

Fifty Years of Family Law Practice - The Evolving Role of the Family Law Attorney

by

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For better or worse, families and family law have undergone tremendous change in the past half-century. Families have increased in diversity and decreased in stability. Marriage has emerged as a marker of class in society.² Family law has moved from a fairly narrow tort-like system of fault and compensation to a very complicated system that at times resembles a partnership dissolution, a criminal prosecution, or a family therapy session, depending on the context. The world of legal practice has changed in important ways in that half-century as well, becoming larger, more diverse, more highly regulated, and with a greater emphasis on a business model of professionalism alongside a model of civic professionalism.³

This essay examines these changes and the ways in which they have fundamentally altered the world of family law practice, making the practice more complex, more specialized, more interdisciplinary, and more expensive, with greater risks of sanction

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² NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 19 (2010) (“a growing literature suggests that family structure itself exacerbates the growing income inequality in the United States and serves as a cultural marker that increase the divisions between regions, races, and classes.”)

³ WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 10 (2d ed. 2005) (defining “civic professionalism” as a “public pledge to deploy technical expertise and judgment not only skillfully but also for public-regarding ends and in a public-regarding way.”).

and liability, but also with greater opportunities for financial reward. At the same time, if one speaks with attorneys who have practiced family law for a half-century or more, one hears that the core of family law practice has remained unchanged. Helping families through difficult transitions and protecting the interests of children remain the core challenge and reward in family law practice. The essay concludes with some thoughts about the next fifty years of family law representation. The greatest risk to the ability of family law attorneys to provide representation that will continue to serve this role into the future is the increasing stratification of both society and the profession.

I. Changes in Families

The past fifty years have seen profound change in family structures and family law that have transformed many aspects of family law practice. The most obvious way in which changes in family structure have affected family law practice is simply the number of families who require the assistance of a family law attorney. In 1960, about sixteen percent of marriages ended in divorce.⁴ Today, more than forty percent of marriages are estimated to end in divorce.⁵ In 1960, there were only 35 divorced people for every 1,000 married; today there are 176. Of every 100 marriages in existence today, 46 are remarriages.⁶

Even as issues of family stability and formation increasingly become politically divisive topics,⁷ divorce itself has become more socially acceptable. “In the mid-sixties, about half of Americans told pollsters they thought parents had an obligation to try to stay together for the children’s sake. By 1994 only 20 percent held this view.”⁸

⁴ KATHA POLLITT, *SUBJECT TO DEBATE: SENSE AND DISSENTS ON WOMEN, POLITICS, AND CULTURE* 156 (Modern Library Paperbacks 2001).

⁵ Mary Pat Treuthart, *A Perspective on Teaching and Learning Family Law*, 75 *UMKC L. REV.* 1047, 1062 (2007) (suggesting that a “conservative estimate of divorce rates in the United States is that slightly more than forty percent of marriages end in divorce”).

⁶ Stephanie Coontz, *Why American Families Need the Census*, 631 *ANNUALS AM. ACAD. POL. & SOC. SCI.* 141, 142 (Sept. 2010).

⁷ CAHN & CARBONE, *supra* note 2.

⁸ POLLITT, *supra* note 4, at 156.

Cohabitation, which provided few legal rights and was, in many states, illegal prior to 1970 has become a common household form in the United States today. There were fewer than 500,000 opposite-sex cohabiting couples in 1960, but there were 4.9 million couples cohabiting in 2000.⁹ Many of the children born outside marriage are born into these cohabitating families.¹⁰

Less than five percent of children were born out of wedlock in the 1950s; compared to 33.8% of births in the United States in 2002.¹¹ Not only have the numbers of non-marital births increased, but the average age of the mothers giving birth out of wedlock has also increased. As women increasingly delay marriage, more older women are having children outside of marriage. In 1970, 50% of non-marital births were to teen mothers; thirty years later, that percentage had fallen to 23%.¹²

The economics of these families have shifted over time. In the 1960s, most children had a parent in the home, especially when the children were very young. Most families were headed by two parents, only one of whom (husbands) brought in a paycheck. Today, most children grow up in single-parent households or two-income households. In non-white families, single parent households are increasingly common: 33% of non-white Hispanic children and 60% of black children lived with only one parent (usually the mother) in 2007.¹³ In married households, two-income families are the norm today. In 1970, over half of married couples relied solely on a husband's income; by 2000, that percentage fell to only 26%. In 1975, only 34% of mothers of children under the age of 3 were in the paid workforce. Over

⁹ Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. FAM. STUD. 1.7 (2007).

¹⁰ Laura Tach & Kathryn Edin, *The Relationship Contexts of Young Disadvantaged Men*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 76, 80 (May 2011) ("Rather than fleeing at the news of a pregnancy, most unmarried fathers remain involved and supportive of mothers during the pregnancy, and half of unmarried couples are living together at the time their child is born.").

¹¹ Anna Stêpień-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. REV. 373, 374 (2010).

¹² Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, 18 NCHS DATA BRIEF (May 2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.htm>.

¹³ KATHLEEN GERSON, *THE UNFINISHED REVOLUTION* 4 (2010).

50% of these mothers work in the paid market today and 71% of mothers of all minor children are employed outside the home.¹⁴

Part of this shift is due to changing gender roles. Part, however, is also due to the disappearance of a living wage option and job security in a host of industries.¹⁵ The impact of increasing fragility in employment security and income on marriage today can be seen in the relationship between divorce and a wife's employment. "In the past, when a wife entered the workforce, the risk that the marriage would dissolve increased. Today, when a wife takes a job, the couple's risk of divorce falls."¹⁶

Finally, science has affected health and reproduction in ways that have altered the nature of family law practice and will likely to continue to do so. In 1960, the average life expectancy for a child born in the United States was 69.7 years; by 2007 it was 77.9.¹⁷ With longer lives, came longer marriages, and later life divorces, with their increased complexity. Increasingly, family law attorneys find that they must be able to deal with issues of social security, health insurance, long-term care, grandparents' rights, and a host of other issues.¹⁸

Medical science has introduced the ability to control and plan reproduction in ways never before imagined. In 1960, the average age of marriage for women was 20; today it is 26;¹⁹ average age at first birth has increased correspondingly.²⁰ The challenge presented by this deferred family formation is lessened fertility. However medical science is developing assisted reproductive technologies faster than laws can keep pace. In turn,

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ Coontz, *supra* note 6, at 142.

¹⁷ Elizabeth Arias, National Center for Health Statistics, *United States Life Tables, 2007*, 59 NAT'L VITAL STATISTICS REP. NO. 9 (Sept. 28, 2011) http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_09.pdf.

¹⁸ See, e.g., Melvyn B. Frumkes, *Tax Implication of Alimony for the Elder Divorcee*, 16 J. AM. ACAD. MATRIM. LAW. 427 (2000); P. André Katz & Amanda Clayman, *When Your Elderly Clients Marry: Prenuptial Agreements and Other Considerations*, 16 J. AM. ACAD. MATRIM. LAW. 445 (2000).

¹⁹ PEW RESEARCH CENTER, *THE DECLINE IN MARRIAGE AND THE RISE OF NEW FAMILIES 1* (Nov. 18, 2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

²⁰ J. Mathews & Brady E. Hamilton, *Delayed Childbearing: More Women Are Having Their First Child Later in Life*, NCHS DATA BRIEF, No. 21 (Aug. 2009), available at <http://www.cdc.gov/nchs/data/databriefs/db21.pdf>.

these reproductive technologies have allowed even greater diversity in family formation, as a mother can give birth to a child who is biologically unrelated to her or to her husband and as same-sex couples can more easily form birth families rather than being restricted to more public processes of adoption.²¹

II. Changes in Family Law

*The law has changed so much. When I started practicing law the entire statutory law consisted of three or four statutes, each several paragraphs long and it was mostly case law. Then in 1969, we enacted our first Family Code . . . it's grown by leaps and bounds. Now it is a thick volume of works with several titles.*²²

The attorney who began his or her practice in 1962 would have been practicing on the cusp of revolutions in the law governing divorce. Changes in the law that have challenged the nature of family law practice include the increasing recognition of individual claims to family status, the prevalence of no-fault divorce, more complicated custody decisions bounded by broadly discretionary standards, more complex property ownership, expansion of standards regarding division of that property, and society and the legal system's increasing willingness to protect vulnerable family members from violence.

In the light of today's battle over same-sex marriage, it may be difficult to recall how much our legal concept of family has changed since 1960. During the 1960s, the U.S. Supreme Court issued a number of landmark decisions expanding concepts of family. Over a single decade, the Court recognized the rights of absent²³ and unwed²⁴ biological fathers, struck down anti-miscegenation statutes,²⁵ and found restrictive definitions of family in zoning laws unconstitutional.²⁶ Constitutional consideration of the right to control reproduction protected contraceptive use

²¹ Of course, the second parent in states in which same-sex couples cannot marry still must rely upon adoption in order to have parental status to his or her partner's biological child.

²² Interview with Kenneth D. Fuller, who began practicing family law in 1962 (April 25, 2011).

²³ *Armstrong v. Manzo*, 380 U.S. 545 (1965).

²⁴ *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁶ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

among married²⁷ and unmarried²⁸ couples and established a woman's constitutional interests in obtaining an abortion.²⁹ In Congress, the Civil Rights Act of 1964 provided protections against discrimination based on sex.³⁰ Subsequent Supreme Court cases emphasized the impact of this Act on women's ability to enter the workforce on equal footing with men. In 1971 the Supreme Court upheld the gender provisions of the Act in a series of cases challenging the Act's application in employment³¹ and in probate law.³² By 1976, when the California Supreme Court decided the landmark case involving cohabitant's rights to property and support,³³ not only had the composition of families changed dramatically, but so had the law governing those relationships.

For most family law attorneys, however, the impact of the civil rights revolution on their practice likely paled in comparison to the immediate impact of the no-fault divorce revolution. In the early 1960s, to obtain a divorce decree, attorneys were required to prove a fault grounds for divorce or to assist their clients in finding jurisdictions in which no-fault grounds were available. The result was an entire profession in which pressures to engage in unethical practice abounded. In states in which divorce was more readily available, some attorneys were willing to assist their clients in producing false affidavits of residency.³⁴ In other instances, attorneys would generate evidence of fault that had no basis in fact. Cruelty and adultery were common bases. While the practice of basing divorces upon "fraud, perjury, collusion and connivance" was notoriously common, there were apparently few disciplinary actions, likely because judges felt the pressure of families desiring divorce as keenly as did the attor-

²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁰ 42 U.S.C. §§ 2000e-1 to 2000e-17 (2011).

³¹ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that employers could not refuse to hire women with pre-school aged children while hiring men with children of the same age).

³² *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Illinois statute that automatically selected men over women as administrators of an estate).

³³ *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

³⁴ *In re McKay*, 191 So. 2d 1, 7 (Ala. 1966) (approving suspension of attorney for one year for filing "quickie divorces" for clients from New York and Florida under false affidavit of residency in Alabama).

neys.³⁵ Some attorneys flaunted their suborning of perjury sufficiently that discipline resulted. In 1954, for example, an attorney was suspended for two years for his practice of preparing and submitting client affidavits stating that the husband refused to have children with the wife, even though many of his clients had in fact fathered marital children.³⁶

In 1969 California adopted the first no-fault divorce statute.³⁷ In 1970, the National Conference of Commissioners on Uniform State Laws approved the Uniform Marriage and Divorce Act (“UMDA”), providing “irretrievable breakdown of the marriage” as the sole ground for divorce.³⁸ By 1985, every state except New York had adopted no-fault divorce.³⁹ In 2010, New York’s governor Patterson signed the state’s no-fault divorce provision into law.⁴⁰ Only in recent years have states moved to reform the no-fault standards for divorce. In 1997, Louisiana adopted a “Covenant Marriage” alternative to no fault and at least nine states had introduced legislation “reforming” no fault laws.⁴¹ In most states, however, the standards established by the no-fault revolution remain unchanged.

The principal effect of this shift to no-fault divorce grounds for attorneys has been the availability of divorce actions without having to forum shop or manufacture evidence of fault. While all states provide no-fault grounds for the divorce itself, in many states fault remains an issue in other aspects of the divorce. Some states still permit fault to be an equitable consideration in division of property or awards of maintenance, especially when

³⁵ J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 90 (1997).

³⁶ *Paonessa v. State Bar of California*, 272 P.2d 510, 510 (Cal. 1954).

³⁷ HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 59 (1988).

³⁸ J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 *PACE L. REV.* 559, 584 (2007).

³⁹ Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 *U. CIN. L. REV.* 1, 54 (1987).

⁴⁰ *No-Fault Divorce Finally Comes to New York*, 36 *BNA FAM. L. REP.* 1495 (Aug. 24, 2010).

⁴¹ Laura Bradford, *Note: The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 *STAN. L. REV.* 607, 618 (1997).

the misbehavior has resulted in financial harm.⁴² The best interests standard for custody, in which almost any evidence that relates to the child's interest is relevant, invites fault-finding regarding parenting behavior.⁴³ So long as the legal system provides an advantage to litigants who can find fault with their spouse, attorneys will be called upon to cast blame.

At the same time that divorce law was simplified, custody determinations became much more complicated. While custody determinations in 1960 would have been governed by the best interests of the child standard,⁴⁴ the indeterminacy of that standard was mediated by strong maternal presumptions, tender-years presumption, and a custody structure in which one parent is given sole custody with limited visitation arrangements for the other parent.⁴⁵ Over the past fifty years, these presumptions have shifted in two ways that increase the court's discretion and the complexity of custody determinations. First, beginning in the 1970s, courts have deferred increasingly to social science in determining custody, both in influencing the law regarding custody⁴⁶ and in influencing individual decision-making through expert testimony. Second, the maternal presumption has given way to a joint custody preference or presumption in nearly all states.

The best interests of the child standard remains the overarching principle in the law of custody. The hallmark of that principle has been the significant discretion it affords the judge. A typical standard of review looks something like this: "Defer-

⁴² See, e.g., Lauren Guidice, Comment, *New York and Divorce: Finding Fault in a No-Fault System*, 19 J.L. & POL'Y 787 (2011).

⁴³ See generally Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1186-88 (1999) (describing the "nexus" requirement for introduction of moral fault issues in custody determinations).

⁴⁴ June Carbone, *Child Custody and the Best Interests of Children - A Review of From Father's Property To Children's Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721, 729 (1995).

⁴⁵ Mary Kay Kisthardt, *The AAML Model for a Parenting Plan*, 19 J. AM. ACAD. MATRIM. LAW. 223, 225 (2005).

⁴⁶ Among the most influential of these works were those by Joseph Goldstein and his colleagues, JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986).

ence is given to the trial court's assessment of what serves the child's best interests, and, unless an appellate court is convinced that the child's welfare requires some other disposition, the trial court's custody decision will be affirmed."⁴⁷ With the expanding role of judicial discretion, the scope and costs of custody litigation have exploded.

As joint custody became the norm, custody arrangements became more varied and subject to negotiation. California enacted the first joint custody statute in 1979, and by 1997, laws in all but seven states provided joint custody as either an option or preference.⁴⁸ Today, custody arrangements are negotiated between parents in a complex parenting plan that details parenting time, decisions, transportation, and costs, down to the detail of schedules for minor holidays.⁴⁹ The judge is less likely to review that arrangement from a standpoint of fact finder regarding past fault and more as a manager of complex dispute resolution and expert evaluation systems.⁵⁰

The economics of dividing households has taken center stage in most divorces today. In 1960, in common law states, a divorce court might not even address the division of property, because title governed ownership of property at divorce. Gender roles in society and the economy meant that nearly all property would have been in a husband's name, so that no division of property would have been necessary in many cases, though alimony would have been considered to address the remaining economic need of the wife. Where jointly titled property existed, it would have been divided by partition actions separate from the divorce in many common law states. Courts in community property states

⁴⁷ DeLong v. DeLong, No. 52726, 1998 Mo. App. LEXIS 69, at 12 (Mo. App. W.D. Jan. 20, 1998) (citing McDowell v. McDowell, 670 S.W.2d 518, 521 (Mo. App. W.D. 1984)), *superseded by* J.A.D. v. F.J.D., 978 S.W. 2d 336 (Mo. 1998). *See also* People *ex rel.* E.C., 47 P.3d 707, 709 (Colo. App. 2002) (finding in a post-termination of parental rights proceeding that "a trial court's findings and conclusions will not be disturbed on review if the record supports them.").

⁴⁸ Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: of Welfare Reform, Child Support and Relocation*, 30 FAM. L.Q. 765, 805 (1997).

⁴⁹ Kisthardt, *supra* note 45.

⁵⁰ Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000).

would have addressed property division more often, but the range of property ownership would not have been as diverse as it is today – as more complex financial investments, pensions and intangible property rights exist and are held by a greater range of families.

Family law attorneys have always had to counsel their clients on a broad range of laws (e.g., taxation, bankruptcy, tort liability), but these laws have only grown in complexity over time just as has family law. Moreover, in recent years, much of what was traditionally reserved solely to state law has since acquired federal layers. Congress and federal administrative agencies increasingly have created direct or indirect regulation of families. For example, as a condition of receiving federal funds, states have transformed the calculation of child support, once a highly individualized and discretionary decision, into a fairly standardized process governed by formulas and tables and administrative procedures.⁵¹

Throughout this half-century of practice, the emotional aspects of family law have remained the same. The problems the clients bring to family law attorneys are relationship problems. They are not about transactions or occurrences, but people. “Few human problems are as emotional, complicated or seem so important as those problems people bring to matrimonial lawyers.”⁵² As a consequence, a client’s emotions and attitudes are central to problem solving and planning. (This is not to say that emotions and attitudes are irrelevant in other areas of law, but they are not typically a central consideration.) Professor Robert Mnookin points out, for example, that most legal rules require determination of the facts relating to some event and are thus “act-oriented.” By contrast, child custody determinations are “person-oriented,” making relevant “the attitudes, dispositions, capacities, and shortcomings of each parent.”⁵³ Similar observa-

⁵¹ Laura W. Morgan, *The Federalization of Child Support: A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law,”* 16 J. AM. ACAD. MATRIM. LAW. 195 (1999).

⁵² AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, *THE BOUNDS OF ADVOCACY*, Preface (1992).

⁵³ Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 251 (1975).

tions could be made about the many other legal issues facing families.

An additional fundamental change in family law over the past fifty years is an increasing willingness to protect vulnerable family members from violence within their families. Undoubtedly, violence has always been an aspect of family life. What has changed in the past fifty years, has been the recognition that the law should intervene in families to protect victims of that violence. Both domestic violence law and child abuse and neglect law have grown exponentially in the past half-century, as courts and legislatures have chosen to pierce the shroud of family privacy and autonomy where necessary to protect vulnerable members of that family.⁵⁴

Prior to the 1960s, both society and the law treated domestic violence as a private, “family matter” about which one did not speak in polite company and courts did not consider of legal significance.⁵⁵ Beating, as cruel and inhumane treatment, did not become a ground for divorce in New York until 1966, but even then the plaintiff had to establish that there had been a sufficient number of beatings.⁵⁶ One of the first domestic violence shelters in the United States did not open until 1967.⁵⁷ The attitude of the courts toward violence in the home was that, while distasteful, it was an ordinary, private matter. Decisions of the New York courts in the mid-1960s provide vivid examples. For example, in reversing the trial court’s finding of cruel and inhumane treatment as against the weight of the evidence, the New York Court of Appeals noted that:

The proof shows that the relations between the parties were trying, unpleasant and at times acrimonious, that defendant said he would

⁵⁴ J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1, 12 (2008) (“Even if deeply disturbed, intact marriages were virtually insulated from legal intervention.”).

⁵⁵ Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1666 (“For all of our history, until approximately twenty-five years ago, the criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it.”).

⁵⁶ DEL MARTIN, *BATTERED WIVES* (1976).

⁵⁷ NANCY LEMON, *DOMESTIC VIOLENCE LAW: A COMPREHENSIVE OVERVIEW OF CASES AND SOURCES* (1996).

have plaintiff committed, that on two occasions (about a year apart) he struck her, and that plaintiff suffered anxiety and depression as a result of their discord. The proof failed to establish, however, that the name-calling, bickering and threats substantially impaired plaintiff's health.⁵⁸

Or consider this 1965 trial court commentary:

The plaintiff admitted . . . that prior to the incident in which defendant held her head under the bathtub faucet she had thrown a pot of water on him and that prior to the incident in which he had tied her hands and feet, he had sought to make love to her and she had repulsed him, slapping and kicking him. Such physical acts as defendant committed were, thus, provoked.⁵⁹

The laws recognizing marital rape developed even more slowly, where again the concerns for marital privacy and restraint in state intervention were valued more than protection of victims.⁶⁰ “[Even] states willing to augment the property rights . . . [and] ratify woman suffrage . . . were emphatically unwilling to subject husbands to prosecution for marital rape.”⁶¹ However, as recently as ten years ago, only seventeen states and the District of Columbia had completely abolished the marital rape exemption.⁶²

While issues of violence continue to plague families today, all states now have protections for victims of domestic violence and features of these protections are woven into family law practice. Whether considering a protective order or evaluating the impact of family violence on custody or shared parenting arrangements, attorneys in family law practice today increasingly recognize that all aspects of family law practice must take into account the possibility of violence and the unique responses necessary where that violence exists.⁶³

⁵⁸ *Schapiro v. Schapiro*, 276 N.Y.S.2d 678, 679-80 (N.Y. App. Div. 2d Dep't 1967).

⁵⁹ *Becker v. Becker*, 260 N.Y.S.2d 879, 880 (Sup. Ct. Nassau County 1965).

⁶⁰ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1486-87 (2000).

⁶¹ *Id.* at 1380.

⁶² National Clearinghouse on Marital and Date Rape (May 2005), available at http://ncmdr.org/state_law_chart.html.

⁶³ Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

Likewise, protections against child abuse and neglect are relatively new features of the legal system. The first comprehensive legislation to focus on child protection was the Child Abuse Prevention and Treatment Act (CAPTA), passed in 1974.⁶⁴ The Act defined child abuse and neglect, and provided federal funding to states that enacted laws consistent with the Act's guidelines. One of those laws required that the best interests of the child be represented by guardians ad litem in cases raising allegations of child abuse or neglect. In a parallel development in the juvenile justice system, the Supreme Court recognized a child's right to counsel.⁶⁵ In the years since, an entire subspecialty of child law has developed, and the issue of the types of representation appropriate for children have become the subject of intense debate.⁶⁶

In summarizing all of these dramatic changes to family law, one attorney who began her practice in 1959 commented:

*Family law is so much more complicated today than it was then. In those days, you went into court with one small file and there were only three issues: Who is the innocent & injured party? How much maintenance is due? and Who will have custody? Of course, it wasn't very fair then.*⁶⁷

III. Changes in the Profession

*We had conferences about how to do hourly billing. And there were people who were mad about it. And there were people who were thrilled about it.*⁶⁸

The past fifty years have seen extraordinary changes in family formation and stability, the economics of family life, and the impact of medical science on families, how have these changes affected family law attorneys? For family law attorneys, the im-

⁶⁴ The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101-5106 (1974).

⁶⁵ *In re Gault*, 387 U.S. 1 (1967).

⁶⁶ Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 22 J. AM. ACAD. MATRIM. LAW. 251 (2009).

⁶⁷ 67 Interview with Grace S. Day, Polsinelli, Shugart, Kansas City, Missouri, who began practicing family law in 1950 and still maintains an active practice today (Aug. 8, 2011).

⁶⁸ Interview with Charlotte Thayer, Kansas City, Missouri, who began practicing in 1959 (March 12, 2011).

mediate consequence of changes in families and family law has been an increasing demand for legal services and a broader range of services. Whereas a family law attorney's practice in 1960 would have consisted almost entirely of divorce and custody, today a family law attorney may be called on to resolve disputes over ownership of property between unmarried couples, represent a grandparent in a guardianship for her grandchild, or bring an action to determine parentage. A family law attorney in 1960 would be involved almost exclusively in litigation. Today's family law attorney may be combining a litigation practice with one that provides planning services for diverse families, from planning for care of family members at various life stages or negotiation of private agreements regarding property or support among unmarried couples. Changes in attitudes toward divorce have been accompanied by more favorable views toward divorce attorneys. While not all family law attorneys who practiced before the sexual revolution may have experienced the approbation of society as "divorce attorneys" some recall this attitude vividly:

*The social and legal climate respecting divorce and divorce lawyers changed from hostility to acceptance, as nice people began to get divorced and their lawyers were no longer schmoes.*⁶⁹

The demographics of the profession alone have had a profound effect on family law practice. In 1960, there were 285,933 lawyers in the United States, nearly all of whom were white males.⁷⁰ Family law practice was, along with criminal defense practice, one of the limited areas of practice open to the few women and ethnic and racial minority attorneys.⁷¹ Between 1960 and 1980, "law school enrollment increased three times, bar admissions four times, and the lawyer to population ratio

⁶⁹ JOSEPH DUCANTO, *ALL IN THE FAMILY* 12 (2009) (recalling a half-century of family law practice).

⁷⁰ MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 39 (1991).

⁷¹ *Id.* See generally JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982) (chronicling the story of the role of ethnicity in the stratification of the bar, based on service to different clienteles).

halved”⁷² so that today there are over one million lawyers.⁷³ Women now make up nearly half of law school enrollments (though recently that percentage has begun to fall) and minority enrollments are at about twenty percent.

This growth in numbers and diversity has had a number of consequences. One of the most obvious for family law attorneys has been the growth in competition for clients. Family law is one of the highest demand areas of practice. Domestic relations and juvenile caseloads together make up sixteen percent of all non-traffic state court trial cases.⁷⁴ Many attorneys believe that family law is a bread and butter practice that they can fall back upon when other practice areas decrease. Unfortunately, many of these attorneys who believe they can “pick up a divorce or two” underestimate the skills and knowledge required for effective family law practice, with the result that family law practice today represents one of the fields of practice with the highest rates of disciplinary complaints and malpractice actions.⁷⁵

Not only are there more attorneys, but also more professionals of other disciplines involved in family law matters today. Court structures and processes have changed significantly for attorneys focusing on family law. Court reform efforts in the early 1960s were directed toward preventing divorce. In 1963, a group of judges and court counselors in California formed what would become the Association of Family and Conciliation Courts.⁷⁶ At that time, court connected services were primarily directed toward reconciliation. The courts employed “marriage counselors”

⁷² Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 627 (1994).

⁷³ In 2008, there were 1,180,386 lawyers in the United States. American Bar Association, *Lawyer Demographics* (2008), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf.

⁷⁴ National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads, Domestic Relations Caseloads* (2008), available at http://www.ncsconline.org/d_research/csp/2008_files/Domestic%20Relations.pdf.

⁷⁵ See 1 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 6.2 (2005).

⁷⁶ Association of Family & Conciliation Courts, *Five-Year Report 2002-2007* at 3, available at <http://www.afccnet.org/pdfs/AFCC%20Five-Year%20Report%20Web.pdf>.

who provided “short-term marriage counseling services” and facilitated “husband-wife agreements to resolve marital disputes to promote reconciliation.”⁷⁷

By the end of the 1960s, the focus of court reform efforts was less on reconciliation and more on reducing the human costs of the divorce systems. The no-fault movement was but part of this overall reform effort. Over the course of the past fifty years, many families and family law attorneys alike have become increasingly disillusioned with the adversary system in family law cases, believing that attorneys add to conflict, costs, and time without adding any value to the process of family restructuring.⁷⁸

The family law bar has responded, becoming one of the earliest innovators of alternative dispute resolution processes. Attorney and court attitudes toward mediation have moved from cautious support⁷⁹ to a sophisticated understanding of when and how mediation can help resolve family disputes.⁸⁰ Parenting education programs helped parents to continue to work together post divorce (or post custody battle in the case of unmarried couples) to raise their children. A range of mental health professionals have become increasingly integral to the divorce process – as custody evaluators, parenting coordinators, or in their more traditional roles as counselors and therapists. The emergence of collaborative law is simply the newest innovation in this drive to move away from the “mudslinging”⁸¹ of divorce litigation in the past.

Some of the most profound effects on family law attorneys have been changes in the practice of law generally. Attorneys

⁷⁷ Association of Family & Conciliation Courts, *History*, <http://www.afccnet.org/about/history.asp> (last visited Nov. 11, 2011).

⁷⁸ Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

⁷⁹ Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIM. LAW. 353, 389 (1997).

⁸⁰ Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 Fam. L.Q. 659, 662 (2008).

⁸¹ *Roundtable on Divorce Law and Practice*, ILL. LEGAL TIMES, (Dec. 1998) (“the role of the lawyer in the matrimonial area has significantly changed from somebody who is just a mudslinger, which was the image of days gone by.”)

have evolved from a self-regulated professional guild to a highly regulated service industry, with international and national regulation by courts, legislatures and administrative agencies. Fifty years ago, attorneys did not advertise and the practice of “time-based billing” was a novel innovation. In 1962, when the American Academy of Matrimonial Lawyers was founded, the profession was largely regulated informally and locally through private bar associations and individual courts. State or local bar associations had mandatory fee schedules that dictated charges for various categories of cases.

During the 1970s, the regulation of the legal profession experienced seismic shifts. In 1969, the American Bar Association first approved its Model Code of Professional Responsibility, which state supreme courts then adopted as their own codes of professional conduct for discipline of attorneys. In the late 1970s, the U.S. Supreme Court stepped into the field of attorney regulation, first finding that fee schedules promulgated by local bar associations constituted illegal price fixing⁸² and then holding that attorneys had rights to commercial speech under the First Amendment and that state bar associations could not constitutionally enforce flat bans on advertising.⁸³ The combination of these two decisions was to recognize the business of legal services delivery as a component of the legal profession.

Today, attorneys in any area of practice must have a sophisticated business model for profitable and effective delivery of legal services, with family law being no exception. With the introduction of the billable hour, family law attorneys suddenly were able to charge for their services in a way that could sustain a practice limited only to family law and provide a comfortable income. Nonetheless, because courts viewed family law cases as requiring special protection, contingent fees were prohibited because it was thought they would discourage reconciliation.⁸⁴ Some of the justifications for this ban recited by courts fifty years ago are still quoted today. As one court commented:

⁸² Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-93 (1975).

⁸³ Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

⁸⁴ Jordan v. Westerman, 28 N.W. 826 (Mich. 1886); Baskerville v. Baskerville, 75 N.W.2d 762 (Minn. 1956); State v. Dunker, 71 N.W.2d 502 (Neb. 1955); *In re Smith*, 254 P.2d 464 (Wash. 1953).

A decree of divorce not only concerns the parties litigant but affects the public morals and domestic relations of the people. The public has an interest therein, not only in maintaining the integrity and permanency of the marriage relation . . . but also in the maintenance of the social obligations arising therefrom.⁸⁵

At the other end of the economic spectrum are those clients who cannot afford representation. Low and middle-income individuals need family law services as much as anyone; however, accessible and affordable legal representation is difficult to find. As the poverty rate for families has increased over the past fifty years,⁸⁶ the supply of attorneys to serve these families has not kept pace.⁸⁷ The most common unmet legal need in the United States over the past decade has been family law.⁸⁸ Professor Russell Engler summarizes the situation succinctly:

We know that large numbers of litigants in family cases are unrepresented, that family law cases are prevalent in unmet legal needs studies, and that unrepresented litigants struggle in cases in which they face unrepresented litigants. One study found that access to legal services is the only proven way to reduce incidences of domestic violence. Another reported that, in seeking protective orders, applicants with lawyers succeed eighty-three percent of the time, while only thirty-two percent of applicants without lawyers obtain such orders. Custody cases are often prioritized in legal services offices, presumably due to the impact the assistance of counsel makes in the outcomes, and many assistance programs short of full representation handle family law cases.⁸⁹

For private family law attorneys, this situation means increasing demands for pro bono representation and appointment

⁸⁵ *In re Fisher*, 153 N.E.2d 832, 840 (Ill. 1958) (citation omitted).

⁸⁶ Carbone, *supra* note 44.

⁸⁷ Since the Legal Services Corporation was first established by Congress in 1974, the level of funding for civil legal assistance for the poor has fallen from a high in 1981 (which represented two attorneys for every 10,000 low-income persons) to the current level which is half that amount. Meanwhile, the poverty population over that same period rose fourteen percent. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION 1-2 (2009), <http://www.lsc.gov/justice-gap.pdf>

⁸⁸ *Id.* at 9.

⁸⁹ Russell Engler, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context: Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 714 (2006).

to those categories of civil cases in which the right to counsel has been provided by state legislation or constitutions.⁹⁰ These needs have created pressures for states to provide legal services to these families, but often in forms or structures that are different than private legal representation. Thus, children increasingly have a right to a form of representation in cases raising allegations of abuse or neglect, but in only a few states is that model of representation one of client-directed representation by an attorney.⁹¹ Parents have rights to child support services, often prosecuted by attorneys, but in a quasi-public role rather than as a representative of the parents.⁹² Victims of domestic violence have access to *pro se* friendly protective order proceedings, with assistance of victim advocates who are often not attorneys.⁹³ Increasing *pro se* representation, including among middle class individuals, creates pressures on courts to provide direct assistance to self-represented litigants.⁹⁴

IV. Conclusion

While the demographics and regulation of the legal profession have changed the practice of law for all attorneys, the changes family law attorneys have experienced in their practice have been some of the most dramatic of any sector of the legal profession. Every aspect of the practice has been affected, from

⁹⁰ Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 342 (2003) (describing right to counsel for parents in child dependency actions).

⁹¹ See generally Guggenheim, *supra* note 66 (explaining the decision of the AAML to provide standards supporting children's lawyers to representation of children's expressed objectives only and rejecting "best interests" attorneys).

⁹² Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 FORDHAM L. REV. 2155 (1999).

⁹³ Jeffrey R. Baker, *Necessary Third Parties: Multidisciplinary Collaboration And Inadequate Professional Privileges In Domestic Violence Practice*, 21 COLUM. J. GENDER & L. 283 (2011); Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROBS. 279 (2001).

⁹⁴ ABA Coalition for Justice, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts*, July 12, 2010, <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf>.

the clients, whose issues and identities have become more complex and diverse to the legal standards and procedures, that have moved from fault-based adversarial contests to multi-disciplinary blends of educational, psychological, social and legal processes.

What will the family law attorney of tomorrow look like? So long as the trends toward increasing social and economic polarization of the country continue, it seems likely that there will be more than ever two worlds of family law practice. In one world, those who can afford marriage and divorce will be able to order their family affairs with relative privacy and with access to complex multidisciplinary services, managed by highly specialized family law attorneys. The other world will be one in which those who cannot afford private legal representation will have their families managed by government entities in which lawyers will play a far more limited role and routine legal services will be delivered in the least expensive manner possible, often by paraprofessionals with specialized training only in their particular family law field. The role of organizations such as the American Academy of Matrimonial Lawyers will continue to be to encourage and guide the highest standards of practice for attorneys in both worlds.

Regardless of changes over the past fifty years or those changes to come, some aspects of family law are unlikely to change. Families – however constituted – will still provide the building blocks of society. Transitions in those families will remain intensely emotional. Children will suffer if the family law system and family lawyers individually do not provide competent and diligent representation. The rewards of family law practice will continue to be the intrinsic satisfaction of helping families through the transitions in their legal relationships.