

# TABLE OF CONTENTS

**[\\*\\*Click the title or page number to go directly to the desired section.](#)**

Introduction.....	1
Parenting and Parenting Plans.....	9
Parenting Coordinators.....	13
Legal Services.....	15
Court Procedures.....	21
Protocols.....	27
Alternative Dispute Resolution (ADR).....	29
Support Services.....	39
Education.....	43
Statutes and Language.....	53
Domestic Violence.....	59
Continuation of Task Force on Family Law.....	63
Appendix.....	65

## **PARENTING AND PARENTING PLANS**

### **Recommendations:**

- 1. Change terminology such as “custody” and “visitation” to words reflecting the continuing role of both parents in each child’s life.**
- 2. Encourage an educational campaign about the continuing role of both parents and the terminology changes.**
- 3. Put the Child Impact Program and Mediation at the beginning of the process.**
- 4. Enable court staff to provide information and referrals about parenting and dispute resolution alternatives at the first contact with the court system.**
- 5. Require parents to file a parenting plan, if possible, an agreed-on parenting plan.**
- 6. Provide a statutory checklist for determining a child’s best interests in developing a parenting plan.**
- 7. Amend child support statutes to deal with shared or split residential arrangements.**
- 8. Establish a procedure for the review and update of child support without reopening the case.**

### **Discussion:**

Numbered paragraphs relate to the recommendations

1. The Task Force proposes refocusing both the culture in New Hampshire and our legal system on parties making their own decisions and both parents being substantially involved in raising children. Except for RSA 458:15-a (the current mediation statute) the divorce and custody statutes primarily consist of procedures and legal standards to follow in litigation. The new family-centered policies, which focus on resolving disputes without litigation, should also be stated in the statutes.

By inserting these principles in the statutes, all readers, whether parents, guardians ad litem, other parties, lawyers, or judicial officers will know the background and reasons for, the specific statutory provisions. A statement of principles would assist the courts in interpreting the statutes on custody (to be called “parental rights and responsibilities”).

2. While they are important, extending the Family Division state-wide, and changing laws and court rules are not enough to protect New Hampshire’s children from adversarialness in divorce and custody cases. The message that children do best when both parents have a stable and meaningful involvement in their lives must be integrated into the practice of judicial, legal, and mental health professionals, and delivered to the citizens of New Hampshire. This is going to take time, but by starting with educating the professionals, change can begin soon. The state-wide expansion of the Family Division offers a unique opportunity for this education program.

3. Ideally, parents would attend the Child Impact Program when they were first considering divorce or separation. This would give them information about how disputes between parents affect children and how to minimize such harm.

Professionals and institutions who have contact with parents in these early stages should encourage attendance at the Child Impact Program. This would include mental health professionals, clergy, lawyers, courts, legal referral sources, and libraries. At the time the divorce or custody petition is filed, both parents should receive the Child Impact Program information.

The requirement to attend the seminar should be enforced and the deadline should be early in the case, not more than 30 days after the first conference or hearing. Court referrals to mediation should occur promptly at the time of the first hearing or conference.

4 The court system itself must commit to seeking appropriate funds so that its staff is provided significant opportunities for education on family law, recent developments in that law, and studies and research regarding child development, parental roles, and parental responsibilities in post divorce life. The court needs to commit training dollars as it expands the family division statewide so that those hearing these cases are as knowledgeable and familiar with the current state of family law as are the practitioners of family law. Many of the concepts embraced in this report, such as parenting plans and parenting coordinators, need to be better understood before they can gain widespread acceptance by members of the bench and bar. Continuing legal education in these and other topics such as child development, attachment, bonding and the effects of divorce on children should be part of ongoing judicial and legal education.

5. A parenting plan is a written description of how the parents will share the care of

their child. It includes details about decision-making responsibilities and the schedule of parenting time focusing each parent's attention on the child's needs and how to meet them consistent with putting children, rather than parents first in decision making. The plan or plans should be filed as early in the process as possible.

The requirement that parents file such a plan will encourage parents to discuss the child's needs and how they can, as parents, meet those needs. Even if the parents are unable to prepare and file an agreed-on plan, individually-prepared plans will assist the parents and the court. If the court must order a parenting plan, having the proposed plan from each parent would aid the court in preparing an appropriate plan for the parties' child.

6. In making an order for parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider the following factors:

(a) The relationship of the child with each parent and the ability of each parent to provide the child with nurture, love, affection, and guidance.

(b) The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

(c) The child's developmental needs and the ability of each parent to meet them, both in the present and in the future.

(d.) The quality of the child's adjustment to the child's school and community and the potential effect of any change.

(e) The ability and disposition of each parent to foster a positive relationship and frequent and continuing physical, written, electronic, and telephonic contact with the other parent, except where contact will result in harm to the child or to a parent.

(f) The support of each parent for the child's contact with the other parent as shown by allowing and promoting such contact.

(g) The support of each parent for the child's relationship with the other parent.

(h) The relationship of the child with any other person who may significantly affect the child.

(i) The ability of the parents to communicate, cooperate with each other, and make joint decisions concerning the children.

(j) Any evidence of abuse, as defined in RSA 173-B:1 or RSA 169-C:3, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(k) The court may consider any preference shown by the child. Considerable weight may be given to the stated preference of a mature minor, provided that preference was not unduly influenced.

(l) If a parent is incarcerated, the court shall consider the reason for and length of the incarceration, and any unique issues that arise as a result of incarceration.

(m) Any other additional factors the court deems relevant.

7. The Child Support Guidelines (RSA 458-C) have done much to decrease uncertainty and adversarialness, by removing the question of what is the right amount of child support from the agenda in most cases. However, one section of the Guidelines, (RSA 458-C:5), lists 10 “special circumstances” for a court to vary from the Guidelines amount. One of these circumstances is “split or shared custody arrangements.”

When parents have shared or split custody, the statute provides no guidance as to what child support would be fair. The decisions from the Supreme Court are not very helpful - essentially, the appropriate support can be anything from full Guidelines to zero, depending on the facts.

Because of the lack of a formula, or at least a checklist of factors to be considered, parents have difficulty agreeing on support in these situations. The result is often a feeling that the other parent is being “unfair,” anger develops, and then litigation results.

The Task Force makes no specific recommendation as to how support issues should be resolved in split or shared arrangements but clarifying legislation would reduce conflict over this subject.

8. RSA 458-C:7 provides for a review of child support every three years. Such reviews are very helpful in updating support orders in light of changes in incomes, health insurance, and daycare costs. (If either parent has a “substantial change in circumstances,” support may be reviewed at any time.)

However, if the other parent will not provide the needed information, the parent seeking the 3 year review must reopen the divorce or custody case, begin litigation, and ask the court to make the decisions for the family. This result could be avoided in many cases by requiring that the parties exchange standard information needed to calculate support in advance.

## PARENTING COORDINATORS

### Recommendation:

**The role of parenting coordinators should be established in order to assist parents in resolving ongoing parenting disagreements in high conflict cases.**

### Discussion:

A Parenting Coordinator is a person trained or experienced in managing chronic, recurring disputes between divorced parents, such as visitation conflicts and other parenting plan issues, and trained or experienced in helping parents adhere to court orders.

The parenting coordinator model is a new “professional role” and an innovative approach to dealing with high conflict and alienating families in domestic relations proceedings in the courts. Parenting coordination would apply where close oversight and monitoring of individual cases is found helpful, if not essential, for families repeatedly and protractedly involved in litigation. The role of the parenting coordinator can be as basic as mediation to assist the parents in resolving ongoing disagreements within the parenting plan, or as broad as that of “co-parenting arbitration” where decisions would be final insofar as the parents’ dispute is concerned. The scope of the parenting coordinator’s role in each specific case would be determined by the court in its discretionary power.

The parenting coordinator is not a Guardian ad Litem, but the parenting coordinator’s role might be exercised in cooperation with a Guardian ad Litem as needed and as appropriate.

The need for parenting coordinators is real. Such a resource can be a substantial contributor to the reduction or elimination of post-separation/divorce litigation around disputed child-related issues.

Appointment of the parenting coordinator would be by court order if the court’s findings justify appointment, or at the request of both parents. Appointment by the court would require a finding that the parenting issues in the case are complicated, that the parties demonstrate a pattern of continuing high conflict, or that such other conditions exist affecting the best interests of the children.

A parenting coordinator may be appointed as early as needed to assist parents in developing the parenting plan, or later for post divorce matters after a parenting plan has already been developed. The timing would be at the discretion of the court or as requested by the parents. The parenting coordinator appointment would be for a two-

year period unless otherwise ordered by the court. The parenting coordinator may resign, be removed for good cause (unless both parties stipulate to the removal), or be substituted by the legal process.

Common issues for the parenting coordinator's authority would focus on assisting parents to implement the parenting plan (custody and visitation order) and in promoting the children's best interests and needs. The standing order on appointment of a Parenting Coordinator could include: time sharing arrangements with the children; daily schedules; daycare/babysitting; parenting exchanges and transportation responsibility; medical, dental and vision care; psychological counseling and related arrangements for the children; extra-curricular activities and arrangements for the children; education, including but not limited to school choice, tutoring, participation in special education programs; discipline; methods of communication; and any other special circumstances involving the family. The parenting coordinator should be given access to non-parties and privileged information including school officials, physicians, mental health providers, guardians ad litem, and other professionals involved with the family. The parenting coordinator should also have access to related court records.

A parenting coordinator should not have authority to decide: termination of parenting plans or orders; modification of parenting plans that would reduce one parent's parenting time with the children or that would change the designation of a child's residence for school purposes; the need for supervised visitation by either parent; relocation of the residence of children; and the formal or informal religious education of children.

The role of the Parenting Coordinator in court proceedings, if any, should be defined by statute, court rules, and Court Order.

## LEGAL SERVICES

### A. Traditional Legal Services And Litigation

#### **Recommendations:**

1. **When acting as advocates, lawyers practicing family law:**
  - **Should counsel their clients to avoid inappropriate conflict;**
  - **Should realistically evaluate each client's case to not raise false expectations;**
  - **Should maintain a civil demeanor with opposing counsel and the parties; and**
  - **Should encourage their clients to do the same.**
2. **Attorneys practicing family law should obtain training in the areas of child growth and development, family violence, causes of the breakdown in the parent/child relationship, parental alienation, the impact on families of high conflict cases (especially those involving parenting issues), substance abuse, mental health issues and resources, and alternatives for resolving conflict.**
3. **Law schools should offer training specific to family law issues. Continuing Legal Education seminars and articles in legal publications should stress the benefits of less adversarial methods in family law cases.**
4. **Limited legal representation and task specific representation, including "limited appearances," should be available to attorneys practicing family law. The Rules of Professional Conduct as well as court rules should be revised to clarify the use of such representation. The Family Law Task Force recommends the adoption of the recommendations of the Supreme Court Task Force on Self Representation, as described in the report dated January 2004, on the issues of expanded legal services and limited representation.**

#### **Discussion:**

Numbered paragraphs related to the recommendations.

1. Family law cases are unique. Unlike other cases in which the litigants may never again see one another after the case is completed, cases involving the parenting of children may continue until the child reaches adulthood. Certainly the impact of litigation on family members can be felt for many years afterward. Achieving the best outcome for every member of the family requires encouraging parental cooperation whenever possible, and not exacerbating the divisions already present within the family.

In providing such advice, the lawyer is fulfilling the role of “Advisor,” as set out in the Rules of Professional Conduct 2.1.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to a body of law but to other considerations such as moral, economic, and social and political factors, that may be relevant to the client’s situation.

There will always be cases in which safety, emergency, or other factors require court action. However, in the vast majority of cases, an attorney should continuously assess the prospect that a fair settlement may often be best for the client. This requires educating the client intent on litigation about the potential range of outcomes, the cost (financially and emotionally) of that litigation, and a realistic assessment of the final outcome. Effective advocacy geared toward problem solving and fair and detailed final agreements will likely result in less post-divorce litigation, which may be as bitter and destructive as the initial divorce proceeding.

While the availability of legal services and the presence of attorneys in the family law system may be regarded by some as causing an increase in animosity and adversity, the availability of effective legal representation for all parties may well result in less adversity if done capably.

2. Legal training should reflect a shift from a focus on competition and winning to a focus on problem solving and reorganization of the family. It should encourage increased consciousness of the fact that, while advocating for the individual client, the attorney must also keep in the forefront the needs and future life of the family and its youngest members.

3. Law school programs serve as a means of not only teaching lawyering skills, but also teaching the values and insight needed to function as an effective family law attorney and problem solver.

4. There are many people who are unable to afford legal representation. There are others who simply choose not to have legal representation, but who would benefit from legal consultation or limited legal representation. Limited legal representation increases accessibility to legal advice and enables parties to choose legal representation solely for their most important or most complicated issues.

“Limited legal representation” (also called “unbundled legal services”) means that the lawyer contracts with the client to provide services that are either limited in scope or in time. For example, the lawyer might only review and advise the client on a mediated agreement, but not prepare or file any court papers. Or the services could be limited to representation at a specific hearing, rather than continuing throughout the case.

## B. Less Adversarial Alternatives

### **Recommendations:**

- 1. Parties should be provided with information regarding dispute resolution alternatives as early as possible.**
- 2. Information regarding mediation, neutral evaluation, and collaborative law should be available at all court houses, attorneys' offices, police stations, therapists' offices, and faith-based institutions.**
- 3. Referral lists for trained marital mediators, attorney neutral evaluators, and practitioners of collaborative law should be maintained by all courts.**
- 4. Parties in mediation should be encouraged to obtain independent legal and financial advice from appropriate professionals during the mediation process.**
- 5. Attorneys should be encouraged to practice collaborative law, and to inform clients of the collaborative law process as early as possible.**
- 6. The New Hampshire Bar Association, as well as private providers, are encouraged to sponsor CLE seminars for attorneys, specifically offering education in alternative dispute resolution and collaborative law methods and benefits.**
- 7. Experienced family law attorneys who are willing to volunteer as neutral evaluators should be periodically trained by the courts or through Continuing Legal Education seminars.**

### **Discussion:**

Although alternatives to traditional legal representation are discussed elsewhere in this report, because of the emergence of those alternatives and their role in changing the manner in which legal services are provided in divorce cases they are also addressed here.

Mediation is an informal process where the parties try to resolve their dispute in a private, confidential setting, with or without attorneys, with the help of a neutral third person, the mediator. The mediator does not decide who is right or wrong, or predict likely court outcomes. The mediator cannot force the disputing parties to reach an agreement or to accept particular settlement terms. Instead, the mediator will attempt to clarify the disputed issues and help the parties find a resolution that meets their underlying needs and interests. The mediator will listen to each party's perspective and facilitate a dialogue between them to help them explore ways to resolve the dispute. The mediator will focus the attention of the parties upon their needs and interests rather

than upon their positions. This requires that the mediator provide an opportunity for each of the parties to be heard in a dignified and thoughtful manner, allowing them to better understand the issues surrounding the dispute. The mediator's focus will be on inviting, encouraging and supporting the parties' presentations to and reception from one another allowing them to find a resolution that is appropriate.

Neutral evaluation is a confidential process where a trained and experienced family law attorney who is neutral and who will listen to each party's view of the problematic issues of the case and have each party talk about these issues in a reasonable and constructive manner. After listening to the parties' presentations, the evaluator will use his/her experience to predict the likely outcome should this dispute go to trial so the parties may reassess their respective positions. Using this prediction, the evaluator will attempt to assist the parties in resolving their dispute. Neutral evaluation often occurs later in a divorce case than mediation.

Collaborative Law is a dispute resolution alternative to litigation. It is a decision-making process facilitated by parties' counsel who are trained in interest-based negotiation and other non-adversarial techniques. The key to Collaborative Law is the contract signed by both parties and both counsel at the beginning of the process. All four commit to resolving all issues without litigation or threats of litigation, if either party later decides to go to court, both lawyers must end their representation.

#### C. Programs And Services For The Low-Income And Unrepresented Parties

##### **Recommendations:**

- 1. All attorneys should be encouraged to participate in the New Hampshire Bar Association's Pro Bono Program, so that free legal services for low income parties can be provided and expanded.**
- 2. If both parties qualify for free legal services, a system should be established so that both parties can be represented by a pro bono program.**
- 3. Attorneys should be encouraged to participate in the Reduced Fee Referral Program so that legal services may be provided to those individuals who do not meet the very low income guidelines of other programs.**
- 4. If both parties qualify for a reduced fee referral, a system should be developed so that both parties may obtain a referral from the program.**
- 5. The state and federal government should be encouraged to support and expand funding for New Hampshire Legal Assistance and the Legal Advice and Referral Center (LARC).**
- 7. Attorneys should be encouraged to participate in specialized programs**

such as the DOVE (Domestic Violence Emergency) program as a means of responding to emergency situations.

8. The Task Force supports the recommendations of the Task Force on Self Representation that Internet access be expanded for consumers of legal services, both through access to court websites, as well as by availability of computers at the courthouse.
9. Lawline programs should be supported and promoted.
10. Every New Hampshire attorney and every New Hampshire bank should be encouraged to participate in the Interest on Lawyers' Trust Accounts (IOLTA) Program to assist in the funding of legal service programs. Those who do participate and those banks who offer favorable rates to support the IOLTA Program should be recognized and honored.

**Discussion:**

Numbered paragraphs related to the recommendations.

1. New Hampshire attorneys are leaders nationally in their support of and participation in legal service programs such as those mentioned in this report. Law firms should reward those lawyers within their firms who do so. From the beginning of their careers young lawyers should be encouraged to participate in legal service programs and activities.
2. Pro Bono Program: Currently, the Pro Bono Referral Service can only make a referral through their program for one party due to a perceived conflict of interest. The second party is considered a conflict of interest. The advantage of a Pro Bono Referral Service referral in addition to free legal services is that court filing fees, sheriff service fees, and other court costs are waived. Such advantages should be uniformly available.
- 3-4. Reduced Fee Referral: Similarly, the conflict of interest problem in making referrals, as described above under Pro Bono, should be addressed.
5. Legal Advice and Referral Center (LARC): The Legal Advice and Referral Center ("LARC") provides a statewide toll-free telephone hot line for counsel and self-help advice. It disseminates educational pamphlets on legal issues and it operates a centralized intake system to assist eligible clients in finding legal advice and representation through LARC, New Hampshire Legal Assistance, the Pro Bono Referral program of the New Hampshire Bar Association, and other resources. The legal service hotline is staffed by attorneys and paralegals who have specialized knowledge in family, housing, consumer and public benefits law. The program is overwhelmed by the demand for legal services, but unable to expand without increased financial support.

New Hampshire Legal Assistance: Due to very limited resources, New Hampshire Legal Assistance cannot deliver services in the area of family law. However, it has, in partnership with Pro Bono, LARC, and the New Hampshire Domestic Violence Coalition, represented victims of domestic violence in seeking both immediate and permanent protection and orders for the support of children, especially in rural areas of our state.

Law School Clinics: The law school clinic provides services to low income people who are not able to be represented by other established legal service programs, and therefore should be supported as yet another means of providing legal services to those in need of services.

6. DOVE (Domestic Violence Emergency) Program: Specialized programs such as the DOVE Program allow individuals to obtain specialized legal representation to respond to domestic violence, without committing either attorney or client to representation beyond that one issue.

7. Internet Access: Many individuals have Internet access, even if not available through an individually owned computer. Programs such as the child support guideline calculator not only educate parents but serve to de-mystify the legal process, and empower individuals to make their own decisions by using resources available through the Internet.

8. Lawlines: Programs such as the New Hampshire Bar Association's Lawline Program provide a means for callers to receive an immediate response to a simple legal question, without providing actual legal advice. They serve as a means of resolving simple legal questions by providing information and also as a means of encouraging callers to obtain legal representation to understand and protect their rights in more complex legal matters.

9. IOLTA Participation: Not only do many lawyers volunteer their time representing low-income people, but they also provide financial support to legal service programs through the Interest on Lawyers' Trust Account Program (IOLTA). They should be encouraged to continue to do so.

10. Volunteers and Other Non-Court Personnel: The task force did not receive comments on the potential role which volunteers or other non-court personnel may play in the system. Perhaps that is an issue to be explored. Volunteer assistants to case managers or volunteer instructors or mediators, as well as other volunteer opportunities may all assist in either the provision of legal services or in assisting the participants in navigating the legal system. As our Court system strives to become more "user friendly", perhaps there is an opportunity for volunteers to participate in that endeavor.

## COURT PROCEDURES

### Recommendations:

1. **Courts need to scrutinize cases filed where provisional custodial issues are presented to provide prompt temporary resolutions of the custodial dispute.**
2. **Courts should be an information source and referral center for parties, and a decision-making forum only as needed.**
3. **Courts should be encouraged to make referrals in appropriate cases to mediation and neutral evaluation, and be given the ability to order parties both to go to and to pay for such services as family resources may permit.**
4. **Cases in which the permanent agreement is filed with the petition should pay a smaller filing fee.**
5. **Self scheduling for final uncontested hearings should be available in all courts which require that parties attend a final uncontested hearing.**
6. **The Vital Statistics Form needs to be made available to parties in electronic form rather than the current required typewriter form.**
7. **Courts should enable joint petitions to be used not only for divorce or legal separation cases but also for paternity or unwed child custody cases.**

### Discussion:

Numbered paragraphs relate to the recommendations.

1. The time period between the initial filing of a first pleading where children are involved and the first court hearing is a critical time in many cases that can have significant impact on the rest of the case. At present, parties to a custody case (married or not) file their pleadings asking for certain custodial provisions only in the broadest of senses (primary custody requested, or not) but with no representation of what custodial provisions will be made in the weeks or months that follow until the court can hold its first scheduled hearing. While many parents work out by agreement what parental rights and responsibilities will govern the parties and the children during this interim period, many do not. This period of time can be an enormous source of stress to the parents and the children, with each parent “jockeying for position” to establish himself or herself as the de facto primary custodial parent before the court holds its first hearing.

At present, it is widely believed that allowing the “status quo” to go on in a custodial relationship without contesting it silently reflects an acceptance that the existing arrangement is appropriate or what is best for the children.

The Task Force finds that this period of weeks or months while parents are waiting for their first hearing is problematic for many parents, and often starts cases off on very much the wrong foot. In high conflict cases, parents often never recover from the uncertainties and distrust established in this initial stage by what the “other parent” will do if left on his or her own without the court taking some control of the case. There is often not even agreement by the time the parties reach the court for a temporary hearing as to what agreements or arrangements were in place for the past weeks since the filing of the initial petition. Many times each party tries to paint the other as the one who denied, abused, or even withheld visitation with the children. In lesser conflict cases, the parents operate during this interim period without guidelines or expectations of what is to occur prior to the court holding its first hearing.

For the most part, the courts have responded reasonably well to the problem of this interim limbo period given the institutional constraints of the judicial system. The courts have made a priority of scheduling temporary hearings or structuring conferences early in the case, usually six to ten weeks from filing of the initial petition. Unfortunately, this period of delay is sometimes much longer in busier counties struggling to get initial orders of notice out on a case. This period of time can be devastating to the process of compromise and child centered focus, especially given that the time of initial breakup is often fraught with so many other changes and emotions in the life of the family.

The only mechanism that the courts currently have to bring these troubled custodial issues to the attention of the court earlier than the regularly scheduled structuring conference or temporary hearing is for the parties to request an expedited temporary hearing or Ex Parte Orders. Ex Parte Orders are rightly reserved by the courts for the most compelling or dangerous of circumstances, and then with only the most limited form of relief necessary to prevent harm until a temporary hearing can be held.

Cases involving such custody disputes need immediate court attention. Courts operating without the benefit of case managers need to schedule these cases at the earliest possible time, ahead of others on their docket. For courts with case managers, a case manager conference should be held to bring the parties together to discuss the reasons each party has for denying the other contact with the children, and to begin the process of informing these parents of the alternatives to conflict and litigation discussed elsewhere in this report. The parties must be made to understand that having no plan for the children in this context is not an option and if they cannot agree with the aid of the case manager, the case manager should use his or her authority to get the matter in front of a judge at the earliest possible time.

Courts operating without case managers but which have in place active networks of neutral case evaluators or mediators should consider calling upon these

professionals to hold sessions with parties facing such conflicts, again to educate the parties, resolve the disputes, or facilitate early scheduling before a judge. The judge or master presented with such a case should use the opportunity to make informal recommendations to the parties as to further negotiation of the matter, or make an order, to address the interim period. The court may determine this to be the appropriate opportunity to proceed with the appointment of a Guardian ad Litem in difficult cases, or defer this appointment until a fuller temporary hearing is held in hopes that further time or negotiation might resolve the interim issues. The court should exercise caution in appointing a Guardian ad Litem at this stage of the proceedings, because counsel will often not yet be involved for both sides and payment provisions aided by financial affidavits of the parties need to be addressed in a Guardian ad Litem appointment. This interim phase must not become so complex or overwhelming to litigants that it becomes a substitute for the temporary hearing process now in place.

2. Historically courts were only decision-making entities, with controversies presented there with only that goal in mind. Court processes were structured around that objective. The modern demands of family law cases however demand a broader and more adaptive role for courts to reduce acrimony and to lessen the impact on litigants and their children. Family law parties are often unaware of alternatives to litigation and unaccustomed to the processes courts require of them to present a controversy before the court. Many family law parties believe that because the court is the final arbiter of family law controversies, it is the place for them to start in resolving their family problem.

Certain core functions have been and should remain the domain of the court, among them:

Approving a temporary or final agreement or other agreement intended to be enforceable in court thereafter;

Making payment orders for support, alimony and property division;

Appointing Guardians ad Litem; and

Adjudicating controversies in which all other less adversarial processes fail to achieve resolution.

Beyond these core functions, courts need to encourage parties to actively seek the alternatives of mediation, family therapy, collaborative law, and neutral evaluation. Parties need to hear this message from judges, court clerks, case managers, attorneys, and non-legal professionals alike, because historically the courts have been the only source for resolution of these disputes. Courts need to provide specific information on where parties may obtain these other services by keeping lists of therapeutic practitioners, neutral evaluators, and mediators in their area. Some form of neutral staffing for a case, whether it be a mediator, a case manager, or a neutral evaluator, needs to be more available at earlier stages of the controversy and on a continuing

basis throughout a case as issues present themselves. To facilitate this, neutral evaluators should begin to be paid for their work by the parties, except where parties cannot afford to do so.

One frequent misconception of parties is that outside services cost money and that courts are free. While it is true that courts do not charge fees for resolving the stages of the controversy (all cases pay an equal filing fee, regardless of the nature of the controversies presented) the costs to litigants in a family law case are not “free” at all. Litigation is in fact very costly both to the parties and to society. While parties cannot be expected to factor in the societal costs in the heat of their own family dispute, they can and should be made to realize the real costs monetarily and in time and stress that proceeding in court will entail in comparison to the other settlement options. Parties need to understand that proceeding on contested issues in court requires written pleadings, ten day objection periods, interrogatories and other discovery processes, court directed scheduling (including continuances), crowded daily court dockets, and public proceedings. Financial costs of these inherent features of the court system often come as a surprise to litigants, and foment discontent as the case drags along month after month.

Courts need to stress the informality and flexibility that alternative processes provide, and the real savings in dollars (less attorney’s fees, less time lost from work, less time waiting for a financial order to take effect, etc.) in order to persuade parties to employ such alternatives. Courts should also emphasize the more intangible benefits of alternative resolution strategies. Courts need to develop information packets that parties should be expected to have read when bringing their cases to court. Court personnel at all levels, including judicial officers, need to remind parties and counsel of these alternatives, not just once in a case, but at every stage of the case, including explaining the risks and uncertainties of presenting the controversy to the court as a decision maker on each phase of the dispute.

3. Historically, courts have taken a passive approach to making referrals to mediation, collaborative law, and neutral evaluation. Referrals have been strictly voluntary, often with reliance on the parties to broach the subject entirely. A more proactive approach on the part of the courts in this area is warranted.

There is a widespread perception that since mediation and neutral evaluation are settlement vehicles, the willingness of the parties to commit to the process is a predictor of whether such processes will or will not resolve a case in the long run. This reasoning is misplaced. Parties tend to decline mediation, collaborative law, or neutral evaluation from a position of ignorance of what these processes entail, or from the view that the history of the parties to that point in seeking to resolve the controversy has been so unsuccessful that a litigated result handed down by a decision maker is the only course left. Dispute resolution alternatives introduce to the settlement process something new and different from what the parties have had to that point, namely, a disinterested facilitator who is there to recognize the impediments to resolution in the past and focus on the need for conciliation in an atmosphere of mutual respect. If nothing else,

facilitators infuse the discussion with a greater air of civility to prevent some of the kinds of breakdowns in communication that have typified the relationship to that point. Mediators and neutral evaluators are specifically trained to keep the tensions and hot button issues off to the side, and to keep the discussion focused on the issues at hand and the view toward the future. By contrast, family law litigants are often stuck on the past and the perceptions of the other party from the failed relationship, rather than their own realistic needs for their future family.

Mediation, collaborative law, and neutral evaluation should become the norm, not the exception in family law disputes not otherwise resolved by the time the case comes to court. Most families have some financial ability to pay for such interventions, and the courts should begin to order parties to attend, to select the mediator or neutral evaluator if the parties cannot agree on the choice of professional, and to order the parties to pay for a certain minimum number of sessions or beyond if the parties then choose to continue in such a process.

Neutral evaluation by volunteer attorneys, a recent arrival in Superior Court family law cases, has been accomplished using the services of volunteer attorneys scheduled upon a request of the parties through the court clerk's office. The frequency of use of neutrals varies greatly from county to county, with the program almost non-existent in some counties, and vigorous in other counties. The mediator's or neutral's role in the case should be considered to be a continuing appointment in the case so that the parties or the court may again refer the matter there for resolution throughout the case. Sliding fee scales should be available from a variety of mediators and neutrals accepting such appointments, and a provision should be adopted in the courts that would enable neutral evaluators to be compensated by the parties for this role for the more expanded participation envisioned in this recommendation.

4. Charging less is a financial incentive in all lines of commerce, and family cases should be no different. Charging less recognizes that by settling, the parties have also saved the system costs associated with what otherwise might have been a contested matter. Charging lower filing fees for a resolved case will certainly not prevent contested cases, but doing so, may make some parties stop to think it may cost less to settle. Some may perhaps try or try again to settle. Giving a price break on whether the permanent agreement is or is not filed with the petition is a bright line rule: it either is or it isn't and the fee is determined accordingly. The price break is directly tied to whether the case is or is not fully resolved.

5. Prior case law held that the question of irreconcilable differences leading to the irremediable breakdown of the marriage is a question of fact that the court must determine before granting a divorce. Statutory changes enabled courts to dispense with conducting a hearing on this or any other subject of the divorce, if the parties had reached a complete stipulation on all issues. The Family Division in its rules adopted a policy that parties stipulating on all issues need not attend court for a final uncontested hearing, but would grant the divorce if all appeared in order from the papers filed in the

case. Other courts required a final uncontested hearing, regardless of whether any concerns appeared on the face of the papers filed.

Some courts have sought to streamline the process of uncontested hearings by allowing parties submitting the necessary papers to “self-schedule” the final uncontested hearing for a set date established by the court at which time the final uncontested hearing can take place. Self-scheduling works well in the counties using it.

Dispensing with the uncontested final hearing would conserve court resources, while still enabling the court to require a hearing if one seemed necessary based on the papers filed. It reduces costs to parties in time lost from work or to pay their attorneys to attend what is a perfunctory hearing. If the final uncontested hearing concept is kept at all, allowing self-scheduling in all courts for final uncontested divorce cases will save courts and parties money and give parties a greater sense of control over their own cases with no apparent downside to courts allowing the procedure.

6. The current Vital Statistics form must be typed on a typewriter on the specific paper form provided by the court. The days of the typewriter are gone. Every other court document today is either prepared and printed by computer or handwritten and filed with the court. The one vestige is the State’s Vital Statistics Form which is required to be prepared by litigants in all divorce and legal separation cases, and must be typewritten on the preprinted form given out by court clerks. This form should be made available in downloadable format and filed like all other papers in any other case. If there are issues needed by the State, such as the quality of the paper on which the form needs to be preserved, the record keeper should make arrangements to reproduce the completed form in a medium more durable than computer printer paper, rather than imposing that requirement on every litigant or attorney in the State.

7. Joint petitions for divorce or legal separation introduced through the Family Division Pilot Program were quickly also made available in Superior Court as well. Many parties to such cases like the joint petition because it eliminates need for formal service of process, and can reflect a more cooperative attitude between parties who agree they need a divorce or legal separation, even if they may not agree upon the terms for the final agreement. There is no reason that joint petitions could not also be made available for paternity determinations or for custody cases where the parties are not married. The same potential advantages for litigants choosing to proceed by joint petition in those cases would apply.

## PROTOCOLS

### Recommendations:

1. **A series of protocols in custody cases needs to be developed by the Family Division for the handling of domestic relations cases to provide consistency in the handling of such matters in the various courts similar to the Protocols for Abuse and Neglect Cases adopted by the District Courts.**
2. **Courts should develop protocols for supervised visitation or supervised exchange orders.**

### Discussion:

Numbered paragraphs relate to the recommendations.

1. The District Courts under the leadership of Administrative Judge Edwin Kelly and a committee of practitioners, DCYF professionals, law enforcement, the public, and others developed a detailed set of guidelines for the handling of Abuse/Neglect Cases in the District Courts. The Committee spent two years developing and refining the draft protocols, and thereafter adopted them for use in all the District Courts in the state. The resulting protocols operate as a “bench book” for judges, clerks and litigants on what needs to be involved in each of the stages of an Abuse/Neglect case under RSA 169-C, from the initial arraignment, to the adjudicatory hearing, to the dispositional hearing and if appropriate to a termination of parental rights case in the Probate Court. The process of developing the protocols led the District Court to consider the many possibilities and problems involved in each stage of the case process and to address how they should be handled.

Developing written protocols for domestic relations cases in the Superior Court and Family Division Courts similarly presents the opportunity to think about how cases should be handled, and can provide benchmarks for measuring how the different courts are handling their dockets. Greater uniformity in decision-making can be expected to result. Predictability in the process tends to reduce acrimony between the parties because the array of possible outcomes that each party can expect is diminished, particularly where parties have counsel who are familiar with the system and the protocols.

2. Courts order supervised visitation where there is risk of harm to a child or a parent posed by unregulated contact with the children. Supervised visitation is most often required where there has been child abuse or neglect, drug or alcohol abuse, or where the conduct of a parent with a child exposes the child to harmful disparagement of the other parent. The goal of supervised visitation and supervised exchange is to provide the minimal degree of restriction necessary to protect health and safety for only so long as the risks persist. By their very nature, orders for supervised visitation or

supervised exchange are and should be temporary except in those situations in which the problem does not improve with time.

There is no uniform procedure in the courts for custody cases where supervised visitation or supervised exchange is ordered. In practice, most courts ordering supervised visitation or supervised exchange either make some provision in their order for review and adjustment of the supervision requirements or enable the parties to come back when the parties think the prior requirement need no longer continue. Missing from such orders on occasion are detailed court findings of the risks giving rise to the supervision requirement. Such findings are important to inform the parties and supervisors of what needs to occur or not occur in the visits; to measure how the risks are or are not changing over the period of the supervision requirement; and to determine when and how restrictions can be eased. Payment for cost of supervision must always be addressed in the order.

Periodic reviews in custody cases should be the norm where supervised visitation or supervised exchange is ordered unless the court makes a finding that improvement sufficient to do away with supervision is not likely in the foreseeable future.

Use of forms reminding judicial officers of the content of these protocols would help courts capture the points needing to be addressed in an order for supervised visitation or supervised exchange.

## ALTERNATIVE DISPUTE RESOLUTION

### Recommendations:

1. Courts must shift their approach toward helping families resolve disputes related to parental rights and responsibilities so that decisions regarding children are made by parents rather than by judicial officers.
- 2a. Information regarding Dispute Resolution Alternatives should be available when families first consider divorce or separation.
- 2b. Court staff and judicial officers should provide information and/or encourage the use of Dispute Resolution Alternatives.
3. Courts must make mediation mandatory in cases involving parental rights and responsibilities where appropriate.
4. Mediation must occur as early as appropriate.
5. The mediation process should focus on encouraging empowerment, fostering recognition and enhancing communication.
6. Parties must pay for mediation absent court or state funding. The state should fund mediation in cases where appropriate.
7. Courts should encourage the continued use of Neutral Evaluation and have the discretion to require parties to attend in appropriate cases.
8. Neutral Evaluators should be trained and qualified by the court.
9. Neutral Evaluators should be paid for their services either by the court or the parties.
10. The use of Collaborative Law should be encouraged, and information about it should be available when families first consider divorce or separation.

### Discussion:

Numbered paragraphs which follow relate to the recommendations above.

1. “Custody disputes” are some of the most contentious which the court faces. While all families are different, the tensions, antagonisms and hostility between the parents have an effect on the children. This impact is further exacerbated by the delays associated with litigating those disputes.

Changing the situation requires a departure from traditional practices. It requires addressing the fact that parents are generally in a better position to determine how their children’s needs are best met. But many parents do not make those decisions for a variety of reasons. Instead they turn to the court or their attorney, which does not reduce acrimony or conflict. This cycle will continue until alternative ways are found to encourage parents to make their own custody decisions. This will not always be easy, but leaving those decisions to the courts has not proven to be the answer.

The focus in this section is on children and how the current ways of handling “custody disputes” must be changed for their benefit. Understanding how custody matters should be addressed requires an understanding of how those issues were addressed in the past. This examination will explain the evolution in thinking about family matters and how the courts and legal community responded.

The legal doctrine of “parental famillus” controlled the disposition of child custody prior to the 19<sup>th</sup> century. Under this doctrine children were considered the property of their father when divorce occurred. As a result, custody decisions left the children’s placement solely to the discretion of their father. This doctrine began to change in the late 19<sup>th</sup> century and early 20<sup>th</sup> century with the first appearance of child custody disputes being resolved on the basis of the interests of the child. This evolution recognizing the importance of the child’s interests in custody determinations was a substantial departure from the earlier rules relying solely on the property rights associated with the father of the child.

The current “best interest of the child” standard was originally conceptualized as the tender years doctrine. Under this doctrine, it was assumed that the mother was better suited and trained to take care of the needs of children. Accordingly, the mother was deemed the appropriate caretaker of all children under the age of 7, and female children of any age. The tender year’s doctrine created a rebuttable legal presumption, (a standard that determines the legal decision unless the opposing side can offer significant evidence to overcome the presumption.) If the opposing side offers no evidence or limited evidence, because of the presumptive rule, then the presumptive standard automatically becomes the legally appropriate decision. Under the tender years doctrine a father could only successfully rebut the legal presumption in favor of the mother and gain custody of the children if he could, in court, provide sufficient evidence that the mother was an unfit parent.

The tender year’s doctrine remained in place until the early 1970s when the Supreme Court ruled that rules based solely on gender were an unconstitutional violation of the equal protection clause of the 14<sup>th</sup> Amendment of the United States

Constitution. The Supreme Court reasoned that it was discriminatory for the state or the government to make important decisions completely on the basis of the gender of the participants. Contributing to the demise of the tender years doctrine, was a changing societal awareness that parenting capacity is not exclusively a product of gender.

As the courts were being buffeted by changes in how custody determinations were made, the state legislatures were changing their divorce laws. Beginning in 1970 and 1971, the legislatures started adopting no fault divorce laws. With the changes in how the courts determined custody, the advent of no fault divorce laws, and changes in gender roles, the courts began to experience an increase in contested custody hearings.

During this period the courts were forced to change how they decided custody cases. Those changes have taken the courts away from their traditional role, to a new place in the law, where they became intimately involved with the inner working of the family. Child custody decisions now require the court to predict future parental and child behavior, future child-parent relationships, and to focus on the placement of a young individual who has a limited right to participation. These decisions involve the balancing of a number of inexact and possibly non-quantifiable non-legal interests, thus ending the principle of stare decisis. These tasks are difficult at best and are even harder given the nature of the adversarial process. The end result is that the courts have moved past their traditional role in making decisions based on applying the law to past acts, and have instead become responsible for overseeing the restructuring of the family unit.

Courts have made attempts to ameliorate these consequences. Guardians ad Litem are used to investigate family dynamics and to help the court make custody decisions. Marital Masters are appointed for their knowledge and experience in handling family matters. Psychologists do evaluations at the request of the parties. But even with these improvements, the court is still responsible for intruding into the inner workings of the family, making decisions regarding which parent is the better parent to raise the child and allocating "visitation" to the non-custodial parent. In addition, the court has also been in the position of having an ongoing relationship with the individual family to resolve future disputes and problems that arise because of custody or visitation issues.

This is less than ideal. Instead of empowering family members to learn to resolve their disputes, the power to resolve those disputes has been taken away from the family. When problems arise, family members resort to the courts, which have become the final arbitrators of family issues. These intrusions cause dissatisfaction especially for the "losing" party, and fail to teach parties how to resolve future family disputes.

To end this cycle the court must find alternatives to the current state of affairs. Ways must be found to empower family members to make decisions regarding their family. Some ways to accomplish this are listed in other sections of this report while those relating to alternative dispute resolution (ADR) are discussed in the following sections.

2a. The public lacks understanding of alternatives to going to court. These alternatives include mediation and neutral evaluation, which are described below.

Mediation is an informal process where the parties try to resolve their dispute in a private, confidential setting with the help of a neutral third person, the mediator. The mediator does not decide who is right or wrong, or predict likely court outcomes. The mediator cannot force the disputing parties to reach an agreement or to accept particular settlement terms. Instead, the mediator attempts to clarify the disputed issues and help the parties find a resolution that meets their underlying goals and interests.

The mediator listens to each party's perspective and facilitates a dialogue between them to help them explore ways to resolve the dispute. The mediator focuses the attention of the parties upon their needs and interests rather than upon their positions. This requires that the mediator provide an opportunity for each of the parties to be heard in a dignified and thoughtful manner, allowing them to better understand the issues surrounding the dispute. The mediator's focus is on inviting, encouraging and supporting the parties' presentations to one another allowing them to find a resolution that is appropriate.

Neutral evaluation is a confidential process in which a trained neutral third party listens to each party's view of the problematic issues of the case and has each party talk about these issues in a reasonable and constructive manner. After listening to the parties' presentations, the evaluator will use his or her experience to predict the likely outcome should the dispute go to trial, so that the parties may reassess their respective positions. Using this prediction, the evaluator will attempt to assist the parties in resolving their dispute.

For parties to use these alternatives they must come to understand what they are and know that they are available. This requires that information be provided. The courts have attempted to provide this information when parties file for divorce or custody, or when the parties attend the Child Impact Seminars. Neither of those approaches have proven to be entirely successful. The information provided by the court is often overlooked, while the information provided at the Child Impact Seminar generally comes too late in the process to have an effect.

New ways must be found to educate the public. Examples may include information kiosks at the court, radio and television advertisements, earlier attendance at the child impact seminars, case managers to explain the alternatives, or mediators stationed at the courthouse. An informed public will be able to make more informed choices of how to proceed with their individual case.

2(b) Education concerning alternatives to the judicial process must also come from the court. Court staff needs to understand how these processes work and be able to provide this information to the public. Likewise, the judges and masters must play a role in educating the parties. Only when the court makes these alternatives a part of the

services which it provides will the parties have a real opportunity to make choices as to how to resolve their disputes.

3. The third recommendation is for the increased use of mediation by amending RSA 458:15-a to make the program mandatory. As previously discussed, courts are increasingly being placed in the position of having to decide which parent is more qualified to serve as the primary caretaker of the child. This places the court directly in the day-to-day life of the family and keeps it involved with the family long after the divorce is final. Mediation offers a way for the court to extricate itself from this position, and instead turns the decision-making over to those most impacted by those decisions.

Mediation can assist the parties in learning how to make decisions about their family. During the process, the mediator will help each side to better understand their situation and will empower the participants to make their own decisions as to what is best. The mediator will help the parties learn to communicate and to understand the other party's motivations. When this occurs, the parties will begin to find ways to resolve their disputes and learn how to solve future disagreements themselves instead of turning to the courts.

Research suggests that parties who participate in mediation are likely to achieve the following benefits: (1) they find solutions that meet their needs without the hostility that sometimes impacts the family (2) they better understand each other even in cases where there is no agreement; (3) they create more durable agreements that last longer than litigated or negotiated agreements; (4) they save money; (5) they experience improved co-parenting relationships; and (6) they communicate more with each other thus reducing the need for future legal action.

Much has been written concerning the use of mandatory mediation, both positive and negative. Most of the negative comments focus on forcing inappropriate cases to mediation. For this reason any program must include liberal opt-outs allowing inappropriate cases to be exempt from this process. New Hampshire's current Custody Mediation Program, RSA 458:15-a, has the appropriate opt-outs.

Currently, the program is available on a voluntary basis since both parties must consent to attend mediation. The result is that program usage has been low. Why are the parties not using the program? One of the reasons is that the parties often do not know about mediation and its benefits as previously discussed. In addition, attorneys who support mediation often fail to avail themselves of the process because it has not been made a part of how they handle cases.

Other attorneys may view mediation as a form of competition. This is especially true when attorneys feel that they can negotiate a settlement directly with the opposing side. Unfortunately those who share this view fail to understand that there are both strategic and cognitive barriers that prevent parties from negotiating settlement in many cases. In addition, research shows these negotiated settlements are not always as durable as mediated settlements.

For those reasons North Carolina adopted a similar custody mediation program but made it mandatory. When attorneys participating in the program were surveyed, 61% indicated that the program had changed how they practice. Attorneys especially liked the reduction in time spent having to negotiate with difficult parties and opposing attorneys. Many noted that mediation helped their practice by making the process easier and more efficient, allowing them more time to spend on financial matters. When asked if the program should be expanded, 92% of those surveyed said yes.

These changes need to happen in New Hampshire for the benefit of children. Parties and attorneys need to see mediation as a valuable resource. More information must be made available when family members first consider divorce or separation. Mediation must also become part of how attorneys practice. Making mediation mandatory will go a long way toward achieving these objectives as it did in North Carolina and other states.

It is the recommendation of this task force to amend RSA 458:15-a to make the process mandatory and to include the opt-outs currently in the statute.

4. Research has found that mediation is most effective when it occurs early in the case. The current Custody Mediation Program encourages the courts to schedule mediation as early in the case as appropriate. When mediation occurs later in the process, the parties' positions are hardened, animosity may be escalated and the parties are less willing to listen to each other. To overcome those obstacles, mediation must occur early in the process. This is born out of the studies showing that settlement rates at mediation are significantly higher when mediation occurs early in the case.

5. Instead of empowering family members to learn to resolve their disputes, litigation removes the power of family members to solve those disputes. When problems arise, family members resort to the courts, which have become the final arbitrators of family issues.

To get parents to regain control over those decisions requires new thinking. It requires that parents be given the opportunity to learn how to make decisions, something the current system fails to provide. Parents need to be empowered. One of the ways to empower them to gain control over their decisions is by the use of a mediation process that focuses on empowering parents.

Not all mediation processes focus on empowering participants to learn to make decisions involving their family. Some mediation processes which focus solely on resolving the legal issues associated with divorce often fail to understand the importance of the underlying relational problems impacting family dynamics and how they impede the parties' abilities to solve problems. Studies indicate this type of mediation process will settle fewer cases and those that do settle will most likely be

back in court as frequently as cases that were litigated or where settlement was negotiated by the parties and their attorneys.

Instead, mediation must focus on enhancing the participation, control and self-determination of the parties. This is accomplished by focusing on empowering the parties and encouraging recognition of the parties. Empowerment allows for the enhancement of participation, control, and self-determination while recognition permits the parties to see each other in a new and shared vision. This new vision reduces the distortion and misunderstanding that would otherwise be a barrier to resolution, and teaches the parties not to demonize each other.

The mediator helps each side to better understand their situation by enhancing the communication between them. This requires that the mediator provide an opportunity for each of the parties to be heard in a dignified and thoughtful manner, allowing them to better understand the issues. The mediator's focus will be on inviting, encouraging and supporting the parties' presentations to and reception from one another. This may include the personal and communication issues affecting each party's actions and allowing them to present their own perspectives to each other. This enhances the communication and understanding necessary for the parties to resolve their dispute.

The process must also focus on the relational issues presented, by helping each side to understand the other so that they may both grow and learn to communicate with each other in the future. Parties must be helped to see the other party's perspectives to gain an understanding of what motivates that party. This reduces the distortions and misunderstandings that create conflict. This will achieve the goals of reduced acrimony, improved parenting agreements, increased satisfaction with the process, more durable agreements, and reduce the adverse impacts on the child.

Coupled with the responsibility to ensure the best mediation practices is an obligation for the court to ensure the quality of the mediators to whom cases are referred. This includes the responsibility to monitor the performance of mediators to ensure that their performance is of consistently high quality. When mediators do not meet their performance expectations, courts should adopt procedures for removing mediators from their rosters.

In New Hampshire, the legislature has enacted RSA 328-C stating "The purpose of this chapter is to protect and assist the public by providing standards for the practice of marital mediation, training, and continued education for certified marital mediators...." RSA 328-C creates a Marital Mediator Certification Board vested with the authority to certify or de-certify marital mediators. By using Certified Marital Mediators, the court can maintain the quality of the mediators.

6. The state should provide the judicial branch with funds to conduct its family mediation program. The state benefits from the program by the reduction in the hostility and emotional issues associated with divorcing parents and their children. Those issues

create community costs resulting from increased community mental health usage, increased school problems, increased alcohol dependency, increased calls to law enforcement, and increased usage of court resources, among others.

Currently, RSA 458:15-a provides for parties who are indigent to qualify for payment of their mediation costs from the Guardian ad Litem/Mediator Fund. Other parties are required to pay the mediator \$60.00 per hour, a rate well below the mediator's market rate.

7. Presently, both the Superior and Family Courts offer neutral evaluation. (See Superior Court Administrative Order 23.) Neutral evaluation is a confidential process where a trained third party neutral will listen to each party's view of the problematic issues of the case and have each party talk about these issues in a reasonable and constructive manner. After listening to the parties' presentations, the evaluator will use his/her experience to predict the likely outcome should this dispute go to trial, so the parties may reassess their respective positions. Using this prediction, the evaluator attempts to assist the parties in resolving their dispute.

This process is extremely helpful where the parties have a different view as to how the court will resolve their dispute. By using a trained evaluator the parties get an independent perspective of how their case might be resolved by the court. This evaluation serves as a reality check and lets the parties reassess the merits of their respective positions. This reassessment is often all that is needed to move the dispute toward resolution.

8. Neutral evaluation is used to varying degrees by the Family and Superior Court. Where the program is used it has been very successful in helping parties resolve their case. High levels of party satisfaction have also been reported. From the court's perspective the program has also been successful in reducing some of the pressures on the trial docket. The problem is that few cases are being referred to neutral evaluation and in some cases the programs are not even being offered.

There are many reasons why the program has not been used extensively. First, there is a lack of participating evaluators. Second, there are a lack of trained evaluators. Other reasons are that many parties do not know about the benefits of neutral evaluation, or that attorneys fail to avail themselves of the process even when it would be helpful.

Because of the value of this program, this task force recommends that the court expand its Neutral Evaluation program in Marital Cases program and allow the court to have the discretion to order appropriate cases to the program. Neutral evaluators can have an enormous impact on cases referred to them, both positive and negative. To ensure the quality of the services provided to parties, the court must be responsible for qualifying the evaluators used.

9. New Hampshire courts have historically relied on the use of volunteers. This is true for the neutral evaluation program, which is staffed by volunteers. While initially effective, the continued use of volunteers cannot be sustained. This is evident in the difficulty which some courts have in finding volunteers for these cases. Attorneys who were once willing to give of their time are finding it more difficult to volunteer the necessary time without any compensation. This is especially true where the program has been in existence for over eight years. The result is that some counties have discontinued the program due to a lack of trained evaluators.

The use of volunteers also creates quality control problems. There is no incentive for volunteers to upgrade their skills or provide the process envisioned by the court. The only option for courts is to not use evaluators who do not measure up to the courts' standards. Unfortunately, the program and parties lose. Paying evaluators will change these dynamics. The court can enforce standards and ensure the quality of the services provided. Evaluators will be willing to give the court the necessary time because they are paid for their services. Evaluators will be considered trained professionals and treated as such. The public will benefit because competent professionals will provide the necessary services.

10. Collaborative Law is a dispute resolution alternative to litigation. It is a decision-making process facilitated by parties' counsel who are trained in interest-based negotiation and other non-adversarial techniques. Parties participating in the process sign a contract with their attorneys before they begin the process. The four (parties and counsel) commit themselves to resolving all issues without litigation or threats of litigation. If either party later decides to go to court, both lawyers must end their representation. As the author of the American Bar Association book on the topic says about the contract:

[It defines] the scope and sole purpose of the lawyers' representation: to help the parties engage in creative problem solving aimed at reaching a negotiated agreement that meets the legitimate needs of both parties. "Tesler, Collaborative Law, ABA, 2001."

The Collaborative Law process takes place before the divorce or other family law case is filed. For this reason, it is important that those facing divorce or separation hear about it when they are first considering these decisions. Information should be available in family resource centers, at mental health practices, at legal referral agencies, from guidance counselors, at law offices, at courts, at libraries, and at every other place where people who need the information might be. The professionals and support staff at these locations need to be familiar with this dispute-resolution alternative so they may encourage its use.

Mental health practitioners would be key sources of public information on Collaborative Law as they typically see people early in the process. Courts are important, as those considering divorce and separation generally "see the courthouse

as the place to go to find out how to get a divorce or to resolve custody issues.” Information on Collaborative Law, mediation, and child impact seminars should be available in printed form, and staff should mention those programs to people who visit or call the court.

## **SUPPORT SERVICES**

### **GUARDIANS AD LITEM**

#### **Recommendations:**

- 1. Define the role and obligations of the Guardian ad Litem with the focus on safeguarding the children's best interest.**
- 2. Offer regular educational programs to Guardians ad Litem on child development, parenting, interviewing children and adults, investigation and fact finding, and understanding the use of parenting plans.**
- 3. Guardians ad Litem should be familiar with appropriate dispute resolution alternatives. Information on dispute resolution alternatives should also be made a part of any general Guardian ad Litem Training Program.**

#### **Discussion:**

Guardians ad Litem should be aware of the following child centered factors in determining best interests of a child:

- Those related to the children themselves, such as health and special needs.
- The children's relationships with others.
- Those related to the parenting of the children in the past and
- Those related to the future parenting of the children.
- Those included in the potential for conflict or violence affecting children.

While it is desirable to give a mature child a voice in the decision-making processes, this must be weighed against the need to prevent the child from being placed in the middle of the conflict.

## **MEDIATION**

#### **Recommendations:**

- 1. Educate professionals and the public on the benefits of dispute resolution alternatives that reduce acrimony and adversarialness among divorcing and separating parties.**
- 2. Make lists of certified marital mediators who have contracted with the court**

available to judges and court clerks.

3. **Require judges to inform the parties of the benefits of mediation, where appropriate.**
4. **If the judge deems mediation is appropriate, the judge shall order the parties to attend at least one mediation session with continuation of the mediation left to the discretion of the mediator.**

### **Discussion:**

All professionals who assist those facing divorce or separation should be aware of mediation and its benefits, and should inform the parties of those benefits. These professionals include therapists, lawyers, judicial officers, and other court personnel.

A complete discussion of the purpose and benefits of mediation is contained in the section on Alternative Dispute Resolution.

Judicial officers must have authority to require parties to attend at least one mediation session. This would give the parties a chance to learn about the process and the benefits for that family.

## **COUNSELING**

### **Recommendations:**

1. **If the court orders counseling for any party, whether adult or child, it shall define the role of the counselor, the identity of the counselor (after obtaining the counselor's consent), and shall ensure the confidentiality of the counselor's relationship with the person, as well as the method of payment and the number of sessions required.)**
2. **When counseling or psychological testing is court ordered, insurance companies should not be allowed to deny coverage.**
3. **Educate mental health counselors to empower clients in divorce cases to communicate with their ex-partner to support cooperative parenting plans and to utilize mediation, in order to safeguard the best interest of the child/ren, as long as there is no apparent danger to the parties or to the children.**
4. **Create a list of mental health counselors who will agree to provide services to the court.**
5. **Child custody evaluations completed by mental health counselors tend to**

**promote acrimony and divisiveness and thus should be utilized only in the rarest cases.**

**Discussion:**

Numbered paragraphs related to recommendations.

1. Multiple individuals shared their concern about the ill-defined nature of court ordered counseling. Counseling although viewed as helpful, often involves a more extensive approach than generally understood. It may also create undue expense for a client, without any definition of expected end results. Furthermore, when confidentiality is not initially agreed to, the effect of counseling is minimized due to the client not wanting to expose any difficulties or issues which might be viewed poorly by the court. Creation of a protocol checklist similar to contractual procedures used for marital mediators was cited as a way to delineate the expected components of the counseling. The sealing of records was also noted as a needed addition so that the counseling will be as effective and safe as possible.

2. Although insurance companies have in the past reimbursed for court ordered counseling, within the last several years, they have refused to pay for court ordered therapy, viewing the counseling as never ending. They have also cited the lack of medical necessity as justification for refusing to pay for counseling or testing. Thus, clients are required to pay out of pocket, at a cost which may become prohibitive and thus may interfere with the completion of treatment. Within the last year, statutory changes were instituted requiring insurance companies to pay for treatment in abuse and neglect cases. A similar statutory change is warranted in court ordered family cases, as well.

3. Counselors are trained first and foremost to establish a therapeutic alliance with their client which then promotes a sense of unconditional support by the counselor. In divorce cases, when discussions of conflict with the ex-partner arise, it is not uncommon for the counselor to at least commiserate if not validate the client's misgivings. Thus, clients may feel justified in continuing to "battle" their ex-partner as opposed to recognizing the benefit of communicating and working through the differences. The negative effects of continued conflict on children in divorce situations is well documented and thus should be avoided. Counselors are in a unique position wherein their recommendations have significant influence. Thus, it is recommended that a consciousness raising campaign be developed and submitted to the various mental health state organizations, starting with an article to the New Hampshire Psychology Association's monthly newsletter.

4. Recruiting counselors who adhere to the principles outlined above and submitting their names to the court will increase the likelihood that counseling will be supportive of cooperative parenting, thus potentially reducing contentiousness between the parties. These counselors would be self-referred and would be informed of the creation of such

a list by their state mental health organizations. When these counselors are assigned to a client they would receive a copy of the court protocol which would outline the information required in Recommendation #1.

5. Although Child Custody evaluations are less frequently requested or utilized in divorce cases, the process of a counselor evaluating all members of a family in order to offer recommendations as to the best parent-child fit inherently creates a good parent-bad parent split. Those evaluations should be ordered only in those cases where there exists a question of how the mental instability or the emotional disability of a parent affects their parenting. If these evaluations are warranted, then the evaluation should comply with the Standards outlined by the American Psychological Association and the recommendations should be in conjunction with the Guardian ad Litem's investigation and should not be substituted for the Guardian ad Litem's comprehensive recommendations.

## EDUCATION

### Recommendations:

1. **A class on adult Roles and Responsibilities should be a graduation requirement in the New Hampshire Public School Standards.**
2. **Instruction and curricula must be geared toward:**
  - A. **Communication skill development**
  - B. **Conflict resolution**
  - C. **Healthy adult relationships**
  - D. **Life management skills**
  - E. **Premarital education**
  - F. **Financial responsibility**
  - G. **Child custody and divorce statute education**
  - F. **Consequences of divorce on children and families**
3. **Communication and conflict resolution skills will be taught throughout the K-12 school years.**

### Discussion:

Numbered paragraphs relate to the recommendations below.

It is important that the skills necessary for productive communication and non-violent conflict resolution be taught to children beginning at an early age.

1. Upon graduation from high school, it is important to have students prepared to be productive and successful members of a family, workforce and community. Curriculum should be offered within our education institutions that provides a foundation for their over all success. The NH Department of Education has identified that there is no one place where a student is able to get information on all the topics that would be encompassed in an adult roles and responsibilities course. The Task Force therefore, recommends this as a requirement.

This course recommendation is the result of a study committee that was formed after a marriage preparation bill was proposed in the legislature. The study was to

assess the means of implementing, operation and funding a marriage education program, including premarital preparation courses. The skills recommended in this course are also valuable and needed in the workplace. The following groups recommended and supported this concept as a graduation requirement:

Marriage Preparation Task Force  
The NH Coalition Against Domestic and Sexual Violence  
Child and Family Law Committee  
Attorney General's Task Force on Child Abuse and Neglect  
The NH Children's Alliance  
NH Children's Trust Fund  
NH Jumpstart Coalition for Personal Financial Literacy  
UNH Cooperative Extension

The graduation requirement should include the Family and Consumer Sciences topic areas and program standards. The Federal Department of Health and Human Services supports Family and Consumer Sciences courses to meet the requirements of the Safe and Stable Families Grant, Chaffee Grant, and Parenthood Programs.

## **COMMUNITY/PUBLIC AT LARGE**

### **Recommendations:**

- 1. Encourage Family Resource Centers and others to offer new programs and expand current programs on topics of concern to families dealing with difficulties and stress, such as:**
  - A. Parenting skills, including the role of the step parent.**
  - B. Communication skills**
  - C. Conflict resolution skills**
  - D. Financial management**
  - E. Marriage preparation skills**
  - F. Alcohol and other drug use**
  - G. Mental Health issues.**
- 2. Present the information in a variety of locations to reach people where they are, such as:**
  - A. Courts**

- B. Family Resource Centers**
  - C. Medical facilities (OB/GYN, Pediatricians, Hospitals, Clinics)**
  - D. Community Agencies**
  - E. Attorneys' Offices**
  - F. Faith Based Organizations**
  - G. Public Schools**
  - H. Libraries**
  - I. Mental Health Professionals' offices**
  - J. Workplace**
- 3. Offer information in a variety of formats, such as:**
- A. Brochures**
  - B. Videos**
  - C. Classes**
  - D. Print and electronic media**
  - E. Websites**
  - F. Toll free numbers for**
    - \*Parent Hot Line**
    - \*Financial Assistance**
    - \*Alcohol and other drug abuse**
- 4. Develop a directory of resources available and a description of each on a regional basis to include:**
- A. State services**
  - B. Family Resource Centers**
  - C. Community organizations**
  - D. Educational resources, Including UNH Cooperative Extension**

## **Discussion:**

1. The focus of this task force has been on reducing adversarialness when people are going through divorce and separation. The Task Force charge includes determining what part Family Resource Centers can play in supporting families. It would be more productive to our society to assist families before they reach the court therefore, having support and educational resources available is also a recommendation of this Task Force.

Testimony indicated a need for more parenting skills. Parenting classes are offered at Family Resource Centers and through other organizations. The continuation, expansion, and promotion of these courses would be valuable. The content of the adult roles and responsibilities class recommended for high school addresses the issues that cause conflict in marital relationships. These subjects should be available to the general public.

2. With people's busy schedules and, in many cases long work hours, it is important to disseminate this information in locations where people are, rather than expecting them to come to traditional classes. Traditional classroom programs remain as one of the options.

3. People have different educational levels and learning styles. Therefore, information needs to be available in a variety of formats. Written information needs to be at a basic reading level.

There are some toll free numbers for parenting information such as Parentlink of Child and Family Services' Parent Hotline. These resources need to be investigated for their capacity to respond to concerns. Research is needed to find out if there are other resources. Toll free numbers must be promoted so that the public is aware of their existence.

The traditional resource for alcohol and other drug abuse is Alcoholics Anonymous or a similar twelve step program. For the non-user Al Anon is of value. Other resources need to be investigated and/or created.

4. It is a challenge to have a comprehensive knowledge of the resources that are available. Developing a directory would be of value to all involved in trying to offer assistance and referrals to families. State services offer programs and contract with other organizations. Community organizations offer programs. The UNH Cooperative Extension is a resource in areas of Family and Consumer Sciences including parenting information and financial resource management. The Cooperative Extension community offers programs in communities in less traditional and more informal formats.

## EDUCATION FOR SPECIFIC AUDIENCES

### Recommendations:

#### 1. DIVORCING FAMILIES

##### Child Impact Program

- A. Increase the availability, including convenient locations and times that the program is offered.
- B. Parents need to take this course as early as possible in the litigation process
- C. Expand the program while keeping it affordable. The four-hour course should be expanded to six or more hours.
- D. The expanded program should include the effects of a blended family on children and how parents should address that issue.
- E. Pilot a “refresher” course to be taken six months to a year after the initial class.

#### 2. ATTORNEYS

- A. Attorneys practicing family law should obtain training in the areas of child growth and development, family violence, causes of the breakdown in the parent/child relationship, parental alienation, the impact on families of high conflict cases (especially those involving parenting issues), and resource and alternatives for resolving conflict.
- B. Law schools should offer training specific to family law issues as outlined above in paragraph A
- C. The New Hampshire Bar Association as well as private providers are encouraged to sponsor Continuing Legal Education Seminars for attorneys, specifically offering education in dispute resolution alternatives and collaborative law methods and benefits.
- D. Experienced family law attorneys willing to volunteer as neutral evaluators should be periodically trained by the courts or through Continuing Legal Education seminars.
- E. Legal professionals and court staff involved in domestic cases should discourage the win/lose dichotomy.

- F. Explore options for non-attorney legal professionals to receive developmental training in appropriate ways to interact with children of separated parents during the litigation process.

### **3. JUDICIAL AND COURT STAFF EDUCATION AND SELECTION**

- A. The Judicial Branch should establish minimum continuing education requirements exclusive to family law for all judges and master hearing family related matters New Text.
- B. All judges and masters transitioning to the Family Division should, not only be given priority in family law judicial educational opportunities, but should also have a decided interest in hearing such matters.
- C. All court staff, including clerks and case managers and especially staff who interact with the public, must have an interest in and commitment to family matters.
- D. All judicial staff should receive appropriate training in understanding the stresses and pressures on families.
- E. Case managers and other court staff should be provided appropriate educational opportunities to enable them to understand the various options of alternative dispute resolution available.
- F. The Judicial system should provide training to judicial officers and staff on the benefits of dispute resolution alternatives in family law matters.

### **4. MENTAL HEALTH PROFESSIONALS**

- A. Educate professionals to the harmful effects of divorce on children and the benefits of counseling when appropriate and when the marriage is salvageable.
- B. Educate professionals to the benefits of dispute resolution alternatives and mediation when appropriate, and if the marriage is not salvageable.
- C. Educate mental health professionals to recognize and quickly address the early indicators of family violence.
- D. Educate professionals to the harmful effects on children of even

**minor physical exchanges observed between adults as well as physical disciplinary techniques, i.e. slapping, spanking, etc.**

- E. Educate professionals to the benefits of cooperative parenting if family violence is not present or continuous.**
- F. Educate professionals to the deleterious effects of their attitudes when they align solely with the adult client and ignore the child's need for both parents.**

### **Discussion:**

1. The Child Impact Program is required for parents with minor children who are involved in litigation. It has received very positive evaluations. People have testified that they wish they had received this information much earlier. The course is a bare minimum and there is a need for a more extensive curriculum while still keeping it affordable. The participants are required to pay for the class. In an expanded program, one recommendation is to include information on blended families. Remarriages and blended families are a source of conflict and parents need to understand the impact of that situation on children. A request was also made to have a refresher course available.

2. Legal training in family law areas should reflect a shift from a focus on competitions and winning to a focus on problem solving and reorganization of the family. It should encourage increased consciousness of the fact that, while providing representation to an individual, the attorney must also keep in the forefront the needs and future life of the family and its youngest members. Law school programs serve as a means of not only teaching lawyering skills, but also teaching the values and insight needed to function as an effective family law attorney and problem solver.

2a. A major source of acrimony in family law matters can be traced to the win/lose dichotomy. Prolonged litigation does not produce any winners, and the financial and emotional toll on the family may result in permanent damage. As stated elsewhere in this report, lawyers practicing family law should realistically evaluate each client's case and not raise false expectations and all participants should be encouraged to maintain a civil and respectful demeanor, focused on dividing the family's assets fairly and reshaping the future family structure in a manner which best meet the needs of all members of the family.

3a. All judges and masters who hear family related matters must have access to ongoing educational opportunities in order to ensure that these judicial officers are familiar with current trends and practices regarding family law. It is critical that judges, masters and other judicial officers deciding issues affecting the family have the expertise that only training and specialization can produce. Comprehensive training of judges who

hear family matters allows them to function at their highest potential while reducing the debilitating effect of the emotional atmosphere and the often high volume of such cases. Through training, judges remain sensitive to families of different races and cultures. They become knowledgeable about child development and family dynamics, and more aware of the impact of mental health and substance abuse issues.

3b. Judges and masters hearing family cases, and court staff involved with these cases, need to be well trained and versed in current trends and practices regarding family law. Their selection should be made on the basis of their interest in such matters, as well as their experience and abilities. Beyond mere training, it is equally important that Judges and Masters selected to hear these cases have another, less easily measured attribute: they must care about families and children. One measure of this trait is their own expression of interest, but careful selection requires a deeper knowledge and understanding of the temperament and qualities of the individuals proposed for this important work and a thorough evaluation of their skills.

3c. Court staff, like judicial officers, should be selected in family cases on the basis of their interest in such matters and the value which they place on families. They must care about families and children and understand that family cases, when the cases reach court, are most often representative of individuals experiencing a very traumatic and disruptive time. Court staff should demonstrate an understanding of the dynamics affecting the individuals and the skill of being able to interact with the parties in family cases in a patient, understanding and compassionate way. Once hired, court staff should immediately be given an orientation in family dynamics and the effect of divorce, and thereafter be provided with ongoing training in these and related subjects as they pertain to the staff member's responsibilities.

3d. In keeping with the recommendations of the report, "A Vision of Justice The Future of the New Hampshire Courts: Report to the New Hampshire Supreme Court Committee on Justice System Needs and Priorities" (September 2004) staff at the courts are, for many, the first point of access to our system of justice. Responsible for reception and case coordination, a trained court staff, like the judicial staff, must be sensitive to the differences between families of various races and cultural backgrounds, and adjust their responses to each individual accordingly. Training, exposure to family dynamics, and understanding the complex and often emotional nature of the cases being heard further enhances staff members' expertise in responding to the individual needs of each case and maintains the protection of and assistance to children and families as the primary goal.

3e. Information regarding alternative dispute resolution (ADR) should be available for family members upon their first contact with the court. Court staff must understand how the alternatives (mediation, collaborative law and neutral case evaluation) work, provide this information to the public, and properly assess the applicability of the available options to each case at the earliest possible point of access. Only when the court makes use of these alternatives and recommends them as a part of the services they provide will the parties have an opportunity to make

choices as to resolve their dispute. When parties understand that there are non-litigious means of resolving family matters, they are in a position to choose a process that minimizes adversarialness and the risk of animosity, to the ultimate benefit of their children.

3f. Judges and masters should play a major role in educating the parties in family law cases as to the alternatives in dispute resolution. They may do so when they themselves are properly and adequately educated in these options. Once a family law case enters the court system, the judiciary is in the strongest position to promote and encourage the use of alternative dispute methods as a means of empowering individuals to resolve their own disputes rather than setting all cases on the traditional adversarial track.

4a. Divorce is difficult for children. Although the harmful effects can be mitigated by how the parents address each other and the needs of the children after the divorce, couples should be encouraged to utilize couple or individual counseling or both to determine changes that can be made in their relationship to one another. Mental Health professionals need to be informed and encouraged to support this position and to refer to professionals who are experienced in couple and/or family counseling.

4b. Mental Health professionals need to be informed about the benefits of mediation and should be aware of trained mediators to whom they can refer. However, when family violence is present, mediation is contra-indicated and individual counseling and referrals to local crisis centers, and groups for batterers may be warranted.

4c. Mental Health professionals must have awareness of the dynamics of family violence, its etiology, its development, and its varying presentations in order to help the individual get the proper treatment. Early intervention is imperative in safeguarding the victim from more severe treatment as well as protecting the children from being becoming victimized and/or traumatized.

4d. Perpetrators have frequently been the recipient or observer of family violence as children. Even minor physical exchanges can set the stage for an acceptance of and tolerance of future potentially abusive behavior. Family violence can be generational and in order to stop the generational progression, a change in the approach to how children are disciplined is needed.

4e. Cooperative parenting is considered the preferred approach to raising children of divorced parents. Children fare far better when both parents are involved and attuned to their children's needs. Mental Health professionals who work with divorced parents need to be versed in the recent literature and be aware of how to support their clients in learning how to cooperatively parent their children.

4f. Mental Health professionals can inadvertently promote a lack of cooperation with a separated or former spouse. In an effort to align themselves with their client and to be supportive of his/her difficulties, professionals can take sides and support the fight with

the ex-spouse as opposed to enhancing the client's ability to partner with their ex-spouse, in cooperative parenting of the child/ren. This dynamic can ultimately foster adversarialness and hostility. Children fare better in divorces when both parents stay involved and work together for the best interest of the child/ren. Parents need to be assisted in knowing how they can work with their ex-spouse, as long as family violence is not present or continuous.

## STATUTES

### Recommendations:

1. **Include statements of intent as to parties making their own decisions and both parents being substantially involved in raising their children.**
2. **Divide the statutes on the marital status (divorce, legal separation, annulment etc.) and those concerning children in divorce and paternity cases into two separate chapters.**
3. **Amend statutes so that the terms “parenting,” “Parenting Plans,” or other similar terms replace the term “custody.”**
4. **Require court procedures that support and encourage divorcing and separating parents to make decisions for their children and for themselves.**
5. **Give the courts authority to require people to go to mediation where appropriate.**
6. **Require the exchange of specific standard documents and information, upon request.**
7. **Amend the child support statutes to deal with shared and split “custodial schedules” (to be known as parenting plans) and other support-related problem areas.**
8. **Provide that health insurance coverage for counseling may not be denied because the counseling is court-ordered.**

### Discussion:

Numbered paragraphs relate to the recommendations

1. The Task Force proposes refocusing both the culture in New Hampshire and our legal system on parties making their own decisions and both parents being substantially involved in raising their children. Except for RSA 458:15-a (the current mediation statute) the divorce and custody statutes primarily consist of the procedures and legal standards for litigation. The new family-centered policies should be stated in the statutes. By inserting these principles in the statutes, all readers, whether parents,

Guardians ad Litem, other parties, lawyers, and judicial officers will know the background of and reasons for, the specific statutory provisions. A statement of principles would assist the courts in interpreting the statutes relating to custody (to be called “parental rights and responsibilities.”)

2. Currently, RSA chapter 458, entitled “Annulment, Divorce, and Separation,” contains both the procedural and substantive law on divorce and legal separation, as well as statutes on child custody, custodial rights, and other child-related topics. All the sections on children apply to never-married parents as well as divorcing and divorced parents. This is confusing, illogical, and makes it difficult for readers other than experienced lawyers.

When the Child Support Guidelines were adopted in 1988, they were placed in a new separate statutory chapter, RSA 458-C. The same was done with the Wage Assignment Statute. The new “parental rights and responsibility” provisions, along with the other provisions concerning children currently in RSA 458, need a new separate chapter. Parents should be able to go to one place in our laws to review all the public policies, procedures, and substantive laws that apply, whatever their marital status. This would leave the laws on marital status in one chapter and the laws on children in another.

3. It is essential that the statutes be amended to include new language on parental rights and responsibilities at the time of divorce or separation, as well as modifications of the original orders. As children do best when both parents are substantially involved in their care, this must be reflected in New Hampshire’s statutes.

The current statutory language emphasizes the “rights” of parents, rather than the joint responsibility of parents for the care and nurturing of their children, whether the parents are married, never married, or formerly married. “Custody” is seen as something that is “won’ or “lost,” as though the child was a possession or a game. Changing the language is not enough by itself, but it is an essential component of the changes needed in the laws which govern the reconstruction of the family.

4. The procedures set out in RSA 458 (divorce and custody) and RSA 458-C (child support guidelines) are oriented to litigation and to judges making the decisions. The only exception is the (now voluntary) court-referred mediation statute, RSA 458:15-a.

One way of protecting children from the stresses of litigation and saving the courts both courtroom and administrative time is for the parties to work out their issues before they file for divorce or separation. In those cases, the petition for divorce or paternity/custody and the agreement on all issues are filed simultaneously. This is the required procedure in Collaborative Law cases and is frequently used by private mediation cases. The statutes could provide an incentive for separating or divorcing parties to settle, by allowing a lower filing fee in such cases.

Another area that could be made more “family friendly” is the procedure for “service,” notifying the second party that a case has been filed. Over the last few years, there have been several changes in how service is handled. Traditionally, the law required the sheriff to deliver the papers. This can be frightening to children and embarrassing to spouses. When the Family Division was first established, it allowed the second party to pick up the papers at the courthouse. This reduces adversarialness. Another option is for the lawyer for the second party to receive the papers for his/her client. The statutes should allow for these methods.

5. The legislation that established the court-referred mediation program, effective on July 1, 2003 was written by a multi-disciplinary committee including mediators, lawyers, therapists, a domestic violence victim’s advocate, a marital master, a judge, and court clerks and administrators. As introduced, the legislation gave masters and judges the discretion to order parties to mediation, where appropriate. During the legislative process, the bill was amended to remove the discretion to order mediation. As adopted RSA 458:15-a, states that only parties who agreed to try mediation could be ordered to mediation.

Across the United States, most court-referral mediation programs authorize the judge to order unsure or unwilling parties to try mediation. This is important as most divorcing/separating couples either don’t know about mediation or don’t know much about it. While just about everyone knows a family who has litigated a divorce or custody case, few know a family that has used mediation.

Of course, mediation is not appropriate in all cases. Our statute already spells out those factors for the court to consider in deciding whether to order mediation.

6. “Discovery” is a process for the exchange of information. Currently it is controlled by court rules. While there are other types of “discovery,” the use of “interrogatories,” (formal written questions that must be answered under oath) is most often used in divorce and custody cases. These questions typically cover assets, income, taxes, and other issues relevant to the particular case.

Interrogatories increase adversarialness. The requirement to answer 30-40 interrogatory questions asked by the other side’s lawyer makes people angry. Interrogatories increase legal costs, as the asking lawyer must draft the questions, then review the answers for completeness and request any missing information or documents. The answering lawyer must prepare the answers.

An alternative is to require by statute the provision/exchange of standard information. This would provide information and documents needed in a divorce or custody case, but in a less adversarial manner. It would be a standard procedure and thus not be seen as a personal affront. A standard set of questions could be handled more efficiently by lawyers, keeping costs down, and self-represented parties could get the information they need, as well.

7. The Child Support Guidelines (RSA 458-C) have done much to decrease uncertainty and adversarialness, by removing the question of what is the right amount of child support from the agenda of most cases. However, one section of the Guidelines (RSA 458-C:5) lists 10 “special circumstances” for a court to vary from the Guidelines amount. One of these circumstances is “split or shared custody arrangements.”

When parents have shared or split custody, the statute provides no guidance as to what child support would be fair. The decisions from the Supreme Court are not very helpful; essentially, the appropriate support can be anything from full guidelines to zero, depending on the facts.

Because of the lack of a formula, or at least a checklist of factors to be considered, parents have difficulty agreeing on support in these situations. The result is often a feeling that the other parent is being “unfair,” anger about that, and then litigation.

The Task Force makes no specific recommendation as to how support issues should be resolved in split or shared arrangements but clarifying legislation would reduce conflict over this subject.

8. Some health insurers refuse to pay for counseling services that are otherwise covered by their policies simply because it is ordered by the Court. The General Court has recognized and addressed this problem as it relates to juvenile cases by prohibiting such discrimination by insurers. A similar statute is needed for divorce and custody cases.

## LANGUAGE

### Recommendations:

1. **Change terminology such as “custody” and “visitation” to “parenting rights and responsibilities” to reflect the continuing role of both parents in each child’s life.**
2. **Use plain language in statutes, rules, and court orders.**
3. **Use terms “mother” and “father” or the parties’ names in court orders, rather than “petitioner” and “respondent.”**
4. **Define statutory and legal terms when they are used.**

### **Discussion:**

Numbered paragraphs below relate to the recommendations above.

1. Language matters. Consider the difference between “elderly” and “senior citizen” or between “paramour” and “significant other.” The meaning is similar but the differences are significant.

“Custody” is no longer an accurate word to describe the responsibility for children after a divorce or separation. The term carries with it the connotations of the other legal uses for the word “custody,” namely:

- # The care and control of a thing or person for inspection, preservation, or security.
- # The detention of a person by virtue of lawful process or security.

Black’s Law Dictionary, 7<sup>th</sup> edition.

It is essential that the statutes be updated to show the changes in how we look at responsibilities for children at the time of divorce or separation, as well as modifications of the original orders. As children do best when both parents are substantially involved in their care, this must be reflected in New Hampshire’s statutes.

The current statutory language emphasizes the “rights” of parents, rather than the joint responsibility of parents for the care and nurture of their children, whether the parents are married, never married, or formerly married. “Custody” is something that is “won’ or “lost,” as though the child was a possession or a game. Changing the language is not enough, but it is an essential component of the changes needed in family law.

“Visitation” is not what an involved parent would want used to describe his or her time with his/her children. Children visit grandparents, aunts, and friends. When they have time with the parent who does not have “primary physical custody,” it is not a visit. The parent is caring for, or “parenting,” the child.

This was recognized by the General Court when it changed the language in RSA 458:17 to read as follows:

In those cases where joint legal custody is awarded to the parents and physical custody of the child or children is awarded to one of the parents, the other parent shall be awarded physical custodial rights during all periods of the time heretofore referred to as visitation, except that such other parent shall not be deemed to have a right of primary physical custody under RSA 633:4.

Since that time, any use of the term “visitation” for parents’ physical custodial rights has been inappropriate.

2. “Plain language” is non-technical, readily understandable language. This should be used in family law statutes, rules, and orders. It should not require a law degree or even a college degree to understand either one’s rights and responsibilities or the court procedures in a divorce or custody case.

3. The most important area for plain language in court orders is the references to the parties. People facing divorce and custody disputes do not commonly use terms “petitioner” and “respondent” and find them confusing. Mistakes also happen, most commonly, reversing the titles.

By using the parties’ names or terms describing their relationship to the children or each other, the meaning is clear and reversals unlikely. An example of the wording that causes problems:

Petitioner shall have the children for Christmas in odd-numbered years and Respondent shall have them for even-numbered years.

4. People should be able to understand their legal rights and responsibilities, especially concerning their children’s family life. If technical terms are used in statutes, rules, and court orders, they should be defined in those documents.

## DOMESTIC VIOLENCE

### Recommendations:

1. Encourage a public campaign to highlight the harmful effects on children of even minor physical or verbally threatening exchanges between adults as well as various physical disciplinary techniques.
2. Encourage funding for intervention programs which are designed to lessen the harmful effects of domestic and family violence on adults and children, as well as to promote behavioral alternatives, to be offered soon after Domestic and Family Violence has been identified.
3. Encourage Judges and Attorneys, who work in the area of Family Law, to participate in comprehensive training on Domestic and Family Violence including but not limited to: the dynamics and continuum of family violence, the similarities and differences of men and women as aggressors, assessing safety and risk factors, and determining safe parenting arrangements and visitation orders.
4. Support and encourage Judges to utilize protocols that comply with The New Hampshire District Court Protocol on Domestic Violence as well as recent case law, in developing final Protective Orders and follow-up orders
5. In cases where Protective Orders are issued, and in cases where counseling intervention is appropriate, encourage the court to utilize a protocol for such referrals, including: referring the aggressor to a batterer intervention program that is in compliance with the New Hampshire Batterer Intervention Standards; the victim to a crisis center which meets the criteria in RSA 173-C for safety planning; and children to a counselor with expertise in family violence and trauma, to assess if they need trauma treatment or other types of counseling.
6. Establish guidelines for assessing the level of risk, to children and the adult victim, of harm and/or of abduction, before limiting access between a child and alleged perpetrator parent, including the emotional harm of such limitations, as well as the comprehensiveness and duration of safety precautions needed to protect the child.
7. Encourage Judges to be more definitive about the consequences of filing a false Domestic Violence report and to reiterate to the reporter that he/she is under oath to tell the truth. Petitioners should be informed of the need to be specific as to the factual bases of their allegations which may need to be addressed by a Protective Order.

8. **Judges should instruct the parties at the time of the Final Hearing as to the need to adhere to the Order as well as to how to petition the court for a modification of the Order based upon RSA 173-B: 5, VIII.**
9. **Establish a procedure in Domestic Violence cases for the courts to periodically review the court's order concerning access to the child/ren.**

**Discussion:**

Numbered paragraphs relate to the recommendations.

1. Members of the Task Force on Family Law believe that a change in cultural attitude is needed if domestic and family violence are to be comprehensively addressed. The precursor to future aggression and assaultive behaviors may begin in how a child has been treated by parents and adults, as well as what a child observes. Speakers cautioned the committee not to disregard even seemingly minor disciplinary actions, since they can set the stage for tolerance of family violence and generational transmission. Crisis Centers currently offer educational and outreach programs including parenting, anti-bullying, and dating violence programs. Support is needed for these Crisis Centers to continue and to expand their on-going efforts to educate children, students, adults and communities in non-violence as well as the various forms of violence: emotional abuse, sexual abuse, physical abuse, sibling abuse, elder abuse, female and male abuse, gay/lesbian, bisexual, and transgendered abuse.

2. Early intervention is critical in order to interrupt the formation of unhealthy behaviors in children and adolescents. Children learn from how they are treated and what they observe. Thus, children who are exposed to domestic and family violence may need help sooner rather than later. Brochures should be available in Physicians' offices to alert parents to the need for early intervention. Educators and Guidance Counselors need to be trained to recognize and address family violence, utilizing the Office of the Attorney General's Child Abuse and Neglect Guidelines for NH Educators: Identifying Suspected Child Abuse and Neglect. Furthermore, programs need to be established to promote healthier interactional skills as early as pre-school, and through high school, to address bullying, self-esteem, conflict resolution and communication skills. Such programs should adhere to the latest Department of Education Curriculum guidelines which teach and promote conflict resolution, assertiveness and communication skills, as well as discussions and lessons on gender equality, non-violent relationships, and respecting boundaries.

3. Judges and Attorneys need to have a more thorough knowledge base regarding the components of Domestic and Family Violence, in order to more precisely address it, given its varying presentations and evolution. It was noted that there has been a lot of improvement since the 1970's in terms of consistency and uniformity of issuing Protective Orders. However, there was much concern raised as to how black and white Protective Orders can be, in that one size does not fit all and that without consideration

of the individual dynamics, acrimony not only increases but the relationship between parent and child can be disrupted. Superior and Family Court judges need to be supported in studying and evaluating the issues thoroughly, rather than relying on anecdotal evidence. Thus, judges and attorneys should receive comprehensive training on domestic and family violence including: the dynamics of domestic and family violence; assessing safety and risk factors; applicable state and federal laws; handling cases involving the co-occurrence of domestic violence and child abuse and neglect, and determining safe parenting orders. Without additional education, Judges are not equipped to be more discerning in their approach to family violence.

4. N.H. RSA 173-B:5 (VI) states that “Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the plaintiff, showing good cause, with notice to the defendant.” However, the general practice in New Hampshire is for the courts to order a protective order of one year’s length in every case in which abuse is found, regardless of the circumstances surrounding the alleged abuse or the history (or non-history) of abuse in the family. In the midst of a divorce where the children are being contended for, parents can say and do things that may be harmful, but may not be indicative of a violent or dangerous person. Circumstances should be more thoroughly reviewed by judges so that a protective order is in proportion to the alleged offense, and considers the needs of and the effect on the safety of the children. A more formal protocol needs to be established that will assist judges in making appropriate protective order decisions that are selectively circumstance-based.

5. It is the view of this Committee that prevention and treatment programs play a vital role in breaking the cycle of abuse within relationships and families. In RSA 173-B Protective Order Cases, Judges should consider making referrals to local crisis centers on Domestic Violence for victims who have experienced abuse, and the aggressor to a provider who subscribes to the New Hampshire Batterer Intervention Standards. Even though children may not be the direct recipients of the violence or abuse, observing violence or abuse can be traumatizing. Thus, children too may benefit from treatment and may be referred to practitioners with experience in treating abuse/neglect and trauma for an assessment of the need for treatment.

6. Research indicates that a 30-60% statistical chance of co-occurrence of domestic violence between partners and abuse of children. In addition to referring to RSA 173-B:5, I (6) for assistance in determining appropriate parental contact plans, judges should be encouraged to utilize other evaluative mechanisms to determine the safest and healthiest parent-child arrangement.

7. Although already reflected in the Statutes (See RSA 173-B:3, I-IV), plaintiffs may not know the need to be truthful, specific, and detailed in requesting a Protective Order. Furthermore, the plaintiff may need to be educated by the court clerk or the Judge not only on the grounds for ordering a Protective Order and to be specific of the facts, but also the consequences for misrepresenting the facts. A great deal of acrimony and

unfairness results from inadequate descriptions in Domestic Violence Petitions that result in the issuance of an ex parte order. The Petition Form itself should be revised to allow for complete presentation of the facts by giving increased space on the form and encouraging use of additional pages if necessary to fully describe what the Petitioner intends to allege in support of the request. The Petition needs to set forth specific facts of what the defendant did that constitutes a criminal act or an attempted criminal act, and the reasonable basis for fear. The judge should not issue a Protective Order unless the grounds on which the Protective Order would be based are clearly apparent from the written petition.

In situations where the Petitioner has not or cannot express the factual basis for the Petition (meaning both the alleged criminal act, or the attempted criminal act, and the reasonable basis for fear,) the Judge can and should take sworn testimony from the Petitioner *ex parte*, in which event, the Judge's *ex parte* temporary Domestic Violence Order should recite in text what the Petitioner testified to upon which the Order is being granted. In this way, the documents the Defendant receives will clearly provide fair notice to the Defendant of the allegations, so that a fair hearing on the Petition can be held.

8. As circumstances may change for the plaintiff and the defendant, Judges should instruct the parties at the time of the final hearing on how to petition the court for a modification of the Order. At the time of the service, law enforcement officials should instruct the defendant that it is her/his responsibility to refrain from any contact regardless of any action by the plaintiff.

9. The Committee heard anecdotal cases wherein the parent and child's utilization of a visitation center remained intact for years without the *pro se* litigant having the resources to dispute the arrangement. It may be in the best interest of the child to modify the orders of supervision. Parties often need instruction on how to petition the court for such modifications. This information should also be available through courts, supervised visitation centers, mental health providers and attorneys. Furthermore, the courts should have in place review mechanisms to reassess the components of the Protective Order to best serve the child.

## CONTINUATION OF THE TASK FORCE ON FAMILY LAW

### Recommendations:

The Task Force on Family Law will be extended for the purposes of:

1. **Monitoring and promoting the implementation of the recommendations made in its report of November 1, 2004.**
2. **Reporting on the progress of its recommendations on or before November 1, 2006.**
3. **Serving as a resource to the courts, the legislature and the public and other professional organizations.**
4. **Continuing to investigate alternatives to the Court system to determine parental rights and responsibilities.**

### Discussion:

Numbered paragraphs relate to the recommendations

1. The Task Force worked intensely since its creation to develop its recommendations to make the New Hampshire system less adversarial for families and children going through the process of separation, divorce and child custody. It has also considered policies that would be of assistance to families when dealing with difficult and stressful situations. The members of the Task Force bring a wide variety of experiences to the process and have invested considerable thought and time into the recommendations. This process has included evaluation of current policies, research regarding procedures that may be less adversarial, testimony, discussion, compromise and a creative, realistic and practical approach to improved policies.
2. A report to the Legislature should be submitted by the Task Force on Family Law on or before November 1, 2006. This report should detail the status of any legislation proposed by the Task Force as well as other proposed or enacted legislation relating to issues included within the Task Force's Final Report of 2004 and consistent with its original legislative mandate in Chapter 250, Laws of 2002, as amended.
3. The continuation of this Task Force will keep in place the individuals who have the history on its recommendations and the commitment to implement those recommendations. The Task Force will provide the mechanism for monitoring the progress of its recommendations.

It is important that there be follow up to the Task Force Report. The members need to work with the Legislature, the Governor, the Courts, the Bar, Mental Health Professionals, Educators, and other interested parties to promote the changes that will

make our system less adversarial. It is also crucial that these recommendations be promoted to the public to gain support for a less contentious process that will be of benefit especially to children.

4. There may exist better alternatives to a court-based resolution process. Some were discussed as part of this committee's deliberative process while others were never explored. Given the time constraints and the magnitude of the mission of this Task Force, additional time is needed to supplement this investigation. Failure to do so may represent a lost opportunity to better serve children and their parents.