

Conscious Lawyering: The Practitioner's Role in Reducing Conflict

By Tia M. Zavaras and Tabitha Sikich

As a newcomer to representing families, I am surprised at how many people need to engage in family law litigation. Though it should be no surprise, the divorce rate in America is shockingly high—one of the highest in the industrialized world, in fact.¹ But what keeps us up at night is what we are learning about the long-term negative effects of divorce—particularly the high-conflict variety—on children. When we combine the numbers with research that demonstrates how parental conflict harms kids, the picture that emerges shows nothing short of a national mental health crisis. The aggregate research tells a definitive story: kids' exposure to their parents' divorce conflict is correlated to an array of intellectual, emotional, and social challenges, such as lower academic performance, inability to focus, depression, and engaging in risky behaviors. As family law practitioners who deal daily in divorce and child custody, it is our business—indeed, our responsibility—to know what divorce conflict is doing to kids.

For decades now, the United States has held rank with top contenders for highest divorce rate in the world. In 2016 we topped the charts with a divorce rate of 3.2% of the population with a striking 827,261 relationship casualties²—and that number is just a small portion of the more than five million family law cases that passed through domestic courts across the country during the same twelve-month span.³ That equates 1.57 divorces or annulments *per minute* across the nation.

We Americans are masters of divorce; and there is no end in sight. Divorce will continue to be a constant and on-the-rise part of our social fabric. But, among other things, the most troubling problem with such an inordinately high divorce rate is the extent of harm done to the children involved.

Just over half of those almost one-million divorces a year involve minor children. Though it's hard to accurately quantify, obviously the real number of kids who walk through their parents' divorce is sizeable. Some calculate that approximately 40% of *all* children in the States will go through their parents' divorce before they reach the age of majority.⁴ Though family restructuring is inevitable in many cases, and naturally carries with it an array of challenges for everyone involved, the high conflict associated with divorce and Allocation of Parental Responsibility (APR) cases is the primary threat with which we're concerned.

¹ Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. Econ. Persp. 27, 27-52 (2007).

² National Center for Health Statistics, National Marriage and Divorce Rates 2000-16, https://www.cdc.gov/nchs/data/dvs/national_marriage_divorce_rates_00-16.pdf (last visited 1 March 2018).

³ National Center for State Courts, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads (2016)*, at 3.

⁴ Rebecca Love Kourlis, *It Is Just Good Business: The Case For Supporting Reform in Divorce Court*, 50 *Fam. Ct. Rev.* 549 (2012).

With Divorce Comes Conflict

It is difficult to quantify exactly how many cases are considered "high-conflict" because the type and characteristics are unique to every family and relationship dynamic. But what we can certainly glean from general observation is that, more often than not, with divorce comes conflict. And those cases involving cooperative and low-conflict parties are, sadly, the rare exceptions. While our own anecdotal human experience confirms this, we now have access to decades of research as support: relational conflict is bad. It is bad for everyone: bad for societies at large, bad for economies, bad for business productivity, bad for adults—but *especially* bad for kids.

It's bad for adults, obviously, as the personal hardship involved in divorce is incalculable: stressors often include acute personal loss, a declined standard of living, the strain of solo parenting, and the inherent social isolation that comes with a drastic change in relationship.⁵ But as tough as it is for the adults, it's especially bad for kids.

The fighting can continue for as long as the children are minors, often long after the divorce is final. This is especially dangerous because the most significant factor as it relates to harm done to children of divorce is *continual conflict between the parents*.⁶ In fact, parents' level of conflict after their divorce has been deemed more influential to the health and well-being of adolescents than the divorce itself.⁷ That should get our attention.

We also know that children of high-conflict divorce exhibit greater rates of depression, anxiety, and obsessive worry. As a whole, these kids suffer more self-esteem and identity issues and exhibit lowered academic performance, sleep-related problems, resentment of authority, drug and alcohol abuse, and interpersonal problems with peers, teachers, and family members.⁸ These problems do not typically resolve themselves after the divorce is final or once the children reach adulthood. In fact, they often follow the child into adolescence and adulthood.

Even years after their parents' divorce, children of high-conflict divorce consistently showed high rates of anxiety and depression.⁹ As adults, children of high-conflict divorce report more trouble in their own relationships.¹⁰ Research also indicates that children of divorce are getting less advanced education, earning less income, and suffering from greater rates of anxiety and depression as adults.¹¹

⁵ Paul R. Amato, *The Consequences of Divorce for Adults and Children: An Update*, 23 *Drustvena istrazivanja :casopis za opca drustvena pitanja* (Social Research: Journal of General Social Issues) 5 (2012).

⁶ William Bernet, *Children of High-Conflict Divorce Face Many Challenges*, *Psychiatric Times*, Oct. 30, 2015, at 9.

⁷ Holly Keller, *Impact of Inter-Parental Character Assassination on Children Post-Divorce* (2017). (EWU Masters Thesis Collection 443.) <http://dc.ewu.edu/theses/443> (last visited 1 March 2018).

⁸ Arnold T. Shienvold, *The High-Conflict Divorce & Your Children's Adjustment*, 34 *Fam. Advoc.* 32 (2011).

⁹ S.M. Jekielek, *Parental Conflict, Marital Disruption and Children's Emotional Well-Being*, 76 *Social Forces* 905 (1998).

¹⁰ Amato, *supra*, at 12-13.

¹¹ *Ibid.*

If the research doesn't say it clearly enough already: The wars being waged in homes, family law firms, and domestic courts are wreaking havoc in profound ways, far beyond just the divorcing couple themselves.

What We Can do as Practitioners

Generally speaking, divorces aren't being handled well through the legal process. As a natural byproduct of this conflict, our families—and particularly, our kids—are suffering the consequences of this relational breakdown. Simply put, we can do better. As family law practitioners and front-runners in the realm of domestic litigation, we play a critical role in shaping the current conflict-riddled divorce landscape, and there's more we can do to mitigate the fallout.

We know that when it comes to divorce, conflict is almost unavoidable. One party files a lawsuit against another to declare they no longer want to be in the relationship. The Petition says it simply: the marriage is "irretrievably broken." As divorce practitioners, we're uncannily familiar with the difficulty of this kind of relational split, and have seen firsthand how ugly divorce can get. It seems generally understood that it's the exception to the rule when a couple can endure the process with limited conflict. But aside from the few and fortunate, most generally seem to fall along the mid- to high-conflict range on the spectrum. The acute problems arise when financial stress and interpersonal dynamics between parents start to trump the well-being of the kids, and the kids are subsequently overlooked.

Our court system and our legal training, both adversarial in nature, add to the high-conflict atmosphere. This sort of hyper-adversarial context is bad for the needs of family litigation and contradicts the ultimate purpose of doing what's in the best interest of the children and restructured families.

Positively, over the past few decades, practitioners and courts in the family law arena have taken steps to address the current divorce-war pandemic and shift the system's focal points. As research has drawn the connection between conflict and child well-being, courts have begun to adjust their approach. Colorado is at the forefront of this movement, being the first state to amend their Rules of Professional Conduct to reflect this shift in priorities. To highlight the reality that children are being forgotten in the divorce process and challenge litigators to inform their clients of the damage that's being done, on December 1, 2016, the Colorado Supreme Court unanimously approved an Amendment to Comment [2] of C.R.C.P. 2.1, as follows:

"In a matter involving the allocation of parental rights and responsibilities, a lawyer should consider advising the client that parental conflict can have a significant adverse effect on minor children."

An Amendment like this is certainly progress in the right direction, but more can and must be done to mitigate this public crisis.

As an aside, it's important to note that sometimes high conflict is unavoidable. Anyone who has

been around family courts for any amount of time knows how the game is often played. There are always going to be abusive bullies against whom a good client advocate must fight back. There will always be aggressive opposing counsels who have yet to acquire the skill, finesse, and fundamental civility required to master such delicate domestic litigation. Ultimately, if we foresee that conflict feels for most like the natural route, we can better manage our clients and help orient and re-orient their goals and priorities (the kids!) through the process. As family law practitioners, the captains of the domestic relations battlefield that is family court, we play a vital role in addressing the crisis.

While we can't ensure our clients' civility toward opposing parties, we can guarantee that every client that sits across the table from us is well educated at the outset of their case about the need to do divorce better than it's been done in the past. Here's what we can do:

Before filing the petition, educate yourself and educate the client.

There is an enormous body of research that we can review to educate ourselves with the cutting-edge thinking and social trends. The Colorado family law community is home to a number of authors and experienced practitioners who can share a wealth of information on the effects of conflict on children.¹² Be sure to educate your clients early and often. At the onset of retention, spend time with your client, ensuring they are focused on the potential effects that the upcoming litigation may have on the children. Explain to your client what the research shows, provide resources for them to review at home, and remind your client throughout the case that this turmoil is to be expected, especially when things get uncomfortable.

Set the tone.

It's no secret that as counsel in a family law dispute, we have an immense amount of influence in setting the tone for our client's attitude about the divorce. Ask yourself: Are you supporting existing conflict by piling-on against the opposing party in discussions with your client? Are you conflating the opposing counsel as no different from the evil-doing and difficult spouse when you relay communications about the case? Are you sending unnecessarily hostile or aggressive communication to opposing counsel in a manner that shows your client that you are tough and not going to be pushed around? Are you taking responsibility and assessing the need to go out guns-blazing at our client's request? Because, the truth is, as practitioners, we bear the weight of choosing heightened conflict in the proceedings when there are children at stake. However, we can also make choices that will demonstrate civility and respect, potentially reducing conflict wherever possible.

¹² Resources:

(1) Justice Rebecca Love Kourlis, Exec. Director, Institute for the Advancement of the American Legal System (IAALS); *It is Just Good Business: The Case for Supporting Reform in Divorce Court*, 50 Fam. Ct. Rev. 549 (2012);

(2) Dr. Marian Camden, Psy.D., LLC, Licensed Psychologist; *Going Back and Forth: A Joint Custody Story for Children*, Centennial: Dawn & Dusk Publications, LLC (2017);

(3) Joan H. McWilliams, Esq., McWilliams Mediation Group LTD; *Parenting Plans for Families After Divorce*, Denver: McWilliams Mediation Group LTD (2011); *Changing the Conversation About Parental Conflict in Divorce*, Annual Family Law Institute (2017).

What else can we do? After we educate ourselves and our client and set the tone with them, do the same with opposing counsel. At the earliest possible moment, pick up the phone and discuss the children. See if you can reach a consensus that the top priority is to reduce conflict between the parties; remind them to make the children the focus. If the inexorable conflict is obvious from the onset, speak to it and actively identify the need to work cooperatively to educate both parents about the conflict's effect on their children, now and long term. Encourage your clients to pay close attention to how the conflict is being handled or discussed in their children's presence. Encourage your clients to seek counseling for themselves and their children—experts can provide long-term advice for managing the conflict in the least damaging manner.

The burden on practitioners working with families in transition—and often in total crisis—is not to be understated. The effects of our work with one client can echo through a generation or more. This makes it all the more important for practitioners to remind themselves of their roles as advocates, not just arguers. Through education, communication, and a tone of civility and respect, the often-difficult road to cooperative family restructuring can be far more easily traversed. Committing to educating ourselves, educating our clients, and endorsing a more peaceful path through divorce, we can mitigate the potentially devastating harms inflicted on children—intentionally and unintentionally—by the divorce process. This more conscientious approach may seem counter-intuitive or even foreign in an adversarial system, but it refocuses our attention on the single most important thing in every family case: the family itself.

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