

Justices Paul Anderson and Helen Meyer wrote the two concurrences, with each also joining in the other's concurrence. Justice Alan Page joined in Meyer's concurrence.

Assistant Hennepin County Attorney David Brown, who represented the state, said that he doesn't read the decision as a departure from the way the Supreme Court has dealt with circumstantial evidence cases in the past and doesn't anticipate a change in the landscape. However, he continued, "I think it'll take several decisions applying this case to see whether or not that's true."

St. Louis Park attorney
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government when an identified victim of a child-pornography offense seeks restitution."



— U.S. District Court Judge Patrick Schiltz

case involved the same alleged victim as the Texas case, "Amy," a 19-year-old woman who was abused as a child and whose image was then placed in a

pornographic series on the Internet. Amy has filed approximately 250 restitution requests against different defendants across the country. The results of her

suits have been mixed. Judges in Florida and Illinois each awarded more than \$3 million in restitution, both of which orders are on appeal.

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Early neutral evaluations are taking the fight out of custody

By Mike Mosedale
 Special to Minnesota Lawyer

The increasing use of early neutral evaluation, coupled with more intensive front-end involvement from judges, is transforming family law in much of Minnesota, and has led to dramatic decreases in the time and expense consumed by divorces, custody disputes and related proceedings.

"We are talking about a changed culture in how these cases are managed," said Tanja Manrique, presiding judge of the family court in Hennepin County. Manrique also serves as lead judge for the statewide Early Case Management/Early Neutral Evaluation Initiative.

Under the ECM/ENE model, a male-female team of neutral experts provides the case evaluations, encouraging parties to find common ground before the files get papered up. Among the hallmarks of the approach: the evaluation is strictly voluntarily

and confidential.

The quick settlements of ECM/ENE provide an obvious measure of relief for court systems under strain from budget cuts and rising workloads — problems that will only get worse in the near future as the state wrestles with a looming budget deficit.

But Manrique believes that, in a family court context, ECM/ENE also delivers better results than traditional litigation. For instance, drawn out and expensive custody trials often exacerbate conflicts between warring parents and



Tanja Manrique, lead judge for the Early Neutral Evaluation Initiative

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Courts master disaster with readiness plan

By Michelle Lore
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A flu pandemic sweeps through the state. Tens of thousands of people are seriously ill, unable to go to work, leave their homes or take care of themselves or their families. They are experiencing employment, housing and medical issues. Thousands of lawyers are ill as well, unable to continue with their law practices or provide the legal assistance the public needs during the crisis.

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Hennepin County has become the fastest place in the state to get divorced

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have well-documented negative effects on children, she said.

In Minnesota, statistics have shown that parents who proceed through a formal custody study return to court post-decree more than twice as often as those who reach negotiated settlements.

"I am 100 percent confident that this process of ECM and ENE for appropriate cases leads to a much better qualitative outcome for most of the people who go through it," Manrique said.

Currently, pilot ENE programs are running in seven of the state's 10 judicial districts. Two of the three remaining districts are poised to launch soon.

In Hennepin County, home to the state's first ENE pilot, a total of 2,315 family court cases passed through ECM/Social ENE between 2002 and 2008.

Of those cases, 65 percent settled at the first ENE session, with an average time consumed per case of just 6 hours. By contrast, a formal custody evaluation is a time-consuming process in which experts must weigh 17 best interest factors and formally verify information collected from collateral sources; typically, it takes 45 hours to complete.

In the six-year sampling period, the overall settlement rate in Hennepin County for Social ENE, which deals with custody and related issues, was 74 percent. The Financial ENE program, which employs neutral evaluators to address money issues, reported settlements in 68 percent of the 415 referred cases between 2004 to June 2009.

Such numbers have helped make Hennepin County the fastest place in the state to get divorced; the average dissolution in Hennepin County takes 5.8 months.

The county's use of evaluators has attracted national attention. Last spring, Harvard University's Kennedy School of Government listed the county's Social ENE program as a Top 50 Innovation in Government.

Early Neutral Evaluation

- About 65% of cases settle in first session*

- Average time consumed — six hours

Formal Custody Evaluation

- Experts must weigh 17 separate best interest factors

- Typically takes 45 hours to complete

* Based on the 2,315 cases processed through Hennepin County pilot project, 2002-08

Early Neutral evaluation has many fans — and a few skeptics

Tanja Manrique, lead judge for the statewide Early Case Management/Early Neutral Evaluation initiative, said she has been a little surprised at the degree to which the bar has embraced Early Neutral Evaluation. After all, don't faster and cheaper resolutions of disputes cut into attorney earnings?

Not necessarily. "Where is it that family lawyers don't get paid? They don't get paid when they have protracted litigation about custody and parenting time because at the end of that sort of litigation one side, if not both, always feels resentful," said Manrique. "Attorneys in family law don't like having high receivables and they don't like having disgruntled clients."

And, she noted, if each client takes less time, the attorney can work for more clients.

Judges have also been very receptive to the initiative, which often leads to more amicable resolutions than would have occurred in its absence.

Despite the buy-in from the bench and bar, some skepticism persists among domestic violence advocates. The issue: whether ENE is appropriate for victims, particularly those who are pro se.

Rana Fuller, managing partner of the Minneapolis-based Battered Woman's Legal Advocacy Project, said that ENE

often occurs at the most volatile time in a breakup, the moment when the "separation has become real to a batterer."

"[The women's] safety is at higher risk because of the circumstances and now we're asking them to work out complicated, emotional issues involving child support and custody," said Fuller.

And while ENE is overtly voluntary, Fuller said some women — and their attorneys — can feel pressured by judges to participate in the process. In Fillmore County, she said, ENE has been used so heavily that there was no trials in family court last year.

"Every single case has gone to ENE. Every single one has settled. How can that possible be? I know there is domestic violence down here," she said.

Fuller also questioned whether domestic violence screening protocols are adequate. She noted that the obvious red flags, such as an order for protection or a prior criminal conviction, are not evident in all cases of domestic violence.

"If the domestic violence community thinks there is a screening tool that can be applied to ENE without fundamentally changing the process, I would like to know about it," responded Manrique.

ENE referral is as much an art as a science, she added, so along with asking directly about domestic violence, judges

look for cues, such as one party constantly talking over the other, to determine whether ENE is appropriate.

When Hennepin County launched its pilot, judges did not refer cases to ENE if there were allegations of domestic violence. Over time, Manrique said, some victims wanted to opt in and the process was "very carefully opened up."

Given the reality that most domestic violence victims can't afford a lawyer, Manrique argues it would be unfair to close the door on alternative dispute resolution.

"How is a pro se victim going to effectively represent him or herself at a trial involving custody or parenting time or child support or spousal maintenance or who gets the house? If there have been power and control issues in the marriage, is it reasonable to infer that a pro se victim is going to be better off at a trial? Or is that person more likely to feel that justice has been served, that they've been heard, that the outcome is thoughtful, that they had their chance to put everything on the table, if they go to an ENE with two very highly qualified evaluators?" Manrique asked.

For Manrique, the answer to that latter question is an unqualified, "Yes."

— Mike Mucedale

Building on success

Pilot ENE programs elsewhere in Minnesota have replicated much of Hennepin County's success.

Over the first nine months of 2009, a pilot in Duluth reported that 65 percent of dissolution referrals were settled at the initial case management conference or ENE. In Itasca County, where a pilot was launched this July, seven of the eight cases referred settled at the ENE.

Manrique said it is significant that the pilots in metro, suburban, exurban and rural areas have reported similar data because the particulars of the ECM/ENE models vary considerably from district to district.

In Hennepin County, professional evaluators are provided by the county's Court Services Department. But most other judicial districts don't have court staff suited to the work, so evaluators are recruited from the private sector. Commonly, the teams — always one man, one woman, to address issues of gender bias — will pair a family law practitioner with a mental health provider. Some pilot pro-

grams charge a flat fee; others have sliding scale. Hennepin County offers the service for free.

Despite those variables, the ECM/ENE settlement rates hover in the 70 percent range where it has been tried.

"It enables us to say this is a replicable model. It needs to be tailored so that each area can set up a pilot that will reflect the resources that it has. But there are some core principles that remain the same," Manrique said.

The posture of the judge at the initial case management conference is also critical. Manrique said she comes to the hearing with an eye toward settlement — and considerable jaundice toward any attorney that seems to be prepping for a "War of the Roses"-style court battle.

Under the ECM/ENE model, parties are prohibited from serving formal notices before an initial case management conference.

"At the [initial case management conference], we ask, 'Is this is a case that requires formal discovery?' Most of the

"We are talking about a changed culture in how these cases are managed."

— Tanja Manrique, lead judge for the statewide Early Case Management/Early Neutral Evaluation Initiative

time, the answer is, 'No,' and the attorneys can agree what kind of documents need to be changed to talk about settlement. We are not going to look favorably upon motions for temporary relief that are just these fault based affidavits that squander people's time and money. That is not the bench expectation," said Manrique.

"Our expectation is that we are going to have a very frank conversation about what are the issues in dispute and who is doing to do what to get the case finished as soon as possible, conserve everyone's resources, reduce that acrimony, and keep the focus on the kids," she added.

If a settlement can't be reached then and there, the judge will often refer the case to ENE. ↘

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