

EMPOWERING CHILDREN’S RIGHTS WHERE THEY MATTER: IMPLEMENTING CHILD-INCLUSIVE MEDIATIONS IN DIVORCE PROCEEDINGS

SAMANTHA LAMKA^{*}

- I. INTRODUCTION
- II. CURRENT CLIMATE
- III. BREAKDOWN OF THE 2008 STUDY
- IV. RETHINKING CHILDREN’S RIGHTS
- V. IMPLEMENTING THE EMPOWERMENT PERSPECTIVE OF CHILDREN’S RIGHTS IN MEDIATIONS USING THE 2008 STUDY MODEL
- VI. BENEFITS TO GAIN AND RISKS TO TAKE
- VII. CONCLUSION

^{*} Samantha Lamka is a 2020 graduate of Ohio University and a 2024 graduate of The Ohio State’s Moritz College of Law. She is thankful for the support she has received from friends, family, and loved ones.

I. INTRODUCTION

When it comes to divorce proceedings, children have everything to lose but nothing to gain in many of these cases. Although each family and divorce is unique, it has been collectively determined that divorce negatively impacts children in most aspects of life; future familial relationships, emotional well-being, academic success, and economic power all take a hit.¹ While some parents may view a divorce as a victory for themselves, it often represents a defeat for the child due to the familial, economic, and societal losses that are associated with the proceedings.² Furthermore, the primary vehicle used to facilitate divorce proceedings—litigation in an adversarial system—creates a hostile and competitive environment that stifles negotiation processes.³ Rather than adding to the acrimony associated with divorce, courts should aim to resolve family disputes in a safe, efficient, and fair way—which is where alternative dispute resolution (ADR) comes into play.⁴

ADR processes, especially mediation,⁵ help encourage better familial relationships during and after the divorce while saving the emotional and economic resources wasted in litigation.⁶ Ohio,⁷ like nearly every other state, may require mediation for divorcing parties, especially when there is a child custody dispute.⁸ Rather than having a judge resolve important family decisions, mediation empowers parents to make these decisions themselves

¹ Jane Anderson, *The Impact of Family Structure on the Health of Children: Effects of Divorce*, 81 THE LINACRE Q. 378, 380 (2014).

² See Andrew Schepard, et al., *If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families*, 26 HARV. NEGOT. L. REV. 25, 35 (2018).

³ *Id.* at 35–36.

⁴ *Id.* at 30.

⁵ *Statistics: Hire a Divorce Attorney for the Best Custody Outcome* (Aug. 24, 2021), <https://www.custodyxchange.com/topics/research/divorce-custody-statistics-2021.php> [<https://perma.cc/R6ZN-GC5S>]. In a poll of 1,000 recently divorced adults, 93% reported using an ADR method, with more than half of all respondents citing mediation.

⁶ Schepard, *supra* note 2, at 30.

⁷ OHIO REV. CODE ANN. § 3109.052 (West 2001) (“If a proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of a child involves one or more children, if the parents of the children do not agree upon an appropriate allocation of parental rights and responsibilities for the care of their children or do not agree upon a specific schedule of parenting time for their children, the court may order the parents to mediate their differences on those matters in accordance with mediation procedures adopted by the court by local rule.”).

⁸ Amy V. Clark, *Divorce Mediation—Overview*, FINDLAW (June 28, 2023), <https://www.findlaw.com/family/divorce/divorce-mediation-overview.html> [<https://perma.cc/RNH6-JNBM>].

EMPOWERING CHILDREN'S RIGHTS WHERE THEY MATTER

without the rigor of an adversarial court setting.⁹ But what about the children's empowerment in making these decisions? This Note aims to advance an empowerment perspective of children's rights, specifically in the context of divorce mediations. By empowering children during divorce mediations, their desires and opinions will be given proper respect and attention which will allow all parties involved to make an informed decision about the future of the family.

This Note will advance this argument in the following manner: Part I will discuss the current climate of the family court system within the United States, setting the stage to discuss the impact that an empowerment perspective for children's rights can have for those going through familial turmoil. Next in Part II, an Australian study from 2008 will be thoroughly discussed since it provides a blueprint for effective and beneficial mediation practices for divorcing parties involving children. Part III will transition to discuss the current legal practices of divorce mediations involving children and how the empowerment perspective will rethink and improve these standards. Part IV will implement this theory by using the blueprint provided by the 2008 study and will end by discussing the benefits to gain and the risks to take by adopting this approach to children's rights. In its conclusion, this Note takes the position that children are entitled to have a say in the future of their family structures and that mediation offers the best context for advancing these rights. By empowering children through ADR, families will be able to better manage the breakdown of their nuclear structure while providing continued support and guidance throughout the process for the children who are central to the familial unit.

II. CURRENT CLIMATE

Divorce has been around in the United States since colonial times.¹⁰ Once considered to be taboo and forbidden, divorce has entered the mainstream and is a common occurrence for many in today's society.¹¹ With the onset of no-fault divorces, which lowered the cost of divorce and made

⁹ Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAM. CT. REV. 323, 324 (2005).

¹⁰ One of the earliest tribunals for divorce law was in the Colony of Massachusetts Bay, established in 1629. It would allow divorces, which were controversial at the time, on the basis of adultery, desertion, bigamy, and in many cases, impotence. James Hardy, *The History of Divorce Law in the USA*, HISTORY COOPERATIVE (May 29, 2015), <https://historycooperative.org/the-history-of-divorce-law-in-the-usa/> [<https://perma.cc/27XP-X8XR>].

¹¹ *Id.* At the time of the writing of this source, in 2015, the average length of a marriage in the United States was around 11 years.

them more easily accessible, the modern divorce courts that exist today came to fruition.¹² As of 2021, there were over 1.9 million marriages and around 690,000 divorces.¹³ These rates reflect a decrease in the number of marriages and divorces in recent times, with 2019 being a record low for divorce rates.¹⁴ Despite these rates, there are still several issues that arise when divorces do occur, especially when these proceedings involve children.

Although divorce law developed dramatically with the onset of no-fault divorces, child custody remained a largely neglected topic within this

¹² No-fault divorces allowed one spouse to dissolve a marriage for any reason—or no reason at all—rather than requiring fault upon one party. California signed the first no-fault divorce law under then-Governor Ronald Reagan, who later described it as one of the biggest mistakes of his political life. *Id.*; W. Bradford Wilcox, *The Evolution of Divorce*, NAT'L AFFS. (2009), <https://nationalaffairs.com/publications/detail/the-evolution-of-divorce#:~:text=Fall%202009,first%20no%2Dfault%20divorce%20bill> [<https://perma.cc/V2YX-WDAH>] (noting that Reagan's likely motive for signing the bill was that his first wife had accused him of "mental cruelty" as a basis to obtain a divorce from him in 1948).

¹³ *Marriage and Divorce*, CTR. FOR DISEASE CONTROL AND PREVENTION (Apr. 24, 2023), <https://www.cdc.gov/nchs/fastats/marriage-divorce.htm> [<https://perma.cc/Z373-2EP9>].

¹⁴ Wendy Wang, *The U.S. Divorce Rate Has Hit a 50-Year Low*, INST. FOR FAM. STUD. (Nov. 10, 2020) <https://ifstudies.org/blog/the-us-divorce-rate-has-hit-a-50-year-low> [<https://perma.cc/E28F-846U>]. For every 1000 marriages in 2019, only 14.9 ended in divorce which is the lowest rate recorded in the last 50 years; as for marriages, for every 1,000 unmarried adults in 2019, only 33 got married. *Id.*

EMPOWERING CHILDREN'S RIGHTS WHERE THEY MATTER

field.¹⁵ The role of children in divorce law has long been the subject of debate. Some consider the family instability caused by divorce a major public health crisis, while others think divorce is innocuous or even a positive change for unhappy couples or children exposed to high conflict.¹⁶ Each side of this debate is supported by research documenting the effects of divorce on children. The negative effects include academic difficulties (like lower grades and higher dropout rates), disruptive behaviors (like substance abuse or conduct issues), and depressed moods.¹⁷ Children of divorced couples are also more likely to engage in risky sexual behavior, live in poverty, and experience their own future family instability.¹⁸ But most of these problems that are associated with being “a child of divorce” can be related to other issues like racism, sexism, homophobia, inaccurate recordkeeping, and insufficient government support.¹⁹ Additionally, there can be some positive effects

¹⁵ Hardy, *supra* note 10. Some laws that do address child custody disputes include the following: The Uniform Child-Custody Jurisdiction and Enforcement Act of 1997 which governs state courts’ jurisdiction to create and change child-custody determinations and requires state courts to enforce these determinations made by sister state courts (replacing The Uniform Child Custody Jurisdiction Act of 1968); The Parental Kidnapping Prevention Act of 1980 which was designed to discourage interstate conflicts, deter interstate abductions, and promote cooperation between states about interstate custody matters—it tells courts when to honor and enforce custody determinations made by courts in other jurisdictions; and The Hague Convention on International Child Abduction of 1986 which has been enforced in over thirty countries, including the United States, with the aim to protect children from wrongful international removals from their lawful custodians by requiring children to be returned to their country of habitual residence for resolution of any custody dispute. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, U.S. DEP’T OF JUST. (Dec. 2001), <https://www.ojp.gov/pdffiles1/ojdp/189181.pdf> [<https://perma.cc/ZAE9-GG2G>]; NAT’L CTR. ON PROT. ORDS. AND FULL FAITH & CREDIT, INTERSTATE CHILD CUSTODY A PRACTITIONER’S GUIDE TO THE PARENTAL KIDNAPPING PREVENTION ACT (PKPA) 28, U.S.C. §1738A, https://www.bwjp.org/assets/documents/pdfs/a_practitioner%E2%80%99s_guide_to_the_parental_kidnapping_prevention_act_pkpa.pdf [<https://perma.cc/3BFZ-NYPA>] (last visited Oct. 23, 2023); Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L. Q. 9, 9–11 (1994).

¹⁶ Brian D’Onofrio & Robert Emery, *Parental Divorce or Separation and Children’s Mental Health*, 18 WORLD PSYCHIATRY 100, 100 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6313686/> [<https://perma.cc/39ZK-U3MJ>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Gail Cornwall & Scott Coltrane, *How Americans Became Convinced Divorce Is Bad for Kids*, SLATE (Jul. 11, 2022, 5:55 AM), <https://slate.com/technology/2022/07/divorce-bad-for-kids-history.html> [<https://perma.cc/X3E9-M737>].