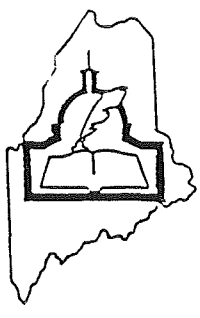
111th Maine Legislature

REPORT OF

THE COMMISSION TO STUDY

THE MATTER OF CHILD CUSTODY

IN DOMESTIC RELATIONS CASES



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COMMISSION TO STUDY THE MATTER OF CHILD CUSTODY IN DOMESTIC RELATIONS CASES

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PREFACE

The Commission to Study the Matter of Child Custody in Domestic Relations Cases wishes to express its appreciation to Justice Donald G. Alexander and Judge Clifford F. O'Rourke for their information, insight, and assistance in the Commission's work. The Commission also wishes to thank all those, too numerous to mention, who offered information and suggestions during the course of the study. Many concerned citizens, attorneys, and executive and judicial officials expressed an interest in and thoughts on the Commission's work. Their participation proved invaluable in the effort to grapple with the complex issues of divorce and child custody in Maine.

SUMMARY

The Commission to Study the Matter of Child Custody in Domestic Relations was established by the First Regular Session of the 111th Maine Legislature. Summarized below are the findings and recommendations resulting from the Commission's study for report to the Second Regular Session of the 111th Legislature.

FINDINGS

1. The current Maine statutes governing the custody of children in domestic relations cases are not adequate.

   Current Maine statutes governing child custody issues in cases of separation, divorce, or annulment do not contain adequate terminology or standards to guide the decision-makers in these cases, including parents.

   The current statutes provide for addressing child custody issues in domestic relations cases through the adversary process of the traditional court system. A more appropriate forum is needed.

2. The current statutes governing the custody of children in domestic relations cases should be amended to change the terminology of custody, visitation, and joint custody, and to insure that shared parenting is encouraged.

   Changing Maine law to define "custody," "visitation," and "joint custody," or to prefer one custody award over another, will not be sufficient. Maine law must effectively describe how rights and responsibilities for child support, residence of the

child, parent-child contact, and decision-making regarding the child may be structured.

Policy statements and directions to decision-makers should encourage frequent and continuing contact between parents and children, and the greatest possible sharing of parental rights and responsibilities, according to the best interest of the child.

3. The best interest standard and related factors, including encouragement of parental cooperation, used in determining questions of child custody in domestic relations cases should be expressly incorporated into Maine statutes.

The "best interest of the child" standard, and factors to consider in its application, developed in Maine court opinions for use in child custody cases should appear in statute. When appearing in statute, this standard and these factors will aid decision-makers, separating or divorcing parents, and the public in knowing the goal of domestic relations decisions concerning children.

Factors concerning the capacity of parents to cooperate and assure a child's contact with both parents after divorce must be considered in child custody determinations and must appear in statute.

4. Institutional changes that emphasize conciliation and agreement should be made in the present system for handling matters of child custody in domestic relations cases.

The current trial-focused system for addressing child

custody disputes is inherently antagonistic to the goals of providing stability for children, meaningful parent-child relationships, sufficient living arrangements and support, and responsible communication between adults. Divorce proceedings should be removed from the adversary process and placed in a forum where discussion, compromise, and communication will be fostered in the best interest of the parties and children involved.

RECOMMENDATIONS

The Commission recommends the creation of an Office of Domestic Relations. This Office will be associated with the courts and will have jurisdiction over petitions for separation, divorce, or annulment. The Office will employ and emphasize the techniques of mediation, but will be able to render a decision without litigation should mediation fail to achieve an agreement. In child custody cases, the Office conciliators will:

-- Be guided by policy statements encouraging frequent and continuing contact between parents and children, and parental cooperation;

-- Apply the best interest standard and related factors;

-- Seek agreements that address the rights and responsibilities of parenting.

Appeal to Superior Court from decisions of the Office, rendered when agreement between the parties is not achieved, will be for error of law or abuse of discretion.

INTRODUCTION

Each year approximately 6,500 Maine children experience the trauma of the divorce of their parents.[1] Most of these children suffer grief, guilt, fear, and anxiety as the family unit breaks apart and they adjust to new parenting arrangements and home lives. Sadly, for many children this adjustment includes the loss of an important relationship with one of their parents and a reduced standard of living. Most children involved in divorce readjust and learn to live with their new circumstances. Unfortunately, some manifest behavioral problems which estrange them from their families, friends, and schools, and which, on occasion, require State intervention through social service agencies, mental health programs, or the juvenile justice system. In a significant number of cases, the State must intervene to provide these children with temporary, or longer term, financial support.

The harmful effects of divorce for Maine children may be the inevitable result of family separation in today's society. However, during the First Regular Session of the 111th Maine Legislature, the Joint Standing Committee on the Judiciary considered the possibility that current Maine domestic relations law may not be completely or appropriately addressing the problems of divorcing parents and their children. In response to this concern, the Legislature adopted Public Law 1983, chapter 564, creating the Commission to Study the Matter of Child Custody in Domestic Relations Cases. Appointments by the Governor, the Senate President, the Speaker of the House, and the Commissioner of Human Services created the Commission membership. The Chief Justice of the Supreme Judicial Court appointed members of the judiciary to serve as advisors. Participants in the Commission's work represented the Legislature, mental health professionals,

social workers, attorneys, the Department of Human Services, judges, and the public.

The Legislature directed the Commission to study Maine domestic relations law, and to report its recommendations for improvements in the functioning, the fairness, and the sensitivity of the present system. Specifically, the Commission's mandate from the Legislature directed attention to four critical questions:

1. Whether the current statutes governing the custody of children in domestic relations cases are adequate;

2. Whether the current statutes governing the custody of children in domestic relations cases should be amended to change the law with regard to joint legal or joint physical custody;

3. Whether the decisions of law and some of the standards enacted in other states governing the determination of the custody of children in domestic relations cases should be expressly incorporated into the current statutes; and

4. Whether any institutional changes should be made in the present court system's handling of child custody matters in domestic relations cases.

The report that follows presents the Commission's findings on these questions, and its recommendations for change.

FINDINGS

1. Are the current statutes governing the custody of children in domestic relations cases adequate?

A. Current Maine statutes

Two statutes govern separation, divorce, or annulment when children are involved: Title 19 of the Maine Revised Statutes Annotated, section 214 addresses child custody issues upon separation; section 752 applies to these issues upon divorce or annulment. Both statutes permit a judge to order exclusive care and custody of a child to one parent, to apportion care and custody between parents, or to order joint custody. Section 752 provides that a judge may award custody of a child to a third person, a suitable society or institution, or the Department of Human Services. Where parents agree to joint custody, the judge, under either statute, must make that award, unless substantial evidence exists that the judge should not. The judge must state the reasons for denial of a joint custody award under these circumstances. Both statutes provide that a judge may award reasonable visitation rights to parents and third persons, and that a judge may order either parent to pay child support. Section 752 permits a judge to alter a custody or support order from time to time, as circumstances require. Section 751 of Title 19 authorizes a judge hearing a divorce action to request the Department of Human Services to investigate and report on the circumstances and conditions of a child and the child's parents; the parents are to pay the cost of investigation if it is for purposes other than suspected abuse or neglect, and if the parents are able to pay.

B. Judicial interpretations of statutes

The Maine Supreme Judicial Court has authored several opinions

discussing the role of the courts in applying child custody statutes. A judge making a custody decision acts for the State as a wise, affectionate, careful parent.[2] A court has full equitable powers under the child custody statutes.[3] The trial judge has broad discretion; a trial court decision may only be reversed if it is so erroneous as to constitute abuse of this discretion.[4]

The Maine courts have also developed a standard to apply in child custody determinations in separation, divorce, or annulment actions, and factors to consider in applying this standard: The paramount concern in a child custody hearing is the best interest of the child.[5] Factors a court must consider in applying this standard include:

* The age of the child;
* The relationship of the child with the child's parents and any other persons who may significantly affect the child's best interests;
* The wishes of parents as to their child's custody;
* The preference of the child, if the child is old enough to express a meaningful preference;
* The duration and adequacy of the current custodial arrangement and the desirability of maintaining continuity;
* The stability of the proposed custodial arrangement;
* The motivation of the competing parties and their capacity to give the child love, affection, and guidance;
* The child's adjustment to a present home, school, and community;
* All other factors having a reasonable bearing on the physical and psychological well-being of the child.[6]

The Supreme Judicial Court has also stated that there is no presumption in favor of mothers in child custody cases.[7]

C. Finding: The current statutes governing the custody of children in domestic relations cases are not adequate.

Current Maine statutes governing child custody issues in cases of separation, divorce, or annulment do not contain adequate terminology or standards to guide parents, attorneys, and judges -- the decision-makers in these cases. Current statutes use terms, such as "custody," "visitation," and "joint custody," that are ill-defined and serve to estrange parents from their children. The statutes do not present the standard on which custody decisions are based, nor do they indicate the factors considered in making these decisions. These elements of custody determinations, developed in case law, should be made more apparent, and should be augmented by society's best current knowledge and judgment as to the principles that must apply in child custody decisions.

The current statutes also provide for addressing issues of child custody in separation, annulment, or divorce actions through the adversary process of the traditional court system. Judges must hear divorce actions and make child custody decisions amidst the hearing and determination of criminal cases, traffic infractions, civil suits, and all the other proceedings that occur in Maine District and Superior Courts. Attorneys must advocate the interests of their particular client only. Judges must apply the same rules of evidence and civil procedure in custody determinations as in other types of civil cases. This litigational, adversarial approach to child custody cases does not permit the needs and interests of parents and children, at the time of divorce and for the future, to be thoroughly assessed. The statutes should provide a more appropriate forum for these cases for the benefit of children, parents, spouses, other relatives, and society.

A more detailed discussion of this general finding follows in

responses to the remaining three questions addressed by the Commission.

2. Should the current statutes governing the custody of children in domestic relations cases be amended to change the law with regard to joint legal or joint physical custody?

A. The meaning of these terms

Current Maine domestic relations statutes refer to "custody" and "joint custody" without definition. Maine case law does shed some light on the meaning of "custody:" In a case where the child lived with each divorced parent in their respective homes for three and one half days each week, the court noted that the father's half week with the child was visitation; the mother was the custodial parent because decision-making responsibilities were hers alone.[8] No opinions of the Supreme Judicial Court elaborate on the meaning of "joint custody."

Several states' statutes define "custody" and "joint custody." For example, Minnesota's divorce statute includes definitions of "legal custody" and "physical custody."[9] "Joint custody" is defined in Montana law.[10] Idaho expands the statutory definition of "joint custody" to include "joint physical custody" and "joint legal custody."[11] The Florida statute does not refer to "custody" or "joint custody," but instead uses and defines the terms "shared parental responsibility" and "sole parental responsibility."[12]

B. Preference for joint custody

Much recent discussion of child custody has focused on whether or not state laws should express a preference for joint custody. While research into the effects of joint custody arrangements on children and parents is proceeding earnestly in many quarters, the research is inconclusive. Although research completed to date has uncovered many benefits of joint custody arrangements, the results are not conclusive for all people. Some

experts on child psychology and family relations support a legal preference for joint custody;[13] others do not.[14] Yet most of these experts agree on two points: the importance to children of a continuing relationship with both parents, and the importance to children of a cessation of conflict between their parents.[15]

The debate about joint custody has developed awareness that public policy should protect the child's right to continue a loving relationship with both parents, and should encourage cooperative parenting with shared responsibility after divorce.[16] The continuing debate centers on the question of how to give these human values legal form.

The domestic relations law of at least twenty-six states incorporates the concept of joint custody of children upon separation, divorce, or annulment;[17] the approaches of the various state laws differ, however. Alaska, Montana, and Pennsylvania couple authorization for a court to award joint custody with a statutory policy statement favoring frequent and continuing contact between parent and child, and the sharing of child-rearing rights and responsibilities by both parents. The New Mexico statute simply states that a court making a custody determination should first consider joint custody. Michigan, as does Maine, provides some preference for joint custody when the parents agree to such an award. California, Connecticut, and Louisiana establish a presumption in favor of joint custody when parents are in agreement. New Hampshire has a presumption for joint legal custody only when parents agree. Idaho provides a presumption favoring joint custody in all cases. Florida's innovative approach mandates an award of shared parental rights and responsibilities unless shared parenting is determined to be detrimental to the child. If shared parenting is awarded in Florida, the court may still divide

responsibilities between the parents according to the child's best interest.

C. Finding: The current statutes governing the custody of children in domestic relations cases should be amended to change the terminology of custody, visitation and joint custody, and to insure that shared parenting is encouraged.

Changing current Maine law to incorporate definitions of "joint legal custody" and "joint physical custody" might aid parents, attorneys, and judges in understanding what effect a joint custody arrangement has on the parents' rights and responsibilities for their children. Preferring one arrangement over the other might be one way of expressing a policy of encouraging a close, continuing relationship between each parent and the parent's children. Neither of these approaches, nor any other combination of defining "custody," "visitation," and "joint custody" and establishing legal preferences or presumptions favoring joint custody, is sufficient.

Maine law does not effectively describe how rights and responsibilities for child support, residence of the child, parent-child contact, and decision-making regarding the child may be structured. New terminology will serve to dissipate the antagonism, polarization, confusion, and opportunity for conflict that are often engendered when child-rearing is assigned to a custodian and a visitor, or to joint custodians without elaboration.

In presentations of findings and purposes, and in directions to decision-makers, Maine law must clearly state that shared parenting after divorce is preferable for the healthy physical, psychological, and social development of children. Policy statements in the law must encourage frequent and continuing contact between parents and children, and the creation of opportunities to develop parental cooperation as early as possible in the process of divorce. Decision-makers should be required to

seek a parenting agreement that provides for the greatest possible sharing of rights and responsibilities, according to the best interest of the child.

3. Should the decisions of law and some of the standards enacted in other states governing the determination of the custody of children in domestic relations cases be expressly incorporated into the current statutes?

A. Current Maine law

The law of child custody in cases of divorce has largely developed through court opinions: the best interest standard appears in case law, not statute; Maine courts apply several factors in determining best interest that are found nowhere in statute. A detailed presentation of these factors may be found in the first section of this report.

B. Other states

Most states require the application of the "best interest of the child" standard in custody determinations in cases of divorce.[18] Many states provide for various factors to be considered in assessing a custody case. Those developed in Maine case law are typical of those in other states. However, several states add to the list of considerations specific references to cooperative parental behavior. New Jersey requires an assessment of the parents' potential to cooperate in child-rearing to be made in determining best interest.[19] Minnesota requires consideration of methods of resolving disputes regarding the child, and the parents' willingness to use those methods.[20] Alaska, Florida, Montana, and Pennsylvania direct the court to consider the capacity of the parents to allow and encourage frequent and continuing contact between the child and the other parent.[21] Finally, another factor for consideration in Minnesota is the effect on the child if one parent has sole authority over the child's upbringing.[22] All

of these factors, in one way or another, deliver the message that parental cooperation is best for a child involved in divorce.

C. Finding: The best interest standard and related factors, including encouragement of parental cooperation, used in determining questions of child custody in domestic relations cases should be expressly incorporated into Maine statutes.

The best interest standard used in judging questions of child custody in separation, divorce, or annulment cases should be expressly incorporated into Maine statutes. This standard guides decision-makers in Maine and is the standard agreed upon by the majority of public policy makers in this country. When appearing in statute, the best interest standard will aid separating or divorcing parents and the public in knowing the goal of domestic relations decisions concerning children.

The factors developed in Maine case law for consideration in determining the best interest of a child in a domestic relations case should appear in Maine statutes. These factors coincide with most of those applied in other states. The existing Maine factors should be incorporated into the statutes to, assist decision-makers and advise parents and the public of what is best for children involved in divorce. Since some parties in divorce cases appear in court without having received legal advice or representation, it is especially important for the governing statutes to present the elements of a child custody decision; statutes are more accessible to the public than case law. Further, new factors to be considered in child custody cases should be added to Maine statutes. Adding new factors concerning the capacity of parents to cooperate and assure a child's contact with both parents expresses a policy favoring parents working together in the best interest of a child. These additional factors also indicate the behavior expected of parents involved in a custody case.

Finally, given the evolving area of child custody research, it is important for statutes to incorporate society's best current judgment as to what is best for children. The statement of this judgment as a guide to decision-makers, coupled with the ability of statutes to be amended to reflect changes in society's knowledge, serves to protect the best interest of all children involved in domestic relations cases.

4. Should any institutional changes be made in the present court system's handling of child custody matters in domestic relations cases?

A. The current system and proposals for reform in Maine

1) The current system

In 1982, 49,557 civil actions were filed in Maine District Courts. Divorce actions made up 6,991 of those filings. In Superior Court in 1982, 6,058 civil actions were filed, with 452 of those filings representing divorce actions.[23] Approximately 6,500 children were involved in those actions.[24] Divorce actions were heard by Maine judges amidst a caseload (including all civil and criminal cases) of approximately 10,260 cases per year for District Court judges, and 1,100 cases per year for Superior Court justices.[25] Each case of divorce, separation, or annulment, including those in which child custody is an issue, is generally governed by the rules of procedure and evidence that apply to other civil actions.[26] To understand the current Maine system for hearing divorce actions and determining child custody, one must examine the way a typical case proceeds through court, and the roles of various players:

-- Lawyer's training and obligations: Under present practices, the machinery for divorce often begins when one or both of the spouses contacts a lawyer.[27] A lawyer's oath, ethical obliga-

tions, and the traditions of the legal profession require that the lawyer aggressively promote the interests of a client, to the exclusion of interests of others who may be affected by the lawyer's actions in achieving the client's individual goals. This professional obligation poses a problem in child custody matters because of the inconsistencies between aggressive promotion of the interests of each client, and promotion of the best interest of the child, which includes continued and responsible communication between the child's parents. Still, the lawyer risks bar disciplinary action and malpractice suits if he or she fails to aggressively promote the client's interests.[28]

One of the few legal malpractice cases to reach the Maine Supreme Judicial Court[29] involved a claim, four years after a divorce, that a lawyer had compromised the divorce too easily, and had not been sufficiently aggressive in investigating and promoting his client's individual interests. The Law Court's holding indicated that this claim should be allowed to proceed to determination by a citizen jury. It serves as a signal to all lawyers of the professional risks associated with less than fully aggressive promotion of the client's interest in divorce cases.

--The adversary process tradition: The American judicial system and its litigation processes are premised on basic procedural rights.[30] In all areas of litigation, these procedures are generally aimed towards a full and free disclosure of the facts promoted by the parties to the litigation, before an impartial fact-finder, with the goal of determining on which side the truth lies. The system is premised on the assumption that the parties involved cannot, will not, or should not resolve the disputes among themselves; it does not

concern itself with the possibility that parties may have to maintain a continuing communicative relationship after the court acts. In civil cases, the parties appear, they prepare for battle trying to maximize their advantage and make the other side's case look as bad as possible, they do battle before the fact-finder, and a decision is made. The parties then depart, in most instances never to have contact again. There is no need, for example, to assure that the errant driver preserves a continuing responsible relationship with the injured pedestrian. The adversary process has several elements which are significant in considering its incompatability with child custody actions:

* It begins with the filing of a "complaint." This document is generally drawn to positively assert the interests of the complainer and place blame for problems on the other party. The other party is then best advised to respond in kind with a similar court document.
* Once complaints have been filed, and advocacy positions have been taken, the parties will frequently stop communicating with each other. Instead, communications will be through lawyers. Lawyers frequently advise such a "no direct communication" stance so that litigation positions may not be undercut through uncounseled communication of the parties.[31] Further, the existence of litigation as an unavoidable prerequisite to divorce may promote a siege mentality in many people, closing off previously open lines of communication.
* After the complaint is filed and communication is limited, the "discovery" process begins. The purpose of discovery is to

marshall all information favorable to your side and to develop as much information critical of the other side as possible. This is done in many ways: gathering of personal and financial papers; hiring private investigators; submitting questions to the other side in writing, called interrogatories; and use of depositions. In a deposition, one side will summon the other to appear before a court reporter. The party so summoned will appear and be subject to aggressive and sometimes extensive questioning by the other party's attorney.[32] This procedure tends to promote the battle nature of divorce litigation, and can only further antagonize a deposed parent towards the other parent.

* When the attorneys believe that discovery is completed the matter will then be brought to trial. By law, divorces cannot be heard for at least sixty days after they are filed.[33] In fact, because of the discovery process, individual attorneys' own priorities, and trial court delays, a divorce which must be resolved by trial often will not be heard for at least six months, possibly not for a year or more, after the first divorce complaint is filed.

At trial, each party must aggressively promote their interests, trying either personally or through counsel to make themselves appear in the best possible light and to make the other party appear in the wrong. Often in this process in a divorce, minor domestic incidents are blown out of proportion.

* There is only late and limited involvement of the decision-maker. While judges occasionally become involved in motions to determine custody and support at an early stage in the litigation, this involvement is brief and transitory. There is no continuing supervision of the case from that point forward. In fact, the

judicial decision-maker usually is not injected into the process until the matter is before the court for divorce, which, as indicated, may be anywhere from sixty days to a year or more after the papers are filed. This will be the first time the judge's attention is directed to the case. Through the earlier processes discussed above, extreme polarization will frequently have occurred. It is too late for the judge to help the parties think responsibly of the children: feelings are too hurt; emotions are too strong. Further, the judge's role must, out of necessity and the judge's own ethical obligations, be detached. The judge cannot sit down with the parties around a table and engage in an extensive discussion, focusing first on the best interest of the children, and only second on the parties' interests and their economic disputes. A judge who becomes too involved in attempting to promote settlements may be viewed as compromising judicial objectivity if the matter ultimately must go to trial and decision.[34] A judge who attempts to limit or exclude acrimonious testimony or cross-examination may face criticism or even reversal by an appeals court for depriving parties of a full and fair hearing.[35] The judge must not actively intervene.

After the plaintiff's and defendant's presentations are completed, after both sides have cross-examined and concluding arguments have been made, the court renders a decision. Sometimes that decision is rendered from the bench at the end of all the evidence. Sometimes that decision takes as much as six months if the parties wish to file briefs and the court engages

in an extensive review of the evidence before rendering a written decision. The court may have ordered the Department of Human Services to investigate the divorcing parents and their children and may have to wait for that report.[36] There is another delay of thirty days before the decision can become final,[37] and it may not become final for a considerably longer period if the decision is subject to appeal. Finally, along with polarization and delay will usually come a large bill for attorneys fees.

2) Proposals for reform

Over the last few years many in Maine have examined, and even attempted to alter, the traditional approach to divorce and child custody cases to better serve the interests of separating families. In 1978, the Maine Civil Liberties Union reported its findings from a study of the status in Maine courts of the presumption in favor of mothers in child custody cases.[38] The MCLU study found that the status of the presumption in the courts could not be determined from available statistical data.[39] The study did uncover other problems, however, including: the possibility that lawyers, working with an inference from the past, are advising male clients not to seek custody of their children because their chances of success are low; the inadequacy of fact-finding procedures for determining best interest of children under the current system; and the detrimental effects of the adversary process on divorcing parents and children.[40] The MCLU report suggested for the creation of a family court system, set up to work towards domestic relations solutions in a nonadversarial manner; possessing a staff with expertise in law, psychology, and social welfare; and capable of the investigations, interviewing, and mediation that would better serve the aim of fact-finding in family matters.[41]

The 1980 Blaine House Conference on Families presented its findings in

a report to Governor Brennan.[42] The conference recognized the added problems the current court system creates for families in crises in two of its findings: The report recommends that the Governor consider the creation of a family court system in Maine a priority. It further recommends that mediation be required (except in situations of serious domestic violence) in all divorce matters involving minor children, and be conducted by qualified family mediators.[43]

Finally, Maine has over six years of experience with a court-sponsored voluntary mediation service for domestic relations cases. In a 1982 report to the Chief Justice by the Court Mediation Service,[44] the statistical benefits of mediation in domestic relations cases were demonstrated. The Director of the Mediation Service stated, in a letter accompanying the report, that:

> ...[O]ur experience has demonstrated [in domestic relations cases] that mediation is generally a better solution than litigation.
>
> Where adversarial trials tend to exacerbate differences, mediation works to lead the parties to a common ground. Because the mediator has more time to listen than our over-burdened trial judges, the underlying causes of disputes are more likely to be aired; and because a mutually acceptable mediated solution more often than not leaves the parties on speaking terms, compliance with the resulting court order is facilitated, which is critically important when the custody of children is involved. In intra-family disputes, mediation makes a unique contribution both to the judicial system and to the welfare of the parties.[45]

The Director of the Court Mediation Service, Lincoln Clark, offered the Commission his most recent information on the voluntary use of mediation in domestic relations cases. On March 7, 1983, the Chief Justice of the Supreme Judicial Court issued an order requiring attorneys and judges to encourage the use of mediation.[46] The impact of that order remains unclear: the statistics seem to show that, while the use of mediation in domestic relations cases has increased or been implemented in certain areas

of the state, there are still many areas where no domestic relations mediation is occuring.[47] In a statement to the Commission, Mr. Clark indicated that the current mediators employed by the judiciary are divided on the issue of whether or not mediation should be made mandatory.[48]

B. Other states' systems

Conciliation Courts have existed in this country since the establishment of the first in Los Angeles in 1939.[49] Professional counselors were first employed in California Conciliation Courts in 1954.[50] A Conciliation Court operates with a judge of each court hearing divorce petitions appointed as a Conciliation Court judge. The Conciliation Court generally has a director and employs counselors and social workers. Parties may petition for Conciliation Court services prior to filing a divorce petition or upon filing for divorce. If the parties to a divorce action do not initiate the proceeding in the Conciliation Court, the judge may transfer the petition to that Court. Judges are encouraged to require divorcing parties to use conciliation services when minor children are involved. Supervising counselors conduct a conference or series of conferences between the parties aimed at achieving an agreement.[51] At least eight states now offer the forum of a Conciliation Court to divorcing parties.[52]

California is the only state currently mandating mediation of child custody matters by statute.[53] Conciliation Court personnel may be used as the mediators. Agreements reached in mediation are reported to the court, and, if no agreement is reached, the mediator may make a recommendation to the court.[54] Since this mandatory mediation law has only been in effect since 1981, statistics on the success of the mediation are few and far from conclusive, but are promising.[55]

Other states make mediation available in some form in domestic relations cases. Arizona permits mediation to be required by local court rules.[56] In five states, the court may order mediation on its own motion or at the request of a party.[57] Florida, and Michigan (and Maine) simply make mediation available.[58] In three states, the court may order the parties to engage in counseling.[59] In four states, the court may seek independent professional advice.[60] Finally, some states require the parties to submit a custody implementation plan to the court.[61]

All of the above -- the experience of divorcing parents and children with the requirements of the traditional court system, proposals for change in the current system that have occurred in Maine over the last few years, Maine's experience with a court-sponsored voluntary mediation service, other states' provisions for Conciliation Courts and mediation -- all argue for some changes in the current system for dealing with divorce and child custody in Maine.

C. Finding: Institutional changes that emphasize conciliation and agreement should be made in the present system for handling matters of child custody in domestic relations cases.

Basic institutional change is needed in the way that divorce is handled in Maine statutes. These institutional changes must alter the entire nature of divorce proceedings, removing them from an adversary arena and placing them in a forum where discussion, compromise, and communication will be fostered in the best interest of the parties and children involved. This change will have considerable benefits: Some of the trauma currently experienced by divorcing parties and affected children may be avoided. To the extent that the trauma, polarization, and poor communication resulting from the present adversary approach to divorce are avoided, demands upon the State to provide social services to children may be prevented, some children's entry into the juvenile justice system may be avoided, and

dependency of some children upon State aid may be lessened by improved willingness of both parents to undertake their fair share of the burden of supporting their children.

Many conflicting needs and emotions must be addressed whenever the question of child care responsibility comes into dispute. Each case must be examined and decided based on its individual, and almost inevitably unique, circumstances. Four basic issues usually must be resolved:

Residence -- What will be the arrangements for the child's residence and school attendance?

Decision-making -- How will basic questions in the child's life -- education, religion, medical care and the like -- be decided?

Support -- How will responsibility for paying the expenses necessary to support the child be allocated between the parents and, in some cases, between the parents and the State?[62]

Parent-child contact -- When and under what circumstances will the child have contact with each parent, and, reciprocally, each parent have contact with the child?

None of these issues can be avoided, each must be resolved in a system which places the best interest of the child first, which emphasizes parents' responsibilities towards their children, and which protects a parent's right to safeguard his or her own interests.

As these matters are addressed in child custody proceedings, four goals should govern:

* To provide parental direction, living arrangements, and financial support which is in the best interest of the child.
* To preserve a meaningful relationship between the child and each parent.

* To promote responsible communication between the separated parents regarding the interests of the child.

* To achieve stability for the child in the child's parental contacts, living arrangements, educational services, and relationships with relatives and friends.[63]

The current litigation-focused system for addressing child custody disputes is often inherently antagonistic to all of these goals. If the current system could be improved simply by changing the way that judges, lawyers, and other participants understand and address child custody questions, that would be the easiest solution. Yet many of Maine's domestic relations attorneys and District and Superior Court judges are already demonstrably concerned with and sensitive to the problems of families facing divorce.[64] No amount of education about or increased sensitivity, to child custody issues by the bar can change some of the basic attributes of the adversary system: The system is necessarily antagonistic to placing the child's interests first, to assuring that each parent retains a meaningful relationship with the child, and to promoting a communicative relationship between the parents regarding the child. Adding a few new presumptions or procedural requirements will not correct the basic flaws of the adversary system in addressing child custody issues. A process that calls itself "adversary," promotes "confrontation," labels the other party a "hostile" witness and ultimately produces a"winner" and a "loser," could not be worse for resolving how two separating parents will continue to have the best possible relationship with their child and each other.[65] Instead, a new system is needed to assess and resolve differences relating to child care responsibilities between separating parents.

RECOMMENDATIONS

The Commission recommends the creation of an Office of Domestic Relations. This Office will be associated with the courts and will have jurisdiction over petitions for separation, divorce, or annulment. The Office, in hearing all domestic relations petitions, will expedite the proceedings for all divorces, but its primary focus, by design and because of the nature of the disputes, will be on child custody cases.

The Commission considered recommending mandatory mediation for domestic relations cases involving minor children. In the end, however, the Commission determined that requiring mediation, with a full court hearing still available to the parties should mediation fail, would be insufficient. Attorneys involved would still be obligated to protect the litigation posture of their clients. As the Director of the Court Mediation Service noted, unwilling participants might treat mediation perfunctorily, as parties did the former requirement of attendance at marriage counseling before a divorce hearing.[66] Approaching mediation with litigation available as a final option could increase the time and costs of the divorce process.[67] The opinion held by many involved with the current court-sponsored mediation program, that the use of mediation techniques to resolve divorce disputes must be a voluntary option, argued against simply making current mediation services mandatory for all divorce litigants.[68] Finally, the bulk of the work of the current court mediation service lies in nondomestic, particularly small claims, areas;[69] a somewhat different approach is more appropriate for domestic relations cases.

Still, the Commission recognizes the significant benefits that mediation of domestic relations cases produces for the parties, their children,

and society.[70] The Commission recommends to the Legislature a system that employs and emphasizes the techniques of mediation, but that can render a decision without litigation should mediation fail to achieve an agreement.

The procedures of the Office of Domestic Relations set forth in the legislation accompanying this report, are designed to achieve several goals which are incompatible with the adversary approach to divorce. The procedures require:

* Prompt involvement, after notification of intent to divorce, by a professional sensitive to child custody issues and trained in dispute resolution.
* Continuing involvement and communication with the parents by the professional decision-maker in attempting to develop a plan, promote the best interest of children involved, and assure each parent a continuing, meaningful relationship with their children.
* Consideration of the interests of the children as each significant action in the process is taken.
* Emphasis on a process which promotes discussion and agreement and minimizes polarization and acrimony.
* An end result which is best for all concerned in the unfortunate but necessary separation, and which, to the extent possible, leaves the parties feeling that their interests have been considered, that there is not a "winner" and a "loser."

The first step in initiating the procedures of this Office will be for one or both of the separating parties to file a petition with a District Court. The petition will be transferred to the Office, and the parties will meet with a conciliator after a thirty day period during which the parties will examine educational and planning materials and, perhaps, work on an agreement. The conciliator will be a person with significant

training in dispute resolution and background skills in law and child psychology.

The conciliator who meets with the parties initially will become responsible for determination of child custody and other issues inherent in termination of the marriage. This will result in the conciliator gaining a much greater knowledge of the parties than any judge has the opportunity to achieve under the present system.

The conciliator's responsibility will be to determine and place top priority on the best interests of the children, and to accomplish the four goals of providing stability for children, meaningful parent-child relationships, sufficient living arrangements and financial support, and responsible communication between adults. The legislation directs the conciliator to apply the best interest standard, to consider the factors discussed in this report in assessing a child's best interest, and to seek agreements that address the rights and responsibilities of parenting. After meeting with the parties, the conciliator could then schedule a meeting with one party, or both separately, if necessary. Through this procedure the conciliator will develop a plan for resolution of the issues and final determination of the disputed points. The plan will necessarily be different depending on the needs of each case. If parties are in general agreement, the matter may proceed to final determination quickly. No sixty day limit or other artificial time period will delay implementation of an agreement.

If dispute exists regarding, for example, the physical location of a child, appropriate psychological evaluations or other studies might be ordered. If disputes are limited to economic issues, a plan could be developed to assure that the facts regarding the economic issues are

brought out. Each case will be different, but the goal, in all cases, will be to resolve disputes in ways which promote the four basic goals for child custody cases, and others that might be set for particular cases. Should the parties be unable to reach an agreement on any issues, the conciliator will decide those issues based on written findings. Appeals to Superior Court from such decisions may be had for abuse of discretion or error of law.

The Commission presumes that in most cases both parents will desire to continue parenting to the fullest extent possible. The Commission also presumes that children will want to continue meaningful relationships with each parent. The four goals stated above, and the general direction of this report, are based on these presumptions. However, exceptions make the rule, and there will be instances where mutual desire for continued substantial contact between parent (mother or father) and child do not exist.[70] Any system must be prepared to identify and accomodate differing situations appropriately, and to modify the goals of the parenting arrangement in each case, without the use of artificial legal presumptions. The legislation the Commission recommends does not, therefore, suggest the use of presumptions favoring one custody arrangement or another or the continuation of categorical descriptions of possible custody awards. Conciliators will apply, instead, a functional approach to determining the sharing or allocation of parental rights and responsibilities.

The proposed system for a new approach to divorce in Maine has significant differences from present litigation oriented procedures. The less formal procedures suggested should result in final determination of unresolved domestic relations questions more quickly than possible under the current adversary system. The new system will have less of an adverse impact on the children involved than does the existing divorce process.

The proposed system will create a greater likelihood that divorced parents can maintain a serious communicative relationship to the benefit of their children. Further, the dispute resolver will remain available to deal with family difficulties as they arise after the separation.

This new system for dealing with domestic relations cases will have expenses. Well-qualified and carefully selected people will be needed as conciliators. Other support staff may be needed. However, some direct initial savings might result from this system. For example, the necessity for more judges, particularly at the District Court level, may be avoided.[71] The greatest savings may occur in reducing the costs, emotional and financial, to divorcing parties. Other savings could arise from the more complete assessments of financial status that decision-makers in the new system will be able to make. Greater information than judges can currently acquire should lead to more appropriate child support awards. The largest savings may be long term, however, if the adverse impacts of divorce upon children are avoided or reduced.[72] Finally, the Commission is proposing to increase the fees for filing for divorce so that the domestic relations system will be essentially self-supporting.

There is precedent for treating divorce cases differently and separately from traditional adult litigation, especially when the interests of children are principally involved.[73] An entirely separate, less formal, and less punitive system has been established for addressing crimes committed by children.[74] In juvenile court the precise procedural requirements of the adult system may be varied, subject only to the overall goal of promoting "fundamental fairness" for the child.[75] Under the Maine Juvenile Code, review of the fact-finder's decisions is for abuse of discretion or error of law.[76] Similar changes can, and must, be made in

current procedures for dealing with divorce. Fundamental fairness to the child's interest, and to that of both parents in the child, must be promoted.

CONCLUSION

Current Maine statutes governing domestic relations cases offer a traditional approach to addressing the issues of divorce. Yet recent research, the experience of other states, and the experiences and insight of many Maine citizens involved with divorce suggest that, especially where children are involved, approaching divorce in essentially the same manner as other civil cases is inappropriate.

Maine law fails to use and define appropriate terminology to describe the possible and most beneficial arrangements for parental rights and responsibilities for children upon divorce. The statutes do not include the "best interest of the child" standard used in making child custody decisions, nor do the statutes supply guidance in the form of factors to be considered in assessing a child's best interest. Important among these factors are those promoting parental cooperation and the child's access to both parents. The legislation the Commission recommends proposes to incorporate all of these elements into Maine domestic relations statutes.

The greatest opportunity for improvement of Maine law lies, however, in changing the current forum available to divorcing families for addressing the issues of separation. Divorces are now carried out according to the current procedures and traditions of the adversary process, and under the ethical obligations of lawyers and judges. Yet this process, conducted correctly, too often has a detrimental impact on parents and children -- especially on children, who are subjects of the process but not participants in it. At the end of the current process, where litigation is the final arbiter of family disputes, communications between parents are usually very strained. Children involved in divorce are aware that their parents have had a fight, that often considerable acrimony has

developed between them, and that they, the children, have been a subject of that fight. Even the prospect of going through the current adversary process may have a significant impact. In some instances, a parent may avoid a custody battle because he or she cannot afford the financial costs. In others, parents may forego efforts to preserve a full and significant relationship with their children simply to avoid the pain to themselves and their children that this process entails.

Because of the inherent problems of the adversary process when applied to divorce, efforts to simply tinker with the current system, adding new presumptions regarding child custody, or otherwise imposing new procedural hurdles to clear or facts to find, will not achieve the goals discussed in this report. Such changes within the context of the current adversary process could simply promote more litigation and acrimony by adding more issues to dispute in an already complicated situation. An institutional change which emphasizes conciliation and agreement is necessary. The legislation the Commission recommends establishes a system in Maine that discourages conflict between separating parents and promotes children's contact with both parents. The legislation offers an opportunity to truly serve the best interests of parents, children, and society.

NOTES

1. Source: Division of Vital Statistics, Maine Department of Human Services. In 1981 there were 6,351 divorces in Maine, involving 6,509 children. The number of children involved in each of these divorces follows:

2,617	-	no minor children
1,720	-	1
1,434	-	2
447	-	3
91	-	4
32	-	5
8	-	6
2	-	7

2. Costigan v. Costigan, 418 A.2d 1144, 1147 (Me. 1980).

3. Harmon v. Emerson, 425 A.2d 978, 984 (Me. 1980).

4. Huff v. Huff, 444 A.2d 396, 398 (Me. 1982).

5. Costigan v. Costigan, 418 A.2d at 1146.

6. Id.

7. Lane v. Lane, 446 A.2d 418, 419 (Me. 1982). The Maine statutes also provide that a mother and father are joint natural guardians of their minor children, jointly entitled to their custody. ME. REV. STAT. tit. 19, §211 (West 1981).

8. Sheldon v. Sheldon, 423 A.2d 943, 945 (Me. 1981).

9. MINN. STAT. §518.003 (1983). In Minnesota:

   -- "legal custody" means the right to determine the child's upbringing, including education, health care and religious training

   -- "physical custody and residence" means the routine daily care and control and the residence of the child

10. MONT. REV. CODES ANN. §40-4-224 (1981). In Montana:

   -- "joint custody" means an order awarding custody of the minor child to both parents and providing that the residency of the child shall be shared by the parents in such a way as to assure the child frequent and continuing (but not necessarily equal) contact with both parents

11. IDAHO CODE §32-717B (Supp. 1983). In Idaho:

-- "joint physical custody" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties

-- "joint legal custody" means a judicial determination that the parents or parties are required to share the decision-making rights, responsibilities and authority relating to the health, education and general welfare of a child or children

12. FLA. STAT. ANN. §61.13 (West Supp. 1983). In Florida:

-- "shared parental responsibility" means that both parents retain full parental rights and responsibilities with respect to their child and requires both parents to confer so that major decisions affecting the welfare of the child will be determined jointly. In ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those aspects between the parties based on the best interests of the child. When it appears to the court to be in the best interests of the child, the court may order or the parties may agree how any such responsibility will be divided. Such areas of responsibility may include primary physical residence, education, medical and dental care, and any other responsibilities which the court finds unique to a particular family and/or in the best interest of the child

-- "sole parental responsibility" means that responsibility for the minor child is given to one parent by the court, with or without rights of visitation to the other parent

13. See, e.g., Kelly, Further Observations on Joint Custody, 16 U. C. Davis L. REV. 762 (1983).

14. See, e.g., Steinman, Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications, 16 U. C. Davis L. REV. 739 (1983).

15. See Steinman, id. and Kelly supra note 13. In their articles, Dr. Steinman and Dr. Kelly review the same joint custody research, yet express different opinions on legal preferences for joint custody. Still their findings and other conclusions are similar and extremely helpful.

Among Steinman's findings in reviewing studies to date are the following:

-- fathers with joint custody are less depressed than visiting fathers

-- co-parental relationships vary regarding the degree of conflict, but parents can cooperate in child-rearing while discontinuing intimate spousal relationship

-- relitigation is half as frequent among joint legal custody awards as among sole custody awards

-- no support exists for a presumption of maternal preference

-- joint custody arrangements should be determined with the child's individual needs and capacities foremost

Steinman concludes, in part, that:

-- parents having the potential for cooperation should be referred to mediation or counseling to help develop their capacities for co-parenting, and to create a child-focused planning process

-- a specific joint custody plan is useful pyschologically and legally

-- it is important to assess the individual child's strengths, vulnerabilities, concerns, and wishes

Kelly's findings upon reviewing joint custody research are compatible with Steinman's, and include the following:

-- hostility diminishes for most couples within the first year; hostility is usually the product of one very angry parent and one who responds to protect his or her integrity and relationship with a child

-- cooperative parenting is encouraged and enhanced with limited, relatively inexpensive education, counseling or mediation

-- joint and sole custody create adjustment problems for children

-- evidence exists of a link between a continuing relationship with a child and child support compliance

-- joint legal responsibility for a child is psychologically beneficial to divorced fathers

-- the traditional visiting pattern of every other weekend provides insufficient contact to maintain a positive parent-child relationship, and the child's adjustment suffers

-- the more paternal contact after divorce, the better the child is adjusted academically and with peers

Kelly concludes that:

-- when both parents are "good enough" there is no basis in law or psychology for making a rational choice between them

-- it is in the best interest of a child to encourage both parents to take an active post-divorce role in the child's life

For other views on the subject of joint custody see e.g., Bruch, Parenting At and After Divorce: A Search for New Models, 79 MICH. L. REV. 708 (1981); Nestor, Developing Cooperation Between Hostile Parents at Divorce, 16 U. C. Davis L. REV. 771 (1983); Potash, Psychological Support for a Rebuttable Presumption of Joint Custody, 4 Probate L. J. 17 (1982); and Reece, Joint Custody: A Cautious View, 16 U. C. Davis L. REV. 775 (1983).

16. See Steinman, supra at 761.

17. The states found by the Commission to include the concept of joint custody in their laws are:

Alaska - ALASKA STAT. §25.20.060 (1983)

California - CAL. CIV. CODE §§4600, 4600.5 (1983)

Connecticut - CONN. GEN. STAT. ANN. §46b -56a (Supp. 1983)

Delaware - DEL. CODE ANN. tit. 13, §721 et seq. (1981)

Florida - FLA. STAT. ANN. §61.13 (Supp. 1983)

Hawaii - HAW. REV. STAT. §571-46.1 (Supp. 1982)

Idaho - IDAHO CODE §32-717B (Supp. 1983)

Illinois - ILL. ANN. STAT. ch. 40, §603.1 (Smith-Hurd Supp. 1983)

Kansas - KAN. STAT. ANN. §60-1610 (Supp. 1982)

Kentucky - KY. REV. STAT. §403.270 (Supp. 1982)

Louisiana - LA. CIV. CODE ANN. arts. 146, 157 (West Supp. 1983)

Maine - ME. REV. STAT. ANN. tit. 19, §§214, 752 (West Supp. 1983)

Massachusetts - MASS. ANN. LAWS ch. 208, §31 (Law. Co-op Supp. 1983)

Michigan - MICH. COMPILED LAWS §722.26a (Supp. 1983)

Minnesota - MINN. STAT. §518.17 (1982)

Montana - MONT. REV. CODES ANN. §40-4-222 (1983)

Nevada - NEV. REV. STAT. §125.136 (1981)

New Hampshire - N.H. REV. STAT. ANN. §458:17 (Supp. 1981)

New Jersey - Beck v. Beck, 86 N. J. 480, 432 A.2d 63 (1981)

New Mexico - N.M. STAT. ANN. §40-4-9.1 (Supp. 1983)

North Carolina - N.C. GEN. STAT. §50-13.2 (Supp. 1981)

Ohio - OHIO REV. CODE ANN. §3109.04 (Baldwin 1983)

Oregon - OR. REV. STAT. §107.137 (1981)

Pennsylvania - 23 PA. CONS. STAT. ANN. §1002 (Purdon Supp. 1983)

Texas - TEX. FAMILY CODE ANN. §14.06 (Vernon Supp. 1982)

Wisconsin - WIS. STAT. ANN. §767.24 (West 1981)

18. Florida's statute, requiring shared parental responsibility to be ordered unless detrimental to the child, provides a notable exception.

19. Beck v. Beck, 432 A.2d at 71-72.

20. MINN. STAT. §518.17 (1982).

21. ALASKA STAT. §25.20.090 (1983); FLA. STAT. ANN. §61.13 (Supp. 1983); MONT. REV. CODES ANN. §40-4-222; 23 PA. CONS. STAT. ANN. §1002 (Purdon Supp. 1983).

22. MINN. STAT. §518.17 (1982).

23. Source: Administrative Office of the Courts. In 1982, 6,751 divorces were disposed of in District Court, though how they were resolved is not reported. See also note 1, supra.

24. See note 1, supra.

25. Source: Administrative Office of the Courts. Maine currently has 21 District Court judges and 14 Superior Court justices.

26. Maine Rule of Civil Procedure 80 does provide some procedures specific to divorce actions.

27. The Commission recognizes that a significant number of Maine citizens seeking a divorce proceed pro se, without representation by or, at times even any advice from, an attorney. While every citizen has the right to represent himself or herself in any legal action, and while various groups have produced materials to guide parties in a pro se divorce -- see, e.g., DIVORCE REFORM, INC., DO YOUR OWN DIVORCE IN MAINE (1982) -- concerns may legitimately be raised about the outcomes of these divorces when children are involved. Do the parties understand the full consequences of the various child custody options? Are parties who have not received legal advice more likely to automatically choose the traditional sole custody - visitation parenting arrangement? Do judges receive particularly insufficient financial information, on which to base child support orders, when attorneys are not involved? The Commission believes that a change in

the adversary system of divorce where attorneys will be involved primarily as advisors rather than as spokespersons, may encourage parties who currently "do their own divorces" to seek legal advice in reviewing agreements reached; the costs of attorneys reviewing proposals should be more affordable than the costs of conducting litigation. A new, nonadversary system should also produce a fuller fact-finding with greater exploration of the needs and interests of children.

28. Canon 7 of the Code of Professional Responsibility published by the American Bar Association requires that: "A lawyer should represent a client zealously within the bounds of the law." The Code of Professional Responsibility has recently undergone substantial revision. The Maine Supreme Judicial Court has yet to determine if it will apply those revisions in Maine. The citation here is to Canon 7 before revision or reinterpretation.

29. Schneider v. Richardson, 411 A.2d 656 (Me. 1979).

30. Disputants are entitled to procedural due process. This constitutionally mandated concept, as applied to cases decided by traditional tribunals, has developed to include: (a) aggressive advocacy of individual client interests, (b) sufficient time for preparation and discovery of the other side's position, (c) presentation of witnesses favorable to one's position, (d) full and free "confrontation" or cross-examination of "hostile" witnesses, and (e) decision by an impartial and relatively passive fact-finder. See U. S. CONST. amends. V and XIV; ME. CONST. art. I, §§6-A and 19. See also Washington v. Texas, 388 U. S. 14 (1967); Specht v. Patterson, 386 U. S. 605 (1967); State v. Fagone, 462 A.2d 493 (Me. 1983); Barber v. Inhabitants of Town of Fairfield, 460 A.2d 1001 (Me. 1983) (time to prepare, right to call witnesses); Ziehm v. Ziehm, 433 A.2d 725 (Me. 1981) (right to cross-examination); In re Bernard, 408 A.2d 1279 (1979); Hughes v. Black, 156 Me. 69 (1960) (impartial fact-finder); Public Utilities Commission v. Cole's Express, 153 Me. 487 (1958).

31. Considering the litigation context, this advice is entirely proper. A lawyer's preparation and tactics can be seriously compromised if parties are having direct dealings, not involving the lawyer, which effect the subject matter of the litigation. Further, any statements made by one party to the other may be used against the speaker at trial. ME. R. EVID. 801(d)(2). Direct contacts between a lawyer for one side and the other party are explicitly prohibited by Rule 3.6(j) of the Maine Bar Rules, and lawyers frequently advise clients not to contact each other to avoid being drawn into disputes that may develop if the parties do meet.

32. Rule 80(f) of the Maine Rules of Civil Procedure requires a court order to approve discovery regarding issues other than alimony, child support and counsel fees. However, since the question of who will get custody is necessarily related to the question of how much child support should be paid, this rule does not significantly limit inquiry into each parent's private life. Efforts to limit discovery under this rule are rare.

33. This 60 day limit, imposed by Rule 80(g) of the Maine Rules of Civil Procedure, may work particular inequity where the parents, having determined to terminate the marriage, seek counseling and work out an amicable settlement prior to commencing the formalities of litigation. In such cases the 60 day limit prolongs the uncertainty for the children which has developed as the marriage has failed and separation has occurred. If custody cases are not to be removed from the litigation arena, the Rule should at least be modified to eliminate this artificial delay to final settlement. The adverse impacts of removing the 60 day limit could be avoided by permitting a final determination without a time delay only where both parties appear and a written agreement is presented to the Court stating the parties mutual desires regarding termination of the marriage, child custody, and economic issues.

34. Resnik, Managerial Judges, 96 HARV. L. REV. 374, 426-35 (1982).

35. See Lagarde v. Lagarde, 437 A.2d 872, 874 n. 1. (Me. 1981). In that case the trial judge, seeking to reduce the acrimony of the proceedings, refused to allow the divorcing wife to testify regarding the problems of the marriage, where both parties were seeking a divorce. The Law Court, although it did not reverse, criticized this restriction and suggested that trial judges should allow parties to say their piece, intended to be critical of the other party, as an essential element of a fair hearing -- even if the criticism of the other party is irrelevant to the disputed issues before the court.

36. ME. REV. STAT. tit. 19, §751 (West Supp. 1983). These child custody studies in some instances, are not completed for six to eight months. D. HEBB, LIFE WITHOUT FATHER: CHILD CUSTODY IN MAINE 46 (Maine Civil Liberties Union July 1978). The Commission heard reports that judges have curtailed their use of these investigations due to the length of time before completion, and due to the statutory change, effective in July 1982, requiring parents who are able to pay the costs of these studies, which may run into hundreds of dollars, to reimburse the Department of Human Services.

37. A divorce judgment can become final instantly upon issuance if both parties file a waiver of appeal. In practice, this does not occur in contested cases.

38. D. HEBB, LIFE WITHOUT FATHER: CHILD CUSTODY IN MAINE (Maine Civil Liberties Union July 1978).

39. Any vestage of the maternal presumption has, at least in law, been removed by Lane v. Lane, 446 A.2d 418, 419 (Me. 1982).

40. D. HEBB, supra note 38 at 4.

41. Id. at 84-87.

42. 1980 BLAINE HOUSE CONFERENCE ON FAMILIES, REPORT TO GOVERNOR JOSEPH E. BRENNAN ON CONFERENCE PROCEEDINGS AND RECOMMENDATIONS (September 1980).

43. Id at 12.

44. COURT MEDIATION SERVICE, MEDIATION IN MAINE: FIVE YEARS OF PROGRESS (November 1982). The Mediation Service operates in the areas of small claims, landlord/tenant, disclosure, and domestic relations. Some of the information contained in the report follows:

    -- FY 81: 130 domestic relations mediation cases; aver. time - 2 hrs. 45 min. (range: 10 min. to 8 hrs.); 68 resolved by mediator, 36 referred to judge, 26 continued

    -- FY 82: 83 domestic relations mediation cases; aver. time 2 hrs. 15 min. (range 20 min. to 7 hours); 47 resolved by mediator, 19 referred to judge, 17 continued

    -- FY 81, 82: aver. cost per case (all types of mediation) - $24.73; per resolved case (all types) - $40.94; total mediation expenditures - $34,099.92

45. Id. at November 16, 1982 letter from Lincoln Clark to Chief Justice McKusick.

46. The order requires:

    -- Attorneys to inform clients of the availability of court-sponsored mediation, and to discuss the possibility of mediation with a client and opposing counsel

    -- Judges to inquire about efforts to settle, and to recommend mediation where appropriate

    -- Courts to give scheduling priorities to cases where parties have attempted to mediate

47. MEDIATION IN MAINE reported domestic relations mediation occurring in only seven of the 32 Maine District Courts, supra note 44 at 25, and in only two of the 16 Maine Superior Courts, supra note 44 at 27 and 28. The figures for October 1983 presented to the Commission by the Director of the Court Mediation Service indicated that mediation still does not occur in Calais, Caribou, Dover-Foxcroft, Fort Kent, Kittery, Lincoln, Machias, Madawaska, Millinocket, Newport, Presque Isle, Rumford, and Van Buren. In a recent speech to the Legislature, Chief Justice McKusick indicated that, during the period of May through December 1983, an average of 50 divorce cases per month were mediated in Maine. Chief Justice McKusick, The State of the Judiciary: A Report to the Joint Convention of the 111th Maine Legislature 3 (January 26, 1984).

48. Lincoln Clark, Director, Court Mediation Service, Statement to the Commission to Study the Matter of Child Custody in Domestic Relations Cases 1 (December 1, 1983).

49. H. IRVING, DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM 47 (1980).

50. Id.

51. California has provided the model for all other existing conciliation courts. See CAL. CIV. PROC. CODE §1740 et. seq. (West 1982).

52. The states the Commission's research disclosed as having Conciliation Courts are: California, Arizona, Indiana, Montana, Nebraska, Ohio, Oregon, and Washington.

53. CAL. CIV. CODE §4607 (West 1983). Other states may mandate mediation by court rule not uncovered by the Commission. See, e.g., DEL. FAMILY COURT R. 470 (1981).

54. Cross-examination of mediators making recommendations to a court may have to be permitted -- See Friedberg, The Custody Compromise 3 CAL. LAWYER 22, 25 (reporting on McLaughlin v. Superior Court, 140 CA 3rd 473 (1983)) -- even though by statute, information disclosed in mediation conferences is confidential. Under the California statute, mediators may also exclude counsel from the conferences.

55. In Los Angeles county in 1981, 1,459 parents mediated their child custody disputes. Of those cases, 720 ended up in court. Friedberg, supra note 54 at 24.

56. ARIZ. REV. STAT. ANN. §25-381.23 (Supp. 1983).

57. ALASKA STAT. §25.20.080 (1983); CONN. GEN. STAT. ANN. §46b-56a (Supp. 1983); ILL. ANN. STAT. ch. 40, §404 (1980); KY. REV. STAT. §403.170 (Supp. 1982) (at the request of either party); OHIO REV. CODE ANN. §3105.091 (Baldwin 1983).

58. FLA. STAT. ANN. §749.01 (Supp. 1983); MICH. COMPILED LAWS §552.513 (Supp. 1983).

59. KY. REV. STAT. §403.170 (Supp. 1982) (may suggest counseling); MASS. ANN. LAWS ch. 208, §§1A, 1B (Law Co-op Supp. 1983); 23 PA. CONS. STAT. ANN §1006 (Purdon Supp. 1983).

60. DEL. CODE ANN. tit. 13, §724 (1981). ILL. ANN. STAT. ch. 40, §604 (1980); KY. REV. STAT. §403.290 (Supp. 1982); MINN. STAT. §518.166 (1982).

61. IA. CIV. CODE ANN. art. 146 (West Supp. 1983); MONT. REV. CODES ANN. §40-4-224 (1983); OHIO REV. CODE ANN. §3109.04 (Baldwin 1983); 23 PA. CONS. STAT. ANN. §1007 (Purdon Supp. 1983).

62. The Commission wishes to emphasize that it views the issue of child support as one of the most crucial in any divorce case involving minor children. However, the Commission viewed its charge to require a focus on the adequacy of Maine's child custody laws. Still, issues of custody and support are not entirely separate. The most thorough study to date of the complex subject of what factors contribute to the likelihood of support payment is D. CHAMBERS, MAKING FATHERS PAY

(1979). Mr. Chambers' research in Michigan indicates that fathers' involvement with their children encourages a greater likelihood of child support payment over the life of a decree. Id. at 129.

The Commission also examined Maine's current statutory and administrative system for child support enforcement. Maine has enacted comprehensive legislation -- administered by the Support Enforcement and Location Unit, Department of Human Services -- to seek and enforce child support compliance. A recent report of the Federal Government demonstrates that Maine's support enforcement agency does well, especially in comparison to other states, in using many possible tools and actually achieving collections of child support for AFDC (Aid to Families with Dependent Children) and non-AFDC families. See U. S. DEP'T. OF HEALTH AND HUMAN SERVICES, CHILD SUPPORT ENFORCEMENT: 7th ANNUAL REPORT TO CONGRESS FOR THE PERIOD ENDING SEPTEMBER 30, 1982 (December 31, 1982). The legislation proposed by the Commission is not intended to remove or alter the current system for enforcing child support compliance after divorce. The Commission believes that its recommendations for a new system for granting divorces will increase the initial amounts ordered as child support, and will encourage the parent responsible for child support to meet his or her obligation.

63. The importance of placing the child's interests first once that child's placement or custody becomes a subject of legal controversy is emphasized in one of the most important texts on the subject: J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). "The child's interest should be the paramount consideration once, but not before, a child's placement becomes the subject of official controversy." Id. at 105. In a later and related book, the same authors again emphasize the importance of placing the child's interests first once controversy beings, and also urge that one of the goals of the process must be "to assure for each child and his parents an opportunity to maintain, establish, or reestablish psychological ties to each other free of further interruption by the state." J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (Free Press ed. 1979) at 5 (emphasis added).

The first book establishes and the second book reiterates three guidelines for making child placement decisions once placement has become the subject of legal action:

> Placement decisions should safeguard the child's need for continuity of relationships.
>
> Placement decisions should reflect the child's, not the adults, sense of time.
>
> Placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

Id. at 6.

Both books are dedicated to a general discussion of all instances when child placement becomes a matter of official controversy -- abuse and neglect cases, abandonment, juvenile proceedings, guardianships and divorce or separation of parents; the overall goals appear equally applicable in all cases.

64. For example, on May 6 and 7, 1983, the Maine State Bar Association presented a Family Law Symposium as part of its continuing Legal Education Program. The Symposium was entitled "Child Custody and Visitation: An Agonizing Decision." Maine attorneys, judges, and mental health professionals participated.

65. See note 30, supra. Derek C. Bok, President of Harvard University, and a former law professor, reported in 1982 to Harvard's Board of Overseers on the state of the legal system and legal education in this country. Some of his comments are relevant to the Commission's recommendation of a nonadversarial, more informal approach to the resolution of divorce disputes:

> ...At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they arouse great temptations to shoulder aside one's competitors, to cut corners, to ignore the interests of others in the struggle to succeed. In such a world, much responsibility rests on those who umpire the contest. As society demands higher standards of fairness and decency, the rules of the game tend to multiply and the umpire's burden grows constantly heariver.
>
> Faced with these pressures, judges and legislators have responded in a manner that reflects our distinctive legal traditions. One hallmark of that tradition is a steadfast faith in intricate procedures where evidence and arguments are presented through an adversary process to a neutral judge who renders a decision on the merits. Compared with procedures used in other advanced countries, ours are elaborate and hence relatively expensive. They also force the parties, rather than the state, to bear most of the cost of finding the facts, thus adding further to the burden of going to court.

D. Bok, A Flawed System, HARVARD MAGAZINE 42 (May-June 1983).

66. Supra note 48. ME. REV. STAT. tit. 19, §691 (West 1981), provided, prior to 1973, for mandatory marriage counseling prior to action on a divorce petition.

67. See Letter to the Commission from Roger J. Katz on behalf of the Maine Trial Lawyers Association (December 1, 1983).

68. See, e.g., id.; Chief Justice McKusick, supra note 47; supra note 66.

On November 11, 1983, the Supreme Judicial Court met with the Civil Rules Advisory Committee to review proposed Civil Rules Amendments. The Court rejected the proposed addition of Rule 80(o) on the ground that it would pressure divorcing parties to mediate, contrary to the

intent of the March 7, 1983, administrative order to keep mediation as a voluntary process. The Civil Rules Committee had proposed that Rule 80(o), read:

> The parties shall file at least three days before hearing a statement indicating what attempts at mediation have been made.

See Information Copy of letter from L. Kinvin Worth, Dean, Unviversity of Maine School of Law to George Z. Singal, Esq. (November 21, 1983) and Copy of Proposed Rule 80(o) both contained in the Commission's files.

69. See MEDIATION IN MAINE, supra note 44 at 25 and 26. See also the figures for fiscal year 1983 (as of October 1983) presented to the Commission by the Director of the Court Mediation Service.

70. See Pearson and Thoennes, Mediating and Litigating Custody Disputes: A Longitudinal Evaluation (Center for Policy Research, Denver, Colo.) (presented at National Conference of State Legislatures Child Support Enforcement Conference, June 1983). Pearson and Thoennes state that in their study:

- -- half of the disputants offered mediation rejected it; they suggest that statistics such as these may have influenced California's adoption of mandatory mediation
- -- a 60% agreement rate was achieved in mediation
- -- 70% of those reaching agreement chose joint custody; with sole custody, noncustodians received more visitation than usual
- -- 90% of persons mediating were pleased with the process, whether or not they reached agreement; only 50% were satisfied with the court process
- -- mediation was perceived as fair and just; mediation reduces polarization for those with some minimal ability to cooperate
- -- relitigation was rare among mediation clients

71. Cf. Chief Justice McKusick, supra note 47:

> .../U/nder the new law of last year that permits me to assign the two Administrative Court judges to sit in the Superior Court, as well as in the District Court, they have during the last six months of 1983 devoted one judge week per month to hearing contested divorces and other nonjury matters in the Superior Court in Cumberland County. At the same time they have continued to sit in the District Court for two judge weeks per month.

"An average of 50 divorce cases per month were mediated during the period May through December 1983. Even though we foresee a further increase this year, the number remains too small to provide any significant relief to our trial courts, faced with 7,500 divorce cases a year." Id.

72. L. SALK, WHAT EVERY CHILD WOULD LIKE PARENTS TO KNOW ABOUT DIVORCE 45, 93-98 (Harper and Rowe ed. 1978).

73. It may be necessary to limit application of the new process to child custody actions where both parents and the children are before the court. Interstate child custody disputes could prove difficult to address in a non-judicial forum. The Uniform Child Custody Jurisdiction Act establishes a comprehensive and necessarily complex procedure for addressing such interstate disputes through court action. ME. REV. STAT. tit. 19, §801 et. seq. (West 1981). Under the legislation proposed by the Commission, the Director of the Office of Domestic Relations is required to report to the Legislature any changes needed in other laws to implement the new legislation.

74. Cf. In re Gault, 387 U. S. 1 (1967); State v. Gleason, 404 A.2d 573 (Me. 1979); Shone v. State, 237 A.2d 417 (Me. 1968).

75. State v. Gleason, 404 A.2d at 580.

76. ME. REV. STAT. title 15, §3405(1) (West Supp. 1983).

An Act to Create the Office of Domestic Relations

Be it enacted by the people of the State of Maine, as follows:

Sec. 1. 19 MRSA c. 17 is enacted to read:

CHAPTER 17

MARITAL DISSOLUTION, ANNULMENT OR SEPARATION

§901. Legislative findings and purpose

The Legislature finds that marital dissolution, annulment or separation should not be determined through an adversary process where strict court procedures apply, where damaging delay can occur, and where great costs may be incurred. The Legislature finds that a more informal, nonadversarial forum, where facts and attitudes can be fully explored, is preferred for dispute resolution and decision-making in cases of marital dissolution, annulment or separation. This forum will encourage mediated resolutions, discourage antagonism, permit less strict procedures to apply, limit the costs of these cases, and produce faster and more complete resolutions.

A primary purpose in changing the system for determining marital dissolution, annulment or separation is concern for the best interest of minor children involved. The Legislature recognizes that it is not in the best interest of minor children for their parents to seek a marital dissolution, annulment or separation in a system that exacerbates conflict between the parents. The Legislature recognizes that it is in the best interest of minor children to encourage frequent and continuing contact with both parents. The Legislature further recognizes that children and parents are entitled to continue as close a relationship as possible despite changes in the family relationship.

§902. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings:

1. Allocated parental rights and responsibilities. "Allocated parental rights and responsibilities" means that responsibilities for the various aspects of a child's welfare are divided between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. Responsibilities may be divided exclusively or proportionately. Aspects of a child's welfare for which responsibility may be divided include primary physical residence, parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses, and any other aspect of parental rights and responsibilities. A parent allocated responsibility for a certain aspect of a child's welfare may be required to inform the other parent of major changes in that aspect.

2. Child support. "Child support" means money to be paid directly to a parent for the support of a child, and may include the provision of health or medical insurance coverage for a child.

3. Director. "Director" means the Director of the Office of Domestic Relations.

4. Jeopardy. "Jeopardy" has the meaning set forth in Title 22, section 4002, subsection 6.

5. Office. "Office" means the Office of Domestic Relations.

6. Original petition. "Original petition" means a petition for martial dissolution, annulment or separation under this chapter.

7. Post-marital support. "Post-marital support" means the payment of support or maintenance to a former spouse over a period of time, or a payment of a lump sum of money instead of a periodic payment.

8. Shared parental rights and responsibilities. "Shared parental rights and responsibilities" means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities and both parents must confer and make joint decisions regarding the child's welfare.

9. Sole parenting. "Sole parenting" means that one parent is granted exclusive parental rights and responsibilities with respect to all aspects of a child's welfare, with the possible exception of the right and responsibility for support.

§903. Office of Domestic Relations

1. Office. The Office of Domestic Relations shall be established in the judicial department. The judicial department shall provide office space for the director and for each domestic relations conciliator. The District Court shall be the place of filing of petitions to be heard by the office for marital dissolution, annulment or separation, of modification or enforcement petitons, and of orders arising from these petitions. The office shall provide administrative support to all domestic relations conciliators. The office shall provide educational and informational materials to the public and to petitioners on the functions of the office; the issues to be addressed by parties seeking marital dissolution, annulment or separation; and the best interests of children involved in these cases.

2. Director. The Governor shall appoint a Director of the Office of Domestic Relations, subject to review by the Joint Standing Committee on Judiciary and to confirmation by the Senate, who shall serve for a 6-year term. The salary of the director shall be $37,000. The director may be removed and replaced as conciliators may be under subsection 3. The director shall be responsible for the administration of the office and for appointment of personnel, other than domestic relations conciliators. The director shall provide training for conciliators so that they meet the requirements of subsection 2, paragraphs C through F.

In January of 1985 the director shall report to the Legislature any further statutory changes needed to implement this chapter.

3. Conciliators. The Governor shall appoint * Domestic Relations Conciliators, subject to review by the Joint Standing Committee on Judiciary and to confirmation by the Senate, to be distributed by the director among the prosecutorial districts established in Title 30, section 553-A. The salary of a conciliator shall be $35,000. The concilators shall participate in the Maine State Retirement System. A person appointed as a conciliator shall have the following minimum qualifications:

A. A law degree or a masters degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships;

B. At least 2 years' experience with domestic relations law or in counseling or psychotherapy, preferably in a setting related to the areas of responsibility of the office;

C. Knowledge of the laws affecting marital property, spousal rights and responsibilities, and parent and child rights and responsibilities;

D. Knowledge of adult psychopathology and the psychology of families;

E. Knowledge of child development, clinical issues relating to children, the effects of divorce on children and child custody research; and

F. Knowledge of other resources in the community to which families, spouses, parents and children may be referred for assistance.

The requirements of paragraphs C through F may be met by training provided by the office.

The conciliators shall serve for 4-year terms, except that upon the first appointment of conciliators the terms shall be staggered, with * conciliators appointed for 2 years and * conciliators appointed for 4 years. The Governor may remove a conciliator, with the review and concurrence of the Joint Standing Committee on Judiciary, for cause prior to the expiration of the conciliator's term. If a vacancy occurs, the Governor shall appoint a conciliator to complete the term of the vacating conciliator.

4. Other personnel. The director may appoint one clerical assistant for the director and one clerical assistant for the conciliators in each prosecutorial district. If the director determines that the amount of work required of the clerical assistants by the conciliators is sufficiently limited so that they may take on other assignments, the director shall make the clerical assistants available to the District Courts to aid with court clerical work. The director may employ by private contract investigators, counselors or other consultants to assist the

* the number of conciliators needed is still under discussion

conciliators. The director may, upon demonstrated need, appoint part-time personnel to serve as conciliators. These part-time personnel shall have the qualifications required of conciliators under subsection 3, and may serve for no more than 2 years.

§904. Powers and duties of conciliators

1. Equitable agreement or decision. The duty of the conciliator is to help the parties reach an equitable agreement on property disposition, post-marital support and payment of fees related to the petition, and an agreement on child support, residence of minor children, parent-child contact and decision-making regarding minor children that is equitable and is in the best interest of the children. When all reasonable efforts to achieve an agreement fail, the duty of the conciliator is to make a decision on the disputed issues. Where a child is involved, the conciliator shall seek an agreement that:

A. Provides parental direction, living arrangements and financial support which is in the best interest of the child;

B. Preserves a relationship of frequent and continuing contact between the child and each parent;

C. Promotes responsible communication between the separated parents regarding the welfare of the child; and

D. Achieves stability for the child in parental contacts, living arrangements, educational services and relationships with friends and relatives.

2. Best interest of children. The conciliator shall in all cases involving children safeguard the best interest of the children. In cases where an agreement is not reached on issues involving a child and the conciliator must decide these issues the conciliator shall apply the standard of the best interest of the child. In applying this standard the conciliator shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;

I. The capacity of each parent to cooperate or to learn to cooperate in child care;

J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;

K. The effect on the child if one parent has sole authority over the child's upbringing; and

L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

3. Equal consideration of parents. In all cases involving children, the conciliator may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's sex or the child's age or sex.

4. Order. Every final order issued under this chapter shall contain:

A. Where a child is involved, a provision for child support or a statement of the reasons for not ordering child support;

B. Where a child is involved, a statement that each parent shall have access to records and information pertaining to a minor child, including but not limited to medical, dental and school records, whether or not the child resides with the parent, unless such access is found not to be in the best interest of the child or is found to be sought for the purpose of causing detriment to the other parent; and

C. A statement as to how the costs and fees, including attorneys' fees, associated with the petition are to be paid.

5. Preliminary orders. The conciliator may issue preliminary orders on any of the issues of post-marital support, property disposition, child support, residence of minor children, parent-child contact and decision-making regarding minor children at the first meeting of the conference on the petition. These orders shall remain in effect as specified by the conciliator or until the issuance of an order under section 907, whichever is the shorter period of time.

§905. Bringing a petition

1. Jurisdiction. The Office of Domestic Relations shall have jurisdiction over all petitions for marital dissolution, annulment or separation filed on or after July 1, 1985. The office shall have jurisdiction over the parties to the petition and all persons having any relation to the petition.

2. Filing the petition; 3rd persons. On or after July 1, 1985, any spouse, or both spouses, seeking marital dissolution, annulment or separation shall file with the District Court a petition, on forms provided by the office, invoking the jurisdiction of the office. The District Court shall inform the office of a petition within 1 day of its filing. The director or his designee shall within 7 days from the filing of the petition assign the petition to a conciliator; provided that if minor children are affected by the petition and the minor children reside with one of the parties in a district, the petition shall be assigned to a conciliator in that district.

Where minor children are involved any interested 3rd person may give notice to the District Court requesting the granting of rights of contact with the minor children to the 3rd person. The notice shall be on forms provided by the office. The 3rd person shall submit the notice to the District Court at the time of the filing of the petition or at any subsequent time prior to the first meeting of the conference on the petition. The District Court shall inform the office of the filing of a notice within 1 day of its filing. The notice shall be sent to the conciliator assigned to the petition.

3. Petition contents. The petition shall contain at a minimum:

A. The order sought, whether for marital dissolution, annulment or separation;

B. The grounds upon which marital dissolution, annulment or separation is sought;

C. The name and address of the petitioner or petitioners;

D. If the petition is filed by one spouse only, the name and address of the other spouse;

E. The name, age and address of any minor child whose welfare may be affected by the petition;

F. A statement as to whether or not any minor child affected by the petition is receiving public assistance;

G. A statement as to whether or not any minor child affected by the petition is currently in jeopardy;

H. The following facts:

(1) The occupation of each spouse; and

(2) The date of the marriage and place at which it was registered;

I. The date and place of any prior marital litigation or of any petition for marital dissolution, annulment or separation under this chapter; and

J. The arrangements sought, if known, with regard to post-marital support, property disposition, child support, residence of minor children, parent-child contact and decision-making regarding minor children.

4. Fees. A fee of $75* shall accompany each petition filed under subsection 2, unless the petitioner files with the petition, on a form provided by the office and signed and sworn to by the petitioner, information demonstrating an inability to pay the $75 fee. In such a case the fee for filing a petiton shall be based on ability to pay according to a fee schedule established by the director.

§906. Conducting the conference

1. Place, date, notice of conference. Upon assignment to a petition for marital dissolution, annulment or separation, the conciliator shall set the place of the conference on the petition. The conference shall occur at an office of the conciliator, or, if more convenient or greater space is needed, in a meeting room provided in the place for holding court established under Title 4, section 115 in the appropriate county. The conciliator shall set a reasonable date for the conference, not sooner than 30 days nor later than 45 days after notice of the conference is sent, except that if the petition contains a statement that a minor child is currently in jeopardy the date set for the conference shall be as soon as possible. If the petition contains a statement that a minor child is receiving public assistance the conciliator shall notify the Department of Human Services of the petition and the department shall be treated as a party to the petition if the department so requests. The conciliator shall send a notice in writing, within 7 days from assignment of the petition, to each party of the date, time and place of the conference. Notice shall be by certified mail, return receipt requested. With the notice the conciliator shall send forms, including forms seeking a statement of resources, prepared by the office, to assist the parties in planning for the conference and to provide the conciliator with information. The parties shall return these forms to the conciliator within 7 days from their receipt. The conciliator may request the parties to bring other materials to the conference. The conciliator shall also send with the notice a statement that the parties are required to attempt to reach an agreement on post-marital support, property disposition, child support, residence of minor children, parent-child contact and decision-making regarding minor children prior to the conference. The conciliator shall send with the notice materials and information to help the parties reach an agreement. The parties shall bring any agreement reached or any agreement proposed by a party to the conference.

2. The conference. The conference shall be conducted informally by the conciliator as a private meeting or series of private meetings to resolve disputes between the parties and procure an agreement on post-marital support, property disposition, child support, residence of minor

*the amount of the fee is still under discussion, but the intent is to establish a fee, such as $75, that will allow the process of divorce to be virtually self-funding

children, parent-child contact and decision-making regarding minor children. The conciliator shall review any agreement reached by the parties prior to the conference. The conciliator may meet separately with a party if necessary. The conciliator shall seek a parenting agreement that provides for the most possible sharing of rights and responsibilities according to the best interest of the child, and shall make a substantial effort to help the parties reach an agreement. The conciliator:

A. Shall not apply the Maine Rules of Evidence at the conference, but shall observe the rules of privilege recognized by law. Evidence shall be admitted if it is the kind upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Evidence which is incompetent, irrelevant, immaterial or lacking in probative value may be excluded;

B. May administer oaths and affirmations, take and authorize depositions, certify to official acts and issue subpoenas to compel the attendance of persons and the production of books, papers, correspondence, memoranda and other records when required by the interests of any party. Subpoenas shall be issued under the procedures established in the Maine District Court Civil Rules. Depositions may be taken for any of the following causes:

(1) When the deponent resides out of, or is absent from, the State;

(2) When the deponent is bound to sea or is about to go out of the State;

(3) When the deponent is so infirm or sick as to be unable to attend at the place of the conference; and

(4) When the conciliator otherwise finds a deposition to be necessary.

The depositions shall be taken by written interrogatories prepared and compiled by the conciliator. The deposition shall be signed and sworn to by the deponent;

C. May meet with any minor child affected by the petition or any 3rd person having a relation to the petition; and.

D. Shall tape record the conference, including any meeting of the conciliator with one party, children or 3rd persons. At the expense of a party requesting it, unless the party demonstrates on forms provided by the office and signed and sworn to by the party that the party is unable to pay the expense, a transcript of the tape recording shall be made. The record shall consist of the petition, the tape recording, other evidence received and considered, any written agreement entered into by the parties that becomes an order, and any written findings and decision by the conciliator that becomes an order.

3. Attorneys. An attorney representing a party may be present at the conference if the party so requests. Attorneys shall not cross-examine persons present at the conference unless permitted to do so by the conciliator. Attorneys may submit questions to be asked during the conference to the conciliator.

4. Investigations or referrals. The conciliator, upon his own initiative or the request of a party, may order an investigator contracting with the office to investigate the circumstances of a child and his parents. The investigator shall submit a written report to the conciliator and the parties by the date set by the conciliator. The conciliator, upon his own initiative or the request of a party, may refer the parties and their children to a counselor contracting with the office. The counselor shall, if requested by the conciliator on his own initiative or at the request of a party, submit a written report to the conciliator and the parties by the date set by the conciliator. The conciliator may use the services of any other office personnel in any case.

§907. Order

1. Agreement. If upon conclusion of the conference, as determined by the conciliator, the parties have reached an agreement which meets the requirements of section 904, subsection 1, on any of the issues of post-marital support, property disposition and, if minor children are involved, child support, residence of minor children, parent-child contact and decision-making regarding minor children, the conciliator shall cause the agreement to be reduced to writing and shall obtain the signatures of both parties on the agreement. An agreement must also contain the provisions required by section 904, subsection 4. The signed agreement, after the conciliator's signature is attached, shall become a final order of the conciliator.

2. Decision without agreement. If any issues concerning post-marital support, property disposition and, if minor children are involved, child support, residence of minor children, parent-child contact and decision-making regarding minor children are not agreed upon by the parties at the conclusion of the conference, as determined by the conciliator, the conciliator shall issue written findings and a written decision on the issues not agreed to. The decision shall be equitable and where property disposition is involved shall be based on the law of marital property. Where minor children are involved the decision shall be based on the best interest of the children under section 904, subsection 2. The conciliator shall order shared parental rights and responsibilities, allocated parental rights and responsibilities or sole parenting according to the best interest of the child. The decision shall contain written findings. The decision must also contain the provisions required by section 904, subsection 4. This decision when written and signed by the conciliator shall become a final order of the conciliator.

3. Report and effect of order. The conciliator shall report the order to the office. The order shall be filed in the District Court. The conciliator shall also cause copies of the order to be given to the parties. The order shall have the same force and effect, and shall be given the same full faith and credit, as a court order.

4. Modification or termination. Any party to the order may petiton for modification or termination of the order upon a substantial change of circumstances. The petition shall be on forms provided by the office and available at the District Court. The petition shall contain the information required under section 905, subsection 3, paragraphs C through J, plus the date of the order to which the petition under this subsection relates and a statement of the alleged reason for modification or termination. The petition shall be filed with the District Court. The District Court shall inform the office of a petition within 1 day of its filing. The office shall assign the petition to the conciliator who issued the original order, if possible, or as original petitions are assigned. The procedures for a conference on the modification or termination petition shall be the same as those for an original petition.

Modification or termination of an order established under chapter 5 or 13 shall, on or after July 1, 1985, be sought under the procedures established in this subsection, provided that there has been no action to modify or terminate the order by the party seeking the modification or termination under this subsection within 3 years from the date of the order. If there has been such action, modification or termination of the order shall be sought under chapter 5 or 13.

5. Enforcement. Any party to the order, including 3rd persons granted rights of contact with minor children in the order, may petition for its enforcement. The petition shall be on forms provided by the office and available at the District Court and shall contain the information required under subsection 4, except that in place of the alleged reason for modification or termination the petiton shall state the alleged violation of the order. The petition shall be filed with the District Court. The office shall be informed and a petition shall be assigned as a petition under subsection 4.

If the alleged violation is a failure to pay child support, the person to whom the support is owed may, at any time, seek relief by resort to any criminal, civil or administrative remedies available at law. Nothing in this chapter shall be construed to limit the remedies available for failure to pay child support under Titles 17-A and 19.

If, upon a petition for enforcement, the conciliator finds any party to be in violation of the order, the other party may enforce the conciliator's order in District Court as contempt or in any other manner that decrees for equitable relief may be enforced. If the court finds a party in violation of the order, it may order that party to pay the prosecuting party the costs of enforcing the order, including attorneys' fees.

§908. Appeals

Any party to a final order may appeal the decision of the conciliator under section 907, subsection 2, to the Superior Court. The court shall review the decision for abuse of discretion or error of law. Appeals to the Supreme Judicial Court may be taken as in other civil matters.

§909. Rules

The Supreme Judicial Court may adopt rules under Title 4, section 8 to

carry out the provisions of this chapter. These rules may not be incompatible with the findings and purposes set forth in section 901.

Sec. 2. Effective date. That part designated §903 of Sec. 1 shall be effective 90 days after adjournment of the Legislature. The remainder of Sec. 1 shall be effective on July 1, 1985.

STATEMENT OF FACT

The purpose of this bill is to remove actions for divorce, annulment, or separation from the traditional court process. These actions, when children are involved and when they are not, will be heard by a new office, connected to the courts, established to assist persons seeking divorce, annulment, or separation to reach agreements on the financial, property, and child care issues facing them. The primary goal of this bill is to remove these issues, especially when children are involved, from the adversary process required by strict court procedures.

A second goal of the bill is to change the terminology of what are now called child custody decisions. Terms such as "custody," "visitation," and "joint custody" cause two problems: When custody is given to one parent, with visitation rights given to the other, the implication is that the visiting parent is no longer a parent but a visitor. When custody or joint custody are decreed, parties often remain confused as to how parental rights and responsibilities are to be exercised. This bill seeks to promote instead as much sharing of parenting as possible according to the best interests of the child. Both parents remain equally responsible for child care when shared parental rights and responsibilities are ordered. Various aspects of child care -- such as primary physical residence, child support, parent-child contact, and medical or educational decisions -- may, where sharing of these aspects is impossible, be allocated between the divorcing parents based on the best interest of the child. As much involvement as possible of both parents in and as much responsibility as possible on both parents for the lives of their children is in the best interest of children. However, sole parenting, where one parent is given full rights and responsibility for a child -- except, perhaps, for child support obligations -- may in some cases be best for the children involved. Section 1 of the bill accomplishes the goals set forth above:

§901 in the bill states the legislative findings and purposes.

§902 provides definitions. In place of the current statutory terms of custody, visitation, and joint custody this bill describes shared parental rights and responsibilities, allocated parental rights and responsibilities, and sole parenting.

§903 provides for the establishment of an Office of Domestic Relations and the appointment of a Director and * Conciliators. The conciliators will act as mediators, dispute-resolvers, and, where necessary, decision-makers when divorce, annulment, or separation is sought. The director will administer the office, and must report to the Legislature in January of 1985 on any further statutory changes needed to implement this legislation.

* the number of conciliators needed is still under discussion

§904 specifies the powers and duties of conciliators. The conciliators must seek an equitable agreement between the parties, and, where children are involved, must seek an agreement in the best interest of the children. This includes seeking financial support for a child, frequent and continuing contact between parents and their child, communication between parents, and stability and continuity for the child. In seeking the best interest of a child a conciliator is to consider several listed factors. Conciliators are not to consider a mother or father better able to care for a child simply because the person is the mother or father. Every order by the conciliator must discuss child support, parental access to information and records pertaining to the child, and payment of fees.

§905 provides for the bringing of petitions for marital dissolution, annulment, or separation. These petitions are filed in the District Court. The Office of Domestic Relations is notified of the filings and assigns petitions to conciliators. Third persons may seek through the office to be granted rights of contact with a child affected by a petition. Petitions are generally accompanied by a $75* fee.

§906 describes the conduct of the conference on a petition. The conference is a private meeting or series of private meetings between the conciliator and the parties. Attorneys may be present. The conference is aimed at achieving an agreement on post-marital support, property disposition, child support, residence of minor children, parent-child contact and decision-making regarding minor children. A parenting agreement -- providing for the most possible sharing of rights and responsibilities, and, where necessary, allocating rights and responsibilities -- according to the best interest of the children is to be sought. The conciliator or a party may request family investigations or counseling.

§907 provides for an order arising from the conference with a conciliator. Any agreement reached by the parties that, where children are involved, is in the best interest of the children becomes an order. Any issues upon which the parties cannot agree must be decided by the conciliator. A parenting order should provide for the most possible sharing of rights and responsibilities. Where rights and responsibilities must be allocated the conciliator shall do the allocation according to the best interest of the child. The conciliator may, in a proper case, order sole parenting.

Parties may seek modification, termination, or enforcement of orders through a conference with the conciliator. Modification of divorce, annulment, or separation decrees previously granted by a court will, after July 1, 1985, be sought through the conciliator's office, provided there has been no action on the decree for 3 years by the person seeking the modification or termination.

Nothing in this legislation precludes a party from using other means of child support enforcement available in statute. If the conciliator finds any violation of the order, the other party may seek court enforcement of the order.

* the amount of the fee is still under discussion, but the intent is to establish a fee, such as $75, that will allow the process of divorce to be virtually self-funding

§908 permits appeals from a conciliator's order, arrived at without agreement of the parties, to Superior Court. The order will be reviewed for error of law or abuse of discretion.

§909 permits the Supreme Judicial Court to adopt rules.

Finally, Section 2 of the bill establishes an effective date for this legislation. The provisions establishing the office, and permitting appointments and administrative functions to proceed, will be effective ninety days after the Legislature adjourns. The change to this new method of hearing and deciding actions for marital dissolution, annulment, or separation will not occur until July of 1985.