

IT'S THE CONFLICT, STUPID: AN EMPIRICAL STUDY  
OF FACTORS THAT INHIBIT SUCCESSFUL  
MEDIATION IN HIGH-CONFLICT CUSTODY CASES

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I. INTRODUCTION

High-conflict custody disputes continue to bedevil the legal profession and the social and behavioral sciences.<sup>1</sup> For custody disputes that the parties cannot resolve,<sup>2</sup> the various professional communities have offered a number of suggestions, none of which seem to have produced any real solutions.<sup>3</sup>

This Study takes another approach. Instead of offering another proposal for handling high-conflict divorce and custody disputes, this Study analyzes the data from parties in custody cases who have enlisted the aid of the court to resolve their disputes. In a jurisdiction with mandatory mediation of custody disputes, the Study then isolates some of the factors that characterize those cases in which the parties do not reach an agreement through mediation. By isolating those factors, the Study offers some insight into which subset of high-conflict custody cases may resist our best efforts to

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1. See, e.g., ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 1 (2004); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 498–99 (2001).

2. Defining “high conflict cases” with precision is not easy. See Berry Bricklin & Gail Elliot, *Qualifications of and Techniques to Be Used by Judges, Attorneys, and Mental Health Professionals Who Deal with Children in High Conflict Divorce Cases*, 22 U. ARK. LITTLE ROCK L. REV. 501, 501 (2000). As the authors point out, however, the presence of a high level of conflict between parents has a demonstrably negative effect on the children of the relationship. *Id.* at 502.

3. Some of these attempts are reported in Sarah H. Ramsey, Conference Report, *High-Conflict Custody Cases: Reforming the System for Children*, 39 FAM. CT. REV. 146 (2001).

resolve them through mediation.

To isolate these factors, this Study analyzes the child custody resolution process in Forsyth County, North Carolina, a county with mandatory mediation of custody disputes since 1995. Our goal was to learn how custody issues are resolved in high-conflict custody cases, which we define as those custody cases in which the parties enlisted the aid of the court.<sup>4</sup> To do this, we set out to read, collect, and analyze court records of all the custody cases in which there was a custody resolution event in the year 2002.<sup>5</sup> From these records, we derived a data set to test the “common wisdom” about how the custody process works by observing the operation of the process through inspecting the court records. Moreover, we collected the data to see if we could isolate any factors that would help us predict in which custody disputes the parties would not be able to reach a mediated agreement.

Systematic and detailed studies of high-conflict child custody disputes are rare.<sup>6</sup> This observation should not come as a surprise. Much information can be obtained from court records, but collecting such information requires patience and time. Identifying what records to review (rather than simply reading all available district court records, whether relating to custody or not) requires the cooperation of court administrative personnel.<sup>7</sup> In addition, custody cases are different from most other civil cases. So long as a child of the relationship remains a minor, the case is open. The parties may need to modify their custody arrangements, which in turn may require them to reexamine support payments. Thus, even though we focused on custody resolution events in 2002, it was common in our research to encounter and review records of cases that began in

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4. The courts are not always involved. Although the dissolution of a marriage does require at least a court filing, custody decisions can be reached without any court oversight. Our focus, instead, is on cases in which custody was contested and some sort of judicial involvement resulted. It is also true that marriage is not a prerequisite to having children. When a relationship, marital or otherwise, ends, custody issues may or may not arise. If they do, the courts may or may not be involved.

5. For the definition of “custody resolution event,” see *infra* at p. 507.

6. See Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 25 (2005). The authors also identify several empirical studies that provide some insight into the dynamics of custody determinations in the context of divorce. *Id.* at 25–26.

7. We thank the entire staff of the Forsyth County district court for their patience and good humor, but we especially appreciate the assistance of Chief Judge William B. Reingold and two of his staff: Amanda Leazer, formerly the judicial assistant for the twenty-first district, and Adam Hurt, the child custody mediator for the twenty-first district.

the early 1990s. Our law student researchers<sup>8</sup> began collecting data from the trial court with jurisdiction over custody disputes in the twenty-first judicial district of North Carolina, the district court in Forsyth County. Using a standardized data collection form, the student researchers read through case files in which custody had been an issue in 2002 and recorded the relevant information. In all, our researchers collected information on more than 500 cases involving some aspect of child custody, typically physical custody and support.<sup>9</sup>

For this Study, we have chosen to limit our review to those cases in which a “custody resolution event” occurred in calendar year 2002. To assure uniformity of results from our researchers, we defined a “custody resolution event” as “file documents relating to custody or child support, including parenting agreements, consent orders, memoranda of agreement, court orders, and temporary custody orders, as well as court rulings on motions to modify or enforce a previous order.” We drafted this definition to be inclusive but remain restricted to custody determinations. We wanted to collect information relating to custody from all possible kinds of filings with the court.<sup>10</sup> These filings might reflect that the parties agreed to a custody arrangement: (1) in mediation in the state’s mandatory mediation program,<sup>11</sup> (2) in an agreement negotiated by

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8. We acknowledge with gratitude the diligent efforts of our researchers, many of whom are now lawyers themselves: Christopher Appel, Sharon Baldasare, Lesley Bark, John Blair, Katherine Royal Bosken, Allison Botos, Flora Chan, Susan Pei-Shan Lynne Cheng, Jennifer Daughdrille, Jennifer Erickson, Chelsea Garrett, Stacey Gomes, Benjamin Huber, Sarah Koniewicz, Jacquelin Lynn, Jee Hye Moon, Meredith Neubauer, Frank Pantano, Suzanne Pomey, Leah Storie, and Lily Woodward. The authors also acknowledge the special role of Scott VanDenburgh Savage, graduate assistant at the University of Arizona, in coding and analyzing much of the data.

9. We should note at the outset that our study was not “randomized.” For example, cases were not randomly assigned to mediation or to litigation. Rather, we gathered data on all cases in which there was a custody resolution event in 2002. For a discussion of random assignment of divorce and custody cases, see Emery et al., *supra* note 6, at 25. In Forsyth County (and North Carolina generally), mandatory mediation of custody disputes is simply a part of a larger process. It is one event in a filed case. However, this difference offered an advantage: we were able to study the mediation of custody disputes in its larger context.

10. We did not include parties whose only filing in 2002 was a separation agreement incorporated by reference in a divorce judgment. Since that filing did not necessarily reflect high conflict over custody, those persons had not “filed with the court” within the meaning of this Study.

11. For a description of the mandatory mediation program, see *infra* notes 21–27 and accompanying text.

or on behalf of the parties outside of mediation and then filed with the court, or (3) in a contested court order. We report on 245 cases that involved child custody and had at least one custody resolution event take place in 2002. Thus, cases included in our study may have been filed prior to 2002. In addition, cases that *were* filed in 2002 were included in the study, but only if a custody resolution event of some sort occurred during that year. Two considerations led to the decision to limit the cases to those in which a custody resolution event occurred in 2002. First, we wanted to present a picture of the process over a defined period of time. Second, we needed to allow enough time after the target year to see what actually happened after the 2002 custody resolution event. As noted above, custody arrangements often change over time for any number of reasons.

## II. THE CUSTODY RESOLUTION PROCESS IN FORSYTH COUNTY

Forsyth County, the North Carolina county from which we collected our data, is in a number of ways representative of North Carolina as a whole. Located in the Piedmont region, it is both urban and rural in nature. The county's estimated 2006 population was 332,355.<sup>12</sup> The county seat of Winston-Salem had an estimated population of 190,299 in 2003,<sup>13</sup> making it the fifth largest city in the state.<sup>14</sup> The 2004 median household income for Forsyth County was \$42,491, slightly higher than the statewide median of \$40,863.<sup>15</sup> The average number of persons per household was 2.39, compared to the statewide average of 2.49.<sup>16</sup> According to the 2000 census, whites accounted for 71.3% of the county's population and blacks accounted for 25.8%.<sup>17</sup> The corresponding percentages for the state as a whole were 74.0% and 21.7%, respectively.<sup>18</sup> As of 2000, the percentage of persons age twenty-five or older in Forsyth County who were high school graduates was 82.0%, compared to a statewide

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12. U.S. Census Bureau, State & County QuickFacts, Forsyth County, North Carolina, <http://quickfacts.census.gov/qfd/states/37/37067.html> (last visited Mar. 18, 2008) [hereinafter Forsyth County QuickFacts].

13. U.S. Census Bureau, State & County QuickFacts, Winston-Salem (city), North Carolina, <http://quickfacts.census.gov/qfd/states/37/3775000.html> (last visited Mar. 18, 2008).

14. According to the 2000 census, Charlotte, Durham, Greensboro, and Raleigh are North Carolina's four largest cities. U.S. CENSUS BUREAU, COUNTY AND CITY DATA BOOK: 2000, at 854 (2001).

15. Forsyth County QuickFacts, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Id.*

percentage of 78.1%.<sup>19</sup> For 2006, an estimated 24.4% of Forsyth County's population was under the age of eighteen, compared with a North Carolina estimate of 24.3%.<sup>20</sup>

For almost thirteen years, contested child custody cases have been ordered to mediation by the Forsyth County district court. The court employs a full-time mediation coordinator, who is responsible for scheduling and conducting the mediation sessions, as well as a mediator. A single mediator employed by the court conducts all the custody mediations. Similar mediation programs are in place in more than half of North Carolina's one hundred counties.<sup>21</sup> Under the Forsyth County custody mediation program,<sup>22</sup> virtually all custody and visitation issues are referred to mediation. The mediation referral is made shortly after the initial pleading is filed with the district court.<sup>23</sup> Mediation is mandatory. The parties are ordered to participate unless the district court grants an exemption.<sup>24</sup> However, the applicable rules do not require the parties to reach an agreement. The parties must meet with the court-appointed mediator once but are not required to meet more.<sup>25</sup> If the parties reach an agreement in mediation, the mediator reduces the agreement (referred to as a "parenting agreement") to writing and submits it to the district court for approval.<sup>26</sup> If the parties do not reach an agreement regarding custody, the mediator remands the case to the docket for eventual resolution by the parties outside of mediation or by the court in litigation.<sup>27</sup> Of course, the parties may settle the matter on their own at any time, either before

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19. *Id.*

20. *Id.*

21. N.C. GEN. STAT. § 7A-494 (2007), enacted in 1989, established a custody and visitation mediation program, to be operated under the supervision of the North Carolina Administrative Office of the Courts. The statute calls for eventual implementation of the mediation program on a state-wide basis. *Id.*

22. LOCAL RULES FOR THE MEDIATION OF CUSTODY AND VISITATION DISPUTES, NORTH CAROLINA CUSTODY AND VISITATION MEDIATION PROGRAM, TWENTY-FIRST JUDICIAL DISTRICT (1999) (on file with authors) [hereinafter LOCAL RULES]. Similar practices are followed in the other North Carolina counties that have this mediation program in place. *See* N.C. ADMIN. OFFICE OF THE COURTS, UNIFORM RULES REGULATING MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES UNDER THE NORTH CAROLINA CUSTODY AND VISITATION MEDIATION PROGRAM (1999) (on file with authors) [hereinafter UNIFORM RULES].

23. LOCAL RULES, *supra* note 22, pts. II & III.

24. UNIFORM RULES, *supra* note 22, at 7; *see also* LOCAL RULES, *supra* note 22, pt. II.

25. UNIFORM RULES, *supra* note 22, at 7–8.

26. *Id.* at 8–9.

27. *Id.* at 9.

or after mediation.

The rationale for mandatory child custody mediation is simple. The parents are normally in the best position to determine what post-separation arrangements will be best for their child or children. The goal of *requiring* the parents to speak with one another, in the presence of a mediator, is to offer an opportunity for them to reach an agreement and to assist the parties in structuring an agreement that will best serve their children's interests.

The custody mediation program in Forsyth County has never been the subject of a systematic empirical study. In 1999, the North Carolina Administrative Office of the Courts conducted a study of custody mediation programs in two other counties, Wake and Mecklenburg, and compared those programs to still another county, Durham, which did not at the time offer custody mediation.<sup>28</sup> The researchers examined contested custody cases filed during a six-month period (July 1–December 31, 1995).<sup>29</sup> They reviewed court files and conducted surveys of both parents and lawyers.<sup>30</sup> The study gave the mandatory custody and visitation mediation program, then in its early stages, high marks.<sup>31</sup> Mediation was associated with a decrease in the trial rate for custody cases, and user satisfaction with the program was quite high.<sup>32</sup>

However, the mediation program examined by the Administrative Office of the Courts in 1999 differs in several important ways from the mediation program in place today in Forsyth County. First, the custody mediation program is no longer an "experiment." Rather, mandatory mediation is now an established part of family law procedure in those counties in which the program operates.<sup>33</sup> Second, the selection of cases has changed significantly. In 1995 (the year for which data was collected for the

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28. LAURA F. DONNELLY & REBECCA G. EBRON, N.C. ADMIN. OFFICE OF THE COURTS, *THE CHILD CUSTODY AND VISITATION MEDIATION PROGRAM IN NORTH CAROLINA: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS* 10–11 (2000), available at <http://www.nccourts.org/Citizens/CPrograms/Child/Documents/custvisitmedrept.pdf>.

29. *Id.* at 10.

30. *Id.* at 9–10.

31. *Id.* at 65–67.

32. *Id.* at 47, 52.

33. In 1989, the General Assembly authorized statewide implementation of the mandatory custody and visitation mediation program. N.C. GEN. STAT. § 7A-494 (2007). At present, the program operates in thirty judicial districts, comprising sixty of North Carolina's 100 counties. N.C. Court System, *Child Custody Mediation in North Carolina: Existing Programs*, <http://www.nccourts.org/Citizens/CPrograms/Child/Default.asp?topic=7> (last visited Mar. 18, 2008).

Administrative Office of the Courts study), the state programs reflected two selection models. One model (Wake County) relied on direct court involvement in the mediation process.<sup>34</sup> The mediation coordinator routinely ordered contested cases to mediation after a “waiting period” of forty-five to sixty days from the filing of the complaint.<sup>35</sup> The second model (Mecklenburg County) relied more on lawyer selection of cases.<sup>36</sup> The lawyers for the parties largely determined what cases would be referred to mediation and when they would be referred.<sup>37</sup> In contrast, in Forsyth County, the court typically orders mediation promptly after the filing of the complaint. There is little, if any, “waiting period” and little, if any, screening of any sort. The fact that mediation is routinely ordered in all contested custody cases makes it possible for us to compare mediation with other forms of custody resolution within the context of specific cases without using a comparison group.

### III. APPROACH TO ANALYSIS

The Study focused on the three basic types of custody resolution events collected in our data: mediated custody agreements, lawyer-negotiated custody agreements, and litigated custody orders. We then made use of bivariate analysis to see whether, and in what ways, the processes differed. To do this, we compared the processes by a number of variables, some relating to the outcome of the case, some relating to lawyer characteristics, and some relating to attributes of cases in which the parties reached an agreement either through mediation or lawyer-negotiated settlement, and those in which the parties did not reach an agreement and instead resolved their dispute through litigation. Using binary logistic regression,<sup>38</sup> we looked at the question of what variables predicted agreement on the one hand—either through mediation or lawyer-negotiated settlement—or resolution by litigation on the other.

The court files had their own limitations. Occasionally, the files had data for some parties but not for others. As a result, some of the totals in the tables that follow differ. Data was not always available for every category. We followed standard methodology and reported the data as available.

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34. DONNELLY & EBRON, *supra* note 28, at 5.

35. *Id.*

36. *Id.*

37. *Id.*

38. For a discussion of the purpose and function of binary logistic regression, see DAVID W. HOSMER, JR. & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 25–34 (1989).

For our analysis, we identified three basic types of custody resolution processes. Two of the processes involved an agreement: mediation and negotiated settlement (almost always lawyer-negotiated); and one that did not, an order entered by a judge, arrived at by litigation. Of the cases in our present Study, fifty-one (22.1%) had mediation as a first custody resolution event; eighty-two (35.5%) had a negotiated settlement (other than mediation) as a first custody resolution event; and ninety-eight (42.4%) had a court order (but not a consent decree or a “memorandum of agreement”) as a first custody resolution event.

The focus on the “first custody resolution event” was intentional. It is important to keep in mind the open-ended aspect of child custody cases. Circumstances change over time, which may lead to a return to the lawyer, the mediator, the court, or some combination of these actors. Indeed, since in North Carolina a child is considered a minor until age eighteen,<sup>39</sup> it is inaccurate to think of a custody matter as “closed” until the child or children reach the age of eighteen. We wanted to see how these three types of custody resolution events differed at the outset and how they varied over time.

#### IV. RESULTS AND DISCUSSION

An analysis of the data enabled us to conclude whether the processes led to different outcomes. Are custody resolutions by mediated agreement, lawyer-negotiated agreement, and court order really different? Thought of as processes, the processes certainly are different. In mediation, a neutral third party with no coercive power convenes the session;<sup>40</sup> lawyers for the parties are typically not present at the session itself.<sup>41</sup> When mediation results in an agreement, the mediator reduces the agreement to writing. The agreement is usually referred to as a “parenting agreement.”<sup>42</sup> In a negotiated settlement, no neutral third party is involved. The negotiation simply takes place between the parties, either by themselves or through their lawyers.<sup>43</sup> In our study, consent decrees

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39. N.C. GEN. STAT. § 48A-2 (2007); *see also* 3 SUZANNE REYNOLDS, LEE’S NORTH CAROLINA FAMILY LAW § 15.27, at 15-108 (5th ed. 2002).

40. Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1644 (2007).

41. *See infra* note 44.

42. N.C. GEN. STAT. § 50-13.1(h).

43. There are other aspects of negotiated settlements when attorneys are involved that merit attention, such as the interaction between lawyer and client in a contested custody case. *See, e.g.*, LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 120–21 (2001); AUSTIN SARAT



and “memoranda of agreement” were typical indicators of negotiated settlements. With judicially imposed court orders, on the other hand, a third party is involved, but this time the third party—the judge—has the power to impose a result on the parties.

Usually lawyers were involved, regardless of the process.<sup>44</sup> Pro se plaintiffs were uncommon in our study. Defendants were more likely to appear pro se, but even then, more than two-thirds of the defendants were represented by counsel.<sup>45</sup>

Compared by outcomes, however, do the three processes differ? We found that they differed in several ways, including time to first custody resolution event, who received primary physical custody, number of days of physical custody received,<sup>46</sup> the presence of other issues at the time of the first custody resolution event, and changes after the first custody resolution event. We also found differences with regard to the number of orders issued by the court, as well as with the presence of terms not related to custody, such as property division.

#### A. *Time to First Custody Resolution Event*

Measured from the date the complaint was filed, obtaining a custody resolution through mediation took noticeably less time than obtaining a custody resolution through settlement negotiations or through litigation. For mediation, the mean length of time was 100 days, with a median of 64 days (n=51); for negotiated settlements, the mean was 159 days, with a median of 116 days (n=78); and for litigated resolutions, the mean was 191 days, with a median of 155 days (n=91).

This result should not be surprising. In Forsyth County, the court routinely ordered the parties to mediation very shortly after the complaint was filed, whenever it appeared that custody was in

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& WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 43–46 (1995).

44. While it was not customary in Forsyth County for the parties’ attorneys to be present at the actual mediation session, a mediation session was ordered only because a lawsuit had been filed. In Forsyth County, if a lawsuit had been filed, it was very likely that lawyers were involved. See *infra* note 45 and accompanying text.

45. Only 5 of 229 plaintiffs appeared pro se, while 71 of 229 defendants appeared pro se. This is consistent with findings noted in our earlier study. Reynolds et al., *supra* note 40, at 1669–71.

46. We measured “number of days” by counting the number of overnight stays the parent was granted. For example, a weekend (Friday, Saturday, Sunday) in which the child would be returned to the other parent on Sunday was counted as two days. We did not include in this count only daytime visitation, with no overnights.

issue.<sup>47</sup> The court did very little screening of the parties and, instead, routinely issued the order to mediate. As a result, the court scheduled a mediation session shortly after the filing of the complaint and usually prior to any hearing before the court regarding custody. For some parents, the mediation resulted in an agreement regarding custody,<sup>48</sup> which a district court judge would then review and approve.<sup>49</sup> If the parties failed to reach an agreement, or if for some reason the parties did not have a mediation session, the court would then schedule the matter for trial. Meanwhile, the parties, usually through their attorneys, might continue to negotiate about custody. The conclusion remained, however, that a successful mediation provided the shortest time for resolution of the custody issues.<sup>50</sup>

Still, the mediation had to be successful in order to minimize the time for resolution. How often were ordered mediations actually held? When held, how often were the mediations successful? Our research left us with a puzzling picture of the process. Our findings, dealing with the frequency with which a previously ordered mediation was actually held, as well as the apparent “success rate” when a mediation was conducted, are set forth in Table 1.

TABLE 1  
MEDIATIONS ORDERED AND HELD

	Was Mediation Ordered?	Was Mediation Held?	Was An Agreement Reached at Mediation?
Yes (Pct.)	185	138 (74.6%)	51 (37% of mediations held)
No	39	73	
Total	224	211	

A mediation was not held in over seventy of the cases in our study. From the files, the most common reasons for not holding a mediation were (1) failure of one or both parties to attend (n=33) and (2) an exemption from mediation, obtained from the court

47. Reynolds et al., *supra* note 40, at 1643.

48. These parents represented less than one-half of the parents in our research. *See infra* Table 1.

49. UNIFORM RULES, *supra* note 22, at 8–9.

50. This finding is consistent with research conducted in a randomized study done in Virginia. *See* Emery et al., *supra* note 6, at 27.

(n=10). Since mediation is ordered early in the life of the case,<sup>51</sup> the relatively large number of cases in which a mediation was not held should not be surprising. The process seemed to begin with a wide cast of the net and then allowed individual cases to select out of the process—either by failing to attend or by seeking an exemption.

The relatively low rate of agreement at the mediation sessions (thirty-seven percent of mediations held) is harder to explain. Outside the family law setting, court-ordered mediations in North Carolina superior courts typically result in an agreement in more than half of the cases.<sup>52</sup> Perhaps one reason is that questions of custody are often emotionally charged for the parties, making settlement difficult. Moreover, the fact that by statute only custody-related issues may be mediated<sup>53</sup> means that reaching an agreement may be more difficult because there are fewer issues on which to compromise. It may also be unrealistic to assess the success of custody mediation by looking only at the result of the mediation itself. It may be that a mediation, although unsuccessful, serves as a useful step in a larger process of reaching agreement prior to trial.<sup>54</sup> This argument, often cited by mediation advocates,<sup>55</sup> is difficult to test, but it certainly makes sense.<sup>56</sup>

#### B. *Outcomes and Amount of Physical Custody Obtained*

Who obtained primary physical custody<sup>57</sup> and the number of

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51. See *supra* note 47 and accompanying text.

52. For example, in fiscal year 2002–03, approximately 54% of cases mediated resulted in a resolution at the mediated settlement conference. See N.C. DISPUTE RESOLUTION COMM'N, PROGRAM STATISTICS, MEDIATED SETTLEMENT CONFERENCE CASES (2003), [http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/msc\\_stats02-03.pdf](http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/msc_stats02-03.pdf).

53. N.C. GEN. STAT. § 50-13.1(b) (2007).

54. In a previous article, we noted that a custody resolution event of some sort is more likely to occur if a mediation has been held. Reynolds et al., *supra* note 40, at 1674.

55. See, for example, the discussion in Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 135–39 (1997).

56. It is also possible that the timing of the order to mediation affects the settlement rate. In the superior court mediation program, a mediation order is not issued until the initial responsive pleadings have been filed. See R. N.C. SUP. CT. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. CIV. ACTIONS 3(B). In contrast, in Forsyth County, a custody mediation order is typically issued promptly after a complaint involving custody is filed. By the time an order to mediate is issued in superior court, at least some cases will have already been dropped or settled.

57. A parent or other custodian may have primary, sole, or joint physical custody. As explained in North Carolina commentary:

days of custody that a parent received are basic measures of contested outcomes. The results varied by process, as Table 2 shows.

TABLE 2  
PRIMARY PHYSICAL CUSTODY AND NUMBER OF DAYS RECEIVED

Process	Mother Received Physical Custody	Percentage	Days of Custody Mother Received (Mean/Median)
Mediation	43/50	86%	265/287
Negotiated Settlement	53/73	72.6%	240/289
Litigation	55/83	66%	219/269

The difference in the number of days received for physical custody reflects in part a difference in the range of outcomes for the three processes. Extreme outcomes (365 days for one parent, 0 days for the other) were more common in litigation (nineteen cases with no days awarded to father, six cases with no days awarded to mother) and in negotiated settlement (five cases with no days awarded to father, three cases with no days awarded to mother) than in mediation (three cases with no days awarded to father, zero cases with no days awarded to mother). In litigated resolutions, there were sixteen cases in which more than 182 days (one-half of the year) were awarded to the father. In negotiated settlements, fathers received more than 182 days of custody in seven cases. In contrast, in mediated resolutions, fathers received more than 182 days only twice. Although mothers received primary physical custody most of the time, regardless of process, both the overall percentage (eighty-six percent) and the average number of days of custody received (265) were greatest with mediated resolutions.

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If the child resides only with one person for significant periods of time, that person has “primary physical custody” or “sole physical custody.” If the child resides for significant periods of time with two persons, these persons may have “joint physical custody.” While the phrase “sole custody” often refers to the person who has primary physical custody, “sole custody” may refer either to “sole physical” or “sole legal” custody or both.

REYNOLDS, *supra* note 39, § 13.2, at 13-16 to 13-17.

*C. The Stability of the Process*

Whether a particular custody arrangement will last is a matter of concern for parents, their children, the parents' lawyers, and the court. Predictability is important. Frequent return trips to court are time consuming and expensive for the parents. Repeat visits impose additional demands on the court, its judges, its personnel, and its resources. Delay is the likely result. For these reasons, we wanted to look at the relative stability of custody results obtained by mediation, negotiated settlement, and litigation. We examined four different, but related variables: (1) whether other issues were pending at the time of the first custody resolution event, (2) whether the first custody resolution event contained terms not relating to custody, (3) whether the first custody resolution event changed with respect to custody, and (4) the number of orders issued by the court in the entire case.

The presence of other unresolved issues, such as alimony or property division at the time of the first custody resolution event, might indicate a need to revisit custody issues later on. Likewise, the inclusion of terms not related to custody in the first custody resolution event might reduce the need to revisit custody issues at a later date. These two measures were of particular interest because under the North Carolina Rules for Child Custody Mediation, only custody-related issues are to be addressed in the mediation.<sup>58</sup> Whether changes did occur with respect to custody was our third measure. Finally, we counted the total number of orders issued by the court through 2006 as a way of assessing the efficiency of the first custody resolution event. Measured across the population of all custody disputants during the study period, the number of orders issued might serve as an indicator of the relative permanence of the three different processes. The results are set forth in Table 3.

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58. See N.C. GEN. STAT. § 50-13.1(b) (2007) (providing that the court may not refer economic issues to the custody mediator); see also UNIFORM RULES, *supra* note 22, at 7.

TABLE 3  
THE STABILITY OF THE THREE PROCESSES

Process	Were Other Issues Pending?	Did the Custody Resolution Event Contain Terms Not Related to Custody?	Did the Custody Resolution Event Change?	Total Number of Orders Issued (Mean/Median)*
Mediation Pct. Yes	32/50 64%	5/47 10.6%	32/51 62.7%	3.06/2.00
Negotiated Settlement	32/76 42.1%	15/77 19.5%	39/79 49.4%	3.87/3.00
Litigation	36/91 39.6%	21/89 23.6%	40/95 42.1%	3.13/2.00

\*Extreme outlier values were not counted to compute the mean. Had they been counted, the means for negotiated settlement and litigation would be much higher.

By one measure (total number of orders issued in the case), mediation was quite stable. The mean number of orders was the lowest of the three processes, and the median number of orders was the same as that for litigated resolutions. On the other hand, mediated resolutions changed more frequently than either of the other two processes. This may be due, at least in part, to the fact that other issues were more likely to be pending at the time of the mediated resolution.

The “custody only” rule has been a staple of custody mediation in North Carolina since the inception of custody mediation.<sup>59</sup> It is a rule with a laudable goal; it seeks to force the parents to focus only on what physical arrangements would be best for their child or children. The possibility of one parent using a demand for primary physical custody as a bargaining chip to extract economic concessions is not attractive. Children should be more important than possessions. However, agreements are often easier to reach when multiple issues are “on the table.” The presence of multiple issues, particularly when valued differently by the parties, makes “trades” easier, and thus promotes agreements.<sup>60</sup>

59. N.C. GEN. STAT. § 50-13.1(b) (providing that the court refer to mediation issues relating to custody, but not to economic issues); *see also* UNIFORM RULES, *supra* note 22, at 7.

60. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING

It is a difficult issue to untangle. It requires little imagination to speculate on the number of “trades” that actually do take place, explicitly or implicitly, in the context of custody mediation.<sup>61</sup>

*D. The Role of Lawyers—The Child Custody Bar*

In a previous article, we noted the fact that almost all plaintiffs, and more than half of defendants, were represented by counsel.<sup>62</sup> In this Study, we take a closer look at the lawyers who represent litigants in custody cases.<sup>63</sup> What can be said about this group of lawyers? Do they affect the custody resolution process in a measurable way?

It is important to begin with a disclaimer. The “bar” about which we report is drawn only from Forsyth County district court records. Nothing in North Carolina requires that child custody agreements be reduced to the form of a court order and filed with the clerk of court. Thus, we know that our research did not identify all the lawyers who specialize in family law in this geographic region. The group of lawyers we describe should more accurately be thought of as a subset—although certainly a large subset—of lawyers who practice family law in Forsyth County. We suspect that the lawyers not included in this study tend to represent higher-income clients than the ones we see in our data.<sup>64</sup>

One hundred eighteen different lawyers represented the parties in these cases, either as counsel for plaintiff or defendant.<sup>65</sup> There were only five cases involving pro se plaintiffs; there were, in contrast, seventy-one such cases involving pro se defendants.<sup>66</sup> Of

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AGREEMENT WITHOUT GIVING IN 68–76 (2d ed. 1991); RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 130 (2002).

61. To some extent, the scope of this problem may be lessened by section 7A-38.4A of the General Statutes of North Carolina, which provides for the mediation of equitable distribution disputes. *See also* N.C. Court System, Family Financial Settlement Program, [www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Default.asp](http://www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Default.asp) (last visited Mar. 18, 2008).

62. Reynolds et al., *supra* note 40, at 1669–71.

63. It is not easy work representing separating parents. In addition, custody battles are often contentious and unpleasant. *See* Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 *FAM. L.Q.* 283, 284 (1999).

64. *See* Reynolds et al., *supra* note 40, at 1662.

65. We did not count an attorney whose identity could not be determined from the files. As a result, for this purpose we report on 227 cases.

66. The incidence of pro se cases in our study was, compared to other states, quite low. For example, in their study of divorce lawyers in Maine and New Hampshire, Mather et al. noted that 47% of New Hampshire divorces and

these 118 lawyers, 6 lawyers accounted for 78 separate cases, representing either plaintiff or defendant; 13 lawyers accounted for 131 cases out of 227 cases in all, suggesting concentration and specialization in this area of practice. In fact, the average number of cases, either for a plaintiff or a defendant, by a lawyer who had represented at least one plaintiff (based on 218 records) was almost seven; the median, six.

Almost always, the lawyers were based in Forsyth County. We identified only four plaintiff lawyers whose offices were located outside the county; all four were based in Guilford County, which borders Forsyth to the east. The four lawyers accounted for only five cases in our study. We identified ten defendant lawyers whose offices were located outside Forsyth County. Six were based in Guilford County, and one was based in Davidson County, which borders Forsyth to the south.<sup>67</sup> The ten lawyers accounted for a total of thirteen cases in our study. The conclusion is obvious and inescapable. Divorce and custody practice are local affairs.<sup>68</sup> This observation, of course, makes sense. Divorce and custody lawyers tend to represent individuals, not corporations.<sup>69</sup> They are likely to draw their clients largely from word-of-mouth referrals and local advertising. They also need to make court appearances frequently. All this suggests a group of lawyers with a practice based in one county, and indeed, in one city—Winston-Salem, in this case.

### 1. *Mediation “Specialists?”*

In the cases for which we have data, two lawyers accounted for twelve of the forty-six mediated resolutions. This result might suggest that some lawyers “specialize” in mediation, or actively promote its use. However, the remaining thirty-four mediated resolutions were handled by nineteen separate lawyers. It appears that mediation of custody disputes in Forsyth County has thus become a part of the procedural fabric. The court will order mediation in most cases, and in some of those cases, a resolution will result. The identity of the plaintiff’s lawyer does not appear to affect that outcome to any great degree.

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50% of Maine divorces involved only one lawyer—meaning that one spouse was not represented by counsel. MATHER ET AL., *supra* note 43, at 43.

67. The other three attorneys had offices in Surry, Durham, and Wake counties.

68. See MATHER ET AL., *supra* note 43, at 42.

69. See JEROME E. CARLIN, LAWYERS ON THEIR OWN 17–18, 91–101 (1994); MATHER ET AL., *supra* note 43, at 7; John P. Heinz et al., *The Changing Character of Lawyers’ Work: Chicago in 1975 and 1995*, 32 LAW & SOC’Y REV. 751, 770–71 (1998).



### 2. *The Role of Gender*

Although more lawyers in our study were male, female lawyers predominated in a number of cases. The three lawyers with the most cases (seventeen, fourteen, and fourteen) were women. Four of the six lawyers with the most cases were women. For the cases for which we have this data (n=223), the plaintiff's lawyer was female 78 times (35%), male 145 times (65%).

There was little evidence that female attorneys tended to represent mothers, or that male lawyers tended to represent fathers. Lawyers tended to represent both plaintiffs and defendants, although since more plaintiffs had lawyers, lawyers represented plaintiffs more often than they represented defendants. For only two lawyers who handled more than the median number of cases (six) was there a noticeably lopsided division of representation: one lawyer represented thirteen plaintiffs and only one defendant, and one lawyer represented twelve plaintiffs and no defendants.

As Table 4 shows, a mediated resolution was more likely when plaintiff was represented by a female lawyer. A litigated resolution was more likely when plaintiff was represented by a male lawyer.<sup>70</sup>

TABLE 4  
GENDER OF PLAINTIFF'S LAWYER AND TYPE OF CUSTODY RESOLUTION

Gender	Litigated Resolution	Pct.	Negotiated Settlement	Pct.	Mediated Resolution	Pct.
Female	27	30.0%	29	38.2%	19	42.2%
Male	63	70.0%	47	61.8%	26	57.8%
Total	90		76		45	

The gender of the defendant's lawyer and type of custody resolution followed the pattern outlined above, but the differences were less pronounced.

### 3. *Lawyer Experience*

We examined the years of admission to practice and the number of cases handled by the plaintiff's and the defendant's counsel to see

70. Whether the gender of an attorney makes a difference in outcomes, or in interactions with clients, remain unsettled questions. See MATHER ET AL., *supra* note 43, at 9; Susan D. Carle, *The Effect of Context on Practice*, 52 BUFF. L. REV. 1347, 1355-61 (2004) (reviewing MATHER ET AL., *supra* note 43); Catherine M. Lee et al., *Attorneys' Opinions Regarding Child Custody Mediation and Assessment Services: The Influence of Gender, Years of Experience, and Mediation Practice*, 36 FAM. & CONCILIATION CTS. REV. 216, 223-24 (1998).

if those measures of experience had an effect on outcome. They did not. Experience (defined either in terms of years in practice or in terms of number of custody cases handled) was not associated with a particular outcome, such as mediation, negotiated settlement, or litigation.<sup>71</sup>

However, we did identify a separate aspect of experience. Cases in which the plaintiff was represented by a lawyer who had handled a high number of cases during the period studied reached a first custody resolution in less time than cases in which the plaintiff was represented by a lawyer who had handled a low number of cases during the period studied. Cases handled by lawyers who handled more than six cases, either as the plaintiff's or the defendant's counsel, reached a first custody resolution in an average of 136 days, with a median of 98 days. In contrast, cases handled by lawyers who handled six or fewer cases, either as the plaintiff's or the defendant's counsel, took longer to reach a first custody resolution, with an average of 185 days and a median of 120 days. This suggests two things. First, handling a large number of these types of cases makes the lawyer more efficient, in terms of time to custody resolution. Second, it suggests that lawyers who handle a relatively large number of custody cases take on a number of cases that require relatively little court time to process—an aspect, perhaps, of a practice premised on volume.

The lack of a consistent connection between the level of the lawyer's experience and the type of outcome (mediation, negotiated settlement, or litigation) is perhaps surprising. Nonetheless, it may be good news. The skill and judgment of the particular lawyer seem to matter. Further, since the type of outcome cannot be predicted by reference to the lawyer's experience, perhaps it means that the type of outcome is determined by other factors, more relevant to the needs of the child and the interests of the parents. It is to that topic that we now turn.

*E. Predicting the Process: Factors Associated with Mediation, Negotiated Settlements, and Litigation*

As discussed above, looking at outcomes, the three processes differed in several respects. Can the processes be predicted? In other words, is one process more (or less) likely to be used in the presence of one or more attributes of the parents or the children? We found several attributes that seemed to predict a particular

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71. Only with the outcome of "negotiated settlements" did the number of cases the plaintiff's counsel had handled seem to make a noticeable difference. Even then, the association was not significant at the .05 level.

resolution process. We also found a number of attributes that did not seem to have any bearing on the process used.

1. *What Did Not Matter*

The number of children, the gender of the child or children, or the age of the child or children was not associated with the type of resolution event the parties reached. The identity of the plaintiff (mother or father) likewise did not matter. Although mediation occurred more often with married couples, the number of years the couple had been married had no bearing on the custody resolution event. Whether the plaintiff alleged that the defendant had engaged in “marital misconduct”<sup>72</sup> was also not a predictor of the type of first custody resolution event.

2. *What Did Matter*

Parents whose first custody resolution event was mediation were more likely to be married, or to have been married, than parents whose first custody resolution event was either a negotiated settlement or litigation. However, the association was not a strong one. On the other hand, when parents disputed the identity of the primary caregiver, they were more likely to reach the first custody resolution event by litigation rather than by mediation or negotiated settlement. Again, the association was not a strong one.

The differences in the processes were most pronounced when we looked at whether the plaintiff had alleged that the defendant was “unfit” as a parent<sup>73</sup> and whether the plaintiff had alleged domestic violence.

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72. For purposes of our data collection, we defined “marital misconduct” in terms of the grounds for divorce from bed and board listed in N.C. GEN. STAT. § 50-7 (2007). Those grounds include, among other things, adultery, excessive use of alcohol or drugs, and abandonment of spouse or family. *Id.*

73. “Fitness” and “unfitness” as a parent are undefined terms in the North Carolina General Statutes. As explained in North Carolina commentary,

To the extent the law gives substance to unfitness, it is by relating an adverse conclusion about the person to the welfare of the child. A parent is unfit to have custody, for example, if the parent is guilty of conduct that would constitute grounds for the termination of parental rights. If a parent is guilty of abuse, neglect, or abandonment, then the parent has not attended to the welfare of the child and is unfit.

A person can be found unfit without a finding of abuse, neglect, or abandonment, however. A person is unfit to have custody if that person does not or cannot attend to the welfare of the child.

REYNOLDS, *supra* note 39, § 13.35, at 13-86.

TABLE 5  
FACTORS ASSOCIATED WITH MEDIATION, NEGOTIATED SETTLEMENTS,  
AND LITIGATION

Process	Were Parents Married? (Yes/Total)	Identity of Primary Caregiver	Plaintiff Alleged "Unfitness" of Defendant (Yes/Total)	Did Plaintiff Allege Domestic Violence? (Yes/Total)
Mediation	41/51 80.4%	Mother: 32 86.5% Father: 1 2.7% Disputed: 4 10.8%	10/50 20%	1/50 2%
Negotiated Settlement	57/80 71.3%	Mother: 48 81.4% Father: 5 8.5% Disputed: 6 10.2%	36/81 44.4%	21/80 26.3%
Litigation	61/93 65.6%	Mother: 51 76.1% Father: 5 7.5% Disputed: 11 16.4%	39/96 40.6%	17/96 17.7%

The overall picture Table 5 suggests is that mediation is a more likely custody resolution event in the absence of allegations of parental "unfitness" and in the absence of allegations of domestic violence. These two observations, along with the higher frequency of disputes over the identity of the primary caregiver in litigated resolutions, suggests that mediation is more likely when there is less conflict, at least in terms of what is alleged in the complaint.

To test these observations, we used binary logistic regression to determine what variables predict the type of custody outcome. To do this, we created three different dependent variables: mediation, negotiation, and litigation. For the mediation variable, if the first custody resolution event was mediation, we coded the case as a "1"; if the first custody resolution was a negotiated settlement or litigation, the case was coded as a "0." In similar fashion, for the negotiation variable, if the first custody resolution event was a

negotiated settlement, we coded the case as a “1”; if the first custody resolution was either mediation or litigation, the case was coded as a “0.” For the litigation variable, if the first custody resolution event was litigation (i.e., a contested court order), the case was coded as a “1”; if the first custody resolution event was either mediation or a negotiated settlement, the case was coded as a “0.” By creating these three dependent variables, we were able to isolate each process and analyze each process separately.<sup>74</sup>

For each of these dependent variables, we entered three independent variables: (1) were the parents married, (2) did the plaintiff allege domestic violence on the part of the defendant, and (3) did the plaintiff allege that the defendant was “unfit” as a parent. The results are set forth in Table 6.

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74. In this table, we report measures of association. In the words of a leading text:

The statistical significance of a relationship observed in a set of sample data . . . is always expressed in terms of probabilities. “Significant at the .05 level ( $p \leq .05$ )” simply means that the probability that a relationship as strong as the observed one can be attributed to sampling error alone is no more than 5 in 100. Put somewhat differently, if two variables are independent of one another in the population, and if 100 probability samples are selected from that population, no more than 5 of those samples should provide a relationship as strong as the one that has been observed.

EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 464 (10th ed. 2004).

TABLE 6  
LOGISTIC ANALYSIS BY PROCESS: MEDIATION, NEGOTIATED  
SETTLEMENT, AND LITIGATION

	Litigation			Negotiated Settlement			Mediation		
	Coefficient	SE	Odds Ratio	Coefficient	SE	Odds Ratio	Coefficient	SE	Odds Ratio
<i>Variables</i>									
Were parents married?	.446	.299	1.562	.063	.315	1.065	-.837	.400	.433
Was domestic violence alleged?	.088	.326	1.092	-.686	.326	.504*	1.404	.619	4.074*
Was parent unfitness alleged?	-.224	.279	.799	-.228	.288	.798	.756	.376	2.130*
Constant	-.721	.699	.486	.911	.714	2.486	-4.054	1.321	.017
-2 Log Likelihood	301.183			285.037			222.105		
N	224			224			224		
*p < .05									

For mediation, all three of the variables listed above were significant predictors. More precisely, mediation was more likely to occur when the parents were married, domestic violence was not alleged by the plaintiff, and the plaintiff did not allege parental “unfitness” on the part of the defendant. The contrasts to litigation and to negotiated settlements are instructive. Compared to mediation, a litigated resolution was more likely when the parents were not married and the plaintiff alleged parental “unfitness” on the part of the defendant. Like mediation, a litigated resolution was more likely when domestic violence was not alleged—although the absence of domestic violence allegations was not a significant predictor. A negotiated settlement was more likely when the parents were not married, when domestic violence was alleged, and when the plaintiff alleged parental “unfitness” on the part of the defendant. Only an allegation of domestic violence was a significant

predictor for negotiated settlements, however.

## V. CONCLUSION

In one way, the similarity in this Study among mediated agreements, lawyer-negotiated agreements, and court orders issued from litigation is more noteworthy than the differences: mothers received primary physical custody more often than not, regardless of the process.<sup>75</sup> This observation—that the outcome was similar regardless of process—undermines the claims of proponents of mediation who promised that mediation would transform the handling of custody disputes. The proponents made grand claims for the benefit of mediation, like more involvement of both parents in the lives of their children post-separation.<sup>76</sup> As noted elsewhere,<sup>77</sup> however, most of the claims for the benefits of mediation relied on studies of voluntary mediation, which one might expect to look very different from the outcomes in higher conflict cases where the parties mediated only because the court compelled them to try it.<sup>78</sup>

On the other hand, this Study—one of the few that draws exclusively from mandatory mediation<sup>79</sup>—did, in fact, identify some

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75. See *supra* Table 2.

76. See, e.g., Robert Dingwall & John Eekelaar, *A Wider Vision, in* DIVORCE MEDIATION AND THE LEGAL PROCESS 168 (Robert Dingwall & John Eekelaar eds., 1988) (maintaining that because mediation was less conflict-ridden, the process would help in children's adjustment to divorce); Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 991–95 (2000) (summarizing some of the claimed benefits); Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11–12 (1990) (arguing that lawyers only hindered the resolution of custody disputes).

77. Reynolds et al., *supra* note 40, at 1653–58.

78. For some of the studies based on parties who voluntarily mediated, see, for example, Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179 (1991); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results, in* DIVORCE MEDIATION: THEORY AND PRACTICE 429 (Jay Folberg & Ann Milne eds., 1988) (describing the Denver Custody Mediation Project). See also Joan B. Kelly et al., *Mediated and Adversarial Divorce: Initial Findings from a Longitudinal Study, in* DIVORCE MEDIATION: THEORY AND PRACTICE, *supra*, at 453 (studying couples who voluntarily came to the mediation center for mediation on all issues related to divorce).

79. For the most significant study of mandatory mediation, see ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 282 (1992). In this monumental work, the authors identified about 2000 families in the court records in two California counties in the mid-1980s and conducted a longitudinal study that followed the families' experiences over almost four years. *Id.* Since California had adopted mandatory mediation, the work does not suffer from the drawbacks of many of

positive differences in the mediated agreements as compared to the negotiated agreements and court orders. Most notably, the time to a custody resolution event was shorter in the mediated agreements.<sup>80</sup> More surprising, however, the mediated agreements were slightly more stable, at least as measured by the average number of orders issued.<sup>81</sup> Since the parties reached the mediated agreements earlier in the dispute and since the mediated agreements did not address many of the pending issues, one would expect the mediated agreements to be less—not more—stable than the negotiated or litigated outcomes.<sup>82</sup>

To the extent the study identifies positive benefits from mediation, the study suggests that we focus on identifying those cases in which the model of mediation described in this Study has the best chance of success. Like most mandatory mediation programs, the program in place in North Carolina requires only one or two sessions, each of which lasts usually less than two hours.<sup>83</sup> While the state has invested significant resources in the program, the program is still modest with respect to the hours expended on each mediating couple. Even in this relatively short period of time devoted to the mediation sessions, however, the sessions have produced parenting agreements that are more stable than negotiated or litigated resolutions and have reached those agreements in a shorter amount of time.

The Study identifies for us those cases in which this model of mediation has the best chance of success—cases with less conflict. The two most significant predictors for a successful mediation were those cases *without* allegations of either unfitness or domestic violence.<sup>84</sup> Of all the factors in the Study, these factors were the ones most associated with conflict between the parties. Without these factors, the parties' chances for a successful mediation increased.

One response to this analysis might suggest that we should spend fewer resources on mediation. Since programs routinely exempt parties from mandatory mediation in the presence of histories of domestic violence,<sup>85</sup> we might conclude from this Study

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the other empirical studies making bold claims about the benefits of mediation but basing their claims on voluntary mediation.

80. See *supra* Part IV.A for a discussion of the time period necessary to reach the first custody resolution event.

81. See *supra* Table 3.

82. *Id.*

83. UNIFORM RULES, *supra* note 22, at 8.

84. See *supra* Table 5.

85. UNIFORM RULES, *supra* note 22, at 7.



that we should merely add other categories of good cause to exempt parties from mediation—specifically, when one parent claims that the other parent is unfit.

But other results of this Study suggest that we should not give up on mediation. One disturbing finding in this Study is that litigated outcomes produced both the most extreme orders in physical custody *and* the highest incidence of significant sharing of physical custody. By extreme orders, we refer to those cases in which the division of physical custody approximated 365 days for one parent, 0 days for the other. By significant sharing of physical custody, we refer to those cases in which both parents had at least 123 overnights.<sup>86</sup>

This combination—finding the most extreme outcomes and significant sharing in litigated cases—is disturbing. On the one hand, one would expect the litigated cases—those failing to settle either by mediation or negotiation—to involve the most conflict. Therefore, finding the most extreme outcomes in the cases with the most conflict is not surprising. If the parents cannot get along, then reducing the parents' interaction by extreme divisions of physical custody has a logical basis. What is surprising, however, is finding the highest incidence of significant sharing of physical custody in the cases with the most conflict. One would expect the cases with the highest conflict to have the least amount of shared custody, not the most. Researchers have worried that in high-conflict custody cases that conclude by litigation, too often the courts order the parties to share custody not to further the best interests of the child, but simply to reach a conclusion.<sup>87</sup> If this is so—and this Study lends some support to that conclusion<sup>88</sup>—then there is reason to continue to look for alternatives to litigation.

Because of the benefits of mediation, perhaps we should focus even more resources on the mediation process. Much of the commentary on reforming the family court systems focuses on a system of differentiated case management.<sup>89</sup> Applied to the mandatory mediation process, we might continue to rely on the current model of mandatory mediation for cases without indicators of the highest levels of conflict—for example, those cases without allegations of parental unfitness or domestic violence. Those cases,

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86. See Reynolds et al., *supra* note 40, at tbl.5; see also *supra* Part IV.B (identifying sixteen cases in litigation in which the court awarded more than 182 days to the father).

87. See MACCOBY & MNOOKIN, *supra* note 79, at 290.

88. See also Reynolds et al., *supra* note 40, at 1668–70.

89. See SCHEPARD, *supra* note 1, at 113–24.

according to this Study, have the best chance of resolution through the current model of mediation. For cases with higher levels of conflict, perhaps the state could save money in the long run by investing more resources in more extensive mediation. For these cases with higher levels of conflict, the state might consider developing different models of mediation with more sessions devoted to addressing the deeper conflict that characterizes the custody dispute. Certainly the state should continue to exempt certain people from the mandatory mediation process altogether, like couples whose relationship is characterized by the type of domestic violence appropriately labeled as intimate terrorism.<sup>90</sup> On the other hand, we may decide not automatically to exempt those relationships with domestic violence appropriately characterized as isolated, situational couple violence.<sup>91</sup>

This Study suggests that we continue to look at the benefits offered by mandatory mediation, perhaps devising a two-track system that continues the current model of mediation for couples without the more serious indicators for conflict and a different track where more serious indicators are present.<sup>92</sup> As we concluded in an earlier study,<sup>93</sup> lawyers should be a part of the process. The most experienced lawyers help reach custody resolutions more quickly,<sup>94</sup> and the myth of the lawyer who obstructs settlements appears to be just that—myth.<sup>95</sup>

The greatest challenge to achieving the best practices for handling high-conflict custody cases may come not from devising separate tracks for mediation, but from the number of pro se parties. The number of pro se parties in this Study was low,<sup>96</sup> but nationwide, family courts report alarming increases in pro se representation.<sup>97</sup> While we may believe the best interests of the

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90. See Nancy Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 LA. L. REV. 1379, 1408 (2005) (distinguishing between intimate terrorism and situational couple violence and concluding that custody mediation may be inappropriate in the former while helpful in the latter).

91. *Id.*

92. For a work concluding that we should indeed devote more resources to mediation, see ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE* 150–52 (2004).

93. Reynolds et al., *supra* note 40, at 1680–81.

94. See *supra* Part IV.D.3.

95. MATHER ET AL., *supra* note 43, at 121.

96. See *supra* notes 44–45 and accompanying text.

97. See, e.g., Steven K. Berenson, *A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105 (2001).

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child in high-conflict custody cases may require both mediators and lawyers, too few states and too few parties appear able to afford them. In short, the mandatory mediation model in use in Forsyth County appears to have achieved a number of important benefits. If we had more money to devote to mediating the more intractable conflict, we might be able to improve the system. The best interests of the child are certainly worth our best efforts to figure out whether we should.