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# Judicial Settlement-Seeking in Parenting Cases: A Mock Trial

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## **Abstract:**

Judicial dispute resolution is common in family courts, where it usually consists of informal efforts to bring about settlement in pre-trial conferences. Many judges are especially eager to promote settlement in child custody and visitation cases. This paper will critically evaluate informal JDR in parenting disputes, by asking whether and to what extent it is in the best interests of the children involved. It begins by identifying several features which distinguish custody and access disputes from other types of civil litigation, and which are relevant to the normative analysis of JDR in this context.

The paper then describes and evaluates three arguments which might be made against informal JDR in custody and access. First, one might argue that there is too much settlement and not enough neutral adjudication of civil cases in general, or of parenting cases in particular. Second, one might applaud settlement in these cases but say that the efforts of the justice system to encourage it are ineffectual or inappropriate. Third, one might approve of settlement-seeking by the justice system in custody and access cases, but maintain that the system's reliance on judges to do this work is mistaken.

The first two arguments can be rejected, but the author argues that the third has substantial merit. This paper will conclude by arguing that facilitative mediation by non-judges appears to have significant advantages over judicial settlement-seeking as a way to resolve custody and access cases without adjudication. Assigning settlement-seeking to facilitative non-judges could revitalize both settlement-seeking and adjudication in family court.

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## Introduction

It is well known that judges deploy a range of techniques to bring about voluntary resolution of legal disputes in pretrial conferences.<sup>1</sup> This includes child custody and visitation cases, which arise when adults are unable to agree about how to divide the duties and responsibilities of parenthood between them. A small literature, written primarily by the judges themselves, discusses judicial settlement-seeking in the context of these family disputes.<sup>2</sup> The author's empirical research has identified judicial settlement-seeking strategies in custody and visitation cases, and points of consensus and controversy among those who do this work.<sup>3</sup>

This article asks: how well does judicial settlement-seeking serve the interests of the children involved in custody and visitation cases? This "best interest of the child" test is the supreme legal doctrine in disputes of this nature, and it is also a criterion against which

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<sup>1</sup> The most recent contributions to this literature include Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271 (2011); Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U. L. REV. 145 (2011), and a series of articles by Peter Robinson: *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335 (2006) [hereinafter Robinson, *Adding Judicial Mediation*]; *Settlement Conference Judge - Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009) [hereinafter Robinson, *Legal Lion*]; *Opening Pandora's Box: An Empirical Exploration of Judicial Settlement Ethics and Techniques*, 27 OHIO ST. J. ON DISP. RESOL. 53 (2012) [hereinafter Robinson, *Opening Pandora's Box*]; *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, forthcoming HARVARD NEGOT. L. REV. (2012).

<sup>2</sup> E.g. Joanne Goss, *Judicial Dispute Resolution: Program Setup and Evaluation in Edmonton*, 42 FAM. CT. REV. 511 (2004); Jacqueline W. Silbermann, *Child Custody in Contested Matrimonials*, 80 N.Y. ST. B.A. J. 16 (2008); Abraham H. Lieff, *Pre-Trial of Family Law in the Supreme Court of Ontario - Simplify and Expedite*, 10 LAW SOCIETY OF UPPER CANADA GAZETTE 300 (1976); Hugh F. Landerkin, *Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model*, 35 ALTA. L. REV. 627 (1997); T.J. Gove, *Judge-Mediated Case Conferences in Family Law: Looking for the Best Attainable Outcome*, 57 ADVOCATE 855 (1999); and FRANCOIS ROLLAND, *MEDIATION/ARBITRATION IN FAMILY LAW: PROS AND CONS (WINKLER LECTURE ON CIVIL JUSTICE REFORM)*, (2009), available at: [http://www.commonlaw.uottawa.ca/index.php?option=com\\_docman&task=doc\\_download&gid=3115](http://www.commonlaw.uottawa.ca/index.php?option=com_docman&task=doc_download&gid=3115) (last visited: 29 June 2012). Peter Robinson surveyed 72 California family law judges about settlement-seeking techniques: Robinson, *Legal Lion*, *supra* note 1.

<sup>3</sup> Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy*, 29 CONFLICT RESOL. Q. 309 (2012) [hereinafter Semple, *Consensus and Controversy*]. This article was based on interviews with 29 judges and other family law professionals in Toronto and New York City. Ethics approval was granted for the interviews by the York University Human Participants Review Sub-Committee. (Certificate Number 2009-161, granted on November 25, 2009.)

custody and visitation dispute resolution procedure can be evaluated.<sup>4</sup> The argument of this article is that, while the justice system needs to actively encourage settlement in most parenting cases, judges might not be the best people for this job. Instead, non-judicial facilitative mediators, backstopped by a judiciary dedicated to authoritative decision-making, would more faithfully serve the interests of children as well as those of parents and society.

Part I of this paper identifies the features of custody and visitation disputes which distinguish them from other civil litigation. The most distinctive elements are (i) the doctrinal supremacy of the interests of a non-party (the child); (ii) the prevalence of self-represented litigants; and (iii) the prospective and relationship-focused nature of the legal standard. Analysis of dispute resolution options such as judicial settlement-seeking and facilitative mediation must take account of the specificities of parenting disputes if it is to meaningfully analyse their fidelity to the best interests of the children involved.

Parts II, III, and IV approach the normative analysis by conducting a mock trial. Judicial settlement-seeking in parenting cases can be indicted on three charges, and this article purports to try the matter. The first charge is that there is too much settlement, and not enough neutral adjudication, of custody and visitation disputes. The second charge is that the settlement of these cases is the business of the litigants alone, and not a legitimate goal for the justice system. I will argue that judicial settlement-seeking should be exonerated on these two counts, due in part to the characteristics of parenting disputes and the limitations of adjudication.

However, this paper will argue for figurative “conviction” on a third count: that judges are not the best people to entrust with the task of encouraging settlement in custody and visitation cases. The available empirical evidence sheds doubt on the proposition that judicial settlement-seeking increases the number of cases which settle. Moreover, four inherent characteristics of the judiciary – high salary, collective ambivalence about settlement-seeking, autonomy, and authority – render them unsuitable for this role, in comparison with others who might perform it. Part V will argue that facilitative non-judicial mediators should be tasked with encouraging settlement, and family court judges should be dedicated to the essential task for which they are uniquely suited – adjudication.

## **I. The distinctive characteristics of parenting disputes**

The most important feature distinguishing custody and visitation from other civil litigation is the doctrinal supremacy of the interests of a non-party – the child. Throughout

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<sup>4</sup> Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 OSGOODE HALL L. J. 287 (2010) [hereinafter Semple, *Whose Best Interests?*].

the West, the legally correct outcome to a private parenting dispute is that which is best for the child or children involved.<sup>5</sup> Despite their doctrinal supremacy, children are almost never parties to the custody and visitation litigation which concerns them. Although courts and practitioners have developed a variety of methods to hear the “voice of the child,” in many of these cases the child is not involved in any way.<sup>6</sup>

A second distinctive feature is the prevalence of self-representation among the adult litigants in parenting cases. For example, in California 75% of the cases which came to court-adjunct family mediation in 2008 had at least one self-represented party.<sup>7</sup> In many North American jurisdictions the majority of cases involve at least one self-represented party, and the proportion of litigants without lawyers in these cases is generally thought to be increasing.<sup>8</sup> The high rate of self-representation is driven by some combination of financial and non-financial factors.<sup>9</sup>

A third key factor in custody and visitation disputes is the prospective and relationship-focused nature of the legal inquiry.<sup>10</sup> Unlike most civil cases, they are primarily about the future rather than the past. The goal is to determine what will be best for the child going forward, even if the relevant evidence is largely historical in nature. By contrast to litigants in tort claims, litigants in parenting cases will not usually become strangers once the dispute is resolved. It is increasingly common for joint legal custody to

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<sup>5</sup> D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes - a Comparative Exploration*, 39 FAM. LAW Q. 247 (2006). E.g. in Ontario: Divorce Act, R.S.C. 1985, (2d Supp.) (Can.), c. 3; Children's Law Reform Act (Ontario), R.S.O. 1990, c. C.12 (Can.). In New York State, see N.Y. DOM. REL. §240.

<sup>6</sup> E.g., Noel Semple, *The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases*, 29 CAN. FAM. L.Q. 1 (2010).

<sup>7</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, SNAPSHOT STUDY 2008: SUMMARY FINDINGS 6 (2010), available at: [http://www.courts.ca.gov/documents/Snapshot\\_2008\\_summary\\_findings\\_FINAL\\_Oct11\\_update.pdf](http://www.courts.ca.gov/documents/Snapshot_2008_summary_findings_FINAL_Oct11_update.pdf) (last visited: 29 June 2012). The overall self-representation rate in this sample was 58%.

<sup>8</sup> Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607 (2010).

<sup>9</sup> Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. Pub. L. 373, 378-379 (2005); Herbert M. Kritzer, *Examining the Real Demand for Legal Services*, 37 FORDHAM URB. L.J. 255 (2010).

<sup>10</sup> Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 364 (2009).

be ordered and for children to spend substantial amounts of time with both of their parents after they separate.<sup>11</sup>

Moreover, the nature of the parties' interaction has a powerful impact on the best interests of the child.<sup>12</sup> Specifically, researchers have established that interparental conflict has a negative impact on children, especially if that conflict is apparent to the child.<sup>13</sup> Evaluating settlement-seeking alternatives in parenting cases therefore requires an attentiveness to the *quality* of the settlements which many other types of civil litigation do not.<sup>14</sup> Some parents who settle have arrived at a position of deep and abiding respect and long-term harmony; others are simply catching their breath for the next round of litigation.<sup>15</sup> To evaluate judicial settlement-seeking or its alternatives exclusively on the basis of *how many* settlements they produce would be no wiser than evaluating a surgeon exclusively on the basis of how many surgeries she is able to conduct per day, without asking what happens to the patients after they are sewn up.<sup>16</sup>

## II. Charge #1: There is too much Settlement of Parenting Cases

### 1. Prosecution

One might argue against judicial pretrial settlement-seeking on the grounds that there is too much settlement of custody and visitation disputes, and not enough decision-making by neutral third parties about what parenting outcomes are in the best interests of the children involved. The classic argument against settlement was made by Owen Fiss in

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<sup>11</sup> Lawrence M. Berger et al., *The Stability of Child Physical Placements Following Divorce: Descriptive Evidence from Wisconsin*, 70 J.MARRIAGE & FAM. 273, 274 (2008); PAUL MILLAR, THE BEST INTERESTS OF CHILDREN: AN EVIDENCE-BASED APPROACH 30 (2009).

<sup>12</sup> Liz Trinder and Joanne Kellett, *Fairness, Efficiency and Effectiveness in Court-Based Dispute Resolution Schemes in England* 21 INT'L J.L.POL'Y & FAM 322, 326 (2007).

<sup>13</sup> Robin Deutsch and Marsha Kline Pruett, *Child Adjustment and High-Conflict Divorce*, in THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 353-374 (Robert M. Galatzer-Levy et al, eds, 2009); Joan B. Kelly and Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAMILY RELATIONS 352, 353 (2003).

<sup>14</sup> Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627 (2007); ROLLAND, *supra* note 2 at 16-17.

<sup>15</sup> BERNARD S. MAYER, STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES, 1ST ED. (2009), 2. Regarding the importance of considering agreement durability and relitigation rates in evaluating family court dispute resolution, see Trinder and Kellett, *supra* note 12 at 325.

<sup>16</sup> Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 62, 83 (1988).

1984. Fiss argued that only public adjudication serves the public goals of justice and insulates outcomes from the effects of inequality between the parties.<sup>17</sup> In principle, it would be better to have pure justice determined by neutrals than to have compromises such as settlements.<sup>18</sup> In elaborating this argument, David Luban distinguished between “instrumental” and “intrinsic good” arguments for adjudication.<sup>19</sup> The most common instrumental argument for adjudication over settlement is that it produces rules and precedents which have public benefits. These allow others to structure their lives in accordance with the law,<sup>20</sup> and bring social and legal problems to light.<sup>21</sup> Beyond these instrumental claims, Luban suggests that adjudicated judgments are “reasoned elaboration and visible expression of public values,” and as such have intrinsic value.<sup>22</sup>

Turning to the specificities of custody and visitation disputes, we find one special reason to be wary of settlements. The child, whose interests are doctrinally supreme, is almost never “at the table” when the settlement is reached.<sup>23</sup> Separating parents may therefore consent to custody or visitation deals which are sub-optimal for their children.<sup>24</sup> David Luban observes that “two parties trying to apportion a loss are most likely to reach agreement if they can find a way to shift the burden to a third party who is not present at the bargaining table.”<sup>25</sup> This theory can readily be applied to the process by which post-separation parenting disputes are settled. Sharing parenting duties while living apart imposes new costs on the adults involved, in terms of time and money. These new costs might be passed on to the children.

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<sup>17</sup> Owen Fiss, *Against Settlement* 93 YALE L.J. 1073 (1984).

<sup>18</sup> Jules Coleman and Charles Silver, *Justice in Settlements*, 4 SOC.PHIL.& POL'Y 102, 108 (1986).

<sup>19</sup> David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO L.J. 2619, 2621 (1995).

<sup>20</sup> TREVOR FARROW, PUBLIC JUSTICE, PRIVATE DISPUTE RESOLUTION AND DEMOCRACY (Canadian Institute for the Administration of Justice, 2008), available at: <http://ssrn.com/abstract=1167702> (last visited: 29 June 2012) at 48; Coleman and Silver, *supra* note 18 at 114-115.

<sup>21</sup> Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 55 (2007); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or the Law of ADR*, 19 FLA. ST. U. L. REV. 1, 25-30 (1991).

<sup>22</sup> Luban, *supra* note 19 at 2626.

<sup>23</sup> Semple, *Consensus and Controversy*, *supra* note 3 at section III(2).

<sup>24</sup> Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1032-33 (1985).

<sup>25</sup> Luban, *supra* note 19 at 2626.



For example, suppose parents of a two year old child separate and move to towns which are 100 miles apart. They agree that the child will be in Parent A's sole custody, but that Parent B will have visitation rights for a 6 hour period, once every other week. This arrangement is satisfactory to both adults. It allows Parent A a substantial block of free time, and minimizes the number of times that Parent B - whom she detests -- visits her house. It allows Parent B to minimize the number of times he makes the arduous voyage between the towns.

However, there is evidence that the child's interest in such a circumstance would be better served by more frequent but shorter visitation periods with Parent B.<sup>26</sup> Given the memory span and cognitive abilities of a two year old, the same total visitation time would be more likely to foster healthy attachment if divided into three one-hour blocks each week. By choosing an arrangement which works well for them instead of one which works well for their child, these parents have passed costs along to the third party who is their child.

Separating parents may also unintentionally externalize the loss of the economic and emotional benefits of cohabitation by passing the loss on to their children. Consider the case of a "traditional" family with one breadwinner parent and one homemaker parent. Apart from 10 hours per week with the breadwinner, the child is cared for by the homemaker. When they divorce, the breadwinner is threatened with the loss of affectionate companionship at the end of a workday. The homemaker is threatened with the loss of the financial benefits of the breadwinner's income. In negotiating a parenting arrangement, the breadwinner asks to have the child spend 25 hours per week in his company. This is far more time than he spent with the child before divorce, and he will struggle to provide this much high-quality parenting after divorce. However, his proposed arrangement assuages the loneliness brought about by the loss of his family. The homemaker accepts this arrangement, in exchange for a support award and property division more generous than the law provides.

The settlement is satisfactory to the parents but may not reflect the best interest of the child, which often lies in a relatively close approximation of the pre-divorce parenting arrangements.<sup>27</sup> To the extent that adjudication would uncover and bring about a parenting arrangement which is more closely aligned with the child's interests than the settlement terms would be, one might argue that there is too much settlement and not enough adjudication of custody and visitation cases.

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<sup>26</sup> Joan B. Kelly and Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM.& CONCIL.CTS.REV. 297, 300 (2000).

<sup>27</sup> AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.08 Comment (b) (2002).

## 2. Defence

The Fiss and Luban arguments for adjudication have been answered by compelling generalist arguments for settlement. It is said that parties prefer settlement, that it is cheaper for everyone involved, that it produces better outcomes, and even that settlement produces deterrence and moral education.<sup>28</sup> Carrie Menkel-Meadow argues persuasively that a settlement need not be a “compromise” of justice – it also has the potential to create better justice (or at least more satisfaction) for all parties than an adjudicated outcome would.<sup>29</sup> To the extent that there is an adjudication-versus-settlement debate, the settlement side would appear to be ascendant.<sup>30</sup> The polarized debate between settlement and adjudication proponents has largely been replaced by more nuanced questions about “when, how, and under what circumstances” cases should be settled or adjudicated.<sup>31</sup>

The specific arguments for more adjudication of parenting cases founder quickly when exposed to the real limitations of the justice system. Given that the existing judicial complement is at best barely sufficient to handle the 5-10% of parenting cases which are adjudicated, how many more judges would be required if the adjudication rate were intentionally increased?<sup>32</sup> In the absence of child protection concerns, on what basis can the state deny separating parents the right which other parents have, to make decisions about their children’s upbringing?<sup>33</sup>

The fact that parents sometimes settle against their children’s interests does not mean that adjudication is, overall, more likely to ascertain those interests. It is notoriously difficult for a judge to determine which among a menu of parenting options would be “best”

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<sup>28</sup> Marc Galanter and Mia Cahill, *‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350 (1994); Lon L. Fuller, *Mediation-Its Forms and Functions*, 44 S. CAL. L. REV. 305, 316 (1971); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO L.J. 2663 (1995).

<sup>29</sup> Menkel-Meadow, *Whose Dispute Is It Anyway?* *supra* note 28 at 2674; Carrie Menkel-Meadow, *For and against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985) [hereinafter Menkel-Meadow, *For and Against Settlement*].

<sup>30</sup> Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266 (2004).

<sup>31</sup> Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 28 at 2664-5; Menkel-Meadow, *For and Against Settlement*, *supra* note 29 at 498.

<sup>32</sup> Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 at 659 (1994).

<sup>33</sup> Mnookin, *supra* note 24 at 1034.

for a specific child.<sup>34</sup> The key ingredients for successful best interests decision-making are (i) knowledge of the parents' abilities to meet the child's needs, and (ii) knowledge of the child in question. Even after a two-week trial the judge's stock of these ingredients will usually be thin in comparison to that of the parents.

Most importantly, there is strong evidence that settlement of parenting disputes is generally in the interests of the children involved.<sup>35</sup> Litigation imposes costs and burdens on parents which are passed on to their children. It can quickly drain parents' financial and psychological resources, diminishing their ability to care for their child.<sup>36</sup> Litigation also seems to increase the level of interparental hostility and the likelihood that the child will be exposed to it, which is clearly contrary to children's interests.<sup>37</sup> It seems more likely that the status quo level of adjudication of custody and visitation cases is actually too high for children's interests, given of the substantial costs and dubious benefits of adjudication for them.<sup>38</sup>

### III. Charge #2: The Justice System Need not, and Should not, Encourage Settlement

#### 1. Prosecution

The specificities of parenting disputes do not provide a justification to discourage settlements. If anything, they suggest that the present level of litigation and adjudication is excessive for children's interests. However a second possible line of attack on judicial

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<sup>34</sup> MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 153 (2005); Semple, *Whose Best Interests?*, *supra* note 4 at 290-1.

<sup>35</sup> This argument is developed at more length in Semple, *Whose Best Interests?* *supra* note 4 at 321-325.

<sup>36</sup> Regarding the financial impact of parenting litigation on families, see Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L. Q. 95, 105 (1998) [Hereinafter Schepard, *Public Health Perspective*], CORNELIA BRENTANO & ALISON CLARKE-STEWART, DIVORCE: CAUSES AND CONSEQUENCES 135 (2006), and the figures in Semple, *Whose Best Interests?*, *supra* note 4, at 322.

<sup>37</sup> Marsha Kline Pruett and Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L. Q. 288 (1999); Marsha Kline Pruett, Glendessa M. Insabella and Katherine Gustafson, *A Court-Based Intervention for Separating Parents with Young Children*, 43 FAM. CT. REV. 38 (2005); HARVEY BROWNSTONE, TUG OF WAR: A JUDGE'S VERDICT ON SEPARATION, CUSTODY BATTLES, AND THE BITTER REALITIES OF FAMILY COURT 12 (2009).

<sup>38</sup> Semple, *Whose Best Interests?*, *supra* note 4, at 319-325.

settlement-seeking is that, while settlement is a good thing, the public justice system should not or does not need to actively encourage it.<sup>39</sup>

Most cases settle, whether or not the justice system does anything to bring about this outcome.<sup>40</sup> Settlements may be reached within “the shadow of the law,” on the basis of the parties’ predictions of what the adjudicated outcome would be.<sup>41</sup> A building or tree casts a shadow without having to try to do so; likewise it might be sufficient for the justice system to passively cast a settlement-fostering shadow. Moreover, settlements might grow outside of the shadow of the law, on the basis of the natural potential of human beings to recognize the interests of others and find creative solutions which “expand their pie.”<sup>42</sup> Court-sponsored ADR might diminish litigants’ incentive to negotiate settlement on their own. For example lawyers might see no need to even attempt bilateral settlement negotiations if they can simply wait and engage in those negotiations at the court-room with in the presence of the judge.<sup>43</sup>

For those disputes which will eventually require adjudication, mandatory alternative dispute resolution (ADR) interventions such as judicial pretrial conferences can be a barrier to justice. Requiring litigants to participate in ADR before they can access authoritative decision-making means requiring them to spend more time and professional fees in order to obtain a judgment.<sup>44</sup>

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<sup>39</sup> For a summary of the debate about court-sponsored ADR and adjudication, see Judith Resnik, *Many Doors--Closing Doors--Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 241 *et seq* (1995).

<sup>40</sup> Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, (1985) 12 J.L. & SOC'Y 1, 3; Mavis Maclean, *Family Mediation: Alternative or Additional Dispute Resolution?* 32 J.SOC.WEL.& FAM.L. 105, 106 (2010)

<sup>41</sup> Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>42</sup> Menkel-Meadow, *Whose Dispute Is It Anyway?*, *supra* note 28 at 2675-6; Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 357 (2006). For an empirical study of the nature and extent of law’s shadow in family dispute resolution, see BECKY BATAGOL & THEA BROWN, *BARGAINING IN THE SHADOW OF THE LAW: THE CASE OF FAMILY MEDIATION* (2011).

<sup>43</sup> H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 439 (1986); Michael Stevenson, Garry D. Watson & Edward Weissman, *The Impact of Pretrial Conferences: An Interim Report on the Ontario Pretrial Conference Experiment*, 15 OSGOODE HALL L. J. 591, 595 (1977).

<sup>44</sup> Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 163 and note 39 (2002) [hereinafter Resnik, *Mediating Preferences*]; Rosanna Langer, *The Juridification and Technicisation of Alternative Dispute Resolution Practices* 13 CAN. J.L. & SOC. 169, 182

Increased costs are also a source of strategic advantage to the party better able to bear them, and therefore a possible source of bad outcomes.<sup>45</sup> In the parenting context, this means that ADR-related costs can be an impediment to reaching an outcome which is in the best interests of the child. For example, suppose that Good Parent and Bad Parent are divorcing. Both parties are represented by lawyers, but Bad Parent is much wealthier and has more free time than Good Parent. Each of them is seeking sole custody of their child, and each is willing to fight until their resources are exhausted in order to get it. It would be in the best interest of the child for Good Parent to be awarded sole custody. If the matter reaches trial, the judge will perceive this and make such an order.

In these circumstances, compulsory ADR increases the likelihood that the child will end up in the custody of Bad Parent. This is because each party must pay legal fees and expend his or her own time and energy for as long as the dispute continues. The requirement to prepare for and attend mandatory ADR sessions imposes these costs on both parties, but wealthy Bad Parent is better able to pay them. If the ADR costs cause Good Parent to run out of money or energy and give up, the child will be left in Bad Parent's sole custody, or in a sub-optimal compromise. In fact, anticipating mandatory ADR costs might have even encouraged Bad Parent to bring a meritless application in the first place, knowing that he or she will at least get *something* from the inevitable compromise.<sup>46</sup> While this scenario may not describe the average custody or visitation dispute, it does illustrate the potential of ADR-related transaction costs to work contrary to the best interests of the child.

There is also a cogent feminist critique of mandatory mediation for family law cases.<sup>47</sup> This school argues that the power imbalance and domestic violence which characterize many intimate relationships make family law mediation dangerous for vulnerable people. Rights which would be vindicated in adjudication will be bargained away in mediation, especially if mediation is mandatory.<sup>48</sup> The author argues in another

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(1998); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 47 (1993).

<sup>45</sup> R. H. Mnookin and L. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 971-2 (1979).

<sup>46</sup> Similar arguments have been made without reference to parenting disputes: Sarokin, *supra* note 43 and Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 762 (1989).

<sup>47</sup> The most frequently cited articles include Martha Fineman, *Dominant Discourse, Professional Language And Legal Change In Child Custody Decision-Making*, 101 HARV. L. REV. 727 (1988) and Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. LAW REV. 441 (1992).

<sup>48</sup> Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1596 (1991).

article that the informal pursuit of settlement by judges and others is potentially *more* problematic for vulnerable parties in family disputes than mandatory mediation is.<sup>49</sup> This is because modern non-judicial family law mediation is accompanied by domestic violence screening, triage, and other safeguards designed to protect the vulnerable. Judicial settlement-seeking in family court lacks most of these characteristics.

## 2. Defence

Notwithstanding these critiques, the characteristics of parenting disputes offer several convincing reasons to accept the necessity of public settlement promotion in this field. Below, this article will review convincing empirical evidence that at least one form of family court ADR – non-judicial facilitative mediation – increases settlement rates and produces other benefits. Assuming, as argued above, that more settlement of parenting cases is generally desirable, this might be considered sufficient justification in of itself. However, it is also worth asking what makes settlement-promotion *more* valuable in parenting cases than it is in other types of civil litigation.

According to the classic legal-economic account, civil litigants settle when the perceived costs of proceeding to adjudication outweigh the perceived benefits of doing so.<sup>50</sup> However, the characteristics of parenting cases may reduce the parties' perceived cost of going to trial and increase the perceived cost of settlement, thereby leading the parties to the incorrect conclusion that they would be better off litigating rather than settling. Lawyers are a key source of information for litigants about the various costs of pursuing litigation to the point of adjudication, but litigants in parenting cases are often unrepresented and lack this information.<sup>51</sup> A parent who has no lawyer and has never been involved in civil litigation may have expectations based on television programs such as *Judge Judy* or *Divorce Court*.<sup>52</sup> On TV, litigants tell their stories in their own words and receive a decision within minutes. To say the least, they make the experience of "telling it to the judge" and getting an authoritative resolution seem easier than it actually is. A neutral settlement-seeker can inform parties about the true costs of proceeding to trial.<sup>53</sup>

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<sup>49</sup> Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, 24 CAN.J.WOMEN & L. 207 (2012) [hereinafter Semple, *Mandatory Family Mediation*].

<sup>50</sup> See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 339 (1986), and John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 101, 103-4 (2009).

<sup>51</sup> See Part I, *supra*.

<sup>52</sup> Steven A. Kohm, *The People's Law Versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 LAW & SOC'Y REV. 693, 694 (2006).

<sup>53</sup> Semple, *Consensus and Controversy*, *supra* note 3 at Part II, Section 2.

Conversely, the perceived costs of settling may be unusually high in many parenting cases. Discussing resolution of a child custody or visitation dispute with an ex-spouse without the assistance of a lawyer or a third party may be a very unpleasant prospect. Given the prevalence of domestic violence, many ex-spouses understandably perceive that unsupervised face-to-face negotiations would put them at physical risk. High-conflict parents who are not actively encouraged and assisted in settling may easily drift toward adjudication, avoiding a difficult task while imagining a glorious vindication. A neutral can supervise negotiations, making a difficult conversation somewhat easier and helping to secure the physical safety of domestic violence victims.

Even if we believe that most parents should settle their custody cases, we should not assume that they all *want* to.<sup>54</sup> Julia Pearce and her colleagues interviewed parents in an English family court in which settlement-seeking was pervasive. They reported that “many parents ... actually prefer to have the court decide, seeing this as preferable to reaching some compromise which they would then resent.”<sup>55</sup> Encouragement to settle from a neutral party might be the “nudge” which is necessary for spouses to overcome their anger and alienation and discuss their child’s future together.

The best interests of the child standard may offer another family law-specific reason to value settlement-promotion. As noted above, it is possible that parents will settle on terms which advance their own interests at the expense of the best interests of the child. It may be possible for a neutral to encourage the parties to focus on their child’s interests.<sup>56</sup> One can ask parents to carefully consider the interests of their child without telling them what outcome those interests require. Reminding parents to focus on the child may thus be entirely compatible with the non-judicial facilitative mediation which this paper espouses below.

There remains the objection that mandatory ADR imposes useless costs on those whose dispute will be adjudicated, and provides a strategic advantage to the better-endowed party. Two points can be made in response. First, mediation which does not

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<sup>54</sup> See Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81 (2002) for a critique of the assumption that litigants dread adjudication.

<sup>55</sup> Julia Pearce, Gwynn Davis & Jacqueline Barron, *Love in a Cold Climate – Section 8 Applications under the Children Act 1989*, 1999 FAM. LAW 22 (1999). See also Rebecca Bailey-Harris, Jacqueline Barron & Julia Pearce, *Research: Settlement Culture and the Use of the ‘No Order’ Principle under the Children Act 1989*, 11 CHILD & FAM. L. Q. 53 (1999): “There is considerable evidence of the dissatisfaction of parents with the outcome of ‘no order’ when they consider that they have invoked the court’s jurisdiction precisely for the exercise of its authority in a matter which they find difficult to resolve themselves.”

<sup>56</sup> BATAGOL & BROWN, *supra* note 42 at 7, suggest that, at least in Australia, many family mediators see advocacy for the children involved as part of their role.

produce a settlement is not necessarily a waste of time.<sup>57</sup> It may open the lines of communication between the parties and allow them to better understand their options. More ambitiously, in the vision of Bush and Folger, mediation can “transform the quality of conflict interaction, so that conflicts can actually strengthen both the parties themselves and the society they are part of.”<sup>58</sup>

Second, the rise of *triage* in family court dispute resolution processes offers hope that we may soon be able to promote settlement for the cases which should settle, while fast-tracking the adjudication of others. Family courts across North America are investing in tools and staff to analyse incoming cases, channelling some to ADR and others to court.<sup>59</sup> While approaches vary, domestic violence and high conflict are usually identified among the indicia of cases which ought to move as quickly as possible to adjudication, without wasting time in mediation.<sup>60</sup> Triage offers hope that settlement-promotion will not waste much time in the minority of cases which necessitate adjudication. The distinct nature of parenting cases provides a strong argument that the majority which ought to settle need some encouragement from a public sector neutral in order to do so. Settlement-promotion must therefore remain a central part of our justice system’s approach to parenting disputes.

#### IV. Charge #3: Judges are not Ideal Settlement-Seekers in Parenting Cases

Having been exonerated on the first two charges, judicial settlement-seeking in parenting cases faces a third indictment. It is alleged that judges, as a group, are not the best people to entrust with the work of settlement-seeking in custody and visitation cases. This section will first review empirical evidence about judicial pre-trial conferences, which

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<sup>57</sup> See Part I, *supra*.

<sup>58</sup> ROBERT A. BARUCH BUSH AND JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, 2D ED. (2005), 13.

<sup>59</sup> Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371 (2009); Peter Salem, Debra Kulak & Robin Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007); Noel Semple and Carol Rogerson, *Access to Family Justice: Insights and Options*, 413-449 in MIDDLE INCOME ACCESS TO JUSTICE (Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., 2012).

<sup>60</sup> RAE KASPIEW ET AL., *EVALUATION OF THE 2006 FAMILY LAW REFORMS E4* (2009), *available at*: <http://www.aifs.gov.au/institute/pubs/fle/> (last visited: 29 June 2012); GLENN A. GILMOUR, *HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION* 36 (2004), *available at*: [http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004\\_1/index.html](http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/index.html) (last visited: 29 June 2012).



does not clearly establish that they increase settlement rates in family or other civil courts. This section will then identify and consider four inherent characteristics of judges which make them unsuitable settlement-seekers in custody and visitation cases. These are: (i) high salary, (ii) ambivalence regarding the settlement-seeking role, (iii) autonomy, and (iv) authority.

### **1. Empirical evidence about the effect of judicial settlement-seeking**

It is clear that settlements are frequently reached during or after judicial pretrial conferences in family courts. For example, in a survey of California judges conducted by Peter Robinson, 52% of the respondents reported that 75% or more of their cases settle in pretrial conferences.<sup>61</sup> Two articles about Canadian cases both found that only 9.3% of the family cases which were subjected to judicial settlement-seeking interventions subsequently proceeded to trial.<sup>62</sup>

However, these findings do not prove that judicial settlement-seeking brings about settlements which would not otherwise occur. Leroy Tornquist compares pretrial settlement conferences to folk remedies for the common cold. Those who partake of the remedies find that their colds go away, and may consider this evidence of the remedy's efficacy.<sup>63</sup> However, the common cold also generally dissipates in the absence of any remedy. Likewise, most cases settle no matter what the justice system does, so the efficacy of judicial settlement-seeking requires some demonstration beyond the fact that settlements emerge from judicial pretrial conferences.<sup>64</sup>

A few articles have suggested anecdotally that mandatory judicial pretrial conferences increase settlement rates.<sup>65</sup> The strongest evidence for a positive effect on

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<sup>61</sup> Robinson, *Legal Lion*, *supra* note 1 at 118.

<sup>62</sup> Goss, *supra* note 2 at 515; Gove, *supra* note 2 at 858. In many family courts, the number of cases resolved in pretrial conferences substantially exceeds the number resolved in trials. See for example Lieff, *supra* note 2 at 304. In this article about the introduction of pretrials in Toronto, Justice Lieff notes that, within a 9 month period beginning in 1975, "the court disposed of 107 cases after trial," and "301 cases were settled as a result of and following pre-trial." See also ROLLAND, *supra* note 2 at 11.

<sup>63</sup> Tornquist, *supra* note 46 at 772.

<sup>64</sup> Katz, *supra* note 44 at 47; Stevenson, Watson & Weissman, *supra* note 43, at 595.

<sup>65</sup> Anecdotal claims of judicial dispute resolution increasing settlement rates is found in Gwynn Davis, *Mediation in Divorce: A Theoretical Perspective*, 5 J.SOC.WEL.& FAM.L. 131, 135 (1983); Lieff, *supra* note 2 at 304; Harold Jr. Baer, *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 143-4 (2001); Goss, *supra* note 2 at 516-7. Richard S. Fox, *Pre-Trial Conferences in the District Court for Salt Lake County*, 6 UTAH L. REV. 266 (1958) described the introduction of mandatory judicial pre-trial conferences in Salt Lake City. One year later, 53.6% of the cases were settling without trial and the

settlement comes from Stevenson et al.'s 1977 study, which found a positive impact of judicial pre-trials on settlement rates. This was an examination of the pre-trial program introduced in the Toronto Supreme Court of Justice in the late 1970s. With the cooperation of the court the authors were able to conduct a controlled and randomized experiment, an accomplishment which other studies of this subject have not been able to replicate. They found that cases subjected to pre-trial conferences had an average settlement rate of 86.4%, compared to a rate of 68.8% in the control group.<sup>66</sup>

However, the preponderance of the evidence points in the other direction. Three major American studies of civil court systems have failed to find support for the proposition that judicial pre-trials increase settlement rates. Maurice Rosenberg carried out perhaps the first quantitative study in this field, examining New Jersey personal injury cases resolved in the 1960s. New Jersey cases had been randomly allocated to either a "lawyers' choice" regime (in which the lawyers chose whether to have a pretrial conference) or a mandatory pretrial regime (in which all cases had the conference). The settlement rates and trial lengths of the cases with and without pretrials were compared. Rosenberg found that pretrials neither increased the likelihood of a settlement, nor reduced the length of the trials which occurred in the absence of settlement, nor reduced the average period between opening and closing of the case.<sup>67</sup>

Judicial settlement-seeking was among the topics of the 1978 "Justice Delayed" investigation into the pace of litigation and solutions to delay in urban American courts.<sup>68</sup> The report compared cities with contrasting modes of judicial conduct, seeking correlations to settlement rates among other output criteria. In Miami and Phoenix, the authors found that "most judges... h[e]ld strong attitudes against judicial coercion of settlements," generally did not mention appropriate settlement terms to the litigants, and did not meet with parties in the absence of their counsel. At the other extreme, Detroit and Bronx County were identified as the most settlement-oriented courts in the sample. In those jurisdictions, pretrial settlement conferences were used in all cases, and the judges proposed concrete settlement terms and conducted caucus sessions with counsel.

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waiting period for those which were tried had been reduced dramatically. However, no data were provided in this report regarding settlement rates before the introduction of judicial pre-trials.

<sup>66</sup> Stevenson, Watson & Weissman, *supra* note 43 at 600-1. For a possible explanation for pilot study successes which larger scale research fails to replicate, see section II(4)(ii), *infra*.

<sup>67</sup> MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE; A CONTROLLED TEST IN PERSONAL INJURY LITIGATION 56-58 (1964).

<sup>68</sup> THOMAS CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978), *available at*: <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=0> (last visited: 29 June 2012).

Minneapolis was in an intermediate position, holding "regular settlement programs" in which judges focused their efforts on settling and assigning "its most effective 'settlers' to work on the oldest cases in the calendar." The researchers then examined each court's median time to case disposition, tort dispositions per judge, and proportion of cases in which trials were held. While acknowledging that the data was insufficient to establish a causative link, the authors concluded that "the most settlement-intensive courts are the slowest courts," and "fast courts on civil case processing need not be 'settling' courts."<sup>69</sup>

Steven Flanders and his colleagues applied a similar methodology in ten American federal district courts, and reached a similar conclusion. The researchers ranked six of the courts in terms of "settlement involvement."<sup>70</sup> The surprising result was that the court which was most involved in settlement-seeking had the *fewest* case "terminations per judge" and the highest percentage of civil cases tried.<sup>71</sup> The least settlement-involved court had the second-most case terminations. While the "Justice Delayed" and Flanders studies do not rigorously define "settlement involvement" and do not statistically assess the relationship between the variables, when considered in conjunction with Rosenberg's experiment they certainly shed doubt on the efficacy of judicial settlement-seeking in bringing about settlements.<sup>72</sup>

A 2009 speech by Chief Justice Francois Rolland of the Superior Court of Quebec offers quantitative evidence which is specifically about family court. Chief Justice Rolland expressed enthusiastic support for Quebec's judicial settlement conference program for family cases. However, he acknowledged that the introduction of settlement conferences in 2001 had not had any effect on the proportion of cases which ended in a trial.<sup>73</sup> Overall, the limited empirical data which is available does not suggest that judicial pretrial conferences increase overall settlement rates.

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<sup>69</sup> *Id.* at 33.

<sup>70</sup> Steven Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147 (1978).

<sup>71</sup> *Id.* at 161.

<sup>72</sup> Several of the law review articles on the topic have also reached this conclusion. E.g. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 93 (2003); Menkel-Meadow, *For and against Settlement*, *supra* note 29 at 494; Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases* (1986) 69 JUDICATURE 256, 265.

<sup>73</sup> ROLLAND, *supra* note 2 at 15.

## 2. Attributes of Judicial Settlement-Seekers

The author's empirical research and the other literature confirm that judicial approaches to settlement-seeking in family and other cases are heterogeneous.<sup>74</sup> However, there are four essential characteristics of judges which are relevant to their suitability as settlement-seekers in parenting cases. These are (i) high salary, (ii) ambivalence regarding the settlement-seeking role, (iii) autonomy, and (iv) authority. This section will explain why these four characteristics make judges inappropriate for this role.

### (i) High Salary

Because judicial labour is more expensive than non-judicial mediators' labour, and because public resources are limited, using judges to seek settlement means having less time available for settlement-seeking in each case. Judges are paid substantially more than most other public-sector professionals who might do the job of settlement-seeking, such as lawyers or mediators. The judges who hear parenting disputes in Ontario, for example, are paid in excess of \$250,000 per year.<sup>75</sup> While a thorough compensation review is beyond the scope of this paper, it is clear that most mediators earn much less than judges. According to a recent job advertisement from an Ontario government agency, a family mediator with a Masters of Social Work would be paid between \$53,000 and \$80,000 per year.<sup>76</sup> Judicial labour is also more likely than alternative labour (e.g. social worker labour) to require the payment of support staff such as clerks. This increases the cost disparity between judicial and non-judicial settlement seeking in family court.

The public resources available for family court settlement-seeking are finite, and are often said to be inadequate.<sup>77</sup> In under-resourced jurisdictions, having judges do this work

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<sup>74</sup> Semple, *Consensus and Controversy*, *supra* note 3; Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1370 (1984); Menkel-Meadow, *For and against Settlement*, *supra* note 29 at 506.

<sup>75</sup> NOEL SEMPLE, COST-BENEFIT ANALYSIS OF FAMILY SERVICE DELIVERY: DISEASE, PREVENTION, AND TREATMENT (2010), available at <http://www.lco-cdo.org/family-law-process-call-for-papers-semple.pdf> (last visited: 29 June 2012) at 65.

<sup>76</sup> LEGAL AID ONTARIO: FAMILY MEDIATOR FOR GREATER TORONTO REGION OF LEGAL AID ONTARIO, <http://www.legalaid.on.ca/en/careers/lao-122-10.asp> (last visited 29 June 2012).

<sup>77</sup> Andrew Schepard and Theo Liebmann, *Ending 3.5-Minute Justice in New York's Family Court*, N. Y. LAW JOURNAL, November 13, 2009; Susan Pigg, *Breaking Up: Family Courts in Crisis*, TORONTO STAR, Oct. 3-7, 2009; Linda Diebel, *Family Court Crisis; Shortage of Judges Is Running up Costs, Putting Lives on Hold*, TORONTO STAR, December 9, 2007, at A1. Regarding the shortage of mediator hours, see Salem, *The Emergence of Triage*, *supra* note 59 at 377-9.

means having only small amounts of time available for settlement-seeking in each case.<sup>78</sup> For example, the average judge in New York City's Family Court (which hears custody and visitation matters arising in the absence of a divorce) disposed of 1,927 cases in 2008.<sup>79</sup> This equates to approximately 48 minutes of judicial time available per family, per judge, per year.<sup>80</sup> Non-judicial mediators generally have more time available, because their time is less expensive. In California's court-adjunct family mediation program, the median mediation involved 90 minutes with the parties, plus 15 minutes of preparation time.<sup>81</sup>

Sufficient time seems to be an important ingredient for successful settlement-seeking. Robinson's survey of California judges found that those who reported the highest settlement rates also reported having the longest pretrial settlement conferences.<sup>82</sup> Airing grievances before a neutral mediator is one of the elements of mediation with which participants are most satisfied.<sup>83</sup> When traditional (non-judicial) mediation programs become rushed due to resource constraints, their own benefits tend to dissipate.<sup>84</sup> If mediation succeeds primarily because it allows parties to tell their stories to a neutral who has the time and inclination to listen,<sup>85</sup> and if resource constraints do not allow judges

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<sup>78</sup> Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 238 (2002); Wissler, *supra* note 1 at 288-289.

<sup>79</sup> SENATE POLICY GROUP, KIDS AND FAMILIES STILL CAN'T WAIT: THE URGENT CASE FOR NEW FAMILY COURT JUDGESHIPS (2009), available at <http://www.nysenate.gov/files/pdfs/Family%20Court%20Report.pdf> (last visited: 29 June 2012) at 7. Peter Robinson reported an average of 1317 new cases per year for California family law judges. (Robinson, *Legal Lion*, *supra* note 1 at 117.)

<sup>80</sup> Testimony cited in the Senate Policy Group report suggests that each judge has 92,400 minutes of work time per year available. (STEPHANIE GENDELL, CITIZENS' COMMITTEE FOR CHILDREN, TESTIMONY BEFORE NEW YORK CITY COUNCIL COMMITTEE ON GENERAL WELFARE, JANUARY 10, 2008, cited in SENATE POLICY GROUP, *supra* note 79 at 8.) Dividing this number by 1,927 equals 47.95. Regarding shortages of judicial time in California, see Edwards, *supra* note 14 at 643-4.

<sup>81</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, *supra* note 7 at 15.

<sup>82</sup> Robinson, *Legal Lion*, *supra* note 1 at 120.

<sup>83</sup> Bush, *What Do We Need a Mediator For?*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

<sup>84</sup> Sandra J. Perry, Tanya M. Marcum and Charles R. Stoner, *Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation*, 11 PEPP. DISP. RESOL. L. J. 441, 455-6 (2011); CONNIE J. BECK & BRUCE DENNIS SALES, *FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS* 27-8 and 80 (1st ed., 2001); Nancy A. Welsh, *Reconciling Self-Determination, Coercion, and Settlement in Court-Connected Mediation*, 420-446 in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* (Jay Folberg, Ann Milne & Peter Salem eds., 2004), 425 [hereinafter Welsh, *Reconciling*]; Salem, *The Emergence of Triage*, *supra* note 59 at 377; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 23 (2004) [hereinafter Kelly, *Family Mediation Research*].

<sup>85</sup> Katz, *supra* note 44 at 48-9. Bush, *What Do We Need a Mediator For?*, *supra* note 83 at 19.

enough time to properly hear these stories, then we should substitute less expensive neutrals if we want to achieve mediation's successes.<sup>86</sup>

## (ii) Ambivalence

Settlement of parenting cases is a worthy goal for the justice system, and it is important to entrust this task to a cadre of employees which will pursue it diligently and consistently. In speaking to a group of enthusiastic family court judges about their settlement-seeking activities, the author was struck by their conscientiousness and dedication. The same impression is conveyed by the few published judicial accounts of this work.<sup>87</sup> Some judges are even willing to engage in intense "emotional labour" in order to create a deep and long-lasting resolution to a family dispute.<sup>88</sup>

However, at least in North America, the attitude of the family law bench as a whole appears to be more ambivalent regarding settlement-seeking. Some judges are not willing to seek settlement, and some believe that doing so is inappropriate, and some may be willing to do it in only a cursory fashion.<sup>89</sup> Many judges are assigned to family court only reluctantly, and these conscripts may be especially ambivalent about settlement-seeking work. While some jurisdictions have permanent family specialist judges, judicial generalism prevails in much of North America.<sup>90</sup> This means that judges hearing parenting cases often have little interest in, and no pre-appointment experience with family law. Nor do they necessarily welcome their assignment to family court. As Andrew Shepard puts the point, "assignment to the child custody court tends to be at the bottom of the judicial prestige hierarchy... Newly appointed judges are often sent to the child custody court, and

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<sup>86</sup> Time scarcity can also impinge upon the settlement-seeker's ability to properly prepare for the session with the parties. See, e.g., Susan Raines and Rosemary O'Leary, *Switching Hats: Issues and Obstacles Facing Administrative Law Judges Who Mediate EPA Enforcement Disputes*, 2 GOVERNMENT POLICY AND LAW JOURNAL 58, 61 (2000).

<sup>87</sup> E.g. Gove, *supra* note 2; Lief, *supra* note 2.

<sup>88</sup> Paul Vlaardingerbroek and Machteld W. de Hoon, *Emotions in Court and the Role of the Judge: Results from Experimental Hearings in Divorce Proceedings*, 2010 INTL. FAM. L. 319 (2010); Semple, *Consensus and Controversy*, *supra* note 3 at 320-1.

<sup>89</sup> Judges are more likely to object to settlement-seeking by the judge responsible for adjudicating the case: Robinson, *Adding Judicial Mediation*, *supra* note 1 at 344. However, other judges do not seek settlement even in cases which are not assigned to them: Shweder, *supra* note 21 at 60 *et seq.*; Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes*, *supra* note 3 at 315.

<sup>90</sup> See Donna Martinson, *One Case–One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases*, 48 FAM. CT. REV. 180, 188 (2010).

cannot wait to be replaced so that they can move up to auto accident and contract cases.”<sup>91</sup> A California judge forthrightly acknowledged that “juvenile and family court are the least favored assignments for judges.”<sup>92</sup> Reluctant conscripts to the family bench may be more likely to limit themselves to the adjudicative role, to the extent that settlement-seeking requires a more active involvement in the case and in its extra-legal dimensions.<sup>93</sup>

Ambivalence may help explain why judicial pretrial conference pilot programs using self-selected judges have produced impressive results in settlement-seeking, which are not entirely replicated after the programs are scaled up across a jurisdiction. The pilot programs involve the best and most dedicated settlement-seekers among the local judges. For example the Stevenson et al. 1977 study discussed above, which produced strong evidence of an impact on settlement rates, focused on a newly introduced pretrial conference program in Toronto’s Superior Court of Justice.<sup>94</sup> While cases were assigned randomly to the pretrial (experiment) or non-pretrial (control) groups, it does not appear that the judges conducting the pretrial conferences were chosen at random from all of the judges on the Toronto bench. It seems likely that the judges who volunteered to conduct the pretrial conferences were more enthusiastic and effective settlement-seekers than the average judge in the jurisdiction.<sup>95</sup> The substantial variations in judicial aptitude and interest for this work are consistent with both (i) the success of small-scale pilot programs with a self-selected core of judges, and (ii) the absence of clear impacts when the programs are scaled-up and formalized over a large jurisdiction.

### **(iii) Autonomy**

Procedural rules and codes of ethics give family judges the right to choose whether or not to seek settlement in a given case. This gives effect to their ambivalence about this role, making them collectively unreliable as settlement-seekers. Their autonomy is therefore a potential source of inefficiency for the system, and of confusion and injustice for litigants and their children.

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<sup>91</sup> ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 117 (2004).

<sup>92</sup> Edwards, *supra* note 14 at 655. See also Alastair Nicholson & Margaret Harrison, *Family Law and the Family Court of Australia: Experiences of the First 25 Years*, 24 MELB. U. L. REV. 756, 760-1 (2000).

<sup>93</sup> Sharyn Roach Anleu & Kathy Mack, *Magistrates’ Everyday Work and Emotional Labour*, 32 J.L. & Soc’y 590 (2005).

<sup>94</sup> Stevenson, Watson & Weissman, *supra* note 43.

<sup>95</sup> The study found some evidence that judges “vary in their ability to stimulate settlement through pretrial conferences.” (Stevenson, Watson & Weissman, *supra* note 43 at 612. For further discussion of whether or not special judicial personalities are required to reap pretrial successes, see Fox, *supra* note 65 at 261.

While pre-trial conferences are often mandatory in family courts, pursuing settlement in the conference is usually not mandatory. Ontario's *Family Law Rules*, for example, list 19 distinct tasks which a judge can legitimately perform in a pre-trial conference. One of these is "exploring the chances of settling the case," while most of the others have nothing to do with settlement-seeking.<sup>96</sup> Other jurisdictions, such as New York State, simply allow judges to do whatever they "deem appropriate" in a pretrial conference, including the pursuit of settlement.<sup>97</sup> Likewise, codes of judicial conduct and ethics give judges the right but not the duty to pursue settlement.<sup>98</sup> The American Bar Association's *Model Code of Judicial Conduct* states that a judge "may encourage parties to a proceeding and their lawyers to settle matters."<sup>99</sup>

This permissive language has been defended on the basis that it allows judges to seek settlement when doing so is in the best interest of the child or the parties, without compelling them to do so when it is not.<sup>100</sup> In family law, there is an especially good reason why settlement should not be "pushed" on some litigants. Many intimate relationships are characterized by domestic violence and power imbalance, and these cases arguably require authoritative adjudication, lest the weaker party be steamrolled into an unjust settlement.<sup>101</sup> However, court systems seeking to avoid unjust settlements in cases of violence and power imbalance generally now use formal screening and triage tools to exclude these cases from mediation.<sup>102</sup> By contrast, the author found no evidence of these

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<sup>96</sup> Family Law Rules (Ontario), O. Reg. 114/99, at R. 17 (Can.).

<sup>97</sup> An interesting exception is found in the province of Quebec. The Code of Civil Procedure of that province states that "in family matters ... it is the judge's *duty* to attempt to reconcile the parties." Code of Civil Procedure (Quebec), Title I, Section 4.3 (Can.). The Code also identifies settlement-seeking more clearly as an obligatory element of pre-trial conferences: "The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions." ((at s. 151.16))

<sup>98</sup> Family Law Rules (Ontario), *supra* note 96 at R. 17; John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569 (2006); Shweder, *supra* note 21.

<sup>99</sup> AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Rule 2.6(B) (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA\\_MCJC\\_approved.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf) (last visited 29 June 2012).

<sup>100</sup> Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide through Negotiation*, 27 WILLAMETTE L. J. 429, 442 (1991); Martinson, *supra* note 90 at 184.

<sup>101</sup> Noel Semple, *Mandatory Family Mediation*, *supra* note 49 at 211-218.

<sup>102</sup> Salem, *The Emergence of Triage*, *supra* note 59.



tools being used by settlement-seeking family court judges to pick the cases in which settlement is pursued.<sup>103</sup>

A more straightforward explanation for the optional nature of judicial settlement-seeking is that some judges have no interest in doing this work, and the permissive language protects their inclination. It allows those who are interested in seeking settlement to do so, while excusing others from this task. Judges, after all, have a central if not dominant role in drafting the procedural and ethical rules which apply to their own work.<sup>104</sup> It is not surprising that those rules would allow discretion with regard to a role which is not universally accepted among them.<sup>105</sup>

Whether or not settlement-seeking will occur in a family court pretrial conference often depends on which judge happens to hear the case, and this leads to substantial potential for confusion among self-represented litigants in parenting disputes.<sup>106</sup> If pre-trial settlement-seeking were clearly identified as such (for example by labelling it as “mediation”), and if settlement-seeking were to reliably occur therein, parents might enter the sessions in a more conciliatory frame of mind. Judges’ autonomy, and their collective ambivalence regarding settlement-seeking in parenting cases makes this impossible so long as they are responsible for this work. Non-judicial mediators can at least given a clear and explicit mandate to pursue settlement.

#### **(iv) Authority**

The final and most complex attribute of judges *qua* settlement-seekers is authority.<sup>107</sup> A settlement-seeking judge can have three types of authority. The first and most obvious is the actual or perceived ability to make an order backed by the enforcement power of the state. In the “one-judge” or “traditional” model used in New York State and elsewhere, the settlement-seeking pre-trial judge will have the power to decide the matter

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<sup>103</sup> Semple, *Mandatory Family Mediation*, *supra* note 49 at 234-9.

<sup>104</sup> Resnik, *Mediating Preferences*, *supra* note 44 at 166.

<sup>105</sup> Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994).

<sup>106</sup> Gwynn Davis & Julia Pearce, *A View from the Trenches – Practice and Procedure in Section 8 Applications* 29 FAM LAW 457 (1999). This is an example of role-blending in family law, which has in other contexts been identified as a source of confusion for litigants. E.g., regarding child custody evaluators who also seek to mediate, see Allan E. Barsky, *Mediative Evaluations: The Pros and Perils of Blending Roles*, 45 FAM. CT. REV. 560, 564 (2007).

<sup>107</sup> Lisa B. Bingham, *Why Suppose - Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 121 (2002).

at a trial if one proves necessary.<sup>108</sup> Under the two-judge or “modern” model, this is not the case.<sup>109</sup> However, while a different judge will adjudicate, pretrial conference judges in the two-judge model may still have the right to make various interim and procedural orders which can substantially affect the parties’ rights.<sup>110</sup>

A second type of judicial authority is the perceived ability to predict what the adjudicated outcome would be in the absence of settlement.<sup>111</sup> Litigants, especially when unrepresented, tend to perceive judges as legal experts who can predict legal outcomes. Those litigants who strategically assess settlement-seeker comments as predictions of adjudicated outcome are therefore influenced by this type of informal authority. Ilan Gewurz describes the impact of legal expertise in a mediator:

The more the parties perceive the mediator’s feedback to reflect a possible legal outcome-meaning, the more closely the mediator is linked to that legal structure-the more deferential the parties are likely to be to her intervention.... deference is more likely to occur the closer one moves into the shadow of the law.<sup>112</sup>

The third type of judicial authority is moral suasion.<sup>113</sup> If a judge tells someone that a certain parenting plan is best, that person may internalize and accept the proposition without subjecting it to much scrutiny. People tend to defer to authority figures such as judges, even when they are neither making orders nor predicting outcomes. One New York matrimonial judge suggested that the emotional state of separating parents contributes to the effect:

The fact that I wear the robe and I am a judge means they do listen. ... We have a lot of power that we have to use very carefully ... sometimes people feel that they have to do what we say but I also think that ... people are very vulnerable when they're getting divorced and want somebody to tell them what to do, tell them how

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<sup>108</sup> Brunet, *supra* note 78 at 232.

<sup>109</sup> For empirical data about the prevalence and consequences of the two models, see Wissler, *supra* note 1 at 302-313 and Robinson, *Opening Pandora’s Box*, *supra* note 1 at 86-7.

<sup>110</sup> E.g. Family Law Rules (Ontario), *supra* note 96 at R. 17.

<sup>111</sup> Brunet, *supra* note 78 at 239.

<sup>112</sup> Ilan G. Gewurz, *(Re)Designing Mediation to Address the Nuances of Power Imbalance*, 19 CONFLICT RESOL. Q. 135, 145 (2001).

<sup>113</sup> ROLLAND, *supra* note 2 at 14.

to think about what they're doing. So they're sort of open to being given some direction about how they ought to behave.<sup>114</sup>

Caucusing (meeting in private with each of the sides) is an optional technique whereby a settlement-seeking pre-trial judge can obtain more authority. Caucusing lets the settlement-seeker solicit information from each side which can be kept secret or selectively revealed to the other.<sup>115</sup> Caucusing also gives the settlement-seeker the power to “throw cold water,” talking down the merits of each side’s case.<sup>116</sup> The power which caucusing gives to the settlement-seeker might explain why many settlement-seeking judges find it so useful,<sup>117</sup> and why many scholars find it troubling.<sup>118</sup>

What effects does authority have when the judge seeks settlement in a parenting case? The settlement-seeker might coerce a settlement, by threatening to “punish” the litigant who is more resistant to the judge’s settlement proposal.<sup>119</sup> The punishment would take the form of an order which is less favorable than it would otherwise be to the party being punished.<sup>120</sup> In a parenting dispute, this would probably mean less parenting time or diminished custodial rights.

The “friendly parent” rules which exist in many jurisdictions might facilitate judicial coercion. Friendly parent rules provide that the willingness of a parent to facilitate the child’s contact with the other parent is relevant to the evaluation of his or her parenting skills, and therefore to the legally correct outcome.<sup>121</sup> The rationale for the friendly parent

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<sup>114</sup> Interview of Justice “MM,” Of the New York State Supreme Court. New York, NY (September 28, 2010).

<sup>115</sup> Baer, *supra* note 65 at 141.

<sup>116</sup> Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 202 (2009) [hereinafter Della Noce, *Evaluative Mediation*].

<sup>117</sup> Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1, 16 (1987); Hogan, *supra* note 100 at 18; Baer, *supra* note 65.

<sup>118</sup> Tornquist, *supra* note 46 at 759; Della Noce, *supra* note 116; Schuck, *supra* note 50 at 353.

<sup>119</sup> Allegations that judges coerce settlements can be found in Frank E.A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG. 11, 22 (1999) and James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 11, 14 (1999).

<sup>120</sup> Melissa Breger, *Making Waves or Keeping the Calm: Analyzing the Institutional Culture of Family Courts through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCHOL. REV. 55, 87-88 (2010).

<sup>121</sup> Regarding the friendly parent rule generally, see Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. LAW 41 (2004); Brenda Cossman and Roxanne Mykitiuk, *Reforming Child Custody and Access Law in Canada: A Discussion Paper*, 15 CAN. J. FAM. L. 13, 51 (1998). For example, Canada’s *Divorce Act* states that “the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that

rule is that, all things being equal, a child benefits from having on-going relationships with two loving parents. Nonetheless, in a one-judge system, it also provides a cover or even a rationale for judicial punishment of a party who refuses to accept a parenting compromise suggested in a pre-trial conference.

However, coercion is not necessary for judicial authority to have an impact within settlement-seeking.<sup>122</sup> Authority is a weapon which is always attached to the conspicuous exterior of the black judicial robe, whether or not the judge chooses to unsheathe the sword from the scabbard. A judge's predictive power and capacity for moral suasion retain their force regardless of whether the settlement-seeking judge seeks to rely upon them. In the words of English scholar Simon Roberts:

Courts are places where people tell us what to do; ... judges are such people. ... Authority is inevitably going to make disputants more disposed than they might otherwise be to follow their suggestions, and be receptive to their persuasion... [The] judge is not in a position to discard this authority.<sup>123</sup>

In theory, a judge might adopt a purely facilitative posture which could render her inherent authority irrelevant.<sup>124</sup> However the existing research suggests that most judges will send some sort of evaluative message during the settlement-seeking process, even if that message is simply "you should settle."<sup>125</sup> These messages cannot be mere "trial balloons," subject to the parties' critical analysis and taken for what they are worth. They will be accorded deference and given persuasive force by the judge's inherent authority, whether or not the judge seeks or wishes to use it.<sup>126</sup>

To illustrate the effect of judicial authority on settlement-seeking with parents, consider a pretrial conference in the fictional matter of *Singh v. Singh*. This conference is

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purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." (Divorce Act (Canada), *supra* note 5 at 16(10).)

<sup>122</sup> Sarokin, *supra* note 43 at 436.

<sup>123</sup> Simon Roberts, *Mediation in Family Disputes*, 46 MOD. L. REV. 537, 556 (1983). In the United Kingdom, a registrar (also known as a "district judge") is a judicial officer with limited authority over family and other matters.

<sup>124</sup> Roberts, *id.*, at 550.

<sup>125</sup> Lambros, *supra* note 74 at 1371; Sharon Press, *Commentary on "The Name of the Game Is Movement: Concession Seeking in Judicial Mediation of Large Money Damage Cases"*, 15 MEDIATION Q. 368, 369 (1998); Brunet, *supra* note 78 at 234.

<sup>126</sup> Gewurz, *supra* note 112 at 145.

conducted by the presiding judge who will eventually adjudicate the matter if the Singhs do not settle. This is a custody case, in which neither Mr. nor Mrs. Singh is represented by counsel.<sup>127</sup> Suppose the judge suggests that the Singhs consider agreeing to sole maternal custody of their child, with 10 hours of access per week for Mr. Singh. The Singhs have no lawyers to explain what statute and precedent mean for their case, or to suggest what facts might be found at trial. They also know that the same judge will be making the decision if they do not settle. They are not likely to perceive much chance that the judge would make a different order after the trial. Mr. and Mrs. Singh will probably settle for sole maternal custody with 10 hours' visitation, even if, had they been given the opportunity to reflect upon and discuss the matter, they would have found a mutually acceptable alternative which would have been better for their child and for themselves.

Amitai Etzioni's typology of compliance helps explain why the judge's suggestion is so likely to be authoritative in this context.<sup>128</sup> *Coercive-alienative* compliance occurs when someone believes that he or she must do something or else face a sanction. Each litigant in the Singh case can readily perceive that the party who appears more recalcitrant could be "punished" with a less favorable order should the matter proceed to trial. Mrs. Singh feels that if she holds out for only 5 hours' visitation, the judge could attribute this position to her selfishness and lack of willingness to facilitate the child's relationship with her father. The judge, who will be adjudicating the case, might then apply the friendly parent rule and find an equally shared parenting regime to be in the best interest of the child. The judge's enforcement power creates the potential for coercive-alienative compliance.

Etzioni's *utilitarian-calculative* compliance means that someone complies in the belief that doing so will maximize rewards while minimizing costs. Because Mr. and Mrs. Singh are unlikely to see why the same judge would reach a different conclusion after a trial, each of them will perceive immediate settlement as offering the same rewards and lower costs, compared to going to trial. The judge's predictive power creates utilitarian-calculative compliance.

Finally, *normative-moral* compliance occurs when someone has a moral commitment to the goals of the authority, and is persuaded that the proposed course is best. The moral suasion power of judges, rooted in the deference which they attract, may

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<sup>127</sup> In point of fact, this would probably not happen in either Ontario or New York. In Ontario, case conference judges will not generally adjudicate the matter, and in New York there is a right to publicly-funded lawyers for custody cases. (Semple, *Consensus and Controversy*, *supra* note 3, at Part III.

<sup>128</sup> AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS, (1975); Amitai Etzioni, *Compliance Structure*, in A SOCIOLOGICAL READER ON COMPLEX ORGANIZATIONS (A. Etzioni and E. W. Lehman, eds., 1980), cited in Bernard S. Mayer, *Mediation in Child Protection Cases: The Impact of Third-Party Intervention on Parental Compliance Attitudes*, 24 MEDIATION Q. 89, 95 (1989).

easily convince the Singhs that the proposed course is best for the child. Judicial authority in a settlement-seeker is powerful because it has the potential to produce all three types of compliance. Note that the judge in the hypothetical matter of the Singhs need not have made any effort to coerce a settlement for these combined compliance mechanisms to take effect.

While some have been suggested that involving judicial authority in settlement-seeking brings about resolutions which are more substantively just than those which would otherwise emerge,<sup>129</sup> this argument lacks empirical support. Robinson's survey of California family court judges found that most refrain from expressing views about the fairness of a resolution reached in a pretrial conference, although they are somewhat more likely to do so if the parties are unrepresented.<sup>130</sup>

It is true that authoritative settlement-seeking might be the only way to produce voluntary resolution in the minority of cases which are characterized by unusually high conflict,<sup>131</sup> by severe domestic violence,<sup>132</sup> or by dramatic power imbalance between the parties.<sup>133</sup> While some cases will always require authoritative judicial resolution, this paper's argument is that these authoritative resolutions should be judgments, preceded by

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<sup>129</sup> Otis & Reiter, *supra* note 42 at 366. Russell Engler has argued that in fields of law characterized by high degrees of self-representation (such as custody and visitation), it is especially important for the settlement-seeker to scrutinize the substantive justice of the outcome. (Russel Engler, *And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1988, 2033-2036 (1999)). See also Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 *HARV. NEGOT. L. REV.* 1, 30-31 (2001) [hereinafter Welsh, *Thinning Vision*].

<sup>130</sup> Robinson, *Opening Pandora's Box*, *supra* note 1 at 72 and 82. See also Semple, *Consensus and Controversy*, *supra* note 3,

<sup>131</sup> The number of these cases is small: the "high conflict" group makes up between 10% and 25% of the total according to most estimates. (Schepard, *Public Health Perspective*, *supra* note 36 at 101.) Regarding the nature of high conflict divorce and the general argument for special treatment of these cases, see Nicholas Bala and Rachel Birnbaum, *Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law*, 48 *FAM. CT. REV.* 403 (2010). There is some evidence that non-judicial mediation is less effective in high-conflict separations: See GILMOUR, *supra* note 60 at 36-8.

<sup>132</sup> Domestic violence is present in some form in the majority of relationships which dissolve: Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 *MEDIATION Q.* 319, 320 (1997); Kelly, *Family Mediation Research*, *supra* note 84 at 9. Severe domestic violence has been identified as particularly problematic for traditional mediation: Semple, *Mandatory Family Mediation*, *supra* note 49 at 226-7.

<sup>133</sup> Menkel-Meadow, *For and against Settlement*, *supra* note 29 at 500; Gewurz, *supra* note 112 at 22-23; Otis & Reiter, *supra* note 42 at 364; Robin N. Amadei & Lillian S. Lehrburger, *The World of Mediation: A Spectrum of Styles*, 51 *DISP. RESOL. J.* 62, 64-5 (1996).

due process in open court. However most parenting cases are not of this nature; most parenting cases are amenable to voluntary resolution through facilitative non-judicial mediation.

## V. Facilitative Mediation in Family Court

### 1. The Facilitative Vision

The problem with authoritative settlement-seeking is that it diminishes the potential for party empowerment and creativity in arriving at settlement terms. This is the core promise of the *facilitative* vision of mediation. Part V will define facilitative mediation, demonstrate its incompatibility with authoritative settlement-seeking, and review the empirical evidence base for facilitative mediation in family disputes. It concludes that the best way to safeguard the benefits of both party self-determination and authoritative justice in parenting cases is to replace judicial pre-trial settlement-seeking with presumptively mandatory, facilitative, non-judicial mediation, backstopped by speedy access to authoritative judicial decision-making for the cases which require it.

The premise of facilitative mediation is that the best resolutions to human conflicts are those generated by the conflicted parties themselves. Disputants should therefore be given and encouraged to use the opportunity to create their own solutions.<sup>134</sup> Facilitated resolutions reflect disputants' own moral and pragmatic judgments, and not necessarily those of legal authorities.<sup>135</sup> This principle, known as "self-determination" or "party empowerment," is at the core of facilitative mediation doctrine.<sup>136</sup>

A facilitative mediator's role is to encourage the parties' creation of solutions, and not to tell the parties what those solutions ought to be. This role generally includes structuring the mediation process and asking questions in order to improve communication between the parties.<sup>137</sup> It does not include predicting adjudicated

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<sup>134</sup> Jay Folberg, Ann Milne & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 1-25 (Jay Folberg, Ann Milne & Peter Salem, eds., 2004), 14; Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996); Bernard S. Mayer, *Facilitative Mediation*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 29-52 (Jay Folberg, Ann Milne & Peter Salem eds., 2004), 39.

<sup>135</sup> Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 89 (1998).

<sup>136</sup> Welsh, *Reconciling*, *supra* note 84 at 422.

<sup>137</sup> Riskin, *supra* note 134 at 24.

outcomes or evaluating the legal merits of the parties' claims.<sup>138</sup> In Zena Zumeta's formulation, a facilitative mediator is "in charge of the process, while the parties are in charge of the outcome."<sup>139</sup> Another manifestation of the party empowerment principle in court-adjunct mediation is the fact that the parties often have some ability to choose among a number of available mediators.<sup>140</sup> This possibility, which does not generally exist within judicial pretrial settlement-seeking, may allow parents to choose a professional with specific linguistic or cultural competencies.<sup>141</sup>

A variety of distinctions have been made within the school of facilitative mediation.<sup>142</sup> The process may or may not involve isolating agreed and disagreed points, identifying options, and probing for the interests which underlie the parties' stated positions.<sup>143</sup> Facilitative mediation may or may not be "therapeutic" or "relational" in nature, seeking to give the parties a better understanding of their past, present, and future relationship.<sup>144</sup> Lon Fuller's influential 1971 article celebrated facilitative mediation's

capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another... helping them to free

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<sup>138</sup> Mary Adkins, *Moving out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22 YALE J.L. & FEMINISM 97, 103 (2010).

<sup>139</sup> Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, NATIONAL ASSOCIATION FOR COMMUNITY MEDIATION NEWSLETTER (2000), available at: <http://www.mediate.com/articles/zumeta.cfm> (last visited: 29 June 2012).

<sup>140</sup> Dorothy J. Della Noce, *Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster*, 84 UNIVERSITY OF NORTH DAKOTA LAW REVIEW 769, 772-3 (2008); Bingham, *supra* note 107, 103 et seq.

<sup>141</sup> Regarding the value of cultural competence in court-adjunct family mediation, see Isolina Ricci, *Court-Based Mandatory Mediation* and Peggy English and Linda C. Neilson, *Certifying Mediators*, 483-515, 509 in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* (Jay Folberg, Ann Milne & Peter Salem eds., 2004), and Alison Taylor and Ernest A. Sanchez, *Out of the White Box: Adapting Mediation to the Needs of Hispanic and Other Minorities within American Society*, 29 FAM. & CONCIL. CTS. REV. 114 (1991).

<sup>142</sup> Mayer, *Facilitative Mediation*, *supra* note 134 at 20-21.

<sup>143</sup> Folberg, Milne & Salem, *supra* note 134 at 14; Zumeta, *supra* note 139; Mayer, *Facilitative Mediation*, in Folberg et al, eds., *supra* note 134 at 33. For a theory of interest-based facilitative mediation in the divorce context, see DESMOND ELLIS AND NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* (1996), 12-13.

<sup>144</sup> Gewurz, *supra* note 112 at 143; Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 J. AM. ACAD. MATRIMONIAL LAW. 233 (1997); BECK & SALES, *supra* note 84 at 10-11. A recent empirical study from Australia suggests that that facilitative mediation of family disputes in that country does *not* usually pursue goals of this nature. (BATAGOL & BROWN, *supra* note 42 at xxv).



themselves from the encumbrance of rules and ... accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies.<sup>145</sup>

However, facilitative mediation need not have such lofty goals. A modest compromise on a discrete legal or financial issue could be a legitimate goal for a facilitative mediator. Leonard Riskin's canonical article identified a "problem definition continuum" for mediators, the two poles of which were "narrow" and "broad."<sup>146</sup> Riskin observed that a facilitative approach is compatible with a narrow, broad, or intermediate definition of the problem.

For example, suppose a child visitation dispute is being mediated. The non-custodial parent has brought an application seeking an expansion of his weekends with the child. He would like these weekends to begin on Friday evening instead of Saturday morning. The custodial parent opposes this change, and supports the status quo. The facilitative mediator could accept the parties' relatively narrow definition of the problem as pertaining to the commencement time of the weekend visit. Alternatively, the problem could be more broadly defined, in terms of safeguarding the child's relationship with the non-custodial parent, while preserving a stable environment in the child's primary home.<sup>147</sup>

The term "facilitative" appears to have been coined by Riskin in his oft-cited 1996 article.<sup>148</sup> However, earlier authors used other terms to capture the essence of this approach and to distinguish it from alternatives such as evaluative mediation. For example Deborah Kolb's 1983 book identified some mediators as "orchestrators" who operate on the assumption that parties need procedural assistance, but not expert guidance, to solve their problems.<sup>149</sup> Especially before the mid-80s, the facilitative mode was often assumed to be an essential characteristic of all mediation, or at least of all family mediation.<sup>150</sup> One

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<sup>145</sup> Fuller, *supra* note 28 at 325.

<sup>146</sup> Riskin, *supra* note 134 at 18-23; see also Gewurz, *supra* note 112 at 140.

<sup>147</sup> Therapeutic facilitative mediation offers similarly broad definition of separation-related disputes but one which is adult-focused rather than child-focused. According to one definition, "in addition to resolving the relevant legal disputes, therapeutic mediators believe that, like therapists, they must: 1) remain cognizant of couples' learned dysfunctional communication patterns; 2) know when and how to intervene to stop couples' harmful and recursive interactions; and 3) be able to teach more effective communication tools." (Erickson, *supra* note 144 at 234.)

<sup>148</sup> Riskin, *supra* note 134; Mayer, *Facilitative Mediation*, *supra* note 134 at 31.

<sup>149</sup> DEBORAH M. KOLB, *THE MEDIATORS* 33-38 (1983).

<sup>150</sup> Zumeta, *supra* note 139; Adkins, *supra* note 138 at 103.

author identifies the facilitative mode as the “original” form of mediation, the “baseline approach out of which most practices of mediation have emerged.”<sup>151</sup> Some have argued that it is so essential that no process which lacks it should even be graced with the title “mediation.”<sup>152</sup>

Nonetheless, the prevailing view today is that any process involving a neutral third party seeking settlement without having the power to enforce it is “mediation.” Facilitative mediation is usually considered one among three broad schools of mediation theory, the others being evaluative and transformative mediation.<sup>153</sup> Transformative mediation pursues the goals of party empowerment and mutual recognition, seeing settlement as a positive but not essential outcome of successful mediation.<sup>154</sup>

However, evaluative mediation is the more common alternative to facilitative mediation in family courts. An evaluative mediator proposes solutions, analyses stated positions based on external criteria such as the law, and predicts adjudicated outcomes. In comparing the archetypal facilitative mediator with the archetypal evaluative mediator, Simon Roberts observes that the former “establishes communication *between* the parties” while the latter “establishes communication *with* each of the parties.”<sup>155</sup> The predominant technique of facilitative mediation is the joint session in which all parties are present.<sup>156</sup>

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<sup>151</sup> Mayer, *Facilitative Mediation*, *supra* note 134 at 21.

<sup>152</sup> Kovach & Love, *supra* note 135. For definitions of the term “mediation” which are implicitly facilitative, see Mayer, *Facilitative Mediation*, *supra* note 134 at 31. See also Frank Sander’s distinction between (i) mediation and (ii) “settlement work,” which, at least when practiced by judges, is “usually evaluative, rights-based and often coercive” (Sander, *supra* note 119 at 22). For critiques of evaluative mediation from a facilitative point of view, see Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron 14 ALTERNATIVES TO THE HIGH COST OF LITIGATION 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997) and Della Noce, *Evaluative Mediation*, *supra* note 116.

<sup>153</sup> L. Randolph Lowry, *Evaluative Mediation*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 73-4 (Jay Folberg, Ann Milne & Peter Salem eds, 2004).

<sup>154</sup> It is also distinguished from facilitative mediation by its ambition to transform human interaction and advance public values. BUSH & FOLGER, *THE PROMISE OF MEDIATION*, *supra* note 58 at 9; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J.CONTEMP.LEGAL ISSUES 1, 9 (1989).

<sup>155</sup> Simon Roberts, *Institutionalized Settlement in England: A Contemporary Panorama*, 10 WILLIAMETTE J. INT’L L. & DIS. RES. 17, 20 (2002).

<sup>156</sup> Zumeta, *supra* note 139.

Caucusing is often used in evaluative mediation but does not easily coexist with the premises and goals of facilitative mediation.<sup>157</sup>

Judicial settlement-seeking is difficult to reconcile with the facilitative doctrine. There is no evidence that judges are selected for their ability or willingness to serve as facilitative mediators. As Frank Sander put the point, "the skills required of judges and mediators are sufficiently different that we cannot assume that even first-rate judges will turn out to be first-rate mediators."<sup>158</sup> Judicial settlement-seekers are not necessarily evaluative; the author found that some of them consciously seek to be facilitative.<sup>159</sup> However, due to their inherent authority judges are not the best people to conduct facilitative mediation. As argued above, they bring coercive power, predictive power, and moral suasion to pretrial conferences.<sup>160</sup> Regardless of whether the judge seeks to rely on them, these forms of power tend to create coercive-alienative, utilitarian-calculative, and normative-moral *compliance* in the disputing parties.<sup>161</sup> Authority in the settlement-seeker is authority not held by the parties, and party empowerment and self-determination are essential elements of the facilitative model.<sup>162</sup> Parents who are following a judge's way forward cannot simultaneously be blazing their own path.

## **2. Facilitative Mediation in Parenting Disputes**

Facilitative mediation appears to be well-suited to custody and visitation cases. As noted in Part I, the distinctive characteristics of these disputes include (i) the likelihood that the parties will have on-going interaction and (ii) the relevance of this relationship to

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<sup>157</sup> Adkins, *supra* note 138 at 104. Caucusing is described above, see notes 115 to 117 and accompanying text. According to D. G. Pruitt, one of the characteristics of caucus sessions is that they "foster a relationship with the mediator rather than with the opponent." (*Process and Outcome in Community Mediation*, 11 NEGOTIATION JOURNAL 365, 375-6 (1995).

<sup>158</sup> Sander, *supra* note 119 at 22; Steven A. Certilman, *Judges as Mediators: Retaining Neutrality and Avoiding the Trap of Social Engineering*, 73 INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT 24, 28-9 (2007).

<sup>159</sup> Semple, *Consensus and Controversy*, *supra* note 3; see also Robinson, *Legal Lion*, *supra* note 1 at 126-7 and 132-141.

<sup>160</sup> *Supra*, section IV(2)(iv).

<sup>161</sup> In her survey of Ohio lawyers, Rochelle Wissler found that they preferred staff mediators over judges as settlement-seekers by a significant margin. Many of their reasons seem to reflect the consequences of judicial authority. For example the surveyed lawyers considered it less likely that the parties would air their concerns openly if the settlement-seeker was a judge as opposed to a staff mediator: Wissler, *supra* note 1, at 285-287 and 317-319.

<sup>162</sup> Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3, 9 (1983).

the goal of the process, which is to advance the child's interest. Several scholars have argued that cases with on-going relationships between the parties are natural candidates for facilitative mediation.<sup>163</sup> Carrie Menkel-Meadow, for example, calls for facilitative mediation when the "process (i.e., direct communication between the parties) may be more important than the substantive outcome."<sup>164</sup> This may be true of parenting disputes, where evidence suggests that the precise terms of the parenting calendar which emerges from the negotiation are less important to the child's well-being than the nature of the parties' subsequent interactions with each other and the child.<sup>165</sup> Similarly, Frank Sander suggests that facilitative process more readily allows a focus on the future of an on-going relationship, while adjudication or evaluative mediation are primarily about the past. In an article which is generally critical of court-adjunct mediation, Deborah Hensler grants an exception for parenting cases.<sup>166</sup> She does so due to the "public policy interest in helping divorcing parents maintain a sufficiently positive relationship to enable them to care adequately for their children."<sup>167</sup>

Amadei and Lehrburger add that the presence of "common or complementary interests" in a given dispute also augurs well for facilitative mediation.<sup>168</sup> By contrast to a purely distributive financial matter (e.g. a suit against an insurance company after a personal injury), the parties to a custody and access dispute often have very significant complementary interests, even if they don't recognize them at first. Every parent wants what is best for his or her child, which creates a complementary interest for two people discussing their child's future.<sup>169</sup> Moreover, most parents wish to spend at least a few of their waking hours doing something other than caring for a child. This usually creates a complementary interest in having the child spend some time in the care of each parent.

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<sup>163</sup> Labour relations disputes share this characteristic with custody and access disputes. Facilitative mediation had become widespread in North American labour relations significantly before it was applied to other civil disputes. (Colleen M. Hanycz, *Whither Community Justice - the Rise of Court-Connected Mediation in the United States*, 25 WINDSOR Y.B. ACCESS JUST. 167, 180-186 (2007)).

<sup>164</sup> Menkel-Meadow, *For and against Settlement*, *supra* note 29 at 511.

<sup>165</sup> For the argument that precisely determining the "right answer" in a parenting dispute is not particularly important to the child, see Semple, *Whose Best Interests?*, *supra* note 4 at 319-21. Regarding the importance of the parties' on-going relationship quality, see Part II, *supra*.

<sup>166</sup> Sander, *supra* note 119.

<sup>167</sup> Hensler, *supra* note 54 at 82.

<sup>168</sup> Amadei & Lehrburger, *supra* note 133 at 64-5. This article specifically mentions "divorcing parents" as good candidates for the "process-oriented mediation style," which appears to be synonymous with facilitative mediation.

<sup>169</sup> Mayer, *Facilitative Mediation*, *supra* note 134 at 38.

### **3. Empirical Evidence : The Impact of Family Mediation**

What empirical evidence exists about the effects of facilitative mediation in parenting disputes? Is there support for the hypothesis that it is particularly well-suited to this context, or that deploying it more widely would support the best interests of the children involved in custody and visitation disputes? While the empirical literature about family mediation may be sparse compared to that on mental health interventions,<sup>170</sup> it is voluminous compared to that on judicial settlement-seeking or other legal processes.

The first question to ask about a settlement-seeking intervention is whether or not it produces settlements. Measuring settlement can be surprisingly challenging. Parents might settle “in the parking lot” immediately after the mediation, a success which would probably go unreported.<sup>171</sup> Conversely, they might appear to settle within the mediation itself, but then return a few months later with unresolved issues.<sup>172</sup>

Nonetheless, it is clear that facilitative mediation, like judicial settlement-seeking, produces many settlements of family disputes. The percentage of mediated family cases producing some form of agreement has been reported to be as low as 46% and as high as 94%.<sup>173</sup> Of course, as noted above with regard to judicial pretrials,<sup>174</sup> evidence of the intervention’s efficacy requires further evidence. While some cases which settled in mediation would also have settled in the absence of the mediation, there are two family court-specific pieces of evidence that they create agreements in matters which would otherwise be adjudicated. Emery et al.’s random-assignment divorce mediation study found that, while only 11% of their mediated cases ever appeared before a judge, 72% of

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<sup>170</sup> Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 39 (2004); BECK & SALES, *supra* note 84 at 21-24.

<sup>171</sup> Saposnek, *supra* note 170 at 47.

<sup>172</sup> Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 27(2005); Saposnek, *supra* note 170 at 47.

<sup>173</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, *supra* note 7 at 18; Kelly, *Family Mediation Research*, *supra* note 84 at 10 and 16. For other reported settlement rates within this range, see Desmond Ellis, *Family Mediation Pilot Project*. Toronto: Attorney General of Ontario, 1994, cited in Kelly, *Family Mediation Research*, *supra* note 84 at 22; C. J. RICHARDSON, COURT-BASED DIVORCE MEDIATION IN FOUR CANADIAN CITIES: AN OVERVIEW OF RESEARCH RESULTS (1988); Robin H. Ballard et al., *Factors Affecting the Outcome of Divorce and Paternity Mediations*, 49 FAM. CT. REV. 16, 21 (2011); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES. EFFECTIVENESS OF ACCESS AND VISITATION GRANT PROGRAMS (2002), cited in Kelly, *Family Mediation Research*, *supra* note 84 at 14; MINISTRY OF THE ATTORNEY GENERAL (ONTARIO), COURT SERVICES DIVISION ANNUAL REPORT 2009-2010 (2009); Emery, Sbarra & Grover, *supra* note 172 at 26.

<sup>174</sup> Section IV(1), *infra*.

the cases which they left on the attorney-negotiation track did so.<sup>175</sup> Second, Australia's introduction of widespread mandatory family mediation in 2006 functioned as a natural experiment testing the impact of the intervention. The total number of child-related family law court applications fell from 19,188 in 2004-5 to 14,549 in 2008-9, and the authors of a comprehensive evaluation concluded that this was largely attributable to the adoption of mandatory mediation.<sup>176</sup>

There is also consistent and persuasive evidence that people who participate in family mediation are satisfied by the experience. While different studies have used different queries to gauge satisfaction, strong majorities of mediation participants are satisfied with their experience.<sup>177</sup> Mediation is especially satisfactory to parties when compared to divorce litigation.<sup>178</sup> Beck and Sales reviewed several studies and found participant satisfaction rates which were consistently in the 60-80% range.<sup>179</sup> Joan Kelly reviewed three other mediation studies, and found satisfaction rates which were between 66% and 76%.<sup>180</sup> More recent data from California's mediation program found 87% of participants agreeing that "mediation is a good way to come up with a parenting plan" and 88% expressing willingness to recommend it to friends.<sup>181</sup>

Why are people satisfied by their experiences in family mediation? Although those who settle report greater satisfaction than those who do not,<sup>182</sup> satisfaction with mediation is also driven by factors beyond its ability to produce an agreement. In California, for example, the rates of satisfaction far exceed the rates of settlement.<sup>183</sup> The reasons why

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<sup>175</sup> Emery, Sbarra & Grover, *supra* note 172 at 25.

<sup>176</sup> KASPIEW et al., *supra* note 60 at 305.

<sup>177</sup> Lori Anne Shaw, *Divorce Mediation Outcome Research: A Meta-Analysis*, 27 CONFLICT RESOL. Q. 447, 457-8, 460 (2010).

<sup>178</sup> Emery, Sbarra & Grover, *supra* note 172 at 28.

<sup>179</sup> BECK & SALES, *supra* note 84 at 77.

<sup>180</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 14, 17, and 22.

<sup>181</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, *supra* note 7 at 21. See also Randall W. Leite & Kathleen Clark, *Participants' Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services*, 45 FAM. CT. REV. 260 (2007), reporting a survey which compared satisfaction rates with various family court services, including mediation.

<sup>182</sup> BECK & SALES, *supra* note 84 at 77-8; Kelly, *Family Mediation Research*, *supra* note 84 at 7-8.

<sup>183</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, *supra* note 7.

participants are satisfied by mediation generally pertain to the process, rather than the outcomes.<sup>184</sup>

In addition to settlement and satisfaction, family mediation may also produce deeper and more long-run benefits, although the evidence for these propositions is weaker. Researchers have investigated whether the compliance of separating parties with child support and parenting obligations is influenced by mediation. Some have found that mediation increases compliance,<sup>185</sup> although others have found no such effect,<sup>186</sup> or that the effect is only short-term in nature.<sup>187</sup> Another study found that interparental conflict was reduced during the two year period following the mediation.<sup>188</sup> After the two year mark the conflict level no longer showed an impact from mediation, but the experience of mediation had apparently taught the participants to use a “more direct and mutual style” in resolving their conflicts.<sup>189</sup> Shaw’s quantitative meta-analysis of mediation studies also found a “fairly large positive effect” of mediation on the quality of the couple’s relationship.<sup>190</sup>

Of particular relevance to this paper is the potential for family mediation to produce demonstrable benefits for the children involved. Unfortunately, the evidence here is decidedly mixed. In California, 89% of family mediation participants agreed that the mediator “helped to keep us focused on our children’s interests.”<sup>191</sup> Lori Anne Shaw’s quantitative meta-analysis based on several studies found moderate overall positive effects of family mediation on parental understanding of their children’s needs.<sup>192</sup> Robert Emery’s Virginia divorce mediation study found that, 12 years subsequent to a family mediation, the non-custodial parents who had mediated remained significantly more involved with their children than were non-custodial parents who had litigated.<sup>193</sup> Moreover, this was

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<sup>184</sup> BECK & SALES, *supra* note 84 at 27; Bush, *What Do We Need a Mediator For?*, *supra* note 83 at 17.

<sup>185</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 14-15 and 23; Emery, Sbarra & Grover, *supra* note 172 at 27; Adkins, *supra* note 138 at 127.

<sup>186</sup> Richardson, *supra* note 173 at 33.

<sup>187</sup> BECK & SALES, *supra* note 84 at 96.

<sup>188</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 18.

<sup>189</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 18.

<sup>190</sup> Shaw, *supra* note 177 at 460.

<sup>191</sup> CENTER FOR FAMILIES CHILDREN & THE COURTS, *supra* note 7 at 21.

<sup>192</sup> Shaw, *supra* note 177 at 460.

<sup>193</sup> Emery, Sbarra, & Grover, *supra* note 172 at 30.

accomplished without any commensurate increase in interparental conflict.<sup>194</sup> C.J. Richardson found a similar phenomenon in a sample of divorce mediation participants from Montreal, but not in a sample from Winnipeg.<sup>195</sup> This may be evidence that the particular circumstances of a family court mediation program – e.g. how much mediation time is funded per case and the quality of the mediators – are important determinants of its long-term success.<sup>196</sup>

These findings about compliance, relationship quality, and parenting behavior have not, however, been consistently replicated.<sup>197</sup> Some of the more ambitious claims regarding mediation’s benefits—e.g. that it reduces interparental conflict and that it is salutary to children’s adjustment in the long run— are not supported by the evidence.<sup>198</sup> Beck and Sales, whose book on the subject reviewed a large quantity of empirical literature, concluded that mediation has little or no effect on the long-term ability of separated couples to communicate, especially among the more highly conflictual ones.<sup>199</sup> Studies of California’s mediation programs have also found a marked drop-off in satisfaction levels when participants are surveyed two years after the experience.<sup>200</sup>

One of the goals of this paper is to compare the merits of facilitative mediation and authoritative/judicial pretrial conferences as alternative ways to further the interests of children whose parents are separating. The existing family mediation evaluation literature in of limited assistance in this task, for two reasons. First, the research comparator for family mediation has typically been courtroom litigation, and not judicial pretrial conferences or any other form of settlement-seeking.<sup>201</sup> Second, non-judicial family mediation is not always purely facilitative in character. Many of the studies do not clearly describe the nature of the mediation being studied, and the extent to which it is facilitative

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<sup>194</sup> Emery, Sbarra, & Grover, *supra* note 172 at 31.

<sup>195</sup> Richardson, *supra* note 173 at 39.

<sup>196</sup> RICHARDSON, *supra* note 173 at 45 identifies other possible explanations for differential success.

<sup>197</sup> See for example RICHARDSON, *supra* note 173 at 38-9.

<sup>198</sup> BECK & SALES, *supra* note 84 at Chapter 5; Kelly, *Family Mediation Research*, *supra* note 84 at 18; Saposnek, *supra* note 170 at 48.

<sup>199</sup> BECK & SALES, *supra* note 84 at 67-8.

<sup>200</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 8: “Follow-up studies with 1,532 parents two years later indicated a decline in measures of satisfaction, including whether mediation was a good way to come up with custody and visiting plans (93 versus 67 percent) and whether the agreement was perceived to be a fair one (87 versus 68 percent).”

<sup>201</sup> Shaw, *supra* note 106; BECK & SALES, *supra* note 84 at 22.



or evaluative.<sup>202</sup> Research findings about family mediation do not, therefore, necessarily pertain to the idealized facilitative mode described above.

However, there are a few tantalizing indications in the literature that facilitative and non-authoritarian settlement-seeking will indeed produce better results for most parenting disputes. Dean Pruitt and his colleagues studied the process and outcomes of mediation sessions at a community clinic.<sup>203</sup> Unlike most mediation research, this study placed observers within the mediation sessions. One of the attributes which they observed to varying extents in different sessions was “joint problem-solving,” a type of discussion in which “disputants ... define the problems underlying their conflict, examine alternative ways of solving these problems, and make a mutual decision among these alternatives.”<sup>204</sup> This concept bears a clear and close relationship to the doctrine of facilitative mediation as described above. The observers rated the sessions on a 7-point scale, according to the extent to which joint problem solving was in evidence.<sup>205</sup> Follow-up interviews were conducted 4-8 months after the mediation sessions. Among other things, the participants were asked about the quality of their relationships.<sup>206</sup> For the respondents in the disputes, there was a significant correlation between the presence of joint problem solving in the mediation sessions and the reported relationship quality.<sup>207</sup> The authors conclude that “one road to relationship improvement, in community mediation as in marital therapy, is to get the disputants to engage in joint problem solving about the issues that divide them. This provides supervised experience in a skill that is likely to be subsequently useful.”<sup>208</sup>

Even more germane is the work of an English team led by Liz Trinder. Trinder and Kellett studied “conciliation” schemes in English family courts, comparing the mechanisms by which they encouraged settlement in visitation disputes and the outcomes of the interventions. The researchers found a “high-judicial control” model of settlement-seeking

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<sup>202</sup> Kelly, *Family Mediation Research*, *supra* note 84 at 4 and 30.

<sup>203</sup> D.G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM.BEHAV. 313, 317 (1993). Some, but not all of the cases mediated were family matters.

<sup>204</sup> *Id.* at 315.

<sup>205</sup> Pruitt et al elaborate on this concept: “Joint problem solving was considered to be in evidence when disputants demonstrated behaviors such as open communication, collaborative attempts to sharpen the issues, exchange of information, concern for each other’s interests, and invention and critique of new alternatives.” (*Id.* at 319)

<sup>206</sup> *Id.* at 318.

<sup>207</sup> *Id.* at 323-4 and 327. There is no explanation offered for why this held true only for the respondents, and not the complainants in the disputes.

<sup>208</sup> *Id.* at 373.

in place at the Principal Registry of the Family Division in London. In this court the judge leads the discussions, and lawyers generally speak for the parties.<sup>209</sup> The court in Essex county, by contrast, deployed a “low-judicial control” model which seems similar to mandatory facilitative mediation. In Essex, before any judge is involved, an employee of the Child and Family Court Advisory and Support Service (CAFCASS) leads a joint meeting in which he or she “encourage[s] both parties to speak to one another ... focussed on the present and the future.”<sup>210</sup> In an intermediate or mixed position were three courts in Cambridgeshire and Suffolk counties. Here, each case goes before the judge as a first step but most are then sent to a CAFCASS-led mediation session similar to that used in the Essex court.<sup>211</sup>

The three courts were evaluated according to the number of agreements reached on visitation disputes, and on various measures of party satisfaction. The high-judicial control court significantly underperformed the other two in terms of number of agreements reached and satisfaction.<sup>212</sup> The low-judicial control court (Essex) also created noticeably higher participant satisfaction rates than did the intermediate courts (Cambridge and Suffolk).<sup>213</sup> This study was a “natural” rather than controlled experiment. The degree of judicial control was by no means the only difference between the three research sites. It does not therefore establish a clear correlation between judicial involvement and quality of outcomes. Nonetheless, it does provide an interesting hint that the self-determinative mode of facilitative mediation may indeed have substantial advantages over the authoritative mode of judicial pretrial conferences.

The empirical evidence base for family mediation establishes clearly that it consistently produces settlement and party satisfaction. There is also some basis to believe that it can improve interparental relationships and compliance with agreements, at least in the short term. The intuitively-appealing idea of a natural harmony between facilitative mediation and parenting disputes does seem to have some basis in fact. Judicial settlement-seeking for family court cases does not have much evidentiary support; in fact it is not even clear that it increases settlement rates. If it is true, as argued above, that judicial settlement-seeking is inherently authoritative, then it follows from the analysis here that this characteristic makes it inferior to facilitative mediation as a dispute-resolution

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<sup>209</sup> Trinder and Kellett, *supra* note 12 at 20-21.

<sup>210</sup> *Id.* at 17.

<sup>211</sup> *Id.* at 22-24.

<sup>212</sup> *Id.* at 41.

<sup>213</sup> *Id.* at 50.

technique for custody and visitation disputes. The Pruitt and Trinder studies focusing on the role of joint problem-solving and judicial control add tentative support this conclusion.

#### **4. Conclusion: For Separate Spheres**

Assigning all custody and visitation settlement-seeking work to facilitative non-judges would revitalize both settlement-seeking *and* adjudication. To question the role of judicial authority in settlement-seeking is certainly not to question the role of judicial authority itself. It is an essential component of family court, but its natural channel is adjudication rather than settlement-seeking.<sup>214</sup> Lengthy waiting periods for adjudication are common in many family courts, and requiring these judges to spend time seeking settlement exacerbates this problem. As Judith Resnik and others have argued, "scarce judicial resources should be conserved and employed only when judges' special skill - adjudication - is required."<sup>215</sup>

Separating the spheres could also revitalize judicial authority by reaffirming its link to due process. Pretrial settlement-seeking permits the exercise of judicial authority without most of the procedural safeguards which accompany a trial or a motion. In principle, judges are meant to reach their conclusions exclusively on the basis of admissible evidence. Many of the allegations and assumptions circulating within a typical pretrial conference do not meet this threshold.<sup>216</sup> A pretrial conference judge is not, of course, making a formal decision backed by the power of the state. However, as argued above judicial authority is certainly being brought to bear in this context.<sup>217</sup> Allowing authoritative decision-making in the absence of procedural rules can lead to both poor-quality decisions and negative public perceptions of the judicial role.<sup>218</sup> It has also been

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<sup>214</sup> A number of procedural scholars have made this case for separate spheres, although without reference to the specificities of the custody and visitation context. E.g. Michael T. Jr. Colatrella, *Court-Performed Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs*, 15 OHIO ST. J. ON DISP. RESOL. 391, 415-6 (2000), Sander, *supra* note 119 at 22, and Roberts, *supra* note 123 at 557 argue for mediation and adjudication being conceptually and practically distinct. Sarokin, *supra* note 43 at 437 and Tornquist, *supra* note 46 at 773 echo this point but also suggest that judicial settlement-seeking could be appropriate in defined and restricted circumstances.

<sup>215</sup> Molot, *supra* note 72 at 32; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 435 (1982). In light of the evidence that many cases do not require judicial attention in order to settle, Leroy Tornquist goes so far as to argue that "the judicial time spent in settlement discussions for all cases is greater than the time it would have taken to try the few cases that would not have settled without intervention." (Tornquist, *supra* note 46 at 764).

<sup>216</sup> Sarokin, *supra* note 43 at 434.

<sup>217</sup> *Supra*, section IV(2)(iv).

<sup>218</sup> Cratsley, *supra* note 98 at 574; Tornquist, *supra* note 46 at 773.

argued that pretrial conference settlements represent an illegitimate expansion of the power of trial judges, insofar as they can wield substantial coercive power therein with little or no appellate oversight.<sup>219</sup>

This article has focused critically on judicial settlement-seeking in custody and visitation cases. These cases have several distinctive factors which inform this analysis – the doctrinal supremacy of a non-party’s interests, the prevalence of self-represented parties, and the importance of the parties’ on-going relationship. With continuing reference to these characteristics, the paper then subjected the practice in question to a figurative mock trial. The first allegation was that there is too much settlement and not enough neutral decision-making in these cases; the second was that the justice system need not encourage settlement. The characteristics of the justice system and parenting disputes require the practice to be found “innocent” on these counts.

However this paper has sought to convince its jury of readers to convict on the third count – that judges are not the people who should be encouraging settlement in custody and visitation cases. The empirical evidence about the practice does not even establish clearly that it increases settlement rates, let alone that it accomplishes any of the deeper and longer-term goals which we should look for in parenting dispute resolution. Moreover, the high expense of judicial labour, combined with their collective ambivalence about settlement-seeking work and their autonomous right to decide whether or not to pursue it, are all reasons to question their suitability for this role. The fourth relevant characteristic of judges is their inherent authority. This authority is a consequence of judicial enforcement power, predictive power, and moral suasion, and it has an effect whether or not the judge seeks to use it.

This article carries a brief for facilitative settlement-seeking in parenting cases. The hallmarks of this technique are self-determination and party-empowerment, and it is essentially incompatible with authoritative, judicial settlement-seeking. There is a natural harmony between the facilitative approach and parenting disputes, and a substantial body of empirical evidence which supports its use in this context. Every family deserves the opportunity to reach a facilitated and self-determinative solution in a parenting dispute, unless domestic violence or dramatic power imbalance make it clearly inappropriate. This paper has concluded by arguing for a separation of spheres in family court. Entrusting the settlement-seeking task in parenting disputes to facilitative and non-judicial mediators could revitalize both settlement-seeking and adjudication, which are both essential. Thus, while the “mock trial” conceit of this article is quintessentially adversarial in nature, the proposed remedy is a gentle form of restorative justice – a reinvigorated family court, with

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<sup>219</sup> Macey, *supra* note 105 at 634; Yeazell, *supra* note 32 at 656; Welsh, *Thinning Vision*, *supra* note 129 at 6.

a renewed and enhanced ability to resolve each parenting case in the best interest of the child.