RETHINKING THE ROLE OF COURTS IN RESOLVING FAMILY CONFLICTS

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Family courts have been a central focus of the national problem-solving courts movement over the last three decades.[1] These courts have sought to replace the law and process-oriented adversary model with a more collaborative and interdisciplinary regime that de-emphasizes legal norms and focuses on therapeutic goals. While the new paradigm may be an improvement over its more adversarial predecessor, it presents significant risks for many who appear in these courts.[2] A growing consensus is emerging among scholars, policy makers, and family law practitioners that the focus for much of family dispute resolution should shift from courts to the community.

This Article begins by situating family courts in the world of problem-solving courts. Part II summarizes the critique of the adversarial system's approach to family conflicts, particularly to resolve child access disputes. It discusses the ways in which the problem-solving family courts seek to respond to this critique, providing a context to understand the current popularity of such courts. Part III explores a number of concerns scholars and practitioners have raised about problem-solving courts and raises specific concerns about the way family courts have implemented the core principles. For both demographic and doctrinal reasons, the impact has been felt most directly by low-income families. Finally, this Article concludes with a recommendation designed to reap the benefits of the problem-solving model while limiting the risks identified in this Essay.

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1 JANE C. MURPHY & JANA B. SINGER, DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION 12–19 (2015) (explaining that "family courts" is a short hand for the problem-solving courts first introduced in this country in the 1990s. As I have written elsewhere, these courts bear a strong resemblance to the "new" family courts introduced in some parts of the country in the early 1900s).

2 *See* discussion *infra* Part II.

I. FAMILY COURTS AND THE PROBLEM-SOLVING MODEL

Problem-solving courts started with drug courts and have flourished primarily in the criminal justice arena.[3] Many of these courts focus on a single issue or population—drug offenses and treatment,[4] veterans,[5] and domestic violence[6]—others are more general in scope like family courts.[7] But all problem-solving courts, whether civil or criminal, specialty or general, share common core features:

> (1) Cases are handled by interdisciplinary teams of lawyers, social workers, and other non-judicial court personnel who work toward a common societal goal and assist the parties in identifying issues and working toward their own legal and therapeutic goals.[8]
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> (2) Judges act as "team leaders" who fashion a disposition and then closely monitor the implementation of the disposition, often through frequent court appearances.[9]

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[3] Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1580–81 (2018) (noting that "the problem-solving movement" was launched as a result of judges' dissatisfaction "with the mass processing of criminal cases").

[4] *See generally* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (Paul J. DiMaggio et al. eds., 2003) (discussing the drug courts movement and analyzing its intended and unexpected consequences); Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (explaining therapeutic jurisprudence and examining therapeutic jurisprudence's application in drug treatment courts).

[5] *See generally* Tiffany Cartwright, *"To Care for Him Who Shall Have Borne the Battle": The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL'Y REV. 295 (2011) (analyzing the benefits and drawbacks of veterans treatment courts); Joseph Darius Jaafari, *Special Courts for Veterans Languish: There's Little Money and Apparently Little Demand*, MARSHALL PROJECT (Feb. 19, 2019, 6:00 AM), https://www.themarshallproject.org/2019/02/19/special-courts-for-veterans-languish (discussing the availability and effectiveness of existing veterans treatment courts).

[6] *See generally* Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, 42 JUDGES' J. 5 (2003); Amy Karan et al., *Domestic Violence Courts: What Are They and How Should We Manage Them?*, 50 JUV. & FAM. CT. J. 75 (1999).

[7] Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L. Q. 3, 15 (1998).

[8] *See, e.g.*, Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 113,113–14 (2010) [hereinafter Spinak, *Problem-Solving Courts*] (focusing on child welfare cases in family court, but noting the shared characteristics of problem-solving courts); Steinberg, *supra* note 3, at 1581.

[9] Spinak, *Problem-Solving Courts*, *supra* note 8, at 114; Steinberg, *supra* note 3, at 1581–82. *See also* Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 86–90 (2006); Deborah Chase & Hon. Peggy Fulton Hora, *The Best Seat in the House: The*

> (3) Procedural protections such as rules of evidence, on the record proceedings, and prohibitions on ex parte contacts with judges are often relaxed to facilitate collaboration and communication among "team members" and with the judge leading the team.[10]

The rise of the problem-solving approach to family conflicts, particularly child access disputes, stems from a longstanding critique of the traditional adversarial system's treatment of family cases and doctrinal shifts in family law. The critique of the adversarial system focuses on both the substance and process of such proceedings. In terms of substance, the adversarial approach tends to look backward to assign blame, using contested hearings to determine which parent was at fault for the breakup or which parent is unfit or the better parent. This focus exacerbates conflict, harming children in the process and making co-parenting after breakup difficult.[11] These contested hearings also often involve complex hearings with experts and extensive testimony, crowding court dockets and causing expense and delays for parties.[12]

Two changes in family law doctrine also contributed to the rise of problem-solving courts.[13] The first is the shift from fault to no-fault divorce, eliminating the need for a court to assign blame for the breakup. Even more importantly, the shift from a sole child custody regime to a shared parenting regime undermined the reliance on the adversarial system to designate a "winner" in child access disputes. Under a shared parenting regime, the goal of a conflict resolution system is no longer to make a one-time custody allocation, but rather to facilitate and supervise ongoing parenting partnerships.

Court Assignment and Judicial Satisfaction, 47 FAM. CT. REV. 209, 234 (2009); James L. Nolan Jr., *Therapeutic Adjudication*, 39 SOCIETY 29, 29, 3234 (2002).

[10] *See, e.g.*, Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU. L. REV. 1459 (2004) (finding that the procedural due process protections accorded to criminal defendants in problem-solving courts are eliminated "as the adversarial process is abandoned in favor of a collaborative endeavor involving the judge, prosecutor, defense attorney, probation officer, treatment provider and defendant").

[11] *See, e.g.*, Hugh McIsaac, *Programs for High-Conflict Families*, 35 WILLAMETTE L. REV. 567, 580 (1999) ("The formal nature of the courts pits the parties against one another like two scorpions in a bottle, at a time when they are most angry and hostile toward one another.").

[12] Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 127–31 (1993) (using a case study to illustrate the delays and expense in a typical family law case under the adversary system). *See also* Steinberg, *supra* note 3, at 1586–87 (describing problem-solving courts as a response to "rising caseloads" and "assembly line" justice).

[13] *See generally* MURPHY & SINGER, *supra* note 1, for a full discussion of these doctrinal changes.

As a result of these conditions, family courts began spreading across the country in the early 1990s with a range of non-adversarial, more informal and less law-focused processes to resolve parenting disputes. These include court-connected mediation, court-affiliated parent-education programs, parenting coordination for high conflict families, and early neutral evaluations conducted by non-judicial court personnel for the purpose of encouraging settlement.[14]

However,

> [a]t the heart of [this expanded vision] . . . is a striking juxtaposition. The new paradigm expands the . . . role of the family courts at the same time as it reduces the primacy and relevance of legal norms. The result is a more powerful court system that is less constrained by legal limitations than its more traditional predecessor.[15]

It is this tension between the courts' expanded mission with its informal processes and the forma and limited goals of traditional courts that gives rise to concerns about both the continued viability of these courts and the risks they pose for those who must appear in them.

II. Problem-Solving Family Courts: Concerns and Risks

While the impact of the expanded mission and non-adversarial approach in today's family courts has not been thoroughly evaluated, both empirical studies and anecdotal research raise concerns.[16] A number of these concerns were raised almost from the start of the problem-solving court movement. Many fear that more comprehensive, local, and effective solutions to social problems like family dissolution, substance abuse, or domestic violence may not be developed or funded if courts are perceived as the place where these problems are solved.[17] In addition, to the extent that family courts are the only places to obtain needed services like free mediation and child support enforcement, more people are drawn

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14 *See, e.g.*, Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 Fam. L. Q. 333, 345–50 (2003).

15 Murphy & Singer, *supra* note 1, at 37.

16 Steinberg, *supra* note 3, at 1590 (noting that "[a]s a condition of federal funding, problem-solving courts have been subject to rigorous evaluation by social scientists").

17 *See, e.g.*, Spinak, *Problem-Solving Courts*, *supra* note 8, at 117–18.

into the courts—the so-called net widening impact of problem-solving courts.[18] Court appearances are inconvenient, intrusive, and may even be traumatic, especially for a person that is poor and vulnerable.[19] As a result, expanding the need to go to court can be harmful to families.

Many commentators and experts have also raised concerns about problem-solving courts' competence to take on this expanded role.[20] In the first comprehensive evaluation done of family courts since their proliferation in the early 1990s, the findings of a 2018 study commissioned by the Conference of Chief Judges and State Court Administrators highlighted the inability of courts to meet the needs of today's families.[21] The study examined "caseload characteristics of domestic relations cases disposed between July 1, 2016, and June 30, 2017, across eleven large, urban courts."[22] Several findings from the study reflect the mismatch between how courts operate and the expanded mission of the problem-solving family court movement. First, the data maintained by today's family courts "harken to a predominantly adjudicative system" making it difficult for researchers to conduct systematic evaluation of whether family courts are meeting the changed mission of the family court.[23] In addition, to the extent such assessment can be accomplished, the study's findings "raise questions [about] both . . . how domestic relations cases should be managed and whether the judicial branch is still the most appropriate forum for such cases."[24]

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18 *Id.* at 118.

19 *See* discussion *infra* Section II.

20 *See, e.g.*, Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 897–900; Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258 (2008) ("[L]essons gleaned from over 100 years of family court history suggest that court-based solutions to intractable social problems have rarely been effective. . . [N]either the structural issues that courts face, such as overwhelming numbers of cases, nor the momentous societal issues that problem-solving courts have recently begun to shoulder can be adequately addressed through court-based solutions.").

21 FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS ii (2018), https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf [hereinafter FAMILY JUSTICE INITIATIVE] (The study "represents the first large, aggregate examination of how family court cases are litigated in the state courts.").

22 *Id.* at i.

23 *Id.* at ii. The study went on to note that, while most family court personnel understand the expanded goals of the new family court, "courts must develop and implement more effective data standards for family court cases, including when and how litigants are using court services and resources" like ADR and parent education and "to assess the impact or the relative quality of the court orders that disposed of the case." *Id.* at 28–29.

24 *Id.* at ii.

Under the new paradigm, family courts' functions are both administrative and facilitative: "to provide education and resources, including ADR or other decision-making tools, as mostly self-represented parties go about reorganizing their families and financial affairs."[25] But the study finds that, despite almost three decades of at least nominal implementation of the new family court model, court structures "still largely reflect the . . . adversarial system."[26] While most decision-making takes place in informal settings, the courts still use court appearances and court orders to move parties through mediation, parent education, and other services. As a result, the study found that cases moving through the family court take substantial time and involve multiple court appearances.[27] In addition, 25% of cases in the study reopened for some kind of post-judgment modification.[28]

This study raises real questions about whether family courts will ever realize the goals they have set for themselves. But what has emerged as the most compelling critique of family courts focuses on the risks these courts pose for those who regularly appear in them—low-income families. Poor families have always been subject to different treatment in the legal system's regulation of families, beginning with the lack of legal recognition or protection of African-American slave families.[29] This different treatment has persisted in family law disputes where the state is a party—child abuse, neglect, and delinquency cases.[30] But the risks for low-income families have now expanded into courts that hear private family disputes—disputes between parents or parents and a third party.[31]

Both doctrinal and demographic trends have brought large numbers of low-income non-marital families into court for reme-

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25 *Id.* at 28.

26 *Id.* at 27.

27 FAMILY JUSTICE INITIATIVE, *supra* note 21, at 26–27.

28 *Id.* at 27. Researchers could not determine whether the petitions to reopen cases were due to "failure to satisfactorily resolve the original dispute" or new disputes but did find that cases without children re-opened more quickly and cases with children were more likely to reopen over a longer period of time. *Id.*

29 *See generally* Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187 (1987).

30 *See generally* Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426 (2014).

31 The state has traditionally been a party only in family court cases where there is an allegation of child abuse, neglect or juvenile delinquency. However, increasing regulation of child support and, more recently, child access has brought the state into some traditionally private disputes. *See infra* text and accompanying notes 35–55.

dies like child custody and visitation orders, paternity judgments, and child support. First, low income, non-marital families are increasing in the general population. In 1990, 28% of births in the United States were to unmarried parents; in 2016, that number was 40%.[32] While the numbers of non-marital children have increased across all education levels and ethnic groups, the largest percentage of non-marital families occurs in populations with less education and in Hispanic and Black families.[33] For a range of complex reasons, there is a strong link between poverty and non-marital family structures, race, and education.[34]

At the same time non-marital low-income families have increased in the general population, changes in family law doctrine over the last few decades have tended to push these families into court. Chief among these changes are laws implementing the aggressive child support establishment and enforcement system focused primarily on low-income fathers.[35] These include the

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32 Elizabeth Wildsmith, Jennifer Manlove & Elizabeth Cook, *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, CHILD TRENDS (Aug. 8, 2018), https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels. However, the percentage of all births to unmarried women has declined slightly in recent years. *See* Joyce A. Martin et al., *Births: Final Data for 2017*, 67 NAT'L VITAL STAT. REP. (Nov. 7, 2018), at 5–6, https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf (finding that the percentage of all births to unmarried women was 39.8% in 2017, unchanged from 2016, and the percentage of all births to unmarried women peaked in 2009 at 41.0%).

33 Wildsmith, *supra* note 32.

34 Maria Cancian & Deborah Reed, *Family Structure, Childbearing, and Parental Employment: Implications for the Level and Trend in Poverty* 1 (Inst. for Research on Poverty, Discussion Paper No. 1346-08, Sept. 2008), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.217.4121&rep=rep1&type=pdf (finding that "[t]he correlation between family structure and economic well-being is well established [and that] [p]overty rates vary dramatically by family structure; in 2006 about 8 percent of married couples with children, 40 percent of single mother families, and 14 percent of single father families were poor"). *See also* Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, in 621 ANNALS AM. ACAD. POL. SOC. SCI. 111–31 (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2831755/pdf/nihms-177221.pdf (demonstrating "unmarried parents come from more disadvantaged populations than married parents" and arguing "that non-marital childbearing reproduces class and racial disparities through its association with partnership instability and multi-partnered fertility"). *But see* GETCHEN LIVINGSTON, PEW RESEARCH CTR., THE CHANGING PROFILE OF UNMARRIED PARENTS: A GROWING SHARE ARE LIVING WITH A PARTNER (2018), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Unmarried-Parents-Full-Report-PDF.pdf (showing that more unmarried parents now live with a partner and, as a result, are faring better financially than nonmarital families with a sole parent).

35 *See, e.g.*, Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803 (2015) [hereinafter Brustin & Martin, *Good Intentions*]; Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law and Father-Absence in Low-Income Families*, 35 CARDOZO L.

"parent cooperation requirement."[36] Under this requirement, recipients of Temporary Assistance for Needy Families ("TANF") must assign their rights to collect child support to the state in exchange for these payments.[37] The state then initiates proceedings to establish parentage, if not already determined, and to enter a child support order against the noncustodial parent.[38] Even if a custodial parent is not receiving TANF, the same legislation authorizes the use of these services to non-TANF parents for a nominal fee, bringing more single parents into court seeking child support orders.[39]

Federal legislation also encourages states to provide new court services to integrate parenting time and child support to promote increased engagement of fathers with their children and encourage compliance with child support orders.[40] As one study noted, "[f]amily court dockets are replete with separated fathers, married or unmarried, who are attempting to negotiate ways into their children's lives through paternity establishment, more defined parenting responsibility, and increases in time spent with their children."[41]

Laws expanding rights for unmarried intimate partners have also contributed to greater numbers of unmarried parents in family court. These include statutes in many states expanding protections for victims of domestic violence to unmarried cohabitants.[42] These statutes consider unmarried persons who reside together or have a child in common as "family or household members" who may seek child custody, financial relief, and stay away orders to protect against family abuse.[43] Some states also expand rights for persons in a dating relationship.[44] As a result of these statutory changes,

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REV. 511 (2013); J. Thomas Oldham & Bruce M. Smyth, *Child Support Compliance in the USA and Australia: To Persuade or Punish?*, 52 FAM. L. Q. 325 (2018).

36 42 U.S.C.A. § 608(a)(2) (West, Westlaw through Pub. L. No. 116-91).

37 42 U.S.C.A. § 608(a)(3) (West, Westlaw through Pub. L. No. 116-91).

38 42 U.S.C.A. § 666 (West, Westlaw through Pub. L. No. 116-91).

39 *See* OFF. CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUM. SERVS., CHILD SUPPORT HANDBOOK 8–9 (2013), https://www.acf.hhs.gov/css/resource/handbook-on-child-support-enforcement.

40 Brustin & Martin, *Good Intentions*, *supra* note 35, at 807–08.

41 Glendessa M. Insabella, Tamra Williams & Marsha Kline Pruett, *Individual and Coparenting Differences Between Divorcing and Unmarried Fathers: Implications for Family Court Services*, 41 FAM. CT. REV. 290, 290 (2003).

42 Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 514–21 (2008).

43 *See, e.g.*, HAW. REV. STAT. ANN. § 709-906(1)(a) (West 2019).

44 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 2019).

more unmarried intimate partners are seeking protection orders in today's family courts.[45]

Thus, because of both an increase in overall numbers of non-marital families as well as changes in family law doctrine, more low-income non-marital families are appearing in family courts. These families are uniquely vulnerable to risks posed by the broad mission and informal procedures that characterize today's family courts. First, decisions in these courts involve fundamental rights—determinations about legal parentage, access to children, and long-lasting financial obligations—but may not reflect the needs and priorities of the parents and children who appear in them. This is, in part, because the majority of parties appear in family court without lawyers. Studies across the country have shown that over 70% of litigants in family courts are not represented by lawyers.[46] This is because "family matters constitute both the largest share of case dockets and the largest share of unmet requests for representation for many legal services organizations[,]" making it difficult for many low-income parties to secure representation.[47] Many of those appearing in family court also have limited education, which adds to the difficulty in navigating the court processes and in being heard.[48]

Moreover, while these informal procedures can encourage more direct participation by unrepresented litigants, they amplify risks that decisions will be made without parties' full understanding

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45 *See, e.g.,* FAMILY PRACTICE DIV., ADMIN. OFFICE OF THE COURTS., STATE OF N.J., REPORT ON THE PREVENTION OF DOMESTIC VIOLENCE ACT 11 (2017), https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/ domestic_violence_prevention_act2013.pdf.

46 FAMILY JUSTICE INITIATIVE, *supra* note 21, at 20 ("*72 percent of cases indicated that the petitioner and/or respondent was self-represented; however, this varied considerably by site, 33 percent to 86 percent")*; Nancy Kinnally & Jessica Brown, *Everyone Counts: Taking a Snapshot of Self-Represented Litigants in Miami-Dade*, ABA: DIALOGUE (Nov. 17, 2017) https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/fall-2017/pro-bono-everyone-counts/ (reporting on a Florida study and finding that 62% of individuals were not represented by counsel in family law proceedings—including, but not limited to, a single spouse seeking divorce, dependency matters—and over 80% were unrepresented in domestic violence protection order proceedings). *See also* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf ("86% of the civil legal problems reported by low-income Americans received inadequate or no legal help").

47 Stacy Brustin & Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 HASTINGS L. J. 1265, 1267 (2016) [hereinafter Brustin & Martin, *Justice Gap*].

48 *See* Insabella, *supra* note 41, at 291 (noting that unmarried fathers in family court "are more disadvantaged in terms of education, income, and age, and they are at higher risk for poorer physical and mental health outcomes").

of both their options and the legal implications of their choices. As two family law scholars describe it:

> Without legal counsel, parents may not understand important issues such as the scope of their legal rights and responsibilities, the pros and cons of formalizing versus privately ordering their parenting affairs, the legal presumptions and factors that govern how courts allocate parenting rights and responsibilities, and how financial and caretaking responsibilities interrelate. In such circumstances, parents might reach agreements contrary to their interests or litigate claims that have little chance of succeeding.[49]

The expanded mission of family courts also means more intrusion and surveillance in the lives of the families seeking legal remedies in court. As discussed, many parents find themselves in family court in child support cases, either because they are required to "cooperate" in exchange for public benefits or are seeking direct payments.[50] Others must initiate or respond to court proceedings to resolve child access issues. These may result from a conflict with another parent or third party. But in many cases, parents are in court because a particular child custody order may be required by a third party before decisions about education or medical care can be made, or before a party can become eligible for benefits like subsidized housing.[51] Regardless of the goal of the petitioning party, the filing of a child access pleading will require court appearances that trigger a number of orders requiring participation in programs like custody evaluation, parent coordination, parent education, or mediation.[52] Participation in these "services" will routinely include

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[49] Brustin & Martin, *Justice Gap*, *supra* note 47, at 1267. *See also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., RESIGNING DIVORCE: USER DRIVEN DESIGN FOR A BETTER PROCESS 12–14 (2019), https://iaals.du.edu/publications/redesigning-divorce; Melissa L. 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 (2010) (discussing the impact informality, including repeat players, on the quality of family court decisions); Jane M. Spinak, *Adding Value to Families*: The *Potential of Model Family Courts*, 2002 WISC. L. REV. 331, 371 (2002) [hereinafter Spinak, *Adding Value*] ("A model court structure divorced from a clear commitment to legal mandates can look too much like a court proceeding without due process.").

[50] Jacquelyn L. Boggess, *Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems*, 55 FAM. CT. REV. 107, 109 (2017).

[51] U.S. DEP'T OF HOUS. & URBAL DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 3-75 (2013). When determining family size for establishing income eligibility for subsidized housing, children subject to custody arrangements must occupy the subsidized unit 50% or more of the time, *id.* at 3–10.

[52] *See, e.g.*, Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process,* 42 FAM. L. Q. 659, 668 (2008) (describing the range of

interviews of parents and child and may even include a visit to the parents' home(s).[53]

At best, fulfilling these obligations leads to a loss of privacy and control over what are often intimate details of family life. In the worst cases, a visit to court puts parties at risk of losing their children or incarceration. A report by a "team member" based on observations or statements made in mediation, parenting coordination, or provisions in parenting plans may result in admonishment from a judge or even a report to child protection offices.[54] Some court appearances may even result in involvement in the criminal justice system, including incarceration. This can result from contempt proceedings brought by one of the parties or an attorney appointed for a child for a failure to follow an agreement incorporated into a court order. Or, the mere presence in court to participate in mediation or other processes can trigger an arrest warrant for failure to pay child support or violation of another court order.[55] A strong and thoughtful "team leader" can mitigate such risks but cannot change the essential family court experience.

At the same time that the courts put low-income families at risk, they also do little to serve their needs. The experiences of these families in family courts have largely been ignored by court

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services and programs family court litigants are now involved in and noting that in some courts "families . . . begin with less intrusive and time-consuming processes, such as parenting education and mediation, and if unsuccessful with these, would go on to participate in more intrusive and time-consuming processes—typically custody evaluation and trial. Unfortunately, some high-conflict families spent time and money in programs and for services that were not likely to be helpful to them, rather than proceeding directly to programs and services better tailored to their needs."). As Co-Director of the Mediation Clinic for Families from 2005–2015, the author supervised students representing clients in child access disputes in the Circuit Court for Baltimore City. In that role, the author saw first-hand the range of obligations the courts required of parents had to meet in these cases and the burdens imposed by them.

53 *Id.*

54 One example of this comes from a case handled by the University of Baltimore Mediation Clinic for Families, which the author has co-directed since 2006 (for more information on the clinic, see http://law.ubalt.edu/clinics/familymediation.cfm [last published July 1, 2019]). The clinic represented a mother in the Family Division of the Circuit Court for Baltimore City who negotiated a parenting plan with her children's father that included a provision in which the mother would pick the children up from the father's home after her evening work shift. The court refused to approve the agreement and suggested a referral to child protection services might be appropriate.

55 The University of Baltimore Mediation Clinic for Families represented a father who was arrested during a child access mediation session in the Family Division of the Circuit Court for Baltimore City. The court sheriff executed a warrant in the presence of his children for unpaid child support.

reformers and the family law bar.[56] "The new paradigm's emphasis on resolving disputes through private agreements, and the limited role of courts in scrutinizing those agreements," assumes parties have sufficient personal and financial resources to support effective participation in consensual dispute resolution processes.[57] Indeed, the emotional and financial pressure of taking extensive time away from work often lacking adequate child care makes full participation in the range of processes in family court almost impossible for many parents.[58] Services like parent education classes, mediation and parenting plans are often built with the assumption that parents have established relationships with each other and their children. As one study noted:

> For parents experiencing unemployment and poverty, a formal document that outlines a financial plan they may not even understand may be irrelevant and useless in the chaotic, unstable reality of life in poverty. . . .[W]hen a parent is ordered by a court to follow the plan, it can be frightening to consider the possibility of being held in contempt of court if they cannot follow through on it over the long term.
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> Support and information about [child] placement and custody could be helpful to low income parents. . . But this work calls for creative thinking and innovation. Poverty and instability . . . can make even a visitation or placement order difficult to follow. The current family court system may not be equipped to respond to the inevitable and often unpredictable "change in circumstances" that make up the day-to-day lives of very poor families.[59]

Families with resources, on the other hand, can bypass courts almost entirely while seeking the same remedies.[60] If disputing

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[56] Boggess, *supra* note 50, at 108–09 (as one recent study put it: "[t]raditional family law bar organizations and professionals are less likely to know or investigate issues presented by low-income, never-married parents . . . [a]s a result, there are fewer analyses, recommendations, or creative and effective ideas for change to accommodate these parents and their children").

[57] MURPHY & SINGER, *supra* note 1, at 74–75.

[58] The author has supervised students representing over 100 clients in court ordered mediation in Baltimore's Family Division in the Mediation Clinic for Families at the University of Baltimore School of Law. Clients in the program regularly had to end mediation or quickly enter into agreements for fear of losing jobs, losing income or because of childcare responsibilities.

[59] Boggess, *supra* note 50, at 109–10. *See also* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 170 (2015) (noting that legal institutions governing family dissolution are designed for marital families).

[60] *See generally, e.g.*, Jane C. Murphy, *Why the Jolie-Pitt Divorce Won't Be Like Kramer vs. Kramer*, BALT. SUN (Sept. 30, 2016, 10:40 AM), https://www.baltimoresun.com/opinion/op-ed/bs-

families have money, they can choose when and how much the court will be involved in their break-up and reorganization. Family lawyers now offer clients a range of options for resolving disputes relating to separation and divorce.[61] Each parent hires a lawyer and lawyers work with their clients to reach an agreement out of court. These families may also hire their own mediators or other experts. They can even engage in collaborative practice where lawyers and parties explicitly agree not to use courts to resolve their disputes.[62] In the few cases where an agreement cannot be reached, one or both of the parents can use the court's resources—settlement judges, custody evaluators, parenting coordinators—to resolve their conflicts within the court structure. It is not a perfect system, but these families are, unlike the poor, in control of the process.

III. Recommendation: Move Family Dispute Resolution from the Courts to the Community

The new problem-solving paradigm for family disputes has focused primarily on the court system as the site of innovations in family dispute resolution. To some extent, reliance on court-based solutions is a relic of the fault-based system, where divorce and child custody were state controlled remedies provided to one spouse against the other. Despite the changing demographics of family court and the declining role of the state in regulating entry and exit from marriage, reformers have continued to rely on courts as the default arena for resolving parenting disputes. Courts should continue to authoritatively resolve high conflict cases, protect vulnerable family members, and articulate norms for novel legal situations. However, moving family dispute resolution away from the courts to the community offers a number of advantages.

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ed-brangelina-divorce-20161002-story.html; Amy Sohn, *Angelina Jolie's Lawyer Now Offers Quickie Divorces Online*, N.Y. Times (Feb. 3, 2018), https://www.nytimes.com/2018/02/03/style/can-you-get-divorced-online.html.

61 *See, e.g.*, Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 3 (2d ed. 2008) (noting that "family lawyers have led the way in developing procedural alternatives to litigation"); Julie Macfarlane, The New Lawyer: How Settlement Is Transforming the Practice of Law x (2008) (noting that "family law is an area in which voluntary participation in alternatives to litigation has grown exponentially, primarily in the form of family mediation or collaborative family lawyering").

62 Tesler, *supra* note 61, at 8–9.

Locating family dispute resolution services in the community should make it easier and less intimidating for individuals and families to access those services—particularly for low-income families. These families tend to have a "negative past experience of government institutions" and may not view courts as "a place where their rights can be defended or supported[,] or their children's best interest will be considered[.]"[63] Allowing families to access services without resorting to court action may also encourage parents to take advantage of these services on a proactive or preventive basis, rather than waiting until positions harden and emotions escalate.

Community-based services also reinforce the message that parental separation is not a one-time legal event, but rather ongoing processes in which circumstances may change often and require regular tweaking and collaboration. Locating these planning efforts in the community, rather than the court system, helps to normalize this reorganization process, characterizing it as part of life's regular challenges, rather than a quasi-criminal proceeding that requires the full machinery of the state.

Decentralizing family dispute resolution and moving some processes from the courts to the community should also enable providers to be more responsive to the families they serve. These services would also likely be more culturally sensitive than the courts are and would be more responsive to the needs of families most in need of free or low-cost services critical to family well-being, such as housing and child-care assistance. Moving some family services out of the courts would also allow the judicial system more resources to engage in fact finding and authoritative resolution to resolve high conflict cases or cases raising novel issues of law.

Scholars,[64] family law practitioners,[65] state legislatures,[66] and even courts[67] have begun to endorse what was once a revolutionary idea—moving family law conflicts out of court—shifting the focus

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63 Boggess, *supra* note 50, at 109.

64 *See, e.g.*, Margaret Ryznar & Angélique Devaux, *Voilà! Taking the Judge Out of Divorce*, 42 SEATTLE U. L. REV. 161 (2018) (arguing that increased reliance on mediation, more formulaic child support, alimony and marital property laws all favor taking the court out of the divorce process).

65 *See, e.g.*, Pauline H. Tesler, *Can This Relationship Be Saved? The Legal Profession and Families in Transition*, 55 FAM. CT. REV. 38 (2017) (arguing that because of decentralization, judicial autonomy, and lack of resources, courts are not places to focus efforts to reform the traditional response to family breakup).

66 *New Legislative Positions Adopted by Assembly*, BENCH & B. MINN. (Jan. 2016), at 11 (discussing legislation introduced to create a "cooperative private divorce").

67 FAMILY JUSTICE INITIATIVE, *supra* note 21, at ii.

from problem-solving courts to developing community-based family dispute systems.[68]

Models for these systems exist in the United States[69] and abroad.[70] These alternatives will not replace courts for cases when parents refuse to support their children or harm vulnerable family members. They can, however, reduce the heavy burdens on family courts while providing families in transition what they truly need: a healthier process for resolving conflicts with voluntary access to useful and supportive services.

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[68] Skepticism about the courts continuing role in family dispute resolution has also made its way into the popular press. *See* Rebecca Love Kourlis, *5 Steps for Fixing the Civil Justice System*, ATLANTIC (June 11, 2012), https://www.theatlantic.com/national/archive/2012/06/5-steps-for-fixing-the-civil-justice-system/258295/ (recommending that we "remove the majority of divorce cases from the adversary court system and create an alternative that gives families access to needed services, counseling, and financial planning advice in an environment that encourages them to resolve their own disputes").

[69] The Institute for the Advancement of the American Legal System has developed two centers for families to receive legal and supportive services outside of the court system that were in operation from 2013 to 2017: the Resource Center for Separating and Divorcing Families at the University of Denver and the Center for Out-of-Court Divorce in the Denver community. For a detailed description of the centers, see https://iaals.du.edu/projects/out-court-model-separating-and-divorcing-families.

[70] For a detailed description of these Family Relationship Centers, *see* MURPHY & SINGER, *supra* note 1, at 110–17. *See also Family Relationship Centres*, RELATIONSHIPS AUSTL., https://www.relationships.org.au/what-we-do/family-relationship-centres (last visited Dec. 6, 2019).