NFLR Nevada Family Law Report

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A NEW PARADIGM FOR FAMILY COURT: THE LEGAL SERVICES COMPONENT

by Thomas L. Leeds, .
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Again at the 1999 Family Law at Tonopah seminar, questions were raised regarding the application of court rules to litigants acting in proper person. On one hand the rules should be evenly applied to lawyers and non-lawyers alike, especially where the litigant is self-represented by choice rather than due to an inability to pay. On the other hand, Family Court cases often involve children who should not be prejudiced because a parent acting in proper person makes an error in legal procedure. The following article addresses this dilemma along with others relating to legal services in Family Court.

Many of the problems of Family Court come not from the people who attend it, nor from the lawyers, judges and administrators who comprise it. Rather, it is the way Family Court is viewed which actually creates systemic problems which in turn frustrates families, professionals and the public at large. A new paradigm — or way of looking at Family Court — would not only help solve problems it would eliminate problems just by virtue of how the system works. A new paradigm is needed because the old system has not changed with the times. This article describes the problems of delivering legal services under the old paradigm and how legal services would be delivered under the new paradigm.

THE PROBLEM

The Old Paradigm views Family Court from the perspective of the traditional divorce case — the breaking up of a married, nuclear family. Possession of the family home, restraining orders, access to the children and child support are components of the divorce action to be decided by the judge. Over time, however, more and more cases came to court which were not traditional divorces. Using the old paradigm, the court created auxiliary, inferior courts — child support court, domestic violence or TPO (Temporary Protective Order) court — to deal with the new types of cases. The Family Court is a hierarchy in which different

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FROM THE CHAIR

by Kathryn Stryker, Chair

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For those of you who didn't make it to Tonopah this year (you know who you are – and so do we!), the annual Family Law Section Meeting resulted in some changes in the Executive Council and some exciting plans for the upcoming year. I am proud to introduce our newest members to the Council: from up north, Bo Pollard and Randy Drake, and from the south, Rebecca Miller. Bo, Randy and Rebecca are enthusiastic and energetic, and I look forward to benefiting from their ideas and insights during the next term. Our immediate past-Chair, Shawn Meador, will stay on as an ***ex officio*** **council member, and I know I will draw upon his experience and diplomatic ways often. Thank you, Shawn, for all that you did during the last two years as Chair, and for staying on to help us continue to meet the Council's objectives.**

The focus of the annual section meeting was pending legislation relating to family law, and what we as a Section can and can't do with regard to that legislation. It was decided that a committee will be formed to look into lobbying efforts in anticipation of the 2001 Legislative session. Additionally, we discussed several bills which are pending in this session which will affect our clients and the way we practice. For those of you who are interested, be sure to check out the new Nevada Legislative web site, found at http://www.leg.state.nv.us. This is a great way to obtain information on bills. (You can also access Supreme Court Advance Opinions from this web site.) One bill that generated a great deal of discussion was AB 154, which addresses several family court issues, including application of offers of judgment to divorce cases. A majority vote at the annual meeting resulted in a decision that the Section would support the concept of allowing offers of judgment to be made relating to property issues in divorce cases. As a result of that vote, I made my way to Carson City to testify before the Senate Judiciary Committee in April, to inform the legislators of the Section's position. As of this writing, the bill is still in the Senate Judiciary Committee.

The Family Law Section's annual meeting is important, and I encourage all section members to attend and participate. However, that requires attending the annual CLE, traditionally held in Tonopah in early March of each year. Which brings me to our present dilemma – do we keep our annual CLE in Tonopah or do we try something new in 2000? The Executive Council will make a decision on this issue at our next meeting on June 26th. Now is your chance to let us know how you feel. Please take the time to complete the enclosed survey and give us your response. Also, feel free to call me or any member of the Executive Council to share your views.

You might also notice a new Editorial Board for the NFLR as of this edition. After nearly 5 years as the Editor of the NFLR, Mary Rose Zingale has resigned. Editing the NFLR is a thankless task, not to mention time-consuming, and Mary Rose did a terrific job. We will miss her! Taking over for Mary Rose as Co-Editors – after only minimal arm-twisting – are Randy Drake from Woodburn & Wedge in Reno (also elected to the Executive Council in March), and Gregory Gordon from Jolley, Urga, Wirth & Woodbury in Las Vegas. Randy and Greg have some great ideas for future issues, and they are always looking for articles, so be sure to call them with your suggestions.

Until the next issue, *to return to Tonopah or to not return to Tonopah – that is the question!*

Paradigm cont.

orders are issued depending upon the court in which a case is initially filed. The formal family court hears all issues as part of a traditional divorce and acts as a court of appeal for decisions of hearing masters from the auxiliary courts. Because each auxiliary court was created in response to a single issue — child support or domestic violence — relief available in one court is not available in another. Except for the formal divorce, for example, a battered spouse cannot obtain enforcement of child support in TPO court; a non-custodian cannot obtain mediation in child support court.

As a practical matter, however, all manner of cases are in all the courts at the same time. Parents who are already divorced may be summoned to Family Court or child support court; parents with a divorce case pending may find themselves in TPO court as a result of domestic violence or child support court for enforcement proceedings; an unmarried parent may file a "Complaint for Custody" in Family Court or be summoned to child support court to establish paternity.

The parent untrained in the law has no real way of telling these courts apart. Each is held in a similar courtroom with a bailiff and a person wearing a robe who is called "Your Honor". But the rules and available relief are not the same in each court because of their ad hoc creation under the old paradigm. Many of the problems of Family Court involve the difficult job of navigating among and between various court dates, decision-makers and orders.

This system also contributes to the problem of the un-represented litigant — the pro per. Because of the hierarchy of courts, pro pers in formal Family Court are viewed as a crisis, pro pers in child support and TPO court pass unnoticed. A

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TONOPAH QUESTION

For the past 10 years, the annual Family Law Convention has been held in Tonopah, Nevada. While many family law practitioners believe that Tonopah has become a tradition, there are many others who would like to see a change of venue. On June 26, 1999, the Executive Council of the Family Law Section will decide where to hold next year's convention, and they need your input. The council is considering either (1) staying in Tonopah, (2) rotating between Tonopah, Las Vegas and Reno, or (3) selecting a different site altogether. Please fill out the survey below and return it as soon as possible. Your vote matters!

_____ I want to stay in Tonopah.
_____ I want to rotate between Tonopah, Las Vegas and Reno.
_____ I want the convention to be held in _____.

Other Comments or Suggestions:

_____
_____
_____
_____

Mail to NFLR at Jolley, Urga. Wirth & Woodbury, 3800 Howard Hughes Parkway, 16th Floor, Las Vegas NV 89109 or Woodburn & Wedge, P.O. Box 2311, Reno, NV 89505.

Or, fax to NFLR at 702-699-7555 or 775-688-3088.

parent can appear pro per in TPO court or child support court without the need of an attorney; the same parent may then be thoroughly humiliated and prejudiced for failing to obtain an attorney in Family Court.

AN EXAMPLE

Imagine a non-custodian wishing to reduce child support from the amount required under a divorce decree based upon reduced earnings. Under the present system, the request would be made either in child support court or Family Court.

In child support court, modification can be requested in open court without cost to either party. When the decision is made, the non-custodian receives a copy of the order at the close of the hearing, and the government sends the order to the employer for child support to be deducted from the paying parent's wages. The government then distributes the money to the custodian and keeps track of payments. Down the hall of the same courthouse — in the formal Family Court — the same request for reduction in support is very different.

In Family Court, a formal written motion is required including a five-page Affidavit of Financial Conditions; the motion must be filed with the court clerk and set for hearing; a Notice of Motion must be properly served on the other party. If successful, the non-custodian must prepare a written Order for the Judge's signature which may or may not have to be approved by an opposing lawyer. The lawyer is frustrated by the pro per not following the rules; the judge is frustrated when the litigant keeps calling for help on wording of the order; the litigant is frustrated and humiliated at the inability to obtain relief. This frustration and inefficiency is not the fault of the judge, the lawyer, or the litigant, it is due to organizing the court under the old paradigm.

THE NEW PARADIGM SOLUTION

The new paradigm, or port of entry system, views Family Court from the viewpoint of the child no matter how a case enters the court house door. Whether it is a traditional divorce, a Temporary Protective Order against Domestic Violence, a request for child support, or a modification of some prior order, the court would begin by addressing the three fundamental needs of a child, (1) Does the child have a father formally recognized on the birth certificate, (2) does the child have means of financial support and health insurance, and (3) does the child have a relationship with each parent subject to protection from violence, abuse or neglect. Rather than depend on how a case was classified the first time it came to court, the scope of services would be defined by the nature of the relief and its relationship to these three needs. This would avoid much of the confusion faced by litigants and attorneys, more efficiently address the fundamental needs of all children, and identify when the assistance of an attorney is necessary.

ROUTINE SERVICES would be accessed directly with no cost other than filing fees. The three basic rights of the child to a father, support and a relationship with each parent should be freely available without the need of hiring an attorney. For child support, mediation, protection from violence and the establishment of paternity (with or without the aid of genetic tests), a parent could simply sign-up for services. If brought to court for one issue, a parent would be able to directly access other services which relate directly to the three needs of the child without having to file a separate action. That is, a battered spouse could immediately obtain enforcement of child support, a non-custodian in child support court could immediately apply for and receive mediation.

Child Support Court, the Family Mediation Center and TPO court are already in place to handle the routine tasks of protecting the child's basic needs. The Family Court would be a court of appeal as it is now. The only material change would be to allow free access to all services by all parents no matter how they happen to be in court.

COMPLEX FINANCIAL AND PROPERTY ISSUES would remain in civil court — the Family Court — subject to the rules of court consistently applied. In this area, courts should hesitate to become too user friendly. Issues of property, alimony and pensions by definition only occur in families with assets, a portion of which would be wisely spent on legal counsel, contested or uncontested. The marketplace is an effective check on any market, including civil court. In an action dissolving a partnership, be it business partnership or marital partnership high legal fees would result from (a) complex litigation involving substantial assets and liabilities, or (b) a stubborn litigant who will not accept reality. Under the new paradigm, the court would not be obligated to provide services where the litigants have the means to hire attorneys for these issues which do not affect the basic needs of the child.

COMPLEX CUSTODY ISSUES would be an area for study, discussion and new solutions. That is, for those cases in which legitimate disputes remain after good faith efforts to mediate, custody disputes should not be determined by who can afford an attorney. Use of Court Appointed Special Advocates, government subsidized attorneys, or other solutions should be considered but are beyond the scope of this article.

UNNECESSARY ISSUES would simply disappear. By clearly defining what issues will be decided where, and allowing direct access to many routine services, many cases will not be filed at all. The parent of a child born out of wedlock would not have to file a formal paternity action if mediation services are directly available through the child support court. The battered spouse would not have to wait six months for a child support application to be processed and possibly return to the abuser for lack of support, if child support enforcement is directly available through TPO court.

LITIGANTS WOULD STILL HAVE A CHOICE. If no case affecting the

family has been filed, parents could access directly services to address the three basic needs of a child or file a formal case in Family Court. If the former is chosen, all decisions would be approved by a judge and entered as a District Court order, but the District Court Judge would only become actively involved if a decision were appealed or mediation failed. If the latter is chosen, the court would initially decide all issues utilizing formal court rules equally applied whether the litigants were represented by attorneys or appeared pro per.

Once a formal order is entered, any modification relating to the three basic needs of the child would be accessed directly. That is, modification and enforcement of support would first be heard in child support court, modification of custody and visitation would first be handled through mediation.

CONCLUSION

By organizing Family Court from the new paradigm of focusing on the child, many current problems with legal services could be solved, many will even disappear. Under the new paradigm, Family Court will provide direct access to meet the three basic needs of a child. It will eliminate the need to hire an attorney to navigate the system. It will enable litigants to understand when an attorney is needed. It will expose the unreasonable litigant who wastes everyone's time. It will ultimately help kids and families.

Please return the Tonopah Survey on page 3 promptly! Your opinion matters!

IS A QDRO A CONTRACT?

by Marvin Snyder

What's a former spouse (wife) to do, after struggling through a divorce, being awarded a court order attaching half of her former husband's pension, and then not getting it? How about suing him for breach of contract - after all, is the condition in the divorce decree concerning his pension a contract? Well, in Pennsylvania it is.

In Dona M. Beltrami a/k/a Dona M. Rossi v. Robert D. Rossi, in the Superior Court of Pennsylvania, filed March 4, 1999, this turned out to be the case. Dona sued Robert, and she won a non-jury judgment, but it was so large that Robert couldn't possibly pay it.

Dona and Robert's marriage ended in divorce in 1988. They had worked out their financial settlement ahead of time, with a property settlement agreement in July, 1987. This was incorporated into the divorce decree. The pension portion awarded to Dona fifty percent of Robert's pension, payable when he would retire.

Robert retired on January 1, 1991, some three years after the divorce, with a lifetime pension of approximately $ 3,000 a month. Dona eventually discovered that Robert had retired, but she wasn't getting her one-half share of his pension.

She sued him for it.

Dona filed a suit for breach of contract in July, 1993, claiming that Robert had failed to honor the contractual provisions of the property settlement agreement. About four years later, in 1997, Dona won her case in a non-jury trial. Since it was six years after Robert had retired, the amount of Dona's past due share of his pension was figured to be more than $ 97,000 (the details of the computation are not available, but an estimate would be computed as follows: .50 x $ 3,000 per month x 12 months x 6 years = $ 108,000).

Robert lost the case and owed Dona $ 97,648, which he could not afford to pay. Dona asked the court to attach Robert's pension to pay off his judgment to her. The court's effort to comply with her request was to issue a Domestic Relaltions Order to obtain direct payment from Robert's pension to Dona. (Author's Note to Readers: Of course, we all know that a DRO should have been prepared at the time of the divorce.)

Robert appealed the court's order to the appellate court in Pennsylvania, the Superior Court. Robert argued that a DRO can't be used in a contract dispute, that his pension is not subject to attachment based on a civil action for monetary damages, and res judicata bars Dona from pursuing this action now.

He lost on all three points.

The appellate court found that the lower court had jurisdiction in the matter, that the attachment when couched in the form of a DRO was the proper way to satisfy Dona's adjudicated award from her suit against Robert. Also, quite opposite to Robert's contention of res judicata, the DRO was merely the mechanism to carry out the court's findings and to effectuate the property settlement agreement in the divorce decree.

Conclusion - a property settlement agreement in a divorce decree is a contract enforceable by the courts by the use of a domestic relations order.

Marvin Snyder, a pension actuary, is president of Marvin Snyder Associates, Inc., 2100 Timber Rose Drive Las Vegas, Nevada 89134, phone (702) 869-0303, specializing in the drafting of QDROs for counsel and in the valuation of pensions in divorce.

DIVESTING YOURSELF OF YOUR PRACTICE

by Harold Albright, Reno Justice Court

I had the good fortune to be elected Justice of the Peace in Reno Township in November of 1998. Along with the excitement of the new job came the realization that I had to divest myself of my practice. My question became, how does one divest themselves of their practice? After looking through the statutes and finding little if any help, I decided to call Bar counsel. Rob Bare promptly returned my call and politely advised me that other than Supreme Court Rule 165, which requires billing records, fund accounts and accounting records regarding clients' property be kept for seven years, there really are no statutes or court rules that *specifically* cover the sale of a practice. One must go through the rules and apply them to your particular situation. My situation was that of a sole practitioner with 26 years' worth of clients, files and memories, and two months to deal with them.

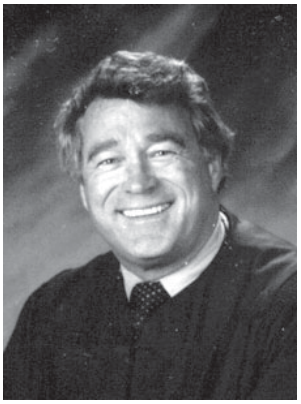
AS TO THE CLIENTS

I believe the most important thing regarding the clients is to try and match clients with attorneys who can meet their expectations. Some clients are hell-bent to fight a scorched earth, no-holds-barred, aggressive campaign. You must match that client with an attorney who will subscribe to that philosophy. Introducing that client to a rational mediation settling type of attorney will not be a favor to either of them. The same holds true regarding the client who wants to consummate the divorce and resolve matters in as conciliatory and compromising a manner as possible. That person will not be happy with the aforementioned aggressive attorney. I suggest giving serious consideration to the personality of the client and the attorney you recommend.

It goes almost without saying that there must also be a great effort given to trying to match the attorney's skill and expertise with the client's needs. Lawyers are developing more and more specialties, and it is important to consider the lawyer's specialties when matching them with a client.

A somewhat more delicate problem is how to start talking to prospective counsel. One has to be careful not to violate the attorney-client privilege, but you still have to discuss the case enough to disclose the heart of the matter to counsel. You also have to be careful not to involve the prospective attorney in a conflict of interest situation.

Generally, all of my clients knew of my election and I had been telling them for months that I would have to try and match them with another attorney if I was elected. Therefore, I had at least their acknowledgment of my efforts, if not their actual consent. As I contacted attorneys who I felt would match my clients' needs, I first reviewed names of parties and potential witnesses with the attorney to determine if there was a conflict. None appearing, I discussed general issues with them to see if the attorney perceived any problems concerning his or her inability to handle the case. None appearing, I drafted a letter to the clients advising them of three things. First, I advised them that they had the right to represent themselves, except for clients who do not have the right to do so (i.e. corporations). Secondly, I advised the client that they could hire any attorney they wish. And thirdly, I recommended the attorney or attorneys I thought were appropriate for them. If you can't get the client to elect another attorney, you must file your motion for substitution of counsel and get yourself out A.S.A.P. Any client who won't cooperate in the transfer of the case to another attorney is a problem you don't need.



AS TO THE FILES

I transfered to the new attorney all of the pleadings and evidence given to me by the client. I kept correspondence and notes for my own protection. If a particular piece of correspondence was important, I, obviously, provided a copy of that to the new attorney. Also, when I met with counsel, I let them examine the retained portion of the file and copy what is necessary. It was my practice, during my representation of a client, to provide them with copies of all pleadings and correspondence, so the client already had the correspondence for their use. Copy expenses could be borne by you or the client, depending on your disposition.

If the client has paid all fees, the attorney has to deliver all papers, documents, pleadings, and items of tangible personal property which belong to or were prepared for that client. See NRS 7.055.

If the client has not paid all fees, you may assert an appropriate lien under NRS 18.015, or the common law retaining

lien. *See* also *Figliuzzi v. District Court*, 111 Nev. 338, 870 P.2d 798 (1995) for the discussion of both liens. However, with the ever present malpractice threat, one should look long and hard before pushing too hard for unpaid fees.

AS TO THE MEMORIES

The last area, but not any less vital than the other areas, is the knowledge you have about the file and the case. I think it is extremely important to convey to counsel any nuances you have perceived about the case, the clients' resolve, the demeanor of the judge or comments of the judge regarding the case. For example, I transferred a case where the fire in the judge's eyes, which was directed toward my client, was not found in his words in the transcript nor was it to be found in the description of events he most likely received from my client. However, I was convinced that when and if the new attorney took this client before this judge, drastic measures may await both. True, my perception might have been wrong, but I believed it was important to convey my perception to the new attorney so that he could factor that into his representation.

As well, providing some background about the case, the problems you have had and the theories you've explored and abandoned will provide the new attorney with a much easier grasp of the case.

A full, candid participation in transferring the case will also provide the new counsel with a favorable attitude toward you, which will bode well both for you and the client.

CONCLUSION

In short, divesting yourself of your practice is a difficult, rock-filled shoal, and you should navigate it carefully so that you do not run aground on any of the potential problems.

ARTICLES, CASE SUMMARIES WANTED

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Co-Editors Randy A. Drake, Woodburn and Wedge, P.O. Box 2311, Reno, NV 89505 and Gregory C. Gordon, Jolley Urga Wirth & Woodbury, 3800 Howard Hughes Parkway, Sixteenth Floor, Las Vegas, NV 89109.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

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