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# TWO GENERATIONS OF PRACTITIONERS ASSESS THE EVOLUTION OF FAMILY LAW

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The last fifty years have seen a revolution in virtually every aspect of family law and practice, bringing unimaginable changes. Among the ten most influential are the changes in the concept of the family, the way we look at marriage, the increasing divorce rate, the specialization of practice due to creeping federalism, emergence of alternative dispute resolution, and the enhancement of rights for children. These changes have profoundly affected the lawyers who have dedicated their legal careers to serving families.

## I. The Concept of Family

Fifty years ago, a family consisted of a husband, a wife, and, in most cases, children. Although nontraditional families existed, the basic notion of "family" was not in dispute. The traditional family still exists, but not in the same form. The concept of the man as the breadwinner and the woman as the homemaker, which was an indelible part of the social fabric then, has been dismantled. Two-income families and "role reversal" families (a term that one day may fade from usage) are now common. Women have made great strides in all aspects of business and the professions and have reached, or are rapidly approaching, an equal role with men in most aspects of life. Many men participate in the day-to-day challenges ***688** of parenting and make professional sacrifices to parent. Although some may consider that people have become more individualistic and self-centered than they were fifty years ago, that individualism is moving married couples toward a more flexible marital partnership. Individual roles, responsibilities, and contributions in families are increasingly customized to suit each married couple.

The composition of the American family has changed with more couples living together without marrying and with one third of all children born out of wedlock. More than forty percent of children are living in one-parent households. The U.S. Supreme Court transformed illegitimate children into "non marital" or "out of wedlock" children who were entitled to support from both parents. Paternity actions can be brought throughout a child's minority. Unmarried fathers now may share parenting time with the mothers.

There has been a growing recognition of same-sex and cohabiting relationships. While same-sex families are not universally embraced, a growing minority of states now recognize same-sex marriage or civil unions. Our own state of Connecticut now recognizes both, a development that would have been unthinkable a few decades ago. Additional expansion of the concept of family that may seem unimaginable or absurd today may come to fruition. Perhaps we will see legalized bigamy, the marriage of cloned persons, or even marriage of self-aware machines. Social and economic change follows every expansion of the family concept. Family law practitioners are at the vanguard of such change and continually must adapt their outlook and practices to account for new realities.

## II. The Rise in the Divorce Rate

As the divorce rate has risen dramatically, attitudes toward divorced persons have changed. Once, people who divorced were regarded as morally deficient. Today, no-fault divorce, coupled with an increasingly fast-paced, individualistic, and mobile society, make divorce a common occurrence. People seem less willing to make the effort to grow with each other through the years and more interested in seeking a partner with compatible interests at various stages of life. We live in a culture of serial monogamy.

An important fallout of no-fault divorce is a significant decline in the weight that many judges place on personal responsibility, or fault. Adultery is seen today as simply the choice of consenting adults, rather than a serious sin. The only fault that most judges seem to take seriously is physical or serious emotional abuse. Certainly casting stones at adulterers or even denying financial rights to sinners was too harsh, but the disregard of **689* personal behavior that is detrimental to the sustainability of marriage is a problem.

The practice of family law is entirely different since the rise of no-fault divorce. No-fault divorce has eliminated many of the outright dishonest practices that existed under the fault system. For example, ethical issues arose for lawyers when parties manufactured fault grounds that were advanced by complicit attorneys. However, no-fault divorce has substituted a culture lacking in marital responsibility, in which people are not held accountable for conduct that undermines marriage, which some consider society's fundamental building block. Some clients still hold the traditional belief that marriage is forever and that a spouse should be accountable for his or her wrongdoing. Therefore, one of the challenges for a family lawyer is to reconcile client beliefs with the realities of divorce in this society.

## III. Creeping Federalism and Interjurisdictional Cooperation

Fifty years ago, the legislative, executive, and judicial branches of the federal government played almost no role in family law. Family lawyers have seen a creeping and deepening involvement by the federal government in an area that traditionally had been left almost entirely to the law of the several states. Since the 1970s, the federal government has taken an increasingly active role in family law. Congress has federalized to a large extent the laws relating to establishment and enforcement of child support, paternity, and custody jurisdiction. Federal laws have made it possible to divide military and other pensions. Changes in the tax code have made structuring divorce settlements easier in some ways and more complex in others. Terms like PKPA, QDRO, COBRA, QMCSO, ERISA, CAPTA, VAWA, and the like have become common jargon for family lawyers. In addition, the United States has ratified international treaties like the Hague Convention on Civil Aspects of International Child Abduction, which allow actions to be filed in state or federal court. The U. S. Supreme Court has recognized a right to marital privacy, individual privacy, abortion, and family autonomy, and supported the integrity of the intact family.

As the need for uniformity in state laws and for better cooperation among jurisdictions became essential, states have enacted numerous uniform acts. Some of these acts, like the UCCJEA and UIFSA, and their predecessors, have been enacted in nearly all states. Federal intrusion and interstate cooperation have been fruitful and helpful in many areas, but with them came a significant increase in complexity for the family law practitioner.

## **690* IV. Legal Complexity and Specialization in Family Law

Without question, the family lawyer of today must know a great deal more than the family lawyer of 1958. The volume of legal information that a truly competent family lawyer today must command is vastly greater than even a few short years ago. That body of information is in constant flux, making the need for continuing legal education very important. That complexity has fostered increasing specialization in family law.

An outstanding family lawyer must have an understanding of human behavior, an ability to suggest creative solutions to an infinite variety of unique human problems, command of both state and federal law, trial skills, and sound judgment in intensely emotional situations. Assembling such varied expertise into a single individual is no easy task. This may explain the development of larger family law firms in recent decades, and of firms with offices in more than one state. Today, women have gained in both numbers and influence in family law, not only as lawyers, but also as judges, custody evaluators, mental health professionals, financial planners, and others who impact the resolution of domestic relations cases. Increased involvement of women has been important to many issues, such as protection of the victims of domestic violence.

## V. The Advent of Meaningful Discovery

This may seem shocking to a modern practitioner, but fifty years ago there was no meaningful discovery in family law cases. Parties disclosed voluntarily or resorted to self-help to gather information. Concepts such a financial affidavits that set forth a party's income, assets, liabilities, and expenses were not a routine part of the practice, and there was no notion that a party had a duty to make full financial disclosure.

Today, the pendulum has swung very far in the opposite direction. In many cases, thousands of pages of documents exchange hands, and parties submit to a variety of mental health, financial, and other discovery examinations. Even nonparties whose lives somehow touch the litigants often are subject to deposition under compulsion of a subpoena and court orders. The universe of what is discoverable, the power to compel compliance with discovery demands, and the penalties for noncompliance all have been greatly enlarged.

Practitioners and parties have benefited from the meaningful exchange of information necessary to resolve a case fairly. Yet, there is a trend toward excessive discovery, pushed in many cases by the defensive practice of law by attorneys who are far less concerned about what the discovery will reveal than they are about potential criticism from clients if they fail to obtain the information.

## *691 VI. Eroding Professionalism and Civility

Fifty years ago, family law practice was less formal and often done with a handshake. Lawyers treated each other as colleagues seeking to do the right things for clients. Today, many lawyers feel that there has been a decline in civility as the number of lawyers has increased and the process has become more adversarial with a win/lose mentality. Civility has declined most markedly in the past decade, as family lawyers and clients embraced a new culture of instantaneous response. Often our prompt e-mail communications inflame situations that in years past would have been tempered by reflection and a courteous telephone call to opposing counsel.

The ABA Section of Family Law enacted Civility Standards for Family Lawyers in 2006. There need not be tension between civility and vigorous representation. Attorneys can disagree without being disagreeable. Litigants and their children will go on with their lives after our involvement ceases. We do our clients and ourselves a disservice if we do not recognize this.

## VII. The Emergence of Alternative Dispute Resolution

There was negligible use of alternative dispute resolution (ADR) until recently. Now ADR is an important and growing part of the practice. It takes many forms, from court-annexed mediation to private arbitration, and is important in resolving tens of thousands of cases every year. Collaborative law is on the ascendency, in part because it recognizes what most practitioners took for granted in the past: family law is not a game to win. The cooperative forms of ADR reflect a longing for civility and self determination, but lack the tools and punch necessary to resolve many matters. Undeniably, however, ADR has given clients and lawyers a longer and better menu of options to resolve domestic disputes.

## VIII. Enhanced Protections for Children

Fifty years ago, the concept of the guardian ad litem existed but was not widely used, especially in the context of child custody. Today, involvement of counsel for minor children and guardians ad litem in custody matters is common and has given children a loud voice in determining their own best interest. The additional expense of child advocates was a topic of debate decades ago but clearly has been worth it. Judges are very interested in the views of the child's representative. In many cases, the child advocate's voice is more important to the decision-maker than the attorneys for the parties. The added protection for children is a truly positive development for which the family bar should justifiably take credit.

## *692 IX. The Emergence of Assisted Reproductive Technology

In recent decades, an entirely new area of concern to family lawyers emerged. Assisted reproductive technology (ART) has allowed large numbers of families to have children, and has generated complex legal and ethical issues for family lawyers. The first in vitro fertilization baby was born in 1978. Who would have imagined that you could have a baby without having sex or adopting? Issues of surrogate parenthood have arisen. Blood testing, tissue testing, and DNA testing have advanced to the point of 99.99% accuracy as to paternity of a child. New policy questions emerge as science makes it possible to do what was unthinkable fifty years ago. Within the past decade, scientists around the world, including many outside the jurisdiction of U.S. law, have reported progress toward cloning human beings. Such developments are fraught with potential both for good and for evil. The age of genetic engineering has arrived, and practitioners can expect to address fast emerging challenges.

### X. Technological Advances and the Information Revolution

The past fifty years, and particularly the past two decades, have seen an explosion of technologies that have completely transformed the daily practice of family law. The typewriter of yesteryear has become the computer of today with its Internet search engines. Document preparation is much easier today, and even voice recognition software has reached a high level of accuracy. There are scanners and photocopy machines. Personal digital assistants (PDAs), such as cell phones with e-mail, text messaging, calendaring, remote access software, and Web access, mean that a practitioner can carry his office in his pocket.

Fifty years ago, legal research was painfully slow, and finding an experienced attorney was by far the greatest asset for obtaining a quick and accurate legal answer. That changed with the electronic communications revolution starting in the 1990s, which made a world of information available and searchable all of the time. Today we have information overload, and there is no doubt that available information is of uneven reliability.

Technological advances have created new schisms in the practice. Many family lawyers use new technologies with amazed reluctance. They view PDAs as the ubiquitous shackles of the next generation of family lawyers, and they want no part of it. They blame e-mail and cell phones for work days that do not end, opposing counsel with no patience, and clients who sabotage cases and lives with self-destructive e-mail flourishes.

The growing segment of the family bar that is comfortable with new technology would agree with many of these criticisms. Yet, they laud the ***693** ability to produce higher quality legal work more quickly and to monitor tense situations more closely after hours. Attorneys celebrate new freedoms that come with untethering from the office, such as the flexibility to attend their own children's activities without losing touch with their cases.

The daily practice of family law is vastly different from fifty years ago. Yet, the problems that family lawyers solve still revolve around human relationships and money. This basic connection with the past is enduring.

Footnotes

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