

## RESPONSE

William J. Howe and Hugh McIsaac

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This is a response to “A Comment on William J. Howe and Hugh McIsaac’s Article ‘Finding the Balance’ Published in the January 2008 Issue of *Family Court Review*.”

**Keywords:** *family law; ethics; children and custody*

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We are grateful to our able colleagues, Judge Edwards, Baron, and Ferrick, who articulately expressed in their “Comment” their disagreement with one paragraph of our article, “Finding the Balance.” Our article promotes nonadversarial decision making when resolving issues concerning children. This principle has guided our professional lives as a family law lawyer and a mediator, respectively. However, our many years of experience in this field also required us to caution in our article:

Whenever there is *significant or persistent domestic violence* and *significant issues of mental health* on the part of one or both parties, *or significant levels of chemical abuse*, generally the adversarial model is preferable because of procedural and other safeguards it provides to the victim or less capable party.<sup>1</sup>

Essentially, Judge Edwards, Baron, and Ferrick contend that mandatory mediation of all parenting disputes is worth the risk, will more often achieve satisfactory outcomes for the parties, and that skillful and highly trained mediators are capable of fairly managing any power imbalance in ways that almost always avoid litigation. In those limited circumstances mentioned above, our experience teaches otherwise.

Many parenting cases involving domestic violence, mental health issues, or chemical abuse can be successfully and fairly resolved through mediation. The “Comment” discusses the strides made in California to screen for and train mediators to handle cases where domestic violence is an issue. However, our caution suggests litigation is *generally* preferable where *both* significant domestic violence *and* mental health issues are present. This combination of behavior and disability often precludes the level of rational negotiation necessary to successfully mediate these matters.

Perhaps the fundamental shortcoming of the “Comment” position is that few jurisdictions have committed the resources necessary and a sufficient pool of highly trained mediators with the skills to handle cases involving the combination of significant domestic violence/mental health issues or significant chemical abuse. The silent premise of their argument is that, notwithstanding the disabilities we describe, the victim parent possesses the will and ability to advocate for the children’s best interest and they further argue it is paternalistic to suggest otherwise. However, we have too often seen a mediated parenting plan containing

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no restrictions prohibiting an addicted parent from using drugs during parenting time or driving a child while high or intoxicated during parenting time because these matters were not introduced in the mediation. This situation occurs because the mediator never learned of the chemical abuse due to denial and codependency. Significant or persistent domestic violence, particularly when coupled with mental health issues, often reduces the victim to a terrorized emotional prisoner with a greatly diminished capacity to negotiate a parenting plan in the best interest of the child. In mediation, the parties often continue the same dance of codependency and denial that persisted throughout their relationship.

Many parenting/mediation programs do not have adequate budgets or they require the mediator to perform evaluations in addition to the mediation function, resulting in less time spent in quality mediation, because the demands of the courtroom take precedence. Court administration is often more concerned about processing cases and “counting the widgets” and less concerned about the quality of the agreements developed. Mediation sessions are frequently limited to a single session of one hour. Sadly, our experience indicates that too frequently victims of domestic violence, when coupled with a party suffering from mental health impairments, are willing to agree to results not in the best interest of their children, such as allowing an alcoholic parent to drive the children. As Judge Tikten of the Deschutes County Family Court in Oregon remarked, “Too often family courts across our state focus on **output** rather than **outcome**.”<sup>2</sup>

Another concern about mediation in extreme domestic violence matters is found in two important critiques of mediation. The first is Laura Nader’s article published in *Family Court Review*.<sup>3</sup> Nader is concerned about substituting harmony for justice and the creation of “micro-legal” processes that do not see the light of day and are not subject to formal review. The second is Trina Grillo’s article published in the *Yale Law Journal* where she raises similar concerns. She argues that domestic violence is a serious legal issue with important safety and justice issues requiring the court’s attention not only for the best interest of the child but also because of the important goal of openly dealing with this issue in a forum of strength and public review.<sup>4</sup>

In these matters, litigation may provide better protection for the children. At least it will prevent the entry of judgments in these admittedly few and rather extreme situations, jeopardizing the children’s safety and emotional well-being. It is for this reason, as our colleagues point out, most jurisdictions do not mandate mediation under the circumstances we are discussing.<sup>5</sup>

Of course, litigating of parenting matters is imperfect as it often further polarizes the parents. Nonetheless, the harmony of a settlement that ignores the children’s best interest because of the fear or disability of one party is hardly preferable. It is also true that it is sometimes hard to determine what is “significant” domestic violence/mental illness or chemical abuse. Exactly the same problem presents itself to the mediator in the model that “Comment” urges. Indeed, under their recommended protocols, it is compounded because the mediator, or mediation program, becomes the final arbiter of the parties’ competence, the fairness of the process, and appropriateness of the outcome, all without review or appeal.

There is a limitation to our response: Many parents do not have the resources to employ sufficiently trained and competent attorneys to manage the courtroom adversarial system. Sometimes the judge deciding the matter has little or no background in family law and is dependent on the mediator/evaluator for a resolution. However, the system works best when an experienced judicial officer is aided by two competent attorneys and a mental health professional with the time and expertise to review and recommend a parenting plan. Better

outcomes are achieved in the best interest of the child in these particular cases. Unfortunately, not all parents have the capacity or the will to reach agreements in the best interest of the child. In fact, in some matters the child is being used by one parent to hold onto, or to get back at, the other parent. Mediation will not work in these situations.

The use of “Nonadversarial Parenting Plan Evaluations,” developed by the Oregon Family Institute, may offer a solution to the dilemma presented above.<sup>6</sup> These evaluations provide procedural safeguards but also involve the parents and their attorneys in an evaluation/mediation process. However, this process is also time intensive.

The excellent research of Robert Emery<sup>7,8</sup> and others supports the assertion that mediation of children’s issues is generally preferable to litigation. No one to our knowledge has researched whether the same is true in cases involving significant or persistent domestic violence combined with significant mental health issues or where there is significant chemical abuse. Until it is proven that another method is preferable in these special cases, litigation and other judicial interventions should be available to protect the best interest of the children trapped in these unhappy situations.

We thank our colleagues for their thoughtful review of our article and appreciate the opportunity to continue the dialogue.

## NOTES

1. William Howe & Hugh McIsaac, *Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake*, 46 FAM. CT. REV. 78, 84 (2008) (emphasis added).

2. Hon. Stephen Tikten, Remarks at the Fourth Annual Statewide Family Law Conference (Aug. 6–7, 2006).

3. Laura Nader, *From Legal Process to Mind Processing*, 30 FAM. & CONCILIATION CTS. REV. 468 (1992).

4. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1545–1610 (1991).

5. Leonard Edwards et al., *A Comment on William J. Howe and Hugh McIsaac’s Article “Finding the Balance” Published in the January 2008 Issue of Family Court Review*, 46 FAM. CT. REV. 586 (2008).

6. Hugh McIsaac, *Programs for High-Conflict Families*, 35 WILLAMETTE L. REV. 567, 569 (1999).

7. ROBERT EMERY, *MARRIAGE, DIVORCE AND CHILDREN’S ADJUSTMENT* (Sage Publications Inc. 2d. ed. 1999).

8. ROBERT EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION* (Guilford Press 1994).

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