# Triage Protocols for Divorce and Child Custody Cases

**Thomas M. Clarke, Ph.D.**
**April, 2017**



Funding for this project was provided by the State Justice Institute Award SJI-12-P-085. The points of view expressed are those of the National Center for State Courts and do not necessarily represent the official position or policies of the State Justice Institute.

## Acknowledgements

This project was made possible by a grant from the State Justice Institute (SJI). Valuable input was provided by the focus group members. Particularly extensive comments were provided by Katherine Alteneder, Serpil Ergun, Stacey Marz, and Rebecca Kourlis. The views presented here do not necessary represent those of the focus group participants. All errors are the responsibility of NCSC.

### Focus Group Members

Katherine Alteneder
Self-Represented Litigation Network

Tom Clarke
National Center for State Courts

Alicia Davis
National Center for State Courts

Bill Delisio
Colorado Courts

Joseph DiTunno
Connecticut Courts

Serpil Ergun
Cuyahoga County Courts

Rebecca Green
William & Mary Law School

Natalie Knowlton
Institute for the Advancement of the American Legal System (IAALS)

Rebecca Kourlis
Institute for the Advancement of the American Legal System (IAALS)

Kara Martin
Colorado Courts

Stacey Marz
Alaska Courts

Zana Molina
National Center for State Courts

Debra Moore
Utah Courts

Dona Playton
Institute for the Advancement of the American Legal System (IAALS)

Joyce Raby
Florida Justice Technology Center

Luke Sanchez
DivorceNM.com

Aaron Spillane
DivorceNM.com

Angela Tripp
Michigan Legal Help

# Table of Contents

## Background

This white paper was inspired by a related set of projects that began in 2012. In that year an SJI-funded project produced a white paper on triaging civil cases in the context of a litigant portal. Some of that work was carried forward in an SJI and BJA funded civil reform project that produced a series of recommendations in 2015 that included specific pathways and triage decision points. In both projects there were hopes that identified triage algorithms could be partly or entirely automated, especially at case initiation in the courts.

This project attempts to document a similar set of triage algorithms for divorce and child custody cases. Although the strategy is similar, the issues and challenges are most different. On the civil side, court experts discovered that they did not have an accurate picture of their actual caseload in terms of both frequency of case types and distribution of case characteristics. Research on the so-called "civil landscape" produced a more accurate description that formed the basis for subsequent recommendations for reform.

Although a few courts were attempting to carry out simple forms of differentiated caseflow management (DCM) in a traditional sense, the results were disappointing. The civil reform project was motivated by a strong desire to lower costs for both litigants and courts while reaching appropriate case resolutions more quickly. Aside from several state pilots of speedy trial reforms that yielded very minor improvements, not much was being done.

Finally, the civil reform project originated with a very successful federal civil reform project that focused on court rules, especially in the area of proportionate discovery. At the state and local level, courts discovered that any significant discovery at all was relatively rare and most of the problems revolved around large numbers of very simple cases, many of which defaulted. Thus, the appropriate strategies for reform were aimed at more operational and process-based changes.

The situation is quite different for domestic relations cases in general and divorce and child custody cases in particular. Most courts understand their distribution of case types quite well and even have considerable insight into case characteristics. A tremendous amount of innovation in case processing has occurred over the last decade and continues to evolve in many courts. There is significant federal and state legislative attention to such cases and court case processing details like timelines for significant case events can often be found described in state statutes with mandatory compliance requirements.

If anything, the courts suffer from an embarrassment of riches with this case type. So many courts are trying so many different and partly conflicting approaches to case processing that it is hard to even understand the range of what is happening,

let alone identify what works best. In one sense this is good. It is traditional to laud the benefits of American decentralization as multiple "experiments" are run in different states or local jurisdictions. On the other hand, if everything is acceptable, then nothing is known to be a best practice—or even a good one. Consequently, this project attempted to discover what good triage practices might look like for this case type.

## Scope

The scope of this white paper is relatively simple to describe, but hard to do in practice. It started out with three goals. Two other significant issues arose during the project and are definitely worthy of further attention, but lie outside the scope of this white paper. They will be discussed briefly as they relate to the core scope:

*Within Scope*

1. Identify appropriate case processing tracks for divorce and child custody cases.
2. Identify appropriate triage criteria for sorting cases into those tracks.
3. Identify what services should be provided to cases within each track.

*Outside Scope*

4. Determine to what extent such cases need to be processed and managed within the courts.
5. Determine the best mix of problem solving and adversarial case processing approaches.

The last two issues do not seem at first related to the prior three, but it turns out that courts are somewhat constrained by statute and court rule in how they can process divorce and child custody cases, so the opportunities for innovation are limited. Some interesting "experiments" in processing such cases are going on now outside the courts. In some cases they are attempting to apply aspects of case triage that are at least partially innovative. Similarly, many courts have moved gradually but steadily toward more problem solving processes without being very explicit about when and where they are implementing a non-adversarial approach. Both of those issues definitely are related to and affect case management strategies, but they are too complex and difficult to address here in a serious way.

A key issue that will not be systematically addressed here is practicality of implementation. There is a definite tension between what should ideally be done, what courts can afford to do, and what litigants want. In real life courts must do the best they can with the resources they have. This may mean identifying "good enough" solutions. It may mean in some cases using second best solutions if resources are insufficient.

One approach to practicality would be to specify the ideal and "back off" that process only when necessary. Another strategy might be to identify ideal practices that will almost never be practical and replace them with the next best practice or, again, a good enough process. As long as budget constraints exist, a court that provides more services to one case is essentially reducing services in another case, so some sense of cost/benefit is definitely helpful in making these kinds of service

and process tradeoffs.[1] In fact, if done well a cost/benefit analysis might point the way to a better approach. This white paper leans toward the good enough approach, but will indicate ideal alternatives when they are not recommended in the first instance.

Litigants also trade off outcomes (legal decisions) against other considerations like time, cost and process complexity. For example, a court might recommend a comprehensive evaluation in a case, but the litigants may prefer a less expensive and faster alternative. So there are actually two levels or kinds of tradeoffs being made that may or may not align. Little attention has been paid to date on the extent to which tradeoff misalignments may exist and how they might best be mitigated.

[1] Of course process improvements may mitigate the need to make these kinds of tradeoffs.

## Case Tracks

As the court community read about the civil reform project, the recommendations about tracks and triage seemed to many like traditional DCM. So, they asked, what is new and different about that? There were several answers. First, most courts still do not practice traditional DCM in any meaningful way, so even doing that would be a change for the better.

The rest of the answer is more technical. Traditional DCM views incoming cases as feeding a "reverse telescope" where the fat end is at the beginning and represents all of the cases. As cases proceed down the standard case management process, attempts are made to resolve them at the earliest possible standard case event. That leaves fewer and fewer cases to proceed further in the process. What makes it differentiated is if a court creates more than one standard process and then separates the cases into those different processes at case initiation. As noted above, a few courts created two tracks for simple and complex cases, respectively, but most did not.

An even more serious problem can arise if courts force all cases through a linear tiered case process[2]. This approach typically starts with mandatory or voluntary mediation and then escalates to other strategies if not initially successful. When mediation is required, it can be detrimental to domestic violence victims if the victim does not feel safe and able to enter into voluntary agreements without being coerced.[3] Also, some issues may not be easily resolved through mediation, so it would be better to identify the need for a judicial decision up front.

Some courts manage cases as if all are headed for trial despite the reality that few actually result in trials. Along the way other services (custody evaluations, appointments of guardian ad litems, mediations, other ADR processes) may be ordered—often in an ad hoc way without evaluating the need against specific criteria for those services.

A single track misses other kinds of efficiencies. For example, complex or high conflict cases which have a high probability of going all the way to a trial could be put on a trial track immediately, rather than working sequentially through events and services that will not resolve those cases. Time and expense is saved for both

---

[2] For a full explication of this problem and suggested solutions, see "Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence," Nancy Ver Steegh, Gabrielle Davis, and Loretta Frederick, Marquette Law Review Vol. 95, Issue 3 (Spring 2012, pgs. 955-991.

[3] While many have long believed that cases involving domestic violence are not appropriate for mediation, mediation may be a good option depending on the specifics of an individual case. For example, the victimized party may want to mediate as opposed to participate in an adversarial trial and this could be an appropriate resolution approach depending on several considerations. These include the type of domestic violence experience and the availability of a well-trained mediator who understands the dynamics of domestic violence and is able to ensure victim safety and eliminate a power imbalance during the mediation session.

the litigants and the court. Alternately, cases that could resolve very quickly because there are no or few issues in dispute could get drawn out and experience conflict where none existed before because the court kept the parties interacting longer than necessary.

In contract to the single track approach, the track and triage approach takes tracks very seriously. It identifies multiple case tracks that represent significantly different case management processes. It puts cases into appropriate tracks at case initiation using appropriate triage criteria. If done correctly, the tracks will and should differ significantly in the amount of court resources required, who does what kind of case management oversight, and what the typical distribution of case resolution times are.

The last point is an important one. Instead of trying to resolve all cases as quickly as possible, the track approach tries to match cases to an appropriate amount and type of court case management. Because some cases require more management and more legal process, they should take longer to resolve. Thus, the goal is to provide just the right amount of process and oversight—not too much or too little.

This is hard enough to do with civil cases that are mostly relatively simple. Divorce and child custody cases unpack to a variety of case situations and a sea of possible services. Services do not play a significant role in civil cases, but they are the heart of the matter in many domestic relations cases because the goal is to obtain the best result for the family—not to resolve a formal legal dispute. Thus, a final difference is that many domestic relations courts implement many characteristics of a problem solving approach, rather than a traditional adversarial process. Like the mix between in-court and out-of-court processing, it is an important issue for further discussion in another forum.

Good examples of traditional DCM using a single track include Cuyahoga County in Ohio, Adams County in Colorado and Connecticut. They triage out to various services in a sequential way along the single track as indicated. Like a number of other courts, Cuyahoga looks on paper like they are running a number of tracks, but they are actually essentially the same process with cases grouped into sub-case types. Connecticut is an interesting hybrid approach, since its single track triages out to one of four services initially and then fails over to other services or additional steps in the track if the first service does not resolve the case.

We have fewer examples of triage, but Alaska has at least two tracks and possibly more. Colorado and Nebraska are actively working on the identification and implementation of multiple tracks with triaging criteria. Utah is studying the possibility, but has not yet committed to a specific triage project.

### *Uncontested Track*

One can envision three tracks for divorce and child custody cases at the highest and simplest level. The first track includes only cases for which nothing is contested and the parties require only a formal order from the court. Even here courts differ significantly in how they process such cases.

At one extreme Maricopa County Superior Court allows parties to apply for divorce decrees online and receive them without physically going to the court. They must meet a number of criteria, which receive a modest administrative review by the court. At the other extreme are states like Alaska that require mandatory substantive reviews by a judge of every case even though there are no contested issues of any kind. This more intensive reviewby the court—which some consider a paternalistic approach--is intended to mitigate unfairness that may result from power imbalances between the parties, physical intimidation, unequal abilities to understand and negotiate, or other reasons.

Most courts fall somewhere in between these two extremes. They require parties to come to the court and a judge does some kind of review, but the cases go through almost no case management process and usually resolve without issue quickly. Cuyahoga County in Ohio is a good example of this approach and is also a great example of well implemented traditional DCM.

The requirements of a court on this issue appear to depend a lot on the culture and history of the state. Of course existing case law, statutes, and court rules that have developed over time are also significant influences. Maricopa Superior Court views divorces from a contractual viewpoint. Logically they hesitate to make independent judgments about the consensual, voluntary, and appropriate nature of contracts. Thus, they do not normally check for the presence of domestic violence protection orders, assess whether or not property divisions are equitable, or if the parenting plans are in the best interests of the children. Only if the proposed decree is blatantly and obviously one-sided will the judges step in.

In states like Alaska, the judges find frequent enough examples of what they perceive as unfair agreements to actively review all proposed agreements and sometimes revise them. The impact of this approach for tracks is that in practice no cases fall into a purely uncontested track where the parties can file agreements that have no judicial review.

All cases are reviewed as if they are potentially contested (with the court being the de facto dissenting party). This strategy reflects in part a culture that treats divorce orders unlike contracts, but also has includes a strong desire to reduce the amount of post-judgment case activity because of dissatisfaction by one or both parties with the negotiated agreement.

If the proposed agreement does not meet legal requirements regarding best interest of the child and a fair and equitable property division, the court will usually attempt to help parties problem-solve solutions that meet legal standards. This may be through judicial questioning, proposing options, holding a more formal settlement conference, requiring a parenting plan facilitation, mediation, early neutral evaluation or a hearing on a special calendar to help self-represented parties reach agreements.

### *Contested Light Track*

There is a fairly clear distinction between cases with relatively minor contested issues and a fair amount of good will on the one hand and pretty complex or high conflict cases on the other hand. The former are appropriate candidates for some form of early resolution track that is quick, relatively inexpensive, and offers an array of lightweight services as needed. The Alaska Early Resolution Program (ERP) is a good example of this kind of track, but there are several variations on this theme. Note however that the Alaska ERP program does not require low conflict or good will to be elegible, but only indications of factually similar views about the circumstances of the case.

Cases that fall into this track are often good candidates for services like parenting plan facilitation, mediation, or early neutral evaluation. Practitioners stress that the success use of this track assumes and requires a solid foundation of self-help services at a court. In the case of the Alaska ERP, the track utilizes limited scope pro bono attorneys or mediators at a single hearing before a settlement judge to help cases involving two self-represented parties successfully reach agreements and receive court orders on the same day.

Several courts in Alaska run so-called informal hearings as part of this track. In essence, the traditional formal rules of due process are waived. A specially trained judge facilitates a fair process with both parties who are unrepresented. Typically those parties cannot bring witnesses before the court or engage in the traditional adversarial direct and cross examination questioning because parties do not present arguments, but instead only agreements if they are reached. An evaluation of the ERP found 80% of the cases resolve in this fashion. They resolve substantially quicker than comparable cases with much less staff and judge time and fewer staff processing steps. Self-represented litigants routinely express their appreciation for this process.

In Alaska consistently over half of the divorce and child custody cases involving two self-represented parties can be appropriately triaged into a contested light track in a typical family court.[4] That percentage would probably be significantly higher in

[4] It is difficult to say how many cases involving represented parties fit into different tracks because the attorney involvement often changes the dynamics in the cases regarding the desire to resolve by agreement.

Alaska except for the existence of a domestic violence presumption law. It may be possible that the percentage could rise as courts gain experience with both the process and the best mix of services. There is currently very little objective data on triage practices, as discussed below, so the potential for further optimization of the process exists.

### *Contested Heavy Track*

This track contains basically everything else that does not go into the contested light track. That poses a difficult problem. The light track contains a fairly homogeneous population of cases, but the heavy track contains cases with a variety of different issues that make them more difficult to resolve. Some have very complex or many contested issues. Others involve a high level of conflict. Still others are complicated by parenting problems such as child abuse and neglect, serious substance abuse and addiction, untreated mental health problems or issues that need presentation of evidence to address disputed facts.[5] This means that a secondary triage into sub-groups is probably necessary. It also suggests that those sub-groups will typically require a different mix of services.

This track will have cases that most often require services like comprehensive custody evaluations, the assignment of a Guardian ad Litem or the services of a parenting coordinator, or. In this track events that involve more directive processes like settlement conferences, early neutral evaluation and trials should occur more often.[6]

It would be great if one could say that this track experiences a higher rate of compliance hearings, since that would indicate that the contested light track successfully resolves cases without them coming back as often. The evidence from Alaska suggests that the rates of subsequent orders and modifications are roughly the same between the contested light ERP program and the contested heavy regular case process. The good news about that result is that the light track apparently does not sacrifice quality and due diligence, which would result later in more frequent post-order activities.

---

[5] Note though that the initial existence of conflict between the parties or concerns about substance abuse, safety, and mental health issues do not automatically prevent cases from being successfully handled in contested light tracks like the Alaska ERP. What matters are the reliable predictors of agreement without the need for a lot of process.

[6] Of course settlements also occur frequently in the Contested Light track, but usually with what might be called informal discovery or "discovery light."

## Triage Criteria

If one accepts the value of operating multiple parallel tracks for divorce and child custody cases, rather than one process, then valid triage criteria are needed to allocate cases to the "correct" tracks (those mostly likely to resolve their cases fairly and appropriately with minimum time and resources for both the parties and the court). It explicitly rejects a "one size fits all" process for the selection of the least intrusive process that is both safe and legally appropriate. That approach cannot operate properly without triage criteria.

As one can see from the track discussion above, the salient difference between the two contested tracks is not simply complexity, conflict, or violence. It is the probability of achieving agreement easily and quickly. The high proportion of cases that are relatively simple and low in conflict are similar and almost by definition close to agreement. Good triage criteria will target indicators of likely agreement as directly as possible.

As part of their Early Resolution Program (ERP), the Alaska courts attempted to identify such criteria of likely agreement. Like many courts they use a manual screening instrument that includes many criteria. Experience shows however that a small subset of them are very effective in identifying valid cases for ERP.

This white paper will focus on the Alaska triage experience because it is a rare opportunity to assess triage criteria. A rigorous assessment of the Connecticut triage criteria has been performed, but their triage strategy allocates cases to services instead of tracks. Alaska uses roughly 12 to 14 criteria for screening cases **out** of the ERP program and another 12 to 14 criteria for screening cases **into** the ERP program.

That is a long list of criteria, especially when the court is manually reviewing case files to assess the criteria. Fortunately, the court thinks a much shorter set of criteria are actually critical for correctly making the triage decision. Essentially, those criteria are length of marriage or separation, similarity in lists of marital property and debt, type and value of property and debt, and age of children. Interestingly, the court does not seriously consider the legal positions of the parties (contested issues) or level of conflict, which they have not found to be useful. The core criteria are basically empirically validated indicators of the level of agreement and cooperation within the family.

Those criteria are used for divorce cases. For child custody cases, the key criteria are the age of the children, the nature of the decision making and child custody arrangements since separation, and a history of domestic violence. Again, contested

legal issues and conflict levels are not considered good predictors for triage into the ERP program.[7]

Alaska does a second level of triage within the ERP program for the most appropriate resource to help parties reach an agreement in the case. These are not true sub-tracks. The choice is among volunteer attorneys, mediators, and settlement judges. In each case five to six criteria are used to triage the cases. Volunteer attorneys are used when parties need a "reality check," there is recent domestic violence, or significant property disputes. Mediators are used primarily for cases involving children, but specifically when there are young parents, babies or teenagers, long separations, long marriages with agreement on the inventory of property and debt, and cases without serious safety concerns. Finally, settlement judges are used for cases with few legal issues, very short marriages, very long separations, and when the "black robe" effect is needed.

If this result can be replicated, it would be a significant if partial step forward, since the biggest barrier to the triage approach currently is the absence of validated triage criteria for the tracks and services.[8] Ideally a court wants a small set of objective criteria that are easily collected and can be reliably used to triage cases between the light and heavy tracks. Right now even the best courts are using long lists of criteria that are manually collected and assessed. In a few cases they are using formal screening tools that are still manually applied and often require assessments and reporting from parties that may be incomplete, inaccurate, or misleading.

This second level of triage is probably more similar to a kind of services triage than to track triage, since the differences are mostly in the expertise of the professional roles. That also makes it similar in approach to the civil reform staffing strategy discussed briefly below.

The report from the civil reform project recommended using a radically different staffing strategy from that traditionally taught in DCM classes. For decades courts were told that judges needed to "take control" of their cases. This was code for not letting the lawyers drive the pace of the cases. Doing the latter was known to result in excessive continuances in criminal cases and some complex civil cases. The latter sometimes also involved excessive demands for discovery.

The report recommendation turned that model on its head, suggesting that the court, not the judge, was responsible for case management. It should utilize the most cost effective appropriate resource first and only as needed escalate to the use of more costly and scarce resources. In practice that meant automating the first

[7] These criteria have many positive characteristics. They are objective, small in number, and potentially possible to automate. For those reasons, they would be good candidates for a truly experimental RCT test in a different jurisdiction to confirm their validity.
[8] See "The Emergence of Triage in Family Court Services: the Beginning of the End for Mandatory Mediation?, Peter Salem, Family Court Review Vol. 47 (2009), pgs. 371, 377, 384.

round of case triage and also a fairly large set of business rules designed to keep cases moving. Those rules included reminders about deadlines, upcoming events, required process steps like secondary service, and so forth.

Thus, courts would start with automation, then move to decision clerks could make, then escalate to staff lawyers or the equivalent, and only last to judges. This strategy conserves the most costly and scarcest resource in the court and removes a significant amount of administrative trivia from judges. It enables judges to "practice at the top of their licenses" by spending most of their time actually applying their legal expertise to cases complex enough to require it.

The same strategy could and probably should be applied to family law cases. To this end, we need triage criteria for who does what with each case. Again, Alaska addressed part of this issue in the context of their ERP program—essentially their Contested Light track. They identified criteria to sort cases among three types of legal resources: mediators, limited scope attorneys, and settlement judges. These criteria are currently being applied using manual reviews, but they are at least potentially applicable using automated objective data sources.

Because a high proportion of cases involving two self-represented litigants (roughly half in the courts where ERP occurs) are eligible and appropriately resolved using the ERP process, the remaining Contested Heavy track essentially gets everything else. The problem with this residual track, as discussed above, is that it contains subsets of cases that are very different and require different sub-processes and services. So, a second set of criteria are needed to appropriate allocate the cases to those sub-tracks.

Some cases are legally or substantively complex, so they require one set of services. Other cases are high conflict or involve a history violence and require a different approach. Finally, there are cases where the parents are essentially incompetent, which requires yet another set of solutions to address their problems.[9]

[9] Incompetent is used here in the sense that the parents severely lack parenting skills and need serious help with those skills. Mere lack of sophistication does not prevent cases from being successfully handled in contested light tracks like the Alaska ERP. Mental incompetence in the sense of mental health is an entirely different matter that lies outside the scope of this paper. n

## Services Criteria

Although this white paper focuses on triage, it is worth taking a moment here to consider what motivates the provision of services in divorce and child custody cases. Marriages and divorces are very unique cases for courts. Society has mandated that marriages are the only kinds of legal contracts that cannot be agreed to or ended voluntarily by the parties. All other contracts enter the court world only if one or both of the parties are dissatisfied with contractual compliance in some way. These other kinds of contracts may suffer from the same kind of power and knowledge imbalances that worry the courts about divorces and child custody, but society does not attempt to mitigate those concerns systematically in any way, and certainly not through the courts.

It is only in this one instance that the courts are asked to determine what is fair even if the parties voluntarily agree that fairness is not an issue. That requirement then creates a need for services not seen in any other type of court case. Similar issues and services are evaluated by courts for certain types of juvenile cases (child abuse and neglect, truancy, etc.), but they do not arise in the context of a legal contract. In short, they are more like criminal cases where the court is exercising an oversight function for society rather than adjudicating the facts of contractual disputes like in many civil issues.

As courts adopt problem solving approaches to divorce and child custody cases, they also shift from making strictly legalistic determinations using adversarial processes to making subjective assessments of what is "best" for the family and children using an array of outside experts in sometimes inconsistent ways. The inconsistency arises primarily because the line frequently shifts between what a judge or other court staffer thinks the court is competent to assess versus what requires the review and input of a non-legal professional. This problem arises with problem solving courts for criminal cases, but it is again unique for civil cases.

These considerations make it critical for courts to be as transparent as possible about how they are making such decisions. Explicit and objective triage criteria for the use of services is very important, not least to enable courts to assess how well they are achieving the goals that society has asked them to support. Explicitness provides the litigants themselves with rationales for what they are being required or asked to do (and sometimes pay for). It also allows independent academic evaluations to be performed.

Arguably the most well known services triage approach is used in the Connecticut courts. It has won national awards and is carefully based on a broad set of academic research and uses a screening instrument that also been separately evaluated. The screen triages cases into one of the following four services: mediation, conflict resolution, focused evaluation, and comprehensive evaluation. Those services are roughly in order of increasing cost to the court and intrusiveness to the parents.

The screen devotes a lot of attention and weight to considerations of conflict, violence, and safety. Partly because of that emphasis, the largest proportion of cases are screened into the most involved service—comprehensive evaluation. The proportions for 2015 were 27% for mediations, 15% for conflict resolution conferences, 17% for focused evaluations, and 41% for comprehensive evaluations.

Although Connecticut does not use tracks, one could roughly equate the mediation and conflict resolution conference services to a contested light track and the two evaluation services to a contested heavy track. That would put 42% of the caseload in the light track and 58% in the heavy track—not that different from the Alaska allocation. There are especially strong beliefs about not using mediation in case with violence and high conflict, so courts requiring all cases to first go through mandatory mediation should consider at least a two track approach like that proposed in this white paper.

Cuyahoga County Ohio has summarized some triage criteria that court use for a comprehensive list of possible services.[10] A partial description of that list includes parenting education, mediation, neutral evaluation, use of Guardian ad litems, parenting evaluation, focused assessments, parenting coordination, and counseling. At a general level, the criteria consider seriousness, severity, and complexity of the identified issues (especially non-legal issues like mental health, personality disorders, abuse, criminality, etc.). Also important is willingness to change position and communicate, respect for the other parent, and history of conflict and litigation.

Some of these criteria strongly overlap with criteria used to assign cases to tracks, so one could imagine that certain types of services would occur more often and sometimes most often in one or the other of the two contested tracks. Still, most of the service types may occur in either track depending on the needs of the family and the case. That is why separate triage criteria for services are independently useful.

[10] Note that if the necessary self-help services were available to the public before they reached court, they might be able to receive appropriate non-court services from community providers. This strategy is an important element of the current Justice for All project sponsored by the Public Welfare Foundation and the Kresge Foundation.

## Out of Court Processes

While this white paper focuses on case triage inside courts, there is growing support for parties wishing a divorce outside of the courts. A discussion of whether or not divorces and child custody matters should best be handled through the courts is too large an issue to consider here, but it is pertinent to note some differences in how such entities handle triage. To illuminate those differences, we will briefly describe one non-profit provider and two for profit providers of divorce services.

In 2013, IAALS, the Institute for the Advancement of the American Legal System, opened a unique multi-disciplinary Resource Center for Separating and Divorcing Families on campus at the University of Denver.[11] The model provided free (fully subsidized) wrap-around services. The first two years produced positive outcomes for the families, and IAALS then moved the model into a free-standing non-profit in the community with professionals as providers: the Center for Out of Court Divorce. The non-profit version of the Center charges a set fee to customers.

The Center uses an out-of-court problem solving approach focused on helping the family navigate the process of uncontested divorce or separation in a manner that prioritizes the children's' well-being and the capacity of the parties to co-parent. The services include co-parent counseling, child developmental information, parent and child therapy, legal education and mediation.

The Center acts a neutral third-party. Clients may contract with their own private counsel should they desire legal advice. The Center bears some similarities with the collaborative law (https://www.collaborativepractice.com/) approach, but that process is guided by attorneys.

The Center screens applicants and rejects divorce cases that are not deemed appropriate for a problem solving approach. Those would typically include divorces where the parents demonstrate no interest in cooperation or where there are histories of untreated mental health issues, serious substance abuse, domestic violence, child abuse, or parental litigation. The process resulted in statistically significant decreases in depression, acrimony, and parental stress. It improved the ability to co-parent and also improved adaptive behaviors in children with anxiety or depression.

These comprehensive pre-filing services that focus on problem solving resources offer the potential to move the problem solving out of court, which can allow consumers to consider collaborative solutions in a private setting and at a pace within their control. This could be of huge benefit to the court, as these cases now come to the court in posture that requires only administrative oversight. And in the

[11] See http://centerforoutofcourtdivorce.org

case of the Denver model, the partnership with the court completely eliminates any burden to judicial resources.[12]

In essence, the Center is a "one stop shop" for the services that a family might require. These services include legal education, dispute resolution (mediation, early neutral evaluation), forms completion, therapeutic help (individual and group counseling, communication training, parenting plan assistance, mental health testing), and financial help (education, assessment, training, and mediation). These services are tailored to the family as needed using an inter-disciplinary approach. As one might imagine, the overall strategy still has a significant cost to provide.

An interesting aspect of this approach is that true professionals in the respective service areas assess the family and work with them on the selection of services that will be most helpful and appropriate. One academic criticism of court triage strategies is that non-professionals may end up making these kinds of assessment decisions or screening instruments are used by non-professionals in a way that may not sufficiently take into account the special circumstances of that family. On the other hand, there is no explicit standard triage algorithm at the Center either.

Examples of for profit divorce sites include Wevorce and DivorceNM.[13] Like the IAALS project above, they currently accept only "uncontested" cases where the family has voluntarily agreed to do what is best for the family and work together toward a common solution. In all of these cases the family does not actually know at the beginning if they will be successful in reaching that goal, so there is always the possibility that they will end up contesting one or more issues of substance and dropping out of these non-court processes.

Wevorce offers a five step process for reaching a court-ready agreement and producing all of the documents and forms required for a court order. It is described variously as "amicable" or "collaborative" divorce to indicate its problem solving approach. There is a suite of online tools and tutorials that walk families through the discussions required to fill out the forms and figure parenting and financial plans. These guided modules follow a structured process, but customers can either use the most basic service for a fixed fee of $749 or add various optional services, many of which involve interacting with professional roles like financial planners, family counselors, family law attorneys or mediators at a fixed rate of $149 per hour.

---

[12] However, it should be noted that these programs, whether non-profit or for-profit, require the parties to invest a significant amount of their own money, whereas court based services are available to all who need them.

[13] These kinds of organizations are indicative of the potential for private sector solutions, but they are not yet significant providers in the larger sense. Their services are limited and the number of customers is small. They do build, like the IAALS program, on experiences with collaborative approaches.

Wevorce claims that a typical divorce costs roughly $30,000, while their process costs between $1,000 and $10,000 and almost always completes in less than 90 days. Further, they claim that 99% of their cases "stay out of court," by which they mean all of the required documentation for a court order are completed using Wevorce. Like all of these for profit organizations, Wevorce works with a large network of professionals outside the firm to provide the additional services that some people need and want.

Another example of this approach is DivorceNM. Although it operates right now only in New Mexico, as the name implies, they already have plans to expand to other states. Its website is very similar to Wevorce. It offers a structured process with tutorials for working through the dialogues required to fill out forms and draft required plans. There are flat fees for that level of service and also for mediation ($550) and settlement facilitation ($650) by contracted attorneys. A consultation with a lawyer is also included in the cost to go over the paperwork and answer any questions prior to filing with the court.

All three of these non-court solutions differ from court processes in several ways. They handle only uncontested cases. They offer services for mostly fixed fees. They permit and even encourage considerable consumer choice about the process. They provide structured processes and tools, but let the family decide what level of services they want. Finally, they offer more tool and process support than most courts, but cost significantly less than traditional lawyers.

The for profit organizations differ from the non-profit approach by making professional services optional and offering no advice on what outside services might be needed. Also, their range of services is narrower than what the IAALS solution provides. Finally, they offer a semi-structured core process, but impose no formal triage criteria on decisions for what services to consume.

## Problem Solving vs. Adversarial Processes

There is no doubt that family courts have over the last several decades moved dramatically from traditional adversarial case processes to more problem solving approaches. This is typically described as "doing what is best for the family or the children." There is a strong if informal and sometimes implicit belief that traditional representation for both parties too often escalated confrontation and extended times to resolution in ways that did not benefit either party. A variety of less adversarial dispute resolution techniques are now frequently used to resolve cases.

The issue that connects this situation to triage is the ambiguity of the case processes used from the litigant perspective. Some courts offer informal courts without the usual formal rules of evidence and due process when both parties are self-represented. The judge actively ensures the fairness of the process. In other courts some cases in a specific case type will use a problem solving approach while others will use a traditional adversarial approach. This typically happens if early resolution processes using mostly problem solving methods like mediation separate simple and low conflict cases from more complex or high conflict cases that have a fully adversarial process and often a real trial.

In that situation, the court understands how its triage algorithm works and what the differences in process are, but those subtleties are lost on inexperienced litigants. One innovative court process provides lawyers to both parties, but limits the scope of their representation to only one hearing and provides them with special training in order to achieve the maximum number of case solutions in that single hearing. The idea is to have the best of both worlds by providing representation to both sides but also giving the attorneys strong incentives to work together toward a quick and equitable agreement.

Through all of these variations, the rights of the parties differ in ways that are significant but not obvious to self-represented litigants. This means there is a strong obligation on the court to make those differences clear in an easily understandable way to both parties. It would be even better if the court allowed the parties to decide which type of process they preferred (with appropriate education about all options), but that usually does not happen now. In short, courts should make their triage algorithms and their implications transparent to lay users of the courts.

It is worth remembering in this context that the out-of-court non-profit and for profit solutions use processes that are simpler, more transparent, and enable more choice and control by the users themselves. It is beyond the scope of this white paper to consider and assess the extent to which that freedom is a better or worse approach.

## Recommendations

Shockingly, extensive conversations with leading family courts does not yield many clear best practices for triage of divorce and child custody cases. Consequently the list of recommendations is relatively short and general. Not surprisingly, several of the recommendations call for focused research and assessment of specific case triage issues.

1. Use a track approach.
2. Use at least three tracks: uncontested, contested light, and contested heavy.
3. Use explicit objective triage criteria to assign cases to tracks.
4. Use explicit objective triage criteria to assign services to cases.
5. Assess and validate the pilot track triage criteria now being used.[14]
6. Assess and validate the service triage criteria now being used.

Finally, note that many important issues in family court processing are not within the scope of this white paper, although several were mentioned in passing. Some of these issues include the use of problem solving approaches, the degree of court oversight required, and the value of utilizing out-of-court solutions.

[14] Ideally, these assessments would be done using an RCT approach that is rigorously experimental.