A JUDGE'S GUIDE TO THE 10 MOST DIFFICULT ISSUES IN CHILD CUSTODY MATTERS

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CHAPTER 3

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PROFESSIONAL BACKGROUND

Admitted to practice in Texas, October 22, 1974.
Licensed to practice, U.S. Supreme Court, May 14, 1979.
Board Certified in Family Law, Texas Board of Legal Specialization, State Bar of Texas.
Marr, Meier & Bradicich, Attorneys at Law, Victoria, Texas, September 1, 1974 to present.
Elected as Judge of the 24th Judicial District Court effective January1, 2013.

EDUCATION

J. D., Texas Tech University School of Law. Graduated, May 1974.
Bachelor of Business Administration, Finance Major, Texas Tech University. Graduated, May 1971.

PROFESSIONAL ASSOCIATIONS

Member in good standing, State Bar of Texas.

Member, The College of the State Bar of Texas.

President, Texas Academy of Family Law Specialists (1994-1995).

President Texas Family Law Foundation - 2006 - 2008

Member, Family Law Council, State Bar of Texas.
- Secretary - 1996 - 97
- Treasurer - 1997 - 98
- Vice-Chair - 1998 - 99
- Chair-Elect - 1999 - 00
- Chair - 2000-01
- Immediate Past Chair - 2001-02
- Ex-Officio - Member - Lifetime

Chair - Family Law Section, Legislative Committee - 2006 - Present

Member, Texas Family Code, Title 2 Revision Sub-Committee of Legislative Committee of Family Law Council, State Bar of Texas.

Member, Texas Family Code, Title 1 Revision Sub-Committee of Legislative Committee of Family Law Council, State Bar of Texas.

Member, Alimony Study Committee, Family Law Council, State Bar of Texas.

Member, Family Law Practice Manual Committee, Family Law Council, State Bar of Texas.

CAREER HIGHLIGHTS

Recipient - Texas Academy of Family Law Specialist - Judge Sam Emison Memorial Award for Outstanding Contributions to Family Law - 2007.

Recipient - State Bar of Texas Family Law Section - Dan R. Price Award for Outstanding Contributions to Family Law - 1995.

Faculty member and course director: Various seminars sponsored by the State Bar of Texas, Texas Academy of Family Law Specialists, South Texas College of Law and American Academy of Matrimonial Lawyers.

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EDUCATION:

Baylor University – B.A. Religion – May 1992
Southwestern Baptist Theological Seminary – M.A. Religious Education – May 1995
Southwestern Baptist Theological Seminary – M.A. Marriage and Family Counseling – May 1995
Licensed Professional Counselor, State of Texas, License #14323 – October 1997 to present
Certified Mediator – Family, Divorce, and Child Protective Services – 2000 to present

PROFESSIONAL EXPERIENCE:

2003 – Present: **Private Social Study Evaluator/Expert Consultant**
Christy Bradshaw Schmidt, MA, LPC – Dallas, Texas
--over 500 social study evaluations completed to date (which includes Ms Bradshaw Schmidt's career at Family Court Services)
--extensive testimony experience – testify on 10-20% of the evaluations
--expert consultant/witness

2000 – 2006 **Family Court Counselor**
Dallas County Family Court Services – Dallas, Texas

1999 – 2000 **Director of High School Activities**
Education America, Inc. – Dallas, Texas

1998 – 1999 **Clinical Coordinator**
Green Oaks Psychiatric Hospital – Dallas, Texas

1997 **Substance Abuse Counselor - Nexus Recovery Center – Dallas, Texas**

1995 – 1997 **Lead Dual Diagnosis Counselor**
Sundown Ranch, Inc. – Canton, Texas

PROFESSIONAL AFFILIATIONS:

Family Law Foundation – 2008 to present (Lifetime member as of 2010)
Association of Family and Conciliation Courts – 2000 to present

SEMINAR PUBLICATIONS AND PARTICIPATION:

- Speaker/Author – Texas Academy of Family Law Specialists 2007 Trial Institute, January 2007, Santa Fe, New Mexico
- Speaker/Co-Author – *Making the Most of Social Studies and Psychological Evaluations*, 8th Annual Family Law on the Front Lines, June 2008, Galveston, Texas
- Speaker/Co-Author – *The Sixth Sense: I Hear Voices, But Is the Child Being Heard? (Which Perspective Really Matters to the Court?)*, 2009 Parent-Child Relationships Conference, January 2009, Austin, Texas
- Speaker/Co-Author – *The Value of Mental Health Evaluations – Different Strokes for Different Folks*, 35th Annual Advanced Family Law Course, August 2009, Dallas, Texas
- Speaker/Co-Author – *The 2 Steps to the 12 Steps: How to Determine if a Parent is a Druggie, a Drunk or Just Dry*, 2010 Parent-Child Relationships Conference, January 2010, Austin, Texas
- Speaker/Co-Author – *Parent Coordinators and Parent Facilitators Under the New Statutes*, Collin County Bench Bar Conference, April 2010, Rockwall, Texas

- Speaker/Co-Author – *The New Parent Coordination/Facilitation Statute: What's in, What's Out*, Marriage Dissolution Institute, May 2010, San Antonio, Texas
- Speaker/Co-Author – *Who Qualifies as a Parent Coordinator? A Parent Facilitator? What's the Difference, and How Do You Know What You Really Need?*, 11th Annual Family Law CLE "On the Front Lines," June 2011, Austin, Texas
- Speaker/Co-Author – *Child Custody Evaluations,* Marriage Dissolution Institute, April 2012, Dallas, Texas
- Speaker/Author – *We're Not The Help: How to Treat Your Mental Health Professionals,* Family Law 101 for the 38th Annual Advanced Family Law Course, August 2012, Houston, Texas
- Speaker/Co-Author – *Welcome to the Future: Child Custody Evaluations,* 38th Annual Advanced Family Law Course, August 2012, Houston, Texas
- Speaker/Co-Author – *Custody Evaluations and the Proposed New Statute*, 36th Annual Marriage Dissolution Institute, April 2013, Galveston, Texas
- Faculty – Houston Family Law Trial Institute, May 2013, Houston, Texas
- Speaker/Co-Author – *The Top 10 Most Difficult Issues Facing Judges in Their Custody Decisions,* Associate Judges' Workshop, 39th Annual Advanced Family Law Course, August 2013, San Antonio, Texas

FAMILY LAW VOLUNTEER EFFORTS:

- Family Law Foundation – Fundraising Auction, 2008-present; Fashion Show Fundraiser, 2009 - present
- Family Law Foundation – Legislative Efforts – 2007 to present

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A JUDGE'S GUIDE TO THE 10 MOST DIFFICULT ISSUES IN CHILD CUSTODY MATTERS

I. INTRODUCTION

As family law cases become increasingly more complex and conflicted, the issues facing Judges in these matters are also escalating in number and severity. In an effort to assist Associate Judges who manage these cases on a daily basis, this paper will focus on the top ten issues and a number of options for assisting in effective decision-making.

II. SURVEY RESULTS

In preparation for this paper and this presentation, a survey was sent to all of the Judges in the state of Texas to assess their perspective of the top 10 issues facing Judges in family law matters. The survey generated 150 responses, and the results can be found in Appendixes A-E. The survey addressed questions related to the most difficult issues in family law matters; under what circumstances a Judge would or would not order a child custody evaluation; the top three factors that a Judge considers in making family law decisions; and other issues that Judges believe to be important in family law cases for Associate Judges to know.

The responses to this survey, as one would expect, are varied, but the results show that these top 10 issues all play a factor in a Judges' decision-making when faced with difficult family law cases. It is hoped that the information outlined in this paper will provide Judges with a go-to guide to help when these specific issues surface in their courtroom. Judge Marr specifically felt that a short guide would be most helpful to Judges in practice, and therefore, any and all pertinent research that was utilized in preparing this paper will be attached in the Appendixes.

III. THE MOST DIFFICULT ISSUES IN FAMILY LAW MATTERS

A. David Letterman's Top 10

1. <u>Cases involving substance abuse</u>

Substance abusing parents pose a significant issue in family law cases. As we all know, when parents are under the influence, their children are at risk. In managing parents who are actively abusing alcohol and drugs, there are a number of factors for the court to consider. However, the primary focus in effectively managing substance abusing parents has to be a collaborative treatment team approach, and often courts and families do not have the financial resources in order to ensure that the substance abusing parent has the best opportunity to achieve sobriety. In turn, the following options will be listed in order of priority in the hopes of helping Judges determine how best to hold these parents accountable while providing them the most opportunities for change:

a. Alcohol and drug testing

(1) random screening is a must;
(2) provide the parent no leeway in the time allotted for them to complete the test;
(3) order both a urine screen and hair or nail testing;
(4) order parents not to shave their body hair, cut their nails, or to consume any liquid prior to the test; and

(5) identify a testing company in your area that you trust and that is available to you for questions.

b. Supervised visitation - if a parent is actively using drugs, supervised visitation is a must. At a minimum, a parent should demonstrate at least six months of sobriety and clean drug tests before being allowed to transition to an unsupervised schedule. (See the section regarding supervised visitation for more details in relation to appropriate supervision.)

c. AA/NA attendance - a parent who has been identified to have alcohol or drug dependency needs to be actively attending AA or NA meetings. That parent should attend 90 meetings in 90 days at the onset of his/her sobriety, and that parent should continue regular meeting attendance after that time frame as dictated by their sponsor and/or their counselor. The parent also needs a AA or NA home group and a same sex sponsor with whom they have regular contact.

d. Relapse Prevention Plan - all addicts and alcoholics who are actively pursuing recovery should know what their triggers are in relation to their drug or alcohol use, and they should have a relapse prevention plan for helping them manage those triggers while avoiding a relapse.

e. Managing relapses - when a substance abusing parent has appeared in your courtroom after a relapse, it is important to determine if that relapse was a slip (i.e. a one time or two time use with an immediate return to sobriety) or a full-blown relapse (i.e. an active return to using). Once that is determined, the need for a return to supervised visitation may be warranted if that parent is having to reinitiate their recovery program after a full-blown relapse.

f. Know the addictive behaviors - all addicts and alcoholics demonstrate similar behaviors that are helpful for Judges and Mental Health Professionals alike to know. These behaviors include: dishonesty, minimization, rationalization, justification, excuse-making, blaming of others, and an inability to assume responsibility for their own behavior. If these behaviors are evident, a substance abusing parent is not actively working a program of recovery even if they are clean and sober from alcohol and drugs at the time.

g. Substance abuse evaluations - if you are uncertain as to whether or not a parent is using drugs, a substance abuse evaluation can help. However, just a SASSI test is not sufficient. A SASSI test is based solely on self report from the parent, and a clinical interview by a trained professional and a drug test are also a must. In addition, if a parent is found to have been dishonest in their self-report, this is potentially a sign of their addiction, and at that point, a more detailed evaluation to include collateral contacts and information from the other parent may be warranted.

h. Individual counseling - if a parent is using drugs, a court ordering that parent to counseling with a professional trained in working with substance abusers can help. It is important that the counselor subscribe to the Twelve Step Program of recovery in order to ensure that the parent receives the best treatment possible.

i. Rehabilitation - if a parent has failed multiple short term and long term treatment options (i.e. inpatient care, day hospitalization, intensive outpatient programs, and individual counseling), long-term rehabilitation may be warranted. The area of substance abuse luckily does have more options for long-term treatment for parents than the area of mental illness.

In addition, when creating orders for substance abusing parents who will need to transition from supervised visitation, stair step schedules are often appropriate. The following stair step schedule provides some alternatives when attempting to create such a schedule for a substance abusing parent who has successfully completed six months of supervised possession while remaining clean and sober:

a. First week - the substance abusing parent can have two hours unsupervised to take the child to lunch or dinner.

b. Second week - the substance abusing parent can have four hours unsupervised possession on a Saturday or Sunday.

c. Third week - the substance abusing parent can have eight hours of unsupervised possession on a Saturday or Sunday.

d. Fourth through Sixth weeks - the substance abusing parent can have eight hours of unsupervised possession on Saturdays and Sundays.

e. Seventh through Twelfth weeks - the substance abusing parent can have unsupervised possession on Saturdays beginning at 6:00pm to Sundays at 6:00pm.

f. Thirteen weeks forward - the substance abusing parent can have unsupervised standard possession with the child.

This type of stair step schedule would be a schedule for consideration with a newly sober parent who does not have an extensive history of abusing alcohol or drugs. The more extensive the parent's history, the more time between the stair steps would be warranted. A trigger provision within the parenting plan can also be helpful. A trigger provision specifically details what should happen when a parent experiences a full blown relapse, i.e. if a parent relapses, that parent returns to immediate supervised visitation for six months or longer, and their stair step schedule starts over with additional time added between the transition steps. (Such a stair step schedule can also be applied to severely mentally ill parents as well.)

For additional research and data in the area of substance abuse in the family court system, please see Appendix F.

2. Relocation cases

Extensive research has been conducted in relation to cases involving relocation. William G. Austin specifically crafted a list of relocation risk factors in 2000 that was expounded upon in an article with Jonathan W. Gould in 2006 entitled, "Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan." This article is available in full in Appendix G.

The list of risk factors includes the following:

a. age of the child - younger children and adolescent children have a more difficult time adjusting to relocation
b. geographical distance of the proposed move
c. degree of involvement by the non-relocating parent
d. degree of interparental conflict including history of domestic violence
e. individual psychological resources of the child/individual temperament
f. degree of psychological stability of the relocating parent/coping skills/ life management skills
g. ability of the relocating parent to support the relationship between the child and the other parent
h. the quality of the child's new educational program
i. the psychological stability of the relocating parent's new spouse
j. resources available to the family likely to assist in paying for air travel
k. checking the parent's reasons for moving
l. the reasons the non-relocating parent is opposing the move
m. tax returns
n. college transcript
o. employment history
p. extended family involvement
q. social support networks
r. educational opportunities for the parent
s. educational opportunities for the child
t. community comparisons
u. parenting involvement, past and present

It is also important to note that while the Texas Family Code does not specifically address the issue of relocation, the issue has been codified into law within the state of Tennessee. In their relocation statute, they identify eleven factors to be considered that may also be helpful in determining these difficult cases:

a. extent to which visitations have been allowed and exercised

b. whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangements

c. the love, affection, and emotional ties existing between the parents and the child

d. the disposition of the parents to provide the child with food, clothing, medical care, education, and other necessary care and the degree to which a parent has been the primary caregiver

e. the importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment

f. the stability of the family unit of parents

g. the mental and physical health of the parents

h. the home, school, and community record of the child

i. the reasonable preference of the child if twelve years of age or older

j. evidence of physical or emotional abuse to the child, to the other parent, or to any other person

k. the character and behavior of any other person who resides in or frequents the home of a parent and such person's interaction with the child.

In addition, the issue of relocation is also addressed in **Bates v Tesar, 81 S.W. 3d 411 (Tex. App.-El Paso 2002 no pet.)**. Within this piece of case law, nine non-exclusive factors are listed to be considered in relocation cases. These nine factors include the following:

a. the distance of the move

b. the quality of the relationship between non-custodial parent and child

c. the nuture and quality of the child's contacts with the non-custodial parent, both *de jure* and *de facto*

d. whether the relocation would deprive the non-custodial parent of regular and meaningful access to the child

e. the impact of the move on the quality and the quantity of the child's future contact with the non-custodial parent

f. the motive for the move

g. the motive for opposing the move

h. the feasibility of preserving the relationship between the non-custodial parent and the child through suitable visitation arrangements

i. the proximity, availability, and safety of travel arrangements.

3. Cases involving grandparents

Currently, the statute in the State of Texas is notably restrictive in relation to grandparents. Specifically, the Texas Family Code reads as follows:

"102.004. STANDING FOR GRANDPARENT OR OTHER PERSON. (a) In addition to the general standing to file suit provided by Section 102.003, a grandparent may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or

> consented to the suit.
> (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.
> (c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153."

The statute in relation to possession and access is even more restrictive than the statute in relation to standing, and despite legislative efforts to align the Texas Family Code more so with *Troxel*, those efforts have been unsuccessful to date.

In addition, in an article within the *Family Court Review* entitled, "State Supreme Court Applications of *Troxel v Granville* and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional," which was published in January 2003, the conclusion in relation to this topic reads as follows:

> "One might argue that if state courts were to strike down overly broad grandparent and other non-parent visitation statutes as facially unconstitutional and instruct state legislatures to draft more narrowly drawn laws, the result would be a 'standardiz(ation of) child-rearing arrangements in a way that unnecessarily curtails diversity and cultural pluralism.' But that need not be the case. States should not simply ignore the needs of nontraditional families and overlook the contributions of grandparents and other nonparents by returning to the rigid common law framework. Instead, courts and legislatures should look for ways to craft more definite and specific legal rules that respect *Troxel's* presumption in favor of parents and protect parents' constitutional rights, while keeping in mind the needs of children to maintain contact with caring adults." (See Appendix H for the article in full.)

From a practical stand point, factors and guidelines for the court to consider in cases involving grandparents are difficult to identify due to the restrictive nature of the legislation that currently exists. The reality is that grandparents in some families play a very important role in the lives of children that often suffers following a family's involvement in a family law matter. Without CPS being involved or a valid reason to allow or prompt a grandparents' intervention, sadly, there appears to be little that the court can do at this point to alter that situation for that child.

4. <u>Cases involving supervision</u>

Cases involving supervision primarily revolve around the issue of safety for the child while in that parent's possession. However, not all supervisors or supervision facilities follow the appropriate guidelines for supervising parents in order to fully ensure a child's safety during the supervised periods of possession. The Commonwealth of Massachusetts' Trial Court Probate and Family Court Department has developed Guidelines for Court Practices for Supervised Visitation that are attached in Appendix I. They specifically provide guidelines for both professional and non-professional supervisors that may be helpful in appointing supervisors in your cases.

In the case of non-professional supervisors, the Commonwealth of Massachusetts has determined that it is appropriate for that supervisor to have the following information prior to beginning supervision:

a. his or her role as supervisor

b. where the visits could take place - i.e. his/her home, a park, or somewhere else

c. the supervisor's responsibilities

(1) compliance with the terms of any existing restraining orders

(2) contacting the probation office (or court) if the supervisor is no longer willing or able to act as a supervisor

(3) following any safeguards set out in the court order

(4) if required by the court, completing the supervised visitation log for each supervised visit and when to submit it to the court - (NOTE: Requiring supervisors to document each supervised visit, i.e. what they saw, heard, observed, can be most helpful.)

d. the type of case and what is expected

(1) if substance abuse is a concern, monitoring the non-custodial parent at the beginning of a visit for the use of drugs or alcohol and not allowing use during a visit

(2) in certain circumstances, the supervisor may also be asked to supervise the custodial parent's behavior during the drop off and pick up of the child

(3) the supervisor stays close enough to the parent and the child so that he or she can hear all remarks said between the two

(4) at no time should the parent and child be outside of the supervisor's vision or hearing or otherwise have the child left alone

In the case of professional supervisors, the Commonwealth of Massachusetts has identified the following requirements for professional supervisors; some of which also apply to non-professional supervisors:

a. qualifications

(1) ability to intervene

(2) neutrality of the supervisor

(3) conflict of interest

(a) no supervisor can be financially dependent on the person being supervised

(b) no supervisor can be an employee of the person being supervised

(c) no supervisor can have an intimate relationship with the person being supervised

(4) be 21 years of age

(5) be able to speak the language of the party being supervised and of the child

(6) have proof of automobile insurance, motor vehicle registration, a valid driver's license, and access to a car seat if the supervisor will transport the child

(7) have experience with children

(8) be willing to be named a supervisor and adhere to and be able to follow the court order regarding supervised visitation

(9) have no civil or criminal restraining orders issued against the supervisor in the last ten years

(10) have no current or past court order in which the supervisor is the person being supervised

(11) know the laws relevant to domestic violence

(12) be trained in domestic violence and the needs of victims of abuse

(13) know the child abuse reporting laws

(14) maintain record-keeping procedures

(15) be trained in performing the functions of supervised visitation

(16) be trained in risks that may arise for children of different ages from contact with a non-custodial parent

(17) accept the appointment as a supervisor of visitation

(18) adhere to and have the ability to follow the court order regarding supervised visitation

In addition to professional and non-professional supervisors, there is also the concept of therapeutic supervision. The Commonwealth of Massachusetts also addresses this concept, but overall, this form of supervision involves a licensed professional with appropriate clinical training. Therapeutic supervisors are actively involved within the therapeutic process, and they are working directly with the supervised parent to help him/her alter and change their behavior for the ultimate benefit of the child. (See Appendix I for additional details to be considered in supervised visitation.)

Finally, in dealing with cases involving supervised visitation, it is also often helpful to identify rules for the supervised parent to follow. The Tarrant County Domestic Relations' Office and Aaron Robb, MEd, LPC-S, require the parents that they supervise to comply with the following rules:

a. no whispering, writing notes, or note-passing between the child and the visiting parent during the visit

b. secrets between the children and the visiting parent are not permitted

c. neither the supervisor nor the visiting parent shall discuss:

(1) the current court proceedings

(2) custody, access schedule, child support, or living arrangements other than plans for the next scheduled visit

(3) the other parent or persons where the child resides

(4) activities, routines, or other events in the home where the child resides

(5) anything about either parent related to custody or access

d. the supervisor will not allow the child and the visiting parent to be alone together, outside of the presence of the supervisor, and shall remain within the sight and hearing of the child and the visiting parent at all times

e. no corporal punishment or other physical force used during the visit

f. no consumption of alcohol twelve hours prior to or during the visit

g. the visiting parent shall not bring or otherwise direct any other person to be present at the visit unless authorized by the court

5. Cases Involving Mental Illness

Similar to parents who are found to be abusing substances, parents who have been diagnosed with a mental illness also often face an uphill battle within the family court system to overcome the obvious biases that exist based upon the uncertainty and often instability that these issues create. Like with substance abusing parents, a multidisciplinary approach to managing these parents can be most helpful to the court in determining a parent's true ability to parent despite their mental illness. The following factors can be important for the court to consider in these types of cases:

a. Past psychiatric history: First and foremost, the severity of a parent's illness needs to be reviewed. If a parent has been hospitalized multiple times in the face of their mental illness, and especially if these hospitalizations have occurred recently, the instability of that parent's mental illness may warrant supervised or limited contact with their children. However, if a parent has not been hospitalized for quite some time and has shown stability within their diagnoses working with one psychiatrist and one therapist, limited or supervised contact with their children may not be necessary.

b. Current psychiatric/psychological care: A parent with a pervasive/ongoing mental illness, like Bipolar Disorder or Schizophrenia or Chronic Depression, should be actively involved with one psychiatrist and one therapist. Psychiatric care in conjunction with therapeutic intervention is vital for achieving stability within a parent's mental illness. Once a parent stabilizes, ongoing therapy may not be warranted, but ongoing psychiatric care is likely to continue for the rest of their lives until their psychiatrist determines termination appropriate.

c. Medication management/misuse: In working with a mentally ill parent, determining if a parent is compliant with their medication regime can be very important, especially if that parent has a dual diagnosis and also has a history of abusing substances. Psychiatrists who are not familiar in working

with dual diagnoses will often prescribe addictive medication to their patients even though this can lead them back to a full blown relapse, and it is important to know what psychotropic medications they are using and if they are compliant. Acquiring pharmacy records is not a difficult process from an evaluative perspective, and these records are quite helpful in determining if a patient is doctor shopping, misusing their medication, etc. In addition, acquiring the entirety of a mentally ill parent's treatment records can help in determining a parent's compliance with their prescribed treatment plan.

d. Emergency room visits: Examining the number of emergency room visits for a parent struggling with mental illness can also be helpful in determining a parent's level of stability.

e. The parent's ability to self-assess: A parent's ability to know and understand their diagnosis is very important. If a parent fully understands their mental illness, knows their triggers for a relapse, and is able to identify those triggers and intervene appropriately, that parent is more likely to maintain their stability in the face of a potential crisis versus a parent who is unaware of the severity of their illness and their need for an appropriate treatment plan.

f. Social study evaluation versus psychological evaluation: Often in cases involving mental illness, psychological evaluations will be ordered by the court in conjunction with a social study. In reality, if a parent has already been diagnosed with a mental illness, dual services that can be quite expensive are not necessary. A trained social study evaluator is quite capable of acquiring and reviewing all of the necessary records from a mentally ill parent to help provide the court the needed data to determine the stability of that parent and their ability to parent the child on a full or part-time basis. (See Appendix J for additional data and perspective on this topic.)

6. <u>Cases Involving Children Under Three</u>

Biases in relation to children under three are still quite prevalent among lawyers, Judges, and mental health professionals alike. The research from the 1960's indicates the mother to be the primary parent; however, this research was conducted at a time when most of the mothers who participated in the study were stay at home parents. Since that time, the new research clearly indicates that children can bond and attach to both parents equally. In turn, the key in identifying appropriate parenting plans for children under the age of three is to determine the level of attachment that already exists between the non-possessory parent and the child. (See Appendix K for a peer-reviewed and up to date article on this topic.)

When the current legislation was being drafted, specific schedules were actually proposed for children under the age of three based upon the non-possessory parent's history of access and attachment. Some of these potential schedules will be outlined below:

a. schedule for the uninvolved parent: When a parent has not been actively involved with a child or has not met a child who is under the age of three, the goal is for ongoing and consistent contact in shorter periods of time. Specifically, that parent may start with a brief period of supervised possession either by the possessory parent or an appropriate family member in order to ensure the child's comfort level in the initial phases of visitation. Such supervision should not be required for more than a week or two. In regards to a specific schedule in this regard, the goal would be for the child to see the non-possessory parent three days per week for two to three hours each time, i.e. Tuesdays, Thursdays, and Saturdays in two hour increments. The times of these visits should allow the non-possessory parent the opportunity to play with the child, to feed the child, to bath the child, to have the child nap with him/her, etc.

b. schedule for the less involved parent: In the process of a SAPCR or a divorce, when the non-possessory parent has been in the home and involved with the child, but not necessarily functioning as a primary parent, the option for an initial schedule would be Tuesdays and Thursdays for two to three hours with an overnight period of possession on the weekends from either Fridays at 6:00pm to Saturdays at 6:00pm or Saturdays at 6:00pm to Sundays at 6:00pm.

c. schedule for the actively involved parent: In the midst of a divorce or a SAPCR where both parents have been actively, if not equally, involved with a child, the options for that child may include

overnight periods of possession of Tuesdays, Thursdays, and Saturdays or a two-two-three schedule; where one week one parent has Monday and Tuesday, the other parent has Wednesday and Thursday, and the initial parent that had Monday and Tuesday also has Friday to Sunday. This schedule then rotates the next week.

The ultimate goal in dealing with cases involving children under three is to ensure that the non-possessory parent has the ability over time to transition to as active a schedule as deemed appropriate by the court. In turn, if both parents are active, stable, and fit, a shared schedule like the two-two-three may be appropriate for the court to consider. In addition, if the under three child has siblings, it is much easier for that child to go longer periods of time between their two homes, but if that child is an only child, summers and holidays and other long term periods of possession should be altered to shorter periods of time until that child reaches at least the age of three.

7. Reunification cases

Reunification cases appear to be a newer or more frequent phenomena facing Judges, lawyers, and mental health professionals. These cases involve either an alienated parent and child or an estranged parent and child, and the question before the court is how to rectify and resolve the issues within that relationship. In the cases of extreme alienation, Richard Warshak has done a great deal of research that is quite helpful in understanding the significance of these cases, and he has proposed that in the worst of these types of cases, a change in physical possession may be warranted. However, in cases that are not quite that extreme, the question then becomes how to fix the relationship at hand, and to date, there is very limited research on this topic. (See Appendix L for Dr. Warshak's article on Family Bridges.)

Ms Bradshaw Schmidt's practice group, NTXFIT (North Texas Families in Transition), has been actively discussing and addressing this issue for some time and is in the process of determining some appropriate policies, procedures, and sample court orders for managing this issue. The actual specifics are still in their infancy, but here are the important factors that have been determined thus far:

a. the court needs to determine if reunification is an "if" or a "when" scenario - this specifically means that the court needs to instruct the mental health professional (who is often identified as the reunification counselor) whether or not the court is trying to determine "if" reunification will occur between the parent and the child or "when" reunification will occur between the parent and the child. Should the court determine that the question is "if," a social study evaluation or guardian ad litem may be necessary.

b. the parents need to be told what the court's determination is surrounding if and when - it is important that the parents understand what the court's ruling is so that both parents are on the same page with the child within the reunification process. This also helps in the counselor's ability to notify the court when one parent is not in compliance with the court's determination.

c. the court needs to determine what the final goal for reunification is - if the court determines that the question about reunification is when, the next step is what the final goal needs to be. In other words, if the ultimate goal is for a child to transition to standard possession with that parent, the reunification counselor needs to know that. Often reunification counselors are ordered to begin counseling with the estranged or alienated parent and child, and they are told to initiate a stair step visitation schedule. However, that schedule is not clearly defined or a long-term goal is not established, and counselors cannot make parenting plan recommendations or rulings per the current standard of practice; so, they need the court's guidance on what the court wants to see happen.

d. both parents need to be involved in the process - it is vital that a child in a reunification situation see both parents involved and supportive of the process. In addition, without both parents involvement in that process, it is difficult to determine if one of the parents is sabotaging the process.

e. the counselor needs to be able to communicate any issues of non-compliance with the court - the process truly benefits from a reunification counselor being able to report to both attorneys and the court when either parent is non-compliant with the process and with the court's rulings. Without this

component, reunification counseling can flounder and be ineffective, which only makes the ultimate goal that much more difficult to accomplish.

8. Cases Involving Same Sex Parents

Individual belief systems in relation to the topic of same sex parenting are often grounded in firm, powerful, and passionate beliefs about what is right and what is wrong in relation to the concept of gay marriage, and while everyone is certainly allowed to maintain their belief system in this regard, it is important to remember that children are often lost in these heated debates.

Ms Bradshaw Schmidt has been involved in a number of cases where a child has been placed in the middle of two same sex parents who have now chosen to terminate their long-term relationship. Some of these parents have been married in other states, and some of these parents have established a SAPCR. The issue that Ms Bradshaw Schmidt has seen revolves around the fact that often times same sex parents want the right to marry in Texas, but when it comes to separating from the other parent of their child, they do not want the laws attached to their SAPCR to apply. It is the age old saying that they want to have their cake and eat it too. However, the problem then becomes that the child in the middle faces the loss of one of their parents, and whether or not there is agreement about that child's parents and their relationship, the reality is that that family system is the only family that child has ever known.

In many same sex parent scenarios, one parent is the biological parent of the child, and the other parent has no biological or judicially established relationships with the child. These cases present perplexing issues regarding the standing of the non-biological parent. The courts of appeals have struggled to establish the criteria required to establish standing. See **In re C.T.H.S., 311 S.W. 3d 204 (Tex. App. - Beaumont 2010, pet. denied) and In re M.K.S. - V., 301 S.W. 3d 460 (Tex. App. - Dallas 2009, pet. denied)**. In these cases involving only one biological parent, best interest of the child may well be a "secondary consideration," unless the non-biological parent can establish a basis for standing to sue. (See the Texas Family Code, Section 102.003.)

In the *Family Court Review* from January 2013, there is an article written by J. Herbie DiFonzo and Ruth C. Stern entitled, "Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families." Within this article, the authors identify a number of key points for the family court community to consider:

a. "even in the light of its decreasing relevance, the nuclear family model continues to shape our perception of what a family should look like."

b. "the presence of a biological tie between parent and child is not always dispositive of parental rights."

c. "despite the prevalence of nontraditional family forms, the notion of de facto parenthood continues to be hotly contested."

d. "stepparent families are America's fasting growing domestic arrangement. Yet, courts and legislatures are slow to accord legal status to nonbiological co-parents, whether married or cohabitating."

e. "the use of assisted reproductive technology is on the rise among same-sex couples as well as infertile couples and single parents. These families are greatly in need of legal definition and validation in order to function and survive as families." (Please see Appendix M for this article in full.)

In the end, the hardest part of these cases from an evaluator's perspective is placing oneself into the shoes of that child. An evaluator is required to approach every case void of bias if at all possible, and at the very least, that evaluator is to be aware of their biases. At that point, it becomes easier to begin viewing that family from the eyes of that child to truly determine what each parent offers that child regardless of gender or biological connection. At this point, the legislature is unlikely to draft legislation on this issue any time in the near future, but the reality of these cases is becoming more prevalent every day, which is going to require a response for the benefit of these children.

9. Child Protective Services' Cases

Cases involving CPS can be some of the most difficult cases for Judges, attorneys, and mental health professionals. The reality is that most of these cases involve more than one of the issues already outlined in this list, and at times, multiple issues are present, such as: substance abuse, mental illness, the involvement of grandparents, the need for supervision, and children under three. It is within cases like these that the best approach for a child can be very difficult to determine.

As we all know, the vast majority of cases that involve CPS have a history with the Department that may go back generations. Making a significant and long-term change in those situations can present a daunting task for Judges, and knowing where to begin in these cases can be the hardest part. The reality is that these cases can appear hopeless from the onset, but the children in these cases need their parents or parental figures to be given the best opportunity the first time to make the necessary changes in their lives so that they are able to parent their child to adulthood. However, at the same time, it is ultimately up to that parent to utilize the services provided to them, which only they can control.

In an ideal situation, the factors identified in the previous areas would all be implemented based upon the needs of the family. However, the Department is limited on funds and resources as we all know, and families usually do not have the resources available to them either to help them make the needed changes. It is at this point that services like Child Protection Mediation and/or Family Group Conferencing can be beneficial resources to the court and to these families. (See Appendix N for a *Family Court Review* article on this topic from where this data was acquired.)

Within the attached article in Appendix N, the reality of these services and the paradoxes that they create are addressed. This article specifically speaks to the difficulties that these cases create; while also trying to find services where families can feel empowered to make the changes needed in their lives that just might permanently alter their extended family's history.

Mediation and family group conferencing programs are similar in some respects. They both attempt to bring the parents and the family more fully into the decision-making process while empowering them to the extent possible by using consensus building methods. However, the two approaches are also different, though they can also compliment each other in some cases and become competing processes in others.

Family group conferencing specifically begins with the underlying assumption that the families should lead in the decision-making process about what happens with the child, and the professionals should follow. Then, only if the family cannot arrive at a responsible decision, should other approaches take precedence. In turn, by putting the family at the center of the decision-making process rather than assigning them peripheral roles as support figures, advisors, or potential placement alternatives, the hope is to change the dynamic of accountability and responsibility for the care of that child. However, in mediation, the parents and CPS need to work together as a team so that the parents are seen as equal and empowered members of the team. The focus in this regard is on consensus based problem-solving efforts so that the dynamic within the mediation becomes negotiation. (See Appendix N.)

These types of services obviously appear to present lofty goals with no resources to accomplish those goals. However, it is hoped that the attached article from which this information was taken will provide Judges with an alternate way of viewing these cases as they also attempt to implement the necessary services for the parents while still protecting that child.

10. Cases Involving Special Needs Children

Cases involving special needs children are becoming increasingly more difficult with the number of disorders that different children are experiencing, and even though there may be very typical ways to treat

certain disorders, a one size fits all approach often is not effective with each child's case needing to be examined individually.

In an article outlined in the *Family Court Review* from 2005, D. Saposnek, H. Perryman, J. Berkow, and S. Ellsworth speak specifically to " Special Needs Children in Family Court Cases." This article is summarized in Appendix O from a different source, and the factors to be considered that are outlined below were gleaned from this summary:

First and foremost, the specific nature of the diagnosis/special need must be determined. The reality is that a special need may entail an acute life-threatening medical condition, a chronic developmental disorder, or psychiatric and behavioral issues. The most common special needs that are often seen include the following: speech and language disorders, learning disorders, pervasive development disorders such as Autism and Asperger's, sensory impairment, psychiatric disorders, intellectual impairment, traumatic brain injury, and orthopedic conditions.

When determining appropriate parenting plans for children with special needs, the primary goal is to compare the needs of that child to the parents' abilities. This may result in different schedules for different siblings in the home, and even though little creativity is allowed within the Texas Family Code, creative schedules are often the best way to ensure that all the children in the family with a special needs child have their needs met.

Finally, when Judges are attempting to determine how best to meet the needs of a child with a specific disorder or disability, the key is to ask the right questions. A full-blown child custody evaluation may be helpful, especially if there is more than one child in a family, but such an evaluation may not be necessary if the sole issue before the court is related to the child with the special need. In these cases, the following options may be helpful:

a. identify an expert to answer any specific questions in relation to the diagnosis or disability
b. order an independent evaluation that will help the court in developing a plan for that child
c. if such an evaluation is ordered, define the focus of the evaluation to include the following:
    (1) the extent of the child's disorder
    (2) the level of the disability
    (3) the child's prognosis
    (4) any special equipment needed by the child
    (5) the child's medication needs
    (6) the child's treatment needs
    (7) the child's educational needs
    (8) the cost of treatment for the child
    (9) the cost of any ongoing monitoring that the child may require
    (10) the necessity of nursing or other care
    (11) the necessity of lifetime financial maintenance for the child
    (12) transportation needs

IV. HOW TO KNOW WHEN A CHILD CUSTODY EVALUATION IS WARRANTED

First and foremost, the attached survey results revealed that not everyone is familiar with what a child custody evaluation is. A child custody evaluation is simply the more updated terminology for what we know in Texas as a social study evaluation. A child custody evaluation may or may not include psychological testing, and it is up to the court as to whether or not such an evaluation with or without testing is warranted.

An evaluation is not always necessary in every case, and some Judges appear to maintain the belief that it is not appropriate to order an evaluation since it is their responsibility to determine what is best for a child. Ultimately the final decision in any family law matter lies with the Judge if the parents are unable to reach an agreement regarding what is best for their child, but there are cases where an evaluation can be helpful in providing the court with data that one or both attorneys may not acquire or present to the court.

In determining if an evaluation is warranted, especially in difficult cases as described previously, the key from a mental health professional's perspective relates to how much information the court has related to the specific issues involved. If a parent has an extensive history of criminal activity, mental illness, substance abuse, abuse or neglect, domestic violence, etc., such an evaluation may be helpful especially if the reality of those issues remain in question or unknown. In these circumstances, an evaluator can assess the family and acquire and review all of the pertinent collateral information so that the court has the data that may assist them in making a determination as to the best parenting plan for the child or children in question.

V. CONCLUSION

Obviously, family law matters are becoming increasingly more complex, and as families also become more conflicted, courts are faced with the ever increasingly difficult reality of sorting through the chaos that these families face or even created. Identifying alternative solutions and factors to consider can help within this process, and working to stay abreast of the ever-changing research in this field can also be quite helpful. We know that time to review research is often limited if not non-existent, but one nugget of information that may be helpful would be to consider having your courthouse or your court join the Association of Family and Conciliation Courts. (AFCC is an international, multi-disciplinary organization made up of Judges, attorneys, and mental health professionals from all genres that focuses solely on the field of family law forensics.) The cost to join this association is between $120 and $170 per year, and this will allow you access at any time to peer reviewed articles on most major topics within family law cases. A number of the attached articles were acquired from that site, and this can allow you to have a go-to guide for research when those difficult cases unexpectedly surface within your courtroom.

(Authors' note: Every attempt was made to copy and include the research used in this paper in its entirety. However, not every article in its electronic form copied as nicely as we would have liked. Please excuse any typos from the electronic copies or formatting issues. Our goal was to ensure that you would have the research if needed as a reference.)

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