

TESTIMONY OF BRIAN MULDOON

February 13, 2014

Madame Chairwoman, and distinguished legislators:

I am most grateful to appear before you today to discuss what I think is an effective and powerful way to address the explosion in recent years of self-represented (*pro se*) litigants and the additional burdens it has placed on our legal system.

First, you should know that this phenomenon is not limited to the State of Montana or even to the United States. It is global and it is pervasive—throughout this country and everywhere there are courts. Why have so many litigants turned away from lawyers in an effort to represent themselves in court? Two factors come immediately to mind. First, the advent of the Internet and its resultant “do it yourself” ethic. This development has rocked the record business, the film industry, the newspaper business and just about every other business. We shouldn’t be too surprised that it has turned the legal system on its head.

Second, the economic downturn of the past six years has convinced a majority of the public that lawyers are a luxury, not a necessity.

As a result, our courts have become overwhelmed by litigants who don’t know how to navigate through the morass of rules, procedures and deadlines, who can’t ask a simple question or properly offer a document into evidence during a contested hearing, and who require an enormous amount of hand-holding and guidance by court employees who are forbidden to give legal advice—only information.

In Flathead County Peg Allison, the Clerk of Court, estimated that the number of *pro se* cases has grown from about 500 in 2011 to over a thousand in 2013, and most of these involve parenting issues. And before 2000, there were perhaps fewer than 100 a year.

The initial response of the bench and the bar to the fact that so many people were unwilling or unable to pay lawyers was to increase the pressure on lawyers—who are already seeing a steep decline in their practices—to take on more *pro bono* representation. For all the bad rap lawyers sometimes get, this is the only profession I know that requires its members to work for free. In Montana, it's fifty hours of volunteer work each year. I am chair of the Flathead Pro Bono committee, and lawyers really get tired of hearing me nag them about volunteering their time, especially when so-called paying clients so often fail to pay. Every family law attorney has a huge accounts receivable that will never be collected.

Then we added free services for *pro se* litigants. In the larger communities, there are Self-Help Centers where folks can get assistance with filling out forms and filing motions. These services are available whether you're rich or poor. The idea was to help every litigant get his day in court. In this society, we are deeply committed to making the judicial process accessible to everyone. In the Flathead we even started offering free classes on how to prepare a case, how to examine witnesses and how to succeed in the courtroom. But perhaps we just made matters worse.

Perhaps we were just looking in the wrong direction for a solution to the problem. Our goal should not be "how can we help non-lawyers start acting like lawyers" or "how can we make sure everyone gets better at suing one

another." Litigation is not only expensive, but it's awful. And it's truly awful when the person we're suing is the other parent of our children. I think we started down the wrong road, however well-intentioned. Yes, everyone should have equal access to the courts. Yes, everyone should have the right to seek judicial relief when there's nowhere else to turn. But the courthouse should not be the first place we go for help. It should be the last—a true court of last resort.

Looking at the statistics, some 70-85% of contested *pro se* cases in Montana are disputes about the parenting of children. As it happens, those are the cases that most judges would rather avoid, and for which they are neither trained nor qualified. There is nothing in law school that teaches a lawyer how to discern which parent is the better parent, or whether it's best for a child to alternate weeks with each parent or spend alternating weekends, whether the fact that a parent spent the last three years in prison means he should have restrictions placed on his time with his children. The legal system isn't designed to handle these kinds of developmental and psychological issues. In 1998, the legislature enacted no-fault divorce, based on its recognition that the courts are not the place to settle moral questions like whether a spouse's adultery and spendthrift ways justified a divorce. Like every other state in the country we stopped making people fight about whose fault it was, and that was a huge step forward. And the legal system adjusted.

But fault hasn't gone away. Like a whack-a-mole, it migrated from dissolution issues into the realm of parenting. So now we don't attack dad for having an affair with the neighbor, but we still get to attack dad for being a narcissist or unreliable or a drunk. We tell the clients that they have to put aside their anger and their grief and focus only on the "best interest" of their

children—and then we send them into the courtroom arena to fight like gladiators. We do that despite the fact that this ALWAYS damages the children. Our system always puts the children in the middle because it pits mothers against fathers. It christens them as adversaries and tells parents that it's OK to shame and humiliate one another in a public venue. Even if a child is not directly in the middle—by having to tell a social worker or the judge which parent they like better—every child is forced to watch the two people she loves most in the world tear each other apart. And that traumatizes a child. You see it in their tattoos, their drug use, the dropout rate, their criminal history.

So what is the alternative?

The answer is simple: mediation. Not just sometimes, or when people get tired of the battle, or can't pay the lawyers, or are a few weeks away from a trial. But all the time—at least in the overwhelming majority of cases that involve children. And do it early, before they start enlisting the neighbors as witnesses and hiring psychologists to pathologize one another. And if mediation doesn't result in an agreement, get them to a special master to make a decision within thirty days or so. Because it's more important that the conflict end than that the result be perfect. And if they really object to the special master's decision, let them go to court. But those cases will be rare. And a last resort.

What we know about mediation is that good mediators can resolve 70-90% of their cases. And the clients are happier. Mediation clients comply with child support about 80% of the time, compared with 20% compliance when a court orders support. And mediation is also fast, because most of the time, people just need to know that their wild fantasies about running off with the

kids to Florida or trading the Jeep for parenting rights won't be allowed in the real world. They need to know that child support is calculated by a computer program and they don't get out of it by quitting their jobs. Most parenting disputes can be resolved in one or two sessions of two hours each. Lawyer-mediators can cobble together a written agreement in an hour or two. And the formal process of discovery that lawyers use to prepare their cases is almost completely unnecessary—there's very little that parents need to know about their children that they don't already know, at least for purposes of preparing a parenting plan. In some cases the evaluative services of a child psychologist may be helpful, but mediation allows the parties to work with the same psychologist instead of each hiring their own expensive testifying expert to say bad things about the other. And if they use the same expert, that allows the psychologist to actually help them co-parent a child, which is what most psychologists would rather do.

Mediation is already being used extensively in Montana. By statute, judges can appoint mediators in family law cases and litigants have to pay them. It's routinely used to settle personal injury and medical malpractice cases. But in parenting cases it is employed arbitrarily from judge to judge and district to district. Leaving it to a case-by-case basis is unlikely to be sufficient to make a dent in the court docket. And self-represented clients aren't familiar enough with mediation to hire a mediator on their own. If we are going to do something meaningful about the court backlog, then mandatory mediation is the only way to go.

But those who really benefit from mediation are not just the courts or even the parents, but, more importantly, the children. They didn't choose to have their parents break up. They are the ones who need the protection of a non-

adversarial system—even if the courts weren't too overwhelmed to hear their parents' cases. Court-annexed mediation would provide that protection.

The committee's deliberations should be guided by the language of M.C.A. §40-4-101, which establishes the purposes of Montana's marriage and dissolution statutes as being to:

- (1) strengthen and preserve the integrity of marriage and safeguard family relationships;
- (2) promote the amicable settlement of disputes that have arisen between parties to a marriage; and
- (3) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.

The legal system pits one parent against the other. Mediation brings them back together.

Our children deserve no less.