again."

Failure. In response to questions about a case that was a "failure" and her thoughts about what contributed to the outcome in that case, Mediator-1 identified a case that had elements of both success and failure. She explained that there is an expected progression of visitation in cases when there is a concern about a parents capacity to spend time with a child safely. It begins with supervised visitation, after which the parent begins taking the child out for a few hours on his or her own. Eventually there are day long visits but not overnights, then overnight visits begin, etc. In the case example of a failure case she thought of, one of the parents wanted to take the step to begin overnight visits but a custody evaluator found reasons for concern about the father's capacity to care for the child for that length of time. The father reacted to this recommendation with rage and retaliated by ceasing all visitation with the child. Mediator-1 explained that the case was a failure in the sense that it did not follow the usual progression, the father continued to be as hostile as he had been, and the relationship between the child and father was threatened. However, she thought it was also successful in that the system permitted the child's needs

to be seen and the court was able to resist simply moving on to the usual next step in the process given that this was not in the child's best interests.

Mediator-4 offered an example of a failure in describing a case in which the child grew up amidst parents maintaining a high level of conflict with each other for years after the divorce. There was a good deal of money in the family which the parents wrangled over continuously in court. Mediator-4 noted that the parents seemed "to thrive on these disputes." They were so antagonistic toward one another that the child was unable to remain psychologically bonded with both of them at the same time. He had to pick one or the other, and then switch. When he was in latency he chose to live with one parent while alleging that the other was abusing substances and very angry. A few years later the case returned to court and the tables had turned with the child making the same sort of allegations about the one parent he had made earlier about the other. He was an adolescent by that time, failing in school and heavily abusing drugs. He had been empowered by the parents, and ultimately by the mediator as well since he was so convincing, to make decisions about where he wanted to live, and it had not worked.

Mediator-2 and Mediator-3 did not respond to the issue of failure in mediation cases.

Perceptions of the Family Court System

Parents

The mediators' comments reflected a great deal of insight into the emotional lives of parents they see in their offices. This level of understanding of the parents' experience could only come from an intimate and sensitive way of knowing and trying to help parents in their work. In responding to questions about the emotion they encounter in working with parents in mediation, these mediators included grief, rage, anger, depression, sorrow, sense of failure, frustration, worried, anxious, jealousy, and hatred. There was a high level of correspondence between their perceptions of the parents and the parents experience as they perceive it themselves. The mediators also noted that from time to time they work with people who are relieved to be out of their relationship and that they see a sense of happiness about moving on.

Mediator-1 commented eloquently

> There's a lot of very heavy emotion. A lot of anger, a lot of feelings of failure, a lot of sorrow and I think fatigue. It's almost like soldiers coming in from the war. People are just exhausted. They come stumbling in like they're coming off a battlefield. You know they're, *they're so tired*, and they've tried *so* hard and here they are and they're *embarrassed* and they're angry. I think that's a lot of what's happening . . . I think that when people come into our offices sometimes they're probably their smallest self, they're real small, and they're real tired, and they're

> kind of like, like little walnuts rattling around in their shells, you know. I mean, they're just petrified with the pressure of the money stuff, the family stuff – all of that. And to bust out of that little shell and begin to consider a future that's different from the past, and to *really* look at the person, to look at that other person and see them as a human being with needs too. It's hard. Most, most people aren't able to do most of those things. But, some people are, are ready to go for it. They're ready to try...and their focus is on the kids.

Mediator-2 described how parents come to court with the hope that a judicial decision will alleviate their suffering. She stated

> People are in *immediate* crises. They come in here, they come into the court knowing that the court's going to make a decision, *hoping* that the court's going to make a decision that's going to make things better. And, they usually believe that's going to happen. The people who come to court are in a position of giving up their control to someone else with the *belief* that this someone else is going to make a better decision than they do or *resolve* an issue that they can't resolve.

Attorneys

The mediators' perceptions of attorneys suggest that in general lawyers are most helpful when they communicate well with their clients, settle the situation down rather than contribute to inflaming things further, focus their clients on the needs of the child, and

prepare their clients for what to expect in mediation. It seems that most of the attorneys who are part of the family law section of the county Bar Association practice in ways that reflect an understanding of the needs of the children and that help their clients work towards settlement of the case. The mediators' comments about the attorneys suggest that problems are more likely to arise when attorneys come to a family law case from other areas of practice where they do not understand that family law is oriented toward problem solving, compromise, and settlement, or where the lawyer has a strong political advocacy agenda. Despite their generally positive regard for the attorneys practicing family law, the mediators shared some comments about difficulties they have encountered with lawyers. For example, Mediator-1 noted that

> Sometimes the attorneys are fighting so much when they come in that you have to work with them before you can work with their clients. I think that happens particularly with people who come from sections of the bar (other than family law), especially criminal attorneys. People who are *really* adversarial and litigious and they *don't* get the idea that in family law we're trying to work together, that it's a collaboration. They just don't get it and sometimes that's very difficult . . . The family law section of the bar is pretty much tuned into all this stuff. But sometimes you'll find attorneys who will identify personally, *incredibly*, with their client. And, they start talking about what *they* want. 'They' meaning, 'they the lawyer,' but also, 'they' meaning 'they the client.' They can't separate and that gets very difficult . . . The attorneys are thinking of what's either in their own

interest or the client's interest and the kids are getting lost in the dust.

Mediator-2 related a story that reflects how the attorney's motivation to win can interfere with the client's willingness and need to settle the case.

> See what happens is the mom goes out and talks to her attorney, the attorney fogs up her thinking and then you've got a mom who comes back – 'Well, I never really wanted to do this.' I had one case where the attorney had met the mother in court that day, prior to the court hearing. I spent an hour and half with the mother and the father, got a full agreement and when I showed the agreement to the attorney she says, 'Oh, my client can't agree to this.' In the lobby. And, I'm standing there thinking, *What do you know?* You met her for ten minutes. I sat in the room with her and, you know, the other parent and she agreed with this, and she blew the agreement sky high because the mother is going to follow her attorney.

Mediator-3 expressed a general sense of satisfaction about his interaction with attorneys. This mediator reported that he has been able to establish collegial relationships with a number of attorneys over the years. He believes they trust his judgment and his sense of fairness. He explained,

> (Sometimes I still have a problem) when I run into a new attorney who doesn't have a lay of the land or sometimes attorneys from out of the county where they

do things differently in their county, or people who are carrying a strong political agenda. Sometimes there are clashes, but with the large bulk of them it's pretty smooth, it's pretty even. And, it's, it's good jousting too. They don't just rubber stamp what I say. I have a lot of discussions with attorneys in my office and they try to wheedle me, and convince me or whatever. There's a lot of give and take still, but I don't feel the, the antipathy that was the case when we first got going. There was just a tremendous amount of hostility and an assumption that we were the enemy and that's no longer the case.

Child Custody Evaluators

The mediators may look to custody evaluations when there is a sense that a psychological problem interferes with the parents' ability to focus on the best interests of the child in the mediation, and which therefore rendered the mediation useless or otherwise put the child at risk. It was in these circumstances it seemed that the mediators felt a sense of relief that another mental health professional was going to look more deeply into how the family functions.

The mediators were appreciative of the work done by child custody evaluators. They particularly valued the level of detail and comprehensiveness provided in well done custody evaluation reports. They also seemed to like when the evaluator worked with the

family to some degree in sharing findings, trying to reach settlement, or remaining available to do follow up work with the family when that is necessary. They liked reports that substantiated conclusions with numerous clear examples. They reacted positively to evaluation reports that contained a minimum of jargon that could make it difficult for people other than mental health professionals to understand. They recognized that the reports needed to reflect a sense of fairness and balance between the two parents in order for it to stand up in court.

Mediator-3 commented on the usefulness of child custody evaluations from the court's perspective.

> . . . You have the opportunity to look at this eight different ways, see it more than once, do the psych testing which may either challenge a clinical observation or support it, hopefully support it. And, so you have, you are giving the court this immense, immensely important tool if you do your job right.

Some custody evaluation reports the mediators found less than helpful were ones that were poorly written, failed to connect the data to the conclusions and recommendations in a logical way, and omitted to provide a specific, detailed plan for the family. Mediator-2 noted that child custody evaluators can create problems if they are unclear about the role they play in the case, particularly if they switch from an evaluation to a therapeutic role with the family.

Several of the mediators noted how difficult they feel it is to do a child custody evaluation and to defend the report in court. Their comments reflected an understanding of the ways in which an adversarial attorney, or even just a strong litigator, will take the evaluator into court and attempt to undermine not only the evaluator's work on the case but their overall credibility, as well. Mediator-3 explained

> Spending hours in court and sometimes more than one day and, and it was just, you know, so toxic. It was, you know, you, you make the good faith effort to sort of read the situation, you do your testing, you do your, your interviews, you make your best judgment and, and then you have somebody trying to pick it apart, somebody trying to knock it down or make it irrelevant because of the spin of a phrase, or the choice of a word, or something like that . . . I wouldn't want to do it because I think it's trivialized to some extent by a good attorney. Bad attorneys are actually probably more promising when there is an evaluation order than good ones because a good attorney, especially in a high profile case where people have lots of money, or they have community status, a good attorney will just scratch, and pick, and, and try to break that, that evaluation if it doesn't flatter his or her client. And, and I think that is – that makes, that would make the evaluation job for me very unsatisfying because it assumes that you've done something, sort of, with ill intent.

Mediator-1 commented that child custody evaluators seldom became aligned with one

party in a custody case in the way attorneys sometimes do. She explained that custody evaluators are usually aware of the way conscious and unconscious influences can operate in human relationships of this type. This developed self-consciousness, as well as the contact with both parents, helps evaluators avoid the problems of overidentification with one party or the other.

Judges

The mediators had many thoughts and feelings about the judges. They expressed appreciation for judges who communicated with them respectfully in ways that valued their experience and expertise. Some of the qualities mediators admired in judges included compassion, empathy, dependability, predictability, punctuality, timeliness, and responsiveness. They valued judges who were graceful about cutting off people who were talking excessively in court but they also appreciated judges giving people an opportunity to speak. The mediators wanted judges to make decisions when necessary but also to be reflective about their work. They did not like judges humiliating people in court and agitating them, especially when the judges sent them right back to the mediators office to work out their problem.

The idea that judges should want to be on the family law bench came up in a number of the interviews. Mediator-3 noted that family law requires value judgments more than legalistic ones, and that many judges are uncomfortable with that type of assignment. He added that judges who want to make a name for themselves to advance in the judiciary or

politically are usually not interested in the family law department but may go through it for a year or so before they can move to something more desirable. Other mediators commented that one of the characteristics of family law judges that is important is for the judge to want to be in the family law department.

The mediators were appreciative also of the judges' intelligence but they felt it was important that he or she not flaunt how smart they are. The problem of judicial arrogance was mentioned repeatedly.

Mediator-4 expressed dismay about judges interviewing children and adolescents. Her concern was based on her belief that children generally believe that if they talk with the judge they are going to get what they say they want. Related to this is the problem that judges, who are not trained in child assessment, are more likely to focus on the verbal content of what children say and not be cognizant enough of how developmental issues and family dynamics might influence what the child is saying. Finally, she noted that judges may have trouble understanding how the responses they get in their talks with children and adolescents may be impacted by the fact that the child or teenager is talking to a person who has so much power over their lives.

The mediators also expressed an appreciation for the judges role as decision maker, differentiating it from their role as mediator. This was true in the interviews with mediators from both recommending and confidential counties. In fact, Mediator-2

explained that it was critical for the judge to remain in role and not try to mediate with families. She described one incident where the judge attempted to mediate and lost his distance from the family. The father reacted strongly to the judge and said things he would not have said otherwise. When the judge resumed his judicial role and made a ruling, the father lost ground in terms of time with his child, most likely due to his behavior with the judge during the attempted judicial mediation.

Mediator-2 explained

> What the judge tried to do is get them to agree. And, of course, what happened was at first they're real respectful. This is a judge. It didn't take long for their gloves to come off and what was sitting in front of us at that point was what had been sitting in my office. Exactly the same dynamics got repeated. Well, the judge didn't handle them quite as well as I did because the judge is in a position of having to make a *decision*. I'm in a position where I can say, 'Look, this isn't working. Let's write it up. I'll send you to the judge.' I can stop the process, the judge *can't*. The judge has to make a decision. And, when it got to that point the, one of the parents was *so* angry and disappointed not getting *his* way, you know, that he jumped up and was leaving the courtroom. Now, that really presents a problem for the judge because the judge hasn't made an order yet, right? And, I thought, 'Oh, my God, what are we going to do now?' Luckily, the judge handled it. The judge was able to get him to come back to the table. And, they sat down

> and then the judge had it that they, that a decision needed to be made, and *made it*. Now, the unfortunate thing is in that interchange the father said some stuff that I'm sure after he left he would take back. And, he cut back his own time with the kid which was a mistake and the judge ordered it . . . But, you know, not up to me to tell a judge how to behave.

The mediators were forthcoming about the qualities they think the judge needs to have in order to do his or her job well. Chief among these was respect for people in the courtroom. Mediator-1 stated

> I think that having a respect for people in your courtroom, I really have to say, is one of the biggest things. Because when I've worked with judges who don't respect the people in their courtrooms it is *blindingly* obvious. And, people become really resentful and it's hard to work with people who are angry already by the court setting.

Sometimes the power of the judge can interfere with the effectiveness of the person in the judge role. This is a phenomenon identified and discussed in the interviews with the judges. It is interesting to note that it is not ubiquitous and to see how it can look through the ideas of the mediators. Mediator-1 noted

> There's sometimes an *enormous* discrepancy between the way a judge will see

himself or herself and the way they're perceived by other people, absolutely enormous. It's like the emperor and his new clothes. There are people strutting around naked, fairly often, who are really happy about their outfit and it's just a shame, you know . . . Judges have a lot of power . . . They are generally fairly narcissistic and self-involved. It goes with the position. If you put on a robe and everyone bows and scrapes and says 'Your Honor,' and everybody stands up when you walk in, then you have a lot of power. I've seen a lot of people get carried away with themselves. So, it sometimes comes with just the fact of being a judge, I think. But . . . I've worked with some excellent judges, some wonderful judges who didn't lose track of what it meant to be human, didn't lose track of caring for people or about people, especially children.

She went on to state

I'm struck on thinking about Jim Carey in "The Mask." He put on the mask and he became a certain kind of person. And, he became this green faced, zippy, zany kind of wonderful guy in a lot of ways. Whereas the other fellow put on the mask and became this really snarly, werewolfy, useless, violent, evil guy. I think the robe is very much like the mask. And, some people have put on the robe and become *more* themselves which was caring, and intelligent, and participatory. And, some people have put on the robe and become arrogant, and blind, and dictatorial. I think it's really fascinating.

Mediators' Perceptions of the Impact of the Family Law System

The mediators were insightful observers of the impact of the family court system on litigants as well as on the people who work in it. Their training in family systems theory and group theory appear to provide a basis for understanding the operation of a complex social system such as the court. Experientially, their role puts them at the boundary between the lawyers, judges, evaluators, and litigants so they have a unique perspective in that sense. While the evaluators are also mental health professionals working with the courts, the mediators actually work in the court on a day to day basis and have much more contact with attorneys and judges, giving them a closer view of interaction in the family court system.

Checks and Balances

Mediator-3 discussed the inherent "checks and balances" in the family court system. Noting that he provides suggestions or recommendations - not orders - to the court from his work with parents who are unable to reach agreement, he explained that the judge can rule differently on a case if the recommendations do not stand up to scrutiny. He explained that litigants and their attorneys have a right to question him in court about his recommendations and why he made them, and that if the court is convinced he did not make a good recommendation the judge will not go along with it.

The Court as a Forum that Can Keep the Fight Going

A number of the mediators commented on their perception of how the court may unwittingly provide a forum which litigants, particularly ones with narcissistic disorders, sometimes exploit for their own purposes. Mediator-4 was most articulate about this problem, noting that some people with this type of character "glow" in the courtroom in front of the judge since they are so self righteous and so much looking forward to an opportunity to tell their story in a public forum where all the attention is focused on them. She explained eloquently

> There are people who thrive in that, that feeling of having a day in court, telling people how misused, they've been used, of having that arena. They feel very important. It *justifies* their rage, it *justifies* their position and they know it hurts the other parent and it's going to cost them money. It's going to cost them time, and they're each going to get time off work. They can *get* to them, they can *demand* an interaction with the other parent that they can't demand any more in another area in life.

The problem, she noted, is that while this is occurring the childrens' needs can get completely lost. She pointed out that being involved in the adversarial system hones fighting skills and deflects attention from children. Mediator-4 reflected on her own experience testifying in court as a way of illustrating her thinking about how parents become preoccupied in the adversarial system, making it extremely difficult to focus on

finding solutions that work for their children. She stated,

> If you're in that witness box, or if you're on the stand or whatever, you know, I'm thinking not just about the child. I'm thinking about how to get a point across, or, or what procedurally can I say, or I can't say – I mean, you know there's all sorts of things going on. You don't want to be a total ass. You know, you're working with people and you want them to respect you. You know, and, and I'm only a minuscule part of this, so I can imagine what people feel in there that they're dealing with some of the things we've talked about – their power, their day in court, their glory, their, you know, they're upset. I think it really deflects people from what they should be focusing on. It can be a huge problem in that way I think.

She went on to explain how litigating in court can keep parents "stuck at a moment in life instead of moving forward." It puts their focus on the insults and injuries they sustained through their relationship with the other parent, and keeps them in a mode of trying to prove the other parent was at fault and vindicate themselves. This interferes with their ability to shift focus to their lives after separation and to the needs of their children.

Impact of the Judges on the Family Court System

Mediator-2 observed the importance of maintaining the differentiation of roles between judge and mediator. She was able to articulate, through imagery, how she "wades through

swampy terrain of litigants' emotional lives" while the judge needs to be kept separate from this so he or she can function in their role and make rational decisions in the case. In a way, this difference in focus leads her to feel separate from the court, as if in her work she is doing something so different that it is not understood by the court. She explained

> It's like walking through muck, and mire, and it clings to you and you can't get it off. That kind of thing. And, that's what judges *don't*, and I wouldn't expect them to, don't understand because they don't – you have to do it to know it. Yeah. And, that's why I feel separate, I think, from them . . . But, actually, on that other level – the conscious level – we are all intertwined and working together, but on that unconscious level, they don't even *know*, and I don't expect them to know, but *they don't know* . . . But, you see, I don't think it's even good for them *to* understand it because it's too much of a burden. They have to make a decision. They do not have the luxury of walking around in muck and mire. That's why I don't want to make a decision, I know too much. I really do. I could make a decision to really *hurt* you because *I know* something about you. But, they *don't*. And, I think they need to stay out of it. They really do.

One of the ways judges are perceived by the mediators as influencing what happens in the family court system is through the lens of how they administer their courts. This issue arose on two levels in these interviews. On one level it was reflected in thoughts about how the judges behaved toward court staff, particularly in terms of honoring their

boundaries and limits around work hours and other conditions of employment. Mediator-1 explained that the staff needed to feel that the judges were protecting their time and not asking more of them than they were able to give to the court.

The second level was reflected in how the law is interpreted relative to whether or not the judges control the flow of cases into family court. Mediator-1 noted that the statute requires a showing of a change of circumstance before a custody decision can be changed but that the judges overlook this fact and regularly allow cases to go forward in the absence of any significant changes. This creates a situation in which parents are able to continually petition for new custody orders and allows them to repeatedly return to court. This mediator explained that she believes the problem exists because judges tend to be concerned about having their cases go up to the appeals court and do not want to risk being criticized for not allowing someone due process.

Impact of Attorneys on Litigants in Family Court

The mediators were all aware of the significant role attorneys play in family court. While many litigants are unrepresented, the ones that have counsel are subject to a range of influences. All the mediators differentiated between 1) attorneys who are helpful to the settlement process and give thought to the needs of the children in the family and 2) those who are purely advocates for their client's position and who take inflexible, "winner take all" positions. It is the former who are seen as part of the team, part of the solution in complex family law cases and the latter who exacerbate and inflame already difficult

situations.

Mediator-3 offered an some insight into the relationship between the business of law and the family court system. He noted the proliferation of attorneys in California over the past twenty years and explained that many litigants are hiring lawyers now when in the past the lawyers would not have taken some of these relatively minor cases since they were busy with more substantial matters. The fact that attorneys would represent litigants in cases that would have been handled in the past through someone simply providing some advice suggests ways that the business of law may contribute to a more litigious atmosphere in family law.

The Child Custody Evaluators

The courts rely on child custody evaluators to increase understanding of and address concerns raised about families in high conflict child custody cases. The evaluator's work is directed toward identifying the needs of the children and the parenting capacities of the adults. In the evaluator's written report to the court, he or she presents an integrated picture of the functional capacities of children and their parents. For the children, the evaluator assesses numerous factors including developmental status, attachments, anxieties, concerns, wishes, strengths, coping capacity, and reaction to the family situation. For the parents, the evaluator focuses on overall psychological functioning, understanding of the child's needs, capacity for meeting the child's needs, ability to support the child's positive adaptation to the divorce including his or her relationship with

both parents, and any other factors relevant to parental capacity. The evaluator's work is oriented toward using a psychologically informed approach to elucidate problems in the family, and to help settle and resolve the custody dispute. Ideally, the evaluation report offers a plan on which a judge could base an order designed to move the family out of litigation and toward a plan for resolution. This being said, the fact is that most cases sent to evaluation settle after the evaluation: either the parents agree on their own or they are helped to reach an agreement that accords with the evaluation recommendations with the help of counsel, the Family Court Service mediator, or the judge in a settlement conference. Only a few cases return to court post-evaluation and require a trial or hearing.

The work of the child custody evaluator involves working intensively with a family usually over a period of two or three months. It is not unusual for the work to consist of interviews with both parents together, each parent separately, the child individually, and the child with each parent. A battery of psychological tests may be administered to the parents, and in some cases to the child or even step-parents, as well. Step-parents, as well as live-in partners, are often included in the interview process, as are grandparents or other relatives involved in caring for the child. The evaluators often visit the child at each parents home, talk with his or her teachers, speak with any therapists involved with the family and with anyone else who might shed light on how the children are functioning and on particular problems raised in relation to one or both parents. The process aims to provide a fair, balanced, comprehensive view of the child within the context of his or her

family and community.

Mental health professionals who conduct court ordered child custody evaluations occupy a unique role in the ecology of child custody conflicts. Unlike the other mental health professionals in the family court system, specifically the Family Court Service mediators, custody evaluators[2] do not work in the court and are not county employees. They do not have daily contact with the judges, attorneys, or Family Court Services mediators. They also do not work with the large numbers of families seen by the Family Court Services mediators. They spend a great deal more time with each family than do court-based professionals. Their involvement in the court process is through an order in which they are appointed as the court's expert[3]. Individuals who conduct a custody evaluation under court order conforming to applicable statutes enjoy quasi-judicial immunity for their work on the case. That is to say they cannot be successfully sued in connection with their work on the case unless they do something egregious. Once appointed by the court, the responsibility for paying the evaluator for his or her services lies with the litigants. The fact that evaluators are in private practice makes them, like attorneys, dependent upon building reputation, establishing themselves, and maintaining a presence in the community so that referrals are maintained. One of the rewards of the work is that evaluators are able

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[2]This refers to child custody evaluators working in the private sector. It is recognized that some jurisdictions provide child custody evaluation services through the court where mental health professions are working as employees of the court system.

[3]This study did not include child custody evaluators who are hired by one side only as "their" expert.

to command a somewhat higher fee for the forensic aspect of their practice than their colleagues whose practices consist of psychotherapy only. Due to the fee for service arrangement, child custody evaluators in the private sector seldom work with families who cannot afford to pay for their services. The quasi-judicial immunity does not mean that litigants who are dissatisfied with the results of the evaluation cannot file complaints with professional licensing boards against which custody evaluators must defend themselves. Although this rarely occurs, the possibility that it could happen is something that may be of concern for child custody evaluators.

The four child custody evaluators comprising the group interviewed as part of this research consisted of two women and two men, each of whom worked in private practice in different Bay Area counties. While one of the four no longer sees individuals for psychotherapy, the other three each maintained psychotherapy practices along with their family court related work. All four have a specialization in working on family law cases, and each of them also works as a special master, custody mediator, co-parenting counselor, and court appointed therapist. All of them have been specializing in this field for over ten years. Three were doctoral level clinical psychologists. One was a masters level clinical social worker.

The four evaluators were recruited for this research through acquaintance of the researcher. They were known from consultation groups, legislative committees, or continuing education functions. Four custody evaluators were invited to participate in

the research project and all four agreed. To preserve confidentiality, identifying information in this report has been eliminated or changed, and evaluators are only identified by the designations Evaluator-1, Evaluator-2, Evaluator-3, and Evaluator-4. Consistent with preceding parts of the research report, this section of the data is organized within three supraordinate categories: the inner world of the child custody evaluators, perceptions of the family court system, and perceptions of the impact of the family court system.

The Inner World of the Child Custody Evaluators

This section of the research report is focused on exploration of the subjective experience of the four child custody evaluators who participated in the study. It begins by looking at their motivation to become evaluators, then moves on look at other issues including how they conceive of their role, stresses in doing the work, how they cope, and values that inform their work. The section ends with a look at how the evaluators conceive of success and failure in this work.

Motivation

The custody evaluators shared to varying degrees the story of how they came to work in this specialization. Evaluator-1 described growing up in a large family and having a life-long interest in working with children. Professionally, he was working as a child therapist after he received his license where he was seeing many children with divorced parents. At one point he was asked by a Family Court Services mediator if he would consider doing a

child custody evaluation. He agreed to try it and enjoyed the work, so began seeking more referrals of that nature. He feels the segue from child and family therapy into family law was a relatively easy one, although it took time to learn and become familiar with the law and procedures in family law court.

Evaluator-2 talked about how the appeal of finding solutions to chaotic situations mirrored her role in her family of origin. She enjoys the stimulation and variety of this work, and the opportunity to influence the development of a relatively new field. She feels this work is a good fit for her and enjoys the stimulation of it. She explained why she likes this work:

> I think the thing I like about it is that it's so challenging. I mean, I think that the child custody, especially the evaluation, work is kind of continuously, intellectually stimulating. And, it draws from such a wide range of information, and it's *so* complicated. Each family is such a complicated mix of individuals and family dynamics. And, that in lot's of these families you also have to learn new things . . . So, it, it feels like it's a very dynamic kind of work to do in terms of keeping interested, and alert, and alive. So, that's a, a good thing. I think another good thing is kind of *feeling* like I'm in a field that is growing. I just happened into it at a time when it started growing and so that it's fairly easy to become part of not just doing the work, but trying to move the system along to something that works better for families. So, it seems like there's a lot of opportunity to have impact and

> influence in the court system in I think way that's *different* probably than criminal work or something like that where the system is much more set. This is a system that has much more flux.

Evaluator-3 also linked her interest in this work with experience in her family of origin. She explained that she was the "mediator" in her family as she was growing up and that she has always been the person in the family who resolved their conflicts. She also noted she had some difficulty tolerating the relative inactivity of the traditional psychotherapist role and found a good fit between her personality and the more active role she takes in working with families and the courts. In terms of the evolution of her work in this field, she explained

> I don't do a lot of individual therapy. At some point, I moved away from doing that and recognized for myself that I really don't have the patience or the tolerance to sit with people, just *sit* and let them work it out, so to speak. That I'm wired more in a way to be more directed, and more involved, and get in and move the pieces around, which is why I think I've gravitated towards working with families to begin with because there's more of an opportunity to do that.

Evaluator-4 talked about the "unexplained tension" he felt in his family while he was growing up and related his interest in this work to that experience. He also enjoys having his expertise recognized by families and the courts. He stated, "I guess the narcissism is

that you come off as an expert, you know. Oh, gee, you know, 'we're paying you good money for good advice,' you know. So, I like that. I like that."

The Work of the Child Custody Evaluator

Child custody evaluation work is primarily an assessment, rather than treatment, task. The assessment does not involve formulating a diagnosis so much as it does arriving at both a developmentally informed understanding of the children and a conceptualization of how parental and family functioning interact with childrens needs. In terms of the treatment issue, experienced evaluators are aware of how attempts by the evaluator to conduct therapeutic interventions while performing the evaluation can complicate the work and undermine both the evaluation and the possibility of helping the family. At the same time, evaluators may attempt to orient their work toward interacting with families in ways that are healing and, to the extent they can without interfering with the assessment process, try to help families resolve and settle their custody and visitation disputes. The child custody evaluators interviewed for this study demonstrated a sophisticated understanding of the ways in which efforts to be therapeutic in their work approach a boundary fraught with potential difficulties. This tension between the assessment and therapeutic function of the evaluation was evident in a number of the comments made by the evaluators in this study. For example, Evaluator-1 explained

> I think that from a kind of clean, forensic point of view -- you know, if there is such a thing – you don't want to mess with the assessment, the data gathering.

> You don't want to spoil it by, perhaps, being therapeutic with one parent and perhaps not with the other because you didn't see something with the other parent that you want to be therapeutic about. I think there's just this feeling that you want to be neutral, really equal with both parents because you're seeing them both under unusual circumstances. You're not there to do therapy with them or to be helpful in that certain way. You're there to understand their relationship with their child and their, you know, strengths and weaknesses as parents. So, yeah it's tricky.

These comments by Evaluator-1 reflect some of his concerns about integrating therapeutic interventions into the assessment process. The other evaluators shared this concern and differentiated between 'being therapeutic' and 'doing psychotherapy.' They seemed to strive to have their evaluations be therapeutic to the extent possible but recognized that it would be a clinical and ethical mistake to use the evaluation as an entre to do psychotherapy with individuals in the evaluation process. For some, this did not preclude working therapeutically with parents post-evaluation if the parents requested it and it was clear that the evaluator would not at some point resume an evaluative role. Primarily, however, the goal for these evaluators seemed to be to find ways of using their clinical understanding of the family to offer what help they could while simultaneously protecting the integrity of their assessment findings. If the case went to trial the evaluator needed to be prepared to present what he or she had done in a way that showed it to be accurate, focused, fair, and balanced. These evaluators were well aware of the possibility that in any

given case they might have to defend their work and reputation in cross examination, and they did not want to leave themselves vulnerable to having attorneys or licensing boards portray their work in a negative light based on having said or done things that fell outside the parameters of community standards for child custody evaluation practice. Evaluator-3 discussed wanting to avoid "crossing any boundaries," not wanting "to do anything major," and being "careful" in these situations. Evaluator-1 described the impact of this concern and the impact it can have on how one approaches the work:

> It makes one very cautious about the work one does and that's tricky cause I think it in some ways narrows ones creativity. In my therapeutic work I'm, you know, I am primarily a play therapist and I fee like, you know, there's a lot of room for, you know, unusual kind of out of the box thinking about families and problems and process. (In evaluations) . . . you got to know what the local quality of the work is and what's expected and what's due diligence, you know . . . so I think it does make one (cautious). It's a little distracting at times, you know, to have to kind of (think about this) . . . It's a subtext.

A therapeutic process vs. using evaluation results therapeutically. The ways in which custody evaluators integrate therapeutic approaches into their work seem to fall into three categories: 1) methods during the evaluation process, 2) methods at the end of the evaluation, and 3) methods for constructing the evaluation report. In the first case, the means of being therapeutic in evaluation work lies in an overall approach to the

evaluation. Dimensions of this aspect of the experience include the quality of the relationship the evaluator forms with the parents and the types of questions that are asked. Evaluator-1 talked about the use of a therapeutic stance in evaluations and offered an example of how he asked questions during evaluation interviews to help parents begin thinking about the consequences of their behavior for their children. He explained

> It is a therapeutic move in the midst of trying to gather information. But, I, I feel like if I totally let go of that then I'd be like a cop just asking questions and I'm, I can't do that. I can't just hang that up and be just like an investigator. So, I think it's an important part of evaluations, but I think evaluators don't like to talk about it and don't.

His comments reflect the tension evaluators experience as they straddle the boundary between maintaining an investigative posture and providing help to resolve the families problems.

Evaluator-3 described a methodology for using the results of the evaluation at the end of the process in a therapeutic manner. She explained

> I now have a much more prolonged feedback loop in the evaluations where I spend much more time explaining to people why I did it, listening to their disappointment about it, and helping them to hear it from me first before seeing it in black and

> white (reading the report in their attorney's office). And . . . the feedback I get from the people that I'm seeing is that that's helpful for them. It's certainly helpful for me because it just helps put that issue out there and get it, gets through it, so to speak, as opposed to kind of sending them out and then waiting for the other shoe to drop. That feels like not a very pleasant way to – and maybe not even a nice thing to do to people, to do it that way. It's not a nice thing to send (the report) out and then have them read it and whatever. Because you've been involved in this very intimate process with people. And, I think it's important to talk them through it – the end of it.

The import behind these comments by Evaluator-3 is that there are ways the evaluator can structure his or her relationship with the parents so as to reduce the chances that their interaction will be experienced as yet another injury inflicted on already damaged, hurt individuals. The evaluation does not have to be undertaken strictly as a forensic investigation, which in the worst cases might look like the parents are suspects in a criminal investigation. To carry out the task in this manner could involve the evaluator in contributing to a similar kind of destructive experience in which the parties may already be involved. It would risk obviating the most potentially helpful aspect of the evaluation process, i.e., the ability of the evaluator to develop an understanding of the family that clearly identifies both strengths and liabilities, and then reflect this perception back to family members within the context of an unbiased, empathic, helping relationship. The evaluator would, in this way, bring a perspective of the family as a unit as well as help

keep the focus on the childrens needs. Evaluator-3 described this as "humanizing" the evaluation process, making it a warmer and more engaging experience for parents. Aside from simply reducing stress as the process proceeds, this approach also helps lay a foundation for the evaluator's opinion to be accepted more easily. Evaluator-3 explained

> Another thing that I find useful and helpful in terms of helping people through the process, cause I don't think it's talked about enough, is a lot of these people who come into the process have to have, from their perspective, very *mean* and mean spirited experiences with their spouse – with the other side – the spouse, whether it's the attorney, whether it's their spouse, whether it's some other projected demon out there. And, what I found is really useful is small acts of kindness with people that you can bring into the process. You know, if they need some accommodation around the time, or if there is some way that you can – I don't know, somebody was in here the other day and just, you know, had dry mouth. I'm just saying to them, 'Do you want a glass of water? I have bottled water and a cup over there. Would you like some?' Those small kinds of acts can humanize the process and really let people know that you're human and that there's something more in the process than just the adversarial aspects of it. So, I just think that that's really helpful for people. You don't want to cross any boundaries, and you don't want to do anything *major*, but I think it's helpful to establish a level of humanness in the process. And, I find that later on that in some ways it pays off down the line because they can see you as human and that means you've

> got – you can make mistakes, but you can also talk about mistakes, and you can be kind . . .

Finally, the findings suggest that evaluators may think about therapeutic aspects of the work lying in writing reports that are straightforward and empathic, and that focus the family and court on the needs of the child in ways that help surmount the impasse. Evaluator-2 stated, " . . . That's what I want my reports to do – is to get parents to see what's happening to their kids, so that they can take it in and make what changes that they can." She described a case in which she had completed an initial evaluation which resulted in a recommendation that the child be placed with a family member other than either of the parents when it was discovered that the father had a substance abuse problem and the mother was disorganized to the point she could not adequately care for the child. Two years later the case came back to the evaluator for an update after the mother filed a petition with the court to regain custody. The results of the mother's psychological test battery on the updated evaluation looked much healthier than they had when she was tested during the initial evaluation. Evaluator-2 recalled,

> I phoned the mom up and I said what is this, either you have, you know, done some research and prepared yourself, or something has changed because *nothing* you've told me accounts for this. And, she said that during the original evaluation she was a methamphetamine addict, and had not informed me (of course), and that my report really struck her and gave her information about what was happening to

her kid in this kind of living situation. Based on the report she went into a program, got cleaned up, and stopped all drug use. And, so that kind of accounted for the shift. It also felt like, even though she was not going to tell me any of that other – until I confronted her.

A critical aspect of the evaluation report from this perspective is that it not skirt or avoid issues and problems, but that it identifies them clearly. The value of this approach for the parents seems to lie in framing the statement of the problem in an empathic context without minimizing or denying its existence.

Investigatory aspect of custody evaluations. Oftentimes, parents in child custody evaluations are motivated to present themselves in the most favorable possible light and the other parent in a most negative light. They may minimize, deny, or even lie about personal problems or faults, and exaggerate or otherwise distort information about the other parent. Sometimes this extends to the other parent's family members, friends, and other individuals, as well. This type of behavior makes the investigatory dimension of child custody evaluations a critical one.

The historical forerunner of child custody evaluations carried out in the days before "no fault" divorce, were Probation Department investigations into these families lives. The officers would observe people's homes, question their co-workers, talk to teachers, and other such things in an attempt to help sort out the truth when there were conflicting

allegations and concerns about the children. The investigations have evolved over time, changing dramatically, but the fact remains that part of the scope of the work done by custody evaluators includes understanding the reality behind denials and other obfuscations. This may be accomplished through intrusive procedures such as sending parents for unannounced drug tests if there is a concern about denial of a chronic pattern of substance abuse[4] or obtaining releases to review hospital records if one parent alleges the other has psychiatric or physical problems that may interfere with their capacity for parenting. At other times, the work of the custody evaluator lies in penetrating the persona of individuals in the family through the interview process in an effort to uncover the underlying nature of personality problems, relationship dynamics, and other family processes. For example, Evaluator-4 described a key part of his approach to interviewing parents in custody evaluations to consist of an oppositional, somewhat confrontive, line of questioning that attempts to force people to reveal whatever underlies a more superficial defensiveness. He explained

> I will often push a point. What I find is people come in to do these evaluations and they've just got their scripts down. They've been through it a hundred times. They've talked with their attorneys, they've talked to their, they've talked to their ex's, they just have down the reasons *why*. And, I push on those some. You know, so somebody will say, you know, 'I discipline in this particular way.' And, I

[4]As this report was being written the Court of Appeal (Cite Wainwright case) found that it was a violation of parents' constitutional rights for the court to order substance abuse testing in family law matters.

know there are some evaluators who just write that down. And, I'll say, 'Well, why do you do it? Well, have you ever thought that maybe, you know, that it has this effect on the kid? Have you thought of doing it this way? Give me an answer.' And, I'll, and I'll push on it. I really do push on it. And, I do that because I want to get beyond the pat answer. I *really* want to get beyond it. I want to see what's the underlying feeling. *And* I want to see, how much can they change? And, often one pushes and one sees a good deal of hurt and anger underneath it which is useful too – sometimes one pushes and that's – you just wait and see is what you get. And, sometimes you push and you see actually a psychotic process underneath and that's what the problem is.

A clinical lens. These child custody evaluators were clinically sophisticated mental health professionals. They were conversant with psychoanalytic and object relational concepts, family systems theory, and child development. They were particularly thoughtful about transference and countertransference phenomena as these impact their work. Evaluator-4 described one of the challenges of doing this work in terms of "getting caught up in extraordinary projections." Elaborating on this theme he talked about how evaluators need to have "an ability to contain the family, but that *really* means being able to take on *enormous* amount of projections of anger. I mean of all different sorts and be able to hold it, act on it, keep a sense of yourself and not retaliate in the face of being asked to do that." Evaluator-3 described her interaction with some parents in words evoking the psychoanalytic concept of projective identification, stating

> They want you to be the bad object, they portray you as the bad object, and I have taken it on for a lot of my own subjective and unconscious reasons. And, this particular thing has just made it very difficult. I think, they're very primitive people and very – they can't integrate their interpersonal experiences. And, so they have to pick a bad object as a source of their problems, and as a way for maintaining self esteem.

Evaluator-2 described her overidentification with a child that led to precipitous action on her part with the hope that she could calm down the crisis in the family. She noted

> I think some of the kind of jumping in there was an attempt to protect this child and maybe, maybe too much of an overidentification with her. You know, not being able to take a perspective that in some ways I was doing what she was doing. I was acting on the *feelings* of chaos and uproar and crises in the family . . . and acting out. Trying to kind of, you know, get things in order. I didn't like sitting with the kind of helpless, not knowing . . . And, and being . . . being kind of powerful and, and...making...you know, trying to get things in order – feeling it was my responsibility to, you know, kind of solve this problem and feeling it's my responsibility to, you know, get things in order. And, that for me (is) a countertransference issue . . . you know that, 'Oh, let's clean up a chaotic family. Let's get it all working smooth. Okay!'

Evaluator-1 stated, "I think it's very easy to get pulled into the drama of an evaluation in, in ways that can be distorting, you know . . . that can distort my judgment." He noted that he is most vulnerable to being "pulled in" when he assesses that a child is at risk, when people are 'whiney,' in cases where there is domestic violence, and when parents are substance abusers. In each of these types of situations, he may feel pulled toward protecting the children and can, under the influence of those feelings, lose some of his empathic connection with the parents. He added that additional education in the area of understanding the perpetrators of abuse has helped him become more able to maintain empathy with parents even when they are engaging in some of these behaviors.

The custody evaluators used the conceptual tools of psychoanalysis that bear on understanding therapeutic interaction to describe their work and show how their thinking along these lines helped avoid or explained the pitfalls of certain forms of reaction to the parents and children. In particular, they seemed conscious of the role of countertransferene, and in particular the need to carefully monitor their own reactions so that they were not saying or doing things that could interfere with the evaluation process. This was especially true of interactions with or reactions to litigants that evoked the evaluator's frustration and counteraggression. Evaluator-3 talked about a case in which she grew impatient with one of the parents. She explained

> I lost patience. Instead of stepping him through the process like I'd done a thousand times before what I did is just say, 'This is how it's going to be. You've

> done this three or four times now, and this is what it's going to be and it absolutely blew the case out of the water. And, what happened is that he became very verbally abusive to me and it really put the kid, a very small child, in a very difficult situation. There was one point where he called to leave a message for me when he was just railing on me, calling me a Nazi and all kinds of horrible things. And, I could hear the child crying in the background.

Sometimes the frustration or anger of the evaluator found its way into the evaluation reports submitted to the court. This could occur in ways that were gross or subtle. In either case it not only had a chilling effect on the client's perception of the evaluator's neutrality and judgment, but also provided attorneys a most useful tool to use in court if they wanted to claim the evaluator was biased in an effort to discredit evaluation results that were unfavorable to their client's position. None of the evaluators in this study indicated they had written reports that were biased but there were statements made reflecting their awareness of this problem occurring in other evaluator's reports which they had reviewed.

Power. The theme of power in the child custody evaluator's relationship with families arose repeatedly in these interviews. The evaluators were aware of the extent of their power to impact the lives of parents and children, as well as the limits of their power insofar as they make recommendations to the court which may or may not be followed by the judge. Evaluator-3, thinking about the evaluator's power relative to the relationship

with parents, noted that it is both a blessing and a curse. She explained

> It's a curse in the sense that if you misuse it you take away the opportunity for the family to sort out their own problems and you become that parent that sometimes they're trying to avoid, or trying to work through. And, you can become intoxicated with it as well. And, there's a lot of countertransference issues around that that you have to be careful of, I think. There are some people that abuse it, and take it too far, and can actually become, in my experience, sadistic in terms of dealing with people. And, that's the part, I think, you have to watch. Not only that, but taking on that much responsibility for someone else's issues and problems is not something that's going to be particularly helpful for them or for you. So, you have to be very careful, I think, about how much you take on and what you do with it. That's the curse side. The blessing side of it is, is that if people get stuck, and if a kid's in trouble, then you do have the authority to be able to go in and say 'This is enough.' And that can be a relief as well as a way of moving the case forward. So, it's a double edged sword. Subjectively, I think that it's – I find that I don't have the kind of wishy-washy issues that some therapists have coming in and changing to that kind of role – going from a therapeutic role which is basically no direct power into a directly acknowledged role of telling people what to do and standing behind what you say.

Evaluator-2 also noted that power inherent in the role could lead to problems for the

evaluator. Interestingly she noted that problems of this nature tend to occur more in males doing this work. Her comments also suggest that it may be useful to have other arenas to express one's narcissistic needs for this sort of thing. She explained

> I've always been aware of not wanting to be . . . getting off on the control. So, I didn't ever feel like, 'Oh, boy I love this control. I love messing around with people's lives. I love having that.' I mean, I've never had that charge which I have seen . . . and it scares me when I see it. It tends to be more in males . . . that kind of narcissistic, power thing. I've seen it less in the women when I hear about their work. My arena for that kind of narcissism has probably always been doing lectures, or talks and that kind of stuff, but it hasn't shown up in my work. And, I'm always very aware of that.

Evaluator-3 noted that the nature of the role exerts an influence on how individuals may relate to the job they are doing. She explained

> I think that there's something in a role where people are waiving their rights and instituting (something) new in its place (where) decisions (are made) about their life which can be very intoxicating. And, the other part of it is, certainly, there are individual differences that people bring to that to make it a good fit or a bad fit.

Entrepreneurial aspects of custody evaluation practice. The fact that child custody evaluations are done within the private sector brings an aspect of entrepreneurship to the practice. The interviews with these four evaluators did not help differentiate the extent to which this reflects a drive for competence or a motivation related to earning a living. Two of the evaluators recalled the time they were starting out in the field as a period when they were trying to have their work become known and respected. They talked about accepting court appointments that were confusing and working hard to prove their mettle. They felt they needed to establish and maintain a strong reputation in the legal community, as well as with the judges and Family Court Services mediators, as these individuals play an influential role in the flow of referrals to custody evaluators. Once they became established, concerns about referrals were less paramount as the work seemed to find them. It is noted that the evaluators interviewed for this study were experienced and well regarded in the community, so their experience in this regard may not be reflective of evaluators who have less success in the work. These individuals would likely experience an ongoing stress related to the search for referrals.

Evaluator-2 noted that earlier in her career she "needed to be very good, get a name, prove myself." Evaluator-1 stated

> I think when I first started and was getting involved in the work I wanted to just take everything that they gave me and see if I could do it, you know, and make it work for them . . .I was trying to prove my competence, I think. I was trying to,

> you know let people know that I knew my stuff, you know, and that, that I wasn't daunted by these multi-problem cases. Lot's of tricky, fired up dynamics. So I wanted to show that I knew, that I could do it and that I could handle it, so that was part of it.

Despite these concerns about proving themselves and professional reputation, each of the evaluators indicated he or she was unwilling to accept referrals of cases when particularly aggressive attorneys were involved. Each evaluator mentioned having in mind a number of lawyers who they felt were too adversarial and difficult to work with. This will be discussed further in the section below dealing with the child custody evaluators' perceptions of lawyers.

Stress

Stress in the child custody evaluator's work is related primarily to the nature of the problems presented by the families, but also to some of their interactions with the family law system. The evaluators described feeling frustrated in the work for a number of reasons that arose in working with parents and children.

Evaluator-1 explained

> Personally I feel like it really takes a toll on me because of the no win situation that, that from a child's point of view it might feel like. When I get myself in that

> empathic place with kids trying to appreciate a situation that they're in, I do feel like it's a hell of a way to grow up. You know, it feels for me like it's a shame that there are no clear choices, there are no – the reality of the circumstances that are forced upon them are not ideal and so I feel . . . frustrated for them . . . There's an inherent frustration about some of these cases. These kids are stuck with the decisions that the parents make.

Evaluator-3 noted

> In this kind of work is it's hard, it's, it's sometimes hard to be sure that you don't get jaded. You know, kind of make assumptions. So, you see a new family and they act in a way that feels familiar, to not make any assumptions. And each family you work with you have to really kind of understand as a, as a unique system. And so I think it's easy to get burnt out.

Each of the evaluators described the frustration they experienced in relation to cases where there was no good solution for the children. For example, Evaluator-1 described the work as highly stressful and anxiety provoking. He stated

> It feels like that way to me sometimes that there's no real good solution for these kids, but there has to be some plan for these kids to have access to both parents, so these are, this is a tough job that some of us are asked to do . . . We do our best.

Evaluator-2 explained

> There are times I also just feel like I'm too embroiled in...in situations that you can't solve. It's pretty unsolvable, and they're nasty, and people are hateful. And it starts giving you a bit of a tainted view on life.

Evaluator-4 noted, "I am often asked implicitly or explicitly to come up with solutions to situations for which there is no solution or no good solution. And that, that's very stressful."

Some comments made by the evaluators reflected stressful experiences that were more personal in nature. For example, evaluator-2 described having been stalked and accused of being a pedophile. Evaluator-3 explained her feelings of anxiety in relation to attorneys and litigants who attack not only her work but also imply or attempt to prove that there is something bad about her as a person. None of these evaluators reported having been physically threatened in the course of doing this work but the nature of the threat seemed to be more to their reputation and to their sense of integrity. Evaluator-4 described the anxiety as more of an internal threat, noting that he felt he was being "invaded" or "wiped out." He also experienced the stress in terms of feeling "paralyzed" when he becomes "awash in the complexity" of the cases. He explained, "You can drown in it and it takes a while to sort of work yourself out of it . . . It just feels overwhelming at times."

A number of the evaluators' comments reflected the difficulty they had with people becoming angry or enraged with them. Their statements also showed concern about how the power to make recommendations in people's lives could lead to negative or tragic consequences if they are wrong. In this respect, evaluation work is seen as much riskier than doing psychotherapy.

In addition to the stresses the evaluators experienced in relation to the psychology of the litigants', their comments also reflected the stress of working in a court system where they were perpetually uncertain of whether or not their work would be accepted or valued.

Fear and caution. Some comments the evaluators made showed how in part the stress of the work is caused by fear of retaliation by litigants in the form of violence. For example, Evaluator-3 commented

> We have to be careful and cautious in this work because we don't have the protection of the courtroom, we don't have the protection of the bailiff or a metal detector . . . We're dealing with people in very important and significant aspects of their lives which is their children. And, so when you mix that in with people who are very disturbed, I think you can put yourself at risk.

A significant level of threat was experienced by the evaluators not so much in relation to concerns about violence but more with respect to licensing board complaints and leaving

themselves open to attorneys who may attempt to discredit their work. Evaluator-1 spoke about the level of concern he had in a case early in his career.

> I did an evaluation, one of my early evaluations, and when I went back on it, I think I – a few things I could have done better on that one, but I didn't do a bad evaluation, but it got really, really intense and I got deposed and it went to trial and the father hired another evaluator to evaluate my work and he threatened to sue me and had another attorney contact me to say that they were suing me. I had to get my malpractice company involved. You know, it just, it just got really nutty . . . I was able to get through that somewhat intact, but it, it really was a wake-up call for me . . . this was a very aggressive, we're going to kick you ass. And what it did was, it was my whole professional life, you know, flashed before my eyes. I'm the primary wage earner for my family. I thought suddenly license, you know, you know it's – a lot of my colleagues who do clinical social work said, what the hell are you doing in that field? Don't you know those people get sued all the time and, so it was clearly – there is, there is clearly a whole different world about this forensic, legal, court related work that was, was frightening, you know, and was, you know, not to be taken lightly . . . And, I haven't had a close call like that since . . . I think people doing this work – the history is that people tend to get sued somewhere along the way if you're involved in forensic work at least once in your career.

Coping with Stress

These evaluators each talked to some degree about their ways of coping with the stress they encounter in doing this work. Each of them commented on the ways that collaboration with Family Court Services mediators, attorneys, and judges was associated with feelings of support and relief about their role. They also noted the need for peer support and consultation. They were aware that consultation was essential to keep the work on track, provide ideas about how to handle difficult cases, and perhaps most importantly, give the evaluators a safe place to talk about their experience in doing this stressful work. They had personal responses to the stress, ways of refueling themselves so they could cope with this difficult work.

Evaluator-2 explained

> I'll either just make sure that I'm doing things for myself – I'll just start going and playing more tennis, and go dancing, and get involved in the *fun* part of humanity. You know, and kind of, you know, talk with friends, or go hiking, or go out into nature, so that it kind of doesn't seem like you're just kind of in this black kind of ugly world so much. And, I think that particularly happens when you're not feeling like anything – you're helping anybody.

One of the ways the evaluators coped with the stress of their work was to keep in mind that the nature of their relationship with the family was time-limited. Although the

involvement could be intense it did have an endpoint.

Relationship with Parents

Evaluator-3 described the relationship with parents during the custody evaluation as a kind of intimate one. Of note, in her comments she differentiates between the ways the custody evaluator is involved with the family and how the judge interacts with them. One could imagine that her thoughts on the intimacy aspect of the relationship could also differentiate custody evaluators from Family Court Service mediators who are seeing parents for a relatively brief period of time. Perhaps the nature of this more intimate relationship is connected to why the evaluators think in a more focused way about transference and countertransference issues as these impact their work. Evaluator-3 explained

> You develop kind of an intimacy with these people in terms of going through the process. You find out things about them that you wouldn't find out. I mean, (you get to know them in ways) you would never get in any kind of therapeutic setting. You do home visits, you see every context, you hear every horrible thing in a very short period of time. So it builds a period of connection, and intimacy, and expectation, and hope that doesn't happen with the judge. And, so I think that we elicit a much stronger response and then a much stronger sense of betrayal, much like the spouse has done, where there's an intimate relationship that then gets blown apart. And, I don't think that the judge, except in the most angry and narcissistic paranoid cases, triggers that as much as we who are in the front lines.

Relationship with Children

The evaluators did not comment much about their actual interactions with children so much as they did the feelings that were evoked in them through their work with the children in these families. For example, Evaluator-4 explained

> I get very sad dealing with these kids. I think it's just *really, really* tragic. Frustration. Enormous, enormous frustrations about these kids, why they can't have a better life. A sense of loss and sadness and sadness. Some anger.

Success

The evaluators were asked to tell about a case that they considered to be successful. Not surprisingly, the success cases identified were ones with a therapeutic process and outcome.

Evaluator-1 described a case that was a success because he was able to maintain an empathic connection with each family member, help everyone feel their perspective was heard and acknowledged, assist the parents in understanding the childrens' needs, and work with the family so that the case settled and did not go to trial. Evaluator-2 described a successful case as one in which she clearly defined the child's needs, helped the parents understand those needs through the evaluation report, and guided the court in setting limits for the parents. Evaluator-3 told about a family in which there were multiple serious psychiatric problems with both parents. She spent a great deal of time with the parents

and the evaluation process took about five months to complete. She came to believe the case was going to settle so wrote her evaluation report in a way that was gentler with both parents than she might have been if she thought there was a chance it was going to trial. After the evaluation, the parents asked her to stay involved with them in the role of a special master. She agreed and continued to work with them as they worked to implement a joint custody arrangement. Asked what, in her opinion, made this case work well, Evaluator-3 replied

> I think what made it successful is spending *the time* with these people. Is going through – letting them go through their process, being tolerant, being patient, being willing to go through it with them time and time again, reminding them about, 'Yeah, this is where you are – *and remember* – we've been here before and this is a problem.' Being able to say to them when they screwed up, cause they would each screw up a lot, nothing overly critical of them when they screwed up, but pointing out to them that it's a problem and you need to correct it . . . You couldn't do *that* with every case that came in the door. I think there are certain cases that evolve that way or that you pick. But, the time element in that – part of it for me was a challenge. I didn't bill them for everything that I did. I saw that it was working so I was willing to *donate* to some degree some of my time to seeing this one through. And, so there was to some degree an investment that I had in the success having started it from here and brought it all this far. But, there's a *huge*, *huge* time, money investment in making these kinds of things happen for families.

> And, the average evaluator doesn't have the ability to do that with all the cases, particularly the difficult ones. I don't think you *need* that in cases – there's other cases that are successful because the people aren't as disturbed, and there aren't as many complex issues, so it's an easier thing to intervene and move the pieces around. But, in these kinds of cases the time and money drain on them, and on the person doing the managing, is a lot.

In a similar vein, Evaluator-4 identified a successful case as one he worked on for three years where the father had a serious paranoid problem to the degree that he had actually made threats to harm the judge that triggered a Tarasoff warning by the evaluator. The evaluator estimated that the parents had been in court "sixty or seventy times" before they worked with him. He worked with the family intensively, seeing each parent individually, both parents together, and each of the children. Asked what made the case go well, Evaluator-4 talked about the father feeling understood and liked by him. He stated

> They knew I liked them. They knew that I was committed to them . . . and that I wanted them to do well, you know. The daughter, the oldest teenage daughter who went through a *horrible, horrible, horrible* teenage depression. They're all incredibly smart, very, very, very smart people (but) . . . very underachieving. But, I liked everyone and it was a case that...people couldn't believe it was all going so well because it had been so horrible. I saw them a lot. I was often seeing them, you know, two or three sessions a week with them. They all knew I kept track of

the boundary and I knew I could keep it.

Failure

Interestingly, three of the four cases identified as failures by the evaluators in this study were ones in which the case had gone to trial and the judge made a decision different than what the evaluator had recommended. In each of these cases, it seemed to the evaluators that the judge did not understand sufficiently the reasons for the recommendations that were made. This usually had to do with a lack of understanding of psychology or apparent lack of appreciation for the contributions that psychological understanding can make toward deciding these difficult cases. The judges were perceived as making decisions based on courtroom behavior of litigants rather than basing their decisions on the analysis offered by the evaluators.

Evaluator-1 described a case that was complex and in which there were considerations about the father having custody that caused the evaluator great concern. The father was a charismatic, compelling individual who, the evaluation data suggested, would likely put his three small children at risk if he were to have custody of them. Evaluator-1 identified two factors that contributed to an outcome in which the judge ruled contrary to his recommendations and gave custody to the father. The first of these was that the judge was new to family law and had trouble containing the proceedings. The evaluator reported that the father, who represented himself, was permitted to turn a twenty minute recommendation conference into an all afternoon process of cross examination.

Additionally, the evaluator's report had been written in what he described as a therapeutic, empathic style so that it reflected a great deal of understanding of the problems the father had and how he came to have them. He stated

> I wondered in that case whether I had been somewhat too therapeutic about the dad because I really did empathize with his history. He was a very damaged person and I spelled that out in a very compassionate way that I think got the judges attention. I think she remarked from the bench how she had been compelled by that description that I had written up about him. But, it made me wonder if I made him a little bit too tragic a character.

Evaluator-1 went on to explain how one must consider the audience for the evaluation report. In this case, it seemed he felt in retrospect that he had taken a too empathic stance in the report which ultimately made it more difficult for an inexperienced judicial officer to understand the serious nature of the psychological problems of a parent who was able to present himself in a compelling way in court.

Evaluator-2 recalled two "failure" cases. In the first, she became overly identified with an adolescent daughter who was acting out (something this evaluator revealed she herself had done in her adolescence) and so acted precipitously to make decisions in the case before she had sufficient information. Consequently, "it ended up then the father becoming quite paranoid, particularly about me." The level of chaos in the family increased. Eventually,

the evaluator came to believe that part of the problem the father was having was with a woman in authority giving him directives. She helped the family find a male with whom the father would be more able to work successfully. The second failure case was one in which the evaluator assessed that a disturbed but high functioning mother was alienating her children from their father. The court followed the evaluator's recommendation that primary custody be given to the father. A year later the evaluator was asked to update her work in the case. She recommended the children continue to live primarily with their father but the mother contested the recommendations, obtained a copy of the evaluator's file, and made numerous personal (verbal) attacks against the evaluator. The children each had their own therapist who the evaluator had interviewed and who could have provided information about their patients that would have supported the evaluator's recommendations. However, in her effort protect the relationship the therapists had with the children, the evaluator persuaded the court to not have the therapists testify. Subsequently, the judge decided to give custody of the children to the mother. Evaluator-2 explained in summary

> It ended up being this case where the judge for reasons that are beyond me kind of came out and gave the custody of the kids to the mother saying these are both good parents and since these are girls they should go with their mother. The expert on the other side was, in my mind, an unethical idiot and didn't know anything about custody. She mixed roles. (It was) . . . one of the most vile experience I've ever had on the stand, I mean, the things I was accused of . . . I

> never got paid on the case . . . It's kind of like it's this horrible case that I felt – I was maligned, I can't defend myself in any, the judge, I think, really missed the boat, I dealt with a very, what I consider, unethical expert on the other side that I can't really do anything about that either. I felt that the courts did something very hurtful to these children. And, I knew it. And, I testified. And, I think I testified well and the court just ignored it. So, it was a *very disturbing* experience.

Evaluator-2 explained she believed there were two factors that contributed to the problem. One was that the judge did not have much respect for psychology, and the psychological assessment of the mother did not match how she appeared in the courtroom. A second was that the judge may have been concerned about the mother's connection to advocacy groups in the area and perhaps wanted to avoid contributing to a political stir.

Evaluator-3 recalled a failed case in which she lost patience with one of the parents and he responded by becoming paranoid, agitated, and verbally abusive. He brought his frustration into the courtroom and lost all custody of his child after he acted out in front of the judge.

In response to the request that he think about a case that was "a failure," Evaluator-4 recalled one in which he recommended the mother be permitted to relocate with the child to her native country. The child had an enmeshed relationship with his mother, who was quite outspoken, while the father had an emotionally distant relationship with the child.

The mother appeared to be the more responsible of the two parents, and she insisted she was going to move whether or not the child went with her. The evaluator wrote a report to the court in which he expressed his opinion that the child should move with the mother and spend summers with the father. The case went to trial. According to Evaluator-4, the mother "could not keep her mouth shut in the courtroom" and the judge decided to not allow the child to move with her. Primary custody was given to the father. Subsequently, the mother visited with the child, kidnaped her, and took her to her native country which does not abide by the Hague Convention concerning returning abducted children. The evaluator felt he did not do a good enough job explaining his recommendations to the court.

Child Custody Evaluators' Perceptions of the Family Court System

Parents

The predominant perception these evaluators have of the parents in custody litigation is that they are frightened, frustrated, and angry. Evaluator-4 described the rage he sees in parents, along with their underlying feelings of loss. He explained that their sense of loss may be overwhelming since they feel so much is being taken from them (and see him as someone who might take more away). Evaluator-2 expressed a deep empathic understanding of the impact of custody litigation on parents, describing it as "a horrible upheaval in your life" that "really shakes your stability." She showed understanding of the degree of pain and fear parents experience in these circumstances and noted how "it could lead you to do all sorts of strange things."

The evaluators also saw the love, stamina, and commitment to their children parents in custody litigation may show. For example, Evaluator-1 explained

> I am sometimes awed by parents stamina in the face of incredible demands emotionally and financially to get through a difficult custody impasse. I'm often in awe and feeling very respectful about parents ability to hang in and work through things, so, let's see – I think that most, most of the parents I've worked with I find are like myself and most parents I know have a range of good and bad qualities and to be, for them to be, I just, I just feel like if they're in the middle of this thing trying to figure out what's best for their kids then they deserve my respect. So, I feel I owe them that to start out with.

Understandably, the evaluators articulated serious concerns about parents in custody conflicts using their children to fight with and hurt the other parent. Evaluator-4 described the sense of entitlement he finds in some of the parents in custody litigation. He stated

> You're meeting with these people and they always talk about *my* child, my child, my child. They never say *our* child, they never say *his* child . . . it's little things like that. And you see them in very large ways too . . . in action.

Evaluator-1 explained that he "hated" when parents lie, particularly since they know he is going to be following up and checking into things they tell him. He also sees parents

sometimes behaving in ways to alienate the child from the other parent and described this type of parental influence as "soul damaging" to children.

Attorneys

The evaluators' perceptions of attorneys were quite split. On the one hand they expressed admiration and deep respect for those attorneys who work collaboratively, seek solutions, focus on the needs of the child, and avoid escalating conflict between parties. Evaluator-1 explained

> The attorneys that I really respect and appreciate are collaborators. You know, they're people who, you know, have some sense of the big picture about children at risk, about finding moderate solutions to difficult seemingly intractable problems. You know, mutually respectful about the other team members. And there's a lot – I've been, I feel – people, I'm always, often telling people that, they go, "Oh, you work with a lot of attorneys" they go "that must be terrible for you." And, I say well actually, most of the attorneys I know, I like. Even most of the ones that I work with day in and day out. The ones that I really see a lot in my meetings and do, you know, evaluations and mediations work are people who, I think, are pretty decent, who are really trying to get their clients through the system in a straight forward, undamaged way as possible.

Evaluator-2 described her collegial, cooperative interactions with family law attorneys. She reported doing "a lot of networking," having open communications, and working on legislative committees together. She noted these attorneys are very respectful of the contributions of mental health professionals. While she was careful to note that she would not accept an appointment to evaluate a case where a close friend is one of the family law attorneys involved, she challenged the notion that a relative level of comfort or friendship in the relationship between evaluators and attorneys is likely to create bias problems in evaluation reports. She maintains that evaluations are data driven and it is simplistic to think that because an evaluator has a social relationship with a family law attorney, he or she would prejudice their work in favor of that lawyer.

Evaluator-3 also expressed appreciation for attorneys who tell the truth and "act as if we're a team here as opposed to the evaluator being the enemy." She explained that the goal of this work is to resolve issues for the family as a whole, and that the process works well when attorneys understand this concept and act accordingly. At the same time, she noted that some lawyers in family law pick evaluators to hedge their bets, based on their information about whether or not, and to what degree a particular evaluator has a reputation for recommendations favorable to that specific type of client.

Evaluator-4 talked about his perception of the benefits that accrue from attorneys who do not simply take their client's position and "go for blood." He described lawyers as helpful when they realize there is something problematic about their client and try to address the

problem. He stated he sees no ethical dilemma in this for the attorney.

The evaluators were much less favorably inclined toward lawyers who pushed for their clients' position in an overly aggressive manner, did not collaborate, and failed to consider the child's point of view. Evaluator-1 noted

> Now that I've been doing this for a long time, I know to ask. When I, when I get a referral more then anything – a mediation, or an evaluation – I ask who both attorneys are. There are some attorneys I won't work with because they are just so aggressive, so narrow about their clients interest, that it just more fuss than I'm willing to, to mess with. At this point I know who they are. I know, at least, who a lot of them are and there's not that many. There's like a half dozen attorneys I just won't do this work for.

This sentiment was reflected in the comments of each of the other evaluators. For example, Evaluator-2 stated

> I have a growing list of attorneys I will never take a case with. I think they're jerks, I think they up conflict, I think they polarize. I want nothing to do with them. I don't think they're helpful and, so . . . if they're on a case I won't go near it. Life is too short. This is not what I think should happen to families. I don't want to deal with them. You know, I don't mind the attorneys who will work

towards settlement or work towards negotiation, and if it goes into court they're, you know, tough in court. I think that's fine. I mean, some of them are very good litigators, and at the point it goes into court they shift gears. And, I don't mind people attacking my work, or questioning me about where my opinions come from. I just don't want to be jerked around. I think the kind of game playing of your criminal litigator – my worst experiences in court have always been with non-family law people. When, you know, someone has a *friend* who's an attorney, and they're representing them, and they do all this kind of gamey junk. And, I just, I, I have no patience for it. So, I, I kind of avoid a lot of attorneys, the ones that don't kind of fit in my mind with how family law should be practiced.

Family Court Services Mediators

The evaluators see Family Court Services mediators as helpful in providing background information and discussing cases when problems or questions arise. The FCS workers were seen as being stable and responsive. Evaluator-1 explained

They're overworked and underpaid . . . And I've rarely had a bad experience with any of them, you know, in terms of getting some phone time to talk about a case or having insightful dialogue about a particular family they've worked with in a different venue. I've relied on them a lot to get background material. I find that they're, you know, really, really well trained. In this county there's very little turnover, so they've been there, you know, for a long time and they've done a lot

> of work. They've had lot's of in-service trainings and we're on the same committees, so I think they're highly skilled professionals. You know, I don't want to be Pollyannish about it, but I think they are damn good.

Evaluator-2 reported having relatively little interaction with Family Court Services. They may give her background information at the start of the evaluation and then be involved at the end of the process in doing things such as setting up a settlement conference with the judge. She particularly appreciated their help in a liaison role with the court when difficulties arise in doing the evaluation.

The evaluators also expressed concerns about the work of the Family Court Service mediators. Part of this had to do with their not spending enough time with families to understand the true dynamics of the family. Evaluator-3 explained that at times referrals are made based on "poor, inadequate information." There was concern that helping parents reach agreement in mediation may not be sufficient to address the issues in the family. Evaluator-2 noted

> On occasion I come into a case where, you know, they've mediated an agreement and then later it falls apart. And, I think they've mediated a stupid agreement. You know, and that attitude of the pure mediators are like, any agreement – that's your goal is to get an agreement. And, I think with, with kids, especially little kids, that that's not a good enough goal. You've got to get help – parents get to a

> good agreement or else it's not going to work.

At times the evaluators felt the Family Court Services mediators were unrealistic and naive in approaching them to perform multiple roles with families as if they were to "be all things to all people."

Judges

The evaluators expressed deep respect for the work of the judges. They seem to see their work as closely allied with that of the judge, insofar as they are both neutrals in these cases. However, there is a certain tension insofar as the custody evaluators feeling adequately protected and respected by the court. Additionally, there is a sense that judges sometimes believe that their relatively brief observation of litigant's behavior in the courtroom is a better tool for deciding complex custody issues than the evaluator's clinical insight based on knowledge and specialized training as well as many hours of observation and interviewing each family.

Evaluator-1 stated

> There are judges that I really admire because they appreciate the complexity of the family law arena and really respect other people's contributions to understanding the family. They have more modesty, if you will, about the limitations of their twenty minute moment, you know, with a, with a family with lot's of problems and

> respect the kind of, the collaboration that has to happen between attorneys and mental health professionals and themselves. So, I respect that and I also respect the fact that they – the buck does stop with them. They do have to make tough calls several times a day and I think it's enormously difficult work, so I respect that a lot about many of the judges I've worked with.

Evaluator-2 noted that the judges are generally inclusive of the mental health professionals and that they tend to be individuals who want to learn. She explained

> Most judges...if you can put things into (words) they can understand really do want to do right for families. That's why *I like* testifying because it seems to me a chance to educate judges. I also like doing training when judges are there . . . I had an experience where I testified as a one-sided expert on a case . . . And after that testimony the court asked me to come in and present to all the judicial officers. So, I think that, kind of, my sense of a lot of judges being very open to learning is, is my overriding feeling.

The evaluators had common sentiments about and perceptions of the judges' behavior with them inside and outside the courtroom. Evaluator-3 expressed appreciation for judges treating evaluators with respect, controlling attorneys in the court, and providing support for her work. Evaluator-4 described how gratifying it feels to have his work respected by the judge, to have dialogue with the court while he is testifying, and to have

the protection of the judge when attorneys are attacking his work when he is testifying. Evaluator-3 values "When they work with you directly about issues instead of blowing you off or not paying attention when you bring something to their attention."

At times, interaction between evaluators and the bench is a less positive experience for the child custody evaluator. Evaluator-4 recalled cases in which he needed to have the court's intervention as its appointed expert and the judge remained elusive and unavailable, failing to return phone calls or respond to letters. Evaluator-1 recounted a similar experience.

What appears to be a most disturbing aspect of perception of judges by the evaluators is their difficulty accepting recommendations based on psychological expertise when this does not seem supported by the litigant's behavior in court.

Evaluator-1 stated

> When either the parties stipulate or a judge appoints an expert to do some focused work and the expert does a lot of that work, puts in the hours, does the time, documents his recommendations, I'd like some acknowledgment of that work, you know. I just don't want those tossed without some good reason. I get personally annoyed when a judge just has kind of their own take on something suddenly seeing everybody in the courtroom for twenty minutes and disregards what seems, what would seem to me to be a substantial amount of the expert's effort. So that

bothers me. It's not like we've got the whole thing figured out or always know exactly the right thing . . . but to just toss it without calling me on the phone, rescheduling a hearing in order to have me there to ask questions about it. You know, that's come up. It doesn't come up very often, but when it does come up, I kind of go – aren't we doing this together? I mean, you know, if you got a problem with the way I did it just give me a call and let's talk about what happened.

Evaluator-3 noted that judges can become highly irritable, angry, and punitive at times. Evaluator-2 explained

My sense is that judges are people. They have biases, they have blind spots, they - unlike the mental health people who are given power - like as a Special Master, these folks may or may not know about their blind spots. They kind of, I think, can get caught in them. So, you know there are certainly judges who, I think, are biased, and are biased coming out of their own unconsciousness, and their own life experiences. So, you know, I think the Bar, the bench – for money things I think they're really good. You know, that they kind of weigh out, and there's rules and stuff like that. For some of the child custody matters, it's more hit and miss. I think that all – but – and it's, it's kind of complicated cause I want the court to protect me, and I feel in general the family court is a very, a protective place for evaluators since you are protected well in testimony when you're on the stand. At least, that's always been my experience. (On the other hand) sometimes

they may protect experts too much. I do *much* more second opinion work now, and I see really abysmal stuff in the court and if I'm in the position of trying to say, 'Wait a minute, this isn't a great evaluation. Maybe you *shouldn't* follow these recommendations. And, here's *why* it's not a good evaluation' There is that kind of 'old boy network,' and there's your star evaluator for the county, and something like that's very hard to attack. And, I think all our work should be open to scrutiny.

Evaluator-1 reported more mutuality in interactions with judges he knows over a period of time. In these relationships there is more of a give and take regarding cases, and there is not the suppression of communication, through observance of legal protocol, that often characterizes the more deferential relationships with judges that are new or otherwise unknown.

Perceived Impact of the Family Court System

The evaluators in this study had several thoughts about the impact of the family court system on families and children. They seem to see the system as split into two factions, although this is clearly over simplistic: those who are collaborative, seeking solutions to problems, and avoiding escalation of the conflict, and those who are competitive, aggressive, disrespectful, and unaware of their own biases or blind spots. The former are perceived as having a highly salutary effect on families in the court, while the latter are seen as destructive. These evaluators each valued helping people feel understood, respected, and included in a process that was focused on helping them with their child

custody problems. They were respectful of the other legal and mental health professionals in their field. They valued a relation of mutuality with the other professionals where there was a give and take of information and help in doing this difficult work.

Escalating Conflict

The evaluators expressed some appreciation for the way the family court system impacts parents and escalates the conflict just by its very nature. For example, Evaluator-2 described how the interactive field influences or determines how parents behave. She described a case in which she was a special master for a number of years with a very high conflict family. For several reasons she reached a point where she felt she had to stop working with them and ended her involvement in the case. Subsequently the parents and step-parents began to be more cooperative with each other, and this continued for a couple of years. However, after some time passed they reached an impasse on several issues and it was agreed they would return to her to work on those problems. She stated

> I got them in and within two seconds these people were exactly as they had been five years ago. And, I realized that kind of the, the *state* dependent behavior is a – these people had been doing fine, they'd been negotiating things, they'd been flexible for a couple years. And, then all of a sudden they get in my office again and they are right back there. So, I think that that really also reinforced to me that you have to be very careful because the setting has a contribution to people staying in a certain kind of place and dynamics.

This field or state dependent behavior seems ubiquitous in family law cases. The parents enter the court system with an idea, conscious or not, that they are in an adversarial relationship and they are orient themselves to behave accordingly.

Limitations of their Work

The comments made by these evaluators showed the degree to which they are aware of the limitations in their work. Even when a trained mental health professional spends twenty or thirty hours with a family, there is a need for humility about what can be known about the individuals involved and their relationships with each other. Evaluator-1 stated

> From a big store of knowledge that parents have for all the years to some paraphrasing that I might be able to get in a snapshot of you as a family, then to the judge . . . it gets distilled and none of it really approaches the actual reality of it . . . I always say to parents I don't think it's maybe entirely satisfying or being very accurate, but I always say to parents 'You know your child far better than I ever will, but I'm just trying to get enough information to help us get to Plan B.' I always try to phrase it that way to them because, God, I don't know, I mean, you know, – they are the parents – 'You guys know way more than I'll ever know.' I say that to parents consistently, 'But you're stuck and I'm trying to get some information for now to help get to the next place and so that's the way I phrase it, but I, I think parents also feel like, 'how the hell could you possibly know who I am?'

He recognizes the presumptuous nature of the work but also the reality that the parents need help and the children need help, and someone else has to work with them and help determine who should care for the children and in what ways this should be done. His humble, modest approach reflects an appreciation of the limits of his knowledge and also an acceptance of his role in the court.

Evaluation as a Process

Each of the evaluators expressed an interest in using the evaluation as a process rather than as a discreet event. Evaluator-3 was most articulate about this approach and how it can help parents. From her perspective, parents benefit from not simply learning the evaluator's opinion but from being involved in a relationship with the evaluator that leads to a frank, empathic discussion about the nature of the problems in the family and what is to be done about it. It is through this type of interaction, according to this evaluator, that parents can be helped to accept the recommendations and avoid further litigation by truly resolving the problem that brought them to court.

Limitations in the Courts' Ability to Understand Mental Health Consultation

A most disturbing impact of the family court system, as reflected in the comments of these evaluators, is the inability, unwillingness, or lack of understanding on the part of some judges who are psychologically naive or even antagonistic to psychology. The evaluators' descriptions of failure cases most often included this type of experience as part of the

reason for the case not going well. When the judge fails to grasp or is uninterested in trying to understand the nature of their consultation, and decides that observation of behavior in the courtroom is a superior basis for making decisions about custody and visitation, then the impact on children in some cases may be dangerous. This appeared to be of particular concern in cases involving parents who are high functioning and present well in social situations but who have serious underlying psychological problems that interfere with their ability to function effectively and safely as parents.

CHAPTER V: DISCUSSION

Three study questions underlie this research. They are: 1) For each level of the family court system, as reflected through the experience of family law judges, attorneys, Family Court Service counselors, court appointed custody evaluators, and parents, in what ways is subjective experience influenced by interaction with any and every other level of the system? 2) What impact does the interplay between individuals at different levels of the system have on the perceptions, behavior, and decisions of those working in the family court system and those going through it? and 3) Are there reciprocal, multidirectional influences between judges, attorneys, custody evaluators, counselors, parents, and children, and if so, how do they work?

In this chapter the relationship between the data and each of the three study questions is discussed in turn. The reader is reminded that the foundational theoretical construct underlying this research is the idea that the family law system and the individuals in it constitute an ecological unit in which each level of the system is incorporated into and influenced by each more encompassing level. The question of whether or not there are reciprocal, mutual influences between the levels is not assumed and is part of the focus of the research, as is the nature of whatever dynamic interaction might create that influence. If the data suggests that reciprocal mutuality is in fact operative, then this would suggest that not only do the more encompassing levels influence the contained ones but also that the contained levels influence and shape the container. In other

words, if there is a mutual reciprocal influence between levels of the family law system then this suggests that there is a multidirectional network of interactions in which not only does the adversarial system shape the behavior and experience of litigants (a factor which is identified in the existing research literature) but also that the nature of the problems faced by litigants exerts influence and shapes the behavior and experience of mediators, evaluators, attorneys, judges, and perhaps of social policy and the law itself, as well.

The chapter is divided into several sections. Each of the first three sections corresponds to one of the three study questions. Following the discussion of the study questions, the remaining sections of this final chapter focus on the relationship between the findings and the existing literature, contributions of the study, implications, limitations, and directions for future research.

The Influence of Systemic Interaction on Subjective Experience

The interview data suggests that the subjective experience of each individual involved in the family court system is influenced by the nature of how he or she is a participant in an ecological matrix. Needs and the psychology of individuals vary greatly but the data suggests there are inherent characteristics of each cohort, related to their role and function in the system, that lead to the development of particular ways of perceiving and responding to one another. For example, while there were wide ranging individual differences in the parents' experience of interaction with attorneys, mediators, child

custody evaluators, and family law judges, they had turned to the family court system out of a sense of frustration, pain, and helplessness in their relationship with their children's other parent. They desperately wanted and needed help, felt overwhelmed and impotent to effect the changes they thought were necessary, and hoped for vindication. In a similar fashion, there was a unique set of factors influencing each of the other cohorts which at least in part determined their experience and shaped their interaction with others in the system. The following does not purport to even approach the impossible task of describing all determinants of subjective experience of the cohorts or individuals involved in the ecological network. However, prominent themes for each group are described.

The Parents

One dimension of the frustration the parents felt with the court system seems to lie in the fact that they were looking to a system that primarily addresses the external elements of family life in order to address problems that existed not only in the external world but also within their internal or psychological life. Interview data from the parents suggested that these were highly stressed individuals coping not only with frustration related to the family court system and their former spouses but even more basically with their own woundedness and feelings of loss. These individuals were experiencing tremendous difficulty coping and continued to be embroiled in marital relationships they could not end. They, and even more so their children who were caught in the middle of the interparental conflict, needed the limits and structure that an

institution such as the court can provide. The parents' troubles seemed fundamentally related to complications with grieving for their lost relationships and the threat of loss of their children, as well as narcissistic injury from the hurt and disappointment they felt secondary to the ending of the relationship with their childrens' other parent. From this perspective they would appear to have turned to the family court system for an external solution to what is fundamentally an internal and relational problem. Thus, even when "solutions" were provided in the form of well-crafted court orders, the court's intervention was not sufficient in these high conflict cases because it did not address the underlying problem. It is these unseen inner dimensions of the problem that may continue to drive custody conflicts. The court system provides protections and links individuals to a powerful decision making mechanism they need when they cannot jointly decide their childrens fate. It is designed to look after the welfare of children and provide orders that decide critical issues concerning their care and protection. However, in the process, the court system inadvertently adds another layer of frustration to already stressed and overwhelmed families. In effect, for parents having high levels of conflict over child custody, the family court system may generate a secondary layer of problems. Furthermore, not only can it effectively further stress the family by involving it in a costly, competitive, bureaucratic system, but may reinforce a pattern of externalizing problems and contribute to distancing individuals from the types of experience that could lead to healing and resolution.

The experiences of these parents with the family court system can be conceptualized as

falling within either of two types, distinguishable by their degree of empathy. The more empathic type of interaction was constellated around a sense of being understood, cared about, and helped. In contrast, a less empathic form of experience was constellated around a sense of being misperceived, threatened, and exploited. Associated with the empathic domain was a sense of fairness and justice prevailing, as well as feelings of satisfaction with the legal and mental health professionals working in the court system. The less empathic domain was related to the sense of an unfair process resulting in what was perceived as an outcome harmful to their children, as well as powerful feelings of frustration and dissatisfaction with the family court system and the individuals in it associated with the perceived negative experience. Each of the parents described both types of experience. Healing experiences for these parents took the form of things such as feeling treated fairly by a judge, having been given the opportunity to speak up in court, having an attorney who returned calls promptly when a parent was feeling desperate, and having a custody evaluator on the case who took the time to do a thorough study of the family where each individual felt understood. In contrast, however, the predominant subjective experience of these parents in high conflict child custody battles was more one of a court system that was impersonal and unresponsive, cases that took too long to move toward resolution, attorneys who charged high fees and were focused on money or legal strategy more than showing concern about children and parents, Family Court Service mediators who spent insufficient time with them and left them with a sense that they did not want to understand the nature of the problem, and custody evaluators who took too long and

left parents feeling blamed and guilty.

The Attorneys

The subjective experience of the attorneys seemed to be most influenced by their interaction with their clients and with opposing counsel. In relation to the parents, the experience of these lawyers seemed to constellate around two tensions: 1) representing their clients' position vs. finding solutions that would accord with the best interests of the children; and 2) balancing the pull from their client to meet their emotional needs vs. focusing on the business of resolving the material issues in the marriage. Perhaps due to their role as advocates, the attorneys were the most allied with their clients positions of any of the legal or mental health professionals in the family court system. They described balancing advocacy for their clients' goals in court with their own inherent sense of what is "right" for the children involved. However, their descriptions of subjective experience often alluded to the need to not become what they called "aligned" with their clients. None of the attorneys in this study could identify a time they had become aligned in this sense but each of them were sure it had happened and they were all aware of times opposing counsel had this problem. There was even an awareness that in cases where alignment occurs, had the other parent been the one who came in first, he or she could have been the one with whom the attorney aligned. The family lawyers' subjective experience is pulled between the dimensions of allying and aligning. They try to be close enough and supportive enough of their clients to provide some level of emotional support but they also try to be distant enough to give guidance

and maintain a rational, problem-solving perspective that will result in the best possible outcome for their client.

The subjective experience of the attorneys is shaped in part by their interface with the intensity of the emotional reactions of their clients. They are often privy to witnessing first hand the destructive results of how parents in high conflict cases behave toward each other. The data suggests that at times the attorneys feel overwhelmed by their immersion in this sea of emotion and that they may adopt various strategies, examples of which include aligning and strategizing, to distance themselves from it.

The relationship between counsel in these high conflict cases is a critical dimension that can either help contain conflict or inflame it. The attorneys identified the competitive drive that is part of their work resulting in a "professional high" from winning in court and triumphing over opponents. Strategies used by opposing counsel whose inferred purpose was to gain advantage for their client, often characterized by a lack of responsiveness, dishonesty, and obfuscation in the relationship with opposing counsel, seem to engender counteraggressive strategies and stronger urges to protect one's own client. To varying degrees, the lawyers in this study described how a framework of collaboration and collegiality can truncate this competitive urge. A sense of being respected, of open communications, of a willingness to share their clients vulnerabilities and work toward mutually acceptable solutions, was part of what seemed to counterbalance the pull toward more aggressive interaction in the relationship

between counsel.

The Judges

The judges subjective experience was shaped by numerous factors related to their working at the intersection of the law and social policy decisions that control allocation of resources to the courts on the one hand and the overwhelming multiple and complex needs of families having high levels of conflict about their children on the other. Chief among these was the knowledge that it was they who are responsible for decisions about the families in the court system. They felt stress about making these decisions, sometimes with relatively little information, in very complex matters. They faced the gravity and complexity of family problems in their courts, even when at times it seemed there was no solution for these situations.

The numbers of cases and the lack of staff resources to assist in handling them was a major determinant impacting the experience of the family law judges in this study. They were frustrated by the limited time available to spend helping families and looked to chambers conferences, often extended out of their own time, as a means of stretching their influence and capacity to settle disputes. At times the judges were constrained from helping more directly, or perhaps more creatively, by the law and judicial rules. However, the body of law and court rules were also experienced as providing guidance for the judge and generating necessary structure so that they could maintain a sense of fairness and decorum in the courtroom.

The judicial officers seemed to feel supported by others working with these families who provided information or assisted in the orientation of the parties toward settlement. Family Court Service mediators, child custody evaluators, and attorneys could all fulfill this function. The judges were impacted negatively by attorneys who spent time arguing their cases in court to an excessive degree or who failed to do the basic legal work necessary before bringing the matter to a hearing.

The need for the judges to maintain neutrality seemed to create a situation in which they felt isolated. They were limited in their ability to form affiliations with others in the family court system, with the possible exception of other judges, since that was a threat to their neutral stance.

The judges wield a great deal of power in the family court system. Their subjective experience was influenced by awareness of this power and how they held it. At times the power is held with compassion and used to affect needed changes. It sometimes seemed to provide a certain social distance necessary to perform their role. However, it seemed that the power could also confound their role and desensitize judges to the impact of their comments and decisions. This could have a negative impact on both litigants and professionals working in the family court system.

The Mediators

The subjective experience of the Family Court Service mediators seemed to be influenced primarily by two levels of the family court system: the parents and the judges. They found the work interesting, particularly insofar as it involved functioning at the intersection of law and mental health. At times they described their task with great humility recognizing that their opportunities to intervene were very limited and that all they could realistically hope for was a chance to set a process of change in motion or provide some education that would have an impact afterwards. Their direct contact with litigating parents, particularly those in high conflict situations, contributed to a great deal of stress. They had a good understanding of the experience of parents going through custody conflicts, i.e., one that corresponded in many ways to that of the parents themselves.

The data suggests that the subjective experience of the mediators was shaped in part by the large number of individuals they see in their offices and the intensity of the problems brought by the parents. The mediators experience reflected their commitment and compassion, but also suggested that they sometimes felt a need to distance themselves from the experience of the parents. They had powerful counterreactions to the woundedness and rage shown by many of the parents in high conflict situations.

The mediators experience was also shaped in part by their interactions with attorneys. They were appreciative of the lawyers who took a collaborative approach and who

worked from an understanding that family law requires a style of legal practice oriented toward mutually acceptable solutions and not simply to winning. The mediators felt a need to protect the families, and the resolution process, from more aggressive, competitive lawyers.

In a sense analogous to how subjective experience of the attorneys and judges is shaped in part by the macrosystem - in this case consisting of law and procedures of the court - the experience of mental health professionals working with the family court system, both mediators and custody evaluators, is influenced by clinical theory and training. Their interpretation of these roles is imbued with a clinical perspective that exists alongside the mandate of the role from the court's perspective more strictly interpreted. The clinical perspective, particularly to the extent that it is inclusive of transference and countertransference phenomena, shifts the experience of these individuals from one where they may feel helpless and angry at witnessing first hand the ways parents sometimes use their children in these conflicts to one where they at least have a sense of understanding their own reactions to the interpersonal dynamics operating in the family system. Additionally, while the role of the mediator may be seen from the court's perspective as helping parents settle custody and visitation issues and keeping the matter out of the courtroom, from the perspective of the mediators, to one degree or another, their role is to work with families in ways that lead to change. At times, the priority placed on change is even more fundamental than reaching an agreement. They are aware that they may be able to assist parents in reaching agreement in many

cases, and inflate their "success" statistics, but that unless these are "real" agreements they may exist only on paper and be relatively worthless.

The data from the mediators' experience with judges suggest they sometimes feel quite supported and at other times feel that there is little understanding of their role and of their work. At best this relationship generates a sense of collegiality and mutual respect but it can also create a sense of frustration and alienation. At times the mediators' experience was frustrated by the court system, recognizing that the family law system provided a forum in which individuals who wanted or needed to flaunt their anger or continually pursue some form of public humiliation of their former spouse could return repeatedly.

The Evaluators

In ways analogous to how the mediators experience a tension between simply helping parents reach agreement and facilitating a change that will be more substantial, the evaluators' experience is shaped in part by a tension between doing the work as a forensic investigation and approaching it in ways more likely to be helpful or therapeutic. They described or alluded to some anxiety about straddling this boundary as they were quite aware of protecting their work as well as their professional reputation. Also like the mediators, but to an even greater degree, the evaluators stood in relation to the body of psychoanalytic theory and were keenly aware of the role of transference and countertransference dynamics when they were working with families

where there was a high level of conflict. Sometimes their experience of countertransference phenomena seemed to be filtered through a classical psychoanalytic lens where it was seen as an interference with the work. At other times, however, their comments reflected an understanding of countertransference in its more modern conception where it is simultaneously used to describe factors in the analyst that can interfere with the work as well as a means of understanding people in a deeper way. When used in the latter sense, the experience of these evaluators is tinged by ways they knowingly let themselves be used in the work with these families so they could understand and use how they were involved in family processes to help comprehend the experience of family members.

The evaluators were deeply affected by collaborative, collegial relations with judges, attorneys, and mediators. They knew a great deal about the difficulties inherent in this field and realized the potential for splitting, denying, and other problems. The collaborative approach seemed to limit the extent to which these strategies could further disrupt the lives of parents and children.

The experience of the evaluators was also impacted by their work with the children in these families. More than any of the other individuals working in the family court system, the evaluators were in direct contact with the children and were in a position to empathically understand the ways these children were caught up and hurt by the conflict between their parents. Even though the evaluators had a keen appreciation for

the emotional struggles and experiences of parents in high conflict custody battles, their closeness to the suffering of the children sometimes led to overidentification with them to a degree that empathy with parents was diminished or lost.

In a more general sense, the evaluators' experience was affected by familiarity and closeness with the families such that they were sometimes unable to see a good solution for them. This sometimes led to feelings of hopelessness and helplessness, particularly since the evaluators felt a strong sense of responsibility knowing that the court was going to rely heavily on their opinions and recommendations.

To some degree the evaluators were impacted by the sense of betrayal and rage directed against them after making their recommendations to the court. This was all the more difficult since they often developed a sort of intimacy with the families while the evaluation was underway. The evaluators described the frustration of having done their best on a case only to be threatened personally or professionally by litigants, or attacked on the witness stand by attorneys. The knowledge that this could occur led these evaluators to be cautious and sometimes to feel they had to be less creative in their approach to working on these cases than they might otherwise be.

Finally, the subjective experience of the evaluators was influenced in large part by their interactions with the judges. At times they felt valued and supported by the judges, particularly at those times they were testifying in court and the judge acted in ways to

protect them from the vagaries of attacks by attorneys. However, at other times they felt a deep sense of frustration with judges who disregarded recommendations based on psychological data, or even more simply ignored information gathered during many hours of evaluation interviews, in favor of making decisions from the bench based on relatively brief observations of individual behavior in the courtroom. This was particularly frustrating for the evaluators when they had serious concerns about individuals who were proficient at presenting themselves well in a public forum or behaving according to social norms, and so were able to deceive the judge.

The Impact of the Interplay between Individuals at Different Levels of the System on the Perceptions, Behavior, and Decisions of Those Working in the Family Court System and Those Going Through It

One dimension of the impact of the interplay between levels of the system is observed through how the law is interpreted and applied by the courts in these cases. The emotions of litigants in high conflict child custody cases are raw and can be overwhelming. The custody conflict and surrounding litigation come to occupy a place at the center of the parents' psychological life. The experience is one of being caught in a situation out of control where one's sense of stability, values, one's economic life, and even the relationship with one's own children can be threatened. What is needed is a way of ceasing to be in a powerful reactive mode, calming the passions, thinking through solutions, separating out the emotions from the need to plan for the children,

and differentiating one's own feelings of hurt and rage from the need to cooperate and coordinate with the other parent for the children. The law is the opposing force to raw emotion. It is emotion*less*. It is an instrument without any heart and does not care one way or another. The law is interpreted by the court, through the person of the judge, who stands at the interface between the inert law and the passions of individuals. In a sense the judge may function as the alchemical vessel through which the law is mixed with the passions of the people who come to it. Out of this mixture can come some degree of resolution. Alternatively the court can become embroiled in the psychology of litigants, losing its potency, or it can stand too far on the side of the law, applying law in so distanced a manner that individuals involved are not taken into account to a degree that could facilitate true resolution.

Another dimension of the interplay between individuals at different levels of the system involves the way in which family law attorneys are influenced by the emotions of their clients. They hear a perspective on the best interests of the child and on the status of the child that is filtered through the perspective of their client, whom the attorneys ubiquitously noted is likely to be frightened and enraged. Since they are hearing about the child's suffering at the hands of the other parent from their client only, attorneys may come to feel strongly about how a child is being harmed by the other parent or about how a child would be better off with his or her client rather than the other parent. This is often reflected in the way pleadings and declarations are written, as well as less formal interactions, which may further polarize the parties. It is not that the attorneys

are necessarily worse at handling this than others in the system, as could be attested to by any seasoned child custody evaluator who describes the experience of interviewing the mother in these cases and seeing the reasonableness of her position which is completely opposite that of the father, only to then interview the father and feel that his position is a reasonable one. Rather, it seems to be a reflection of two factors: 1) the nature of the role of the attorney advocate in that he or she hears only the one side and so is vulnerable to identifying with clients to a degree that alignment can occur, and 2) the absence of any form of training for family law attorneys that could help them recognize transference and countertransference reactions.

Furthermore, the role of the attorney in zealously representing their client is to represent the client's position without the ambivalence that is an inherent part of every human experience. In this scenario, parents in high conflict child custody cases - likely individuals who tend to have difficulty grieving for the loss of the family and who attempt to cover over the pain of deep narcissistic wounds with rage - are individuals who tend to not focus or even tolerate being aware of their contribution to the custody problem. They come into the family law system and are represented by advocates who help them present their position as righteous and justified while portraying the other as wrong, selfish, or dangerous. The other side of the ambivalence remains in the shadow, hidden from sight. Furthermore, the healing that needs to come to these families will come from individuals looking within themselves and finding ways to understand their own feelings, behavior, and contributions to the problems they face.

The advocacy position tends to diminish the possibilities that this will occur.

Information about the family may be kept from the court since the judge lacks direct experience with the child and with the parents other than observations of their demeanor in court and, in cases that continually return to court when the same judge is on the bench, the judge's familiarity with the family over time. There is a telescoping of information about the child such that those in direct contact with the child have the most information and as one moves into the court system and to the level of the judge making the decisions about the child, there is usually no direct contact with the children and often minimal information about them. The only ones in the system who might see the child directly are obviously the parents, secondarily the custody evaluators, in a few cases the court mediators, and rarely the judge or the attorneys.

The court itself can become an unwitting ally of individuals fighting over custody of their children by providing a public forum in which they can tell their story, argue their case, and demand their rights while ignoring their own responsibility for working out solutions to the problems in their lives. This may be particularly true for individuals with problems of the narcissistic or histrionic types who may shine in the limelight of the custody hearing and in "having their day in court." Of course, this is a false solution for them as it serves as yet another attempt to ward off their own feelings of emptiness and depression. The litigation can become an organizing principle in their lives, something that justifies behavior but only maintains certain dysfunctional

patterns.

The parents in high conflict child custody disputes come to lawyers and the courts with incredible pain and frustration. They want to be understood and heard. The attorneys and the court tend to address those parts of their problem which they believe they can affect, and to do this they may focus on concrete realities and limit the expression of emotion. The courts and attorneys then risk being experienced as apathetic and indifferent to the feelings that drive custody litigants. This engenders further frustration and pain in the parents. Individuals who are injured from their relationship and whose connection with their children is threatened are then faced with another experience of rejection.

The data of this study suggests that Family Court Service mediators may, in a sense, play a more limited role with high conflict families than other professionals working in the family court system. It is recognized that the mediation service is not a panacea and cannot resolve all issues. It is an intervention designed for individuals capable of using a rational, problem solving orientation in a relatively collaborative manner. The Family Court Services mediation is often the first level of intervention offered to parents disputing custody. Those most able to make use of the service are likely to resolve their conflicts at that level. However, this may not be possible for the relatively small group of high conflict parents. These individuals may leave Family Court Services mediation with the sense that it was frustrating and ineffectual. In these

situations, perhaps, the role of Family Court Services needs to be further differentiated so that rather than offering mediation services per se, it is thought of more as a triage type program first, in which a menu of possible services are available and the mediator links each family with the type of service most likely to be maximally helpful. These could include any and all of the following: mediation, individual psychotherapy, co-parenting therapy, child therapy, focused assessment, evaluation, and others. If this were the case there would need to be some careful thought given to the ways this could be structured so that the assessment process was also a helping one. This approach might reduce some of the frustration mediators feel with parents who are unable to reach agreement. It may just be that a substantial number of such parents are simply in the wrong forum and cannot make use of it. At the same time, it is important to recognize that many families may appear to be unable to use mediation at first but could possibly use it effectively after some further preparation for it or through a more prolonged intervention. Some opportunities for less intrusive levels of intervention may be lost if families are denied a chance for a mediated settlement and prematurely sent to more intensive levels of intervention.

The Dynamics of Reciprocal, Multidirectional Influences Between Judges, Attorneys, Custody Evaluators, Mediators, Parents, and Children

The data of this study suggests that the interplay of individuals at different levels in the ecological system may exert formative influences on the experience and behavior of each other. Furthermore, it seems that these influences reverberate up and down the levels of the system in an endless series of feedback loops, where each interaction sets up a response that then shapes subsequent experiences and interactions. Rather than a straightforward parallel process in which the conscious and unconscious dimensions of experience in the litigants is reflected in the individuals at other levels of the system (e.g. the anger of parents reflected in anger of attorneys) it seems that there are a continual series of interwoven feedback loops in which individual responses to interactions with others in the system are simultaneously and paradoxically both triggers for further experience and responses to past or current interactions. For example, the intense emotional reactions of parents may exert a powerful influence on their attorneys. While they often manage the tensions and pulls exerted on them by clients, at times the lawyers may adopt an overly distanced relationship with clients where their focus is primarily on the business aspects of divorce law. At other times they can be overwhelmed by their clients' experience of anger, hopelessness, and sense of injustice. When the lawyer feels overwhelmed he or she is more vulnerable to aligning with clients in ways that overly involve them in the interparental conflict. Each of the attorneys see the alignment problem as one resulting from their own (or more specifically, their colleagues') problems. They lack a sense of the interactive

nature of these problems and so miss out on using their feelings and reactions as a tool to further understand their clients and help themselves be able to maintain the empathy they may want to bring to the work. Awareness of the interactive nature of this phenomenon could help avoid problems with attorneys distancing themselves to a degree they are experienced by clients as aloof and uncaring. When the attorney maintains an overly distanced relationship the client can be left feeling the frustration that comes from an expensive business-like response to a very personal problem. The client in a high conflict custody case, in either of these two scenarios, is likely to experience a further lack of connection. In the former the lack may be with the reality of what can be accomplished and of what must be done for the welfare of the children. In the latter the problem may lie in the sense of feeling that "the system" is institutional, uncaring, and unresponsive. In either case, these responses may have a secondary impact on the parents' ability to manage and resolve their conflict with one another and focus on the needs of their children.

The psychoanalyst, Wilfred Bion, wrote in his seminal paper, "Container and Contained," that "The recurrent configuration is of an explosive force with a restraining framework" (Bion 1985, p.131). This quote expressed in part Bion's thinking about the relationship between direct experience and deep understanding on the one hand (as occurs in geniuses, mystics, people who discover important truths such as Freud, Faraday, etc.) and the institutionalization of ideas, practices, and other things that grows out of and follows these discoveries. His idea was that the kinds of powerful

experiences that are the basis on which institutions are originally built will later become threatening to what he calls the "establishment" of the institution set up to contain them. The institution may then react to these experiences and ideas and squash them. In order to maintain itself, however, the institution must develop ways to contain these experiences or ideas without completely absorbing them or crushing them, since the institution also needs these for its own survival. The metaphor of the container and the contained may help explain the dynamic interaction that occurs in the interactive chemistry of the individuals. In a sense, the data of this study suggests that the family court system needs the raw emotion of the litigants to remain vital. It must develop ways to tolerate this aspect of human experience without crushing it or absorbing it. This is a useful way to think about the interactive chemistry because it describes the essential interaction between the problem faced by litigants and the functioning of the system in relation to that problem. For the litigants, the problem involves an emotionally charged situation which they are unable to resolve and which leads them to turn to the legal system for relief. The litigants in this study had in common the experience of feeling terribly hurt, damaged, and violated by their former spouse (who we can assume is feeling similarly toward them). They want justice, the experience of having someone hear their story and then pronouncing judgment that validates their position, punishes the "perpetrator," and makes things right for the children. The courts are looked to as the institution in the best position for providing a moral judgment. The hope is that the institution of the court will heal the hurt and violated self, and restore a sense of equilibrium. In this respect, the legal system is regarded as

a container - a system that can take in these emotions, metabolize what the individual cannot, and give them back in a more benign, less hostile, form. To accomplish this most effectively, the litigants need to feel listened to, understood, and have the experience of their concerns being considered.

Seen in this light, the family law system is the container and the litigants are contained. However, the data suggests that the reverse is also true, i.e., that litigants in the family court system come to contain aspects of the family law system. One most often sees this in its negative form as parents in high conflict custody matters incorporate legal jargon and fight unremittingly over positions both of which claim to be in the best interests of the child. Individuals who were once simply "parents" become "litigants," "petitioners," and "respondents," and, as Attorney-1 referred to it, "rev up" to win their case. However, there are also instances when this is seen in a positive version such as those cases in which parents benefit from the clarification of issues and receive encouragement and help to reach settlement and resolution.

The nature of this container-contained dynamic is changing as there is some shift occurring in family law from a more hierarchical decision making approach to a process oriented approach that looks at the needs of families in a more holistic manner. In the more archaic, patriarchal approach, the focus is on making decisions about only those issues brought before the court in ways that provide a decision without much if any attention to how the family as a whole, and the child in particular, is likely to be

impacted by the decision. In the process oriented approach, while maintaining basic rules for courtroom procedure, there is more of an emphasis on having the court work in ways that meet the needs of children within the context of their families. Interestingly, the male judges were more allied with the former while the females were more involved with the latter, although these patterns are certainly not solely related to gender.

Relation of the Findings to the Literature

The "interactive chemistry of the key persons" identified by the participants at the Wingspread Conference (ABA 1989) and the work of Johnston and Roseby (1997) begin to identify and explain the mutual influences among individuals involved in high conflict cases in the family law system. The literature to date, however, offers relatively little insight to help understand the processes underlying the dynamic relationships between parents and the legal and mental health professionals working with them in the courts. The present study offers ways to think about these interactions, both in terms of individual psychological reactions and systemic influences.

The findings of this research suggest that problems brought into the family law arena in high conflict divorce cases consist of both conscious and unconscious elements. Conscious aspects include things such as the need to sort out property and support matters, as well as decide on custody and visitation arrangements for the children. The unconscious aspects seem to consist of experiences such as primitive fears, feelings of

shame and humiliation, emptiness and loss, guilt, and powerful aggressive drives. In high conflict custody cases these unconscious elements of the parents' psyches may be denied, repressed, or projected. The intense nature of the parents' struggles, particularly defenses against the unconscious aspects of them, influences the ways they are experienced by the legal and mental health professionals working in the courts. They may be perceived as demanding, unreasonable, rigid, or hopeless. Such perceptions can then become the basis for legal and clinical judgments. These judgments may further shape the meaning of the experience related to attempts to resolve the problems which bring parents into the family court system. When these interactions are imbued with empathy such that individuals feel understood and sufficiently attended to there appears to be a lessening of anxiety and decreased desire to continue litigating. On the other hand, when interactions suffer from a lack of empathy, feelings of frustration and aggression may be intensified which can result in further litigation in the hope of addressing the unmet needs.

Wallerstein's (1990) paper on transference and countertranference in clinical interventions with divorcing families is focused on normative divorce and does not specifically address the experience of working with families experiencing high levels of conflict and who have a long history of contacts with the courts. The findings of this study suggest that the theoretical model developed by Racker(1968) and elaborated by Lambert (1974) are useful and applicable ways of thinking about the influence of parents on mental health and legal professionals working with the courts. Drawing a

distinction between concordant and complementary countertransference seems to be a way of understanding the complex, multidimensional reactions to litigants described by the various professionals interviewed for this study. At times their responses were deeply empathic, suggestive of the concordant state, while at other times their sense of frustration, anger, alienation, and fear were suggestive of the complementary experience in which they may have internalized parts of the projected inner world of the parents they were trying to help.

The findings reflected in the literature concerning judges decision-making in custody cases was somewhat supported by the findings of this study. As was the case in other research (Lowery 1981; Lowery 1985; Sorensen and Goldman 1989; Sorensen, Goldman et al. 1995; Sorensen, Goldman et al. 1997; Stamps, Kunen et al. 1997), the data of this study suggests that judges rely heavily on their impressions of litigants' testimony and behavior in the courtroom, and that sometimes they count on this information more than psychological reports in contested custody matters. However, the present study also found that judges often place great weight on reports from mediators and custody evaluators. It seems that they want to be conscientious about their responsibilities in these cases and not simply defer to others. However, particularly with judges less experienced in family law or with more limited psychological insight, this could result in their making decisions based on more superficial impressions, on the ability of a litigant to present themselves well in court, or on the verbal content of what is told to them by adolescents they interview in

chambers.

Fellner's (1985; 1987) findings regarding the suspicion with which attorneys and judges regard mental health services were not supported by the data of this study. The conclusion drawn by those researchers fails to reflect the extent to which the lawyers and judges in this research showed interest in and reliance on the work of mental health professionals in the courts. Furthermore, Fellner's idea that attorneys turn to mental health professionals when they believe it will help their case suffers from the same type of limitation. While there certainly seem to be attorneys focused exclusively on strategizing to win, the data suggests that there is a strong sentiment among family lawyers that part of their role involves considering and working towards finding solutions that are in the best interests of the children involved.

The literature concerning the role of mental health professionals as custody evaluators in the courts reflects some of the same conflicts discussed by the evaluators in this study. However, the comments by the evaluators interviewed in the present research suggest that they are not burdened by some of the problems identified in earlier studies. They were helped by their level of sophistication, particularly insofar as it included awareness of and ability to use transference and countertransference dynamics, as well as by familiarity with the unique issues arising in working with this population in the forensic context. For example, the finding by LaFortune and Carpenter (1998) that many custody evaluators become embroiled in the efforts of attorneys to help their

clients win was not supported by the results of this study. Similarly, the suggestion by Simons and Meyer (1986) that evaluators are challenged by role strain resulting from the work differing from psychotherapy did not appear to be a significant issue for the evaluators in this study who were experienced and well socialized to their complex role.

The perspectives of writers within the domain of therapeutic jurisprudence (Small 1993; Wexler 1993) were strongly supported by the findings of this study. The idea that law could be used as a therapeutic agent, that it can be a tool to address complex social problems, was ubiquitous in this research. While continuing to place great value on due process protections, the bench officers and attorneys who participated in this research showed a keen appreciation for the role of the courts in resolving family problems brought to them and of the need to protect families from the more regressive aspects of the adversarial system. The mental health professionals identified strongly with the potential of using their role within the legal system as a basis from which to impact families in ways that promoted healing.

Bronfenbrenner's ecological model (1979) and Lewin's field theory (1948; 1951) seem to be useful conceptual models that help understand the nature of interaction in family court. Lewin's contribution highlights how the behavior of individuals is shaped by their social environment. Bronfenbrenner's ecological theory builds on and elaborates this kind of systemic thinking. His model of how multiple, mutually influential levels

of the social system influence the course of development seems particularly germane to the study of family court processes. The data of this study illustrates how the microsystem (parents and children), mesosystem (interactions between parents and attorneys, mediators, evaluators, and judges), exosystem (courts and political bodies creating social policy and law), and macrosystem (cultural and historical beliefs and values) mix and mutually determine outcome in these complex cases.

Contributions of the Study

There are two primary contributions made by this study. The first of these is that it suggests there are multidirectional influences at work in the family law system. The adversarial system has long been recognized as contributing to further polarization, blame, and externalization of problems in the population of separating and divorcing families. This study not only adds other dimensions to an understanding of how that occurs but it also suggests something that has heretofore not been adequately appreciated, namely the ways in which the family court system is shaped by the experience of litigants. If the impact of litigants emotional reactions is identified this creates the opportunity to see how the subjective experience of the professionals can function as a tool for understanding the families they are working with and thereby reduce the need to distance from them or blame them. The recognition of mutual influence can thus help legal and mental health professionals working in the family court system more fully understand the nature of their own experiences in doing this work, and use that understanding as a tool to better help families and children.

A second primary contribution of the study is that it helps deepen and broaden the appreciation of how to incorporate clinical concepts into the practice of family law. It adds to the study of the psychology of what occurs within the family law system. Through such a discipline we may learn something about how in high conflict custody cases parents' behavior and experience is shaped not only by inner forces that may be described in terms of individual psychopathology but also by the machinations of the family court system that can produce, or at least contribute to, what could appear to be the range of clinical syndromes. In this manner, perhaps, the field as a whole can take a step away from the danger of a "blame the victim" approach to family law practice.

One additional contribution of the study is that it adds to the body of knowledge in the field by presenting phenomenological data based on actual lived experience of individuals at the various levels in the family court system, and relating that experience to a number of clinically informed theoretical perspectives. The experiences of parents involved in high conflict custody disputes is presented first hand. Not only is their experience of the custody problem recorded in their own words but the data gives a fairly detailed set of views of how litigants in high conflict custody matters experience the family court system. The consumers of the service were given an opportunity to talk about what it was like for them to use it. They discuss their ideas of ways the system may be helpful to individuals in their situation and ways that it makes a bad problem worse. The study provided that type of opportunity for individuals at each level of the family court system. The experiences of these individuals were linked to

particular categories or types of experience, and these categories were then linked with a theoretical perspective that helps shed further light on their meaning.

Implications

This study points out the need for mental health professionals working in family court to avoid diagnosis-based evaluations and recommendations. Instead, the focus of mental health consultation to the courts should be on providing a psychologically grounded, balanced, and clinically honest *functional* understanding of parents and children. Functional understanding views parents and children as individuals in their complexity, with a mixture of strengths and weaknesses, and seeks to understand the ways in which the characteristics of individuals work, both synergistically and antagonistically. Without sacrificing any focus on safeguarding the welfare of children, it seeks to place the needs of the child for both parents - and not the psychological characteristics of the parents - in the foreground. Furthermore, mental health professionals working in the courts must understand that oftentimes part of what they see clinically in families referred for services due to high levels of conflict, when those families are engaged in the court system, are accentuated levels of stress that may mimic or intensify psychopathology. These may be a reflection of the impact of the court system rather than individual psychology. In other words, to an extent the family court system can produce its own casualties in these cases and mental health professionals need to keep in mind that what they are seeing clinically may be an equivalent in the legal arena of what has come to be known as iatrogenic illness in the

medical profession.

The study raises questions about whether the family law court is the most appropriate venue for decisions about child custody and visitation matters. In the case of high conflict custody cases, the data suggests that the adversarial aspects of the court system tend to complicate the conflict, if not sometimes actually drive it, and limit opportunities for resolution. The fact that these family problems become family law cases, in and of itself, is an historical artifact from the days children were regarded as property. The data of this study point in the direction of considering the development of public policy changes that could come from differentiating custody and visitation issues from property and support issues in divorce. The former may well be better handled in an as yet to be developed forum while the latter seem to be handled well in the current court context.

The advantages of the family court system for families unable to resolve custody and visitation issues on their own or with professional assistance is that it strives to safeguard the rights of the parents and to look after the welfare of the children in its parens patriae function. It seems that there may also be a benefit from the stature and decorum of the court in handling these disputes, perhaps in that it provides a communal, public forum in which aggrieved parents can bring their woundedness in the hope that they will be heard, their points of view considered, and their dignity restored. Perhaps these strengths could be incorporated into a different venue which was still

communal and in which rights were honored, but which was much more overtly focused on reaching resolution of these problems in a less competitive, less aggressive manner. For example, there are reports that in Maori (New Zealand) culture, disputes are handled by the whole community. Individuals closest to the dispute speak first, children are given the opportunity to speak if they are old enough, and everyone in the community may voice their thoughts on the matter. In the event this process does not result in resolution then designated elders may make the decision (Duryee 1989).

The way in which the family law system responds to parents in high conflict child custody cases needs to shift from one that is more investigative and adversarial to one that is grounded in an empathic model oriented toward healing. One would be naive to think that investigatory procedures could be dispensed with entirely. This point is that such procedures and safeguards could have a place within an approach focused more fundamentally on empathic understanding and therapeutic-type interventions. This implies that the approach to custody and visitation disputes should be one that is primarily therapeutic but that this therapeutic orientation would need to have a certain procedural safeguards so that due process is assured.

The system would also benefit from increased accountability of the professionals working in it. Families would be better served and professional competencies would be furthered if evaluators, mediators, family law attorneys, and the courts had feedback mechanisms that allowed for individuals at all levels - parents as well as professionals

involved in the system - to respond to each other's work in some sort of formalized manner.

The four parents included in this study had a less than positive experience with Family Court Services mediation. Since they were unable to resolve their problem in mediation they could be expected to have a less favorable view of that service than the many parents who were able to use mediation to settle their dispute. These parents were embroiled in child custody conflicts in ways and to degrees most other parents are not. This being said, the data suggests that the mediation services may 1) fail to offer an adequate level of service for high conflict families, and 2) offer a "one size fits all" approach which may inadvertently heighten the frustration of parents in high conflict situations by placing them in a process that is unlikely to work which then may secondarily undermine their experience with other, potentially more effective, parts of the system.

The study suggests that the resources of the family law courts are limited in light of the enormous need and demands made on the individuals in it. One implication of this research is the need for a shift in the distribution of funding so that the family court's claim to its share of the pie of state funding increases. Funding services for children and families who are having troubles with divorce and custody may not be nearly as glamorous as criminal trials or building more jails, but a more generous societal response to families going through custody problems could help reduce the need for

criminal trials and jails while sparing individuals enormous suffering.

The study also suggests the need for additional education for legal and mental health professionals. Law school education, as well as continuing legal education, should incorporate coursework focused on psychological issues in family law. This should be required for individuals interested in practicing family law primarily or in part. Such training could help address the problem of attorney alignment in these cases to some degree and would also help reduce the experience of stress for all those working in the family law system. Mental health professionals interested in training as mediators and child custody evaluators should similarly have training that helps understand the particular psychology of the family law system. Such educational efforts could contribute a great deal toward reducing stress and helping provide more clinically sensitive services for parents and children.

Limitations of the Study

There are numerous limitations of this study. The first is that it is not at all generalizable to broader populations. In part this is a function of the nature of qualitative research and in part it has to do with the small sample size. No conclusions can be extrapolated from this research to any group of individuals or to the family court system as a whole. The value of this study lies in its identification and articulation of themes and categories of experience, as well as its attempt to draw out possible interconnections and relationships between them. It is hoped that the identification of

these themes and categories can serve as a basis for further research that would explore their applicability with additional and more diverse segments of the population.

A second limitation is that this study was conducted entirely in Northern California, and primarily in the Bay Area. The family law community in the San Francisco Bay Area tends to be a highly progressive one and the responses given by individuals to the interview questions were shaped at least in part by the ethos of the local community and may, to some extent, be unique to that community. Additionally, each of the attorneys interviewed was a family law specialist and each of the evaluators and mediators was a highly seasoned mental health professional. The perspective of attorneys who rarely take family law cases, as well as that of evaluators and mediators who are new to this area of practice, were not included.

Another type of limitation of the study is that there was no opportunity to investigate the dynamics of any one or more cases from the perspective of all the individuals involved in it. Since one of the study questions is about mutual and reciprocal influences in the family law system it would be useful to investigate how those relationships work within a single case or even within many cases. This approach was considered but abandoned early on in the research planning process when the author realized the extent to which researchers are not privileged and the confidential information that could have been collected would be discoverable in legal proceedings. Furthermore, preliminary discussions with some judges suggested that it would violate

judicial ethics for them to talk with a researcher about cases that were currently being adjudicated.

There were groups of individuals who were not included in this study yet whose experience is an essential part of the ecological context of child custody conflicts. Foremost among these are children. The author attempted to compensate for this by discussing the research on children of high conflict divorce in the second chapter of this report, but the fact that they were not included in the study as another cohort is a limitation. The study sheds no light on the question of how children experience the family law system and what their ideas are about it. There was no representation of ethnic minorities in any of the groups studied. All the respondents were Caucasian. The inclusion of people from different ethnic and cultural groups could help broaden the perspectives and findings.

The experience of parents in the family law system not represented by counsel was also not included in this study. This is a significant limitation, particularly in light of the explosive rise in the numbers of pro per litigants in California family law courts.

Another limitation of the study is that the data is based exclusively on self report interview material. While this is consistent with the qualitative approach, it lacks observational data that could supplement it. In other words, what this study reflects is how individuals involved see their own work and their experience, but does not include

observations of what they actually do. For example, it would have been fascinating to have had opportunities to observe the actual process in the courtrooms of these judges when these particular parents appeared with their attorneys, or to have been in the room when the evaluation interviews or the mediation sessions were held. Along with this limitation is the fact that the researcher and his work in this community were known to many of the respondents. It is possible that this could have biased their comments to some degree.

Finally, a few of the interviews felt rushed and would have produced richer data if there had been more time, or perhaps even a series of times, to discuss some of these complex issues and more deeply understand the subjective experience of the individuals involved.

Directions for Future Research

This research report takes an important step in the direction of explicating process and experience within the family law system. To the author's knowledge, this study is unique in bringing together the "players" in the system within an ecological context grounded in actual subjective experience. The study design allows their various perspectives to be juxtaposed and compared, and for development of theory about how they interact with and influence each other. Expanding and building on this knowledge would involve further investigation of these research questions. The qualitative approach seems particularly well suited for this type of research and should be

incorporated into future studies.

Future research can be done to further explore dimensions of the experiential categories identified in this study, and in particular on the interplay between them. Subsequent research should be conducted with larger numbers of individuals and with a broader cross-section of people that included people from different geographical areas, individuals of different racial and ethnic backgrounds, individuals who are not represented by counsel, attorneys who are not family law specialists, and mediators and evaluators who are relatively inexperienced and new to their roles. It would also be of use to have research that integrates qualitative interview data with the kinds of data that come from empirical studies based on observation and standardized psychological or social interaction measures. Finally, it would be useful to have additional research that followed a number of individual cases, from start to finish, using interviews and standardized testing with parents and children. Such longitudinal studies could integrate test data with simultaneous interviews and observations as family members interact with each other level of the system in the ecology of child custody conflicts.

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APPENDIX A

Format for Initial Phone Contact Seeking Participation of Judges, Attorneys, Custody Mediators, and Custody Evaluators

I am a doctoral candidate in the process of writing a dissertation at the California Institute for Clinical Social Work in Berkeley, California. I am calling to ask if you would be willing to participate in the study. The purpose of my research is to understand the mutual influences between professionals and parents in the context of the family law system. It is an exploration of the meaning of the experience of being involved in child custody litigation from the point of view of those most involved in it. The research investigates this phenomenon through the subjective experience of judges, attorneys, child custody evaluators, family court service mediators, and parents. This study may provide benefits for judicial officers, attorneys, and mental health professionals, as well as for families having custody disputes, insofar as it may help understand how stresses in the family are helped or hindered by the practices of and interactions between individuals working in the legal and mental health systems.

In order to participate in the study you must either be a professional who has worked for at least six months in the family court system as either a judge, attorney, family court service mediator, or child custody evaluator. If you agree to be included in the study, I will want to set up a time to meet with you for an hour or two to talk with you about your experience. Our talk will be audiotaped and the tape will then be transcribed. Through

coding of transcripts, care will be taken to assure that your responses remain anonymous. No names or any other identifying information, other than job description (e.g., family law judge, or child custody evaluator) and that respondents were from the Bay Area in Northern California, will ever be used in either written or oral presentations of the findings. However, in the interest of furthering understanding of the research findings, you may be quoted directly when your words would in no way reveal your personal identity.

If you consent to participate, I would interview you at a time and place that is convenient for you. The place must be quiet and free of distractions while we speak. If you do not have such a place I will arrange for one. The interview will take between one and two hours. As I stated, I will audiotape the conversation. I may want to phone you afterwards if I have questions about the meaning of things you say in the interview.

Participants in the study are selected based on their involvement with the family court system, personally or professionally. Everyone involved in the study should understand that they are free to withdraw from it at any time.

Do you have any questions so far?

At this time, I would like to know whether you would be willing to participate in this study.

(If the prospective respondent does not agree to participate, then thank them for their time and interest, and end the conversation. If the prospective respondent agrees to participate then proceed with the following.)

I would now like to make an appointment to meet with you so we can do the interview. What is a convenient time and place? At that time would you be willing to sign an Informed Consent Statement which states: (read statement aloud)? (If yes, the appointment is scheduled).

Thank you very much for your willingness to participate in the study. If you have any questions or need to reach me for any reason, my office phone number is (415) 563 6040.

APPENDIX B

Parent Recruitment Letter

Dear _____:

I am writing to ask your assistance. I am working on a doctoral dissertation at the California Institute for Clinical Social Work in Berkeley, California entitled, "The Ecology of Child Custody Conflicts." The purpose of this study is to better understand the interface between family law and psychology through an exploration of the experience of being involved in custody litigation from the point of view of those personally and professionally immersed in it. I will be interviewing a number of parents, mediators, evaluators, attorneys, and judges. This study may help understand the impact we have on each other and how family members are helped or hindered by the practices of and interactions between individuals working in the legal and mental health systems.

The purpose of this letter is to ask if you would contact a client you have represented in custody litigation who might be interested in participating in this study. I want to speak with a number of parents who have been through custody litigation, including both mediation and evaluation, within the past five years. The family cannot be one I have already worked with in my practice and must be one whose case is no longer active. Inactive cases are ones where there is no pending court date and the individual is not in the process of filing a petition with the court seeking a hearing.

If you are willing to help, I am asking that you think about your client case load over the past five years. If a parent comes to mind who went through custody mediation and evaluation, and whose case is no longer active, I would like you to contact him or her to ask if they would be interested in participating. Participation in the study involves meeting with me for a single 1.5 hour interview, at a time and place convenient for the individual.

If you find a parent interested in being included in the study, then please call me and leave a message with their phone number. I will then call them directly. If the parent prefers, you can give him or her my phone number and have them contact me directly. I will explain the study and answer any questions at that time. For your information, the parents will be asked to participate in one audiotaped interview. The interviews will be coded and transcribed. All data will be anonymous and confidential. No names or any other identifying information, other than "mother" or "father," and that respondents were from the Bay Area in Northern California, will ever be used in either written or oral presentations of the findings. However, in the interest of furthering understanding of the research findings, parents may be quoted directly when their words would in no way reveal their personal identity. Thank you very much for your willingness to consider helping with the study. If you have any questions or need to reach me for any reason, my office phone numbers are (415) 563-6040 or (510) 869-5099.

Sincerely,

Steven E. Zemmelman, L.C.S.W.

Appendix C

Format for Initial Phone Contact with Parents

Your name was given to me by _____ (attorney who made the referral) as someone who might be interested in participating in a study of parents and professionals involved in the child custody litigation process. I am a doctoral candidate in the process of writing a dissertation at the California Institute for Clinical Social Work in Berkeley, California. The purpose of my research is to understand the mutual influences between professionals and parents in the context of the family law system. It is an exploration of the meaning of the experience of being involved in child custody litigation from the point of view of those most involved in it. The research investigates this phenomenon through the subjective experience of judges, attorneys, child custody evaluators, family court service mediators, and parents. This study may provide benefits for judicial officers, attorneys, and mental health professionals, as well as for families having custody disputes, insofar as it may help understand how stresses in the family are helped or hindered by the practices of and interactions between individuals working in the legal and mental health systems.

In order to participate in the study you must be a parent who has gone through mediation and evaluation within the past five years but your case must no longer be active. Inactive cases are ones where there is no pending court date and you are not in the process of filing a petition with the court seeking a hearing.

If you agree to be included in the study, I will want to set up a time to meet with you for an hour or two to talk with you about your experience. Our talk will be audiotaped and the tape will then be transcribed. Through coding of transcripts, care will be taken to assure that your responses remain anonymous. No names or any other identifying information, other than a pseudonym, or reference to you as a "mother" or "father," and that you live in the Bay Area in Northern California, will ever be used in either written or oral presentations of the findings. However, in the interest of furthering understanding of the research findings, you may be quoted directly when your words would in no way reveal your personal identity.

If you consent to participate, I will interview you at a time and place that is convenient for you. The place must be quiet and free of distractions while we speak. If you do not have such a place I will arrange for one. The interview will take between one and two hours. As I stated, I will audiotape the conversation. I may want to phone you afterwards if I have questions about the meaning of things you say in the interview.

Participants in the study are selected based on their involvement with the family court system, personally or professionally. Everyone involved in the study should understand that they are free to withdraw from it at any time.

Do you have any questions so far?

At this time, I would like to know whether you would be willing to participate in this study.

(If the prospective respondent does not agree to participate, then thank them for their time and interest, and end the conversation. If the prospective respondent agrees to participate then proceed with the following.)

I would now like to make an appointment to meet with you so we can do the interview. What is a convenient time and place? At that time would you be willing to sign an Informed Consent Statement which states: (read statement aloud)? (If yes, the appointment is scheduled).

Thank you very much for your willingness to participate in the study. If you have any questions or need to reach me for any reason, my office phone number is (415) 563 6040.

Appendix D

Interview Guide for Parents

First of all, I want to thank you for taking the time to talk with me and to assist in this research. You have been asked to participate because of your personal experience in this area. Your thoughts about the issues being investigated are extremely valuable and will help more fully explain the dynamic interactions that affect individuals in the family law system.

This is a study concerning the subjective experience of individuals involved in the family law field. In particular, I want to learn about your experience as it is influenced by other individuals and institutions, including on the one hand the law itself and bureaucratic requirements, and on the other hand your interaction with judges, attorneys, custody evaluators, family court service mediators, other family members, and your children. In order to understand this more fully, I have a number of questions I want to ask as a way of helping frame the discussion. Please feel free to use the time we spend together talking about these issues from your perspective and do not feel constrained by the questions asked. However, please keep in mind that I am most interested in having you describe your own personal experience as opposed to ideas, opinions, and theories about how things work or don't work.

I. Context

How would you describe your experience in the family law system?

II. Psychological Climate

What were the most common types of feelings or emotional states you experienced as you were going through the custody litigation? What were your worries about your child(ren) and how were you affected by them? How were you impacted by the mediator? evaluator? judge? your attorney? the other attorney? How did going through the litigation process impact your relationship with your former spouse? With your child(ren)? What do you think was the most successful part of the litigation for you? What do you think was the most difficult part of the litigation for you?

In your experience with the family law system, what characteristics have you come to admire in judges? attorneys? custody evaluators? family court system mediators? custody litigants? Why have you come to admire these characteristics?

In your experience in the family law system, what characteristics have of judges/attorneys/evaluators/mediators/custody litigants have bothered you the most? What about these characteristics has bothered you?

III. Interactional Dynamics

How was your experience affected by divorce law?

Thinking about your interactions with legal and mental health professionals as you went through the custody litigation process, what did you find most helpful in your interactions with judges? evaluators? mediators? attorneys?

IV. Values and Beliefs

What are your thoughts about how your own personal values and beliefs about yourself and your children influenced your experience in going through child custody litigation?

What would you tell another parent who asked you for advice about whether or not to litigate a custody matter?

V. Reflections on the Interview

Tell me what it was like for you to do this interview. Did any new perspectives or thoughts emerge in the course of our discussion? If so, what are they?

Appendix E

Interview Guide for Judges, Attorneys, Mediators, and Evaluators

First of all, I want to thank you for taking the time to talk with me and to assist in this research. You have been asked to participate because of your professional experience in this area. Your thoughts about the issues being investigated are extremely valuable and will help more fully explain the dynamic interactions that affect individuals in the family law system.

This is a study concerning the subjective experience of individuals involved in the family law field. In particular, I want to learn about your experience as it is influenced by other individuals and institutions, including on the one hand the law itself and bureaucratic requirements, and on the other hand your interaction with (other) judges, attorneys, custody evaluators, family court service mediators, family members, and children. In order to understand this more fully, I have a number of questions I want to ask as a way of helping frame the discussion. Please feel free to use the time we spend together talking about these issues from your perspective and do not feel constrained by the questions asked. However, please keep in mind that I am most interested in having you describe your own personal experience as opposed to ideas, opinions, and theories about how things work or don't work.

I. Context

How would you describe what you do in the family law system? Probe questions: In your particular role(s), what is the nature of your interaction with (other) judges?, (other) attorneys?, (other) mediators?, (other) custody evaluators?, litigants?, and children? For judges and lawyers: Have you worked or do you now work in other fields of law besides family practice? What are some of the similarities and differences? For evaluators and mediators: Have you worked or do you now work in other aspects of mental health practice than that related to family law? What are some of the similarities and differences?

II. Psychological Climate

What in your opinion are the most common types of feelings or emotional states that you deal with in your work as these arise in families you encounter in your job? How are you impacted by your work with family members showing or expressing any or all of these emotions? What kinds of feelings have arisen for you as you encounter other professionals in the family law system? How are you impacted by your interaction with these experiences?

Tell me about one or two cases that you consider "successes." What in your opinion differentiated this (these) case(s) from others that were less successful or that were failures?

What was the overall impact on you? Did you change as a result of these experiences? What was the impact on the family?

Now tell me about one or two of your most difficult cases. What were the factors that made it so hard? How did that affect you? What was the impact on the family involved? What was the overall impact on you? Did you decide to handle cases differently as a result? Did you change as a result of these experiences? If so, how?

In your experience with the family law system, what characteristics have you come to admire in judges? attorneys? custody evaluators? family court system mediators? custody litigants? Why have you come to admire these characteristics?

In your experience working in the family law system, what characteristics have of judges/attorneys/evaluators/mediators/custody litigants have bothered you the most? What about these characteristics has bothered you?

III. Interactional Dynamics

How has your work been affected by the legal context of divorce in the family law system as it is structured today?

The following question was posed to evaluators: Thinking about other legal and mental health professionals working in the family law field, what do you find most and least helpful in your interactions with judges? attorneys? mediators?

The following question was posed to mediators: Thinking about other legal and mental

health professionals working in the family law field, what do you find most and least helpful in your interactions with judges? attorneys? evaluators?

The following question was posed to judges: Thinking about other legal and mental health professionals working in the family law field, what do you find most helpful in your interactions with attorneys? evaluators? mediators?

The following question was posed to attorneys: Thinking about other legal and mental health professionals working in the family law field, what do you find most helpful in your interactions with judges? evaluators? mediators?

IV. Values and Beliefs

What are your thoughts about how your own personal values and beliefs about families and children influence your approach to doing this work? What in your personal history led you to work in family law? As a result of your experience, personally or professionally, what type of clients do you tend to feel the most empathy for? What type of clients do you tend to have difficulty feeling empathic towards?

V. Reflections on the Interview

Tell me what it was like for you to do this interview. Did any new perspectives or thoughts emerge in the course of our discussion? If so, what are they?

Appendix F

Informed Consent Statement for Parents

I, _____, hereby willingly consent to participate in the research project, The Ecology of Child Custody Conflicts, conducted by Steve Zemmelman, L.C.S.W., under the direction of Sylvia Sussman, Ph.D., faculty member at the California Institute for Clinical Social Work.

This research examines the "interactive chemistry" between individuals at different levels in the family court system.

I understand the procedures to be as follows: An interview lasting between 1 and 2 hours will be held at a time and place convenient for me. The interview will be audiotaped and then the tape will be transcribed. All identifying information will be removed so that the confidentiality of my responses will be protected.

I will be talking about my experience with the family law system.

I am aware that potential discomfort from participating in the study is the possible recall of feelings connected with difficult or frustrating custody matters. If this should happen, I will be able to contact the researcher who will make provisions for me to receive consultation at no charge for a reasonable and limited time (three visits maximum).

I understand that no obligation is involved and I am free to withdraw from this study at any time. I also understand that this study may be published and that my personal identity will be protected. No names or identifying information will be used in any oral or written materials. I am aware that I may be quoted, in the interest of the research, but only when what I say would not reveal my personal identity.

I understand that I have the option to receive feedback from the results of the study, including but not limited to receiving a written summary of the results.

I would like a summary of the results after the study is concluded:

(check one) ____yes ____no

Date_____ Signature_____

Appendix G

Informed Consent Statement for Professionals

I, _____, hereby willingly consent to participate in the research project, The Ecology of Child Custody Conflicts, conducted by Steve Zemmelman, L.C.S.W., under the direction of Sylvia Sussman, Ph.D., faculty member at the California Institute for Clinical Social Work.

I understand that the research investigates the subjective experience of individuals involved in the family law field as part of the interaction between individuals at different levels in the family law system. In particular, it explores the experience of attorneys, judges, custody evaluators, family court service mediators, and parents as it is influenced by other individuals and institutions, including on the one hand the law itself and bureaucratic requirements, and on the other hand other judges, attorneys, custody evaluators, family court service mediators, and families involved in litigation.

I understand the procedures to be as follows: An interview lasting between 1 and 1.5 hours will be held at a time and place convenient for me. The interview will be audiotaped and then the tape will be transcribed. All identifying information will be removed so that the confidentiality of my responses will be protected. No names or identifying information of any kind will be used in any oral or written materials. The city and county in which I practice, as well as the names of cases and other legal and mental health professionals with

whom I work, will not be noted in the research report. I am aware that I may be quoted, in the interest of the research, but only when the quote would not reveal my personal identity or that of any other individual.

I will be talking about my experience with the family law system. More specifically, I understand I will be responding to questions about: 1) my role in the family law system; 2) my experience interacting with other professions in addressing custody issues; 3) emotional responses to working with families litigating custody matters and other legal and mental health professions working on cases with me; 4) factors that contributed to "successful" and "failed" cases; and 5) how my own values and beliefs about families and children influence my work in this field.

I am aware that there are risks associated with participation in this study. Liability could be associated with discussion of specific information about particular cases. I understand that I will not be asked to discuss specific court cases, families, or other professionals in a manner that could reasonably lead to their being identified. If I have concerns about disclosure of sensitive information to the researcher I will be able to contact the researcher (Steve Zemmelman, L.C.S.W., by mail at 2142 Sutter Street, Suite 4, San Francisco, CA 94115, by phone at (415) 563 6040 or (510) 869 5099, or by fax at (415) 563 2711) who will discuss the issue with me to a point that I am comfortable with how the information is going to be used and/or protected. If it is impossible to arrive at an agreement as to how the information is going to be used in the research report, then I understand I can ask the

researcher to delete the information that is of concern to me.

I understand that no obligation is involved and I am free to withdraw from this study at any time. I also understand that this study may be published and that my personal identity will be protected.

I understand that I have the option to receive feedback from the results of the study, including but not limited to a written summary of the results. If I am interested in receiving a written summary my name and address will be put on a list for distribution that will be kept completely separate from the research.

I would like a summary of the results after the study is concluded:

(check one) ____yes ____no

I have reviewed the provisions of this Informed Consent Statement, have had an opportunity to ask any questions I have about my potential participation in the research project described, and consent to participate in the study.

Date_____ Signature_____