Bludgeons and Flagons:
Game Theory and Parenting Disputes

Edward C. Budd, Ph.D.

Introduction

My purpose is to encourage the professional community to adjust its approach to parenting disputes, especially in working with certain types of families. I will begin with a primer on game theory and will argue that the central concepts (though not the mathematics) of game theory have pragmatic implications for parenting disputes. The essence of the discussion can be reduced to seven major points presented in—I hope—a logically compelling sequence.

Game Theory

"Game Theory" is a branch of applied mathematics. Its subject is strategic decision-making when the consequences of one individual's decisions are affected by the decisions of others. Those situations are called "games." Reduced to its essence, game theory is a set of tools used to analyze what choices people should make, given the facts of a particular situation, to maximize benefit to them.[1]

The best-known example of a two-person game is the prisoner's dilemma. Two career criminals are picked up near the scene of a burglary—a burglary they in fact committed. They're questioned separately by police detectives and have no opportunity to communicate with each other. Because there's no evidence implicating either man in the burglary, convictions hinge on the officers' ability to elicit confessions. They tell each man he should confess to receive a reduced sentence. However, because they have extensive experience with the criminal justice system, both burglars know the following:

- If neither man confesses, each will spend one year in prison on a concealed weapons charge.
- If both men confess and implicate each other, each will serve a ten-year sentence.
- If one burglar confesses and implicates the other, while the second burglar refuses to say anything about the crime, the "fink" will go free. The burglar who remains mute will serve a twenty-year sentence.

To confess or not to confess, that is the question. If I'm one of the prisoners, I have to make a dichotomous decision. The two choices and their possible outcomes for me are represented in tabular form below. This table is a *payoff matrix*—it defines the gains (or losses) under every potential outcome.

1Disclaimer: I have no expertise regarding game theory and in fact have only rudimentary knowledge of the topic. I invite anyone who finds errors in this section to enlighten me.

	He confesses.	He doesn't confess.
I confess.	10 years	no jail time
I don't confess.	20 years	1 year

Exclusively from the viewpoint of my self-interest, the ideal outcome is to rat out my buddy and go scot free. The second-best outcome is the one-year sentence if neither of us admits anything. The third-best outcome is ten years in jail if we both confess. At worst, if I clam up and my buddy rats me out, I'll rot in jail.

At first glance, this looks like a guessing game—it appears that which decision is preferable hinges on what my fellow burglar does. I have to try to guess what he'll do. But of course he has to guess what I'll do. Therefore, I really need to anticipate what sort of guess he'll make about my choice, and he needs to anticipate what I'll guess about his guess about me. That means he really has to guess what I'll guess about what he's guessing, and I have to—oh, never mind.

Alternatively, one could approach the decision from the viewpoint of cooperation. I might ask myself what action I should take to maximize the common good. From that standpoint, the best outcome is the one in the lower right-hand cell. We each get one year in jail, which is by far the lowest *combined* jail time for the two of us. Thus, I could reason that "don't confess" is the better choice because it maximizes the common good. But I might worry a teeny bit that my cohort—who is, after all, a low-life career criminal—may not see it that way. If he confesses and I don't, I'll spend twenty years in the slammer.

Or maybe it really isn't necessary to speculate about my crony's choice. Game theorists have a different slant on this deal. From their viewpoint, I have to assess only two possibilities. One is that my buddy confesses; the other is that he does not confess. The crucial question is which decision is better for me under each scenario. Let's consider them in turn.

If my cohort confesses (look at the left-hand column), then confessing is my preferred alternative. I spend ten years in jail instead of twenty.

What's my best play if my pal doesn't confess? Under that scenario (represented in the right-hand column), I get no jail time by confessing and spend a year in jail if I don't confess. Thus, if he doesn't confess, my best decision is to confess.

The obvious choice is to confess. I have no idea what my colleague is going to do. I do know that if he confesses, it's better for me to confess, and if he doesn't confess, it's better for me to confess. Game theorists call that a *dominant strategy*—I have a single preferred choice regardless of what the other player does.

Of course, because the outcomes are identical for the other guy, he should come to exactly the same conclusion. He, too, has a dominant strategy. We should both confess.

Incidentally, that outcome—both prisoners confess and receive ten-year sentences—is a *Nash Equilibrium.* Movie lovers will vividly recall John Nash from *A Beautiful Mind*. The

movie is based (loosely, given the mandatory Hollywood omissions, twists, and elaborations) on a true story. John Nash is an American mathematician who shared a 1994 Nobel Prize in economics for his contributions to game theory. He identified situations in which no player would alter his decision if informed of other players' decisions and given the opportunity to change his mind. The resulting solution is called a "Nash Equilibrium." Another prominent mathematician, John von Neumann, had previously proven that an equilibrium point can be established for any two-person, zero-sum game. Nash was able to prove that at least one equilibrium solution can also be identified in any multiple person, non zero-sum game. The paper in which he offered that proof was published in 1950, when he was a 21 year-old graduate student at Princeton. It was (and still is) a landmark contribution to game theory.

The solution to the prisoner's dilemma is a Nash Equilibrium because: (a) using a logical maximizing strategy, we both confessed; and (b) neither of us, if informed the other guy confessed, would change his choice. A Nash Equilibrium doesn't imply that the outcome is optimal for everyone—or for anyone. In the prisoner's dilemma, it would be much better to cooperate and not confess, because then we'd each spend one year in jail instead of ten. The Nash equilibrium simply means that neither player would change his choice once the other player's choice (based on optimal strategy) has been disclosed.

Game theory was developed in academia by mathematicians. At times, their analyses can seem completely divorced from the behavior of real people in actual situations. Nevertheless, game theory is not a purely academic subject. People do make strategic decisions, and they do consider how others' decisions may affect the payoff. Understanding derived from game theory has been used to guide decisions in diverse endeavors, including military strategy, business, and economics. The most striking thing about Nash's seminal research in game theory is how often it has been cited in fields completely distinct from mathematics.

The concepts have been applied to pricing decisions in business. Suppose Domino's considers reducing prices by a dollar a pizza. They will sell more pizzas (the controlling factor is "price elasticity of demand," for those of you keeping score at home) but make less profit on each sale. If Domino's were the only pizza vendor in town, the calculation might be comparatively easy. However, they have Pizza Hut to consider. If Pizza Hut did not alter its prices in response to the Domino's cut, the resulting increase in market share might increase profits. However, if Pizza Hut reacted by reducing its prices by a buck per pizza, Domino's market share would not change, and increased sales would reflect a price response from existing customers only. The actual result might be a reduction in profits. Depending on the details, analysis might reveal that Domino's has a "dominant strategy" in making the pricing decision. That is, it may be possible for the company to decide what they should do without knowing how Pizza Hut will react.

Some pricing decision are versions of the prisoner's dilemma. Indeed, for game theorists, the prisoner's dilemma is a generalized game format that has nothing whatsoever to do with crime and punishment. Variants of the prisoner's dilemma arise daily, in diverse contexts.

There are various types of games—or, more precisely, any game can be described in terms of certain dimensions or qualitites. Some games involve simultaneous moves. Each person must make a decision without knowing what choice the other player has made. The prisoner's dilemma requires simultaneous moves. In other games, players move sequentially.

Player one makes a move, then player two responds. Some games are mixed—they include simultaneous and sequential moves.

A "zero-sum game" is one in which anything gained by one participant is lost by another. Poker is an easy example. Imagine that I meet with four friends for a Friday evening poker game. We each put up $20 for the entire game. (My friends and I are financially cautious people—that is, cheapskates.) One hundred bucks comes into the room at the beginning of the game, and $100 will leave at the end. Collectively, we will have $100 in losses and $100 in gains. The net outcome is zero—thus the name "zero-sum game."

Zero-sum games can be nasty because there are no win-win solutions. Contrast a poker game with the prisoner's dilemma. If our two burglars had a chance to confer, they might agree that neither would confess. Assuming they both honored the agreement, no one would pay the serious penalties—the 10-year or 20-year prison sentence. Further, that solution maximizes the collective good. Under the cooperative solution, the total jail time is two years. Under the other three outcomes, the total time served is 20 years, divided between the burglars one way or another. Conversely, there are no cooperative solutions in a zero-sum game. For me to win, you have to lose.

Some zero-sum games include only two players. They're called (not surprisingly) "two person, zero-sum games." Suppose you and a friend make a simple wager—let's say for $10,000, because you're a high roller—on which of you will shoot the lower score over eighteen holes next Saturday on the Lone Tree Golf Course. Whatever one of you wins, the other will lose. That's a two person, zero-sum game (though one of skill rather than strategy).

As a mathematical discipline, game theory generally assumes that players use logical analysis to make decisions that optimize personal gain. The mathematical reasoning tells you what people *should* do, *if they were motivated exclusively by personal gain.*

Of course, people don't always do that. Some people are just lousy players. They're not capable of figuring out what they should do, even when analysis reveals an obvious course of action. Further, people sometimes act on guesses. In the prisoner's dilemma, if I knew my partner in crime well enough that I felt certain I could predict what he would do, I might base my decision on that conclusion. Finally, real people have complex motives. The wish to maximize tangible gain doesn't always run the show. In fact, game theory is generally a poor predictor of how people actually behave.

Within the game theory literature, there's an interesting example of the contrast between actual behavior and choices based on the logic of maximization. In one game, the experimenter offers two players the opportunity to divide some quantity of money—let's say a dollar—between them. The first player gets to propose a split. It could be fifty-fifty, ninety-ten, or whatever. The second player has the option of accepting or declining the proposal. If he accepts, the players divide the money as proposed by player one. If player two declines the offer, neither player gets anything.

If you analyze the game logically, with the only criterion being maximizing gains, the first player should propose a 99¢/1¢ split and the second player should accept it. Given that proposal, the second player has a choice between a penny and nothing, and a penny is obviously better than nothing. The first player, having figured that out, knows the proposal should be accepted. That makes the 99/1 split the optimal proposal to make.

When they actually play this game, people don't do that. The most common outcome is the proposal of a 50-50 split, accepted. The first player rarely makes a dramatically unequal proposal. Ideas of fairness apparently have a more powerful influence than maximizing self-interest. Further, when the first player does make a proposal according him the lion's share of the loot, the second player usually rejects it. The wish to be treated fairly is evidently sufficiently compelling that people would rather get nothing than tolerate unfair treatment.[2] I call that the "Up yours, bucko," factor.

Domestic relations attorneys are quite familiar with the "up yours, bucko" phenomenon. An attorney advises his client to accept a settlement proposal on the grounds that it's better than the likely outcome of litigation. The client rejects the advice, curtly informing the attorney that he or she will not agree to *anything* that's acceptable to the ex-spouse. In those cases, animosity (rather than ideas of fairness) outweighs rational consideration of self-interest.

Game theorists have speculated that in this particular game, deviations from logical maximization occur because there isn't enough money at stake to be truly motivating. Someone hit on the bright idea (believe it or not) of testing that hypothesis by asking really, really poor people in third-world countries to play the game. That way, you can circumvent the "not enough money to matter" objection. Ten bucks per game is affordable to an experimenter, yet might represent a huge amount of money for the players. They don't behave any differently. Player one still proposes an equal split (or something close) more often than not, and player two still rejects markedly unequal splits when they are proposed.

I continue to suspect that if *enough* money were at stake, thoughts about fairness would recede into the background and something resembling logical maximization would take place. If I were player two in a game played for $10 and player one proposed a $9/$1 split, I might reject it just to show him who's boss. If $10 million were involved and player one proposed a $9 million/$1 million split, I'd take the million bucks in a heartbeat. Ultimately, the relative importance of fairness and tangible gain is very likely dependent on how much financial gain we're talking about.

From actual experience with the "divide the loot" game, one might draw the conclusion that human behavior deviates from the logic of game theory because people are inherently cooperative. That conclusion would be wrong.

Psychologists have done zillions of experiments to tease apart the factors driving actual behavior in "game" situations. One study allowed pairs of subjects to earn payoffs by pushing a red button or a black button. Each player had to decide without knowing the other's choice. (This is a two-person, non zero-sum game with simultaneous moves.) Each pair played the game over and over. For ease of exposition, I'll call the two players Jack and Shirley. The payoff matrix for this particular game is represented below:

Shirley—black

Shirley—red

2Just for the heck of it, I asked my wife and children to play this game. I refereed four games, with a different pair each time. The outcomes were two fifty-fifty splits, accepted; 75¢ to me and 25¢ to you, accepted; and nothing to me and a dollar to you, accepted. (My youngest daughter is an extremely giving person.)

Jack—black	Jack 4¢; Shirley 4¢	Jack 1¢; Shirley 3¢
Jack—red	Jack 3¢; Shirley 1¢	Jack 0; Shirley 0

Strategically, this game isn't even remotely interesting. The transparently obvious choice is for both players to play black every time. That outcome, represented in the upper left-hand cell, is a Nash Equilibrium. It maximizes winnings for each player, regardless of what the other player does. Moreover, it maximizes combined winnings for Jack and Shirley—it's a "greatest common good" solution, above and beyond being a Nash Equilibrium. It appears to be witless for either player to ever play red. Nevertheless, subjects in the experiment pushed the red button *47% of the time*.

The likely explanation is that their decisions were driven by competitive motives. Black was the maximizing choice for each player—but it also maximized the other player's winnings and precluded ever gaining an advantage. The only possible way to beat the other player is by pushing the red button when the opponent plays black. Thus, the players' behavior makes clear that "success" was construed as *getting more than the other player, even at the cost of reducing one's own gains.*

Once again, divorce lawyers will recognize the phenomenon. Some people are happy to short-change themselves—if in the process they can short-change the ex-spouse even more.

The lesson to be drawn from the contrast between real-world behavior and the logical maximization strategies identified by game theory is as follows: To predict and/or understand the strategic decisions people make, you have to know *what payoff the player mentally attributes to each outcome*. That payoff may or may not be the same as the apparent payoff. In the "divide the loot" game, the payoffs that motivate players evidently arise from financial gain *and* positive feelings derived from behaving fairly (or negative feelings from being treated unfairly). In the red button/black button game, motives evidently include accumulating money *and* besting the other player.

For the sake of clarity, I'll make up a couple of terms. For any given outcome, I'll call the payoff specified by the rules of the game (for example, the pennies earned in the red button/black button game) the "assigned payoff." I'll call the total perceived payoff, in the mind of the player, the "psychological payoff." Actual human behavior reveals that the assigned and psychological payoffs are often different. Because game theorists are mathematicians, they have been endlessly frustrated by that fact. Because I'm a psychologist, it doesn't bother me one iota. I'm neither surprised nor dismayed that in a given game, a player may evaluate outcomes on the basis of some complex and subjective combination of factors. In a particular game, the psychological payoff could be the assigned payoff + acting in the common good + wanting to win + refusing to tolerate unfair treatment + wanting to make smart decisions. Assign weight to each consideration and add 'em up, and you have the psychological payoff.

Factors like "fairness" or "desire to win" can't be quantified precisely, and that takes the mathematical starch out of game theory when it comes to understanding real-world behavior. Nevertheless, even when the payoff matrix can't be quantified, it's still there. People do make strategic choices based on "psychological payoff"—whatever it is that feels, to that person, like a desirable outcome.

Point 1: *Game theory is a branch of applied mathematics that offers tools for analyzing strategic choices. For pragmatic purposes, its key insight is that the rules of the game create incentives to make specific decisions.*

Incentives and Real-World Behavior

The analyses conducted by mathematicians who specialize in game theory can be esoteric in the extreme. However, the concepts underlying those analyses are pretty simple. The idea is that many situations involve "rules" that create incentives. Our behavior is powerfully influenced by those incentives.

Above, we began with mathematical analysis, then moved to actual behavior under contrived or experimental conditions. Let's take the next step and look at how people behave in *real-world* situations.

The 2006 book *Freakonomics*, by economist Steven Levitt and journalist Stephen Dubner, provides intriguing examples of the impact of incentive systems on human behavior. Though the book is not framed in terms of game theory, Levitt's thinking was influenced by his exposure to its concepts.

One example involves home sales. The authors analyzed data from the Chicago area. They compared sales of homes owned by realtors to sales in which realtors acted on behalf of clients. On the average, the realtors' homes stayed on the market ten days longer and sold for roughly three percent more—about $10,000 on a $300,000 house. What's up with that? Well, that extra ten grand on the sale of a client's home translates into an additional commission of roughly $150 for the realtor. That's a trivial consideration, more than offset by the advantages of closing the deal quickly and focusing on the next sale. Conversely, if the realtor can manage an extra $10,000 on the sale of *his* home, the ten large goes into the realtor's pocket. The incentives dictate holding out for the best price if it's your house—but selling someone else's house as quickly as possible. Very often, that's exactly what real estate agents do.

A second interesting example cited in *Freakonomics* involves ten day care centers in Israel. Researchers studied the problem of late pickups in those centers. For the first four weeks, there was an average of eight late pickups per week, per center. Beginning in week five, the researchers instituted a $3 fine for each late pickup. Fines would be added to the parent's regular monthly bill, which averaged $380. After this system was in place for a few weeks, the centers averaged *twenty* late pickups per week. Huh? The fine system more than doubled the number of late pickups.

If you put yourself in the parents' shoes, it actually makes perfect sense. Pre-fine, picking up your child on time was a matter of conscience. If you got to the center too late, you were placing an unfair burden on the staff. You had to feel like a schmuck. After the fine was instituted, what parents had construed as a *social* transaction was converted to a *financial* transaction. In effect, the day care centers said to the parents "Watching your children after the pickup time is a service provided for a fee. The fee is three dollars." Now I don't have to feel like a jerk if I show up late. Instead, I ask myself "Is it worth three dollars to take my time and enjoy dessert before I go pick up my child?" Of course, the answer was often "Yes." Adding three bucks to a $380 monthly bill is a measly 0.8% increase.

This situation is a nice example of the need to consider human motives—what *really* goes into the cells in the payoff matrix for a given game—when analyzing real-world behavior. Evidently, the psychological payoff in the day care study involved money, personal convenience, and self-esteem. Instituting a fine removed the self-esteem factor, and the fine was small enough that it was completely outweighed by the convenience factor. If the centers wanted to create a financial incentive, $3 was way too low. One wonders how the late pickup rate would have been affected if the fine had been $50.

.

A third illustration (not drawn from the aforementioned book) involves the rules shaping various types of purchasing situations. The decisions inherent in selling and buying anything can be regarded as a "game," and in fact many of the real-world applications of game theory are in business and economics.

Most financial transactions are relatively straightforward. When I order a hamburger, I give you my money and you hand me the burger. Burger King has a strong incentive to do whatever it takes to induce me to come back repeatedly and buy my hamburgers from them. That means they need to maintain a clean store, provide food I like, sell at a reasonable price, offer prompt and courteous service, and so on. I have a strong incentive to hand them my money, because otherwise they won't give me any food. By acting rationally on our perceived self-interests, we produce an outcome that works for everyone.[3]

Suppose the hamburger industry didn't work that way. Let's imagine a world in which employers are obligated to provide lunch for employees. They do that by contracting with a "lunch provider." The corporation I work for—let's call it Acme Widgets—pays a fixed amount to a contract lunch provider (make it Bonzo Burger), with part of that payment made by the company and another portion withheld from my paycheck. I get a "lunch card" that entitles me to eat lunch at Bonzo. I merely go to Bonzo Burger, show my card, and get my food.

How would Bonzo do business? They have a very strong incentive to please Acme Widgets, because their income depends on winning the contract and keeping it. Of course, what pleases the corporate officers down at Acme is saving money. They're not eating Bonzo burgers for lunch and couldn't care less about the food. What they want is to minimize the "lunch provider" expense line on the corporate income statement. Thus, the boys at Bonzo want to offer a contract price *just low enough* that Acme Widgets will choose them as the provider. Any higher, and they lose the contract and a huge amount of income; any lower and they reduce their profits. (They could use game theory to set the price bid by considering profit margin and the possible bids of competing providers.)

Meanwhile, Bonzo Burger has virtually no incentive to please me. In fact, they have a concrete incentive to *displease* me. Their income is fixed by the contract and has already flowed into the coffers before I walk through the door. Every burger they serve cuts into their profits.

Consequently, what should I expect when I walk into Bonzo's? Long lines, shoddy service, and lousy food. The more Acme employees who choose not to go there for lunch—instead biting the bullet and paying their own way at Burger King—the higher the profit margin.

Or it may not be quite that simple. If: (a) Acme has any inclination to listen to its employees; and (b) there are plenty of other lunch providers out there; then (c) Bonzo can't afford to make the food and service *too* bad. The masses might revolt by complaining vociferously to human resources, leading Acme to go elsewhere for its lunch contract. Given the

---

3I say "perceived" self-interest because it may not be in my *actual* self-interest to eat hamburgers at all.

circumstances, Bonzo has to maintain a delicate balancing act. They need to provide food and service *just bad enough* that Acme employees often choose not to eat there, but not quite bad enough that the company changes providers.

Remind you of anything? The "lunch provider" scenario has crucial elements in common with the health insurance industry. With health insurance, you give them money up front, then try to talk them into providing the product (which is payment for health care services). The more often they say "no" and make it stick, the more money they make.[4]

Suppose—purely hypothetically, of course—that a health insurer took forever to process claims, lost claims, inaccurately denied claims, and so on. If claims worth ten million dollars enter purgatory, a fair number will stay there. Doctors will give up and write off uncollected claims, or they'll hassle patients who will pay fees that should have been paid by the insurer. If ten percent of $10 million in obligations disappears, that's another million on the bottom line. Burger King could never get away with that. They don't dare accept your money and then say "I'm sorry, your burger claim has been denied."

The fact of who makes the purchase decision is a critical difference. You and you alone decide whether to go to Burger King for lunch, and you choose from among numerous alternatives. If you're unhappy with the product, you make a different choice next time. No one would get the "burger claim denied" message from Burger King three times. You might conceivably write off the first experience as an anomaly and try again. If the same thing happened a second time, your allegiance would switch permanently to Taco Bell.

In contrast, you did not choose your health insurer, from fifty alternatives, based on personal experience with each of them. If you're self-employed, you probably took whatever you could get. If you're employed by a corporation, the VP in charge of benefits picked two or three insurers, primarily on the basis of the cost to the company. You had only those options. Consequently, in complete contrast to Burger King's business, your personal satisfaction with product and service has virtually no impact on the sale.

Most businesses have a strong incentive to provide services that please you as much as possible. In contrast, health insurers have a powerful financial incentive to process and pay claims as inefficiently and obstructively as possible. To a considerable extent, that's exactly what they do.

Meanwhile, the health care system of the good old days—under which most working people had "major medical" policies paid for largely by their employers—created unrealistic incentives for consumers. The rules of the game encouraged consumers to think of health care as almost free. If your employer pays most of the cost of health insurance and your insurer pays most of the cost of health care services, then you should use all the services you can get. The traditional system was a hypochondriac's dream—go to the doctor every time you have the sniffles, demand that extra battery of tests to find out whether you have the disease you just read about in Reader's Digest, and so on. Artificially limit the price of anything, and people will use a whole lot of it.

4The health insurance situation is actually a lot more complicated. It could be viewed as a four-player game in which the players are the consumer, the health care provider, the insurance company, and the corporation that enters into a contract with that insurer. My Bonzo Burger scenario is a three-player game—employer, employee, and lunch provider.

The old system also created odd incentives for doctors. If consumer demand is not strongly restrained by price considerations, it makes perfect sense for vendors to demand top dollar for the product and to sell as much of it as possible. Thus, in the glory days of employer-subsidized major medical coverage, physicians had a strong economic incentive to charge high prices and provide every service the patient's little heart desired.

In short: Some problems in the health care industry arose because the game was historically structured so that players had strong incentives to behave in ways that produced problematic outcomes. In many respects, they still do.

I'm drawn to game theory—as a way of thinking about things, rather than a branch of mathematics—because it is a conceptual lens that has wide applicability to everyday phenomena. Game theory teaches us to consider what choices people must make to maximize perceived benefit, or psychological payoff. Stopping to ask yourself "What does the payoff matrix look like?" can be extremely useful. The answer often tells you what people will do.

Moreover, this type of analysis can explain why some systems work beautifully, and why others don't work very well at all. When the rules encourage behavior that produces positive outcomes, "the system" will generally work fairly well. When the rules encourage choices that create problems, you're going to have problems.

Point 2: *Strip away the mathematical analyses, and the nuclear concept of game theory has applicability in numerous real-world situations. In a nutshell, the idea is that we should take a careful look at the incentives created by how a system is structured. The decisions people make are shaped by those incentives. An important corollary might be stated as follows: Never set up a game in such a way that the incentives encourage undesirable behavior*.

Zero-Sum Parents

Most professionals who work with divorcing families place a high priority on the well-being of minor children. Depending on one's role in the family, other considerations may be extremely important. For example, a domestic relations attorney who represents a parent has an obligation to act in the client's interests. A judge or magistrate hearing a case has an obligation to protect the legal rights of all concerned. Even given the reality of competing interests, the well-being of children is a major consideration. In this arena, the work of many professionals is centered on efforts to facilitate the well-being of children.

Professionals are frustrated by the fact that some divorcing parents behave in ways inimical to the well-being of their children. To a large extent, the problem arises because those parents construe a divorce as a two-person, zero-sum game. Let's call those people "zero-sum parents."

Of course, a great many parents don't view divorce as a zero-sum game. In fact, only a small minority of parents adopt that viewpoint. Many divorcing parents strongly consider the best interests of their children as they make decisions. Those people don't see the situation as a win-lose contest between the parties. Instead, they adopt the viewpoint that three sets of interests are in play—mine, my ex's, and the child's. Further, they accord the child's well-being such a high priority that they will not sacrifice the child to maximize their own winnings.

Although that reality is important, it has few pragmatic implications for professionals working with high-conflict parents. Parents who act primarily in service of the child simply

don't pose major problems; consequently, there's no reason to expend a lot of energy worrying about them.

Why do other divorcing parents behave in ways that seem to reflect complete disregard for the well-being of their children? Maybe some parents are so selfish they just don't care what happens to the child. Their credo might be "Of course, if I take this approach, it will really screw up my child. But hey, who gives a flip? This is all about me."

Or maybe not. I doubt that *conscious* disregard for one's children is common. Parents never tell me they are knowingly placing their interests ahead of the interests of their children. Of course, if they did feel that way, they probably wouldn't tell a Court-appointed evaluator. Even at that, I have a hard time imagining that many parents consciously think "I'm going to do this even though it's really bad for my child."

An alternative hypothesis is that zero-sum parents are incapable of recognizing that the needs of their children are distinct from their own needs and wishes. Within litigated disputes, I see many people who genuinely believe their interests and the child's interests are the same. "My child desperately wants to move to Pennsylvania so we can be with family," a mother may say. "He doesn't want to ever see his father. He tells me that all the time. I just want what's best for him." Unfortunately, mom fails to understand that she has put excruciating pressure on the child to endorse her preferences. The mother is sincerely—though falsely—convinced the child's best interests and her own wishes are identical. A father is profoundly wounded by his wife's decision to divorce him and subsequent criticisms of him. Driven by a consuming need for vindication, he can't see that the children have needs different from his own. He may tell an evaluator that everything he's doing is motivated by an impassioned desire to "fight for my children"—and wholeheartedly believe it.

The actual explanation for parents' destructive behavior is surely complex and varied. There may be as many reasons for behavior contrary to children's best interests as there are high-conflict parents. I suspect that the commonality—the final common pathway, if you will—for such behavior is the inability to discern what the child needs independently of the parent's needs, wishes, and emotions. Because of that inability, *accurate discernment* of the child's needs is not part of the "psychological payoff" driving the parent's behavior. When parents are incapable of recognizing that their self-interest is different from the child's interests, they often construe divorce as a two-person, zero-sum game—and that poses problems.

Bludgeons and Flagons

From here on, we're focusing on people who are not motivated by *accurate* understanding of what's best for the child. They see divorce-related disputes as a zero-sum game. We'll call the game they play Bludgeons and Flagons. The rules are as follows:

(1) There are two players, a divorcing mom and dad.

(2) The prize consists of 100 chips, which will ultimately be distributed between the two players. Some of those chips represent money (property division, child support, and maintenance). Others represent time with the child. Still others represent the power to make major decisions about the child. The outcome can be any division of the 100 chips into two parts—100 to dad and none to mom, 100 to mom and zero to dad, a 65-35 split one way or the other, and so on.

(3) For each player, the object of the game is to win as many of the 100 chips as possible.

(4) The players sometimes move simultaneously and sometimes alternate moves. A "move" might be demanding that the other player leave the marital home, requesting a restraining order, telling the child the other parent had an affair, making a settlement offer, making allegations against the other player, and so on.

(5) The game can be terminated at any time by mutual agreement of the players regarding chip distribution. The day the parties conclusively agree that Parent A gets 32 chips and Parent B gets 68 (or whatever), the game is over.

(6) If the players do not reach agreement regarding chip distribution, the outcome will be determined by a Bludgeon Master. Each player will make an impassioned argument as to why he or she deserves a specific portion of the chips. The Bludgeon Master will listen to those arguments and render a final decision.

We now have a two-person, zero-sum game. The rules will powerfully influence each player's behavior. Let's take a look at optimal strategies dictated by the rules.

Non-Cooperation

There is no incentive whatsoever for cooperation. In a zero-sum game, there never is. Neither player gains anything unless the other player loses it. Consequently, the optimal strategy is akin to that in a Texas Death Match.

Making the Other Player Say Uncle

The surest road to victory is to induce the other player to give up. You've won the day your opponent says "I can't take it any more. You can have ninety-five chips. I'm out of here." Therefore, making the game as painful as possible for the other party can be good strategy. Imposing huge financial costs on an opponent who cares a great deal about money and/or doesn't have much is excellent strategy. Public humiliation of the other player may lead to his or her capitulation. Emotional exhaustion is a potent ally; if the opposing player reaches the point where he or she just can't stand it any longer, you go home with the lion's share of the chips.

Winning the Heart and Mind of the Bludgeon Master

If you can't induce the other player to give up, it becomes imperative to make the strongest possible case to the Bludgeon Master. There are a number of ways to approach that.

First, establishing the upper hand early in the game is extremely useful. The guy who lands the first punch wins most street fights; so it is in Bludgeons and Flagons. Catching up is much harder than keeping up. Therefore, it's important to play with a lead. Seize control of the house, bank accounts, and children as early as possible. Get in first with the restraining order request or the contempt motion.

Second, if the ultimate decision will be made by the Bludgeon Master, it's advisable to make yourself look better than you really are. If you couldn't pick your child out of a lineup, get a picture and memorize his name and birth date. If you've never taken the child to a doctor's appointment, start. If you and the other player have each taken the child to half of all doctor's

appointments, start doing all of them. Go to parent-teacher conferences and volunteer in the classroom. Take the children on vacations. Learn what parents are supposed to say about the child's needs and say those things, even if you don't mean them. Always pay cash at the liquor store. (It's bad when you tell an evaluator you drink one glass of wine about every two weeks but your credit card records show purchases averaging $100 per week at World o' Booze.)

Third, although looking better than you really are is helpful, it's easier to make the other player look worse than he or she actually is. One of the most powerful tactics is the frightening and non-falsifiable allegation. The potential consequences to the child have to be so serious that no one can ignore the allegation or be completely reassured by the conclusion that it *probably* isn't valid. Further, it's imperative that the allegation not be falsifiable. The player who says "My ex suffers from a severe mental disorder," is taking a huge risk. If it's not true, making the statement is terrible strategy. That claim may be *demonstrably* false. On the other hand, saying "My ex is nice to everybody but me and behaves wonderfully in public, but he/she was severely emotionally abusive of me in private," can be an excellent tactic. There's no way to disprove that one. Allegations to the effect that the other player is a closet, functional alcoholic can be useful. Another tactical gem is the compound allegation. Player A says "Player B is nice to the children in public but is severely verbally abusive of them behind closed doors. They're so terrified of reprisals that they refuse to talk about it to anyone except me." That's an excellent move in Bludgeons and Flagons because it's a very worrisome allegation *framed in such a way it can't possibly be disproved.*

Another means of making the other player look bad is the "Greek Chorus" approach. Player A knows that his or her statements will be contradicted by Player B. Thus, Player A recruits a chorus of allies to say the same thing. The tactic is predicated on the assumption that a position endorsed by twenty people is more credible than the same position voiced by only one person. The claims may be accurate; Player A and the chorus may have a shared viewpoint because it's true. Or the chorus may be wrong. History is replete with examples of mistaken beliefs shared by millions of people. The chorus may be allied with Player A because they're friends and family members, or because they've developed their opinions exclusively on the basis of what Player A has told them. The claims of a chorus can then assume the form of "The Big Lie."

Another strategy for denigrating the other player is "Throw enough stuff against the wall and something may stick." Player A expresses numerous worrisome allegations. The Bludgeon Master has to consider all of them. If the Bludgeon Master sees evidence supporting one or more of those claims, Player A may win chips. This approach also plays to an element of human nature. The assumption "Where there's smoke, there's fire," is deeply ingrained. The Bludgeon Master may find himself or herself thinking "Gee, if half of what that person says is half true, it's still pretty scary." Of course, the smoke-fire idea can be illusory. The fire producing all that smoke is sometimes in the person making the allegations.

The "throw stuff against the wall" tactic can also be extremely useful because it puts the other player on the defensive and focuses attention on his or her purported deficiencies. Player B may have no opportunity to do anything except defend against allegations. As long as the sole focus is on the truth or falsehood of allegations made against that person, the accuser isn't subjected to much scrutiny. Pleadings, evaluation reports, and testimony may be limited almost exclusively to allegations framed by Player A. Even if Player A has some pretty spooky skeletons in his or her closet, they won't come to light if no one ever has time to poke around in

there. It's like playing an entire hockey game in the other team's defensive zone; there's no danger of ever giving up a goal.

Fourth, influencing the children's expressed preferences can be a powerful strategy. The children's preferences may be a significant issue for the Bludgeon Master. If one player can induce the children to choose him or her, a decisive momentum shift may result.

Fifth, parent-child alliances may strongly influence ultimate chip distribution. Any move that damages the child's relationship with the other person can be good strategy. It's also a risky strategy because it can backfire. When the children have strong relationships with Player B, efforts by Player A to turn them against that person can have the opposite effect.

Risks aside, some simple moves can be extremely effective. A child says "Why are you getting divorced?" The parent replies (sorrowfully) "I hate having to tell you this because I don't want you to be hurt, but mom/dad is moving out to live with his/her new boyfriend/girlfriend." That single move may have a strong impact on the children's relationships with the other parent. Combinations of moves can also be powerful. Consider the parent who requests and receives a restraining order. The children don't see or hear from the other parent for six weeks, and they're extremely upset about it. When they ask why mom/dad isn't coming to see them or calling them, the parent who requested the restraining order says "I know it's horrible for you and I'm sorry, but I have no idea why." By the time the other party has a chance to make another move, the children's relationships with that person may have been significantly damaged.

Decision-Making

The statutory best interests criteria—a major element of the rules of Bludgeons and Flagons—include "credible evidence of the ability of the parties to cooperate and to make decisions jointly." Some of the chips on the table represent the power to make major parenting decisions. Consequently, Player A's efforts to demonstrate that the parties are unable to cooperate can be excellent strategy. Again, heavy-handed moves can backfire. If the Bludgeon Master concludes that the players can't cooperate because Player A refuses to work with Player B, the move might actually *lose* chips. Nevertheless, it's often possible to torpedo cooperation in ways that are obscure.

One example is the player who participates in an open, civil dialogue regarding disputed issues but *offers only solutions that are sure to be rejected by the other player*. Player A and Player B are divorcing. Player B is an airline pilot or flight attendant. Player A says "Of course the children should have relationships with both of us, and I think equal time would be fine. The kids need a regular schedule so their lives won't be horribly disrupted. Obviously, the children should spend alternating weeks with each of us. When you won't be available during your week, I'll be happy to watch the kids for you." Player B will reject the offer, probably with spluttering indignation. An airline schedule makes alternating week parenting time unworkable.

When this strategy is applied cleverly enough, Player B may become so outraged that he or she really is extremely contentious. Player A may be able to demonstrate that cooperation is impossible, while creating such a convoluted history of failed negotiations that the Bludgeon Master will be unable to determine who caused the problem.

Prioritizing Golden Chips

On the B&F table, most of the chips are equivalent. You come out the same whether you get the Italian marble coffee table, with a replacement value of $4,000, *or* you get $4,000 more of the savings account.

However, not all chips are created equal. Some chips are scotch-taped to others. Under current Colorado law, some of the chips representing child support are connected to some of the chips representing parenting time. If you get more of the parenting time chips, you may get more of the money chips. The parenting time chips that can push you across the Schedule A/Schedule B threshold are "golden chips." Winning those gives you more bang for the buck. Therefore, making those parenting time chips a priority is sound strategy.

Absent the linkage, Parent A might be willing to agree to a schedule proposed by Parent B. However, the connection between child support and parenting time changes that strategy. Parent A might refuse a proposal he or she actually believes is best for the children because it's financially disadvantageous. Strategically, it makes perfect sense to insist on a larger share of parenting time if that alters child support obligations.

Quid Pro Quo Bargaining

If maximizing winnings is the parent's actual motivation and total chips won consists of time with the child + decision-making authority + money, then it makes perfect sense for the parent to use some items as bargaining chips in negotiations about other items.

Suppose I'm a guy for whom money is a high priority, but parenting time is the hot issue for my ex-wife. If parenting time were the only issue on the table, I would be willing to accept a schedule giving me four days out of each two-week period. But I want to use the demand for fifty-fifty parenting time as leverage in financial negotiations. I tell the other player that if she agrees to waive maintenance, I'll agree to a ten-four split. If she keeps insisting on outlandish maintenance, I'm going to court and asking the judge for an alternating week schedule.

If I've properly assessed the other player's priorities, my approach is good strategy. The ploy is a sound means of advancing my cause.

Point 3: *For a parent who construes a divorce as a two-person, zero-sum game, behavior contrary to the best interests of the children may be good strategy. Professionals often see the behavior of such parents as irrational. However, our real objection is to their interpretation of the dispute as a zero-sum game in which the child's well-being—accurately discerned—is not included in the payoff matrix. Given that interpretation, a parent's destructive behavior may be perfectly sensible strategy.*

Doing the Right Thing

For many professionals who work in this area, the goal is to induce parents to behave in ways that benefit children. We do that primarily by trying to talk mom and dad into doing the right thing. Over and over, we explain that certain actions are in conflict with children's needs, while other behaviors benefit children. The underlying assumption is that if parents could really comprehend how their actions affect their children, they'd behave differently. When you're speaking to parents embroiled in litigated disputes, those efforts are often wasted. *When people see a dispute as a two-person, zero-sum game, the only means of changing their behavior is an appeal to their self-interest*.

I teach a Court-ordered class on co-parenting after divorce. One segment addresses the issue of bad-mouthing the other parent. I begin by explaining how much children hate hearing one parent bad-mouth the other and how much they're harmed by it. The audience reaction to that presentation is not extraordinarily enthusiastic. Some parents listen with interest; others have the glassy-eyed appearance of iced mackerel in a fish monger's window.

I then shift gears and tell a true story about a twelve-year old girl who told her father "I love my mom. When you say bad things about mom, it doesn't make me dislike her. It makes me dislike *you*." (She later told her mother, who was equally guilty of bad-mouthing dad, exactly the same thing.) The mood of the audience shifts perceptibly. A few people look uncomfortable. Others nod with interest. Some make notes. I next cite research indicating that when they reach adulthood, children exposed to extensive bad-mouthing often choose to have little or no relationship with the parent who did the bad-mouthing. More nodding and note-taking.

What's the deal? I begin the bad-mouthing discussion by urging parents to do the right thing, and that doesn't produce much reaction. My hypothesis is that parents don't perceive that as useful information. Parents who place a high priority on their children's well-being and can accurately assess what's best for them don't need the information because they already have it. Where they're concerned, I'm preaching to the choir. Meanwhile, the information is useless to parents who perceive the battle as a zero-sum game. They can't gain any strategic advantage by learning that bad-mouthing is bad for children.

Part two of the bad-mouthing presentation is fundamentally different because it's an appeal to parents' self-interest. That captures the attention of some people who might otherwise doze through the evening. For them, the new information has potential strategic utility—it might help them get something they want.

We should of course make every effort to educate divorcing parents about how they can best meet their children's needs. We should also be realistic. Some people just aren't going to get that message. *In service of children, it's imperative that we structure and explain the rules of the game in such a way that the actions parents take in their perceived self-interest are as consistent as possible with the children's interests.*

Stated another way, our own behavior is often poor strategy because we make markedly unrealistic assumptions about the rules of the game in which we're involved. When you encounter sharks in the midst of a feeding frenzy, it doesn't make much sense to point out that there's plenty for everyone and that they would all be better off if they could just get along. A diver who adopted that approach would quickly assume his rightful place at the bottom of the food chain.

Point 4: *When parents see a divorce as a zero-sum game, efforts to educate them about what's best for their children are ineffective. Those efforts reflect a failure, on the part of professionals, to understand the nature of the game in which we are participants. Trying to convince zero-sum parents to do the right thing is bad strategy.*

Potential Solutions

There are three rational ways to intervene. First, we can invite people to step out of Bludgeons and Flagons and play a different game entirely. Second, we should change any rule of the game that gives parents an incentive to act in ways contrary to their children's best

interests. Third, we need to carefully educate parents about existing rules of the game that *should* lead them to behave in ways consistent with their children's best interests.

Playing a Different Game

When people pursue cooperative approaches to dispute resolution, the incentive systems are different. Cooperative approaches include do-it-yourself stipulations; divorces in which each parent has traditional legal representation and parents and attorneys work together to generate an agreement; mediation; and collaborative divorce. Because the rules of the cooperation game are fundamentally unlike those of Bludgeons and Flagons, they encourage different behaviors.

The goal of cooperative approaches is to reach an agreement. People like to succeed. When you define "success" as defeating the other party, they're going to want to defeat the other party. When you define success as coming to an agreement, people have some incentive to reach an agreement.

A second motivating factor is the desire to maximize benefit relative to costs. In cooperative endeavors (excluding the do-it-yourself stipulation), you're paying someone to try to help you reach an agreement. The quicker you come to a mutually agreeable solution, the sooner the meter stops running. Similarly, if you have already paid a mediator for six hours' work, it's painful to walk out the door having accomplished nothing.

A third difference is that in cooperative approaches, most rules of Bludgeons and Flagons simply don't come into play. As one example, the non-falsifiable allegation is a perfectly sensible tactic in a spirited B&F game, but it isn't advantageous in mediation. No one in mediation wants to hear allegations; the object of the game it so reach a consensus. Making such allegations may actually cause mediation to fail. Failure is unpleasant.

To the degree that divorcing parents can be steered into any of the non-adversarial means of dispute resolution mentioned above, the specter of Bludgeons and Flagons is avoided. Unfortunately, we're confronted by the same Catch-22 that impacts parent education regarding what's best for kids. People who can recognize the advantages of cooperation rarely create problems. Consequently, this solution won't help much with the population that poses the greatest challenge.

Even at that, there may be ways to encourage zero-sum parents to cooperate. The appeal to enlightened self-interest can be a powerful tool.

For example, it should be possible to collect data on the cost of different approaches to divorce and the ultimate financial outcome for people in various economic categories. Suppose a family has net assets of $200,000 and combined annual income of $120,000. For such a family, if you knew: the average cost of a fully litigated divorce; the average cost of a divorce resolved via cooperation; and the most likely outcomes; you could construct a payoff table. It might become clear that litigation simply isn't advantageous for a particular family. If litigation gets you $110,000 but costs $30,000, you would be better off getting $90,000 via settlement. I suspect the payoff matric would be different for a family with assets of $20,000 or $20,000,000.

From a financial standpoint, a divorcing person *involved in litigation* who believes he or she is playing a zero-sum game is deluded. For divorcing people who work out a financial agreement on their own, it really is a zero-sum game—the available payoff is divided between them. Because the costs of litigation can be substantial, a litigated divorce is not a zero-sum scenario. The parties may pay mom's attorney, dad's attorney, and a court-appointed evaluator. Add a couple of accountants, a second evaluator, and a rebuttal expert, and you're up to seven

people who have to be paid. The more chips that are diverted into the pockets of others, the fewer are left to be divided between mom and dad.

Let's construct a game. It's a two-person, non zero-sum game with sequential moves. We'll call the players "mom" and "dad." They begin with $200,000 in assets. Each player has two response options, "compete" and "cooperate." Here's the payoff matrix, with each person's payoff in thousands of dollars:

	Mom—cooperate	Mom—compete
Dad—cooperate	Dad $100K; Mom $100K	NA
Dad—compete	NA	Dad $20K; Mom $20K

That payoff matrix, though purely hypothetical, may be in the ballpark if "cooperate" leads to a quick settlement and "compete" leads to extended litigation. Because the game involves sequential moves, each player gets to respond to the other player's choices. The outcome cells involving cooperation by one party and non-cooperation by the other are therefore void—if either party decides to aggressively litigate, the other will respond in kind. Litigation (including evaluators, attorneys, various experts, and so on) could cost the parties $80,000 each. The most likely outcome would be an equal division of assets remaining after the total costs of litigation have been paid. Thus, the two possibilities are cooperation, under which each party winds up with a hundred grand, and hotly contested litigation, leaving each party with $20,000. Given this information, the parties would be fools not to choose "cooperation."

But what if mom and dad never get to see the payoff matrix? Rational decision-making requires information. Absent information, the parties could not make rational decisions. Their choices would either be random or (more likely) based on assumptions that may or may not be accurate.

It would be interesting to see what would happen if people were fully informed of the expectable payoff matrix from the outset. If parents were clearly apprised, from day one, of expectable costs and outcomes—based on actual data from families of various asset and income levels—a significant number of divorcing couples might be induced to cooperate.

Point 5: *One means of mitigating the "zero-sum problem" is by encouraging parents to play a different game entirely. The rules of cooperation are fundamentally different from the rules of litigation and include incentives to behave more constructively. Parents inclined to view a divorce as a zero-sum game are inherently less likely than other parents to cooperate. However, it might be possible to induce some zero-sum parents to cooperate by informing them of how various approaches may impact their self-interest.*

A Tangent: Professional Incentives

The possibility that merely providing accurate information could steer some divorcing parents into cooperative approaches raises an interesting question: How is the behavior of professionals working with divorcing families shaped by the incentive systems that affect those professionals? Analysis informed by game theory applies to professionals as much as it applies to divorcing couples.

Suppose an accurate payoff table characterizing the outcomes of various approaches to divorce were readily available. If you're a domestic relations attorney with a strong penchant for litigating, would you share the payoff table with a prospective client? If you have a traditional practice and strongly prefer working toward settlements, would you show people the payoff table? If your practices centers on collaborative law, would you provide that information? If you're a mediator, would you like for parents to know, up front, the expectable costs of various approaches? The answer may depend on how the decision would impact your self-interest.

Let's look at the question from my perspective. I support myself, a wife, and three children (and a guinea pig and three fish and a Labrador retriever, now that you mentioned it) primarily by providing services to families involved in parenting disputes. The inherent incentives don't alter my behavior in relationship to *any one family*. I get more referrals than I can accept, and I get paid the same amount regardless of whether I facilitate a settlement or people litigate to the bitter end.

On the other hand, I would be in big trouble if *all* divorcing couples suddenly began resolving their differences amicably. Suppose I discovered a "cure" for conflict between divorcing parents. That cure consists of a one-page document so compelling that every parent who reads it works avidly toward a cooperative solution that serves his or her children. I would be out of business in short order. Moreover, I probably could not get much income from the cure. Even if I copyrighted and sold the paper, the gist would soon be available for nothing on eleventy-zillion web sites.

Knowing that I could help mankind but impoverish my children in the process, would I publish the paper? I believe I would—but I don't know for sure. Doing so would be strictly contrary to my financial self-interest.

I won't go any further with the analysis of professional incentives because: (a) it's not the subject of this paper, and (b) it might evoke such strong emotional reactions in readers that the point I'm trying to make would be obscured. Let is suffice to say that professionals who work with divorcing couples should take a careful look at the incentive systems inherent in their work and should assess the impact of those incentives on their own decisions.

Changing the Rules

Another potentially beneficial approach is to change the rules of the game. To the degree that the rules of any game give people an incentive to behave destructively, those rules should be changed.

As Bludgeons and Flagons is presently played in Colorado, the one outright honker of a rule is the linkage between child support and parenting time. We should conclusively separate monetary incentives from parenting issues. Schedule A and Schedule B should be taken out behind the barn and shot in the head.

For many years, I've struggled with two conflicting beliefs. One is the belief that the linkage between child support and parenting time creates or exacerbates conflicts that harm

children. The second is the belief that there is no reasonable alternative. I'm changed my mind about the latter issue.

I long believed that if monetary arrangements completely ignored parenting time, the resulting situation would be unacceptable. Suppose that an order based exclusively on relative incomes—that is, completely independent of parenting time—dictates that Pat pay Terry $1,600 per month in child support, even though the children spend twelve days out of every fourteen with Pat. That just doesn't make sense, right?

Or maybe it does. Consider this argument: While mom and dad were married, the children lived in one home. Post-divorce, the children have *two* homes. Whether they spend equal time in those two homes or live primarily in one of them, they have two homes. The quality of *both* homes should be as good as possible, given constraints dictated by the parties' combined income. Children shouldn't live in a mansion with one parent but in a hovel with the other.

Someone may object that separating child support and parenting time will result in some unfair child support orders. It probably will—but that isn't the real question. Existing law sometimes results in unfair child support orders.

I conducted one evaluation in which dad lived in another state, while mom was a Colorado resident and the primary residential parent. Dad was required to pay mom something like $600 each month in child support. During the evaluation, I visited both homes. Mom had remarried, and her current husband—though by no means rich—made more money than mom or dad. Mom and stepdad lived in a large, attractive home in a nice suburban neighborhood. Dad, whose income was modest, lived in a shoddy one-bedroom apartment in a bad neighborhood. When they spent summers with dad, the two children slept on a sleeper sofa in the living room and wandered around a community with a high crime rate.

Thus, the question is not whether a different system would produce unfair financial arrangements. The real questions are: (a) Would a change in the law produce unfair arrangements more often than the existing law? and (b) If it did, would resulting inequities be outweighed by benefits to children? I don't know the answer to the first question. *If* the change increased the number of unfair child support orders, I suspect that cost would be more than offset by benefit to children.

In short, the financial game and the parenting game should be completely separated. Under the new rules, the parties will play a zero-sum game only for money. Burn bag Schedule A and Schedule B, and deep six the ashes. There should be only one child support schedule. Child support should be determined independently of parenting time.

Separating child support from parenting issues would have three benefits. First, it would eliminate some litigated disputes about children entirely. I don't know how many. I suspect that it would be a comparatively small percentage—certainly well under fifty percent. I think the complaint "He/she doesn't care about the kids; the fight is really about child support," is expressed more often than it's true. Nevertheless, it's sometimes true. Maybe three percent of litigated parenting disputes would go away; maybe it would be thirty percent. I don't know. If it were only five percent, this change in the law would eliminate a large number of disputes about children each year.

Second, separating child support from parenting time changes some specific strategies in Bludgeons and Flagons. Most importantly, prioritizing golden chip would have no utility. In a spirited B&F game, it makes perfect sense to fight about overnights that would push parenting

time across the Schedule A/Schedule B threshold (in one direction or the other). Disconnect child support from parenting time, and those overnights have no monetary implications.

Third, separating money and parenting time would render people slightly less likely to construe disputes about the children as a zero-sum game. Apart from the costs of litigation, the financial issues really *are* a zero-sum game. By mixing those issues with the "kid issues," we implicitly encourage people to treat parenting disputes as a zero-sum game.

The blending of money and parenting can be quite evident from parents' behavior. During interviews of parents by an evaluator, the two sets of issues are often intertwined. In mediation, settlement discussions often move back and forth repeatedly between the two topics. Post-decree, a parent who reportedly "doesn't care about money" gets a modification of the parenting time schedule and *immediately* files a motion to modify child support.

In effect, the message we currently give parents is something like "It's time for you to go to court to fight about money and parenting. The rules are that what you get, the other player loses; what the other player gets, you lose."

When we unlink child support and parenting time, we're now sending two messages. One is "It's time for you to go to court to fight about money. The rules are that what you get, the other player loses; what the other player gets, you lose." We then send the second message, which is something like "Now it's time to come up with a parenting plan for your children. Let's figure out how we best meet their needs."

A corollary of Murphy's Law is that every solution creates a new problem. A change in the law could have unintended effects. Suppose Parent A is strongly motivated by money. Orders regarding finances have been established. To the degree that money is the overriding consideration for Parent A, he or she now has a concrete incentive for the children to spend as *little* time as possible in his care. Less parenting time means fewer meals purchased, less gas money spent transporting the children, fewer requests for twenty bucks for the arcade, and so on. Parent A, so stingy that he or she squeezes every dime until tears roll down Roosevelt's cheeks, might choose to *give up* parenting time to save money.

If that happens, it's regrettable. However, I don't think the objection is damning. If a parent will relinquish time with a child to save a few bucks, the child probably doesn't derive much benefit from time with that person anyway.

I have advocated a change in the law; I will now argue in favor of a change in legal procedure. Procedurally, the domestic relations system should completely separate litigation about money from litigation about children. Again, because property division really *is* a zero-sum game, combining the two processes sends a destructive message and complicates issues.

My fondest wish would be to address money and parenting in entirely different settings. Money matters could be addressed in existing courtrooms, under traditional rules of evidence. Parenting issues would be addressed in a different location and in a setting as unlike a courtroom as possible. I envision something like a living room in a model home—couches, easy chairs, and a decent rug, with coffee and cookies.

Okay, so that's a pipe dream. Nobody is going to sign off on it. Even if there were a groundswell of public opinion in favor of the idea, we'd run into due process problems related to that pesky U.S. Constitution.

Given that my ideal is unworkable, let's switch to Plan B. We can at least separate property and kid issues in time. The domestic courts should *never* address money and parenting

in a single hearing. If you're determined to have a contested hearing regarding money, you can have the morning of Tuesday, September 12. If you're determined to litigate child issues, you have to set another hearing—let's make it October 2.

Because the domestic courts are terribly overburdened, there may be pragmatic arguments against this approach. I doubt that those objections would hold up in practice. Remember, by eliminating the linkage between child support and parenting time, we've already disposed of some litigated parenting disputes, lightening the load. Further, although you'd have more hearings (for example, two separate Permanent Orders hearings in some families) the total amount of *time* required wouldn't be altered. You might have more hearings, but they would be briefer. Finally, I suspect that by completely separating property and parenting, the total number of litigated issues would be reduced.

Suppose Pat and Terry are really going at it about kids and money. If they're so far apart about *one* of the two issues that there's no hope of a cooperative resolution, ill will tends to bleed over into the other. We have all seen parents who really weren't far apart on a parenting plan but got so wound up about money that one or both said (in effect) "The hell with it. Let's go to court and fight it out." If it were made crystal clear, from the get-go, that the two sets of issues are treated separately, that reaction would be less likely. Some parents might sign off on a parenting plan even though they're determined to fight to the death about money (or vice versa). Settlement of one issue or the other would ultimately lighten the burden on the court.

Point 6: *Presently, the rules encourage parents to view parenting disputes as a zero-sum game. We should alter those rules so that parents are actively discouraged from treating parenting disputes as a zero-sum game. The most obvious step is to completely separate financial disputes from the process of establishing a parenting plan.*

Making Sure Parents Understand the Rules

The other rational approach is to *make sure parents understand existing rules*. The rules linking money and parenting are bad rules; they encourage behavior we would prefer to discourage. In contrast, the rules stated in the statutory best interests criteria are good rules. Any parent who plays by them will behave in ways that foster the well-being of his or her children.

Some problems arise because parents don't know or don't understand the "best interests" rules. They act in ways that are bad for children *and* in conflict with the parent's self-interest. In other words, many litigated parenting disputes are inflamed by bad strategy.

Parents make assumptions (often unconsciously) that reflect misconceptions about the rules of the game. Among other things, they assume they can influence the Bludgeon Master by: (a) obstructing parenting time and/or undermining the child's relationship with the other parent; (b) inducing the child to express parenting time preferences consistent with their own; (c) making themselves look better than they really are; and (d) making the other parent look worse than he or she really is. Each of these strategies sometimes works. However, they can also backfire spectacularly. Far too many parents are unaware of the risks they are taking.

Parents should be acutely aware that if they compel a Bludgeon Master to determine parenting time, that person must consider "the ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party." Efforts

to obstruct parenting time or undermine the other parent's relationship with the child are directly in conflict with that criterion. Thus, they can be extremely poor strategy.

Contentious parents need to hear a message along these lines: "If you must go to court and fight this out, a judge is going to make the final decision. The law says he has to consider your ability to support the child's relationship with your ex. If he concludes you do that well, he's more likely to rule in your favor. If he concludes that you do a poor job, he's more likely to rule in your ex's favor. If he concludes that you're really horrible about it, he may order a parenting plan that gives you very little time with the child."[5]

Similarly, zero-sum parents should know that one of the best interests criteria is "the ability of each party to place the needs of the child ahead of his or her own needs." Insulating the child from parental conflict is an important aspect of subordination of self-interest. Thus, parents need to hear a message something like this: "If you make the judge decide, she has to ask herself how much you're able to put your own needs aside to do what the child needs. If the judge is convinced you put the kids in the middle, you're very likely to end up with less parenting time."

Contentious parents also tend to have misconceptions about the children's preferences. All too often, they pressure children to echo their own wishes, then adamantly insist that the children's expressed preferences should be the controlling consideration. Those people need to hear a message something like the following: "If the judge concludes that your children reject the other party because you've encouraged them to choose sides, *that's going to count against you big time*. If the children say they prefer you but their statements are too extreme and implausible, you could wind up with a ruling you find intolerable."

5In this section, I've referred exclusively to judges, rather than "judges and magistrates." That usage is just more economical. I'm not discounting magistrates—some of my favorite people are magistrates.

Parents' efforts to glorify themselves and vilify the other party can also be bad strategy. Zero-sum parents need to hear a message along these lines: "Judges hear parents' stories all day, every day. Mom's story and dad's story can be so contradictory that they're almost non-overlapping. The judge has heard hundreds of people tell bald-faced lies. She has also heard hundreds of people say things they wholeheartedly believe but that happen to be incorrect. As a result, the judge will not automatically believe a single word anyone says in court. She'll be trying to figure out what's credible and what isn't. If your story is 'I'm wonderful and my ex is horrible,' *the judge ain't gonna buy it*. And once the judge has concluded that your credibility is shot, she's going to be extremely skeptical about everything else you say. The more balanced and reasonable your approach is, the more credible it is —and the more likely the judge is to rule in your favor."

Explaining the rules is parent education. However, it's a fundamentally different kind of parent education. I've moved away from "This is how you should act because it's best for your children," and am instead saying "This is how you should act because it's more likely to get you what you want." The appeal to do the right thing has been supplanted by an appeal to informed self-interest.

Imagine a bright lady who sits down to play a game of chess. For whatever reason, that person falsely believes pawns aren't allowed to capture queens. Midway through the game, she places her queen on a square in front of and diagonally adjacent to an opposing pawn. That pawn immediately sweeps the queen off the board.

No chess teacher would say "Gee, you're going at this all wrong. The object is to get along. Your opponent has feelings, too. You need to take a kinder, gentler approach." Instead, he would say "Oops. You're confused about one of the rules. Pawns can capture queens, just as they can capture any other piece. That misconception cost you the game. Now that you know, let's set up the board and play again."

From the viewpoint of game theory, the behavior of parents is often based on faulty assumptions about the nature of the payoff matrix. They make strategic choices based on a presumed payoff matrix that's very different from the *real* payoff matrix.

Let's look at hypothetical payoffs for Pat, who is divorcing Terry. Pat believes that if the children reject and denigrate Terry, Pat will get all parenting time. Pat thinks the payoff will be 100% of parenting time if he or she can recruit the children as allies, while the payoff will be only 50% if the children are free to develop their own preferences. Given the assumption, pressuring the children to reject Terry appears to be good strategy. However, the belief is a misconception. If Pat doesn't try to unduly influence the children's preferences, the payoff will in fact be 50% of parenting time. If Pat induces the children to say they hate Terry and never want to see that person again, Pat will get the children only 15% of the time. Pat's behavior might be *very* different if he or she knew that from the outset. In short, even among zero-sum parents, strategic decisions might be altered by providing clear and accurate information about the actual nature of the payoff matrix.

Before someone accuses me of trying to help parents "win" to the detriment of their children, let's pause to consider how a zero-sum parent would behave differently *if he or she accurately understood the rules*. That person would be more supportive of the child's relationship with the other parent. He or she would be much less likely to try to unduly influence the children's expressed preferences. The parent would be more likely to acknowledge each party's strengths and weaknesses and to express a balanced and reasonable understanding of the family history. Thus, the contentious parent who has been educated about how to use better strategy would behave in ways more consistent with his children's interests.

Books about divorce and parenting tend to have hopeful titles. Actual examples include *Parenting After Divorce: A Guide to Resolving Conflicts and Meeting*

Your Children's Needs; *Creative Parenting After Separation: A Happier Way Forward*; and *How to Parent with Your Ex: Working Together for Your Child's Best Interest*. That emphasis is wonderful. However, the parents I'm talking about aren't reading those books—or, if they are, they're not understanding them. The book those people need might be called *So You're Going to Trial: Play by the Rules and Get More Parenting Time*.

The change I'm advocating is of course a shift in emphasis, rather than an all-or-none transformation. Suppose you've been working hard—as a judge, a parent's attorney, a therapist, or a child advocate—to help a parent understand what's best for his or her child. Unfortunately, you've had very little impact. It becomes clear that you're dealing with a zero-sum parent. That awareness might change the focus of your next conversation with that person. "Your child needs both of you, and it's best for him if you support his relationship with his other parent," has fallen on deaf ears. It may be time to instead say "Okay, it looks like you're not going to reach a settlement. If you go to trial, the judge is going to decide what kind of parenting time you have. If you continue to do everything possible to keep your child and your ex-spouse apart, the judge is likely to be extremely critical of you. By law, he has to take into consideration your ability to support and encourage the child's relationship with your ex. Because you want as much time as possible with your child, you should back off and take a more supportive approach. I'd really hate to see you shoot yourself in the foot and wind up with minimal parenting time."

That shift in emphasis won't help everyone. Some parents are so irrational that they're not capable of acting in their own self-interest. Parents have spent $50,000 on litigation to gain $10,000 in property. Even at that, some parents who are not capable of accurately discerning what their children need *are* capable of acting in their self-interest. Those people won't respond to "do the right thing" messages. Some of them will respond to "don't shoot yourself in the foot" messages.

To cut to the chase: Some parents who just can't hear "Stop doing that because it's bad for your child," may be able to hear "If you keep doing that, you're going to get creamed when you go to court." We should tell them.

Point 7: *In working with zero-sum parents, we should take a fundamentally different approach to parent education. Instead of telling those parents what's best for children, we should clearly inform them that certain behaviors (which we know to be harmful to children) are contrary to the parent's self-interest.*

Working on the Margin

The astute reader will be able to think of people who won't benefit from the three recommended approaches—encouraging cooperation, changing ill-considered rules, and education regarding self-interest. Some people are spoiling for a fight and will have one, regardless of the consequences. Some parents are outraged when a professional offers any opinion not absolutely consistent with their own viewpoints. Some reject corrective feedback out of hand and shop around until they find someone who tells them what they want to hear.

As one example of a more or less hopeless case, consider the parent who needs to engender an ongoing battle with an ex-spouse *because negative engagement is experienced as a way of maintaining an emotionally important connection*. Those people can't tolerate peaceful coexistence because it implies indifference, which is experienced as a devastating loss. Frankly, absent several

years of productive psychotherapy, there is no way to induce such a parent to behave constructively. The conflict itself is central to the "psychological payoff." Neither changing the rules nor appealing to enlightened self-interest will have much impact, because the battle is the payoff.

My suggestions are offered without illusion that they can provide a "cure." We're always working on the margin. The object is to identify approaches that will have *some* benefit for *some* children. If we can make a twenty percent improvement in the lives of twenty percent of those children caught in battles between zero-sum parents, we will have accomplished something extremely useful.

Summary

Game theory is a branch of applied mathematics that offers tools for analyzing strategic decisions. For pragmatic purposes, its key insight is that the rules of a game create a "payoff matrix" that provides incentives to make specific choices.

Game theory *per se* involves mathematical analysis that can be divorced from the real world. However, the nuclear concept of game theory has applicability in numerous actual situations. In a nutshell, the idea is that we should take a careful look at the incentives created by how a system is structured. The decisions people make are shaped by those incentives. An important corollary might be stated as follows: Never set up the rules of a game in such a way that they encourage undesirable behavior.

A two-person, zero-sum game is one in which two players compete for a fixed payoff. Whatever one player gains, the other loses. Zero-sum games are inherently non-cooperative. If a parent construes a divorce as a two-person, zero-sum game, behavior inimical to the best interests of the children can be good strategy. Professionals often see the behavior of such parents as irrational. However, our real objection is to their interpretation of the dispute as a zero-sum game. Given that interpretation, destructive behavior may be perfectly sensible strategy.

When parents see a divorce as a zero-sum game, efforts to educate them about what's best for their children are ineffective. Those efforts reflect a failure, on the part of professionals, to understand the nature of a game in which we are participants. Trying to convince zero-sum parents to do the right thing is bad strategy.

One means of mitigating the "zero-sum problem" is by encouraging parents to play a different game entirely. The rules of cooperative approaches to dispute resolution are fundamentally different from the rules of the litigation game and include incentives to behave more constructively. Parents inclined to view a divorce as a zero-sum game are less likely than other parents to pursue those approaches. However, it might be possible to move some zero-sum

parents in the direction of cooperative problem-solving by educating them about how various approaches may impact their self-interest.

Some rules—as defined by law and legal procedures—of the divorce game should be changed. Presently, certain rules *encourage* parents to treat parenting disputes as a zero-sum game. We should alter those rules so that parents are actively discouraged from approaching parenting disputes as a zero-sum game. The most obvious step is to completely separate financial disputes from the process of establishing a parenting plan.

In working with zero-sum parents, we should take a fundamentally different approach to parent education. Instead of telling zero-sum parents what's best for children, we should clearly inform them that certain behaviors (which we know to be harmful to children) are contrary to the parent's self-interest.

REFERENCES

Dixit, Avanash, and Skeath, Susan. *Games of Strategy*. New York: W.W. Norton and Company, 1999.

Levitt, Steven, and Dubner, Steven. *Freakonomics.* New York: William Morrow, 2006.

Nasar, Sylvia. *A Beautiful Mind*. New York: Simon & Schuster, 1998.

Poundstone, William. *Prisoner's Dilemma.* New York: Anchor House, 1992.