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Fall 2020

MAGAZINE

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in the Hague Convention

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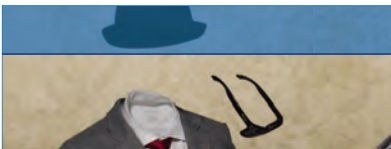
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MESSAGE FROM THE PUBLISHER



Dan Couvrette is the CEO of Divorce Marketing Group and Publisher of Family Lawyer Magazine, Divorce Magazine, and DivorcedMoms.com

COVID and Child Custody

COVID's impact on our business and daily lives is far from over. Over the last six months, when we have all experienced lockdowns and disruptions, we have had to find new ways to safely manage our work and personal lives. And unhappy couples who have been living in close quarters for what feels more like six years than six months are ready to make a change now.

In May, I wrote an article predicting a surge in business for family lawyers based on a noticeable jump in traffic on www.DivorceMag.com: one of our websites geared towards people considering, in the midst of, or who have recently gone through a divorce. The article appeared in the special COVID Issue of *Family Lawyer Magazine*, published in June. At that time, traffic had doubled between March 15 (when COVID became a

household name) and May 16 (when we started to seriously wonder when/if our lives would return to normal). That increase has continued ever since with another record month in traffic for www.DivorceMag.com in July.

This means family lawyers need to prepare to be found and hired as online searches turn into retaining legal representation. To help you connect with potential clients, see my article "6 Secrets to Securing More Clients With Your Website" on page 18. Since searching online for products and services is now well-entrenched, you need a great online presence now more than ever.

I have also heard anecdotally from various clients that child custody cases have increased since COVID – which is why this issue focuses on custody. For example:

- Written by the team who argued *Monasky v. Taglieri* from Ohio to the Supreme Court, "Defining 'Habitual Residence' in the Hague Convention" is required reading for anyone handling international custody disputes (p. 6)
- Make sure your client appreciates both the potential upside and downside of seeking a GAL appointment (p. 10)
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P.S. If you have not read our Special COVID Issue, you can download it at www.bit.ly/flm-special-covid-issue. The articles are highly relevant for managing and growing your practice during and after the pandemic.



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Defining Habitual Residence in the Hague Convention

In *Monasky v. Taglieri*, SCOTUS took the opportunity to define “habitual residence” and proclaimed a uniform legal standard for the first time. The decision alters the trajectory of US Hague Convention jurisprudence on this issue.

By Amy Keating and Chris Reynolds, Family Lawyers

On December 11, 2019, the United States Supreme Court (SCOTUS) heard oral argument in *Monasky v. Taglieri*¹, a case that hinges upon the definition of “habitual residence” for an infant under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Convention”). In fact, this was only the fourth case that the Supreme Court has taken dealing with the Convention and the first time that the Court has spoken on the issue of habitual residence. The term “habitual residence,” which is not defined in the Convention itself, afforded SCOTUS the opportunity to consolidate jurisprudence in the United States.

Many family law practitioners find international issues daunting, even if they have a vague understanding of what the Convention is. So, what is it? Plainly, it is a multinational treaty, one of many under the “Hague Convention” umbrella intended to protect children from the harmful effects of international abduction. Its main goals include bringing about children’s prompt return, and it is designed to prevent parents from forum shopping in international custody disputes. Like the UCCJEA, the Convention is essentially a forum selection law, intended to be about who decides not what is decided.

The basic components of a Convention claim include: 1) a wrongful removal/retention of a child; 2) when the child was habitually residence in a contracting state; 3) in breach of rights of custody; 4) when the child is under the age of sixteen; 5) within one year of the removal/retention (after one year, the Convention still favors returns but considers whether the child is settled in his/her new environment [Art. 12]). The burden of



proof is on the petitioner who must prove these elements by a preponderance of the evidence in the U.S. Establishing a prima facie case presumes a right of return to the child's habitual residence unless one of the narrow defenses applies.

Three Standards for Habitual Residence

Despite its critical importance, "habitual residence" is not specifically defined in the Convention – primarily because the drafters could not agree on a definition². As a result, prior to *Monasky*, different jurisdictions crafted different legal standards to determine this very key term of the Convention. For purposes of simplicity, there were three standards that developed in the U.S.:

1. Acclimatization standard;
2. Shared Parental Intent standard;
3. A hybrid of both standards.

Acclimatization, the prior standard in the Sixth Circuit³, focused on where the child has been physically present for an amount of time sufficient for "acclimatization" and which has a "degree of settled purpose from the child's perspective."⁴ It

looks for indicia of the child's connectivity to a place through objective criteria such as school, extracurricular activities, social activities, and meaningful relationships with people in that place.

Shared Parental Intent focused on where the parents intend for the child to be raised. To determine a child's habitual residence, we "look[ed] for the last shared, settled intent of the parents."⁵ A court considered the parties' subjective intent but also objective evidence of steps the parties' took in furtherance of that intent – outward manifestations of where the parties intended for the child to be raised⁶.

Other circuits have adopted a hybrid standard that considered both Acclimatization and Shared Parental Intent, weighing them differently depending on the jurisdiction. Good examples of this exist in the 8th and 3rd Circuits, among others⁷.

Monasky v. Taglieri

In *Monasky*, the parties meet and marry in Illinois, but relocate to Italy, disagreeing as to how long they intend

to stay. The parties' marriage deteriorates, and there are credible allegations of domestic violence. Monasky becomes pregnant but, by the time of the child's birth, the marriage is irretrievably broken. After an emergency cesarean section, Monasky cannot leave Italy due to her recovery and lack of a US passport for the

child. Monasky tells Taglieri she intends to return with the child to the US as soon as possible; Taglieri alleges that the parties had reconciled. When the child is six weeks old, Monasky and the child are placed in an Italian domestic violence safe house. When the child is 8 weeks old – and as soon as her US passport is issued – Monasky and the child leave Italy for the US. After a four-day bench trial, the district court found that Italy was the infant's habitual residence and ordered a return.

In the Sixth Circuit, acclimatization had been problematic for infants or children with cognitive disabilities. In other words, what should a court do with children that cannot acclimatize? This had been an "open issue" for some time, but the Sixth Circuit had not been forced to contend with it directly. *Monasky* – along with another case that hit the Sixth Circuit at the same time (*Ahmed v. Ahmed*, 867 F.3d 682, 2017) – made it impossible to sidestep any longer. Would the Sixth Circuit agree with the majority of other circuits that shared parental intent was the standard for this category of children? Ultimately, an *en banc* Sixth Circuit agreed that shared parental intent was the proper standard (907 F.3d 404, 2018).

Must Every Child Have a Habitual Residence?

Further, must every child have a habitual residence at all? One camp holds that, while rare, there are times when a child has not formed a sufficient connection to a particular place, either directly or through its parents. In those situations, the Convention simply does not apply because there is no status quo to return to. The other camp argues that a child always has a habitual residence; that it must always exist. In *Monasky*, our position had been that the child never acquired a habitual residence due to her young age and the parental discord about where the child would be raised – the absence of shared parental intent.

Despite agreeing that shared parental intent was the appropriate standard, the *en banc* Sixth Circuit found that

¹ In the District Court of Court of Appeals, the case is captioned *Taglieri v. Monasky*.

² A more comprehensive analysis of the Convention would necessarily include additional explanation of the other components. Because *Monasky* is focused on habitual residence, we are confining our discussion to only that term.

³ See *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) and *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

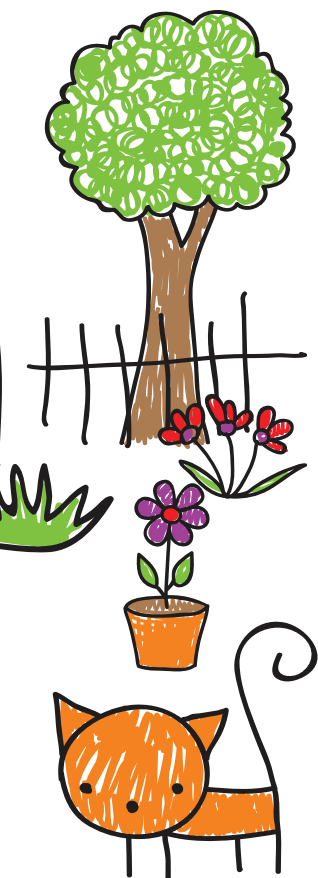
⁴ *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007).

⁵ *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013).

⁶ The seminal case on this standard is *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

⁷ A slightly different version of this exists in the 7th Circuit in *Redmond v. Redmond*, which implements a totality of the circumstances approach that considers both Acclimatization and Shared Parental Intent as factors. The Supreme Court seems to have relied heavily on *Redmond* and similar cases in this line of reasoning in arriving at its decision in *Monasky*.

Cont. on page 12



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Be Wary of “Saviors”:

The Guardian ad Litem in Contested Custody Cases

There is always a risk that a Guardian ad Litem will make recommendations that are not in a child's best interest. Meanwhile, your client will have spent thousands of dollars on an investigation and report that could cost them custody of their beloved child.

By Rachel A. Elovitz, Family Lawyer

Seen through the eyes of the law, minor children are weak and deficient. They lack the maturity, life experience, and sound judgment that adults enjoy in making basic life decisions. This is why minors are legally unable to contract, marry, sue, or be sued in their own name, and have no right to refuse medical or surgical treatment for their own bodies. The law presumes that a child's parent is the fittest person to make decisions for the child – and that every parent has an avid affection for their child that can't be doused by even the most ungrateful, impish, or rebellious child.

So, what happens when that innate affection, that intrinsic bond, takes a back seat to incapacity, abusive inclination, or neglect? In those instances, the state acts to protect the child – in part by appointing a Guardian ad Litem (GAL), who is charged with representing the child's best interest. (*In re W.L.H.*, supra.) This is a practice that has become widespread since the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, the intent of which was to ensure that children in dependency (abuse and neglect) cases are adequately represented. Since CAPTA's enactment, GAL appointments have been extended to contested

a review of the minor child's records (e.g., academic, attendance, medical), meeting with the child, observing the child with each parent, and interviewing lay and expert witnesses familiar with the child and/or the parent-child relationship. The GAL then consolidates the information in a written report and submits it to the Court with custody and parenting time recommendations. When in this role, the GAL is viewed as an arm of the Court, gathering over the course of many months material information that the Court would not be able to glean in a few hours or days of trial. Without a GAL, a judge has no practical way to ensure, prior to

concerns (if the child is reticent about sharing), or that the GAL report contains untruths (because the child is reporting what he or she was coached to say). A child's reporting also can be influenced by parental alienation, situational anxiety, a desire to please, even domestic violence, and a GAL with insufficient training or little experience may not recognize that the child's reporting has been so influenced.

A GAL's Report May be Fraught with Hearsay and False Statements

Also potentially problematic, courts tend to defer to a GAL's findings, at times rubber stamping them, even

It can be unbearable for a parent fighting for custody to listen as the GAL testifies about witness statements that are imprecise, mistaken, false, or even fabricated.

custody cases, and GAL roles have become increasingly diverse, including those of fact investigator, mental health evaluator, next friend attorney, family mediator, and child attorney.

GALs are Valuable, Neutral, and Unbiased – Except When They Aren't

GAL appointments are generally considered valuable – so much so that *Palm Beach Post* reporter Fran Hathaway once referred to GALs as “saviors” in an opinion piece entitled “Some Children Do Have Saviors” (June 9, 2002). GAL appointments, however, are complicated by conflicting ethical mandates, little statutory guidance, and ever-changing case law. The absence of uniformity in state-to-state guidelines regarding a GAL appointment, role, training, and compensation further confuses matters, resulting in a chaotic and inconsistent system.

Of the many roles in which a GAL can be tasked, the most common is that of investigator, which typically includes

determining what custody arrangement is in the child's best interest, that all necessary information is brought before it “untainted by the parochial interests of the parents.”¹ The GAL serves as the eyes and ears of the Court, their perceptions formed of fact, not fiction, and free from the stain of self-interest and bias – except when they're not.

Before drawing conclusions about a child's best interest, a GAL should listen to and consider a child's wishes and concerns, but doing so requires that a level of trust be established such that the child feels safe sharing. Establishing that trust can be difficult if a GAL only visits a child a couple of times, which is not uncommon, or if one or both parents instruct the child not to answer the GAL's questions or coaches the child to say things that might not reflect how the child feels or what the child wants.

Children may also be concerned about speaking freely once made aware that communications with a GAL are not confidential. The risk is that the GAL's report is quiet on the child's wishes or

when the case involves issues or allegations beyond the ken or expertise of the GAL (e.g., mental health issues, sexual abuse, substance abuse, physical violence) – even though a GAL's recommendations are not a substitute for the court's independent judgment².

GAL reports are also fraught with hearsay³, statements made by persons outside of court and offered by the GAL in court for their (supposed) truth. Effectively, the Court is asked to assume that everyone the GAL interviewed was honest and their observations reliable, when neither the GAL nor the judge know enough about the witnesses to make such an assumption⁴.

¹ State ex rel. *Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993) October 5, 1993.

² *Higdon v. Smith*, 565 Fed. Appx. 791, 793 (11th Cir. 2014)

³ Federal Rules of Evidence: 801-03, 901

⁴ *McClain v. State*, 311 Ga. App. 750, 752, 716 S.E.2d 829, 831 (2011)

It can be unbearable for a parent facing removal of a child, seeking reunification, or fighting for custody to listen as the GAL testifies about witness statements that are imprecise, mistaken,

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false, or even fabricated – particularly when there is no opportunity to cross examine, and knowing the statements might influence the Court’s decision. While hearsay is not admissible, absent objection, it may be allowed into evidence⁵. A judge is presumed to be able to separate “the wheat from the chaff,” but once a judge has heard the “chaff,” it may be hard to unring that bell.

Finally, there is always a risk that a GAL’s perception of the facts will be contaminated by their own predispositions, that they will prejudge the case, engage in confirmation bias, or for some other reason make recommendations that are not in a child’s best interest, and your client will have spent thousands (if not tens of thousands)

of dollars for an investigation and GAL report that could cost them custody of their much-loved child. So before you file that motion seeking a GAL appointment, make sure your client appreciates both the potential upside – and downside – of the motion being granted. ■

⁵ O.C.G.A. § 24-8-802



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Hague Convention / Cont. from page 7

habitual residence was an issue of “pure fact” subject to clear-error review. It refused to remand the matter so the trial court could apply the facts to the new legal standard and upheld the return by a vote of 10 – 8.

We identified two circuit splits that the Supreme Court agreed merited review. The questions were:

1. Whether a district court’s determination of habitual residence under the Hague Convention should be reviewed de novo...or under clear-error review; and
2. Whether, when an infant is too young to acclimate to her surroundings, a subjective agreement between the infant’s parents is necessary to establish her habitual residence.

Is Habitual Residence an Issue of Pure Fact?

“Standard of review on appeal” may not seem like a “sexy” topic, but lawyers know that it can make a big difference in the outcome of cases. The Court must determine whether habitual residence is an issue of pure fact – calling for strong deference to the trial court on appeal – or a question of “ultimate

fact” or “mixed question of fact/law” – requiring a de novo review.

SCOTUS’ Decision

On February 25, 2020, the U.S. Supreme Court issued its opinion in *Monasky v. Taglieri*. SCOTUS held that a child’s habitual residence depends on the totality of the circumstances specific to the case – providing one uniform legal standard for this key term for the first time, applicable to *all* children. The Court rejected Monasky’s “actual agreement” requirement in favor of a flexible and fact-driven standard. SCOTUS also held that habitual residence determinations should be subject to a “clear error” appellate review.

This decision has altered habitual residence determinations in the US and changed the language and the landscape of habitual residence going forward. Despite the positive effects of a now-unified habitual residence standard, we remain concerned about the practical impact of the Court’s adoption of a clear error standard of review.

This pronouncement – and the Court’s apparent trade-off of expediency over other considerations – makes it more likely that cases with similar facts will have disparate outcomes driven by the proclivities of the

particular judge or court hearing the case with almost no basis for meaningful appellate review. “Prompt but wrong” is not a generally accepted legal norm, and it is especially pernicious when the well-being of children is at stake. While we certainly hope our fears don’t materialize, that is now the state of our law. ■



Amy Keating and Chris Reynolds are both OSBA Certified Specialists in Family Relations Law practicing at Zashin & Rich. In 2016, they tried Monasky v. Taglieri in the Northern District of Ohio. On both appeals in the Sixth Circuit and before the Supreme Court, they were co-counsel with Gibson Dunn in Washington, D.C. and Professor Joan Meier of



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The Contractual Approach to Assisted Reproductive Technology Litigation

Current laws fail to protect parties making agreements relating to their frozen embryos. Courts using the contractual approach must carefully examine these so-called agreements to determine whether they are valid in a divorce context.

By Jennifer S. Tier, Family Lawyer

In 2002, there were approximately 346,000 frozen embryos in the United States¹. By 2017, the number of frozen embryos grew to approximately 1,000,000². People are turning to assisted reproductive technologies (ART) at an exponential rate. Yet, as so often happens when technology accelerates at lightning speed, the law is slow to catch up.

Take the scenario of a married couple who have trouble conceiving and use *in vitro* fertilization (IVF). The couple is under extreme stress, both emotionally and monetarily. At the fertility clinic, they are given a stack of paperwork six inches thick. One of the forms is a lengthy questionnaire about the disposition of any remaining frozen embryos. One of the questions states “In the event the patient is divorced any remaining frozen embryos will, A) Be awarded to Wife, B) Be awarded to Husband, C) Be donated to research, D) Be donated to another couple, or E) Be destroyed.” The Wife fills out the form; checks the box that the embryos will be awarded to her; and the Husband signs. The couple has no actual discussion about this issue nor do they receive any legal explanation or advice.

The couple successfully has one child and six remaining frozen embryos. Then they get divorced. Husband is adamant that he does not want Wife to be able to use the remaining frozen embryos as he does not want more children with Wife. Wife wants more biological children. She argues that because Husband signed the form, she should be awarded the embryos. Further, Wife argues Husband would not be the legal “father,” although the form makes no mention of the conditions that would determine whether Husband is the legal father.

The Contractual Approach to ART

State courts are trending towards a “contractual” approach for deciding the complex problems presented by this scenario. Under this common approach, Wife would be awarded the embryos because the parties had an agreement (the form where Wife checked a box at the fertility clinic). In fact, a similar scenario is presently before the Supreme Court in the case of *Bilbao v. Goodwin*. In adopting this contractual

approach, courts have shown a preference toward honoring agreements between parties.

Courts want to encourage people to have serious and lengthy discussions about these highly personal issues. Specifically, in *Kass v. Kass*, 91 N.Y.2d, 544, 5673 N.Y.S.2d 350, 696 N.E.2d 174, 180 (1998), the court noted:

“... parties should be encouraged in advance before embarking on [in vitro fertilization] to think through possible contingencies and carefully consider their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of litigation are simply incalculable...to the extent possible, it should be the progenitors – not the State and not the court – who by their prior directive make this deeply personal life choice.”

Courts in California, New York, New Jersey, Tennessee, and Illinois have all made rulings consistent with the contractual approach. The trend is that these very personal decisions should be made by the parties involved – not the court.

Should an ART Agreement Be Binding in a Divorce?

In theory, honoring the parties’ ART agreements seems like a sensitive and practical approach to resolving such weighty emotional issues. But is simply having an “agreement” enough? What if the parties are not having serious discussions about the implications of their decisions because they are highly emotional or rushed because of medical concerns? What if the parties are filling out hundreds of pages of forms? What if the forms are not explicit and do not address fundamental issues like whether the Husband will be treated as the legal father of any resulting children in the event of divorce?

It is unlikely that a layperson could truly comprehend the complex legal implications of everything they must sign when seeking IVF. Courts are trending toward the contractual approach, but so far, they have not delved deeper to discuss whether parties should meet certain requirements to create a valid agreement.

This is in stark contrast to laws surrounding gestational surrogacy contracts. Many states have adopted statutes obliging parties to meet a long list of requirements to have a valid surrogacy contract. For example, statutes require the parties to be represented by independent legal counsel, to notarize signatures, and for two witnesses to sign the agreement. The list of requirements can be lengthy and onerous.

Legislatures have reacted swiftly to enact these comprehensive gestational surrogacy laws after several high profile cases received widespread media attention. Unfortunately, there has been no such widespread attention to the disposition of frozen embryos. The lack of guidance is all the more striking because IVF is so much more common than gestational surrogacy.

Legislatures and courts should treat the disposition of frozen embryos more like surrogacy agreements and put safeguards in place to protect the populace. Although this would place a greater burden on parties using IVF, it would also ensure that the most fundamental rights of the parties are protected: the right to be – or not to be – a parent. Parties should be advised of the consequences of their agreements regarding the disposition of embryos upon divorce and whether the Husband (or partner) would be the legal parent of any resulting children after divorce.

Bright-line laws could also limit litigation. For example, the *Uniform Parentage Act* (Uniform Law Commission 2017) suggests the following law: “Section 706(a). If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.” This Act only governs whether a spouse is considered a parent and does not dictate who may control embryos after a divorce. Nonetheless, such legislation provides much-needed guidance to couples considering IVF.

Until state legislatures actually change the law, if courts are to use the contractual approach, then they have a responsibility to look at parties’ so-called agreements more closely. Statutes are often a codification of case law. Therefore, State courts should start to weigh in on what constitutes a valid agreement over frozen embryos rather than stopping their inquiry as soon as they see a signed form with a checked box. This would ensure parties meet the Kass court’s goal that parties have serious and lengthy discussions over this “deeply personal life choice.” ■

¹ “How Many Frozen Human Embryos Are Available for Research?” (Rand Corporation, 2003), by David Hoffman et al. www.rand.org/pubs/research_briefs/RB9038.html

² “The Leftover Embryo Crisis” (*Elle*, 11 Oct. 2017) by Elissa Strauss. www.elle.com/culture/a12445676/the-leftover-embryo-crisis



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Related Article

Fighting Over Custody of Frozen Embryos

Even when intended parents have signed an agreement stating what will become of stored frozen embryos in the case of divorce, that doesn’t necessarily stop them from fighting for custody of those embryos.

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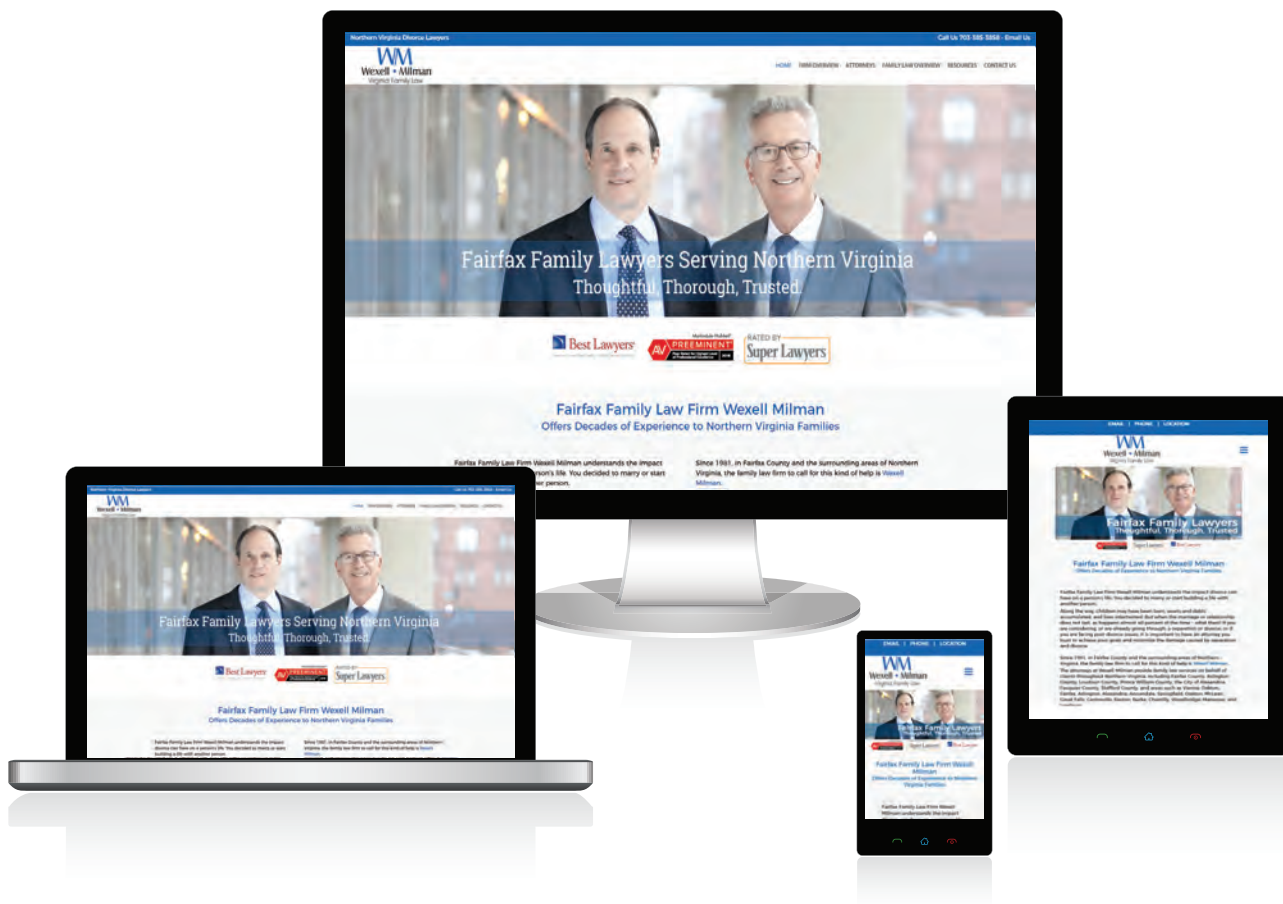
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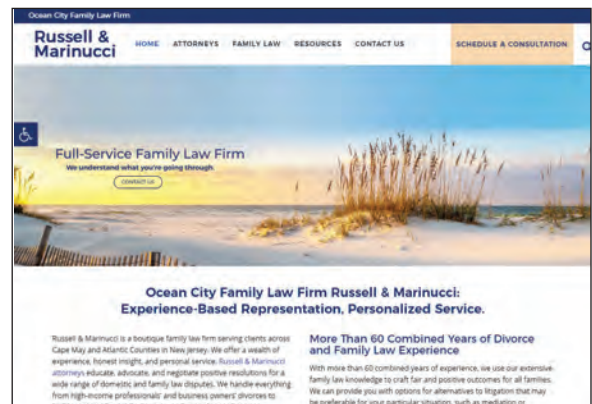
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~ M., a California client’s client



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6 Secrets to Securing More Clients With Your Website

Many family lawyers do not know why their websites fail to generate quality leads – much less how to fix what's wrong. For those firms, these tips could be game changers.

By Dan Couvrette, Marketing Expert

Most family lawyers know a good in-person consultation will increase their chances of getting a client. While the consultation is important, there are ways to secure more clients before they even step foot through your door – and that is by “stepping” through your website. Here are the top ways to make that happen.

1 Display Positive Client Reviews on Your Website

A prospective client who reads glowing reviews on your website is much more likely to contact and retain you. Statistics show the average consumer reads 10 reviews before feeling able to trust a business.¹



There is an art to asking for feedback on your service that will lead to great testimonials. Consider asking the following:

- What kind of issue/case brought you to our office?
- How have we helped you and what are you able to do as a result?
- How would you describe the quality of service and interactions with our lawyer?
- If someone were looking for a family

lawyer, how would you describe our lawyer and our firm?

Here's a little-known secret: most clients choose and evaluate a lawyer based more on how the lawyer and their team make them feel than on technical skill and academic achievement – so testimonials that appeal to potential clients on an emotional level will greatly increase the chances of them contacting you.

There are also technology/services that can help automate the asking and to ensure positive testimonials are posted on third party websites such as Google, Yelp, etc.

2 Use High-Quality Images

You have one chance to make a positive first impression.

- **Hire a Professional Photographer.** A lot of terrible pictures of family lawyers end up on websites. It pays to hire a professional photographer.
- **Tell Your Photographer About Your Branding.** Make sure they look at your website and understand where and how your pictures will be used, who you are, what you do, and what makes you different from your



competition. Ask for their advice on location, staging, your outfit, and your pose that would complement your branding.

- **Take Pictures of EVERY Person in Your Office.** Post photos of everybody in the office: from partners to associates to paralegals to your receptionist (who, after all, is the first person a potential client speaks to on the phone and in your office). This sends a message to your team that you value them – crucial for morale and the intake experience for your prospective clients.

3 Create Relevant Podcasts and Multipurpose them

In my 25 years of experience working with family lawyers, I have found podcasts to be the easiest way to create highly relevant and current content for their websites. While a lawyer will have a hard time writing informative answers to 10 frequently asked questions (FAQs) their ideal clients would ask, they will gladly schedule a 15-minute phone call with me and answer the same questions verbally. We will record the phone call, turn it into a podcast, and transcribe it.



Having a transcript of your podcast is great for many reasons. It can be posted with your podcast on your website, and we can post them on our websites – www.divorcemag.com or www.divorcedmoms.com – for a much wider reach. (These two websites receive 4,000,000 visits a year.) Or, we can turn the transcript into several blog posts and questions and answers on your FAQs website page.

Podcasts and transcriptions can be promoted in your eNewsletter, on social media, and on your firm's podcast channel on Podbean and iTunes. They can also be used to produce videos or the start of an article. By sharing your podcasts and transcriptions on multiple channels, you will build/enhance your reputation as a thought-leader in the field.

4 Add Relevant Videos and Multipurpose them

When it comes to content, video is king. Quality information-packed videos beat text every time because they are easy to consume. Consider this²:

- 96% of people have watched an explainer video to learn more about a product or service.
- 84% of people say they've been convinced to buy a product or service by watching a brand's video.

Well produced short videos allow you to provide just enough information to offer value to viewers and to convince them that they need your services. You can post them on your website and YouTube, and share them via eNewsletters and social media.

Zoom videos are easy and inexpensive to create, and they allow you to discuss highly relevant and topical issues just when people are searching for them. You can record these videos on your own or you can work with a professional marketing company to create them.

Professionally produced and edited videos shot in person have a

different look and feel; think movies you watch in a cinema vs unedited home-made movies. Due to COVID-19, we are not currently recording professional videos in person – but when it is safe to resume, we will thoroughly prepare before showing up at our client's office. We will handpick the questions based on our client's business goals and help the lawyers script their answers. We will upload the scripts to a teleprompter for the lawyers to follow while they are being filmed. Our experience shows that very few lawyers are good at winging it in front of a camera. Lawyers are much more authoritative when there is a script on a teleprompter: it keeps them concise, on topic, and eliminates "Ums" and hesitations.

Few family lawyers have quality videos on their website, even fewer have media interviews. As the publisher of *Family Lawyer Magazine* and *Divorce Magazine*, we do video interviews with our clients via Zoom and in person. Media interviews on your website and the interviewers' websites can distinguish you as the authority in family law.

5 Written Content Is Still Vital

While video is king you need to have quality text to have your website rank well in Google. Your text must be highly relevant, updated regularly, and contain keywords that an ideal client would use to search for the kind of service you offer, and therefore find your website. Text can be better optimized for search engines than videos.

You need to offer information that addresses questions your ideal clients have. You can create pages for every practice area, or write FAQs, articles, and blog posts on those topics. You can write your own content, or you can outsource to professional writers who have a solid understanding of family law in your state. Avoid low-quality articles and blog posts that offer no substance; they can do more harm than good.

6 Get Technology on Your Side

Your prospective clients will not tolerate a dated website with poor navigation that is not mobile-friendly, or one designed by a website builder who knows nothing about family law. That's a given these days.



Visitors want what they want and they want it *now* – and in a divorce, *all* questions are urgent. The faster you respond to inquiries from potential clients, the more likely you are to secure a consultation – especially since people are online more than ever due to COVID-19. Having multiple ways for prospective clients to get what they want 24/7 will greatly improve their experience. This is where having plenty of helpful information that positions you as an expert – as well as tools like interactive chatbots and an appointment calendar – can help. ■

¹ According to BrightLocal's 2019 "Local Consumer Review Survey"

² www.wyzowl.com/video-marketing-statistics-2020

Dan Couvrette is a marketing expert for family lawyers and divorce professionals. He is the co-owner and CEO of Divorce Magazine, Family Lawyer Magazine, DivorcedMoms.com, and Divorce Marketing Group, a marketing agency dedicated to promoting family lawyers and divorce professionals. www.DivorceMarketingGroup.com

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Soberlink: Providing Documented Proof of Sobriety During Parenting Time

Family Lawyer Magazine interviewed the team at Soberlink to discover why their technology has become the “go-to” solution for attorneys – whether they are on the side of the accused alcohol abuser or the concerned parent.



What is Soberlink – and how does it reduce the risk of children spending time alone with an intoxicated parent?

Soberlink is a state-of-the-art system for real-time alcohol monitoring during parenting time. Our system combines a portable breathalyzer with wireless connectivity, and it includes cutting-edge technology such as facial recognition, tamper detection, and Advanced Reporting that no other solution offers. Soberlink provides real-time documented proof of sobriety that reduces litigation and creates peace of mind during parenting time.

When a parent is required to submit a breath test, he or she simply blows into the Soberlink device for 3 seconds. Once the test is complete, the system automatically sends the results to everyone named in the monitoring agreement – typically the other parent, the attorneys, and other family law professionals. Additionally, Soberlink is the only product that offers Advanced Reporting, which analyzes and displays testing results in an easy-to-read calendar view. This real-time reporting gives the “Concerned Party” peace of mind when their children are spending time with their ex-spouse, the “Monitored Client.”

How long has Soberlink been around? How many people are using it today?

Soberlink has been the leader in real-time alcohol monitoring in criminal justice, addiction treatment, and family law since 2011. Our technology has been trusted for use in court in all 50 states and Canada. We are proud to say we have had over 175,000 users and counting.

How does Soberlink’s technology help family lawyers?

Attorneys across the U.S. and Canada recommend Soberlink because they know the records will hold up in court, allowing

lawyers to present tangible evidence to judges. Soberlink has gone through extensive testing and protocol management to secure FDA Clearance as a medical device to measure blood alcohol levels. In addition, retired judges from the Justice Speakers Institute have written a third-party paper that speaks to the admissibility of Soberlink in both Daubert and Frye states. Our in-house Family Law team is readily available to provide lawyers with useful resources – from how to create an order with Soberlink to best practices for set up and testing. All this has made Soberlink the “go-to” technology solution that family lawyers recommend to clients.

How is Soberlink helpful to a family lawyer’s client?

Soberlink helps keep kids safe while giving those who have been accused of abusing alcohol the opportunity to parent and document sobriety. Monitored parents often tell us that Soberlink is the reason they now have a strong and honest relationship with their children, and concerned parties are grateful to know that their children are safe while with the other parent. We have a special spot on our website – Sober Stories at www.soberlink.com/reviews – that highlights some of this feedback.

Are there alternatives?

There might be – but we guarantee that our technology and service are unparalleled. There is no substitute for the convenience, accuracy, and reliability that Soberlink offers. As the experts in alcohol monitoring, we have the technology of real-time facial recognition, tamper detection, and advanced reporting along with a solid history of use. We also have a family law support team dedicated to exceeding our clients’ expectations.

To request a Monitoring Agreement from Soberlink, go to www.soberlink.com/professionals-family-law. ■



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What Family Lawyers Must Know

When irrevocable trusts include ex-spouses or soon to be ex-spouses as beneficiaries, family law practitioners should be aware of the options to potentially reduce or eliminate those interests.

By Sharon L. Klein, Family Wealth Strategist,
Trusts & Estates Attorney

When irrevocable trusts are drafted in happier times, and then times change, is it possible to reduce or even eliminate the interest of an ex-spouse or soon to be ex-spouse? Trustees potentially have access to powerful tools that might change beneficial interests. Indeed, it might be said that there is no such thing as an “irrevocable” trust. In any event, family law practitioners should counsel clients to investigate the options.

“Decanting” is a technique that allows the trustee of an otherwise irrevocable trust to transfer the trust assets into a new trust with different terms. The rationale behind decanting is that a greater power should include a lesser power: If a trustee can make outright discretionary distributions to a beneficiary, then the trustee should also be permitted to do something less than an outright distribution and instead distribute trust assets into another trust for that beneficiary.

Decanting can be a tremendous tool for dealing with changed circumstances, correcting mistakes, facilitating tax benefits, or optimizing a trust’s administration.

In the divorce context, a trustee might be able to use the decanting technique to limit a beneficiary’s interest – or even to eliminate a beneficiary.

Ferri v. Powell-Ferri – Decanting in a Divorce Context

*Ferri v. Powell-Ferri*¹ is a recent example of the power of decanting in the divorce context. Trust assets were successfully moved out of reach of

About Modifying “Irrevocable” Trusts

a divorcing wife, although they were considered for alimony purposes. Husband was the beneficiary of a trust (the 1983 Trust) created by his father under which he had the right to receive the trust assets at certain ages.

The trust was valued between \$69 – \$98 million. The trustees, who were concerned divorcing Wife would reach trust assets, transferred the assets to a new trust (the 2011 Trust) without the knowledge or consent of Husband. At the time of the creation of the 2011 Trust, Husband had a right to request outright 75% of the 1983 Trust assets, and during the course of the legal proceedings, his right matured to 100%. The new 2011 Trust extinguished Husband’s power to request trust assets at stated ages, making distributions solely discretionary with the trustees.

Wife had filed to dissolve the marriage in Connecticut, and the trusts were settled in Massachusetts. The Connecticut Supreme Court asked the Supreme Judicial Court of Massachusetts to determine whether the trustees, one of whom was Husband’s Brother, validly exercised their powers under the 1983 Trust to distribute the trust property to the 2011 Trust. The Massachusetts Court determined that since Father, who created the 1983 Trust, intended to convey to the trustees almost unlimited discretion to act, the decanting was authorized. The Massachusetts Court did not rule on whether the trust assets must be considered in the divorce, including for alimony purposes. The Connecticut Supreme Court issued two opinions in the *Ferri* matters – one related to the decanting, the other related to the divorce action.

The trustees sought a judgment declaring that they were authorized to decant assets to the new trust², and that Wife had no right or interest in those

assets. The Connecticut Supreme Court adopted the opinion of the Massachusetts Supreme Judicial Court, and held that the decanting was proper.

The court noted that the Massachusetts Supreme Judicial Court determined that the decanting was appropriate: “Consequently, the assets from the 1983 Trust cannot be considered as part of the dissolution judgment...” With regard to the 2011 trust, because that was a so-called “spendthrift trust” (protected from creditors), it was not considered an asset of the marital estate that the court could divide under Connecticut law. Wife’s status was that of a creditor and the court held that, although the court could divide the assets while they were held in the 1983 Trust, it could not reach them once they were moved into the 2011 Trust, so the decanting was successful in removing the assets from division. However, the court also noted that, although the trial court could not consider the assets decanted to the 2011 trust for equitable distribution purposes, it could and did consider Husband’s ability to earn additional income when creating its alimony orders³. The trial court found that the trust funds had routinely supported Husband’s investments. Notably, the trial court ordered Husband to pay Wife \$300,000 in alimony annually – despite the fact that, when the action was commenced, he had been earning only \$200,000 annually.

Some Further Thoughts About Decanting

About half the jurisdictions in the U.S. provide statutory authority to decant. Most states require that notice be given to beneficiaries. It was important in the *Ferri* case that the decanting occurred without Husband’s permission, knowledge, or consent. Query if the same

result would follow if a beneficiary was given notice of the decanting, or whether notice alone would not detract from the Connecticut Supreme Court’s holding that Husband took “no *active role* in planning, funding or creating the 2011 Trust” (emphasis added).

Including decanting provisions in trust instruments may maximize flexibility without having to resort to state default law. Indeed, in a recent New York case, *Davidovich v. Hoppenstein*⁴, the trustees successfully relied on their powers under a trust document to distribute a life insurance policy on the settlor’s life to a new trust that excluded an estranged daughter of the settlor and her issue. Dismissing an objection that the transfer did not satisfy the requirements of the New York decanting statute, the court held that the New York decanting statute had no bearing on the case since the trustees relied on their powers under the document to effectuate the transfer.

In *Hodges v. Johnson*⁵, however, a New Hampshire court found that trustees had violated their duty of impartiality because they did not consider the interests of beneficiaries who were removed in decantings. The court found that the decantings were void and ordered the removal of the trustees. Although the court’s decision rested on broader grounds, the facts of the case may have influenced the holding: the trial judge

¹ *Ferri v. Powell-Ferri*, 476 Mass. 651, 72 N.E.3d 541 (2017)

² *Ferri v. Powell-Ferri*, 326 Conn. 438, 165 A.3d 1137 (2017)

³ *Powell-Ferri v. Ferri*, 326 Conn. 457, 165 A.3d 1124 (2017)

⁴ *Davidovich v. Hoppenstein*, 162 A.D. 3d 512, 79 N.Y.S.3d 133 (2018)

⁵ *Hodges v. Johnson*, 170 N.H. 470, 177 A.3d 86 (2017)

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How to Become Invisible (and Hide Your Assets)



To find hidden assets, family lawyers have to adopt the mindset of someone who is intentionally trying to make themselves invisible.

By Barry Sziklay,
Forensic Accounting and Valuation Expert

To be able to find hidden assets during divorce, put yourself in the shoes of someone who is trying to become invisible. The only limit on a divorce litigant's ability to conceal their assets and/or income is their imagination.

Levels of Invisibility

In *How to Be Invisible* (St. Martin's Press, 3rd Ed., 2012), author J.J. Luna identifies four levels of "invisibility":

1. **Level 1** – economical, relatively easy ways to conceal your identity (e.g., using a trading-as name as opposed to a corporate name; using a "c/o" address).
2. **Level 2** – Using alternate names to conceal your true identity.
3. **Level 3** – Using shell corporations, single member limited liability companies (SMLLC), or trust/trust-like structures, both on and offshore, to conceal your true identity.
4. **Level 4** – Similar to a "Witness Protection Program", this complete change in location and identity is used by parties who are being hunted by other people or organizations.

As you move up the levels it becomes increasingly difficult to find you – and your assets. It generally takes a lot of money to find the assets of a Level 4 party. In a divorce context, private investigators are generally used to find assets at Levels 1 to 3 whereas former government agents are generally employed to locate an individual and assets at Level 4. The attorney must hire these investigators in order to maintain attorney-client privilege and/or the attorney's right to confidentiality pursuant to the work-product doctrine.

Levels of Invisibility in Divorce

Level 4 is rare in divorce. We often deal with Levels 1 to 3; the more sophisticated the party, the more likely you are to be dealing with Level 3.

To keep their whereabouts secret, Level 3 individuals often have mail delivered to a P.O. box, mail drop, or ghost address (where your mail is delivered, but not where you live). They may use ghost addresses

on their tax returns, licenses, and all forms of picture identification to keep their true address secret.

You can obtain valuable information about someone from their trash, so those in Levels 3 and 4 generally take their trash to dumps rather than leave it for pickup outside their homes.

Frequently, people in Level 3 will put their assets in entities such as SMLLCs, including S corporations, limited partnerships with S corporation general partners, limited liability companies (LLCs) in which the members are other LLCs or S corporations, domestic and offshore trusts and trust-like structures, and tenancies-in-common. All of these are designed to make it difficult to identify the owner(s), and some may also provide a liability shield.

Using a VPN to Hide

To conceal their physical location while online, a divorcing spouse can subscribe to a Virtual Private Network (VPN). InVinciBull, for example, protects your data using military-grade AES 256-bit encryption and allows you to route your email through any of their 76 servers worldwide; ExpressVPN boasts servers in 160 locations in 94 countries! Most VPNs keep some logs and credit card information on file, so if you know which VPN an invisible spouse is using, you could serve a subpoena to get some fairly limited information.

The small monthly charge for a VPN can be prepaid annually with a bank check or money order to further obscure the paper trail. Aside from cash, no payment method is completely untraceable – but a money order paid for with cash, for example, is difficult to trace. Some Level 3s or 4s may use multiple VPNs, varying usage each time to make it extremely difficult to find and access their email.

Telephones can be tapped; registered cell phones can be tracked; regular email is relatively easy to trace; and computers leave a trail of metadata. Using a payment service such as PayPal generates an email to the recipient of a payment, so you could obtain a copy of the email via subpoena.

Hiding Money Transfers

Level 4 spouses might take a page out of the terrorists' playbook by using an Informal Value Transfer System (IVTF) to transfer funds. An IVTF uses a network of people to receive money and then make the funds or an equivalent value payable to a third party in another geographic location. An IVTS is almost impossible to trace.

Although not as good as IVTS, another way to conceal money transfers is to establish a system of U.S. compensating balance bank account arrangements with related foreign branch credit lines outside the U.S. A good forensic accountant can identify the extension of credit outside the U.S., but it is not easy to do so because it requires "connecting the dots." What appears as a foreign loan turns out to be a source of money without a U.S. bank actually having to transmit the cash. SWIFT (Society for Worldwide Interbank Financial Telecommunication) codes are used for international money transfers, but they leave no trail. However, the bank itself would undoubtedly have some

sort of record of the draw of funds – if you can locate the bank.

A compensating balance (a minimum balance kept by a financial institution to support a loan) can help you to find hidden assets. When you send out your discovery request and/or subpoena, you must specifically ask the litigant or financial institution to identify any financial account that serves as a compensating balance – regardless of whether the financial institution designates it as such – and what and where is the related credit account.

How Do Invisible Spouses Communicate with Others?

Spouses who become financially anonymous still need to communicate with others: their children, paramour, accountant, lawyer, banker, etc. But how can they maintain anonymity during communications?

Face-to-face communication is the safest method for an invisible spouse, but that is often unfeasible – particularly when communicating internationally.

One easy way to remain invisible is to use burner phones that you throw away after use. You would pay cash for the phone(s) and the telecommunication charges to minimize any trail.

People in Level 3 or 4 might use self-destructing chat apps in which the electronic message disappears leaving no trace on the devices. These apps include *Snapchat* (message lasts for 24 hours); *Telegram* ("secret chat" option employs end-to-end encryption and has a self-destruct option); *Wicr* (military-grade encryption, sender can control view time); *BurnChat* (claims to be screen-shot proof and untraceable; masks sender's identity; messages self-destruct as you slide to the next one; unread messages are deleted); *Stealthchat* (advanced encryption of phone calls and chat messages; uses burn timer to determine message deletion); *CoverMe* (can send texts to any number from private new number; can make secure private calls; immediate read-message notification followed by immediate deletion); *Secret for iMessage* (messages self-destruct from all devices); *DatChat* (can "Un-Send" a message anytime and "Nuke" to eradicate the conversation); *Confide* (confidential messenger with end-to-end encryption); and *Dust* (erases almost every record of a call from a recipient's phone). ■

This article has been condensed from a seminar Barry Sziklay presented at the 2019 AAML/BVR National Divorce Conference. To learn about the 2020 Conference, visit www.bvresources.com/events/national-divorce-conference-2020. To read the full article, go to: www.familylawyer magazine.com/articles/how-to-become-invisible-hide-assets.



Barry Sziklay (CPA, ABV, CFF, PFS) is the Partner-In-Charge of Friedman LLP's Forensic Accounting, Litigation Support, and Valuation Services. He is a nationally recognized valuation and litigation support practitioner with over 40 years of experience in a broad range of CPA firms as well as within the investment banking industry.

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Assigning Jewish Holiday Schedules in Custody/Visitation Matters

Conflicts in the level of holiday observance between Jewish parents, or Jewish holiday observance altogether between inter-faith couples, makes it imperative to learn some basic Jewish holiday issues.

By Alexandra Leichter, Family Lawyer

Most family law attorneys shy away from religious holiday scheduling because they incorrectly assume that courts are constitutionally prohibited from allocating religious holidays. But the case law often cited – *In re Marriage of Murga*, 103 Cal. App. 3d 49 (1980); *In re Marriage of Mentry*, 142 Cal.App.3d 260 (1983); *In re Marriage of Weiss*, 42 Cal.App.4th 106 (1996) – does not prevent courts from considering religious practices and observances in devising appropriate time-share arrangements. Those cases merely preclude, absent a showing of “harm,” courts from restraining either party

from allowing children’s participation in religious activities or observances.

Most appropriately crafted custody and visitation orders apportion Christian and legal holidays in a manner that best suits parties and their children. There is no reason the same cannot be done with Jewish (or other religious) holidays. However, Jewish holidays are not easily ascertainable from the Gregorian calendar. The Jewish calendar is a lunar one: Jewish New Year is in September or October on the Gregorian calendar, Jewish months have 28 or 29 days, and in Jewish leap years, an entire month is added to the calendar. Additionally,

there are many Jewish holidays, which, depending on the degree of religious observance, may or may not be important to the parties. Conflicts in the level of holiday observance between Jewish parents, or Jewish holiday observance altogether between inter-faith couples, makes it imperative to learn some basic Jewish holiday issues.

How the Four Branches of Judaism Observe the Holidays

Religiously affiliated Jews in the United States are generally members of one of four branches of Judaism: Orthodox, Conservative, Reform, and

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4 Ways Divorce & Co-Parenting Apps Can Benefit Lawyers

Modern divorce and co-parenting apps can benefit lawyers as much as clients; here are four reasons why you should care that your client uses an app specifically designed for divorce.

By Jessica Hoffmann, Lawyer and Entrepreneur

Traditionally, communication applications that help couples going through divorce or co-parenting were thought of as tools for the couples themselves and often suggested for use at the conclusion of a case. Over time, more clients have been struggling with communication during the divorce or custody battles and have turned to their lawyers for assistance. In those cases, lawyers will suggest using an application or, in more extreme circumstances, make the request of the court to order its use.

These approaches miss the fact that these applications are helpful to the family lawyers themselves as well as to clients right from the start of the case. Keep reading to see why you should be recommending their use at the outset of every case to eliminate headaches for you and your client, and thus have more successful



outcomes, as well as gain more business. Asking clients to use divorce and co-parenting apps from the beginning of the legal process is the right thing to do – and they will likely be looking to you for guidance regarding which is the right app to use. Here are four reasons why divorce & co-parenting apps benefit lawyers.

1 A Good Divorce & Co-Parenting App Is a No-Cost Marketing Advantage

Clients often call or meet with multiple attorneys during their selection process. Discussing a tool like this is not common at the outset of a case and can be a differentiator. The clients may not even realize that other lawyers they spoke with have the same access to the tools you mention. You can discuss the advantages (discussed in more detail below) of these tools and highlight how they could save money for the client.

- **More and More Clients Will Expect Use of Technology**
According to the US Census Bureau, 57% of co-parents are under 38. That age group is often more comfortable with technology than we as lawyers are. They see the benefits of how technology can make their lives easier, and the lawyers that put that to use will be more likely to attract and retain clients. Apps are everywhere. Smartphones are in everyone's hands. They are a common part of life and communication. We as attorneys should embrace this reality and take advantage of these tools to enhance our representation of our clients.
- **Clients Are Referral Sources for Lawyers**
The better the client experience, the more likely they will send others your way. Additionally, close to 1/3 of cases go back for a modification or enforcement action. Some applications allow you to maintain connection with the client and may improve your chances to pick up the modification case down the road and put you in a better position to be successful. How? Keep reading...

2 A Quality App can Improve Results for Clients

- **Save Time and Money**
Save their time sending you information, such as text message correspondence (see below). Save your time dealing with receiving those messages outside your normal evidence collection mechanisms. This ultimately results in money saved for your client.
- **Be Prepared**
All texts between the parties are available for their lawyer in real-time as the communication is happening on the lawyer's secure portal. Expenses are tracked from the outset – easier for enforcement or demonstrative exhibits (how many doctor

appointments there were, how much was paid for each, etc.). These tools help automate preparation and bring peace of mind to the busy practitioner that nothing was missed.

3 Specific App Features Can Eliminate Headaches for You

- **Stop Drowning in Text Message Screenshots and Stressing About How to Properly Store Them**
Text message is quickly becoming the go-to communication method for divorcing and co-parenting couples. This is how they are already communicating in their relationship. By using a tool that tracks actual text messages, it makes your clients' lives easier (which, as mentioned above, will improve your service for them and increase the chances they will refer additional business to you). Because their messages are being tracked automatically, it also eliminates their need to take numerous screenshots of their conversations and text or email them to you – making your life easier.
If a client has a need for a longer message, they can use the in-app message feature for those communications. This can still allow access or views for the lawyer to easily review communication and print them for use in evidence.
- **Have Clients Provide Documents Securely**
Clients often are not organized and you can help them. Pictures, videos, audio recordings, and documents like tax returns can all be uploaded and shared. This promotes efficiency by being able to do it just once and provides clients the convenience of being able to access the documents remotely on their mobile device.
- **Expenses**
This is likely going to be something that adds work for your client. They will be giving or receiving reimbursements at some point in time. Either way, this process is in addition to paying their own bills. Using a tool can keep them organized right from the beginning. It also cuts down on unnecessary communication about a tricky topic. The tool also saves time and expenses if enforcement of the court order becomes necessary because you have access and can download the Excel payment file. This can save you time and money for those enforcement actions by helping create the summary exhibits related to expenses.
- **Calendar**
Keeping track of custody arrangements and activities starts even during the divorce. A tool makes all of this easier to track and easier to enforce. Products that

Cont. on page 33



Access to Justice for Immigrant Communities

In immigrant communities, language and poverty can create significant barriers to justice. This new model removes those barriers, allowing lawyers to assist more potential clients with family law issues.

By Dr. M. Jude Egan, Family Lawyer

I have a family law practice (with some immigration) in Santa Maria, CA, a town of about 110,000 residents in northern Santa Barbara County. Unlike its southern neighbor, Santa Maria is a poor community, with more than 60% of residents living at or below 125% of the poverty line and 17% living below the poverty line. As in so many places, race and poverty go hand-in-hand. More than 75% of residents are Latino/Hispanic, 62% speak a language at home other than English, and almost 34% were born in another country (all data, unfortunately, based on the 2010 census, which will be updated this year). Close to 60% of new family law filings are parental rights actions (meaning the parents were not married).

Although so much of becoming a Certified Family Law Specialist is the ability to take “complex” or “high asset” cases and charge a higher fee, in fact, low asset cases with immigration status issues, Hague Convention issues, issues regarding quasi-community property held in other states or countries, cross-border visitation issues, linguistic issues, housing issues, employment issues – including verification of income teaching us all about how Latino workers are taken advantage of by employers – all point to incredibly complex family law matters.

Language Can Create an Insurmountable Barrier

Although I have not observed overt discrimination in our courthouses, I acknowledge that it is incredibly difficult to provide the same blind justice to people who speak another language and have little in the way of experience in speaking up in front of a judge. Spend a morning in family court and listen: first to the advocacy of the attorneys, followed by English-speaking pro per litigants. Enough courtroom teledramas have educated them in the language of advocacy, but Mexican courts, for example, are not places of civil procedure reform and opening of access to justice for self-represented litigants.

Too often Latino litigants spend their entire court time talking about where the baby should sleep and forget to mention hidden assets or an arrest that will lead to a deportation of one parent or a pending eviction or a school IEP or a child walking the thin line toward gang initiation because there is no education system for them (or anyone) to know what or how to ask for what they want. The language barrier makes cross-examination, even by the judicial officer, next to impossible. Hearings border on farce (without blame laid at anyone’s feet).

Non-Lawyers Providing Legal Advice

Santa Maria has a “gray market” of Legal Document Assistants (LDAs) who help prepare and file court documents. Many of them are fluent Spanish speakers and, as a result, they are called upon to assist people through the process. I have long been a proponent of LDA work, especially in communities like mine, but I believe strongly in continuing education because the road is paved with landmines – even for Family Law Specialists, much less for LDAs. My biggest concern is that clients of LDAs cannot request legal advice (we know they do, but they should not receive it from non-lawyers) while they request legal help in filling out documents.

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This creates an opportunity for impropriety. On the other hand, LDAs are an absolute necessity in communities like ours, where, for many of our residents, accessing lawyers is nearly impossible given the poverty and language barriers. Thankfully, the LDAs assist people in doing financial disclosures, but I have been on record stating that LDAs should not draft Marital Settlement Agreements because of the high likelihood of error. The poverty of the parties is no reason to assume a divorce is not complicated; there are many details of many divorces that go unadjudicated or ignored.

Since judges are reactive, they respond only to what they are asked. When parties know neither what nor how to ask – or even what types of things they might ask for – divorces in communities like ours are often incomplete despite the best efforts of judicial officers to properly resolve all issues.

Good judicial officers, of which my particular community is fortunate to have, attempt to resolve what they can and allow Family Code 2556 (reserving jurisdiction over unadjudicated assets), ongoing child support jurisdiction and the ability to modify child custody at a later date. But this effectively means that even good judicial officers are attempting a sort of “rough justice” in which they resolve what they can, dissolve marriages, and figure they will deal with future problems as they come. Because our Spanish speaking litigants’ problems are complex, this “rough justice” approach rarely resolves all issues, including the executory issues: for example, drafting QDROs, transferring title to vehicles and real property, etc.

A Crisis of Access to Justice

In response to what we believe is a crisis of access to justice, my firm launched the Family Law and Immigration Center (FLIC) on July 15, 2020. FLIC is not unlike “unbundled” legal services except that it will provide educational services for the community, including evening classes on family law and immigration issues. FLIC keeps prices low and gives them access to a lawyer with no deposit or retainer by allowing them to schedule time to ask questions, have documents drafted, and learn what to ask for and how to ask for it.

I believe that this model is the only way to deal with multiple problems affecting the immigrant communities in towns like ours. The answer is not, as the State Bar seems to suggest, to open legal practice to non-lawyers, but to permit

lawyers to assist more potential clients. If we get the documents and disclosures right, we make it easier for judges and courts to serve their communities.

At some level, FLIC will provide expanded services of the Family Law Facilitator, but including immigration issues, at prices that even our impoverished residents can afford (likely \$1,000 over the course of the six-month “cooling off” period, with no retainer).



Providing Equal Services to Immigrants

The only way to provide truly equal legal services to immigrant communities is to give them access to lawyers at prices they can afford without retainers. You eliminate the high-priced barrier to entry and allow people to buy hours or fractions of an hour as they need them. Clients have access to legal advice when they need it and, importantly, they learn how and what to ask for in court (including decorum).

The FLIC model can be replicated across jurisdictions to give greater access to justice for non-native English speakers, the poor, immigrants, and people who are otherwise left out by the legal system. Particularly during the pandemic when so many communications are digital, FLIC will be

available statewide so that we may serve other communities. We will gather and publish data as we develop. ■



M. Jude Egan, Ph.D., a California Certified Family Law Specialist, wrote his doctoral dissertation on Jurisprudence and Social Policy. He was commended by the National Voluntary Organizations Active in Disaster for his work drafting the National Nonprofit Relief Framework for a policy paper ultimately adopted by the Centers for Disease Control. www.JudeEganLaw.com

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If Black Lives Matter, Black Dads Must Matter, Too

There is no community that has been harder hit by dad-deprivation than the African-American community. If dad-deprived boys are to avoid destructive role models and the school-to-prison pipeline, we must create scholarships to inspire great male teachers, mentors, and coaches.

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Irrevocable Trusts / Cont. from page 23

found that the trustees decanted the trusts to remove beneficiaries in three separate decantings at the request of the settlor and commented on the “deeply personal and harsh nature of the decantings.” The removed beneficiaries were the grantor’s second spouse, his stepchildren, and one biological child, leaving his other two children as beneficiaries. In each of the three decantings, one of the two individual co-trustees resigned; the settlor’s estate attorney was appointed as trustee to replace the trustee who resigned; the co-trustee who remained as trustee delegated his decanting power to the attorney/trustee; and the attorney/trustee executed the decanting documents. Once the decanting documents were executed, the attorney/trustee resigned as co-trustee, and the individual trustee who had resigned was re-appointed. This occurred on three successive occasions.

Perhaps this is just a reminder that trustees must be vigilant about performing their fiduciary obligations, and cannot act at the behest of the settlor or any other individual. Including specific guidance in trust agreements as to why the settlor may wish the trustee to exercise discretion unevenly may be helpful.

Collaboration Early and Often Is Key

Clients benefit when matrimonial, trusts and estates, and accounting and investment professionals partner throughout the whole divorce process to integrate considerations that cross disciplines. If a family law practitioner finalizes the divorce and then refers a client to a new investment advisor and/or trusts and estates attorney, it may be too late to address a myriad of issues that should have been resolved before the divorce is concluded. Many nuanced issues require the input of a team of advisors before the divorce decree is signed. ■



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Trusts & Estates Counsel, and she chairs the Domestic Relations Committee of Trusts & Estates magazine.

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Co-Parenting Apps / Cont. from page 29

sync with your client’s already established calendar promote convenience for the client and help to avoid arguments about unclear responsibilities and possession schedules brought on by orders difficult for a layperson to easily understand.

4 You Have a Duty to Provide Appropriate Guidance to Your Clients

Anticipating issues clients are going to have is better than waiting for things to get out of hand. If they are dealing with someone who may be a narcissist, dishonest, and/or difficult to deal with, then they need to protect themselves. Many lawyers advise clients not to communicate via phone and limit communication to writing. Similarly, maintaining written communication that is easy to monitor, review, and use in evidence is the best advice you can give.

Why wait to advise clients to use a communication tool until mediation or decree when many of the hot button issues have been resolved, or only after communication is breaking down? Some of the most detrimental communication occurs in the midst of the divorce or custody battle. Having communication tracked and stored in a manner that cannot be altered can be a deterrent to bad behavior. Even if it isn’t, the communication is then very easily and

cost-effectively used in court. Protect your client’s information now – don’t wait until it is too late. ■



Jessica Hoffmann is the CEO of FamilyDocket, a software application that records and aggregates text messages, tracks reimbursements, and

securely stores documents. She is also a lawyer and Chief Strategy Officer of Clark Hill Strasburger. www.familydocket.com


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4 Tips for Handling a Custody Case with a Military Parent

When one party to a custody dispute is in the military, the lawyers must consider the requirements and expectations of military service when proposing custody arrangements.

By Kristopher J. Hilscher, Family Lawyer

The military service of a parent frequently impacts custody and visitation rulings. When one party to a custody dispute is an active servicemember, the lawyers must consider the requirements and expectations of military service when proposing custody arrangements. Here are some of the most important points to remember regardless of which side you represent.

Tip 1: Delay and the SCRA

The servicemember parent may need to request a stay of proceedings under the *Servicemembers Civil Relief Act* (SCRA: 50 U.S.C. § 3901 et seq). A request for stay shall be granted upon the servicemember's application (50 U.S.C. § 3932[b][1]), though this mandatory stay has requirements. The movant must provide a letter or communication in the application for stay that:

1. states that the current military service impacts the servicemember's ability to appear, and
2. states a date upon which the servicemember will be available to appear.

The movant must also provide a letter or other communication from the servicemember's commanding officer stating that military duties prevent the servicemember's appearance and leave is not authorized at the time of the letter.

If you represent servicemember Sally Doe, make sure to investigate the facts with her and determine whether you can meet the requirements and apply for a stay. Denial of a stay has been determined to be reversible error in custody cases,¹ and therefore the lawyer should obtain all relevant facts and carefully work through the SCRA stay issue.

If you represent the non-military parent, you should prepare to defend against a stay sought solely for delay or for improper purposes. Also, inform your client of the possibility of a stay request; the client will appreciate your knowledge and that you are taking a proactive approach to a potential SCRA stay issue, and an informed client is (usually) a happy client.

Tip 2: Know Your Remedies

In the last few years, the 2012 *Uniform Deployed Parents Custody and Visitation Act* (UDPCVA) has been passed in 14 states; currently, the states include Florida, West Virginia, Utah, Iowa, South Carolina, Nebraska, Arkansas, Minnesota, North Dakota, South Dakota, Tennessee, Nevada, Colorado, and North Carolina (see Uniform Law Commission: www.uniformlaws.org). A majority of states have enacted similar legislation supporting or addressing the custodial rights of military parents.²

The chief remedy provided by the UDPCVA is the delegation of visitation rights by the servicemember. The court may grant substitute visitation under the UDPCVA, essentially allowing a non-parent to step into the deployed servicemember's place. A judge has the authority to delegate decision-making authority as well.

This can be a powerful tool for the attorney and for the servicemember. I have used this tool in the past to

equalize the positions of the parties and negotiate a resolution to the entire case. The grant of authority has the following requirement: the individual to whom delegated rights are granted must have a *close and substantial relationship* with the child.

Tip 3: Stake Out Your Territory

Military family law requires an investigation of jurisdictional questions on a regular basis. Servicemember Sally Doe may live at Fort Bragg in North Carolina for military assignment – but

if Sally is reassigned to Joint Base Lewis–McChord outside of Seattle, Washington and her child goes with her, is the child's home state Washington? To make matters worse, suppose that Sally pays personal property taxes, votes, and lists her *home of record* as Arizona. What is a practitioner to do?

A court order including the facts, the transient nature of Sally's career and assignments, and a custodial schedule can help to prevent either parent from taking advantage of a jurisdictional quandary. While jurisdiction cannot be transferred by consent (see *Strommen v. Strommen*, 927 So. 2d 176 [Fla. Dist. Ct. App. 2006]), a court order can go a long way towards preventing a multi-state or interstate custody battle.

Tip 4: Plan for Distance

Attorneys involved in a military custody case must address the challenge of planning and paying for long-distance custodial situations. Military assignments change and it is very common for a servicemember and the other parent to be separated by thousands of miles.

What can be done?

First, always advise your client to include an order that takes military duties, distance, travel limitations or availability, and any related factors into account. A good remedy is to include two custodial schedules in any order: one schedule that applies if the parties reside within a short radius, say 50 miles; and a second schedule that applies if the parties live outside of the short radius. If the servicemember is anticipating living far away from their co-parent – such as an international

Attorneys involved in a military custody case must address the challenge of planning and paying for long-distance custodial situations.

permanent change of station (PCS) – the practitioner may want to include a third custody schedule that takes the extended travel time and expenses into account.

Second, address transportation costs, fees, and realities in the agreement, consent order, or in evidence and argument to the court. Who will transport the child to the airport, train station, etc.? What notice is required before arranging a flight? What factors should be considered in selecting a flight? Can the child fly alone? What costs are associated with travel? Are there fees for additional services, such as “flight buddies,” or additional tickets needed for a parent to travel with the child(ren)? These issues – and any

¹ See e.g., *Williams v. Williams*, 552 So. 2d 531 (La. Ct. App. 1989); *Kline v. Kline*, 455 N.E.2d 407 (Ind. Ct. App. 1983); *Coburn v. Coburn*, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982).

² National Conference of State Legislatures (NCLS): 2018 NCLS's Child Support and Family Law Legislation Database.

other issue applicable to the facts in your case – should be included in any order or agreement. As a practical tip, this factual research can be quite costly if done at an attorney's or paralegal's hourly rate. If possible, delegate the task of investigating options for travel, the associated cost, the anticipated travel time, and so forth to the client.

Resources for Family Lawyers

Due to space constraints, this is only a partial review of the custody issues faced by military parents. For more information, see *The Military Divorce Handbook* (Am. Bar Assn., 3rd Ed. 2019) by Mark E. Sullivan. There are many resources available for family lawyers handling military custody cases available at www.nclamp.gov. For the SCRA, see "A Judge's Guide to the Servicemembers Civil Relief Act" at www.nclamp.gov/media/425665/jdg-guide.pdf. For a look at the UDPCVA, see www.ncsl.org/research/military-and-veterans-affairs/military-parent-custody-and-visitation.aspx or the applicable statutes in your state. ■



Kristopher J. Hilscher practices family law at the Law Offices of Mark E. Sullivan, P.A. in Raleigh, North Carolina and is a frequent presenter and author on military family law issues.

He works with attorneys and judges nationwide on military divorce issues and in drafting military pension division orders. www.ncfamilylaw.com

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The Uniform Deployed Parent Custody and Visitation Act

This Act is a vast step forward in providing standard steps, rights, and procedures to use when a military parent leaves on unaccompanied military business.

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Jewish Holidays / Cont. from page 26

Reconstructionist. The Orthodox branch observes every holiday to the maximum extent prescribed by Jewish law. Conservative and Reconstructionist branches have more liberal observance practices, while the Reform branch often adjusts observance to particular secular lifestyles.

Nevertheless, all four branches concur about the *existence* of each of the holidays. By way of example, Rosh Hashana, the Jewish New Year, always occurs on the first day of the first Jewish calendar month (which falls in either September or October). However, while Orthodox and Conservative Jews celebrate two days of Rosh Hashana, many (though not all) Reform and Reconstructionist celebrate only the first day.

Further, on Sabbath and most major holidays, Orthodox Jews refrain from many weekday activities, such as working, traveling in a vehicle, answering telephones, handling money, carrying objects outside the home, etc. Many Conservative Jews interpret no-work-on-Sabbath rule more liberally, and they may answer telephones, drive cars, etc. Reform Jews attend synagogue, and may have celebratory meals on the Sabbath and the holidays, but they observe very few of the other restrictions on the Sabbath and on most major holidays.

Key Issues in Assigning Jewish Holiday Schedules

One key issue is learning each parent's mode of holiday observance. For example, Orthodox parents not living within walking distance of each other cannot split a two-day major holiday because the children cannot travel during those two days. Similarly, assigning each parent one of the two Seder evenings on Passover is meaningless if both parents are Reform Jews because they celebrate only one Seder night.

With limited exceptions, Jewish holidays (and Sabbath) begin at sunset the evening before the holiday (or Friday for Sabbath) and end one hour after

sunset on the last day of the holiday (or Saturday for Sabbath). Another important consideration is that a major two-day holiday occurring on a Thursday/Friday, or a Sunday/Monday, extends that weekend for Orthodox Jews into three days because travel and work is prohibited on Saturday as well.

Finally, remember that in interfaith marriages, Christmas and Hanukkah often conflict, as do Passover and Easter.

For a schedule of all Jewish Holidays this year, go to www.calendarlabs.com/holidays/jewish/2020. You can also download free Jewish calendar apps for your mobile device at the App Store or Google Play. ■



Alexandra Leichter is a California State Bar Certified Family Law Specialist, a fellow of the American Academy of Matrimonial Lawyers, a fellow of the International Academy of Family Lawyers, and an AAML Certified Family Law Arbitrator. She has written and lectured widely on Jewish and Islamic divorce laws. www.ilmfamilylaw.com

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Are You Learning to Fail or Failing to Learn?



As a family lawyer, failing to learn from your mistakes – without feeling like a failure – can spell disaster for your career, happiness, and health. Here's why.

By James Gray Robinson,
Family Lawyer

Most lawyers would agree that the practice of law – especially family law – is demanding if not downright difficult. Not a single lawyer I know would claim that the practice of law was simple or easy. While acknowledging that the law can be complex and challenging, family lawyers still expect to be successful. When the concept of failure creeps into a lawyer's consciousness, life can get depressing; in more cases than we'd like to admit, feelings of failure can lead to a lawyer self-medicating with alcohol or drugs.

My personal definition of failure is "not living up to expectations." Practicing lawyers are, by definition, successful: they had to be successful in school, law school, and bar exams to become practicing lawyers. However, when we compare ourselves to others, we can feel like failures because we haven't met our goals or done as well as others. How can we turn these disappointments into success?

Why Learning to Fail Is Crucial to Success

One of the most productive and effective ways to become successful is to "take inventory" of your professional strengths and weaknesses on a regular basis, examining what you did well and what you'd change if you had a "do-over." Remember, your

arguments and strategy can be flawless and you can *still* lose a case due to variables beyond your control; this is where learning to fail without *feeling* like a failure will come in handy.

I don't know many lawyers who take the time to do a post-mortem or examination of a meeting, trial, relationship, project, or career. What did you say or do that worked? What did you say or do that *didn't* work? Make a list of both – especially what didn't work – and review it regularly. Forgetting or failing to learn what didn't work may doom you to repeat the misstep.

When taking your inventory, consider asking your colleagues or contemporaries to help by offering their opinions on what did or didn't work. Different perspectives can help you focus on specific things you need to change to be more successful. Unless you're a solo practitioner, consider having all the lawyers in your firm take their own inventories, then meet for a post-mortem on all the firm's cases so you can learn from each other's experiences.

As family lawyers, we often spend all of our time completing a project, looking for new clients, and moving on to the next pressing project. We seldom, if ever, take the time to reflect on what happened during our last project or case. If we make a list of things to change (or never do again), it can be a reference point for a strong trajectory in our career.

Get a New Measuring Stick for Success

Another way to recognize your success is to change the measuring stick. We often measure our performance or abilities by comparing ourselves to others. This is inherent in law firms where we are always jostling for position to make partner, and then to get larger partner shares. If this is your only measure of success, then you will

often be disappointed. Here's a better way to measure your performance: Did you give your absolute best? Did you research, study, and prepare for every possibility, or did you fly by the seat of your pants?

Ultimately, you need to decide whether you are meant to be a lawyer or not. Although we often forget this, we are human beings *first* and lawyers *second*, and being successful at the former is far more important than the latter if you want to be happy. It takes a certain kind of self-discipline, mental attitude, and passion to be a successful lawyer; sometimes, we may have to admit we are better suited doing something else.

I became a lawyer initially to please my parents. To be perfectly honest, I would have rather have been doing something else – preferably outdoors. I was a successful lawyer, so I kept practicing a lot longer than I probably should have the first time around.

A Family Lawyer Can Learn More from Failure Than Success

We need to learn from everything that we do. Keeping inventories is an excellent way to learn – as is repeating this mantra: "There are no mistakes, only learning opportunities." People with law degrees or law licenses often make extraordinary business professionals, politicians, and CEOs. The preparation required to gain a law degree or a license makes us disciplined and focused, and few people have the talent or the mental ability to achieve these things. If practicing family law is making you miserable or jeopardizing your health, do not be afraid to explore other uses for your legal talents.

Ironically, I quit practicing law not because I was a failure but because I was too good at it – without the feelings of accomplishment and happiness that should have come with success. As I reflect on my career, I knew I wanted

to do something else, but because I was successful and wanted to please my family, I couldn't bring myself to follow my dreams.

Perhaps I would have gotten there sooner if I had been a complete failure, since that's often the signal that we need to make a big change. If you keep failing to achieve results that make you proud, then you are in the wrong law firm, the wrong area of practice, or the wrong profession. Look very hard at what you are doing and decide what you need to change. In that regard, failure can be both liberating and fortunate.

Examine what went well and what did not, keep lists of these things to refer to regularly, don't compare yourself to others, and look at failure for what it is: an invitation to change. As the old saying goes, if you keep doing what you are doing, you will keep getting what you are getting. If that's not good news, then you're likely overdue for a change. ■



James Gray Robinson, Esq. was a third-generation trial attorney, specializing in family law, for 27 years in his native North Carolina up until 2004, when he became a business consultant. At the age of 64, Gray passed the Oregon bar exam and is again a licensed attorney.

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Are You a MASTER NEGOTIATOR or Merely an Effective One?

What sets outstanding family law negotiators apart from the merely competent? Bob Bordone, founder of Harvard's Negotiation and Mediation Clinical Program, recently spoke with *Family Lawyer Magazine's* Diana Shepherd about crucial skills and mistakes, changing the tone, and handling difficult clients.

Diana Shepherd: Negotiation is a crucial lawyering skill. What are some of the most common mistakes that family lawyers make in negotiation?

Bob Bordone: The common mistakes that family lawyers make are probably similar to the kind of mistakes that most of us make when we negotiate. The foremost one is that we tend to think of negotiation as a battle of wills, a back-and-forth process where the goal is to make the fewest, smallest, and least important concessions that take other side the longest amount of time to extract from us. Some family lawyers think of negotiation as a battle – but the most skillful attorneys see negotiation as an opportunity to advance not only the interests of their own client, but also the interests of the other side and the family members, both in the short and long term.

The second, related mistake is missing the opportunities – particularly in family situations – to achieve mutual gains. Family lawyers sometimes fail to look beyond their client's demands, which often involve anger, bitterness, and rancor, to identify the deeper underlying interests. These interests can provide opportunities to move beyond a mere distributive negotiation to something we call "mutual gains" or "interest-based negotiation."

Some people contend that family law is not well-suited to interest-based negotiation because the issues are primarily distributive. What do you say about that?

Bob: Family lawyers often tell me that family situations are different because they're so distributive. I would say, "Yes and no." There are some distributive questions in family situations, including everything from child custody and who gets the marital household to the division of assets. But because it is a family situation where there are lots of emotions, differing needs of parties over time, and ongoing relationships, there are many opportunities to create real value between the parties.

There are opportunities to turn those purely distributive questions into ones that actually are quite amenable to a mutual gains approach. For example, people may have different preferences with respect to how things get divided, what's most important to them, and how things might change or evolve over time. In fact, many times what looks distributive can actually be an opportunity for mutual gain. One parent says they want more visitation; the other is reluctant. When you look deeper, the parent who is reluctant

is actually concerned about last minute cancellations and thinks they will be less likely if the parent demanding more visitation has fewer opportunities to see their children. But once you unearth the real concern – worries about cancelled visits – many more creative outcomes are possible.

Lastly, I think part of the argument or claim that family negotiations are primarily distributive can be tracked back to a psychological bias where we tend to over-focus on the areas of difference and ignore or downplay the areas where there might be shared or differing and non-competing interests.

What is the most important skill of a great negotiator?

Bob: It's easy to identify and hard to do well: active listening. This can be counterintuitive to those who are new to the field. They may think, "Wait a minute, isn't negotiation supposed to be persuading somebody? How am I persuading them if I'm listening to them?"

Active listening, which is asking curious questions, acknowledging underlying emotional content, and making sure that you've carefully understood everything the other side has said, has a number of valuable impacts in negotiation. First, just making the other person feel understood reduces their own kind of repetitive behavior and moves them into a place where they can be more constructive and problem solving.

It can also provide critical information that can help you better understand what might be persuasive to them.

While I rank active listening as number one, it is also perhaps the hardest thing to do and the most tiring, because good active listening is not a passive event. It is, in fact, active. It's training your mind to be present when the other person is speaking and making sure you do what is necessary to make them feel truly heard and seen.

Is it possible to actually change the tone of a negotiation if only one person is doing active listening? I can see going in there with all of the best of intentions that you are really going to listen to the other side, but if the other side comes back and tries to run you over with a Mack truck, maybe your listening goes out the window?

I think it is much harder to do when the other side is not inclined to do much listening. When I am asked to mediate family situations, especially those involving multiple family members, I'll often try to persuade them to do some training with me first, because it's clearly better, as your question indicates, when both sides participate in active listening.

Having said that, I think that even if just one side is doing the listening, there's an increased likelihood that you can move to more constructive problem solving. At some point, the person who is doing the bullying or yelling in the face of really skillful listening typically moves away from whatever it is they're doing. Their intransigent behavior really isn't working; it's not causing a fight back, a surrender, or a cave in, and it starts to look ridiculous.

Of course, this doesn't always work. But I would distinguish really good listening from caving in or making concessions, even if the listening is not effective, because it changes the negotiation dynamic. And you lose nothing by doing it, except maybe a bit of time.

What if the difficult client is yours? Can you negotiate effectively when you have an unreasonable client? Or is litigation the best choice for really difficult clients?

Bob: When people come to their lawyer for a family situation, they're not typically feeling good about their relationship, themselves, or their life. From a negotiation perspective, it is critically important for lawyers to see their interactions with their clients as negotiations. It would be an error to agree to their client's demands or to say, "Here are the reasons why you'll never get that in court, or here are the reasons why that doesn't make sense."

Both of these approaches could get a lawyer in trouble when they're negotiating across the table with the other side. Instead, it's important to use active listening skills to acknowledge the challenging emotions that are coming up, and to help the client distinguish their emotional needs from what they're asking of the other party. This requires the same set of negotiation skills around listening and perspective, taking their time, of course, when a client is exhibiting challenging behavior that they're not going to change. In this situation, I think the lawyer should "reality check" their client. Attorneys are familiar with the term BATNA, which is, in negotiation parlance, the best alternative to a negotiated agreement. ■

What happens if you don't reach an agreement in negotiation or mediation? Visit www.familylawyermagazine.com/articles/master-negotiator-or-merely-effective for Bob Bordone's answer to this and other questions about family law negotiation.



Bob Bordone is an internationally recognized expert, speaker, author, and teacher on negotiation, mediation, and consensus-building dialogue. A visiting clinical professor of conflict transformation at the Boston University School of Theology, Bob was also a clinical professor of law at Harvard Law School for more than 20 years.

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Best Practices for Child Estrangement Cases

It takes practice and expertise, but if you take the right steps in a timely manner, then the estranged child has a chance to form a healthy relationship with *both* parents.

By Marjorie S. Slabach, Judge Pro Tem

If you have been practicing in family law for a few years, you will have run into at least one case where a child is resisting contact with a parent.

Even though these are a small minority of cases, they take up an inordinate amount of time in your law office and in the court. More often than not they end with the complete loss of parental contact, which carries with it poor outcomes for the child.

Since the mid-1980s, this phenomenon has erroneously been called “parental alienation syndrome” as an umbrella term for all manner of resistance. The DSM-V has chosen not to identify the phenomenon as a syndrome, so presenting it as a syndrome in trial testimony should not meet the *Daubert* test. Research experts in the field have found that the factors involved are rarely simply the matter of one *evil parent* alienating the child against the other *model parent*. Therefore, focusing on a parent’s actions by using the term “parental alienation” to describe all forms of this dynamic is too narrow and loses sight of the child.

The Estranged Child

Instead, let us call the child an “estranged child,” and the parents either the “favored or aligned parent” and the “rejected or alienated parent.” When we talk about estrangement we will also use terms such as *realistic* or *unrealistic* estrangement. And rather than talking about all *protective* actions by the aligned parent as alienating, we will discuss it in the form of *gatekeeping*. These



terms have very specific meanings in the research literature and must be used carefully.

As the action plays out in our offices and courts, the big question is always: “Is the child justified in rejecting the parent due to some danger presented by that parent, or is there some active alienation occurring?” If, in fact, the estrangement is justified, we say that the gatekeeping coming from the favored parent is appropriate – e.g., the rejected parent is physically or emotionally abusive or a danger to the child as a result of drug abuse, alcoholism, or intimate family violence.

More often than not, the case is a hybrid case – a mix of inappropriate gatekeeping on the part of the aligned parent, poor parenting from the estranged parent, the child’s personality and age, and outside forces in the family’s environment. Ferreting out the factors that went into creating this toxic cocktail is the important job of both mental health professionals and the attorney.

The Problem with Estrangement

If a child doesn’t want contact with a parent and that parent has some parenting difficulties, why not just leave it alone and stop trying to bring the two together? What’s the harm? Unfortunately, the consequences to the child are severe.

One of the most devastating consequences is the lesson the child learns: that avoidance is the proper solution to difficult situations and conflict.

Best Practices for Family Lawyers

Lawyers working in the child estrangement arena should focus on three themes:

1. This is a case requiring intervention with the whole family, not just the child or the child and rejected parent.
2. It takes a team of legal and mental health professionals acting as a team – pulling in the same direction and not pulling against one another. This team creates the container of expectations, close monitoring, and consequences for failure.
3. Because estrangement can become more entrenched as time goes by, time is the enemy. Work fast!

The characteristics of a good family lawyer for these cases include:

1. An inquiring mind and healthy skepticism;
2. Openness to seeing the vulnerabilities of your client;
3. Willingness and ability to be a team player;
4. Ability to acknowledge the possibility that what your client wants may not be what’s good for the child; and
5. An appreciation of the complexity of the case.

4 Dos and Don’ts for Lawyers

1. **Don’t** adopt your client’s story without question. **Do** keep an open and inquiring mind about the whole family system.
2. **Don’t** interview the children. **Do** refer the children to an ethical, experienced therapist for an assessment.
3. **Don’t** scream “parental alienation” – that’s a conclusion, not a description and you’ll embarrass yourself if you use the term “syndrome.” **Do** describe the behaviors, facts, concerns you are seeing.
4. **Don’t** delay the process or hearings. **Do** get to the judge quickly and ask for a team meeting.

The Ideal Team

The judge is an essential member of the team. They are the role model for good parenting – spelling out expectations, using the bully pulpit to educate and persuade, and creating accountability by responding appropriately to misbehaviors. And the judge has the authority to order appropriate interventions that can reintegrate the family system.

The ideal team is made up of the judge, the attorneys, the therapists for the family members, and a therapeutic coordinator, and perhaps minor’s counsel. This is an expensive prospect, and it can be whittled down to the absolute essentials of a family therapist and a judge. The judge is the team leader and active participant; the lawyers are supportive of the team process and not adversarial; the parents give the

therapists authorization to talk to one another and to the coordinator who talks to the legal team members.

The team creates a specific and detailed court order regarding the parenting schedule and the parents’ roles and responsibilities as well as the intervention process and description of the roles and responsibilities of each of the team members. The orders will state the objectives of the intervention, the timing of the frequent return to the court, and the consequences of a violation of the court orders.

A Healthy Relationship with Both Parents

It takes practice and expertise, but if the team of legal and mental health professionals avoids delays, creates detailed court orders, and meets frequently to manage the case and share information, then the child has a chance to form a healthy relationship with *both* parents. ■



Marjorie A. Slabach is a traveling family law judge pro tem. A retired San Francisco Superior Court Commissioner, she is past-president of Overcoming Barriers (www.overcomingbarriers.org), an organization that provides programs for professionals and families dealing with high-conflict parenting issues. She has been a California Certified Family Law Specialist since 1992. www.mslabach.com

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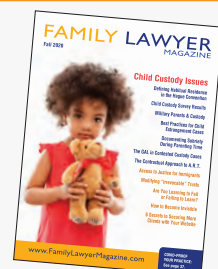
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Dan Johnson is a Los Angeles divorce lawyer who has been practicing family law exclusively for 20 years. An accomplished family law attorney, Mr. Johnson is a Fellow of the American Academy of Matrimonial Lawyers who has also been named as a SuperLawyer and a Best Lawyer in the past 5 years. He provides clients with comprehensive representation in a variety of family law matters, including divorce, property division, alimony, custody and child support.

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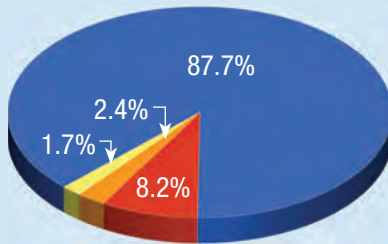
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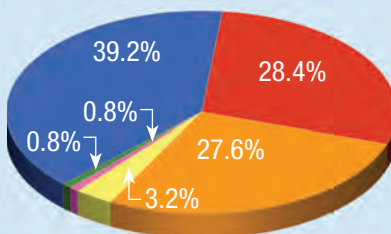
Over the last 5 years, your contested custody cases result in?

- Joint legal custody
- Sole legal custody to the mother
- An Assortment & Guardianships
- Sole legal custody to the father



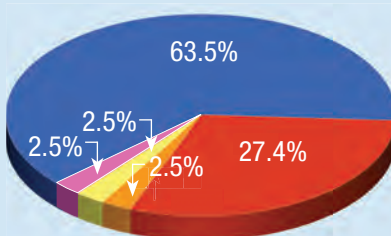
Over the last 5 years, what is the most common parenting time/custody arrangement you have seen?

- Joint Physical Custody (e.g., 60/40)
- True Shared Parenting (50/50)
- Father every other weekend + midweek
- Parenting Time Varies Due to Schedules
- Mother every other weekend + midweek
- Birdnesting (i.e., kids remain in the home, Mom and Dad alternate)



Do you think the starting point of legal and physical custody should be:

- No presumption: each case is unique
- Joint (50/50 to 60/40 with adjustments based on the circumstances)
- Sole custody to the children's primary caretaker pre-divorce
- Joint legal custody, no presumption regarding physical custody
- The best interests of the child(ren)



Child Custody Survey Results

Family law professionals answer the question: "Do you think the laws related to child custody need to be changed?"

By Diana Shepherd, CDFA®, Editorial Director of *Family Lawyer Magazine*

Our original plan was to take a "2020" look at custody across the nation by sharing responses to a survey in our Spring issue. When lockdowns started, we switched gears and created a special COVID-19 issue instead. Conducted from February to April, many of these survey responses pre-date COVID-19, but the insights are no less valid.

Of the 120 respondents, almost all were family lawyers (117), some of whom were also mediators (38). We received too many responses to share in these pages; to read them all, go to www.familylawyermagazine.com/articles/child-custody-2020-survey-results. Here is a sampling of the written responses.

Is a 50/50 a Good Presumption?

"We should start with a presumption that both parents will be sharing time and responsibilities.

~ Amanda Bradley, Family Lawyer

The notion that 50/50 is the starting point needs to be either codified or renounced by statute.

~ Amy Goodblatt, Family Lawyer & Mediator

The presumption of true joint physical custody leads to unjust results.

~ Leigh Carson, Family Lawyer

The presumption of shared 50/50 custody would be a great place to start – then let cases deviate from there as needed based on circumstances. The current system whereby the parents either have to agree on 50/50 or go to court and risk losing custody is terrible.

~ Karen Leiser, Family Lawyer

When the default order is a 50/50 timeshare, many children experience substandard parenting much of the

time and a chaotic life no adult would tolerate (having to move between two homes all the time). Courts should focus on determining which home better suits the children's needs. The emphasis on fairness to the parents shortchanges children of divorce.

~ Christopher F. Emley, Family Lawyer

We need a preference for joint legal and shared physical custody, and a default statute on parent relocation.

~ Anonymous, Family Lawyer

There's such a strong leaning toward joint parenting right now that even when there are issues of the children's safety, the court [favors] shared parenting. This may not be appropriate when one parent is involved with drugs or alcohol, or has never provided appropriate care for the children.

~ Christy Collins, Family Lawyer

Set ideas relating to the importance of equal time with each parent often result in failure to fully examine each parent's ability to parent, the relationship between parent and child, an examination of the child's feelings toward and desire to have contact with the parent, and the lifestyle of each parent.

~ Anonymous, Family Lawyer & Mediator

The whole notion of a "tie-breaking authority" in joint legal custody is nothing but sole legal custody.

~ Vincent D. Sowerby, Family Lawyer

A presumption of joint legal custody is a good idea – as is 50/50 physical custody with consideration given to the primary caretaker pre-divorce. But not too much consideration: just because one parent did the most of the childcare does not mean that the child did not

learn important skills and habits from the other parent.

~ Stacy Albela, Esq., Family Lawyer

Although each custody case is unique, the reality in the Bay Area is that there is a strong presumption in favor of 50/50. If that is the de facto law, then actual law should state that expressly.

~ Vanessa Hierbaum, Family Lawyer

The Best Interests of the Child

"Best interests" is a very vague standard. The elements should be codified and more overt.

~ Joy Rosenthal, Family Lawyer

There should be clearer guidance beyond "what is in the best interest of the child." A presumption of 50-50 shared physical custody – without a hard-and-fast rule to mandate it – would help.

~ Lawrence Rothbart, Family Lawyer & Mediator

The Language of Custody

The statutory language needs to be updated to reflect modern concepts, using terms such as "physical custody" instead of "visitation." Parents don't "visit" their children – they exercise physical custodial periods or parenting time.

~ Moura Robertson, Family Lawyer

We need to focus less on labels (e.g., sole, primary) and more on a shared custody agreement based upon the particular facts of each case.

~ Martin Charlton, Family Lawyer

We need to codify custody law and the best interests of the child standard, update language, and strengthen custody law for when DV/child abuse is alleged.

~ Anonymous, Family Lawyer

We don't have a definition for "Custody" in the statute. The small changes have not been child focused, and there is not enough understanding of children's developmental needs.

~ Rose Hubbard, Family Lawyer

Maryland has no legislation on custody "factors" – it is all case law. However, our Court of Appeals now requires parties to

provide Parenting Plans with guidance as to factors the court might consider. If the parties agree on all issues, the the Court will adopt the Plan. If they disagree, they will offer testimony on the areas of disagreement.

~ Keith N. Schiszik, Family Lawyer

Judicial Discretion

Judges have too much discretion and the rules should be tightened to permit appeals to review abuses. When making permanent custody arrangements, judges should be discouraged from relying upon pre-court filing custody arrangements as this almost always favors a non-working parent.

~ Anonymous, Family Lawyer

Depending on which judge is hearing the case, a father may or may not have a fair shot at shared custody. Current research and common sense support the idea that shared custody should be the starting point when feasible and in cases not involving domestic or drug abuse.

~ Taylor Fontenot, Family Lawyer

The application of the laws need changing. The law presumes judicial neutrality, but the reality can be quite different. This is not the case in every jurisdiction, but gender bias regarding custody does still exist.

~ Byron Morgan, Family Lawyer

The current "alphabet soup" of determining factors is overly long, and tasks the lawyers, GALs, and the judges with too many miniscule details. It also prevents the GALs and judges from making good and clear decisions in the best interests of the minor children, who are the only ones in the dissolution case who are without a voice.

~ Rebecca Amster Cantor, Family Lawyer & Mediator, GAL

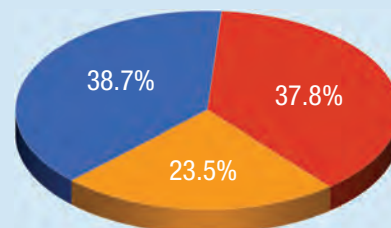
Child Support and Custody

We need more clarity regarding the interplay of parenting time and child support, and we need to better articulate a standard so that there is neither a "penalty" nor a "bonus" involved when parents are sharing physical custody.

~ Francine Cohen, Family Lawyer

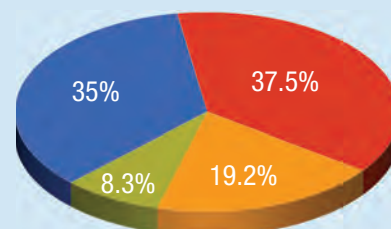
Do you think the laws relating to custody in your state need to be changed?

- Yes, they require a major overhaul
- Yes, they need minor adjustments
- No change is needed



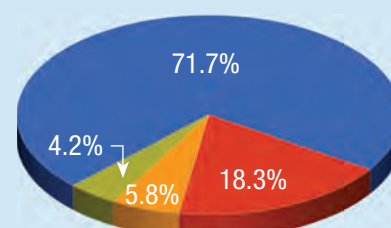
What percentage of your custody cases have been high conflict?

- less than 25%
- 25 to 50%
- 51 to 75%
- more than 75%

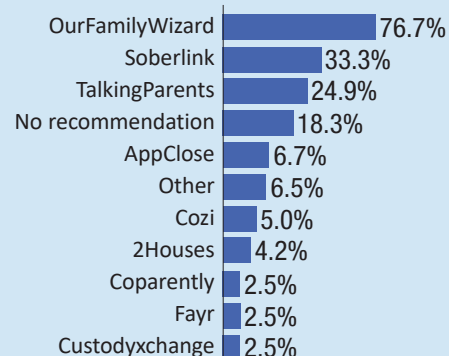


In what percentage of your contested custody cases do you use a parenting evaluator?

- less than 25%
- 25 to 50%
- 51 to 75%
- more than 75%



Do you recommend any apps or software to help your clients co-parent during and after divorce?



There always seems to be a fight over overnights because it affects child support. I had a case where the father cared for his child from after school to bedtime on weekdays, but because he didn't have overnights, he paid support as if he only had his child every other weekend. We should be able to arrange creative parenting plans that help both parents and the children *without* the fear of affecting child support.
~ *Natalee Picillo, Family Lawyer*

Domestic Violence, Mental Health, and Special Needs Issues

The opioid crisis has created an overload in our custody courts and more grandparent custody cases. But grandparents get old, and some will die with minor grandchildren in their custody. The statute makes it difficult for other family members to pitch in because there's a presumption that the petitioner is a bitter sibling – not a caring aunt or uncle who has actually been involved with the children for years. The courts give too much weight to the natural parents and not enough to what has actually been going on in the family.
~ *Anonymous, Family Lawyer & Mediator*

Current laws are insufficient in addressing domestic abuse, chemical dependency, and reunification.
~ *Anonymous, Family Lawyer*

Mental health issues cloud the “usual” plans and don't seem to have a good path to be part of the resolution of the issues.
~ *Anonymous, Family Lawyer & Mediator*

The statutes do not take into account the needs of special needs children and the judges do not seem to have any clue about how to handle these cases.
~ *Rebecca Fischer, Family Lawyer & Mediator*

Other Suggestions

Issues regarding parenting do not belong in an adversarial system. The Santa Clara County Superior Court has a program called the Young Children's Settlement Teams in which a team consisting of one lawyer and one mental health professional can be assigned to parents with children 5 and under. The parents meet

with their team up to four times a year to discuss parenting plans that evolve over time as their children get older. The teams are volunteers and the program is voluntary for the parents.
~ *Karen D. Russell, Family Lawyer*

The children's preferences should be given some legal standing.
~ *Maryann Conway, Family Lawyer*

There should be a statutory framework for better meeting a child's needs based upon maintaining the status quo.
~ *Melissa Atteberry, Family Lawyer & Mediator*

We should always be open and willing to amend or create new laws when we realize (e.g., as a result of psychological

studies on how various types of parenting schedules impact children at certain stages of development) that changes in the law are necessary to safeguard children's rights to grow up in safe and nurturing environments with consistent parenting.
~ *Rachel Elovitz, Family Lawyer & Mediator*

The legislature should pass laws that alter the move-away presumption on behalf of the moving parent.
~ *Anonymous, Family Lawyer*

We could divide decision-making between parents (e.g., one handles education, the other handles medical) to give more balance and speak to each parent's strengths.
~ *Anonymous, Family Lawyer* ■

Pitfalls in PA's Proposed Presumption of Shared Custody Bill



On Dec. 9, 2019, Pennsylvania family lawyer Maria Cognetti testified before the House Judiciary Committee about the pitfalls in the presumption of shared custody bill. Chair of the joint state “Domestic Relations Advisory Committee on Custody,” Maria is also a past-president of the AAML. Here are a few excerpts; you can read her complete testimony at www.bit.ly/presumption-of-shared-custody-bill.

“[One] huge problem with this bill is the burden of proof for a parent seeking primary custody. It would be difficult – if not impossible – to get past the burden in this bill. For 42 years, my practice has focused on custody; most of my custody clients are men, and I can tell you that they would not like this bill. Good dads want and deserve the ability to ask for primary custody. This bill would basically take away their ability to do that, based on how hard the presumption is to overcome.

“My clients don't want shared custody with an unfit parent. I do a lot of appellate work, and the Superior Court regularly knocks down any opinion where there was not a total review of custody factors.

“The bill purports to take out both partial and primary physical custody – perhaps because the assumption is that it will be shared. But if a parent cannot actually get past the burden of proof, that creates a huge void. Grandparents often got partial custody – but with partial gone, they would get shared or supervised. This would probably remove about 95% of grandparent cases.

“The bill also removes sole legal and sole physical custody; I'm not sure why, because they are rare cases. In my 42 years, I have had three cases where my clients have gotten sole legal – but it does happen, and in those cases, it was really justified.

“Our current statute calls for no presumption: which gives parents equal footing while protecting the rights of the child and putting the child's best interests first. This proposed bill should be child-focused. Instead, the bill is parent-centric: it puts the parents' rights ahead of what is best for the child.” ■

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