

REPORT OF THE TASK FORCE ON FAMILY LAW

The Task Force on Family Law was charged with developing a proposal for integrating a non-adversarial system for families undergoing divorce, separation, custody disputes, and other family matters. (Chapter 250, Laws of 2003) In accomplishing its goal, the task force was ordered to:

- I. Gather information on and study the current state of family law and its application in the court system, including current procedures and reporting requirements.
- II. Develop a comprehensive plan, including but not limited to:
 - (a) Recommendations for modifying New Hampshire's family laws.
 - (b) Recommendations for modifying court rules as they apply to family law.
 - (c) Recommendations to increase efficiencies in case processing, reporting and information exchanges.
- III. Consider how the proposals of the Task Force may be coordinated with family resource centers and family service centers in order to integrate a non-adversarial family law system that provides support to families prior to making decisions regarding divorce, custody or other family law issues.

Chapter 250:3 required the Task Force to provide an annual report describing its activities and findings to the House and Senate Judiciary Committees, the House Committee on Children and Family Law and any other relevant committees, and to submit a final report outlining the findings and recommendations of the Task Force to the Senate President, the Speaker of the House of Representatives, the Senate Clerk, the House Clerk, the Governor and the State Library on or before November 1, 2003.

The final reporting deadline was later extended to "on or before November 1, 2004." (Chapter 25, Laws of 2003) A preliminary report was submitted to the Senate President, the Speaker of the House of Representatives, the Senate Clerk, the House Clerk, the Governor and the State Library as required by the legislation creating the Task Force. This final report completes the reporting requirements of the Task Force.

For the Task Force, a group of twenty-one diverse, talented, informed, and committed members, this report has been a journey from which we have all gained great understanding and insight. We are wiser about the problems facing families for whom divorce or separation is contemplated and the needs of their

children. We are aware of limitations on state and local resources, but made recommendations without regard to their actual implementation costs. For many of our recommendations there are few actual new dollars needed, requiring instead a commitment to do a better job of meeting the needs of the public by introducing and supporting a new approach to Family Law. The dedication and commitment of the Task Force members over the two year period has been nothing short of incredible as these busy professionals committed to attending thirty meetings, as well as hours of work preparing sections of the report on their own time. The State of New Hampshire has benefited greatly from their efforts. Hopefully, this introduction will give the reader a sense of the process through which the final recommendations of the Task Force were derived.

The Task Force cares deeply about improving the current system of divorce in New Hampshire by placing emphasis on our most important citizens, our children. As we have learned and shared we have always kept an eye on those for whom this report is really written, our citizens. It is our hope that as we bring forth these various recommendations, that they will be read and reviewed by constituents in the Bar, and the Legislative and Judicial Branches and the public, with a recognition that change in the culture and process surrounding the way we approach divorce and separation can result in a less adversarial and damaging process, so very important especially for children following a divorce. Although the change may be difficult, the Task Force believes that it will be an effort well worth undertaking.

In submitting this final report, the Task Force is grateful for the cooperation of so many citizens who conveyed to us their concerns regarding the adversarial nature of the divorce process and their thoughts about what we should consider in making our final proposals. We learned a great deal about parenting plans from parents who had found them a way to resolve the acrimony that had divided them, resulting in meaningful parenting roles and better communication for both parents and children. We were also fortunate to have been able to draw upon the experience of many divorce practitioners, experts in the field of domestic violence, child development specialists, parenting coordinators, child impact seminar providers, counselors, family resource center providers, and visitation center providers, among many others. Their insights into the effects of the adversarial process and its impact on children were helpful in fashioning our recommendations.

This report is built upon a series of simple principles derived from the notion that divorcing and separating parties need to consider what is in the best interests of their children. It is a child-oriented model asking the court, parents, and practitioners to put the needs of children first. Each family is a unique construct whose special needs must be recognized during divorce and separation. We urge the courts and divorce practitioners to look at each family individually, and not apply a cookie cutter approach by either directing all cases to a trial driven schedule, or by being rigid in the approach to making decisions

regarding the post divorce family and its reconstruction. Parents are urged to consider their children's needs, and their developmental stages and the appropriateness of contact with both parents as they share and shape their post divorce relationship with their children and between themselves. Practitioners must assist their clients in understanding the impact of the divorce itself, and the effect of its adversarialness on children. We ask lawyers to join with those experts who have told us that redefining and reshaping the relationships among family members is a complex issue, one often made more difficult in a highly adversarial process. Lawyers need to serve as "counsel" not just as "advocates" for their clients, helping to identify other alternatives to highly contentious litigation, whenever possible.

The report acknowledges that children should have appropriate contact with both parents, as each individual family construct dictates. Our recommendations aim to foster an environment in which more parties are empowered to actively participate in their important decision-making rather than having a judge or master make the final determination for them. We urge the courts to support a system in which appropriate referrals to mediation, child impact seminars, parenting classes, and support groups are made, to reinforce parental rights and responsibilities. Other forms of alternative dispute resolution should be made available as early in the process as possible, and explored on a case by case basis. As current statistics reinforce, less than 10% of all divorce cases in this state end up in trial, although there may be some degree of acrimony and adversarialness in many settled cases. The aim of this report is to expose more divorcing parties, the courts, and those who practice in this area of the law, to the benefits of a less adversarial, more party directed approach. This approach is reinforced by policy statements and recommendations of the report, "A Vision of Justice: The Future of the New Hampshire Courts."

We applaud the efforts of the House Committee on Children and Family Law which created this Task Force. The time now seems right to support the recommendations derived from this comprehensive review of the adversarial process as the only system of family dissolution, and what might be done to reduce the impact which it has on families and children. As we began this investigation we thought we might be alone in taking a hard look at the major factors contributing to adversarialness in divorce. By the conclusion of this report, we are among several other voices suggesting a path for the courts, the public, and the legal community that is more directed to customer service and sensitive to the needs of self represented litigants and families experiencing divorce. A separate Task Force, derived from HB 310, Chapter 103, Laws of 2003, established a Commission to Study Child Support and Related Child Custody Issues. As a result of their specific charge, we have made only one recommendation which deals with amending the statutes to deal with shared and split residential arrangements as these family arrangements, are not defined in existing law. A report of the Commission to Study Child Support and Related Child Custody Issues is due by December 1, 2004.

This undertaking was the first comprehensive look at how divorce and separation and child custody matters are handled in New Hampshire, since the Resolution of Family Issues in the Courts Study Committee Report was released by a legislatively created commission established in 1994. Although there have been a number of significant legislative enactments affecting divorce law during the intervening years, the legislature had not commissioned a comprehensive look at ways to decrease the adversarial nature of the process itself. For many involved in divorce, separation, child support, and custody issues, the process has remained very adversarial and in need of further review.

Significant areas of change have begun to develop as this Task Force has been engaged in its study. The Family Division Pilot Project which was enacted in 1995 (which was the product of the Resolution of Family Issues in the Courts Study Committee), after eight years as a “pilot project” it has emerged as the model through which the court system will process family related cases statewide (Chapter 240, Laws of 2004). An implementation committee headed by Associate Supreme Court Justice Linda S. Dalianis, is actively working on a plan to lay out the expansion and will report its findings by December 1, 2004. The Family Division expansion will be well suited to implement much of what is recommended in this report. As a more locally based court system is developed, with judges and masters working close to where families live and work, ties to many of the resources outlined in this report can be accessed and further developed, and expanded where needed. Family support services can be crucial for many families both pre and post divorce. Family Division judges and masters, with opportunities for additional training and a commitment to hear these cases, will be the hallmark of the expansion statewide. Through the Family Division greater use of dispute resolution alternatives can be offered as alternatives and made available to families.

The expanded use of mediation in family cases was advanced by legislation enacted into law on July 1, 2003. Although at first a casualty of court budget shortfalls, greater referral to mediation by certified marital mediators in appropriate cases, has finally become a reality with a slow, steady increase in the number of cases being referred. The legislation also contained a provision for state funding for indigent parties unable to afford the full cost. Mediators participating in this program have agreed to a flat fee payment for the mediation and the parties are required to repay the state for the mediation. This first small step lays an important foundation to expand access to mediation and/or other dispute resolution alternatives, in all appropriate cases. The court system itself is now supporting an initiative to bring other dispute resolution alternatives back into the court system as part of its own service options, rather than as annexed services outside the system and available only to those who can afford them. (See recommendations of the “Visions” report referenced below.)

Although not focused specifically on the processing of family cases, in February, 2004 the Supreme Court established the New Hampshire Court Committee on Justice System Needs and Priorities. Its report, "A Vision of Justice: The Future of New Hampshire Courts," released in September, 2004, outlines the vision and recommendations for identifying critical needs and a series of priorities aimed at assessing developments which affect the delivery of justice to the public. Many of the recommendations contained in that report again serve as a basis or platform for implementation of many of the proposals outlined in this Task Force report.

It is not insignificant for the future that there is a clarity and commonality to the various voices calling for a "better way of serving the public" in the "handling and processing" of family cases and "empowering individuals to shape their own plans for enhancing parental rights and responsibilities." A statewide family court system can better focus and direct available local resources to the families it serves. This setting has been identified by the court as the means by which it can best serve people at a time when they are facing profound personal issues, in an exclusive venue committed to the fair and impartial delivery of family related justice. It is upon the existing structural platform, which is now being expanded statewide, that these recommendations can be implemented and built upon as an alternative to our current adversarial model. A justice system that is mindful of the need to provide greater access to justice for all can approach the need for further structural, procedural and rule changes with a greater understanding and commitment to the needs of the families which this report seeks to serve. In so many ways, the time could simply not be more right for advancing these recommendations and goals common to the public and to the judicial system and to those who practice family law.

In advancing many of these recommendations we are mindful of the fact that currently nearly 70% of family related cases in our state involve at least one of the parties appearing and proceeding without the aid of counsel (pro se). This factor alone leads us all to consider changes in how family law cases must be handled. In that regard this report supports the major recommendations of the Supreme Court's own Task Force on Self-Representation as contained in its final report, "Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Court," January 2004. This report adds its voice to the call for greater access to legal assistance, pro bono services, and unbundling of legal services so that those who wish to have the assistance of a lawyer can obtain one.

This report does not minimize the role that appropriate legal assistance can provide to families. Although we urge the courts to expand the availability of case managers who serve to triage cases upon entry into the marital system, we remain committed to the notion that with professional guidance, post divorce relationships for children and families can be better and stronger. Our host of recommendations seek to empower parties through greater access to parenting programs, child impact seminars, counseling, community support groups and

services, and other forms of dispute resolution alternatives. One of our many recommendations encourages the development of localized service resource guides which should be developed and made available at expanded locations including courthouses, libraries, town offices, schools, and on the Internet.

There are many who have suggested that it is not possible to reduce adversarialness in divorce, separation and child custody cases. They suggest it is an oxymoron. They have smiled smugly at our charge and suggest that divorce is by its nature adversarial. Our research and study suggest that it can be otherwise, or less so, if the parties to these proceedings are made aware early enough, of other means, to cooperate in achieving settlements which enable them to fashion final outcomes which provide for better long term parenting agreements.

It will require a significant cultural change in the way we approach divorce. For all the parties involved in this process, a change in how these cases are processed must begin. Although less than 10% of cases ultimately require a trial, shortly after a case is filed, courts begin to schedule them as if a trial is inevitable. In the future courts should provide "off ramps" that encourage counseling and dispute resolution alternatives. A Judge or Master and a lengthy adjudicated trial should be the last door (or ramp) available, the "court of last resort" when the parties are unable to resolve the matter, themselves. We recognize, however, that those ramps must first be made available.

For the public there must be a rethinking of the absolute costs of the adversarial process especially as it relates to children. The emotional costs of the current process on children has been clearly documented. The best interest of the child should be our first and primary consideration. In addition to stressing the need for the immediate attendance at child impact seminars, parents must be made aware of the opportunity for mediation, one significant alternative to the current trial model. Parties need to be empowered to more actively settle the matters relating to their families. A public educational campaign needs to be undertaken which brings attention to the various alternatives to a highly litigated divorce, so that divorcing parties are familiar with options before they head to the courthouse to file for divorce.

In our child-centered approach, we were deeply affected by testimony regarding the importance of providing a course of study to teach positive "Adult Roles and Responsibilities." Such a course of study in our public schools would expose many young students to problem solving techniques, dispute resolution alternatives, information on finances, cooperative decision-making, and tools and which resources once traditionally imparted in the home. These students would be better equipped to handle many of the issues which arise up in marriages and are often the chief causes of divorce and separation. We believe it is absolutely essential that students be provided with the tools to better adjust to their roles and responsibilities as young adults and parents. Such a course of study is all

the more significant as we realize that more than 50% of our children are now raised in families where a divorce or separation has occurred. The Task Force advocates for such courses at the local school level and urges that they be adopted as a graduation requirement by the State Board of Education.

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 itself 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 laws as 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.

Those practicing in the areas of family law also need to explore the changing landscape, which this Task Force Report embraces. The long held notions of “custody,” “support,” and “visitation,” are value laden terms which denote concepts of ownership and denial, both of which increase adversarialness. Practitioners and their clients need to understand the value of child centered decision-making and the importance of developing parenting plans which lay the foundation for healthy relationships between children and both parents post divorce, whenever appropriate. It is clear that there are many cases involving imbalances of power, domestic violence and mental illness where such dispute resolution alternatives may be inappropriate. The first step in moving forward is to provide for initial case screening with the aid of a well-trained case manager at the onset of each case. Even highly adversarial parties may be able to focus attention on issues of agreement, if offered the opportunity to do so early enough in the process. The training of case managers must include knowing their legal boundaries as they are assisting parties in understanding case processing and alternatives, while not providing inappropriate advocacy or legal advice.

What follows this introduction is a series of detailed sections outlining and describing the major subject areas and the recommendations promulgated by the Task Force. Our process in arriving at these recommendations was one which involved information gathering from volumes of studies, presentations by professionals, input from the public, and discussion and debate during our two year existence. Our recommendations derive from debate, discussion, and vote. Our report is based upon consensus, mainly on unanimity, but not always total agreement. On those issues where we could achieve no true consensus there were no recommendations brought forward. In this process we were guided by

our charge “How does this reduce the adversarial nature of divorce?” How does this promote our goal of serving “the best interests of the children?”

The following topic areas are detailed in the sections to follow: Statutory Changes and Language, Rules and Other Court Procedural Changes, Parenting Plans and Parenting Coordinator, Domestic Violence, Dispute Resolution Alternatives, Educational Components-Bar Member, Judicial Branch, Mental Health, and the Public, Support Services, Protocols, Legal Services and a recommendation for continuation of the Task Force for purposes of implementation and oversight of the recommendations of the report.

With the submission of this report, the first phase of our work is complete.

A comprehensive bibliography of materials reviewed and consulted will be made available to the House and Senate Committees with subject matter jurisdiction in the areas referenced in this report.