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FAMILY GROUP CONFERENCES AS A FORM OF COURT-APPROVED ALTERNATIVE DISPUTE RESOLUTION IN CHILD ABUSE AND NEGLECT CASES

Jolene M. Lowry*

The problems associated with long-term foster care of children have escalated over the past decade as more abused and neglected children enter the already overworked and underfunded state child protective systems. The recent Personal Responsibility and Work Opportunity Reconciliation Act of 1996 mandates giving preference to placement within the extended family for children who cannot be returned to their parents. Compliance with this law requires substantial changes in the policies and procedures of human services agencies in most states. This Article discusses "family group conferencing," a new model for working with families within the system. Family Group Conferencing originated in New Zealand and is now in place in the child welfare agencies and family courts of several states. In this model, professionals working in the child-serving agencies take a collaborative rather than adversarial role with families, enabling the extended family to devise a plan for the care of the abused or neglected child with the approval and oversight of the family court.

In this Article, Lowry presents a proposal for combining family group decisionmaking with court-approved alternative dispute resolution models that have been used successfully in other fields of law. Lowry also discusses some of the concerns attending the development of family-centered programs, such as confidentiality requirements in state and federal law. The author recommends, as a first step within a state, the establishment of two or three pilot programs. In the author's proposed model, all parties—including the family members, the child's attorney, the social service agencies, and others involved in the case—would reach an agreement that they would submit to the family court judge. The court, as the ultimate decisionmaker, would incorporate the approved plan into a court order for the child's placement and custody. The family-centered dispute resolution plan keeps the child within the care of her family and is both less costly and more efficient than the current long-term, out-of-home placement that often devastates children by leaving them in impersonal state custody throughout their childhood.

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INTRODUCTION

Urgent calls for personal responsibility and laments over the breakdown of the American family permeate current American political discourse. Our child welfare policies, however, do not reflect the same urgency and priority. In the area of child protection, where the consequences of "family breakdowns" often arise, policies and practice do very little to encourage families to take responsibility for their problems. In particular, families are not required to participate in the process of developing a plan for protecting their own children, nor are they required to seek out relative placements for the child. Instead, the normal practice is to remove children from the home and to place them in foster care until the parents complete whatever plan the social worker and the court devise. Courts, attorneys, and social workers must take special care to ensure that ending the abuse of a child does not also put an end to the child's family. Exchanging a private nightmare for a public one does not serve the best interests of the child.

In response to the recent passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the Act),¹ states will have to develop kinship care policies and procedures that encourage parents and extended families to develop plans to provide care for their own children within the extended family, even if the children cannot be returned to their parents. The Act requires that states consider giving preference to adult relatives over nonrelative caregivers.² In developing these methods, policy makers and practitioners will need to design programs that enhance the strength of the extended family network, and caseworkers will need more extensive training in kinship care and family-focused practices. A new approach to working with families involved with the child welfare system, called "family group decisionmaking" or "family group conferencing" (FGC), may help many states accomplish this task. Other countries have used this approach for nearly a decade, and it is becoming quite popular in the several states that have adopted it.³ The approach has had positive results in encouraging the professionals who work in the child-serving agencies

1. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

2. See *id.* § 505, 110 Stat. at 2278 (to be codified at 42 U.S.C. § 671(a)(18)).

3. See, e.g., Ted Keys, *Family Decision Making in Oregon*, PROTECTING CHILDREN, Summer 1996, at 11, 13 (stating that the approach "has taken on a life of its own").

to take a collaborative rather than adversarial role with families. Those who were at first skeptical of this process have found that, when given the responsibility, families do prove that they can protect children within the family.⁴ This method has an additional benefit: if the youth court approves and sanctions the use of FGC, it may operate as a form of alternative dispute resolution, eliminating any need for a formal hearing.

Those who have used family group conferencing have found that the method generally succeeds, although it is neither perfect nor easy.⁵ The method works for two reasons: first, the family plans are more creative, more stringent, and better followed than agency plans; and second, committed and caring family members "will always 'out-distance' and 'out-care' any social worker, . . . lawyer, [or] foster parent"⁶ no matter how well-intentioned the professionals may be. Children instinctively react positively to the care of a relative, for they know that the care of a professional will never match the love, care and commitment possible within the family.⁷

This Article presents a proposal for combining court-approved alternative dispute resolution with family group conferencing. Parts I and II discuss the strengths of each program; Part III suggests that a combination of the two would be uniquely suited for determining placement of abused and neglected children. The Article concludes that using family group conferencing as a form of court-approved alternative dispute resolution in child abuse and neglect cases will encourage placement of children in kinship care arrangements rather than stranger care. In addition, the use of FGC will generate more creative and rigorous plans of care, which will result in better monitoring and compliance than traditional plans.

4. See Paul Ban & Phillip Swain, Participation, Empowerment, Partnership—Family Group Conferencing in the Australian Context 14 (1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*).

5. See Grant Allan, The New Zealand Family Group Conference—A Lawyer's Perspective 2 (Oct. 1996) (unpublished paper for "UNDER CONSTRUCTION: Building a Better Future for Colorado's Children and Families," Denver, Oct. 1-4, 1996) (on file with the *University of Michigan Journal of Law Reform*).

6. *Id.*

7. See *id.*

I. COURT-APPROVED ALTERNATIVE DISPUTE RESOLUTION

Many youth court judges and referees are struggling to find better ways of managing their growing caseloads.⁸ In response to this, the National Council of Juvenile and Family Court Judges (NCJFCJ) has recently published resource guidelines which encourage the improvement of case flow management⁹ and the use of alternatives to contested litigation.¹⁰ The NCJFCJ suggests that courts consider encouraging some form of alternative dispute resolution (ADR) as "a means for reaching more productive and constructive solutions than can be achieved through formal adversarial proceedings."¹¹ "Court-approved alternative dispute resolution" programs include programs directly annexed to the operation of the court as well as those within the court's responsibility or jurisdiction. Alternative dispute resolution is generally consistent with the nature of the youth court: both are less adversarial systems focusing on problem resolution, treatment, education, and prevention rather than punishment.¹²

It is usually desirable to resolve child abuse and neglect cases through agreement of the parties, rather than in contested hearings, because outcomes reached by agreement are often superior to those arising from litigation.¹³ In achieving the best outcome for the child, it is necessary that the child-serving agencies and the families cooperate. Unlike contested hearings, which often create an adversarial atmosphere that discourages this cooperation, negotiated settlements require everyone involved to understand each other's positions and to work together to devise solutions. In this atmosphere, parties are more likely to view each other as allies rather than adversaries in devising solutions for the child.¹⁴

8. See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995), app. B at 135.

9. See *id.* at 19.

10. See *id.* app. B at 132.

11. *Id.* app. B at 135.

12. See THE CENTER FOR POLICY RESEARCH, ALTERNATIVES TO ADJUDICATION IN CHILD ABUSE AND NEGLECT CASES (1992).

13. See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 8, app. B at 132.

14. See *id.*

Courts have used various forms of ADR for decades in other forums.¹⁵ Although the use of ADR in the forum of child abuse and neglect is more recent, it is clearly guided by the same principles that have made the process so valuable elsewhere. Studies of the concerns of disputants and the way in which they use dispute resolution procedures indicate great benefits in applying common standards of interpersonal interactions to traditional judicial processes. In particular, “[l]itigants are more willing to comply voluntarily with decisions reached in ways that they believe are fair.”¹⁶ The common elements that affect litigant or disputant satisfaction with a process include representation or participation in the process, the ethical appropriateness of the behaviors involved, the perceived honesty of the third parties involved in their process, and the consistency of the outcomes relative to others.¹⁷ It would seem that disputants would generally prefer compromise because its results often exceed those of strict adjudication: in adjudication each party usually gets only what he is entitled to, but in compromise each party usually gives the other more than he believes the other deserves. Accordingly, people generally do not perceive informal negotiation as unfair, even though it lacks many of the structural features of “due process” associated with trials.¹⁸ On the contrary, disputants judge the fairness of arbitration “by the presence of a trusted third-party decision maker and the absence of overt evidence of bias.”¹⁹

Although many parties to child protection cases already seek to reach informal agreements on their own, court encouragement of settlement negotiations lends legitimacy to the process. Formal settlement procedures allow complete exchange of information involving all relevant parties, while informal settlement practices currently in use may result in only partial or incomplete exchange of information.²⁰ The goal in negotiation is to transform the parties from adversaries into joint problem-solvers and to empower the families, guided by assistance from the professionals, to devise their own solutions. If the judge sets

15. See NATIONAL COLLEGE OF JUVENILE AND FAMILY LAW, COURT APPROVED ALTERNATIVE DISPUTE RESOLUTION: A BETTER WAY TO RESOLVE MINOR DELINQUENCY, STATUS OFFENSE & ABUSE/NEGLECT CASES 4 (1989).

16. Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1997).

17. See *id.* at 370-72.

18. See *id.* at 372.

19. *Id.*

20. See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 10, app. B at 134.

the proper atmosphere surrounding the settlement by encouraging all involved to give settlement a chance, the parties are likely to be prepared to settle.

Although settlement negotiations should always focus on the best interests of the child, they should also attempt to validate the concerns of all participants, especially family members. The arbitrator or mediator should help to orient and educate the family members, to clarify issues, and to facilitate exchange of current case information in order to creatively resolve barriers to settlement. This process respects the family and creates an investment in complying with the settlement agreement. In jurisdictions currently using a form of court-approved alternative dispute resolution, it has been found that the family typically perceives negotiation to be more friendly and empowering than traditional court processes.²¹ As a result, the court may encounter less resistance when it holds the family accountable for commitments they have made during settlement.

Alternative dispute resolution helps youth court judges facilitate the development of early, appropriate, and comprehensive settlements that protect the safety and best interests of the child. It allows judges to preserve the dignity of the family, to emphasize family preservation and strengths, to involve the families in solutions to their problems, and to facilitate a full exchange of the most current case information. Further, judges can clarify the roles and responsibilities of the participants, encourage the accountability of family members and professionals interacting with the family, and reduce the family's sense of alienation from the child protection system and the courts.²²

Although ADR is less costly than adjudication, it tends to yield superior results.²³ One study from three major juvenile/family courts using ADR found that about 75% of child abuse and neglect petitions were settled through mediation.²⁴ Similarly, Denver juvenile court authorities believed that mediation could be effective in resolving 80% of their child protection cases.²⁵ Despite this data, Child Protective Services (CPS) and court personnel handle almost all child maltreatment

21. See THE CENTER FOR POLICY RESEARCH, *supra* note 12, at 85-87.

22. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 10, app. B at 134.

23. See *id.* at 132.

24. See Nancy Thoennes, *Mediation and the Dependency Court: The Controversy and Three Courts' Experiences*, 29 FAM. & CONCILIATION CTS. REV. 246, 256 (1991) (reporting that of 800 cases, 600 were settled in mediation).

25. See Bernard Mayer, *Conflict Resolution in Child Protection and Adoption*, MEDIATION Q., Mar. 1985, at 69.

cases throughout the nation as if they will proceed to a formal adversarial process. One commentator described the risks of this approach:

This presumption that child abuse and neglect cases *will be* litigated—rather than mediated within the community (a coercion rather than treatment paradigm)—tears at the thin fabric that holds together many families who have been reported for maltreating their children—and may actually make successful outcomes for children more difficult to achieve!²⁶

ADR can also be very helpful in resolving case-related inter-agency disputes over which agency will provide services (e.g., social service agency dispute with mental health and education provider).

By emphasizing the importance of negotiated settlement at the start of the ADR process, a judge can encourage the parties' commitment to their plan and reduce the amount of time, energy, and money which would otherwise be needed to coerce their compliance. Additionally, this process can help the entire family to recognize its strengths and to identify available services that can help the family to build on those strengths.²⁷

Judges should be encouraged to require parties to participate in settlement negotiation whenever it appears that it might prove beneficial. In cases involving parties who cannot participate fully because of mental illness or those involving family violence allegations, the judge should have the discretion to not refer the case to mediation if he feels it would not be in the child's best interest. The NCJFCJ report notes, however, that "judges and commissioners initially reluctant to refer cases to mediation have been consistently surprised and pleased at the results of mediation."²⁸ Additionally, even in cases where settlement on all issues does not occur, a settlement conference may serve a valuable purpose by narrowing the issues to be discussed during formal court proceedings.

26. Howard Davidson, Changing Government Policies to Promote Dispute Resolution in Child Protection Cases 56 (unpublished paper for the American Bar Association's 8th National Conference on Children and the Law: Achieving Justice in Child-Related Conflicts, Arlington, June 1996) (on file with the *University of Michigan Journal of Law Reform*).

27. See Thoennes, *supra* note 24, at 248–49.

28. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 10, app. B at 137.

II. THE FAMILY GROUP DECISIONMAKING METHOD

A. Overview of Family Group Decisionmaking

1. *Historical Background*—Family group decisionmaking is an alternative dispute resolution model for working with families to plan and provide for the safety and best interests of children at risk for abuse and neglect. Because the model relies on a family meeting (the family group conference) to develop solutions for families, it encourages cooperation, communication, and collaboration between professionals and the family. Family group decisionmaking was developed in the late 1980s in New Zealand and was implemented through legislation in 1989.²⁹ The pressure to have families make decisions to ensure the safety of their children came from New Zealand's indigenous Maori population, who sought the return of their children from institutional and stranger care.³⁰ While the Maori represent only about 13% of the country's total population, they are vastly overrepresented in many negative social indicators. For instance, they are overrepresented in the child welfare statistics, in prison populations, and in the ranks of educational underachievers.³¹ "[The] Maori believed their *whanau mana* (family autonomy) had been undermined and had resulted in a disproportionate number of their children being 'lost to them.'³²

The reasons for the development and use of the practice in New Zealand are the same reasons that have made it so attractive to those now using it in the United States: the number of children living in out-of-home placements was escalating, children were spending an unacceptable length of time in such settings, and children were experiencing multiple out-of-home

29. See MARK HARDIN, ABA CTR. ON CHILDREN AND THE LAW, FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE IN NEW ZEALAND 3 (1996).

30. See Harry Walker, *Whanau Hui, Family Decision Making, and the Family Group Conference—An Indigenous Maori View*, PROTECTING CHILDREN, Summer 1996, at 8, 8.

31. See Margaret McKenzie Davidson, *Family Decision Making as a Preventative Solution in Child Protection* 4 (unpublished paper for the Tenth International Congress on Child Abuse and Neglect, Sept. 10–13, 1994) (on file with the *University of Michigan Journal of Law Reform*).

32. Walker, *supra* note 30, at 8.

placements.³³ Child welfare experts in the United States have started to embrace this new approach because it fits closely with the philosophy underlying newly renewed efforts to preserve and strengthen families and to reduce the number of children currently in foster care placements.³⁴ The target uses for family group decisionmaking now range from the protection of children from abuse and neglect to several new uses such as reunification of foster children with their families, domestic violence cases, and juvenile corrections cases.³⁵

2. *The Principles Which Guide Family Group Decisionmaking*—Family group decisionmaking is family-centered, strengths-oriented, and community-based. It recognizes that families have the most information about themselves, have the primary responsibility for their children, and should provide their children with a sense of identity.³⁶ The purpose of the conference is to provide the child with care and protection while keeping the child within his kinship circle. It is the family's task to design a plan for achieving this goal, which the court approves once the family and professionals reach a consensus on the outcome.

The principles underlying the practice of FGCs are not new to social work; they have been used for decades in family therapy and community development work.³⁷ For most child welfare

33. See Lisa Merkel-Holguin, *Putting Families Back into the Child Protection Partnership: Family Group Decision Making*, PROTECTING CHILDREN, Summer 1996, at 4, 4.

34. See *id.*

35. See *id.*; see also Keys, *supra* note 3, at 13–14.

36. See Merkel-Holguin, *supra* note 33, at 4.

37. See Paul Ban & Phillip Swain, *Participation, Empowerment, Partnership—Family Group Conferencing in the Australian Context 3–4* (1994) (unpublished manuscript, on file with the *University of Michigan Journal of Law Reform*). The principles are as follows:

1. Decision making should be made by those who have the problem. People object and adversely react to others making decisions on their behalf.
2. The "problem" of one family member has an impact on and reverberates through the whole family system.
3. People make better decisions if they have a vested interest in the outcome of those decisions.
4. Professionals have the responsibility to provide the family with their knowledge of resources, assessments, expertise in similar cases, and the reasons for their professional judgments in an educative and supportive manner.
5. Solutions lie within the family system that has the problem, not outside or in the hands of professionals.
6. People act and will respond accordingly to the way they are treated by professional services. If they are treated as having the potential

agencies, however, adopting a family-centered approach represents a radical departure from their traditional method of dealing with families.³⁸ Instead of searching for solutions outside of the family, agencies will have to focus on the family as the primary source of change and resolutions.³⁹ The child-serving agencies can expedite this change in focus by adopting basic values and assumptions that focus on family strengths rather than problems and weaknesses. These values should include the following principles:

- [Children] are best raised in families.
- The primary responsibility for the care of children rests with their families, which should be respected, supported, and protected.
- Family groups can make safe decisions for their own children. Families have strengths and can change.
- Family groups are experts on themselves. Families have wisdom and solutions which are workable for them.
-
- The essence of family empowerment is the belief in self-determination: Those we help have a right and need to be free in making their own decisions and choices.⁴⁰

3. *The Family Group Decisionmaking Process*—The family group decisionmaking process comprises four main parts: the referral, the preparation, the family meeting, and the subsequent decision.⁴¹

a. *Referral*—In most locations that have adopted the FGC model, the social worker who investigates an abuse case refers it to a coordinator, who then decides whether to hold a family group conference.⁴² The coordinator is generally a person who

to find solutions, they will mobilise themselves positively and not waste the opportunity.

Id.

38. See Elizabeth Cole, *Key Policy Decisions in Implementing Family Group Conferences: Observations Drawn from the New Zealand Model*, in HARDIN, *supra* note 29, at 121.

39. See *id.* at 122.

40. *Id.* at 122–23.

41. See Merkel-Holguin, *supra* note 33, at 5–7.

42. The Michigan, Washington, Vermont, and Illinois programs adopt this approach. See Telephone Interview with Melissa Hansen, Washington FGC coordinator

can remain impartial and who has no connections to the case. In the United States, the social worker may ask families to participate voluntarily in the conference in lieu of traditional court processing of cases, although in some locations courts have also ordered conferences.⁴³ Additionally, Vermont's program allows professionals other than the social worker to refer cases and also allows the family to decide independently whether to solicit this service.⁴⁴ Oregon's program receives referrals from judges and citizen review boards.⁴⁵

In New Zealand, an FGC is required by statute in all substantiated cases of abuse and neglect.⁴⁶ While the issues of immediate safety are being addressed, the social worker *must* meet at the earliest possible time with the "Resource Panel," an interdisciplinary body of professionals from the community who convene weekly.⁴⁷ The members of the Resource Panel are appointed by the Director-General of Social Welfare,⁴⁸ who has the statutory duty to implement the use of FGCs.⁴⁹ The Panel members meet with the social worker twice to discuss the case and the options available for the family, once while the issues of immediate safety are being addressed and again when the investigation and assessment are complete.⁵⁰ The Panel decides based on the results of the investigation and assessment whether the care and protection issues warrant a referral to a

(Oct. 1996) [hereinafter Hansen Interview]; Telephone Interview with Wendy Lewis Jackson, Program Director, Kellogg Families for Kids Program, the Grand Rapids Foundation (coordinator of a pilot FGC project in Michigan) (Oct. 1996) [hereinafter Jackson Interview]; Telephone Interview with Sara Kobylenski, Division Director, Casey Family Services (Vermont FGC Coordinator) (Oct. 1996) [hereinafter Kobylenski Interview]; Telephone Interview with Jackie Lynn, Office of the Inspector General, Ill. Dep't of Children and Family Services, and Nicole Anderson, Lawndale, Ill., Coordinator (Oct. 1996) [hereinafter Lynn/Anderson Interview]. A list of all sites using the Family Group Decisionmaking method is on file with the *University of Michigan Journal of Law Reform*.

43. See Merkel-Holguin, *supra* note 33, at 5.

44. See Kobylenski Interview, *supra* note 42.

45. See Hansen Interview, *supra* note 42; Kobylenski Interview, *supra* note 42; Lynn/Anderson Interview, *supra* note 42; Jackson Interview, *supra* note 42; Telephone Interview with Ted Keys, Program Coordinator, Family Based Services, Oregon State Office for Services to Children and Families (Oct. 1996) [hereinafter Keys Interview].

46. See Children, Young Persons, and Their Families Act, 1989, § 17(2) (N.Z.).

47. See *id.* § 21; see also Denis Smith, Family Group Conferences—The Process 3 (Oct. 1–4, 1996) (unpublished paper for "UNDER CONSTRUCTION: Building a Better Future for Colorado's Children and Families," Denver, Oct. 1–4, 1996) (on file with the *University of Michigan Journal of Law Reform*).

48. See Children, Young Persons and Their Families Act, 1989, § 428 (N.Z.).

49. See *id.* § 7.

50. See *id.*

FGC coordinator.⁵¹ If the Panel refers the matter to the FGC, the social worker provides information at the conference and continues to work with the family afterward.⁵² Families who have participated in FGCs indicated that they most valued "social workers who were available to talk to, who were good listeners, who kept in contact with them and the child or young person, who followed up on progress and who took action when difficulties arose."⁵³ The director of the Vermont program indicates that the two social workers who conduct their conferences both meet with community panels prior to a conference. The professionals who serve on their resource panel include school guidance counselors, IFBS clinicians, mental health clinicians, health department officials, foster parents, and a former foster child.⁵⁴

b. Preparation and Planning—According to the literature concerning the current programs, great preparation and planning make the crucial difference between the success and failure of an FGC.⁵⁵ Broad family representation and understanding of the process must be balanced with the necessity to start the process as quickly as possible.⁵⁶ In New Zealand, FGC policy guidelines require that the conference be convened within thirty working days of the referral.⁵⁷

The Coordinators are generally social workers with advanced training in the practice of family group decisionmaking.⁵⁸ Their responsibilities vary but generally include the following critical activities:⁵⁹

51. *See id.*

52. *See* Bryony Walker, *Family Members' Experiences of the Care and Protection Family Group Conference Process*, 6 SOC. POL'Y J. OF N.Z. 216, 220 (1996).

53. *Id.*

54. *See* Kobylenski Interview, *supra* note 42.

55. *See* Merkel-Holguin, *supra* note 33, at 5.

56. *See id.*

57. *See* NEW ZEALAND CHILDREN AND YOUNG PERSONS SERVICE, COORDINATOR'S GUIDELINES: THE LEGAL AND POLICY REQUIREMENTS FOR THE CARE AND PROTECTION COORDINATOR ALONG WITH A COMPREHENSIVE GUIDE TO PRACTICE ¶ 3.1.4 (1992), *reprinted in* HARDIN, *supra* note 29, app. 5 at 9.

58. For example, Melissa Hansen, Washington's FGC coordinator, has an M.S.W. and four years prior experience as a caseworker. She participated in a two-day training session in Oregon and had an opportunity to observe a meeting there before beginning her program. *See* Hansen Interview, *supra* note 42. The two coordinators in Vermont are known as "social workers;" they both have M.S.W.'s and are clinically licensed in Vermont. They both attended a one-day training session with the project in Newfoundland and spent a day with one of the coordinators there. *See* Kobylenski Interview, *supra* note 42. The coordinators in the Illinois projects both have M.S.W.'s, but have had no training specific to family group conferences. *See* Lynn/Anderson Interview, *supra* note 42.

59. *See* Merkel-Holguin, *supra* note 33, at 5-6.

1. *Ensure that the child is in a safe placement, either in an out-of-home placement or kinship care.*
2. *Define the family of the child or children.*

The coordinator must be careful to define families broadly to include a "kinship network." The very premise of FGC relies heavily on utilizing extended families to protect and care for children.⁶⁰ In deciding whom to invite to the FGC, the coordinator should work with the family and the child to identify individuals who *can protect and care for the child*—not those whom the parents necessarily *want* to participate in the conference, but those who actually *are* the child's family. The two most popular ways to identify appropriate participants are to have the parents make a family tree or to ask the parents to describe their relationships with various family members.⁶¹ The family group conference typically includes the child's parents and extended family members. In some cases, the family's closest friends also attend the FGC if they are considered to be "family" or "fictive kin" to the child; i.e., they have a significant psychological attachment to the child.⁶² The investigating social worker, counsel for the child, teachers, therapists, and other professionals who are already working with the family also typically attend the conference.⁶³ Those professionals may include drug/alcohol treatment providers, mental health professionals, school counselors, probation and parole officers, and juvenile court counselors. If the parents or children are not receiving services, then the coordinator may invite an area professional with particularly relevant expertise to advise the family of available services. For example, if family violence is an issue, the coordinator may invite someone from the community who can talk to the family about the cycle of violence and services available in the community.⁶⁴

3. *Invite family members and other participants.*

The social worker, either alone or with the coordinator, is responsible for introducing the family to the idea of the conference.⁶⁵ The family initially receives written material about the conference. The coordinator then calls upon the family

60. *See id.* at 4.

61. *Cf. HARDIN, supra* note 29, at 33 (citing one coordinator who asks parents for a list of relatives' names and addresses).

62. *See Cole, supra* note 38, at 136.

63. *See HARDIN, supra* note 25, at 4.

64. *See Hansen Interview, supra* note 42; Keys Interview, *supra* note 45.

65. *See Hansen Interview, supra* note 42; Kobylenski Interview, *supra* note 42; *see also HARDIN, supra* note 29, at 111.

members to arrange “pre-conference meetings” to identify additional family members and prepare participants (family members and professionals) for the conference;⁶⁶ these meetings ordinarily address both format and purpose of the conference.⁶⁷ The conference providers have found that these pre-conference meetings are very important in helping to build relationships among the possible participants.⁶⁸

4. *Clearly define and communicate participants’ roles for the conference.*

Both families and professionals need to fully understand the process before it begins. Some jurisdictions have developed standard questionnaires specifying the information that professionals should be prepared to provide to the family at the conference.⁶⁹ The family also receives a set of questions that they will be asked to answer during the family meeting portion of the conference.⁷⁰

5. *Manage unresolved family issues, but maintain proper focus.*

66. See HARDIN, *supra* note 29, at 111.

67. See *id.*

68. See Hansen Interview, *supra* note 42; Kobylenski Interview, *supra* note 42.

69. For example, the Kansas FFK Project uses the following questions:

1. How did you become involved with the client and what is your current involvement?
2. What options would you like to see this family consider and what is required for your agency to accept this plan?
3. What services would you like to see the family consider and what is required for your agency to accept this plan?
4. Any other comments that you would like to share (i.e. reintegration, your involvement after the conference)?

Kansas FFK Project, Kinship Care Conference Professional’s Worksheet; Kansas Children’s Service League (on file with the *University of Michigan Journal of Law Reform*).

70. The Kansas family questions include:

1. Who will the child/youth reside with? Are there other agreeable options as well?
2. What will the contact/visitation be between the child/youth and their parent/caregiver referred to in the conference?
3. What services will the child/youth and the family need? Who will provide this?
4. Who will help provide respite/relief care for the child/youth?
5. What other issues or concerns would the family like addressed in the plan? Any educational/medical/recreational issues to address?
6. Who will service as the family monitor for the Kinship?
7. Does the family feel a follow-up conference would be helpful?
8. Additional information.

Kansas FFK Project, Kinship Care Conference Plan Guideline (on file with the *University of Michigan Journal of Law Reform*).

Coordinators must inform the family members before and during the meetings that issues unrelated to protecting the child will not be discussed in order to keep the family "on task."

6. *Coordinate logistics.*

The coordinator is responsible for organizing all meeting logistics, including date, time, location, supplies, refreshments, seating arrangements, extra security if necessary, and having letters or conference calls set up in order to include those who cannot attend.⁷¹ Although these details may seem trivial, the coordinators consider them to be fairly important⁷² to making the family comfortable with the surroundings. The coordinator works with the family to identify an appropriate meeting place.⁷³ It is usually best to hold the meeting in the family's home or a neutral community meeting place, rather than in the coordinator's office, so as to reinforce the message that the family is in charge.⁷⁴

c. *The conference*—The conference itself generally comprises four stages: the welcome, information sharing, the family meeting, and the decision.

Generally, the coordinator begins the family meeting in a way that is culturally and traditionally relevant to the family, such as a prayer.⁷⁵ The coordinator welcomes the participants, explains the process and purposes, and obtains agreement as to the meeting's goal and each person's role.⁷⁶

In the information sharing stage, the social worker and other professionals simply and respectfully explain the child's situation to the family and give options for the family to consider.⁷⁷ They should be careful, however, not to offer any opinions or recommendations that influence the family's choices, for this would defeat the purpose of the family meeting. The professionals then answer questions from the family. This exchange allows everyone present to have the same information, which is especially important in cases where some family members might be relying on half-truths, misunderstandings, or partial information.⁷⁸

71. See Merkel-Holguin, *supra* note 33, at 5-6.

72. See Smith, *supra* note 48, at 5 (noting that the availability of refreshments is "an aid in helping family members keep their anger within constructive bounds").

73. See Children, Young Persons and Their Families Act, 1989, § 21(b) (N.Z.).

74. See Cole, *supra* note 35, at 138.

75. See Merkel-Holguin, *supra* note 33, at 6; Walker, *supra* note 32, at 8.

76. See Merkel-Holguin, *supra* note 33, at 6; see also Smith, *supra* note 48, at 6.

77. See Smith, *supra* note 48, at 6-7.

78. See Carol J. Harper, *Family Group Decision Making: A Mother and Case-worker's Perspective*, PROTECTING CHILDREN, Summer 1996, at 15, 15.

Next, the family meets in private to ascertain whether the child has been abused or neglected or is otherwise in need of care, and, if so, to develop a plan to meet the child's needs.⁷⁹ Both professionals and other non-family support persons generally are asked to leave the room,⁸⁰ leaving only the family to discuss the case in private, in order to avoid inhibiting the family's discussions.⁸¹ It is believed that the privacy of this process allows families to reveal their secrets more easily, which empowers them to assume their role of decisionmaking and facilitating amongst themselves. Surprisingly (at least to this writer), experience in New Zealand, Vermont, Washington, and Illinois has revealed that the family will usually agree that the child has been abused or neglected.⁸² The family's private time typically varies between 15 minutes to 3–4 hours, but in some exceptional cases the discussion has lasted all day.⁸³

The coordinator, the investigating social worker, and the child's attorney are asked to return when the family presents its plan for the child. The decisions can then be clarified by the professionals and, if necessary, modified by the family.⁸⁴ In New Zealand, only the child's attorney, the social worker, or the coordinator may veto a family decision.⁸⁵ If the family plan is vetoed, the conference is "not deemed to have reached

79. See Merkel-Holguin, *supra* note 33, at 6.

80. See *id.* The family can ask the coordinator to stay in the room, if that makes the family more comfortable with the discussion; however, the coordinator should be careful not to interfere with the family's deliberation.

81. See Smith, *supra* note 48, at 7.

82. See Gale Burford & Joan Pennell, *Family Group Decision Making: Generating Indigenous Structures for Resolving Family Violence*, PROTECTING CHILDREN, Summer 1996, at 17, 19; Kobylenski Interview, *supra* note 42; Hansen Interview, *supra* note 42; Lynn/Anderson Interview, *supra* note 42.

83. See Smith, *supra* note 48, at 9.

84. See HARDIN, *supra* note 29, at 115.

85. See Allan, *supra* note 6, at 5. In contrast, Vermont reports that its child welfare agency has veto power over a family's plan if the case is open with that agency and that a judge would have similar authority. See Kobylenski Interview, *supra* note 42. Furthermore, in Vermont, attorneys do not attend the conference (including, presumably, attorneys for the children or guardians ad litem (GALs)) and presumably would have no veto power. See *id.* Washington and Oregon give only the assigned social worker a veto. See Hansen Interview, *supra* note 42; Keys Interview, *supra* note 64. Michigan plans must be approved (signed) by all family members; but only the coordinator has veto power. See Jackson Interview, *supra* note 42.

Although in some of these state projects concerns may still arise about the representation of the child at the conferences or the necessity for GALs or children's counsel to hold veto power over the plan. No doubt those wishing to institute such a program should carefully evaluate this possibility. Additionally, states should consider what role, if any, the parents' attorneys should have in these conferences.

agreement."⁸⁶ Experience has indicated, however, that participants reach agreement in 90–95% of the cases.⁸⁷ Thus, only a small percentage of plans are vetoed;⁸⁸ these cases then follow the traditional route to court. In some jurisdictions, the court has asked the family to "have another go at it" if the plan was vetoed or if the family was unsuccessful in reaching agreement.⁸⁹

4. *Subsequent Events & Monitoring*—Following the conference, the participants commit the plan to writing.⁹⁰ In most cases the plan is approved by the court and thus has the same force as any court order.⁹¹ Follow-up meetings or review hearings can be scheduled, and the family is also permitted to reconvene the conference if they find that decisions reached in the first FGC are not working and that the child is at risk.⁹² In New Zealand, this occurs at the coordinator's own request or at the request of at least two family members.⁹³

The plan developed by the conference must also provide a mechanism for monitoring its effectiveness. Two essential components of the monitoring structure are ensuring that the family is obtaining services according to the plan⁹⁴ and ensuring that all parties remain accountable for their responsibilities under the plan.⁹⁵ It is a core assumption of the FGC model that families are more likely to implement plans that they develop themselves and that they will monitor the plans more thoroughly than social workers currently are able.⁹⁶ Nevertheless, external monitoring is critical because state child welfare agencies retain the authority to protect children from abuse or neglect.⁹⁷

86. See Smith, *supra* note 48, at 9.

87. See Merkel-Holguin, *supra* note 33, at 6.

88. See Denis Smith, Remarks at "UNDER CONSTRUCTION: Building a Better Future for Colorado's Children and Families," Denver (Oct. 1–4, 1996) [hereinafter Smith, Remarks].

89. Cf. Children, Young Persons and Their Families Act, 1989, § 30(3) (N.Z.) (permitting a coordinator to reconvene an FGC if the first FGC failed to reach agreement or if its plan was vetoed).

90. See Smith, *supra* note 48, at 9–10.

91. See Allan, *supra* note 6, at 5.

92. See *id.* at 11.

93. See Children, Young Persons, and Their Families Act, 1989, § 36(1) (N.Z.).

94. See Merkel-Holguin, *supra* note 33, at 7.

95. See Cole, *supra* note 38, at 147 (observing that "[i]n the New Zealand experience, no one is really sure that what has been agreed to has been done" and recommending "a robust monitoring and review process" for severe cases).

96. See Merkel-Holguin, *supra* note 33, at 7.

97. See *id.*

In Washington, the family usually chooses to do some of its own monitoring, but the family plan usually provides for a follow-up meeting after three to six months.⁹⁸ In Vermont there is a researcher who does follow-up even if the plan does not require it.⁹⁹ In both states, however, the caseworker maintains most of the responsibility for monitoring.¹⁰⁰ Vermont's coordinators have rejected follow-up monitoring by choice, although they anticipate that this will change as the legal system begins to take more interest in their work.¹⁰¹ The Illinois program requires that the coordinator monitor the family's plan weekly for six months following the conference and monthly for three to six more months, regardless of any ongoing monitoring by the social service agency.¹⁰² Michigan created a "Family Advocate" to monitor completed plans and to work with the family to connect them with community resources for up to one year.¹⁰³ At the end of the year, the family members reconvene in a final group conference to make decisions regarding permanency for the children.¹⁰⁴ Oregon's project director, reflecting on the success of FGCs over several years, reported that the monitoring plans which develop from these conferences are "no worse than usual child welfare monitoring, and in many cases better because the family is carrying out their own plan for the most part."¹⁰⁵

Even when the plans or decisions of the FGC do not work, the results are not more damaging to the welfare of the child than the results of failed state-directed resolutions.¹⁰⁶ Generally, families working as primary decision makers do no worse than state agencies; in most cases they do better.¹⁰⁷ The New Zealand team further reports that when the cases are reviewed for follow-up, about 80% of the items that were not completed were agency responsibilities, not family responsibilities.¹⁰⁸

5. Attendance of Parents' Attorneys, Children, and Offenders at the Conference—In New Zealand, the parents' attorneys are not involved in the conference and generally are not invited.¹⁰⁹

98. See Hansen Interview, *supra* note 42.

99. See Kobylenski Interview, *supra* note 42.

100. See Hansen Interview, *supra* note 42; Kobylenski Interview, *supra* note 42.

101. See Kobylenski Interview, *supra* note 42.

102. See Lynn/Anderson Interview, *supra* note 42.

103. See Jackson Interview, *supra* note 42.

104. See *id.*

105. Keys Interview, *supra* note 45.

106. See Allan, *supra* note 6, at 7.

107. See *id.*

108. See Smith, Remarks, *supra* note 88.

109. See Allan, *supra* note 5, at 3.

The rationale is that legal representation of individual family members at the conference might encourage those family members to focus on their individual interests rather than on the interests of the family as a whole regarding the child's future well-being.¹¹⁰ This self-interest would "undermine the consensus decision making that is the real strength" of the family conference.¹¹¹ In Vermont, no attorneys attend the conferences.¹¹² In Washington, parents' attorneys are welcome to attend the information sharing stage, but they do not participate in the family deliberation.¹¹³ They may return when the family presents its plan, but they generally do not play a role other than to assist in putting their clients at ease and in clearing up misunderstandings.¹¹⁴ Attorneys in Oregon who have experience with the meetings are somewhat less likely to attend these conferences because they realize that the process is not adversarial and that their clients are likely to gain from the meetings; however, many do attend as support persons.¹¹⁵ Children's attorneys commonly attend in Oregon.¹¹⁶

Although attorneys do not frequently attend FGCs in New Zealand, the children who are the subject of the conference commonly do.¹¹⁷ The New Zealand policy is that children generally benefit from attending the conference.¹¹⁸ Child welfare professionals in New Zealand feel that children perceive that the gathering of family members is an affirmation of love and concern for them by their family.¹¹⁹ The New Zealand professionals also feel that the mere presence of the child at the conference seems to focus the gathering very specifically on its function to benefit the children.¹²⁰ Children attend the family conferences in both Vermont and Washington.¹²¹ Other projects, however, expressed concern that this practice might put the child in a difficult position by forcing her to express her prefer-

110. See *id.* at 4.

111. *Id.*

112. See Kobylenski Interview, *supra* note 42. This exclusion apparently applies not only to the parents' attorneys but also to the child's counsel or GAL. See *id.*

113. See Hansen Interview, *supra* note 42.

114. See *id.*

115. See Keys Interview, *supra* note 45.

116. See *id.*

117. See Allan, *supra* note 6, at 5.

118. See Children, Young Persons and Their Families Act, 1989, § 22(1)(a) (N.Z.).

119. See Allan, *supra* note 6, at 5-6.

120. See *id.* at 6.

121. See Kobylenski Interview, *supra* note 42; Hansen Interview, *supra* note 42.

ences with her entire family present.¹²² In New Zealand the professionals believe that family members who may have contributed to the neglect or abuse should also be encouraged to participate in order to facilitate determination and implementation of the solutions.¹²³

B. Effects of Family Group Decisionmaking

The number of children in New Zealand living in institutional and foster care has decreased sharply since the enactment of legislation implementing FGCs.¹²⁴ This dramatic reduction may have resulted in part from increased contact between social workers and extended families. This expanded contact has become necessary because the family members are actually making the decisions, and because the workers must rely upon them to monitor and provide information about the child's situation.¹²⁵ Social workers have found that FGCs allow the family to invest its own time and energy to make the plan work and that the family members are much more aware of their own resources and abilities.¹²⁶ Professionals who were at first skeptical of families' ability to make adequate case plans now find that most family plans are more stringent than case-workers' plans would have been.¹²⁷ Workers also find that because the families are so acutely aware of the family secrets, they know who would be inappropriate as a care provider.¹²⁸

Both attorneys and judges find that they are involved in fewer cases than before; but where they are involved, the involvement is more intense.¹²⁹ Michigan has found that the attorneys involved with their project are now their most "ardent" supporters,¹³⁰ and Kansas and Oregon both report that judges are beginning to refer some of their cases to FGC before attempting traditional court processes.¹³¹

122. See Telephone Interview with Kim Gillum, Kinship Care Coordinator, Kansas Children's Service League (Oct. 1996).

123. See Merkel-Holguin, *supra* note 33, at 5.

124. See HARDIN, *supra* note 29, at 6.

125. See *id.*

126. See Harper, *supra* note 78, at 16.

127. See *id.*

128. See *id.*; see also HARDIN, *supra* note 29, at 41.

129. See HARDIN, *supra* note 29, at 7.

130. See Jackson Interview, *supra* note 42.

131. See Keys Interview, *supra* note 45; Telephone Interview with Kim Gillum, Kinship Care Coordinator, Kansas Children's Service League (Oct. 1996).

The FGC process enables children to live with persons they know and trust and reduces the trauma they may experience when they are placed outside their homes.¹³² Because FGC focuses on providing care and protection within the family, it reinforces a child's sense of identity and self-esteem¹³³ and preserves her connections with her parents and siblings.¹³⁴ The process further enhances children's opportunities to stay connected to their own communities and promotes community responsibility.¹³⁵

Extended family members remain more actively involved when they can see that their recommendations are taken seriously.¹³⁶ The FGCs encourage families to consider and rely on their own family members as resources. In doing so, they strengthen the ability of families to give children the support they need.¹³⁷ Professionals also become more involved with the extended families when they have an opportunity to meet with them in person to assess their needs. The direct contact promotes development of some sense of accountability.¹³⁸ Families also report that the family deliberation time enabled some family members to build or strengthen their relationships.¹³⁹

C. Legal Implications

1. *Legislation*—Social workers in New Zealand began using FGCs in 1986, but legislation mandating their use was not enacted until almost three years later.¹⁴⁰ New Zealand's Children, Young Persons, and Their Families Act of 1989 sets forth the entire practice from referral to subsequent monitoring.¹⁴¹ The act explicitly requires referrals to FGC when a police officer or social worker has substantiated abuse or when an emergency case of child abuse or neglect is brought to the court's attention.¹⁴² Thus, New Zealand law now requires that every

132. See Smith, *supra* note 48, at 14.

133. See *id.*

134. See HARDIN, *supra* note 29, at 95.

135. See Walker, *supra* note 30, at 9.

136. See HARDIN, *supra* note 29, at 7.

137. See *id.* at 40–41.

138. See *id.* at 6, 14–15.

139. See Walker, *supra* note 52, at 219.

140. See HARDIN, *supra* note 29.

141. See *id.*

142. See Children, Young Persons, and Their Families Act, 1989, §§ 18–19 (N.Z.).

substantiated case of child abuse be referred for an FGC.¹⁴³ Although FGCs were used prior to 1989, proponents of the legislation felt that a statutory mandate would help to legitimize the practice and extend its recognition.¹⁴⁴

Many jurisdictions using FGCs here in the United States currently do so without the benefit of legislation, largely because the impetus to use the method evolved outside the legal system (i.e., through social service agencies).¹⁴⁵ Some states, however, do have legislation that recognizes the use of FGCs in order to bring legal sanctioning to the method. For example, Kansas has a specific statute authorizing the social service agency or the court to initiate an FGC as a "predispositional alternative."¹⁴⁶ It mandates that the FGC be held "before placement of a child with a person other than the child's parent,"¹⁴⁷ and states that after the relatives submit their recommendation, the court must place the child with the relative whom the family recommends unless the secretary of social and rehabilitative services or the court determines that there is "good cause" why this should not be done.¹⁴⁸ The Kansas statute also provides that conference participants are immune from civil liability stemming from their participation.¹⁴⁹

2. *Shift in Decisionmaking*—Adoption of the FGC method will shift the court's abuse and neglect caseload toward monitoring rather than decisionmaking. This shift will likely cause concern in the child welfare community about the safety of the child under a family's plan, as opposed to a court developed plan. However, the court, social worker, and child's attorney all have veto power over the family's plan.¹⁵⁰ By not vetoing the plan, these professionals are, in effect, confirming that the plan does not conflict with their idea of what is needed to protect the child. Finally, social workers in the United States routinely resolve child protection cases without the involvement of the court or extended family members, or at an uncontested hearing.¹⁵¹ Teachers, medical personnel, and extended family, all of whom are in excellent positions to monitor the safety of the

143. See *id.*

144. See Amy Printz Winterfeld, *Legal Issues in Implementing Family Group Decision Making in the United States*, PROTECTING CHILDREN, Summer 1996, at 22, 22.

145. See *id.*

146. KAN. STAT. ANN. § 38-1559 (Supp. 1996).

147. *Id.* § 38-1559(a).

148. See *id.* § 38-1559(a)-(b).

149. See *id.* § 38-1559(c).

150. See *supra* note 85 and accompanying text.

151. See Winterfeld, *supra* note 144, at 25.

child, are rarely involved in those cases.¹⁵² The opposite is true of the FGC method.¹⁵³ A sample FGC case summary and family plan from the Washington project are attached as Appendix A.

3. *Federal Privacy Laws & State Confidentiality Laws*—Federal law provides a general framework for addressing confidentiality issues under the Child Abuse Prevention and Treatment Act (CAPTA)¹⁵⁴ and the Adoption Assistance and Child Welfare Act.¹⁵⁵ Confidentiality requirements under both statutes seem to be flexible enough to support the disclosure of child abuse and neglect information to extended families during an FGC.¹⁵⁶ These statutes only apply when states seek to access federal funds under them.¹⁵⁷ Both, however, permit interagency coordination and information sharing that would permit disclosure in order to serve the purposes of the Acts.¹⁵⁸

State confidentiality laws, which came about largely because of CAPTA,¹⁵⁹ provide standards for maintaining confidentiality of child welfare information and for disclosure under cooperative agreements with multidisciplinary teams when necessary to protect children.¹⁶⁰ Some states (such as Maine) have statutes that would potentially allow the disclosure of information about child protection issues to extended family members under the theory that they are part of a team investigating the allegations of abuse or neglect by agreement with the state's child protection agency.¹⁶¹ Other state multidisciplinary team statutes are more

152. *See id.*

153. *See id.*

154. 42 U.S.C. § 5106 (1995).

155. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.).

156. *See Winterfeld, supra* note 144, at 25.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.* Maine's statute permits disclosure to "[a]n agency or person investigating or participating on a team investigating a report of child abuse or neglect when the investigation or participation is authorized by law or by an agreement with the department." ME. REV. STAT. ANN. tit. 22, § 4008(2)(A) (West 1992). The state would allow either a statutory provision to authorize extended family members as investigators or develop an agency policy to do so by agreement (i.e., the family members could derive their authority from an agreement with the agency). Additionally, the Maine statute excepts from strict confidentiality

[a] person having the legal responsibility or authorization to educate, care for, evaluate, treat or supervise a child, parent or custodian who is the subject of a record. . . . This includes a member of a treatment team or group convened to plan for or treat a child or family that is the subject of a record.

narrowly drawn,¹⁶² and probably would not permit disclosure to extended family members.¹⁶³ Oregon, which has already implemented family group decisionmaking in some jurisdictions, has a broad statute that can be interpreted as permitting disclosure of reports and records to family members as "necessary to administer child welfare services and . . . in the best interests of the affected child."¹⁶⁴ Michigan has taken the approach of using voluntary agreements with families during the intake and investigation stage of the child protective services process. After a referral is made in Michigan, families are asked to sign a consent form to allow later disclosure of information about the child who is the subject of the report.¹⁶⁵

4. *Use of Information Shared During the Conference*—Information shared during the conference generally should be confidential and not subject to discovery. There are two potential exceptions, however. First, any new allegations of abuse or neglect may be subject to mandatory child abuse and neglect reporting laws. Second, any threats of harm to any individual must be reported in order to protect the safety of those threatened.¹⁶⁶ Although the Fifth Amendment does protect against compelled disclosure of self-incriminating information that could be used for criminal prosecution, it does not extend to the use of such information in civil child abuse or neglect proceedings in youth court.¹⁶⁷ Additionally, if the New Zealand model forms the basis for the project, the family would conduct its discussions without making statements to anyone acting in an

Id. § 4008(2)(E) (West Supp. 1996). See June Melvin Mickens, *The Privacy Implications of Family Group Conferences in the United States*, in HARDIN, *supra* note 29, at 153, 169.

162. See, e.g., CAL. WELF. & INST. CODE § 10850.1 (West 1991); 23 PA. CONS. STAT. ANN. § 6340(a)(1) (West Supp. 1997).

163. See Mickens, *supra* note 161, at 168.

164. See OR. REV. STAT. § 419B.035(2) (1995). The statute provides:

The division may make reports and records available to any person, . . . or other entity when the division determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect [or] to protect children from abuse and neglect

Id.; see also Winterfeld, *supra* note 144, at 25.

165. See Winterfeld, *supra* note 144, at 25.

166. See Mickens, *supra* note 161, at 163 (citing 42 C.F.R. § 2.63(a) (1996), which provides a comparable exception to confidentiality requirements for federally funded drug treatment programs).

167. See Winterfeld, *supra* note 144, at 26.

official capacity.¹⁶⁸ Finally, when negotiation is unsuccessful, coordinators should not be made to testify against any party in court. The results, including the coordinator's opinion as to who failed to cooperate, should not be used in court at all, even in conversations to the judge.¹⁶⁹ Such confidentiality encourages open discussion of all relevant issues, protects the trust of participants, and maintains the integrity of the process.¹⁷⁰

5. *Worker & Departmental Liability*—As long as the child remains in agency custody, it is clear that the agency will be responsible for the child. But every placement made by social services agencies involves a risk that cannot be eliminated.¹⁷¹ It is unclear whether liability could flow from a child's placement resulting from an FGC decision.¹⁷² If FGCs become common practice, the agency and worker should have no greater liability than they would for any other decision related to the care and protection of a child.¹⁷³ As long as the process is conducted in accordance with "generally accepted social work practice" and thus is not conducted "negligently" or with "willful or wanton disregard" for the well-being of the child, it would be inappropriate to subject the agency or the social worker to any liability for poor outcomes. Additionally, "veto power" built into the system provides the agency and the worker with a means to "take action to alleviate liability concerns about family-based decisions that seem unsound."¹⁷⁴

III. CONSIDERATIONS FOR THE USE OF THE FAMILY GROUP DECISIONMAKING METHOD AS A COURT-APPROVED NEGOTIATED SETTLEMENT OPTION

Parts I and II above, concerning court-approved alternative dispute resolution and the family group conferencing model, suggest that each program by itself has experienced a fair

168. *See id.*

169. *See* Children, Young Persons, and Their Families Act, 1989, § 37(1) (N.Z.) (making FGC information inadmissible).

170. *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 10, app. B at 137; *see also* FED. R. EVID. 408 (Compromise and Offers to Compromise).

171. For example, placement with a relative may not sufficiently protect the child from further abuse by the parent. Placement in foster care may involve the same risk if parents still have access to the child.

172. *See* Winterfeld, *supra* note 144, at 25–26.

173. *See id.* at 26.

174. *Id.*

amount of success, as measured by policy makers in social services and the judiciary. What follows is an attempt to combine the ADR and FGC approaches. Since an existing model of family group decisionmaking as a court-approved method of settlement negotiation does not yet exist, the author presents the following ideas for consideration by those who may be interested in implementation.

Implementation is probably best structured as a pilot project for one or two counties, adding a few more counties if FGC proves to be a workable approach. Funding could come from state, local, or private sources, or any combination of the three. A multidisciplinary planning committee should be established with representation from all of the professions which would be involved with this project.¹⁷⁵

The specifics of a local program are best left to those who work in the area. Local professionals should prove far less resistant to the program if they have representation or participate in its planning stages.

Once the plan is developed, it will be necessary to inform and educate the child welfare community about the program in order to gain the cooperation of those who will be involved in implementing it. Devising and planning implementation for just a pilot area should not present a difficult task, for the program will only affect a limited number of individuals in the pilot area.

This pilot program would have a certain amount of inherent legitimacy because FGC is judicially based and initiated. In order to implement this model as a form of court-approved settlement negotiation, however, judges, attorneys, and the social services leadership must have an interest and a commitment to encourage this.

As mentioned above, portions of the New Zealand FGC model can be adjusted and refined to fit the needs, goals, and policies of a given site.¹⁷⁶ Elizabeth Cole and Mark Hardin, of the American Bar Association's Center on Children and the Law, identified a number of the issues for the planning committee to

175. These professionals could include family court judges, county attorneys or youth court prosecutors, and youth court staff; attorneys for parents and children, including guardians ad litem and Court Appointed Special Advocates; professionals and counsel from the state social service agency; representatives from the local school district and community mental health agency; a child psychologist or therapist; and former or current foster parents.

176. See Merkel-Holguin, *supra* note 33, at 7.

consider.¹⁷⁷ In addition to those concerns, it will be necessary to anticipate common criticisms of the family group conferencing model and to consider some of the legal issues likely to be raised by adapting the FGC model to a court-approved ADR procedure.

A. Common Concerns About the FGC Model

In order to respond effectively to concerns about the use of family group conferencing in protecting children, program initiators must first have a clearly articulated statement of why they are using the method.¹⁷⁸ They may find guidance by examining the reasons of other policy makers for choosing this method, which have included the following:

- The family can't do any worse than the state.
- The state intervened too much and too frequently.
- The state ignored the cultural importance and strengths of extended family and social groupings in their minority populations.
- Reliance on agency-based solutions to family problems has placed added strain on increasingly limited organizational resources.
- Earlier family involvement may keep a child with her family.
- FGCs recognize the responsibility and capacity of the family and community to assist in monitoring for safety.
- Social workers recommended family meetings when they were asked what worked best to strengthen families.
- FGCs acknowledge the strengths of families and communities and place more responsibility on them for the definition and remediation of their own problems.¹⁷⁹

177. Elizabeth Cole & Mark Hardin, *Checklist of Issues in Establishing Family Group Conferences*, in HARDIN, *supra* note 29, app. 1 at 185.

178. See Cole, *supra* note 38, at 123.

179. See *id.* at 123-24.

Despite these compelling reasons for attempting to implement the FGC model, there are many doubts about its potential for success. Among the most common concerns are the following: (1) that a placement devised by the family will endanger the child (monitoring concerns);¹⁸⁰ (2) that the family will devise a poor plan;¹⁸¹ (3) that some families might not have the ability to mediate effectively because of mental or physical barriers;¹⁸² (4) that the process will be used for "plea bargaining" or as an opportunity for abusers to evade responsibility;¹⁸³ (5) that the professionals will lose power but will still remain liable;¹⁸⁴ and (6) that confidentiality may be compromised.¹⁸⁵ This section of the Article argues that program sponsors can alleviate many of these common concerns through careful advance planning.

1. *Safety*—The pilot project will need to have clear policy and practice guidelines on the importance of safety. It is critical that the family be made aware during the family meeting of things that they might do to recognize and eliminate harm or potential harm to the children. Those who have worked with this model have found that members of the extended family are in the best position to protect the safety of the children.¹⁸⁶ Because they can put pressure on the parents and usually have regular access to the child's home, they can do more in providing frequent monitoring than can social workers.¹⁸⁷ Additionally, a child's extended family also has a great personal stake in protecting her.

In New Zealand the professionals found that prior to the legislation authorizing family group decisionmaking,

the responsibility of the family to monitor the home through frequent visits could not have been recognized. Under the previous legislation, the matter would have been taken to court and there would have been a five minute hearing before the judge followed by an order of agency supervision. The social worker would have occasionally

180. See Hardin, *supra* note 29, at 87–88; Winterfeld, *supra* note 144, at 24–25.

181. See Cole, *supra* note 38, at 125; Gale Burford & Joan Pennell, *Family Group Decision Making: Generating Indigenous Structures for Resolving Family Violence*, PROTECTING CHILDREN, Summer 1996, at 17, 19.

182. See Hardin, *supra* note 29, at 94.

183. See Cole, *supra* note 38, at 125–26.

184. See *id.* at 126; Winterfeld, *supra* note 144, at 25.

185. See Cole, *supra* note 38, at 126; Winterfeld, *supra* note 144, at 25.

186. See Cole, *supra* note 38, at 124.

187. See *id.*; HARDIN, *supra* note 29, at 87.

visited the home with prior notice to the caretaker under the supervision order.¹⁸⁸

New Zealand is now finding that FGCs can enhance the safety of the child because they create more whistle blowers who can be involved with the family far more frequently than any professionals.¹⁸⁹

2. *Poor Plans*—New Zealand's experience shows that the helping professionals and the families reach substantial agreement in over 90% of the cases.¹⁹⁰ The ability of certain professionals to assist the family in "fine-tuning" their plan after deliberation and the "veto power" of some professionals over the decision protect against deficient plans.¹⁹¹ Program evaluations from existing programs show that very few plans were unacceptable, but those that were found deficient were revised either by the professionals during the conference or by the judge when the plan was submitted for approval.¹⁹²

3. *Lack of Capacity to Deliberate Effectively*—Sites that have tried this project have found that even the most dysfunctional families and those which might have some mental illness problems should participate in FGC, for even in those families there may be some undiscovered strengths.¹⁹³ The state can grant the judge discretion to exempt families from the process should he feel that there is no chance of either rehabilitating of the parents or of the extended family helping the child. However, this exemption may not be necessary; even where no acceptable plan is offered, the FGC would present a number of benefits. The social agency would have the opportunity to identify for the whole family any of the children's specific needs that their proposed plan failed to address.¹⁹⁴ The professionals could also point out family patterns of coping that had not been helpful.¹⁹⁵ Finally, the FGC would afford an opportunity to narrow the issues for resolution at a formal proceeding.¹⁹⁶

188. HARDIN, *supra* note 29, at 87 (quoting unnamed "[c]are and protection coordinators" describing a recent case).

189. *See id.*

190. *See Cole, supra* note 38, at 125; Merkel-Holguin, *supra* note 33, at 6.

191. *See Cole, supra* note 38, at 125, 140–41; Merkel-Holguin, *supra* note 33, at 6.

192. *See Cole, supra* note 38, at 125.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See HARDIN, supra* note 29, at 44.

4. *Evading Responsibility*—The legislative authorization for this project should clearly indicate that it does not mandate a strategy either for mediation between abusers and victims or for diversion from punishment.¹⁹⁷ Some discussion will be necessary to determine what matters will be on the conference agenda; for example, whether the perpetrator will have to acknowledge responsibility for the abuse. As indicated above,¹⁹⁸ the conference could still produce valuable information on the family's ideas for protecting the child even if no one acknowledges responsibility for the abuse. The dispositional options produced in the conference will be useful if a formal hearing should later reveal that the accused perpetrator did commit the abuse or neglect, for the family already will have considered those matters.

5. *Control, Power & Liability*—Veto power over the plan and other safeguards built into the model should address concerns by social services personnel that they will have less control and more liability. Actually, any liability for harm that results from the conference should be no greater than the liability they currently have for children in their care for which they themselves wrote the case plan.¹⁹⁹

6. *Confidentiality*—Each state implementing the FGC model should clearly define the extent to which statements made during the conference may be used in subsequent civil or criminal proceedings.²⁰⁰ States will also need to decide what information may be shared with the extended family.²⁰¹

B. Considerations Particular to Adapting the FGC Model as a Court-Approved ADR Procedure

In most of the court-approved ADR processes ordinarily used in child abuse and neglect cases, the negotiation really only takes place between the coordinator, the attorneys for the parents, and the attorney for the child—the parents are very rarely included.²⁰² In the family group conferences, no one except family members is present during the private decisionmaking

197. See Cole, *supra* note 38, at 125.

198. See *supra* Part III.A.3.

199. See Winterfeld, *supra* note 144, at 26.

200. See *id.*

201. See *id.*

202. See CENTER FOR POLICY RESEARCH, *supra* note 12, at 30–31.

process.²⁰³ The planning team will have to consider the following issues: (1) what issues will be resolved through the negotiation process, including a decision as to whether the family's plan will replace adjudication, disposition, or both; and (2) how much time the court should allow for parents to clear the plan with their attorneys before submission to the court for approval. Regardless, all parties should sign the agreement and understand and consent to its terms. The judge should review the terms of the agreement submitted by the parties to see that it establishes a procedure by which the case can be monitored and reheard. This helps to remind the parties that the court is the final decisionmaker and that it makes the participants accountable for the items set out in the plan. If it approves the plan, the court should immediately enter it into the record as a court order consistent with the court rules. The court must ensure that the plan allows all parties to be fully informed of their rights and to operate on equal terms. The court must further advise the parties that, if they cannot reach total agreement in negotiation, they will be subject to a formal hearing. Finally, administrators should note that settlement outcomes will only be as effective as the resources available to provide services. Judges therefore must work to secure professional support and the necessary resources to make the program successful.²⁰⁴ If the court undertakes all of these actions as a court self-improvement effort, it will show the community that the court is trying to allocate its resources effectively in response to community needs.

CONCLUSION

Implementation of the family group decisionmaking method is not intended to be, and cannot be, the total solution to the problems facing the foster care system. It is, however, a promising first step that has proven successful in keeping children within their extended families and out of stranger care placements. Providing family group decisionmaking as a type of court-approved settlement negotiation will help to reduce the number of children in out-of-family placements and to reduce the number of cases that proceed to formal court hearings. This

203. See *supra* note 80 and accompanying text.

204. See CENTER FOR POLICY RESEARCH, *supra* note 12, at 98.

program should provide for a greater number of children in longer, stable placements, as well as a more effective youth court that works in cooperation with all involved professionals to strengthen family bonds.

APPENDIX A

FAMILY GROUP CONFERENCE CASE SUMMARY²⁰⁵

Two children ("Jimmie," age 7, and "Susie," age 1.5) were removed from their mother's care in December of 1995 as a result of drug/alcohol related neglect. Dependency was established in June of 1996.

The children were initially placed with the maternal grandmother, but were removed by a second Child Protective Services worker when a criminal background check revealed recent domestic violence and alcohol problems concerning the step-grandfather. The children were placed together in a foster home in May 1996. Jimmie appeared to be doing well. Susie, diagnosed with "failure to thrive," had made strides while in the grandmother's home, but had made little or no progress since placement into foster care. Children's Hospital, where the child's condition was monitored, had expressed concern.

The court ordered the mother to participate in drug/alcohol treatment, random UA's, a psychological evaluation, a parenting class and domestic violence counseling through DAWN. At the time of the referral, the mother was participating in outpatient drug/alcohol treatment but had been unable to maintain her sobriety. Inpatient treatment was recommended. The psychological evaluation and parenting class had been put on hold. The mother was not participating in the DAWN program.

Visitation was offered once a week at the Department of Children and Family Services (DCFS) office and monitored by DCFS contracted personnel. The mother appeared for visitation on occasion smelling of alcohol. Also of concern was the mother's live-in paramour, who reportedly also abused substances and had a history of violence towards the mother.

The whereabouts of Susie's father were unknown—he was last known to be living in Nevada. The father of Jimmie was paying child support but had not come forward for visitation or service evaluation. He was invited to the FGC, but did not attend.

205. This case summary and sample plan were graciously contributed by Melissa Hansen from Washington.

At the time of the referral, the case was in CWS.

**FAMILY GROUP CONFERENCE:
"A" FAMILY MEETING NOTES AND FAMILY PLAN**

Date of Meeting: 10/17/96

Participants:

Mother

Maternal Grandmother

Maternal Step-grandmother

Maternal Uncle 1

Maternal Uncle 2

Maternal Aunt

Maternal Great-aunt

Maternal Cousin

Caseworker

Former CPS Worker

Susie's Case Manager at Childhaven

Social Worker at Children's Hospital

Guardian ad Litem

Public Health Nurse 1

Public Health Nurse 2

Health Educator—Fetal Alcohol Syndrome

Family Group Conference Coordinator

FAMILY'S PLAN

PLACEMENT:

- **Children to be placed with Grandmother 10/23/96**

FACILITATION OF PLACEMENT:

- **Caseworker will provide Grandmother with a letter to assist her in obtaining non-needy relative AFDC.**
- **Caseworker will provide notice to foster parents regarding move.**
- **Aunt and caseworker will look into transportation remedies for Susie to get to and from Childhaven.**

- Caseworker and Aunt will look into the possibility of Susie moving to a different Childhaven site closer to Grandmother's home.
- Aunt will notify the Department of Public Health and Children's Hospital of the change in placement and obtain next appointment dates.
- Step-grandfather agrees to move from his and Grandmother's home into the home of his brother for a period of six months following placement of the children in Grandmother's care.
- Step-grandfather agrees to participate in an anger-management program. (Referrals provided for Family Services Domestic Violence Program, Harborview Anger Management, and New Directions. Other programs will be explored at Step-grandfather's request.)
- Step-grandfather to participate in a drug/alcohol evaluation through TASC.
- Step-grandfather to attend regular AA meetings.
- Step-grandfather to sign releases of information for caseworker to obtain reports from treatment providers.

PLACEMENT SUPPORTS:

- Susie to continue attending the Childhaven program.
- Aunt to provide child care for Susie and Jimmie if Grandmother wishes to attend Step-grandfather's AA meetings.
- In order to allow Step-grandfather to spend time with Grandmother in the family home on weekends, Aunt and Uncle 1, Cousin, and Uncle 2 each agree to provide weekend respite in their homes to the degree that their schedules allow.
- Efforts will be made to assist Grandmother in obtaining a phone ASAP.
- Possible counseling for Jimmie will be explored by the family.

REUNIFICATION SERVICES:

- Aunt to assist Mother in obtaining another ADATSA referral.
- Aunt to assist Mother in entering a DAWN shelter while awaiting an opening at Cedar Hills inpatient treatment program.

VISITATION PLAN:

- Visitation to occur at McDonald's on Fridays at 4:00.
- Visitation to be supervised by Aunt.
- All parties agree that Mother's paramour will not be present for the visitation.

MONITORING:

- Aunt and Uncle 1 will provide local monitoring of case compliance.

FOLLOW-UP:

- Meeting to be scheduled in 6 months to evaluate placement, progress and compliance by both Mother and Step-grandfather.