Child custody disputes are among the most emotional and stressful kinds of disputes that can occur between parents or in litigation. The dispute pits two people who care deeply about their child against each other, each parent bringing into that dispute their own background, histories, psychology, fears, anxieties, and agenda. Parents reactions leading up to and within the child custody dispute may spring from frustrations from the parents’ own childhoods, from their continuing (or failed) relationship with their own parents, from anger and upset at the way in which the other parent has treated them in the past or from the way in which they fear they will be treated because of the parent’s own psychological makeup, from past abuse or control by the other parent – or their own abuse, control or manipulation of the other parent – or myriad other reasons of which the parents themselves may not be aware.

Unlike most other disputes that come before the legal system, judges and associated professionals dealing with child custody matters decide not only what will be the child’s current and ongoing living arrangements, but also what is and will be the nature of the continuing relationship between that child and the child’s parents, between the parents themselves, and between the parents and other relatives, the manner in which parental responsibilities for health, educational and other matters are handled – and, thus, the “balance of power” between those various people, and the ongoing nature of the child’s family.

A recent article on Parenting Plans for Young Children highlighted these concerns:

For all of our recent gains in understanding the impact of divorce on children and families, what we know about its effects on young children remains a tunnel with scant light at the end. It is generally accepted that divorce affects a substantial proportion of children. Nearly half of all children in this country spend an average of 5 years living in a single-parent home. The majority of single parents will remarry, with divorce rates even higher among remarriages. A less well-known fact is that the youngest children are among those most likely to experience the changes in family structure attendant to separation and divorce. More than half of the children who experience divorce do so by age 6, and 75% of these young children are younger than 3 years of age.

Divorce, therefore, is likely to produce ongoing disruption in the nurturing domain at precisely the time of development when the stabilizing aspects of
children’s cognitive, social, and emotional worlds are so crucial to their well-being. Even in amicable divorces, reaching legal and financial settlements can take a substantial proportion of a young child’s life; the younger the child, the more his or her life is subsumed by the divorce period. In less amicable circumstances, this process can occupy (and for parents, preoccupy) ¹ much of the young child’s life.

When child custody disputes come into the courts, judges, attorneys and associated professionals try mightily to help those parents achieve an end that may only be the first step in a much longer, continuing search by those parents for satisfactory results. In dealing with these matters, courts are charged with determining what is in the child’s “best interests.” This charge, however, requires the ability to decide what is best for children in widely disparate situations and in situations in which neither the judge nor associated professionals are well versed and in which those professionals have their own biases, predispositions, viewpoints, and agenda affect the ways in which the problems of the particular family are addressed.

As described by Janet Johnston in the introductory article to the AFCC Review analyzing the use (and abuse) of social science in family law:

These professionals come with different backgrounds, in terms of their education and training, and have different goals and priorities. They have learned to think differently and to communicate in their own language or professional jargon. Governed by their own logic and their own body of ethics, these diverse professionals are in pursuit of relevant facts (data) in order to ensure that the family court will arrive at wise and just decisions for their client—whether a parent, child, or family as a whole.

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. . . Family court matters constitute an emotional and ideological cauldron where the most private and personal conflicts — within marriage and family—are seething and where very public and political struggles take place—over issues like domestic violence, child abuse and neglect, parental abduction, joint custody and access schedules, parent relocation, same-sex marriage and parenting, adoption, and grandparents’ rights, to name a few. This makes family law a hive of activity for policy makers, lobbyists, legislators, and administrators who are busy crafting new laws and procedures and modifying old ones. Alternatively, established laws and precedents are reinterpreted in the slow evolution (or convolution) of common law in appellant and supreme court decisions. Moreover, despite efforts to make contemporary family courts more collaborative, family law matters are situated in legal institutions that are historically and traditionally adversarial.²

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Because of these serious effects upon children, the American Academy of Matrimonial Lawyers provides in its Bounds of Advocacy:

“In representing a parent, an attorney should consider the welfare of the children.”3

As explained by the commentary to this standard, “Although the substantive law in most jurisdictions concerning custody, abuse, and termination of parental rights is premised upon the ‘best interests of the child,’ the ethical codes provide little (or contradictory) guidance for an attorney whose client’s expressed wishes or interests are in direct conflict with the well-being of the children. This provision stresses the welfare of the client’s children.” To that end, a leading rule in handling child custody disputes is the oft-heard phrase: “First, do no harm.”4

Kansas law requires that the court consider all those factors that impact upon the child’s best interests in determining child-custody matters presented to the court. K.S.A. 60-1610(a)(3)(B) states:

In determining the issue of child custody, residency and parenting time, the court shall consider all relevant factors, including but not limited to:

(i) The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;
(ii) the desires of the child's parents as to custody or residency;
(iii) the desires of the child as to the child's custody or residency;
(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
(v) the child's adjustment to the child's home, school and community;
(vi) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent;
(vii) evidence of spousal abuse;
(viii) whether a parent is subject to the registration requirements of the Kansas offender registration act, K.S.A. 22-4901, et seq., and amendments thereto, or any similar act in any other state, or under military or federal law;
(ix) whether a parent has been convicted of abuse of a child, K.S.A. 21-3609, and amendments thereto;
(x) whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, K.S.A. 22-4901, et seq., and amendments thereto, or any similar act in any other state, or under military or federal law; and

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whether a parent is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, and amendments thereto.

In coming to decisions – and in resolving child custody matters – Kansas law mandates the use of parenting plans “defining the legal custody, residency, and parenting time to be exercised by parents,” the objectives of which are to:

1. Establish a proper allocation of parental rights and responsibilities;
2. Establish an appropriate working relationship between the parents such that matters regarding the health, education and welfare of their child is best determined;
3. Provide for the child's physical care;
4. Set forth an appropriate schedule of parenting time;
5. Maintain the child's emotional stability;
6. Provide for the child's changing needs as the child grows and matures in a way that minimizes the need for future modifications to the permanent parenting plan;
7. Minimize the child's exposure to harmful parental conflict;
8. Encourage the parents, where appropriate, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
9. Otherwise protect the best interests of the child.

Deciding what is in the child’s best interests is a difficult task in the best of circumstances. We hear stories about the burn-out of judges hearing domestic relations cases and how the domestic relations dockets of court across the country are the least desired of all assignments.

But what of the families? How do our efforts in these areas affect the families and the way in which they interact in an ongoing manner?

Volumes have been written about how to draft parenting plans, how to handle child custody cases, how to present evidence in child custody cases, how to raise each parents interests to the court in coming up with a plan for ongoing parenting time. Over the years, professionals have focused increasingly on the “high conflict child custody case,” including Kansas in which the Supreme Court appointed a committee to examine what could be done to address the concerns of the high conflict case in the Kansas court system.

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5 K.S.A. 60-1623.
6 K.S.A. 60-1625(a)
In handling domestic relations in general, and child custody cases specifically, however, there is often little thought given to the fact that many children – and parents – in family court have special needs and that those special needs have to be addressed by the courts and associated professionals in order to come to a successful result in the handling of the case. Often, the courts and associated professionals apply their own histories, viewpoints, upbringing and outlook on the cases with which they are dealing, failing to recognize that every family is different and that every family’s needs and challenges are different – but not better or worse – than those dealt with by each one of us on our own.

We think of ourselves and our families as the perfect American Family – even though none are – striving to make the most of ourselves, knowing full-well the problems, challenges, and frustrations we each have and with which we have each had to deal. While consciously knowing that everyone is different, we often apply our own sense of propriety and our own sense of how things ought be done giving little thought – or credence – to those different backgrounds, histories, upbringing, and challenges that others face – and the special needs that the courts and associated professionals often see, but too frequently gloss over and attribute as an aberration.

It is interesting that as much time as is spent on dealing with high conflict in domestic relations cases, that very little time is spent addressing how to effectively and appropriately address special needs in family courts. We acknowledge the problems of the adults in family law cases, frequently addressing alcohol and substance abuse, physical, mental and emotional abuse, addictions, financial inability, and other intransigent difficulties that lead to separation and divorce.

But the focus on problems with the adults coming before the family court ignores a basic concern: if the courts have to deal with so many adults with significant problems, from where do they come?

Studies show that children with learning disabilities and other diagnosable disorders are vastly overrepresented in the juvenile justice system. The Office of Juvenile Justice and Delinquency Prevention found in 1994 that 73 percent of juveniles self-reported having mental health problems and 57 percent reported having prior mental health treatment or hospitalization. Of the 100,000 teenagers in juvenile detention, US Department of Justice estimates that 60 percent have behavioral, mental, or emotional problems. But these problems are not limited to the juvenile courts – and they are not limited to poor families or to families outside the family courts system. A recent article examining special needs children in family court states:

Recent years have seen a significant increase in the population of young children with special needs, including acute, life-threatening medical conditions; chronic developmental disorders; and psychological and behavioral syndromes These are

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children for whom ordinary parenting skills are insufficient. They require extraordinary parenting and place extraordinary demands upon the adults who care for them. In fact, conflict, marital separation, and divorce are often an unfortunate consequence of trying to raise these high-maintenance children. Moreover, the stress of parental separation and divorce exacerbates the symptoms of these children, makes them harder to care for at a time when there are fewer resources to go around, and impacts the entire family in unique and often profound ways. It is because of these consequences that these families are more likely to appear in family court.

The ubiquitous presence of these children in family court cases suggests that court personnel and divorce professionals need to acquire special knowledge in order to facilitate the development of appropriate parenting plans for these high-risk families.8

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8 Donald Saposnek, Special Needs Children in Family Court Cases, 43 Family Court Review 566 (2005).