

Divorce Conflict Information Booklet Series¹

Section One: Understanding the Problem

Booklet V

Is the Traditional Family Law System a Static Culture, Doomed to a Future of Slow or No Change?

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BIOLOGICAL EVOLUTION 101³

Biological evolution is indifferent to outcomes. People often think of evolution as a process of improving the adaptability of a species, but this is not the case. The evolutionary process is simply a competition to get genes into the next generation by replication. Evolution is indifferent as to whether a variant in the next generation increases or decreases the chances of those genes getting into the following generation. If they do, the genetic variant survives; if they do not, the genetic variant becomes extinct. Evolution is a giant experiment, trying out variants, with most of them failing. The effect is that the species progress to being increasingly adaptable, unless the context changes.

Sometime after the earth was created by the collision of several astrological bodies about 4.5 billion years ago, molecules replicated themselves, perhaps by accident or perhaps under the influence of forces such as volcanoes.

1 Our Divorce Conflict Information Series is organized into two Sections: Section One- Understanding the Problem and Section Two- Planning the Solution. Each of the Sections has six Booklets.

² For more on the subject, you are encouraged to read the following two books written by your authors: "***Game Theory and the Transformation of Family Law: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties.***" Unhooked Books. Scottsdale, AZ 2015 and "***Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation.***" The latter is an online book only. See www.unhookedmedia.com.

3 A quick introduction to biological evolution is important to understanding the question posed in this Booklet:

Is the Traditional Family Law System a Static Culture, Doomed to a Future of Slow or No Change?

Then a miracle occurred, and no one really knows how: Sex was “invented”. Sex involves the combination of genes from two organisms in order to create a new organism in the next generation. This meant that each generation had new variants. Natural selection then punished variants that could not get their genes into the following generation with extinction, rewarded variants that could.

**Culture follows a similar evolutionary path.
Culture is a bunch of ideas shared by a group.
Scientists call these ideas “memes.”**

An example. Language is a bunch of ideas with regard to the meaning of certain sounds. If people in a culture speak the same language, they share those memes and therefore can communicate with one another. Those memes replicate in the minds of children learning the language. If a person comes in contact with a different culture with a different language, and sounds are made, the person says, “I have no idea what that means.” This means that the person does not share those memes.

A culture is a collection of memes, from simple to complex memes, that are passed on to the next generation through replication. An example of a simple meme is a greeting, such as a smile, or a nod, if a stranger, or a hug, if a friend. An example of a complex meme is a joke. A joke essentially gives other memes a twist that we find funny. Idioms, for example, allow for this twist. If I am talking with a friend, and I say “take my wife,” the meme involved is an idiom, which suggests that I am about to disclose something about my wife. When a comedian says, “take my wife . . . please,” we laugh because rather than the idiom, the comedian is referring to the literal meaning. Another even more complex meme is the religion practiced in a culture, which is a collection of hundreds if not thousands of memes.

Memes exist in two forms: first, the idea in the brains of those who share the memes; and second, some form of behavior that allows the replication of the memes. Just having the meme in the brain will not lead to replication; it is through behavior, such as speaking or writing the meme, that the meme can be replicated. Replication of memes is a complex process and is not just imitation, as David Deutsch points out.⁴ Imitation is a part of the replication process, but true replication involves adopting the meme into the new brain as a belief about reality. If I write the word “tree,” you do not think of the sounds or shapes of the letters - you think of a tree. The meme has become reality to you. The meme, “tree” becomes an unquestioned assumption. If I say, “Look at that tree,” you don’t wonder what “tree” means, you just look.

Culture evolves rapidly because culture is a collection of memes that can be replicated quickly because people can be creative and produce new memes with little difficulty. Memes that have merit, that is, that become widely replicated, appear to improve the culture. Memes

⁴ Deutsch, David (2011) *The Beginning of Infinity: Explanations that Transform the World*. Viking.

that are not replicated become extinct. People retell a good joke, but not a bad joke. As a result of this replication process, cultures evolve and mostly in the direction of progress.

At the same time, a culture can be or become static, that is, it might not change much, and/or change so slowly that no one notices. Most human cultures were relatively static until the Period of Enlightenment. In a nutshell, a static culture has unchallenged dogmatic memes that come from accepted authority, such as religious leaders or royalty.⁵

**What is important to this Booklet
is that the evolution of cultures
has been extremely rapid since the Enlightenment,
which has led to unprecedented rates of progress
across all arenas of human life.⁶**

The development of legal systems followed this path of rapid evolution after being freed from the heavy hand of the clergy and the royalty. When the clergy and the royalty were no longer the sole source of law and justice, a system of law needed to be established, along with an enforcement system for that law. An early form of our current judicial system was developed.⁷ Initially, the focus of that system was on disputes and crimes, but eventually included expansion into systems previously handled by other institutions, such as contracts and marriage. For our purposes, we will focus on marriage and divorce.

Although the evolution of memes in the family law system was slow, the family law system did continue to change. When children became a class of citizens and not property, family law changed. When early psychological theories suggested that mothers were more capable than fathers with young children, the Tender Years Doctrine dictated a change in custodial arrangements. When women were able to own property, the division of marital property and the custody of children changed. When the gender revolution occurred, and women broke into the work world and men sought larger roles in parenting, the legal system changed. Evolution was slow, because a new “authority” [legislation and case law] is slow to change. Even with these constraints, the legal culture evolved as new memes were created in the larger culture.

**Over the last fifty years,
the culture of the family law system has been static.**

Only three new memes have arisen in the traditional family law system in the past 50 years: (1) incorporation of social science and social scientists into the system, (2) collaborative

⁵ We again refer the reader to Deutch, David, *The Beginning of Infinity*.

⁶ For a thorough discussion of that progress, see Kimper, Steven (2016) *Enlightenment Now*.

⁷ In Western culture.

divorce⁸ and (3) the common use of mediation. These memes were not a fundamental change to the static culture of the family law system. They were band-aid add-ons, trying to minimize the conflict between parties that seemed to be inevitable. It is no accident that it was during this same fifty years that we have seen the incredible growth of *pro se* divorces, sadly due to increasing dissatisfaction of parties and the diminishing reputations of divorce lawyers.

EVOLUTION WITHIN THE FAMILY LAW SYSTEM

Your authors have argued that the traditional family law system is in danger of going extinct.⁹ Here are a few warning signs: a. the rapid growth of *pro se* divorces; b. mediation and the proliferation of other alternative dispute resolution approaches, such as arbitration; and the reputation problem of many divorce lawyers. Some attorneys will take new cases for negotiations, but will not litigate those cases if they fail to settle. Some attorneys will only do mediation and will not represent parties either in negotiation or in litigation. In a sense, both parties and professionals are abandoning a system that they intuitively know is not working well as a legal culture.

Two questions come to mind at this juncture.

- 1. What evolutionary failure is occurring in the current family law system?**
- 2. How and why has the system remained a static culture?**

David Deutsch has argued that a culture remains static under three influences:

- customs, rules and law,
- enforcement and
- suppressed creativity.¹⁰

Let us unpack these three influences:

Customs, Rules and Law

Practice in the family law system by mental health is clearly governed by customs, rules and law, all of which are enforced. For mental health professionals, the customs refer to standards of practice usually established by professional organizations. For example, for a psychologist who has been appointed to perform a custody evaluation, there are standards of

⁸ In 1990, Attorney Stuart Webb, became dissatisfied with the manner in which traditional family law worked for parties and families. He created Collaborative divorce, which is a negotiation approach with several rule changes and intended to be a more cooperative negotiation model.

⁹ See our Booklet VI regarding Extinction, the sixth in the Divorce Conflict Series, discussing the extinction problem at www.thedivorcedoctor.net.

¹⁰ Deutsch, David (2011) *The Beginning of Infinity: Explanations that Transform the World*. Viking.

practice established by the American Psychological Association, by the Association of Family and Conciliation Courts, and outlined in several influential books. The psychologist operates at his or her peril to develop new and creative approaches to performing a custody evaluation. Rules also dominate the process, such as demonstrating a lack of bias and performing the same procedures on subjects of the evaluation, whether needed or not. For example, if a psychologist appointed by the Court to perform evaluations fails to meet standards of practice and takes a more creative approach to an unusual family situation, the work product of the psychologist might be inadmissible in court and/or a license complaint might follow. If a mental health mediator makes a recommendation regarding a legal outcome, he or she might be sued for practicing law without a license. The law and local rules dictate under what circumstances, and by whom, custody evaluations be performed, including what must be included in reports, and so on. There are rules that must be followed, and there is enforcement.

Attorneys are in a similar position, having customs, rules and law dictating their behavior. A failure to follow prescribed customs and rules, such as providing a fee contract or forms for obtaining informed consent, can be punished in various ways. Most common are license complaints and law suits, but reputation can be affected, such that there are negative monetary consequences.

For example, assume that an attorney, representing one party with the other party unrepresented, helps both parties develop a good Plan for both of them and puts that Plan into a written stipulation. That attorney might be subject to a malpractice lawsuit and/or a license complaint by the represented party for providing what might be construed as legal advice to the unrepresented party. As another example, if an attorney provides two parties with a non-binding arbitration decision, perhaps in the form of a prediction of what a judge is likely to rule, without following specified written procedures for arbitration, the attorney does so at his or her peril. In short, rules are enforced.

Enforcement

Simply having customs, rules and laws, and having them enforced, is not enough to block the evolution of memes that make up a culture.

Suppressed Creativity

Is suppressed creativity the impediment to change? This brings us to Deutch's third point: suppressed creativity. There are people with knowledge to form new memes that could improve a system that most people involved (including both professionals and the parties served) know needs improving. We therefore ask: Why is the traditional family law system a static culture? How and why is creativity being suppressed?

- Is it that nobody wants the system to change?
- Is it that everyone believes changing the system is impossible?

- Is it that everyone believes that any system change will not make things any better?
- Is it the training of attorneys and the actual practice of law that suppresses the creativity of lawyers, some of whom eventually populate the judicial bench? OR
- Is it simply that the Period of Enlightenment has not extended to the family law system?

Could the training of lawyers squelch creativity and the production of new memes?¹¹

When education is by rote and prescription, and when the assumptions undergirding a system are sacred and unquestioned, creativity and critical thinking are suppressed. If classes in law school focus on, “This is how it is done” and “This is how it is not done,” then students will replicate the inexplicable memes of an underlying philosophy that explains why the practice of law is done a certain way and not another way. Many law schools begin the training with briefing, the method for which is clearly prescribed and which reinforces the authority of legislation and case law. Briefing also only makes sense if the student buys into the unexpressed meme: that the job is to advocate for one’s client with an assumption that the client is in a dispute.

Many law schools have developed departments specifically for training attorneys in negotiations. Shifting away from briefing and trial strategy is a new meme. However, are the underlying assumptions in negotiation the same as in trial preparation?

One meme that undergirds family law is that the parties have a “dispute”. Most interesting, this meme never needs to be taught. Why? Because another meme is taught: that each party must have his or her own representation, since the parties’ interests are at odds with one another. It is also taught through language, when discussions include words like “opposing counsel,” “the other side,” and so on.

**That there is a “dispute” must be true,
because there could be no other explanation for what is taught.**

Creativity is not channeled into new memes. Creativity is channeled into doing the old memes better. The goal remains to win disputes and to get better at winning. The assumption of a dispute is never questioned, and anyone who does question it, is dismissed out of hand. Creativity is channeled into programs, like parent education programs, to try to minimize the damage caused in part by the family law system.

**The underlying meme that the legal system
has the purpose of dividing property, income and children
remains unchallenged.**

Of course, there are exceptions. We have mentioned Stuart Webb, who literally started a new form of divorce law practice with his Collaborative Divorce idea. Justice Donald King in

¹¹ Please allow us the latitude us to push a point to make a point!

the San Francisco area established a different style of judicial supervision, although other than giving him a particularly positive reputation, the practice never caught gained any traction. Judge Mary Davidson in the Minneapolis area established a particular judicial process which focused on encouraging and incentivizing settlement, but that did not catch on either.

Your authors have created a new set of memes and have written two books introducing a Negotiation Model, which is different from traditional family law.¹² Our Model is based on the branch of mathematics called Game Theory, which is the mathematical study of how and why people make the choices that they make. In our books, we analyze the traditional family law system using Game Theory principles, arriving at the surprising conclusion that the traditional family law system makes the choice of escalating conflict the most rational strategy.¹³

**Our Model is a new meme
which rejects the assumption that,
at least in family law,
parties have a dispute. Rather, our model
posits that the parties have come to a
life transition and need a plan.**

**We therefore ask:
Is it possible that this variant if accepted,
could lead to major changes
in the family law system?**

In the practice of family law, there is one additional factor not considered by David Deutsch, which makes maintaining the status quo dominant over stimulating evolutionary variants in the memes that might improve the system: Status. Status in the legal field is attained by winning cases, and status has its own rewards in the marketplace, such as making partner in a firm and making more money. Traditional family law is set up as a head-to-head competition, and like any other game or sport, the winners come out on top. Lawyers often use words like “fight for justice,” and might even be proud of being one of the highest priced attorneys in the area because of a reputation as a “fighter.” This is another reason that the status quo is dominant, and why the culture is static. Divorce lawyers may have an incentive (of course unintended) for promoting conflict. Only with conflict is there a game to be won.

HOW AND WHY DOES THE FAMILY LAW SYSTEM REMAIN STATIC?

¹² *Game Theory and the Transformation of Family Law: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties.* Unhooked Books. Scottsdale, AZ 2015 and *Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation.* The latter is an online book only. See www.unhookedmedia.com. See also our Blog and the “Buy Our Books” tab for more information about these two books. www.thedivorcedoctor.net.

¹³ See our Booklet IV, “What’s Wrong with this Picture,” for an introduction to this analysis.

How and why does the family law system remain static? In our rapidly changing times, it is hard to conceive of any culture remaining as static as has the family law system. However, history helps explain this phenomenon. Remember that in Western society, the legal system in general was taken, in many cases by force, from the hands of the royalty and the clergy during the Period of Enlightenment and the revolutions that followed. A new form of a legal system was required.

The basic premise of that new legal system was to get to the truth in a particular dispute. In order to do so, the concept was that one person would put forth his or her best case, and the other person to the dispute would do the same. An impartial judge, panel of judges and or a jury then would decide what was the truth. Rules evolved to prevent cheating, lying and other forms of persuasion that clouded the issue of the truth. Eventually, the rules became sufficiently complicated that parties to a dispute needed to hire people trained in those rules: attorneys.

Family law enters the picture when the State took an interest in marriage because of property issues.¹⁴ Although “justice” was no longer the prerogative of the church, religious principles remained. Getting a divorce in Western society was considered much the same as a crime, because of the lingering meme that marriage is sacred and ordained by God and that “no man shall put asunder.” Thus, in earlier times, in order to divorce, fault had to be proven to justify the divorce, much the same as a person might try to justify murder as self-defense. In the shadow of this meme, seeing divorce as an inherent dispute, with issues of guilt and innocence at stake, made sense.

The very notion that divorce is equivalent to a crime, is not only a bad idea but also ignores human history. Social anthropologists tell us that divorce is common to the human condition, at a rate that averages about 30% across cultures and time. That rate fluctuates, depending on other cultural factors, but only rarely drops significantly. In reality, a divorce is a simple event in which at least one of the parties wishes to change his or her legal status from married to single, much the way their legal status had been changed from single to married earlier in time. The only difference is that for the marriage, mutual consent is required, whereas in many divorces, the person wanting the divorce might be initiating the action over the objection of the other party. When people marry, they make plans for their futures, and the legal requirements are handled almost as passing thoughts. In fact, many people marrying are unaware of all of the laws governing marriage. It is the lingering meme that getting a divorce is like a crime (sin), even after a party no longer had to prove fault in order to break the contract. That lingers and makes evolution of the system more challenging.

Your authors posit that these traditional beliefs about divorce perpetuate divorce as a static culture,

¹⁴ We remind readers that children were considered property at the time.

**with assumptions that the parties have disputes,
that each party must be represented separately,
that winning the case is paramount,
that proving fault through blaming the other party
and exonerating one's own client
is the way to win, and so on.¹⁵**

We can learn much about the current family law system by studying history and culture. The central concept and “truth” about divorce has always remained the same: that both parties, through attorneys, present their best case, and an impartial judge makes the decision, unless there is a plea bargain (which in family law we call a negotiated Marital Settlement Agreement). In other words, this meme has not evolved with the wider culture in which it is a part.

The explanation that attorneys have priced themselves out of the market is too simplistic and fails to take into consideration that people will pay a good deal of money for something they believe is worth it. The same people getting a divorce might well have paid a substantial sum for their wedding. People go to fancy expensive restaurants in droves, but will refuse to go to a much cheaper restaurant they do not think is worth the money.

**Expense is a factor, particularly for poorer people,
but the traditional family law system may be on its way to extinction,
not solely because of the expense.
but also because the system is a static culture and
has few new memes to handle divorce differently.**

If professionals are aware, at least intuitively, that something is terribly wrong with the traditional family law system, why does evolution not take place for the improvement of the system? New memes could be created, and those that lead to improvements could be replicated rapidly. The answer is that the memes in the brains of those same professionals immediately dismiss new memes that conflict with unconscious beliefs. For example, at a recent convention, an unidentified voice asked a simple question: “... Why can't one attorney represent both parties to a divorce?” This is a new meme. The reaction of the crowd immediately squelched the idea and dismissed that lone voice as naïve.¹⁶ The underlying assumption that the interests of the parties conflict is a meme so imbedded in the minds of legal professionals that they cannot even contemplate an alternative. If one did not make that assumption, the question posed (“Why can't one attorney represent both parties to a divorce?”) is a very good question.

¹⁵ Again, please allow us to push a point to make a point.

¹⁶ As reported in the Family Court Review.

We remind the reader that evolution is indifferent. However, selection is not. Many variants emerge, and those that improve the human condition, at least in the short term, tend to find their way into the next generation through replication, whereas those that worsen the human condition tend to disappear. Evolution in biology is a very slow process, but evolution in culture is unbounded by the restrictions of biology.

**A new meme could be invented by a creative mind in a moment,
which can be passed on to others besides one's progeny
and can spread like wildfire if it is seen as an improvement.**

Of course, rapid evolution can have its dangers. Even biological evolution can have its dangers. Some variants can improve the adaptability of a species for a while, but then be the cause of extinction when conditions change.

The check on cultural evolution comes from the Scientific Method coming out of the Enlightenment. Science dictates that when a conjecture is made, it must be tested, criticized, and efforts to refute it are made before it is accepted as truth. Testing and criticizing are the gatekeepers to progress: blocking bad ideas and letting good ideas through.

The cause of the static family law system culture is the same cause that prevented cultural evolution prior to the Period of Enlightenment: Anthropocentrism. Humans, once they escaped the mental limitations of ape-hood, created gods in their own likeness and believed that they (the humans) were the focus of those gods. They believed in their superiority to all of the other species of plants and animals, in spite of many of those plants and animals demonstrating much more adaptability and reproductive success. They came to believe that the earth was the center of the universe, that humans were the center of the earth and that the future depended on being the center of fickle gods. This is “anthropocentrism.”

**The Period of Enlightenment freed us from this “bad explanation,”
as David Deutsch would call it,
and humans quickly discovered
that humans were the center of nothing.**

Lawyers and judges see legal outcomes at the time of a divorce as their major focus. This may be the “human centric” issue mentioned above. The professionals in the traditional family law system believe (in good faith but not realizing otherwise) that their main role as players in the system is centered on one task: determining legal outcomes at the time of the divorce.¹⁷

Many of the procedures employed in this process reflect this central focus.

¹⁷ Your authors recognize that this may be an exaggeration and does not fairly represent the mindset of many family law attorneys and judges, and for that, we apologize. We nevertheless believe that this is a factor contributing to the system remaining static, and to make the point, we felt it necessary to exaggerate a little.

- Laws focus on the day of the final Judgment of Divorce and the legal outcomes set forth in the Judgment.
- A deposition is conducted for the purpose of determining what evidence will be provided in court if the divorce case is litigated, and what influence that evidence will have on the legal outcome.
- The vague standard of the “best interests of the child” comes closest to encouraging a Plan for the future rather than a legal outcome, but the question is still which legal outcomes of custody and physical placement appear to be in the best interests of the child.
- Current law restricts changing the parties’ Plan (meaning the Judgment of Divorce) with various legal obstacles, at least if the parties disagree about that change.

The family law system sees itself as the center of a process, with the lingering shadow of a divorce being a “crime”: anthropocentrism.¹⁸

This mindset is a bad explanation.

The family law system needs another

Period of Enlightenment to free itself from the bonds of a static culture.

IS THE CURRENT FAMILY LAW SYSTEM READY FOR A NEW MEME?

Recall that the evolution of cultures requires the production of new memes which are variants that can be put to the test. Some variants will no doubt be poor ideas, some will make little or no change, but some are likely to make improvements in the culture. Also recall that the Scientific Method which developed during the Period of Enlightenment helps determine which variants are likely to be helpful ideas.

Interestingly, new memes are created in the family law system, but have difficulty being replicated for two reasons: (1) the people who invent the new meme are rarely in positions to actually change the system; and (2) the assumptions undergirding the status quo reign when feet hit the ground.¹⁹

Let us unpack these two assertions. The first assertion: that the people who invent the new meme are rarely in positions to actually change the system. Bright minds engaging in interesting research develop new memes, often published in trade journals. Practitioners reading those articles might agree that what is asserted sounds like a good idea. However, those researchers and readers are rarely in a position of power to change the system. They are not the Senators or Congressmen who can write new laws to allow for those memes. They are not the heads of professional associations who can make new rules. In a recent example, a

¹⁸ Apologies for one last exaggeration.

¹⁹ Schneider, A.K. & Mills, N. *What Family Lawyers are Really Doing When They Negotiate*. Family Court Review, Vol. 44, No. 4.

group in Wisconsin promoted the idea that an attorney who mediated a case should be able to write up the settlement agreement for court. That seems like a simple rule change, and on its face, a good idea. The idea is efficient because the attorney-mediator is most familiar with the agreement and the people involved, likely objective because the attorney-mediator is the “neutral” in the situation and economical. However, the proponents had to run the gauntlet of getting Bar Association and Wisconsin Supreme Court approval before enacting the new rule. Only the persistence of the proponents made that possible.

The second assertion, that the assumptions undergirding the status quo reign when feet hit the ground simply means that an attorney or judge might be attracted to a new meme, but when an actual case comes up, doing things the same old way prevails. When the client says, “I want 50/50 custody” or “I don’t want to pay spousal support,” the attorney might like in theory the idea of negotiating differently in order to optimize the outcomes for both parties, but in practice begins the actual case advocating on behalf of the client’s positions. Old habits die hard!

Your authors have heard many attorneys profess approaches to cases that differed from what actually happens in their real cases.²⁰ However, there are laws, rules and enforcement procedures in place (perhaps more accurately “entrenched” in the system), which suppress creativity and dominate the potential impact of any new memes.

**In a dynamic culture, when there are new memes,
the idea is that an individual or group criticizes and tests the variant.**

If the variant holds up under that criticism and testing, there is a convergence of opinion on what appears to be the “truth,” or, in the case of evolution, what improves the culture. That new meme then gets replicated across the members of that culture.

This sounds simple, but let us propose a couple of variants and see how the reader reacts. Rex Sater sat on the Family Law bench in Sonoma County, California for many years and was considered a wise man. Since his death, an award is given each year in his name to professionals who stood out in some way involving the family law system in that County. Judge Sater once said from the bench that, “You cannot legislate parental responsibility.”

If we take Judge Sater’s pronouncement seriously, and literally, one variant might be for divorce law to say nothing about how children are to be handled or financially supported,

²⁰ We are aware that “integrative negotiating,” as opposed to “distributive negotiating,” theoretically aims at increasing value to both parties by looking for tradeoffs that favor the subjective interests of both parties, but in actual cases lawyers are bounded by law and practice standards. Thus, in spite of the best of intentions, they often find themselves in distributive negotiations. There are a limited number of overnights with children to be awarded. There is a limited estate to be divided equitably. Some minor integrative steps might be included, such as an unequal distribution to property in lieu of spousal support, but the system is set up for competitive representation. Settlement is often the result of unwanted compromises to avoid litigation.

except when that handling meets standards for child abuse or financial abandonment. In other words, let parents work out how they will raise their children after they divorce, and how they will pay for the expenses incurred by their children and the choices that the parents make on behalf of the children. Following this logic, the Court would no longer have jurisdiction over legal or physical custody and child support, except when gaining jurisdiction because of child neglect, abuse or financial abandonment. Bottom line, the Court could provide summaries of relevant social science for guidance purposes, but offer no final word.²¹

With this new meme, it is assumed that some parents might make a mess of their children, but those parents are likely to do that no matter what a Court orders. However, a possible effect is that fewer parents would end up in disputes because there would be no third-party decision-maker. They would “forced” to find some resolution to disagreements, if and when they encountered them.

Let us look at an example of how a new meme regarding children might work in practice:

1. Assume a paper is written in a respectable legal journal by a respectable author asserting that the Court’s jurisdiction over how children are raised following a divorce is unconstitutional, unless there is a showing that the child is being neglected or abused. The premise of the argument is that Courts consider the raising of children by single parents or by married parents as protected by the privacy clause of the Constitution and that same clause should restrict the Court’s jurisdiction after a divorce.
2. Assume over the next year, numerous articles are published on case law granting the Court jurisdiction, arguing for and against. Also assume esteemed social scientists post articles both for and against, including mental health professionals, familiar with new research and serve as a resource to separated parents, should the parties develop disagreements. This is much the same way many mental health professionals perform these same services for married parents who have trouble resolving disagreements about parenting.
3. Assume several studies are conducted to test the assertion that separated parents have the same or very similar long-term goals for their children (e.g., have a successful marriage, do well in academics and have a satisfying career, be of good character and avoid problems with substance abuse and criminality; etc.). Also assume the studies find that in fact, separated parents do share goals.

²¹ Your authors are not advocating this position, but giving an example that is likely to cause family law practitioners to recoil- prompting them to think about the idea of a new meme. For certain, this idea is “new,” and what if taken seriously, it led to substantial changes in law? What if it actually did improve people’s lives? Just think!

4. Assume a pilot study is done in a jurisdiction in which a Court grants a divorce without language involving the children (i.e., custodial decision making, physical placement schedule and child support). As a precaution, also assume that the Court gets a written Plan from the parties regarding these issues and either approves the Plan or sends the parties back to negotiation if the Court does not approve the Plan (i.e., the parties cannot get a divorce without an approval of their Plan). Also assume that the parties are warned that any form of child abuse or neglect, including financial abandonment, will give the Court jurisdiction, which may include punitive Orders.
5. As part of the experiment, assume that the mental health professionals are trained to help parents resolve disagreements, should they arise.²² (The parents are aware that they cannot take disagreements before the Court, unless they rise to the level of neglect or abuse).
6. Finally assume that these cases are followed for a period of time to determine outcomes.

Notice that in the meme regarding the children and child support, the parents are in control of the Plan, and not necessarily bound by the confines of divorce law.

Now let us look at an example of how a new meme regarding finances might work in practice:

1. Assume following a research study, a Committee of family law attorneys and accountants publish a paper finds that the “equitable division of property and income” produces poor outcomes for divorcing parties. The study finding is that on average both parties are doing worse economically five years following their divorce than they were at the time of the divorce. Also assume that the Committee proposes that rather than an equitable division, a different standard be used: specifically, that the parties would each prepare a five-year financial Plan to reach their financial goals, including what division of property and income is most likely to achieve success.
2. Assume that debate, criticisms and proposed improvements in the findings are the subject of trade journals. Also assume that the meme gathers support, with suggested improvements, and a research study is designed to determine long-term outcomes.
3. Assume that the research study finds that the subjects who used their existing property and income to plan long-term financial outcomes did substantially better than the control group, financially and also in satisfaction rates. Assume that a second study is done with similar results.

²² See Booklet I: Divorce Conflict for “lagging skills” in resolving disagreements.

**Taking these two examples presented above,
might new law be written?**

Do we know if these memes are likely to improve the culture? Of course not.²³ More importantly, such proposals are likely to make people in the current culture very nervous. But, the great advances in modern science and technology made people very nervous at first. Einstein made people nervous when he replaced classical mechanical physics with relativity and space-time, and then he became nervous when the deep idea of quantum mechanics was proposed. However, both of those theories were criticized and tested and ultimately become accepted science.

**Nervousness, and fear of the unknown
should not prevent progress in a culture.**

New memes, or variants on old memes, must be criticized and tested, but should not be simply doing business in the usual way in a slightly different format.

**In short, for the current family law system
to correct its problems and survive in the future,
it must become dynamic, not static,
and allow cultural evolution to take place.**

Creativity and critical thinking must be encouraged, and rather than maintaining the *status quo*, professionals in the system should be encouraged to produce new memes and allow them to be tested and criticized, rather than dismissed out of hand. When a lone voice calls out, “Why can’t we try X,” the response should be,

“Let’s try that and see what happens.”

**Sacred assumptions need to be surfaced and questioned.²⁴
Only by unleashing the power of evolution
will progress in the current family law culture be made.**

²³ We reiterate that we are not advocating for any particular memes. We simply want to demonstrate our points with a dramatic meme, rather than a slight change in the way business is currently conducted.

²⁴ In our books, *Game Theory and the Transformation of Family Law* and *Winning Negotiation Strategies in Divorce*, the analysis of the traditional family law system surfaces assumptions and what we call “tricks” of the system and proposes new assumptions and strategies to reach different outcomes.