

FAMILY LAW

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THE OVERDUE RIGHT TO COUNSEL IN CIVIL CASES: FOCUS ON CUSTODY

By Debra Gardner

On August 7, 2006, Michael Greco, then President of the American Bar Association (ABA), called upon the ABA's House of Delegates to address one of the most pressing contemporary problems facing the justice system in this country:¹ "[W]hen litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result."² The House of Delegates unanimously answered this call by resolving:

[T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.³

The notion of a civil right to counsel did not begin with the ABA Resolution;⁴ however, the ABA was in a good position to speak with authority on this issue.⁵ Its first two goals are promoting "improvements in the American system of justice" and "meaningful access to legal representation and the American system of justice for all persons regardless of their economic or

social condition." The ABA has played a critical role in creating, funding, and preserving civil legal services from its beginning.⁶ Its first standing committee, created in 1920, was the Standing Committee on Legal Aid and Indigent Defendants (SCLAID),⁷ which signaled the ABA's permanent commitment to the realization of access to justice for the poor.⁸

Notably, this commitment resulted in the ABA's filing an amicus brief in *Lassiter v. Department of Social Services*⁹ that urged recognition of a right to counsel in civil termination of parental rights proceedings as a matter of federal due process.¹⁰ Unfortunately, the majority of the Supreme Court did not agree. In a 5-4 decision, the Court held that whether counsel was necessary in a civil matter to satisfy federal due process should be determined on a case-by-case basis.¹¹ Worse, it announced a presumption that there is no right to counsel in a civil case unless the litigant faces a loss of physical liberty,¹² defined narrowly as confinement.¹³

Predictably, *Lassiter* all but shut the door to progress on achieving a broad civil right to counsel, at least for a time. Eventually, some indigent litigants and their advocates returned to the idea of seeking recognition of a right to counsel, despite the setback of *Lassiter*. Much of this work has focused, for good reasons, on family law and, specifically, custody disputes. One

such early effort was *Frase v. Barnhart*,¹⁴ a third-party custody dispute. While the case was decided on grounds favorable to the unrepresented indigent parent,¹⁵ the majority of the court did not reach the issue of the right to counsel. Three members of Maryland's seven-member high court filed a concurring opinion indicating that they would have reached the issue and would have found a right to counsel under the Maryland Declaration of Rights.¹⁶

This and other advocacy around the country inspired Michael Greco to take up the fight. With its historic resolution, the ABA once again fundamentally rejected the approach taken by the Supreme Court in *Lassiter* as a viable framework for ensuring access to justice in civil proceedings for indigent persons.¹⁷ The resolution was carefully crafted to address the kinds of legal proceedings that have the greatest impact on individual rights and basic human needs.¹⁸

There are those who might question the inclusion of child custody disputes, especially cases between private parties, among the basic human needs to which a civil right to counsel should be afforded.¹⁹ The ABA, though, did not shy away from making a bold statement that such cases are among those most requiring lawyers for those who cannot afford to hire them.²⁰

A parent's right to an unfettered relationship with her child has been called even "more precious . . . than the right of

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life itself.”²¹

This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. “[F]ar more precious . . . than property rights,” parental rights have been deemed to be among those “essential to the orderly pursuit of happiness by free men,” and to be more significant and priceless than “liberties which derive merely from shifting economic arrangements.”²²

Private custody disputes utilize the machinery of the state and the courts to alter the family relationship. The purportedly private nature of these cases is rendered less and less significant when trial courts access their own experts to conduct evaluations and studies of the parties, appoint guardians ad litem or counsel for the children, or even participate in questioning during trial.²³ An indigent unrepresented parent can easily face an array of resources and adversaries every bit as formidable as may exist in a state-initiated parental rights termination proceeding.²⁴ Further, the consequences of the judicial process are highly invasive, and the impacts of potential error reach not only the parent but also the future lives of young children.²⁵ The notion that a loss of custody is not a permanent and severe intrusion into the parent-child relationship does not withstand scrutiny.²⁶ Circumstances under which a parent can move for modification of a custody decree are, under most states’ jurisprudence, entirely outside that parent’s control and may never occur.²⁷ For these reasons, the right to counsel should flow from the potential loss of custody, rather than from the public or private nature of the adversary.

The ABA Resolution also focuses on adversarial proceedings because such matters are inherently complex, and lack of lawyer representation for indigent persons poses the greatest concern in this context.²⁸ The presence of lawyers in a

civil case makes a substantial difference to the outcome of the proceedings,²⁹ which is why those who can afford lawyers hire them. Research bears this out.³⁰ Parties without lawyers are far more likely to fall prey to procedure.³¹ For instance, at the most basic level, unrepresented parties have much higher rates of default.³² During contested proceedings, parties with lawyers make much greater use of procedural mechanisms that are key to success in civil litigation than do parties without lawyers.³³ A comparison of those with lawyers to those without demonstrates that those with lawyers are more likely to file motions (73 percent compared to 8 percent), request discovery (62 percent compared to 0.0 percent), and receive continuances (35 percent compared to 3 percent).³⁴ A party who is unrepresented but faces a lawyer on the other side is at a significant disadvantage.³⁵ The unrepresented party’s chances of prevailing drop by approximately half.³⁶ Perhaps obviously, lawyers’ knowledge of and ability to raise substantive claims and defenses has also been found to significantly improve outcomes for their clients.³⁷ First, represented litigants far more frequently raise substantive claims and defenses.³⁸ Second, as expected, raising substantive claims and defenses greatly increases litigants’ chances of achieving outcomes that reflect the underlying merits of their cases.³⁹ Applicants for domestic violence protection orders with lawyers succeed 83 percent of the time, while only 32 percent of applicants without lawyers successfully obtain such orders.⁴⁰ Representation can also ease the burden on the courts.⁴¹ Parties with lawyers are much more likely to achieve settlement than those without.⁴²

For these and other reasons, the ABA is not the first, but is among the most powerful, to suggest that *Lassiter* ought to be overruled.⁴³ One commentator has asserted that “civil litigants are arguably at a greater disadvantage without counsel than are criminal defendants without counsel[.]” and that the doctrines of

*Gideon v. Wainwright*⁴⁴ and *Lassiter* are “irreconcilable.”⁴⁵ However, for now, it is wise instead to urge state courts to reject *Lassiter* when determining the parameters of due process under state constitutions.

Gideon’s recognition that the lack of counsel distorts the adversary process is no less true in the civil context, at least in cases that implicate fundamental rights or basic human needs.⁴⁶ *Gideon*’s “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,”⁴⁷ applies with equal force to a custody case.⁴⁸ Lawyers, in these and other civil matters involving basic human needs, “are necessities, not luxuries.”⁴⁹ The stakes for indigent civil litigants in such cases may be as great as, or even greater than, those for the criminal defendant.⁵⁰ The loss of custody of one’s child is a life-shattering event that for most custodial parents would be more profound than the prospect of 30 days in jail.⁵¹

Due process should protect more than physical liberty—it should also protect one’s “freehold, liberties or privileges” and “life, liberty or property.”⁵² Limiting the due process right to counsel to protection only of physical liberty creates an artificial and illogical distinction.⁵³ Given what is at stake in many civil cases, the failure to provide counsel “offends a sense of justice [that] impairs the fundamental fairness of the proceeding.”⁵⁴ Thus, *Lassiter*’s presumption against appointment of counsel in civil matters should be abandoned.

Another significant problem with *Lassiter* is its relegation of this critical right to a case-by-case determination.⁵⁵ As 22 amicus states told the Court in *Gideon*, a categorical right is far easier to administer, and to administer fairly.⁵⁶ The need for fairness of administration cannot be over-emphasized. A categorical right to counsel avoids arbitrarily uneven outcomes.⁵⁷ It also avoids the paradox of providing counsel to only those unrepresented parties who are fortunate or sophisticated enough to be able to articulate the nature of their rights and their need for counsel

well enough to meet the relevant test.⁵⁸ Justice Blackmun recognized this in his dissent in *Lassiter*, wherein he articulated:

The flexibility of due process, the Court has held, requires case-by-case consideration of different decision-making contexts, not of different litigants within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.⁵⁹

The provision of a categorical right to counsel as defined by the Court also promotes judicial efficiency by obviating the need for appellate review of individual cases based on distorted and misleading records.⁶⁰ As Justice Blackmun also wrote in his *Lassiter* dissent, “it is difficult, if not impossible, to conclude that the typical case has been adequately presented.”⁶¹

At least one state high court has openly rejected *Lassiter* when deciding the parameters of due process under its own constitution.⁶² The court wrote simply that it “reject[s] the case-by-case approach set out by the Supreme Court in *Lassiter*,” reasoning that “loss of custody is often recognized as ‘punishment more severe than many criminal sanctions’ . . .”⁶³

Currently, advocates of equal justice for the poor are pursuing a broad spectrum of approaches, each fashioned according to local strategic considerations.⁶⁴ Poor litigants in Washington recently suffered a setback when, in *King v. King*,⁶⁵ the Washington Supreme Court rejected claims in custody disputes for a civil right to counsel under the Washington Constitution.⁶⁶ However, advocates were heartened somewhat by the two-judge dissent, which included the following:

Ms. King’s struggle to represent herself in this case demonstrates the legal hurdles that arise every day in courtrooms across Washington, showing the importance of

counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children. The majority’s decision does not begin to address the obstacles an indigent parent encounters when she is unrepresented by counsel, nor does it realistically assess the loss she faces.⁶⁷

In other states, including Maryland, there will be future appeals involving similar state constitutional claims.⁶⁸ And in yet others, more incremental litigation is underway. One example is the recent Alaska Superior Court decision in *Gordonier v. Jonsson*,⁶⁹ where the court extended an existing right to counsel in cases where representation is provided by a publicly funded agency to cases where there is private representation on the other side.⁷⁰ This case is currently pending before the Alaska Supreme Court.⁷¹ There have also been incremental legislative successes in expanding rights to counsel in family law matters.⁷² Each such victory is a step on the path to recognition of a right to counsel in civil cases involving basic human needs, including custody disputes.

Debra Gardner has served as Legal Director of the Public Justice Center (PJC) since 2000. Before joining the PJC, she worked at Legal Aid in Maryland for more than 15 years. Among her duties at the PJC, she pursues a judicial recognition of a civil right to counsel under the Maryland Declaration of Rights and coordinates the National Coalition for a Civil Right to Counsel. This article is excerpted and adapted from Debra Gardner, Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases, 37 U. Balt. Law Rev. 59 (2007). Ms. Gardner can be contacted at gardnerd@publicjustice.org or 410 625 9409.

1. Michael S. Greco, President, American Bar Association, Remarks to the House of Delegates at the ABA Annual Meeting 6-7 (Aug. 7, 2006) (transcript available at http://www.abanet.org/op/greco/speeches/aba_greco_hod_final_remarks.doc).
2. ABA Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 518 (2006), available at <http://www.abanet.org/legal/services/sclaid/downloads/06A112A.pdf> [hereinafter ABA Task Force].

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3. *Id.* at 508.
4. See, e.g., Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 170 (2006). For a tracing of the recent revival of efforts to achieve a civil right to counsel, see Gardner, *supra*, note 1.
5. See ABA, History of the ABA, <http://www.abanet.org/about/history.html> (last visited Jan. 14, 2008).
6. ABA TASK FORCE, *supra* note 3, at 508–12.
7. *Id.* at 508.
8. See *id.* at 508–10.
9. 452 U.S. 18 (1981).
10. Brief of the ABA as Amicus Curiae Supporting Petitioner, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (No. 79-6423).
11. *Lassiter*, 452 U.S. at 31–32.
12. *Id.* at 26–27.
13. Compare *id.* (“[A]n indigent litigant has a right to appointed counsel only when . . . he may be deprived of his physical liberty.”) with *id.* at 40 (Blackmun, J., dissenting) (“I do not believe that our cases support the presumption . . . that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel . . .”).
14. 379 Md. 100, 840 A.2d 114 (2003).
15. *Frase*, 379 Md. at 102, 840 A.2d at 115.
16. *Id.*, 379 Md. at 141, 840 A.2d at 138.
17. ABA TASK FORCE, *supra* note 3, at 517–18.
18. *Id.* at 521 (“The categories contained in this resolution are considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel.”). The fundamental nature of these basic human needs is also reflected in international human rights law. See International Covenant on Economic, Social & Cultural Rights, art. 10, Dec. 16, 1966, 963 U.N.T.S.14531.
19. Cf. ABA TASK FORCE, *supra* note 3, at 508, 522 (resisting Civil Gideon in private child custody disputes by courts led the ABA to include support for the right in its resolution advocating counsel for low-income people in civil cases “where basic human needs are at stake”).
20. *Id.* at 522. Besides the high stakes and the complexity of the proceedings, discussed *infra*, contested custody represents the area of greatest unmet need for civil legal services. See GLORIA DANZIGER, CENTER FOR FAMILIES, CHILDREN & THE COURTS, UNIVERSITY OF BALTIMORE SCHOOL OF LAW, MODEL CHILD CUSTODY REPRESENTATION PROJECT EVALUATION REPORT 1 (2003), available at <http://www.mlsc.org/ChildCustodyEval.final.pdf>.
21. *In re Welfare of Myricks*, 533 P.2d 841, 842 (Wash. 1975) (en banc) (quoting *In re Gibson*, 483 P.2d 131, 135 (Wash. Ct. App. 1971)).
22. *Lassiter*, 452 U.S. at 38 (1981) (Blackmun, J., dissenting) (alteration in original) (citations omitted).
23. See *Frase*, 379 Md. at 121, 820 A.2d at 126.
24. See, e.g., *id.* at 138, 840 A.2d at 136 (Cathell, J., concurring) (expressing fear that, in private custody battles, “affluent third parties, by reason of the quality of the legal representation their affluence brings them, may be able to simply overwhelm poor parents who cannot afford counsel in a civil adversarial system that is not permitted to fully ensure equality in the presentation of cases”).
25. See *id.* at 140–41, 840 A.2d at 138 (Cathell, J., concurring).
26. *In re Welfare of Myricks*, 533 P.2d at 842.
27. See, e.g., *McCready v. McCready*, 323 Md. 476, 481–82, 593 A.2d 1128, 1130–31 (1991).
28. ABA TASK FORCE, *supra* note 3, at 517–18, 521.
29. ABA TASK FORCE, *supra* note 3, at 517–18.
30. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001).
31. See *id.* at 427.
32. See *id.* (indicating that an experiment showed only 16% of represented parties default versus 28% of unrepresented); see also Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 414, Tab. 18 (1995) (indicating a default rate of 0% for parties with lawyers, 19% for those without).
33. See Anthony J. Fusco Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 115 (1979); Gunn, *supra* note 109, at 411–12; see also Russell Engler & Craig S. Bloomgarden, Summary Process Actions in the Boston Housing Court: An Empirical Study and Recommendations for Reform 7 (May 20, 1983) (unpublished manuscript, on file with the University of Baltimore Law Review).
34. Fusco Jr. et al., *supra* note 35, at 115 (continuances); Gunn, *supra* note 34, at 412, Tab. 16 (motions); Engler & Bloomgarden, *supra* note 35, at 17, Tab. 10 (discovery).
35. See, e.g., Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, in DIVORCE REFORM AT THE CROSSROADS 37, 64 (Stephen D. Sugarman & Herman Hill Kay eds., Yale Univ. Press, 1990).
36. *Id.* at 64; see also Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role Of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 132 (1990); Engler & Bloomgarden, *supra* note 35, at 53–58.
37. See Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 9, 35, 44–45 (1973).
38. *Id.* at 44, Fig. 17 (83% of represented litigants raised available defenses compared to 30% of unrepresented); Engler & Bloomgarden, *supra* note 35, at 19, Tab. 11 (80% versus 2%).
39. Gunn, *supra* note 34, at 413–14, Tab. 18.
40. Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U.J. GENDER SOC. POL'Y & L. 499, 511–12 (2003).
41. Seron et al., *supra* note 32, at 427.
42. Mosier & Soble, *supra* note 39, at 47, Fig. 18 (17% versus 0.1%).
43. ABA TASK FORCE, *supra* note 3, at 513.
44. 372 U.S. 335 (1963). *Gideon* was, of course, the landmark decision recognizing a right to counsel in criminal matters.
45. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 336 (2001).
46. Roger C. Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 676–78 (1976).
47. *Gideon*, 372 U.S. at 344.
48. See Cramton, *supra* note 48, at 676–77.
49. *Gideon*, 372 U.S. at 344; see Cramton, *supra* note 48, at 676–77.
50. See Cramton, *supra* note 48, at 676.
51. See Ritchey, *supra* note 47, at 338.
52. MD. CONST. DECL. OF RTS. art. XXIV.
53. Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1330, 1332–33 (1966).
54. *Sites v. State*, 300 Md. 702, 717, 481 A.2d 192, 200 (1984).
55. See *Lassiter*, 452 U.S. at 31–32.
56. Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Washington, and West Virginia filed an amicus brief urging the overruling of *Betts*. See Brief for the

State Government as Amici Curiae Supporting Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155). Alabama, joined by North Carolina, filed on the other side. See Brief for the State of Alabama as Amici Curiae Supporting Respondent, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155). 57. See *id.* (referencing numerous virtually identical pairs of cases in which counsel had been appointed in one and not the other). 58. See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. CHI. L.J. 363, 379 (2005). 59. *Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting). 60. See *id.* at 50–51 n.19. 61. See *id.* at 51. 62. See *In re K.L.J.*, 813 P.2d 276, 282 n.6

(Alaska 1991). 63. *Id.* at 282, 283 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1145 (1977); see also *Frase*, 379 Md. at 138, 840 A.2d at 136 (Cathell, J., concurring) (“I am drawn more to the well reasoned dissents in *Lassiter*, as a guide to how this Court should consider these issues under our State Constitutional provisions in these evolving times.”). 64. For more information on these activities, visit the web site of the National Coalition for a Civil Right to Counsel, www.civilrighttocounsel.org. 65. 162 Wash.2d 378, 174 P.3d 659 (2007). 66. *Id.*, 162 Wash.2d at 395, 174 P.3d at 668. 67. *Id.*, 162 Wash.2d at 403-04, 174 P.3d at

672 (Madsen, J. dissenting). 68. See generally, John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL. 238 (2006). 69. Case No. 3AN-06-8887 CI (3d D. Alaska Super. Ct. Aug. 14, 2007). 70. *Id.* at 10-16. 71. *Office of Public Advocacy v. Alaska Court System, et al*, Case No. S-12999 (Alaska filed Feb. 7, 2008). 72. See, e.g., 2008 La. Acts 778 (eff. Aug. 15, 2008) (codified at LA. CHILD. CODE art. 1245.1) (extending the right to counsel to private intra-family adoptions); 2006 Sess. Laws of N.Y., ch. 538, S. 8096 (eff. Aug. 16, 2006) (codified at N.Y. JUDICIARY LAW § 35.8) (extending the right to counsel to custody disputes in matrimonial court).



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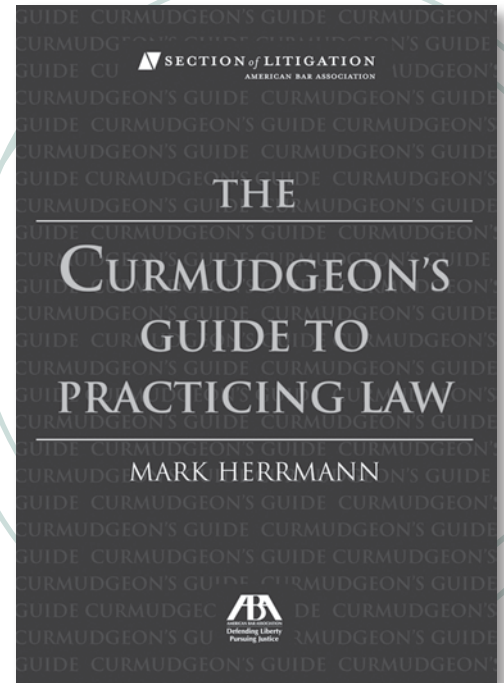


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A CHILD'S RIGHT TO SPEAK IN THE FAMILY LAW CONTEXT

By Katherine Clarey

With the increase in crimes against children during the past few years, child witnesses and child evidence are being used more frequently than in the past in the criminal justice system. Many law reforms have made children's participation in the courts easier, such as the use of screens and videotaped statements. Children have been given the right to speak, and they provide valuable evidence in the criminal process, causing some to wonder whether these same rules of evidence can be adopted in the family law context of custody and access disputes.

Introducing child evidence in custody disputes and using it as it is used in the criminal justice system is unrealistic. Special emotional circumstances are often inherent in family disputes but are less prevalent in the criminal courts. A child's right to speak may be exercised indirectly in the family courts using methods other than direct testimony, and protecting children by using indirect means to elicit their views in custody disputes is more attuned to a child's best interest.

Child Evidence and Testimony

Child evidence in criminal trials differs greatly from child evidence given in family courts. Child evidence in the context of a criminal trial may be considered direct evidence, whereas evidence in the family courts may be considered indirect because children generally do not actively participate in family courtroom proceedings.

Criminal Courts

In the criminal law context, the increased need for child witnesses is due to the greater prevalence of crimes against children and the consequent increased demand for these children to participate in the trial process.¹ In these cases, children are often the only witnesses to the crime, and their testimony is essential to secure a conviction of the offender.² Thus, child testimony and direct participation of children are neces-

sary for the trial process. The Canadian government has implemented various policies and procedures that cover child witnesses who become involved in criminal proceedings.

Professor Paciocco discusses two of the most important reforms: allowing the child to testify without facing the accused and the introduction of videotaped evidence.³ Videotaped evidence allows children to provide their stories in a more familiar setting, which prevents them from being influenced by suggestive questioning by lawyers or other members of the court.⁴ It also alleviates the stress and trauma associated with participating in the trial process.⁵ This video provision was challenged in *R. v. L (D.O.)*, which argued that it was unconstitutional because it offended the accused's right to a fair trial by admitting hearsay and prior inconsistent statements into trial.⁶ This argument was rejected, and the provision was held to be constitutional on the basis that "once the child witness adopts the video-taped statement, that evidence becomes part of the child's in-court testimony and is no longer strictly hearsay."⁷ In *R. v. F (C.C.)* Justice Cory stated that "videotape evidence should generally be admitted" because when a videotape is taken shortly after the incident, it would in effect be the best account as to what occurred and would be of "great assistance in augmenting a child's testimony at trial."⁸ Safeguards to ensure the reliability of this direct or videotaped evidence include the following: the statement is to be made within a reasonable time; the trier of fact can watch the video to assess demeanor, personality, and intellect of the child; the child is required to attest that she was attempting to be truthful at the time the statement was made; and the child can be cross-examined at trial as to whether or not she was actually being truthful when the statement was made.⁹

Although these are strong factors in securing the reliability of videotaped

statements, the trial judge continues to have discretion in excluding videotaped statements when these factors are not present, or where the admission of the statement would "interfere with the proper administration of justice."¹⁰

These two major reforms to the admission and use of child evidence signified a shift toward removing children from the courtroom and exploring viable options that would not require the child to testify in court and would also respect the accused's constitutional rights to a fair trial.

A number of additional changes over the years have expanded how the evidence of child witnesses may be received in criminal courts. These changes, largely a result of an increase in known sexual abuse cases against children, have relaxed the standards of admissibility for child evidence in criminal courts, and other measures have been implemented to encourage the participation of children in the process.

In the majority of criminal cases, the testimony of a child is necessary; without the admission of this kind of evidence, many crimes against children would go unprosecuted. In addition, children are called upon to recite facts of an incident that they have experienced, not to render opinions of what might be best for them in the future (frequently an essential part of testimonies in family courts).

Family Courts

In custody and access disputes, however, the child's direct testimony is not necessary, and only in exceptional cases will the child be required to testify in court. Apart from direct evidence at trial, other means allow a child to express his or her views and preferences on custody and access. One such option involves third-party interventions. Such indirect means of obtaining child evidence provide opportunities for the assessor or interviewer to gain a full account of children's views and

preferences and to consider their interests, capabilities, and family bonds in conjunction with their expressed views. This approach maximizes the reliability of the child's evidence.

A divorce can be extremely traumatizing to a child, especially when custody and access are disputed. Requiring children to testify on custody and access issues, such as which parent they want to live with, is problematic because children are often too young to have the foresight and ability to take into account their own best interests.

Anne McGillivray describes how, in civil proceedings, "children are central but usually silenced parties to custody disputes and protection hearings which will affect the rest of their lives. They are often witnesses to assaults on other children and on parents. Blocks to their participation in the legal process must be removed in the interests of justice."¹¹

Only a small percentage of parents (as low as 3 percent) rely on judges to resolve custody and access disputes. Thus, exploring other viable options in which child evidence may be elicited continues to be necessary.¹²

Alternative Forms of Child Evidence

As stated above, a child's right to speak can be satisfied in a custody and access dispute without having to involve the child directly in the process. Mechanisms available in Canadian family law proceedings include the work of the Office of the Children's Lawyer (the Office), family assessment, arbitration, use of parenting coordinators, and mediation.

Office of the Children's Lawyer

The role of the Office is to "advocate for a child client so that the child's interests are understood and communicated to the parties and to the court."¹³ The Office will interview the child to gain an understanding of the child's views and preferences,¹⁴ and will generally produce a report by a social worker to assist the court in deciding issues of custody of and access to the child.¹⁵ The policy statement of the Office provides that where "the information about the child's interests differs from the child's independent and consistent views and

preferences, counsel should advance a position on behalf of the child's views and preferences."¹⁶

The Office is an effective way to provide evidence of the child's views and preferences indirectly to the court. The Office acts as a buffer to the dispute and also ensures that parental influences on the child will not affect the outcome because "if the child's counsel believes that the child is being influenced by one parent that counsel may decline to advocate for the outcome sought by the child."¹⁷ This works to protect against any manipulation of the child by either parent and therefore allows an objective view of the child's best interests to be presented in court proceedings.

Family Assessment

Family assessments are another way in which a child may be given the opportunity to provide evidence of his or her views and preferences. Justice Kukurin in *Parniak v. Carter* describes family assessments as follows:

The involvement of the assessor is generally perceived to be a neutral involvement—indeed and that is aligned more with the children who are the subject of the dispute than with the protagonists in the case. This neutrality makes what the assessor's report much more palatable to each side and contributes to a possible resolution.¹⁸

Family assessments are also useful because they often contain recommendations that may assist the parties in achieving a resolution to the custody and access disputes without the need to proceed to trial.¹⁹ Experts such as social workers, psychologists, and psychiatrists provide a range of assessments to assist the courts and provide valuable insights into complex issues of a particular child and family.²⁰

The Ontario Court of Appeal continues to emphasize the value of tools such as family assessments to bring forward evidence of a child's wishes.²¹ The court's view is that it should be open to an assessment in cases where the expert considers it appropriate and where the

court does not direct to the contrary.²²

The Ontario court's approach is expansive of the value of child evidence in family law proceedings and does not limit the use of family assessments to instances where clinical issues are present and impact a custody and access dispute. This broader approach enables experts to interview children as part of the family assessment and provides the courts with valuable knowledge as to the child's views and preferences. The function of family assessments is therefore similar to the role of the Office, although family assessments provide a deeper understanding of the dynamics operating in the family before the court.²³ The assessors are not advocating on behalf of the child but rather are assessing the child's views and preferences in light of the views and preferences of the rest of the family. The assessors therefore provide neutral, objective information that enables the judge to make a decision as to the best interests of the child in the context of the parties' positions in the family law proceedings.

Although family assessments can be extremely valuable in providing an objective evaluation of a child's views and preferences, they are not ideal in all situations. In *Tucker v. Tucker*, the court observed that "an assessment should not be ordered routinely or without good reason. Nor should a child be subjected . . . to needless assessments at the whim of the non-custodial parent in the hopes of obtaining a favorable opinion."²⁴ The discretion of the court to order family assessments should therefore be exercised cautiously and only when highly contested issues regarding custody and access exist.²⁵

Arbitration

Arbitration is another method now used to incorporate child evidence in the resolution of custody and access disputes.²⁶ Arbitration has been particularly effective in resolving issues of child care and parenting.²⁷ The advantage of arbitration is that it is less formal than family law court; as a result, the parties can choose "mental health professional[s] with experience in children's and parents' adjustment to separation and divorce."²⁸ This

flexibility allows the arbitrator to “take careful consideration of children’s wishes without disclosing the exact nature of their wishes to their parents.”²⁹

Parenting Coordination

Parenting coordination is a service that aids parents in developing a parenting plan that will be in the best interest of all the parties involved, especially the children. Parenting coordinators are equipped with skill, expertise, and the authority conferred by the parties to help families.³⁰ The benefits of this approach are that parenting experts become intimately involved with the separating families and have the time and experience to take a holistic approach to understanding the dynamics of each family.³¹ Parenting coordination is suitable for high-conflict situations in which a court may order the family to work with a parenting coordinator, and it also benefits low-conflict situations where the parties agree to work with a parenting coordinator.³²

Parenting coordination has the potential to provide children the opportunity to participate in the process and, therefore, have their perspectives and views considered. Due to the intimate involvement that parenting coordinators have with the family, the coordinator has ample opportunity to incorporate the child’s views and preferences into a parenting plan.

Mediation

Mediation has become an important alternative dispute resolution method in custody and access cases.³³ Mediation can be used for a number of custody and access issues:

Parents may use mediation to settle custody and access arrangements at divorce or separation, to vary existing arrangements or to resolve other access disputes such as access denial or breach of access. Parents can use mediation for specific issues or to resolve all their post-separation parenting issues together (comprehensive mediation).³⁴

Successful mediation can be very

beneficial in including the child’s views and preferences in ultimate decisions pertaining to custody and access. Mediators often elicit a child’s evidence through a private discussion in which they explore the child’s views directly with the child. In other circumstances, mediators will involve children in meetings with the parties.³⁵ In both approaches, the children are allowed to express their thoughts and feelings about custody and access and to meaningfully contribute to the process of settling the dispute.

Limitations of Child Evidence and Testimony

There are many limitations to use of child evidence and testimony in custody and access disputes. Two major ones are the children’s potential suggestibility and cognitive limitations, which may lead to ineffective communication between children and the lawyers, judges, and other professionals involved in custody and access disputes; and the limitations of reforms regarding the consideration of child evidence in custody and access disputes.

Research has established that children can be reliable witnesses, but it is important to consider that children’s memories are not as developed as adults’, children are more suggestible, and children often experience difficulty in communicating what they know.³⁶ A major concern with child testimony is potential suggestibility.³⁷ This is especially true with direct evidence in criminal trials. It is possible for a child who has been subjected to repeated, suggestive questioning to develop “memories” of events that did not in fact occur.³⁸ Inappropriate questioning can lead to a distorted representation of what the child really wants, which could be contrary to the child’s best interests. Therefore, safeguards against suggestibility of children should be in place to protect the reliability of children’s evidence.

It is also possible that a child’s views can be distorted by one of the child’s parents. One example of this is parental alienation, in which one parent attempts to alienate the child against the estranged parent.³⁹ Because a child

is generally more suggestible than an adult, the child may be more vulnerable to the influence of one parent, which could cause the child to provide evidence that reflects what the alienating parent, rather than the child, wants.

Another limitation on child evidence is the ability of specific children to give the evidence required. Studies have shown that when questioned properly, children are capable of describing situations that they have experienced. What is not clear from the research is whether children can effectively predict what their futures will hold, nor how well they may understand what they really want or what is good for them. It is also difficult to imagine that children’s views can be objective when they most likely do not want their parents to separate in the first place.

Yet another potential problem with the use of child evidence involves limitations of reforms on use of child evidence in custody and access disputes. Family courts continue to be reluctant to involve children in these areas. No legislation requires that the child be involved. Most reforms, such as those directed toward videotaped statements, screens, and admission of hearsay, tend to cover child witnesses in the criminal justice system rather than in family courts.

These limitations can be very problematic in custody and access cases. Finding solutions to these problems will allow more children to have a voice in the process and improve the quality of child evidence.

Recommendations

There are many ways in which a child’s right to speak in custody and access disputes will be satisfied by admitting child evidence into custody and access proceedings. Four possible solutions can be considered to improve the effectiveness of child evidence: educate the judiciary and court officials involved in custody and access disputes on how to interview children and use age-appropriate questioning techniques; increase the use of alternative dispute approaches to elicit child evidence; encourage the legislature to reform the law in the areas of child witnesses in the civil context; and

relate the quality of evidence provided to the weight of the evidence, not to the admissibility.

Specific questioning techniques can increase the accuracy and completeness of children's testimony; these include the expert's showing warmth to and support of children, mimicking the child's vocabulary, avoiding legal jargon, confirming meanings of words with children, limiting use of yes/no questions, and avoiding abstract conceptual questions. Preparing children for court and providing them with memory retrieval strategies also can increase their recall of details.⁴⁰

In a recent study, judges were questioned about children being asked developmentally inappropriate questions.⁴¹ Judges perceived defense counsel to ask the most developmentally inappropriate questions and child protection workers to ask the fewest.⁴² It may be inferred from this study that child protection workers were able to ask more developmentally appropriate questions because of their education and experience in working with children.

It is clear that age, maturity, communication skills, and suggestibility of children create many doubts as to the reliability of child testimony. To safeguard against negative effects of these factors, professionals in the court system must be educated on how to ask developmentally appropriate questions of children.⁴³ "A child who is asked developmentally appropriate questions is more likely to give accurate and reliable testimony, and the trier of fact is more likely to accurately assess the child's testimony."⁴⁴ This is true not only for lawyers and judges but also for outside experts such as mediators, parenting coordinators, or any professionals involved in interviewing children. Training and education would mitigate some of the shortcomings associated with the reliability of the evidence that a child provides.

The involvement of a children's lawyer, a family assessor, a mediator, an arbitrator, or a parental coordinator creates an effective outlet for a child's evidence to be "reasonably ascertained" by the courts. Legislation ought to be enacted to make these other options

mandatory in family disputes to facilitate negotiations, parenting plans, and, ultimately, settlements that incorporate the child's views and preferences. Creating such provisions would encourage more families in custody and access disputes to engage in more child-centered settlement discussions.

Last, the quality of children's evidence should go to the weight of the evidence rather than to its admissibility. Admitting the evidence allows the child's voice to be heard and examined. Because of differences in the nature of the proceedings, all of what a child says to a third party (e.g., children's lawyer, mediator) should be admitted as evidence to the presiding judge ruling on the case. However, exceptions should be made in cases where there is evidence of parental alienation or influence on the child's views and preferences.

To satisfy children's right to speak in matters pertaining to them, as well as to ensure that the evidence of children is accurate and aids the process, the family courts should take a common-sense approach. This approach was advocated by Justice Wilson in *R. v. B.*, where the strengths and weaknesses of the evidence were taken into account and allowed judges to assess the weight of the evidence. This approach would provide judges the ability to assess the evidence on a case-by-case basis. Judges should not simply dismiss evidence based on the age or maturity of the child, because it is clear that when developmentally appropriate techniques are used, even young children can give reliable evidence. If a judge believes a child's evidence cannot be reasonably ascertained, that fact should be factored against the weight, not the admissibility. Judges should seek to maintain the child's right to participate in court proceedings by allowing the evidence to be admitted and then assessing the weight, if any, that will be given to that evidence.

Conclusion

In the past few years, various reforms have been enacted concerning the use of child evidence in criminal contexts due to its value in obtaining

convictions in crimes against children. Children are often witnesses in criminal trials because their evidence is necessary. Yet it is equally arguable that children are necessary witnesses in family matters as well, particularly those involving custody and access disputes where the best interests of the child are directly affected. Child evidence can be effectively obtained through the use of methods that help remove the stress and trauma associated with direct involvement. Children have the right to speak and to express themselves just as any adult does. Simply because a person is young and has not yet developed the ability to communicate and cognitively function at the same level as an adult does not mean that the child's right to speak ought to be diminished.

In eliciting children's evidence in custody and access disputes, it is important to realize that children are not being asked to choose between their parents. Their involvement in the process may be as simple as deciding where to spend their holidays. The indirect means described in this article provide that a third party may act as a voice for the child and supply reliable evidence and a true understanding of what the child wants and needs. These approaches are not only in the best interest of the child, but they also satisfy a child's right to be heard in matters affecting the child. There are many ways to mitigate the dangers in child evidence. It is time to rid ourselves of the legal jargon and to find out what these children really want. It is time for law reform in the civil context—for child evidence to be required in custody and access disputes. Children in custody and access disputes are robbed of a family structure with which they were once familiar; they should not be robbed of their right to speak as well.

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1. DAVID M. PACIOCCO & LEE STUESSER, *THE LAW OF EVIDENCE* (5th ed. (Irwin Law Inc., 2008), at 476.
2. *Id.*

3. *Id.* at 477.
 4. *Id.* at 478.
 5. *Id.* at 479.
 6. *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, 85 C.C.C.(3d) 327, 25 C.R. (4th) 325 at 36.
 7. *Id.*
 8. *R. v. F.(C.C.)* [1997], 120 C.C.C. (3d) 225 at 239–240.
 9. *Id.* at 241.
 10. *Id.* at 245.
 11. Anne McGillivray, “Dubunking Myths: Children in Civil Courts,” (1992) 21 Man. L.J. 151–159 at ¶15.
 12. Bureau of Review, *Evaluation of Divorce Act* (Ottawa: Department of Justice, 1990).
 13. Nicholas Bala, “The Best Interests of the Child in the Post-Modern Era: A Central but Paradoxical Concept” in Harold Niman and Gerald P. Sadvari, ed., *Family Law: “Best Interests of the Child”* (Toronto: Law Society of Upper Canada, 2000) 1 at 33–42.
 14. *Id.* at 26–31.
 15. *Parniak v. Carter* [2002] O.J. No. 2787 at ¶ 6.
 16. Wilson McTavish, Office of the Children’s Lawyer-Policy Statement-Role of Children’s Counsel (Toronto: April 3, 1995).
 17. *Supra* note 14.
 18. *Supra* note 15 at ¶17.
 19. *Id.*
 20. *Supra* note 13 at 33–42.
 21. *Id.*
 22. *Weaver v. Tate* [1990], 28 R.F.L. (3d) 188.
 23. *Supra* note 15 at ¶ 21.
 24. *Tucker v. Tucker* [1998], 41 R.F.L. (4th) 404 at 413.
 25. *Supra* note 13 at 33–42.
 26. Austin, G., P. Jaffe and P. Hurley, “Incorporating Children’s Needs and Views in Alternative Dispute Resolution Approaches” (1992), 8 C.F.L.Q. 69 at 78.
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. CPCA, “Key Advantages of Parenting Coordination” Canadian Parenting Coordinators Association online: http://www.parentcoordinators.ca/CPCA_PC_Advantages.htm.
 31. *Id.*

32. *Id.*
 33. Alastair Nicholson, (1994) “Mediation in the family court in Australia.” *Family and Conciliation Courts Review*, 32(2): 138–148
 34. Department of Justice, “Voice and Support: Programs for Children Experiencing Parental Separation and Divorce” by Pauline O’Connor, (Ottawa: Department of Justice Canada, 2004).
 35. *Id.* at 5.2.
 36. Nicholas Bala, Karuna Ramakrishnan & Roderick Lindsay [2005] “Judicial Assessment of the Credibility of Child Witnesses.” 42 *Alta. L. Rev.* 995-1017 at para 10.
 37. *Id.* at 13.
 38. *Id.* at 13.
 39. The Leadership Council on Child Abuse and Interpersonal Violence, “Parental Alienation,” online: <<http://www.leadershipcouncil.org/1/pas/faq.htm>>.
 40. *Id.* at para 10.
 41. *Id.* at para 57.
 42. *Id.* at para 58.
 43. *Id.* at para 71.
 44. *Id.* at para 75.

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DISTINGUISHING PERSONAL AND ENTERPRISE GOODWILL IN DIVORCE VALUATIONS: THE TWENTY-FIRST CENTURY LINE IN THE SAND

By Andrew Z. Soshnick

Since the economic crash that began in September 2008, marital dissolution litigants now more than ever feverishly search for methods to enhance or devalue marital estates. Often, the most valuable asset in a marital estate is a business or a professional practice, and the value of that asset may be materially affected by the allocation of personal and enterprise goodwill. For the business owner or professional, casting any goodwill as personal reduces the outlay to a spouse and may critically affect the time to post-divorce economic recovery. For the non-income spouse, maximizing enterprise goodwill may fundamentally impact his or her post-divorce economic survival. Leaving aside the high drama, the personal and enterprise goodwill assessment determines to a great extent the size of the marital estate, the post-divorce economic fortunes of the spouses, and the adherence to statutory and common law divorce rules such as equitable distribution. In short, distinguishing personal and enterprise goodwill in divorce valuations is the new way to frame marital property disputes.

Goodwill

The concept of goodwill has its roots in ancient English law, perhaps best expressed by Justice Benjamin Cardozo's view in *In re Marriage of Brown*¹ that goodwill is the tendency for customers to return to the same location or business because of its name or other attributes regardless of location. A recent AICPA (American Institute of Certified Public Accountants) definition guide characterizes goodwill as "that intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified."² The Internal Revenue Service defines goodwill in a business context as "... the value of a trade or business based on expected

continued customer patronage due to its name, reputation, or any other factor . . ."³ Representative of state interpretations of goodwill is the Wisconsin Court of Appeals' definition that goodwill is

the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local posture, or common celebrity, or reputation for skill or affluence, or predictability, or from other accidental circumstances, or necessities, or even from ancient personalities, or prejudices.⁴

"Goodwill," succinctly, is a catch phrase for the value of one or more intangible assets that is in excess of the tangible assets value of a professional practice or business.

Personal Versus Enterprise Goodwill

There is a bright-line distinction between personal and enterprise goodwill. Personal goodwill, also known as professional goodwill, is the value of earnings or cash flow directly attributable to the individual's characteristics or attributes.⁵ Enterprise goodwill, also known as entity goodwill, is the value of earnings or cash flow directly attributable to the enterprise's characteristics or attributes.⁶ Today, no generally accepted methodologies classify goodwill as personal and/or enterprise. Multiple characteristics however may serve as indicia of either component of goodwill. Personal attributes are frequently considered in assessing the amount, if any, of personal goodwill that is present. Those attributes include, but are

not limited to earning power of the professional/business owner; reputation in the community for judgment, skill, and knowledge of professional/business owner; professional/business success of professional/business owner; age and health of professional/business owner; nature and duration of the professional practice/business; work habits of professional/business owner; importance and closeness of contact of professional/business owner; duration of professional practice/business; referrals directly to professional/business owner; name of professional/business owner; location of professional/business owner; size of professional practice/business; marketability of professional/business owner; types of clients/customers for professional practice/business; sources of new clients/customers; competition to professional/business owner; size of workforce; professional/business competition; billing methodologies; and demographics.

Attributes that are considered in assessing enterprise goodwill include, but are not limited to, organization of professional practice/business, systems and decision-making of professional practice/business, reputation of professional practice/business, staffing of professional practice/business, name of professional practice/business, location of professional practice/business, duration of professional practice/business, intellectual property of professional practice/business, revenue stream of professional practice/business, referrals to professional practice/business, size of professional practice/business, marketability of professional/business owner, types of clients/customers for professional practice/business, sources of new clients/customers, competition to professional/business owner, size of workforce, professional/business competition, billing methodologies, and demographics.

Many of these factors merit detailed consideration in the breakdown of personal versus enterprise goodwill. These considerations include the following:

- **Marketability.** The marketability of a professional practice or business is a factor in distinguishing personal and enterprise goodwill. Demand for a professional practice or business, reputation, ease of entry requirements, and potential competition affect this characteristic. For example, the easier the entry into a particular professional practice or business, the more likely that a lower level of enterprise goodwill exists.
- **Duration.** The duration of a professional practice or business is also significant to the analysis. The longer a business has been operational, the more likely enterprise goodwill is present.
- **Location and Demographics.** The location of a professional practice or business is vital to the goodwill allocation. More desirable locations (i.e., closer to clientele or customers) may create a higher enterprise goodwill value than will entities located farther from potential clientele.
- **Source of New Clients.** An important factor in distinguishing enterprise and personal goodwill is the referral base. A steady source of new business to an individual connotes personal goodwill, while a steady source of business to the enterprise suggests a larger proportion of enterprise goodwill.
- **Productivity.** The individual professional's/business owner's work habits are key to determining productivity. Depending on the hours and efficiency of the professional/business owner, the personal goodwill element may increase or decrease. A professional or business owner who works more than "average" hours may accrue a higher level of personal goodwill.
- **Workforce.** The presence and continuity of the workforce is a key factor to professional practice/business success. A more stable workforce may lead to repeat business because familiar faces breed enterprise goodwill.
- **Competition.** The degree of competition affects the level of each type of goodwill. The more competitive the professional practice/business, the more the individual professional/business owner may impact the success of the enterprise. Increased competition may suggest a larger amount of personal goodwill.
- **Ability, Skills, and Judgment.** The more able the professional/business owner, the more significant the personal goodwill. An individual who performs at a high level that generates high profitability is more vital to the entity. That effort, in turn, creates larger personal goodwill value.
- **Age and Health of Professional/Business Owner.** To the extent that work efforts are determinative, professionals/business owners close to retirement may have less personal goodwill due to anticipated lower future earnings. Likewise, health problems that hamper an individual's performance may lower the personal goodwill element.
- **Types of Clients/Customers and Services Provided.** The classic example in this arena is the mode of payment for services. In the medical industry, Medicare or Medicaid payors, and those using insurance, are valued differently than are private-pay consumers. These issues play a part in the relationship between personal and enterprise goodwill.
- **Fees.** The fee schedule of the professional practice/business is another element in the bifurcation of personal and enterprise goodwill. The fee basis may be calculated by amount of time spent on a client/customer, variable or fixed rates, and/or the importance of an individual professional/business owner. In professional practices, a client may be willing to pay a higher fee to a skilled professional because of that professional's reputation. That reality suggests the presence of a higher proportion of personal goodwill.
- **Reputation.** The reputation of the individual or the entity affects the designation of personal and enterprise goodwill. The greater the reputation of the person or enterprise, the larger the personal or enterprise goodwill segment. This element takes into account more than simply the name of the professional or entity; it implicates the marketing and branding of the professional practice or business.
- **Referrals.** How referrals are designated is a significant guidepost in determining personal and enterprise goodwill. If the referral is to an individual, personal goodwill is indicated. If the referral is made to a company, though, enterprise goodwill is apparent. Referrals may have a direct impact on the profitability of a professional practice or business. However, a deeper review of the referral network is in order. "In-bound referrals" (referrals to the professional practice or business) often indicate a very favorable view of the professional/business owner. "Outbound referrals" (referrals from the professional practice or business) may indicate a symbiotic relationship between two professionals or business owners.
- **Repeat Clients/Customers.** The incidence of repeat business is a key indicator of personal versus enterprise goodwill. This attribute may augur for an examination of the personal and enterprise goodwill to understand the real reasons for repeat clients/customers.
- **Intellectual Property.** Patents, trademarks, copyrights, and other intellectual property may affect the goodwill calculation. This intangible property may be sourced to the professional/business owner or to the professional practice/business. A careful evaluation of this factor will affect the personal and enterprise goodwill distinction.

These factors, among others, significantly impact the allocation between personal and enterprise goodwill. Determining how to make this distinction, however, varies by jurisdiction and remains an art rather than a science.

Jurisdictional Considerations

There is wide variance in how different jurisdictions treat goodwill. A minority

of states take the position that goodwill is not marital property. That position is exemplified by the Wisconsin Court of Appeals opinion in *Holbrook v. Holbrook*.⁷ *Holbrook* involved the valuation of a law firm partnership interest.⁸ The opinion focused on the four major criticisms of the treatment of goodwill as marital property. The first factor, difficulty in valuation, emphasized the speculative nature of valuing tangible assets such as goodwill, the lack of actual sales data, and the inequity in compelling a professional to pay liquidation value for an asset that was not being liquidated.⁹ The second factor illustrated the inequities and inconsistency in valuation of a sole proprietorship as opposed to a large business enterprise.¹⁰ Texas and California courts did not adopt this treatment. The third factor showed that goodwill could be viewed as enhanced earning capacity and that it is difficult to distinguish personal reputation from professional excellence.¹¹ The fourth factor dealt with “double dipping”—the fact that the working spouse’s substantial salary was taken into account in setting the non-working spouse’s alimony.¹² Of course, the court in *Holbrook* did not speak to jurisdictions that do not connect alimony and this factor. Perhaps taking this reality into account, the Wisconsin Court of Appeals later moderated the *Holbrook* decision, in *Peerenboom v. Peerenboom*¹³ and in *Sommerfield v. Sommerfield*,¹⁴ to include goodwill in the value of a dental practice and an accounting business, respectively, given the lack of ethical or contractual barriers to sale. Nonetheless, *Holbrook* remains an example of the “no goodwill” position.¹⁵ Following the progeny of these cases, however, makes it apparent that the view that goodwill is not marital property has been subject to intense scrutiny. The main reason for criticism has been that the treatment of goodwill as non-marital property does not comport with the purpose of equitable distribution. *Holbrook* and *Preis* represent the overarching minority position and are not reflective of current analysis. A number of states, although still a minority, treat the entirety of goodwill as a marital asset subject to division. California is a leader in this

area. *Golden v. Golden*¹⁶ is the initial authority that holds that the goodwill of a professional practice be considered when determining the award of community property to a spouse. The California Courts of Appeal reiterated that view in the seminal case *In re Marriage of Lopez*,¹⁷ in which the court rejected the notion that the complexity in goodwill valuation justified the exclusion of that value as marital property. Even California, however, has clarified its position over the years and recently distinguished between the goodwill of a business and the goodwill of a person conducting a business.¹⁸ Washington also falls into this camp. *In re Marriage of Lukens*¹⁹ followed the California approach and held that goodwill is subject to equitable distribution. This opinion, however, distinguished goodwill from future earnings and cautioned that careful attention must be given to the tangible resources of the enterprise rather than the post-marital income-earning efforts of the professional. That distinction echoed in *In re Marriage of Fleege*,²⁰ where the opinion rejected the contention that goodwill that affects the purchase price of a professional practice should be considered a marital asset. *In re Marriage of Hall*²¹ brought further clarity in stating that, although a salaried employee has no goodwill, a self-employed professional has goodwill.²²

The vast—and growing—majority of states advance the position that personal goodwill is excluded from marital estates, but enterprise goodwill is marital property. Indiana courts have concisely explained this distinction. *Yoon v. Yoon*²³ holds “the goodwill that is attributable to the business enterprise is divisible property, but to the extent that the goodwill is personal to the professional or business owner, it is a surrogate for the owner’s future earning capacity and is not divisible.” Interestingly, several states held this view long ago. For example, the Missouri Supreme Court adopted a similar position in *Hanson v. Hanson*.²⁴ *Hanson* followed the Nebraska Supreme Court’s transcendent ruling in *Taylor v. Taylor*.²⁵ That opinion took to task the competing views that goodwill be fully excluded from marital estates

and that it be fully included in marital estates. The *Taylor* court noted that the primary difference between these two approaches is whether the reputation of a professional/business owner is being valued, and it held that goodwill must be a saleable or marketable asset (without setting forth the methodology for establishing salability or marketability) to be valued for equitable distribution purposes.²⁶

How to Value Goodwill

Courts throughout the United States have employed various methodologies to value goodwill. One of the many capitalization-of-excess-earnings formula variants is often used to value goodwill. Additionally, a review of comparable sales and the existence of covenants not to compete can impact goodwill valuations. Buy-sell/shareholder agreements also may be considered in the valuation of assets.

Trial courts enjoy broad discretion in choosing which valuation approach to employ. Capitalization of earnings formulas have been subject to criticism for a variety of reasons, including overemphasis on the future earnings of a professional practice/business (which may capture the future income-earning capacity of the professional/business owner in contravention of legal principles) and the production of unusually high valuations. While fair market value is the preferred standard employed in valuations (as opposed to fair value, investment value, intrinsic value, or liquidation value), it is difficult to acquire reliable market data for private concerns. Similarly, buy-sell/shareholder agreements have been criticized because just as the capitalization methodology may overvalue interests, buy-sell/shareholder agreements may artificially undervalue goodwill.

Application of the multi-attribute utility model (MUM), an economic model for distinguishing personal goodwill from enterprise goodwill in divorce cases, has surfaced in the past few years as a new approach to valuing goodwill. Essentially, MUM first identifies and categorizes attributes that indicate either personal goodwill or enterprise goodwill; it then applies rela-

tive weights to each attribute to confirm, rebut, adopt, and communicate the valuation conclusion. Attributes considered in the analysis of personal goodwill include name, reputation, staff, age, health, work habits, marketing and branding, referrals, reputation, closeness of contact, ability, skill, judgment, fees, relationship to contact, and important personal traits. Attributes connoting enterprise goodwill include business location, multiple locations, marketing and branding, systems and organization, name, reputation, enterprise staff, referrals, and repeating revenue stream. The factors are weighted on a 1–4 or 1–5 scale, totaled, and then extrapolated to calculate the percentage of personal goodwill compared with enterprise goodwill. While certainly not a bright-line test for distinguishing personal goodwill and enterprise goodwill, the model does bring a considerable intellectual rigor to the mystical world of allocation between types of goodwill.

*In re Marriage of Alexander*²⁷ is the first reported divorce case to apply the MUM methodology. The Illinois Court of Appeals first determined that the method does not constitute scientific evidence subject to a *Frye* hearing.²⁸ In dicta the court remarked that even if MUM were sufficiently scientific to trigger a *Frye* hearing, the evidence would pass the general acceptance test.²⁹ It naturally followed that the court affirmed the application of MUM to the goodwill analysis. *Alexander* essentially codifies a principled approach to distinguishing personal and enterprise goodwill—an approach that many experts have applied nationally on an informal, non-uniform basis. MUM, as applied in *Alexander*, also eradicates the evidentiary proof drama by forcing the business valuator to pedigologically, as opposed to randomly, draw a distinction between types of goodwill. Although no precise computation can apply to each factual situation, MUM offers at least a quantum of guidance and gravitas to the art of distinguishing personal and enterprise goodwill. That art may develop over time into the science surely contemplated nationally by judicial precedent.

Despite the *Alexander* holding, MUM is not without its critics. In jurisdictions that cling to *Frye v. United States*,³⁰ challenges will abound to valuation professionals who seek to distinguish between personal and enterprise goodwill. Those challenges will occur whether the MUM analysis or some other formula is used. Given the relatively recent introduction of goodwill valuation designations, and the lack of strong intellectual analysis, the application of the “general acceptance” standard to this purported novel scientific evidence surely will be litigated. In jurisdictions that adhere to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³¹ there will be even more challenges. The trial courts’ “gatekeeping” function pursuant to applicable evidentiary rules, and the question as to whether “scientific, technical, or other specialized knowledge will assist the trier of fact,” is sure to be challenged throughout the United States. Regardless, for every advocate who claims that the methodological distinction between personal and enterprise goodwill is on sound analytical footing, the opposing advocate will argue that the attempt to distinguish between personal and enterprise goodwill is merely junk science. Until the AICPA other governing bodies or state appellate courts tackle this problem and provide either detailed standards or another form of guidance, expect these disputes to continue.

Conclusion

In 2009 and for the foreseeable future, distinguishing personal and enterprise goodwill in divorce valuations will continue to be a challenging, hotly contested property issue. As each state winds its way through this maze, further judicial commentary, professional standards, and other refinements are likely to shape the discussion. Yet, until there is a measure of consistency and a more formulaic approach to this issue, it is probable that controversy will continue to swirl in this venue. For the gladiators of the courtroom, along with accounting and economic trial professionals,

the fun is just beginning. Or, as they say, goodwill hunting!

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1. 150 N.E. 581, 582 (N.Y. 1926).
2. American Institute of Certified Public Accounts, *International Glossary of Business Valuation Terms* (2001).
3. See IRS. Publication 535 (2008).
4. *Holbrook v. Holbrook*, 309 N.W.2d 343, 352 (Wis. Ct. App. 1981) (quoting Joseph Story, *Commentaries on the Law of Partnership* § 99 (William S. Hein & Co. 1980)).
5. *Goodwill Attributes: Assessing Utility*, The Valuation Examiner at 22 (Jan./Feb. 2007).
6. *Id.*
7. 309 N.W.2d 343 (Wis. Ct. App. 1981).
8. *Id.* at 355.
9. *Id.*
10. *Id.* at 353.
11. *Id.* at 354.
12. *Id.* at 355.
13. 433 N.W.2d 282 (Wis. Ct. App. 1988).
14. 454 N.W.2d 55 (Wis. Ct. App. 1990).
15. See also *Preis v. Preis*, 649 So. 2d 593 (La. Ct. App. 1994) (regardless of size of professional practice, goodwill cannot be isolated from individual competence and attributed to corporation).
16. 270 Cal. App. 2d 401 (1969).
17. 38 Cal. App. 3d 93 (1974).
18. See, e.g., *In re Marriage of McTiernan & Dubrow* 133 Cal. App. 4th (2005).
19. 558 P.2d 279 (Wash. Ct. App. 1976).
20. 588 P.2d 1136 (Wash. 1979).
21. 692 P.2d 175 (Wash. 1984).
22. See also *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983); *Nehorayoff v. Nehorayoff*, 437 N.Y.S.2d 584 (N.Y. Sup. Ct. 1981).
23. 711 N.E.2d 1265, 1267 (Ind. 1999).
24. 738 S.W.2d 429 (Mo. 1987).
25. 386 N.W.2d 851 (Neb. 1986).
26. *Id.* at 859.
27. N.E.2d 766 (Ill. App. Ct. 2006).
28. *Id.* at 773.
29. *Id.*
30. 293 F. 1013 (D.C. Civ. 1923).
31. 509 U.S. 579 (1993).

INTERNATIONAL CUSTODY BATTLES AND USE OF ARTICLE 13(B)

By Dolly Hernandez

The Hague Convention on the Civil Aspects of International Child Abduction (Convention) is a vehicle used by an aggrieved parent who has suffered the loss of a child due to the other parent's unilateral decision to remove the child from or to retain the child at the place of habitual residence, without the consent of the other parent. Because of the complexities involved in international custody battles, the Convention establishes a uniform procedure for a parent to petition the court in the jurisdiction where the child and the abductor parent are located, to make a determination as to which state has jurisdiction to make a custody determination.

More often than not, a respondent will plead as an affirmative defense Article 13(b) of the Convention and allege, in general, that the wrongful removal or retention was a preventive measure taken by the respondent to cease the abuse inflicted upon the child by the petitioner and that the child should not be returned to the petitioner because there would be a grave risk of physical or psychological harm to the child. Once Article 13(b) is pled as an affirmative defense, the court must undergo an analysis that requires the presiding judge to determine whether the respondent has met the burden of proof through clear and convincing evidence. This analysis involves a great deal of fact finding and in some circuits has led to an increased use of experts who assist in ascertaining whether a child will be subjected to a grave risk of harm in the event of a return.

Procedure

A Hague action may be commenced in the district court where the child is located at the time of filing the petition.¹ The goals of the Convention are effectuated by Articles 3, 5, 12, and 13, which together establish the remedy of the return of a child to the child's country of habitual residence and set out the circumstances under which the return remedy is available.² It is important to

note however that the court's inquiry is limited to determining rights under the Convention but not the merits of the underlying custody battle.³ Upon the petitioner's satisfying its burden, a child shall be returned to the place of habitual residence, unless the respondent establishes one of the affirmative defenses.

Affirmative Defenses Under the Convention

Four affirmative defenses cover the return of a minor child under Convention Articles 12, 13, and 20.⁴ The most controversial of the four affirmative defenses, and the one addressed in this article, is found under Article 13(b), which requires the fact finder to discern not only the credibility of witnesses, who are usually individuals close to the matter at hand (i.e., the parties, extended family, and friends), but also to appoint experts to assist the court in its fact-finding investigation of whether any of the allegations proffered in support of the Article 13(b) are substantiated and whether there is a grave risk of harm to a child in the event of a return.

Respondent's Burden under Article 13(b) Is by Clear and Convincing Evidence

The respondent's burden of proof under Article 13(b) is to establish by clear and convincing evidence⁵ that there is a grave risk that the child's return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."⁶ Even if a defense is successfully established, the court retains the discretion to order the return of a child.⁷ The affirmative defenses are to be applied narrowly by the courts.⁸

The alleged physical or psychological harm is to be "a great deal more than minimal."⁹ When examining the "intolerable situation" prong of the exception, the assessment "must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence."¹⁰ *Cases Addressing Article 13(b) Affirma-*

tive Defense and the Role of Experts in Discerning Grave Risk of Harm As the Eleventh Circuit in *Baran v. Beatty*¹¹ addressed, the Convention and ICARA (International Child Abduction Remedies) do not provide a specific course of conduct or procedure for a reviewing court when analyzing whether a grave risk of harm to the child exists and whether that risk alone is sufficient to justify the denial of a petition to return a child to his or her habitual residence. Many courts in different circuits have implemented ad hoc procedures to conduct the analysis under the Article 13(b) defense.

Article 13(b) was pled as a defense by the mother in a case involving two Mexican citizens and three minor children wrongfully removed by their mother from their habitual residence in Mexico to Colorado, in violation of the father's rights of custody and access, in *Lieberman v. Tabachnik*.¹² The mother alleged that the children had been subjected to mistreatment and abuse by the father for years.¹³ The mother claimed that the father had kidnapped the children in the past, had not fed them, and had exposed them to verbal as well as other forms of abuse while they resided in Mexico. As evidence of abuse, the mother testified that the father would shout and get mad at the children.¹⁴ The mother also argued that Mexico City was dangerous and that Colorado was a safer place for the children.¹⁵ In this case, the court made a finding that the respondent failed to establish by clear and convincing evidence that the return of the children to Mexico would expose them to physical or psychological harm or place them in an intolerable situation, and that, therefore, the respondent's Article 13(b) defense failed.

In *Lieberman*, the mother also pled the children's views as a defense and asserted that the children objected to being returned to Mexico. To take into account a child's view, the court must consider whether the child has "attained an age and degree of maturity at

which it is appropriate to take account of its views [which must be proved by a preponderance of the evidence].”¹⁶ The Convention is silent as to when a child is sufficiently mature for his or her views to be taken into account; the analysis depends upon the child and the child’s age.¹⁷

The *Lieberman* case further illustrates the court’s dependence upon an expert, namely the guardian ad litem, to offer guidance to the court and facilitate its interaction with children, to navigate difficult issues such as allegations of domestic violence and abuse, and to gather the proper facts for the court’s analysis and determination of the credibility of the respondent’s allegations. The role of an expert is significant in this process because the courts can consider a child’s testimony when conducting an analysis under Article 13(b), as long as the child is of a sufficient age and degree of maturity.

During the hearing, the *Lieberman* court conducted an ex parte meeting in chambers with the children and inquired whether they wanted to return to Mexico.¹⁸ After this meeting, the court allowed two of the children to testify. During the hearing, the children were questioned by the court, the attorneys, and the guardian ad litem. The parties and the guardian ad litem agreed to the procedure. Because the court was unable to determine whether the children’s views were influenced by the mother, the court made a finding that the mother had not proven by a preponderance of the evidence that the children were of sufficient age and maturity for it to take their opinions into account.¹⁹

As a further illustration of this point, in *Blondin v. Dubois*,²⁰ the court interviewed the children in chambers along with an expert in child psychiatry and pediatrics from Yale University. The mother was not present at this interview. To make the interview as comfortable for the children as possible, the judge provided toys for the children to play with while they spoke with him and chose not to wear his judicial robe. The court’s ability to address the children’s concerns on a one-to-one basis allowed the children to open up

in a conducive and therapeutic setting. Also, the presence of a child psychiatrist would be beneficial to children experiencing difficulty opening up, and would ensure their well-being by minimizing any potential detrimental effects the process might have on a minor child.

In *Jaet v. Siso*,²¹ the mother filed a Motion for Rule 35 Exam to have the parties’ three children evaluated by a mental health professional. The court granted the mother’s motion and appointed a licensed psychologist to evaluate the children.²² In this case, the court determined that it did not have the requisite expertise necessary to conduct this type of analysis and appointed an expert to assist the court in determining whether the children would face a grave risk of physical or psychological harm if returned to their habitual residence.²³ The court then ordered a limited psychiatric evaluation of the children to address the ultimate question “whether [the children] had been subject to physical or psychological harm, and to the extent possible, whether there is a grave risk of such harm if they are returned to Mexico.”²⁴ As a result, the children were evaluated by the expert in what can be deemed the first phase of the court’s investigation as to grave risk of harm.

With that in mind and in furtherance of its analysis under Article 13(b), the court in the trial of *Jaet v. Siso*²⁵ conducted an in camera interview of the children, but also had other people present during the interview. The court and the parties agreed that it would be beneficial to the children to conduct the interview in the presence of the court-appointed psychologist because the children had become familiar and comfortable with her during the course of the litigation. In addition to the expert, the court requested the presence of the judicial law clerk and the court reporter during the interview. The court’s rationale for adopting this ad hoc procedure was, ultimately, to determine whether the allegations advanced in the pleadings and during the trial were in fact credible. The *Jaet* court followed the procedural template set forth by the court in *Leites v. Mendiburu*.²⁶ In *Leites*,

a forensic psychologist interviewed the child briefly prior to the hearing and made some preliminary findings.²⁷ The psychologist, based upon her findings, recommended that the court conduct an in camera examination of the child. This examination was conducted in chambers in the presence of the judicial law clerk and the court reporter.

After the interview, the court announced its findings in open court. Ultimately, after hearing the testimony of the parties, experts, and family members, the *Jaet* court determined that the mother had failed to prove by clear and convincing evidence that the children would face a grave risk of physical or psychological harm if returned to Mexico, their habitual residence.

Conclusion

As demonstrated aptly by the Second, Tenth, and Eleventh Circuits, district court judges are applying ad hoc rules when conducting their analyses of grave risk of harm under Article 13(b) of the Convention. Although the Convention addresses its objectives, it is silent and provides no guidance or proposed course of conduct for a court analyzing an Article 13(b) affirmative defense. Given the objectives of the Convention, however, it seems a logical extension for a court to appoint an expert, typically a forensic psychologist, who either interviews or evaluates the child in order to assist the court with its grave risk of harm analysis, because these experts are trained professionals and are equipped to handle children’s issues. A practitioner should be prepared for the court to appoint an expert to interview or evaluate children in these circumstances and for this expert to be present in camera with the judge to assist during the interview of the child. It is clear that the role of experts in Hague actions is an area of law that continues to evolve.

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1. 42 U.S.C. § 11603(b); see also *Lops v. Lops*, 140 F.3d 927, 936 (11th Cir. 1998).
2. See *Furnes v. Reeves*, 362 F.3d 702, 710

(11th Cir. 2004).

3. 42 U.S.C. § 11601(b)(4).

4. The four affirmative defenses are: “(1) the proceeding was commenced more than one year after the removal of the child and the child has become settled in his or her new environment; (2) the person seeking return of the child consented to or subsequently acquiesced in the removal or retention; (3) there is a grave risk that the return of the child would expose it to physical or psychological harm; or (4) the return of the child would not be permitted under the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.” See *Cabrera v. Lozano (In re Cabrera)*, 323 F. Supp. 2d 1303, 1310 (S.D. Fla. 2004) (citing *Furnes*, 362 F.3d at 712)) It is important to note that the burden of proof for the first two af-

firmative defenses requires a preponderance of the evidence, but the last two affirmative defenses require clear and convincing evidence. See *Furnes*, 362 F.3d at 712 n.8.

5. 42 U.S.C. at § 11603(e)(2)(A).

6. Convention, Art. 13(b).

7. See *Miller v. Miller*, 240 F.3d 392, 402 (4th Cir. 2001).

8. 42 U.S.C. § 11601(a)(4).

9. See *Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000).

10. See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1364 (M.D. Fla. 2002).

11. 526 F.3d 1340, 1346 (11th Cir. 2008).

12. No. 07-cv-02415-WYD, 2008 U.S. Dist. LEXIS 86874 (D. Co., Apr. 10, 2008).

13. *Id.* at *7.

14. *Id.* at *40.

15. *Id.* at *41.

16. *Id.*

17. See *Blondin v. Dubois*, 238 F.3d 153, 166-67 (2d Cir. 2001).

18. No. 07-cv-02415-WYD, 2008 U.S. Dist. LEXIS 86874 (D. Co., Apr. 10, 2008), at *44.

19. *Id.* at *45-6.

20. 238 F.3d 153, 167 (2d Cir. 2001).

21. No. 08-81232-CIV-Cohn/Seltzer, 2008 U.S. Dist. LEXIS 102747 (S.D. Fla., Dec. 10, 2008).

22. *Id.* at *8.

23. *Id.* at *7.

24. *Id.* at *6-*7.

25. No. 08-81232-CIV-Cohn/Seltzer, 2009 U.S. Dist. LEXIS 169 (S.D. Fla., Jan. 5, 2009).

26. No. 07-cv-2004-Orl-19DAB, 2008 U.S. Dist. LEXIS 1677 (M.D. Fla., Jan. 9, 2008).

27. *Id.* at *16.

INFORMED CONSENT: DIVORCING COUPLES HAVE OPTIONS

By Debra C. Ruel Esq.

Are divorce clients' interests being well served if the process they enter into is selected by the attorney they choose? Family law practitioners should make it their business to familiarize themselves with the process options available to a divorcing spouse to fully counsel the client. Not every client presents with the same needs and goals. A client has the right to determine which process he or she prefers, and not necessarily the process preferred by the attorney with whom the client happens to consult.

Over the past decade, addressing the needs of high-conflict couples and the incidents of domestic violence between warring couples has preoccupied the family court system. Is the adversarial model of litigation contributing to the conflict? Is a model that pits one parent against the other in evidentiary hearings likely to bode well for the couple co-parenting in the future? Are we stuck with the traditional system?

Prospective divorce clients should be fully informed of all of the options available to them when confronted with divorce or separation: mediation, collaboration, and litigation. In a medi-

cal setting, the doctrine of informed consent has been long established. The patient, who may be traumatized by a life-threatening illness, is entitled to a description of the procedure, all reasonable alternatives, and the risks associated with each procedure. The patient is entitled to make an informed decision, weighing all of the relevant factors as set forth by the medical care provider. A particular physician's lack of expertise with regard to a certain procedure does not excuse the need to disclose to the patient all available information. The divorce client should be entitled to no less than a full explanation of all alternatives.

An initial consultation with a client seeking divorce should always include a description of the various modalities accepted by the court system. First, a client may choose to represent himself or herself in the process as a pro se party. The client may go to a court service center for a “do-it-yourself divorce kit.” There the client will be assisted by specially trained, often bilingual, court staff. The client will be guided through the process from service of the complaint to requesting fee waivers

to final judgment. In family court, the prevalence of the self-represented party is much more common than most attorneys believe.

Second, a client may participate in mediation with a neutral attorney-mediator who does not file an appearance or represent either client. The better practice for the client in mediation is to have “consulting counsel” review the final agreement and/or give legal advice to assist the client throughout the mediation process. This process is well suited to many couples, especially where all of the relevant financial information is readily available to and understood by each spouse. The couple usually shares the cost of one mediator rather than of each spouse retaining an individual attorney, and consulting counsel is often paid on an “as-needed basis.” Mediation is not only cost-effective, but it actually “teaches” the couple how to discuss areas of disagreement in a positive solution-oriented manner, which very often carries on post-divorce.

The third modality is known as the “collaborative” process, which involves a “no court pledge” and resolution

of issues during a series of four-way meetings. Each client is represented in the process by collaboratively trained counsel of his or her selection. Often, ancillary professionals, such as forensic accountants and child psychologists, are brought into the process to utilize their specialized knowledge to generate solutions for the couple. Once again, as in mediation, the couple participates in positive problem-solving methods to reach an agreement that each party has helped create and understands. During the “collaborative” process, the couple is actively encouraged to gather the necessary factual information, raise issues of concern, describe their needs, concerns, and goals, and generate solutions to the problems.

It is important to note that since the case is resolved through four-way meetings, all communication is transparent: Everyone hears the same thing at the same time. A couple will experience the same process in mediation. However, during the collaborative process, the client is assisted by counsel at every meeting. Most importantly, the couple learns how to discuss areas of disagreement without “going into battle.” Compared to litigation, the collaborative process is cost-efficient, as there is

no “downtime” waiting to be heard in court or to be seen by a family relations officer. At every meeting, the couple’s needs and issues are discussed and addressed.

Finally, there is the traditional litigation model. The parties hire attorneys who communicate with their respective clients and with each other. They are prohibited from communicating in any manner with the adverse client. When four-way meetings are held, each side comes into the meeting with a strategy for negotiation and tries to utilize information to leverage his or her position. Disputes are resolved by the court at trials, in evidentiary hearings, or by way of arguments of counsel before the court. Unfortunately, in cases involving children, the nature of the adversarial system is to place the parents at odds with each other in a contest to see who can “win.” Of course, the children are often the casualties in this type of battle.

To be sure, traditional litigation has its place. There are many examples: One spouse may have exclusive access to assets and information; one spouse may be a member of a closely held family business; one or both spouses may have significant mental health issues

that may interfere with the ability to participate in an alternative process; or the couple may have a history of domestic violence, all of which may impede forthright dialogue about the pending issues and investigation of financial information.

Most clients seeking divorce counsel are traumatized, anxious, and feeling a sense of helplessness. As in the medical setting, these clients need to be fully informed of the options available, as well as the advantages and disadvantages of each approach, before they make a decision as to how to proceed. Very often, actions taken or not taken at the commencement of the case can determine the tone and tenor of not only the divorce case but also of the future of the reconstituted family. The needs of children are of paramount concern to the court and should also be of concern to the parents and their attorneys. Careful consideration of all options available to the couple should be the very first assistance provided by competent, caring family law practitioners.

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