



VIVID

**Voices, Idea, Views, Insights and Dialogues for
Professionals working with Families in Transition**

FALL 2004

THE NEW YORK CHAPTER OF AFCC-NY MISSION STATEMENT

The well-being of children and families is a fundamental goal of our society and its legal system. The New York State Chapter of the Association of Family and Conciliation Courts is dedicated to using the experience, knowledge, and resources of judges, mental health professionals, attorneys, law guardians, mediators, and other professionals, to improve that well-being through cooperative efforts that seek new, less adversarial approaches to the resolution of child centered legal matters.

CO-PRESIDENT'S MESSAGE

Steven Demby, Ph.D. and Leonard Florescue, Esq.

This past year has seen consolidation and growth in the NY Chapter of AFCC. While much work remains to be done, our Chapter has had a productive year. We received our official charter from AFCC National at the San Antonio conference in May. Many thanks go to past co-president Justice Evelyn Frazee for shepherding us through this process to its successful conclusion.

There have been some changes in our Board membership since our last Newsletter. We were sorry to say goodbye to valued Board members Joanne Pedro-Carroll, Judge Joseph Lauria, and Vicky Lutz.

We have had the good fortune to be able to add two excellent new Board Members who have already stepped into active roles. We welcome Justice Tandra Dawson and Alayne Katz, Esq. as our new Board members.

Several Board meetings have been devoted to

mapping out our vision and strategy over the next two years. We are interested in learning more about how other chapters have gained professional stature to be able to gain influence over policy and practice in family law in their respective states. Some of our goals for the next two years include:

- out reach to traditional litigating attorneys, teachers, and other under-represented groups in our chapter
- expand membership
- strengthen our organizational structure

In order to achieve these and other goals and for our Chapter to remain vital and robust as an organization we need the strong involvement of our members. At the right side of this column you will find a list of committees. If you have an interest on being on a committee, please email either of us and we will be happy to let you know what is involved.

We are sure you have been following with interest, as we have, the debate over whether forensic evaluators should address ultimate issues. The article in the New York Times

on May 23rd captured some of the strong feelings in this debate. NY Chapter Board members, Justice Jaqueline Silbermann and Andrew Schepard were quoted in the article. The Kaye Commission, led by Justice Sondra Miller and described in more detail elsewhere in this newsletter, is in the process of considering this issue as well as other issues important to family law in NY. The Commission will be holding public hearings and representatives from AFCC NY plan to attend to make our voices heard. We welcome your comments and suggestions on this important issue.

The above discussion brings us to this newsletter. We want the newsletter to serve the membership. If you are running an innovative program and would like to do a brief write-up of it for the newsletter or if you have other ideas for a brief article, get in touch with us. We also want to have a section for member news; if you have given a presentation recently or had an article or book published, please send us a line for the newsletter.

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Committee List

- Program Planning
- Membership Development
- Newsletter
- Special Projects

AFCC SAN ANTONIO CONFERENCE by Steven Abel, Esq.

San Antonio is best known for "Remember the Alamo." At the AFCC National conference in May 2004 in San Antonio, I did visit the Alamo, and the Riverwalk, and a few good restaurants. But what I will remember is the opening plenary about "Civil Marriage and Same-sex Union." The speakers were leaders of the successful legal cases in Massachusetts and Ontario approving gay marriage.

Individual lawyers representing individual clients poignantly presented why there is such a real difference between marriage and civil union. Particularly, one quoted the child of a gay couple, who no longer felt different because his parents were now married. Although civil union (as in Vermont's law) may sound good, in the end it is a "separate but equal" status that is never equal, just separate.

The weight of these considerations and cases was offset by the good humor of a gay judge from Ontario who quipped that gay marriages will certainly lead to gay divorces. To an certain extent, good humor was present throughout this conference. It may be that working in family law requires a real ability to laugh when ever possible, or burn out will occur real fast.

Although individual workshops begin to blur after a few months, the one I remember best is the one that had nothing to do with my normal work.

I attended a Family Law Education Forum for law school professors. Mostly led by NY's own Andrew Schepart and Herbie DiFonzo, it was wonderful to hear new ideas for family curriculum, so different from the

incredible inadequate course I took 35 years ago.

But conferences are mostly about people and networking. AFCC is a land of friendly people and that's why I'll go back.

THE KAYE: MATRIMONIAL COMMISSION by Hon. Tandra L. Dawson

The Matrimonial Commission was formed in June 2004 by Chief Judge Judith S. Kaye to review all aspects of matrimonial litigation, identify existing problems, and make recommendations for improving how the courts handle such litigation in both Supreme Court and Family Court. The Commission, chaired by Associate Justice Sondra Miller, of the Appellate Division, Second Department, is comprised of members of the judiciary and the bar, mental health professionals, and financial evaluators. The formation of this Commission represents the latest in the state court system's reform efforts concerning matrimonial litigation and builds on the work of a prior panel, the Committee to Examine Lawyer Conduct in Matrimonial Actions, which was chaired by Hon. Leo E. Milonas. The findings and recommendations of that committee ultimately led in 1993 to the adoption of new rules to govern attorney-client relationships and case management in matrimonial matters. A report issued in January 2004 by the Office of Hon. Jacqueline W. Silbermann, the Statewide Administrative Judge for Matrimonial Matters, indicated considerable advancements in these matters, but identified persisting problems, particularly in the area of custody litigation.

The Commission is comprised of three subcommittees working together to gather information on numerous issues, including custody and visitation; appointment, qualifications and use of law guardians and forensic experts; alternative dispute resolution and mediation; and collaborative divorce.

The Commission will also examine the role and function of the judiciary and the bar in connection with these issues. The information will be solicited from members of the bar, the judiciary, other professionals, and the public through public hearings, which will be held throughout the state. A comprehensive review will also include information collected from jurisdictions outside of New York State. The Commission plans to report their findings to the Chief Judge in approximately one year. More detailed information about the Matrimonial Commission may be obtained through the website at www.nycourts.gov/ip/matrimonial-commission.

**** Join us at the Fall Conference on November 19, 2004 (see page 3)****

**THIRD ANNUAL CONFERENCE
UNDERSTANDING CHILDREN'S COMMUNICATIONS IN CUSTODY CONFLICTS:
LINCOLN HEARINGS AND BEYOND**

Date: November 19, 2004
Location: Association of the Bar of the City of New York
42 W. 44th Street, New York, NY

Co-Sponsored by:



REGISTRATION

Date: November 19, 2004
Time: 8:00 AM to 4:00 PM
Place: Association of the Bar of the City of New York
42 West 44th Street, New York, NY

Conference Program

8:00 Registration opens

9:00 Welcome: Leonard Florescue, Esq.
Co-President, AFCCNY

Leslye Hunter, M.A. President,
AFCC

9:15 The Child's Voice in the Courtroom:
The Honorable Sondra Miller, the
Honorable Tandra Dawson, and the
Honorable Judith Gische

10:30 Break

10:45 The Mental Health Perspective:
Ava Siegler, Ph.D. and Steven
Demby, Ph.D.

12:00 Lunch (Provided)

1:00 The Law Guardian's Perspective:
Carol Sherman, Esq. and Pamela
Sloane, Esq.

2:00 Interdisciplinary Break Out Groups

3:00-4:00 Plenary Panel Discussion and Q&A

Dr/Mr/Mrs/Ms _____
First Name M.I. Last Name

Organization _____

Street Address _____

City _____ State/Province _____

Postal Code _____ Country _____

Telephone _____ Fax _____

E-mail _____

Professional Designation (check all that apply):

Attorney Academic
 Court administrator Custody Evaluator
 Judicial Officer Mediator
 Mental Health Prof. Parent Educator
 Law Guardian Other

Conference registration fees: (includes lunch and program materials)

AFCC-NY Member \$ 95
 Non-member \$125
 Student \$ 35
 For CLE credits* an additional \$ 75

* Hardship policy available: Call (718) 767-7667

Mail check (payable to AFCC-NY) and registration to: Teresa Ombres, Esq., DivorceLab, 38-39 Bell Boulevard, Suite 320, Bayside, NY 11361

Kramer vs. Kramer - Revisited

Requiring Lawyers to Discuss ADR

By Andrew Schepard

New York Law Journal-September 10, 2004

On July 9, 1996, this Law and Children feature began with a thud. Entitled "A Divorce Lawyer's Pledge for Children," and based on a pledge by corporate counsel, the inaugural column called on divorce lawyers to voluntarily pledge to discuss alternative dispute resolution (ADR) and parent education programs with their clients before initiating child custody litigation. While I got many pats on the back after publication, to this day I have not heard of a lawyer who has adopted the pledge, or a bar group that promoted it.

Luckily for me, and hopefully for readers, the Law Journal continued this column. Increasing experience and knowledge, furthermore, has only reinforced how important the policies behind the 1996 voluntary pledge proposal are.

A NEW PROPOSAL

Thus, approximately eight years and 50 columns later, this column advocates changing the form of the proposal to something that will achieve the same end but is, perhaps, more realistic. It calls for enactment of a court rule that requires lawyers to certify that they discussed ADR with their clients before initiating a claim for custody or state why such discussion would be inappropriate in a particular case.

Similar court rules exist in other states for all disputes (not just custody) and could be used as a model for one in New York.¹ ADR-oriented subcommittees of the Association of the Bar of the City of New York made a similar proposal several years ago.²

A call for a court rule requiring lawyer-client communication about ADR in child custody disputes is particularly timely. Chief Judge Judith Kaye recently created a matrimonial commission, charged with examining every facet of the divorce process in New York. It will soon begin consideration of how to reform treatment of custody disputes; a court rule along the lines proposed here should receive its serious consideration.

It is important to note at the outset that a rule mandating that a lawyer and client discuss ADR options, does not mandate that a lawyer endorse mediation or parent education, just that the lawyer be informed about their benefits and costs. Just like litigation, mediation is not appropriate for all parents in all circumstances. For example, mediation may not be appropriate in cases involving serious allegations of domestic violence or child abuse and neglect, a threat of child abduction or a parent who is mentally ill or troubled by substance abuse.³ A lawyer should certainly explain these limitations of ADR to a client during their required discussions of the subject.

RESEARCH ESTABLISHES:

- High levels of parental conflict arising from custody disputes harm children emotionally, educationally and economically.

- Parents dislike litigation because of the time, emotion and expense it requires and because they feel the adversary nature and formalities of the court room process do not give them adequate voice in decision making about their children.

- Parents give mediation and parent education high marks for fairness and responsiveness to their needs and concerns and the needs of their children, even when their participation is mandated.

- Mothers and fathers share an unfavorable view of litigation and a favorable view of ADR.

- Parents who mediate their disputes and participate in parent education are more likely to agree on a parenting plan and follow it than comparable parents who litigate.

- Parents who mediate are more likely to both be involved in the life of their child following divorce than parents who litigate.⁴

POSITIVE INFLUENCE

Research has also established that court rules mandating lawyers discuss ADR with clients positively influence local legal culture and practices. Their effect has been widely studied, particularly in Minnesota, Missouri and Maine (which mandates custody mediation, not discussion of ADR). Here is what is likely to happen over time if New York adopted a discussion requirement rule:

- The perception that the lawyer who first broaches the subject of ADR and settlement with the other side is "weak" will be reduced.

- Motion practice in divorce cases will drop as the bar and clients incorporate the norms of ADR into their cases.⁵

- ADR use will increase.

- The quality of ADR programs will improve as lawyers demand high quality services for their clients.

- Continuing education programs and law school courses to educate lawyers about ADR processes will increase.⁶

- The Bar's support for ADR will increase as lawyers develop more confidence in it. In a recent survey of the Family Law Section of the Florida bar (a state with a long history of requiring mediation of child custody disputes), for example, 91 percent described the impact of mediation on family court as positive, whereas 8 percent viewed it as positive and negative, and only 1 percent saw mediation as negative.⁷

An interesting way of illustrating how lawyer and client conversations are changed by an ADR discussion requirement is to rewrite a lawyer-client dialogue in "Kramer vs. Kramer," the well-known movie which won the Academy Award for Best Picture in 1979. "Kramer vs. Kramer" is described by a leading scholar of law and popular culture as "an outstanding and definitive film that treats all the elements of the divorce process seriously and which pointed the way for divorce-related films of the present."⁸

Representations of lawyers and clients in popular culture are powerful metaphors that influence public understanding of the role of lawyers and the legal system. "Kramer vs. Kramer" sends the message that a divorce lawyer in a custody case is an adversarial gladiator and that there are no options for resolution of custody disputes other than litigation.

KRAMER: A LOOK BACK

The dramatic core of the film is a child custody dispute between Ted (Dustin Hoffmann), whose wife, Joanna (Meryl Streep), leaves him to raise their six-year-old Billy when she decides to end the marriage and move to California. Much of the first part of the movie focuses on Ted's gradual evolution into a devoted single parent to Billy, and Billy becoming accustomed to Ted as the nurturing and supportive figure in his life. On the legal front, Joanna and Ted are divorced in an uncontested action in which Ted receives custody of Billy in their divorce decree.

Joanna returns to New York a year and a half later and arranges a meeting with Ted in a restaurant. The discussion begins warmly. Then, Joanna says that "she wants [her] son" and an argument ensues. Ted says "you can't have him" and accuses Joanna of abandoning Billy. She states that she has her life together and never stopped loving Billy. In anger, Ted breaks a glass against a wall. As he departs he tells Joanna that she should "do what she has to do" and so will he.

Ted consults a lawyer, John Shaunessy (played by the late Howard Keel). Ted begins the discussion by stating that he thinks he has a strong case, as Joanna abandoned Billy. The following dialogue ensues:

Attorney Shaunessy: Well, uh, first Mr. Kramer there is no such thing as an open and shut case where custody is involved. While I'm willing to bet your ex-wife has already found a lawyer and he has advised her to move back to New York to establish residency, the burden is on us to prove your ex-wife is an unfit mother. And that means that we will have to play rough. Can you handle that Mr. Kramer?'

Ted: Yes ...

Shaunessy: Now, how old is the child again?

Ted: My son is 7.

Shaunessy: Uh, huh. [with a skeptical tone]

Ted: Why?

Shaunessy: That's tough. Well, in most cases involving a child that young the court tends to side with the mother.

Ted: But she signed over custody!

Shaunessy: I'm not saying we don't have a shot. But it won't be easy....

Shaunessy ends their interview by informing Ted that fighting Joanna for Billy's custody will cost him \$15,000, a figure that obviously shocks Ted. Shaunessy tells Ted to go home and make a list of pros and cons of a custody fight. If he decides to go forward, they will "beat the pants off of them," meaning Joanna.

A subsequent scene shows Ted making a list with many cons but no pros. Nonetheless, he decides to fight for custody because of his love for Billy and retains Shaunessy. The result is a bitter trial, after which Joanna receives custody. For reasons unexplained in the movie, despite her legal victory, Joanna decides that Billy should continue to live with Ted.

KRAMER: ALTERNATIVE PROPOSAL

I have discussed elsewhere whether Shaunessy's advice to Ted, particularly about gender bias and indeterminacy of custody rules, is accurate or not.⁹ What I want to illustrate here is how their consultation might be differently portrayed in a modern day imaginary update of "Kramer vs. Kramer" if a court rule required lawyers to discuss alternatives to litigation with clients.

Shaunessy: I understand that you are angry with Joanna for abandoning Billy and how strongly you feel that you are the better parent. I am worried, however, Ted, about the effect a long custody fight might have on Billy. I know you are too. Children can really be hurt if caught in the middle of their parents' battles. Do you really want a judge deciding how you and Joanna should parent Billy? You and Joanna should do that. You know Billy best and are both going to be his parents forever no matter what you think of each other. Custody fights cost time, emotion and money. They may be worth it, but we should also think about whether we have any alternative before we go to war. That's why the court makes us and Joanna and her lawyer consider whether mediation and parent education will be helpful before we file suit.

Ted: But Joanna and I can't talk to each.

Shaunessy: Many of my other clients have good experience with parent education and mediation even though they are very angry with the other parent. The parent education programs that the court sponsors help parents understand what continuing battles

do to their children and how they can help kids through divorce. A mediator can help you and Joanna develop a parenting plan for Billy. The mediator is a facilitator; she doesn't tell you what to do about Billy or order you to do anything. She simply tries to help you reach an agreement. And mediation is confidential. It might improve your ability to communicate with Joanna.'

I leave it to the reader to decide whether the revised version of the conversation between Shaunessy and Ted is better for Billy, Ted and Joanna and the public's view of lawyers than the version in the actual film.

OPERATION OF COURT RULE

We expect a doctor treating a patient for cancer to discuss the benefits and costs of all treatment options (e.g. chemotherapy, surgery, "wait and see ") before securing a patient's consent to treatment. The lawyer-client relationship is also based on the client's informed consent to the course of action that the lawyer proposes. Mediation and parent education can be analogized to a viable treatment option in custody dispute. A strong argument can thus be made that a lawyer has an ethical duty to discuss their benefits and costs with a client as part of securing a client's informed consent to representation.¹⁰

A court, as opposed to an ethical rule, however, seems a better way to promote discussion of ADR between lawyers and parents. The sometimes cumbersome and always threatening machinery of disciplinary violations enforces ethics rules, while potential malpractice suits lurk in the background for violations.

In contrast, a court rule requiring lawyers and clients to discuss ADR options can be enforced through checking boxes on a simple court form, standardized procedures and standardized information approved by the court system on the different types of ADR and their benefits and drawbacks in custody cases. For example, the subcommittees of the Association of the Bar of the City of New York previously mentioned proposed the core of what could be a workable procedure. Under their proposal, an attorney is required to give a client an ADR notice approved by the court that contains information about different ADR processes. Both the attorney and the client are then required to return a certification indicating receipt of the ADR notice and questionnaire indicating willingness to participate in ADR even if not ordered by the court to do so a short period after the defendant answers the complaint or makes a motion. The Florida court system produced an excellent video in 1995 describing mediation to divorcing parents that could be updated and made applicable to New York.¹¹

Courts protect the best interests of children, regulate the conduct of lawyers, and establish rules for the handling of court business. Current court rules require attorneys to certify that claims are not frivolous and clients receive a statement of rights and responsibilities. Other states have successful rules requiring lawyers to discuss alternatives to litigation with their clients. It is time for New York to consider whether the interests of future Billy Kramers require a rule that lawyers

should discuss responsible methods of conflict management with parents before they engage in potentially devastating custody litigation.

1. California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, Ohio, Texas and Virginia all impose mandatory duties on attorneys to discuss alternatives to litigation with their clients via court rule. See Marshall J. Berger, "Should An Attorney Be Required to Advise a Client of ADR Options," 13 *Geo. J. Legal Ethics* 427, Appendix I-II (2000) (comprehensive listing of court rules, state statutes and ethics provisions).

2. See Ready or Not: City Bar Drafts Uniform ADR Notice, 16:7 *Alternatives To The High Cost Of Litigation* 93, 103, 108 (July/August 1998).

3. See 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).

4. The data are summarized in A. Schepard's "Children, Courts and Custody: Interdisciplinary Models for Divorcing Families" at 62-67, 75-77.

5. See Lynn Mather et. al., *Divorce Lawyers at Work: Varieties of Professionalism in Practice*, 187 (2001).

6. Bobbi McAdoo, "A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota," 25 *Hamline L. Rev.* 401 (2002); Bobbi McAdoo & Art Hinshaw, "The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri," 67 *Mo. L. Rev.* 473 (2002).

7. Williams & Buckingham, Sondra Williams & Sharon Buckingham, "Family Court Assessment: Dissolution of Marriage in Florida-Preliminary Assessment Findings" 39 *FAM. CT. REV.* 170, 181(2001).

8. Michael Asimow, "Divorce in the Movies: From the Hays Code to Kramer vs. Kramer," 24 *Legal Stud. F.* 221, 222 (2000).

9. Chidren, *Courts and Custody*, supra note 4, at 12-26.

10. Nicole Pedone, "Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interests of the Children," 36 *Fam. & Conciliation Cts. Rev.* 65 (1997).

11. Gregory Firestone & Sharon Press, *Mediation Works: Making It Work for You* (Florida Dispute Resolution Center, Supreme Court of Florida, 1995).

Andrew Schepard is professor of law at Hofstra University School of Law and the author of "Children, Courts and Custody: Interdisciplinary Models for Divorcing Families" (Cambridge University Press 2004). Timothy Cameron, Hofstra University School of Law, class of 2004, assisted in the preparation of this column.

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