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FAMILY & DIVORCE LAW 2020

VIRTUAL ROUND TABLE

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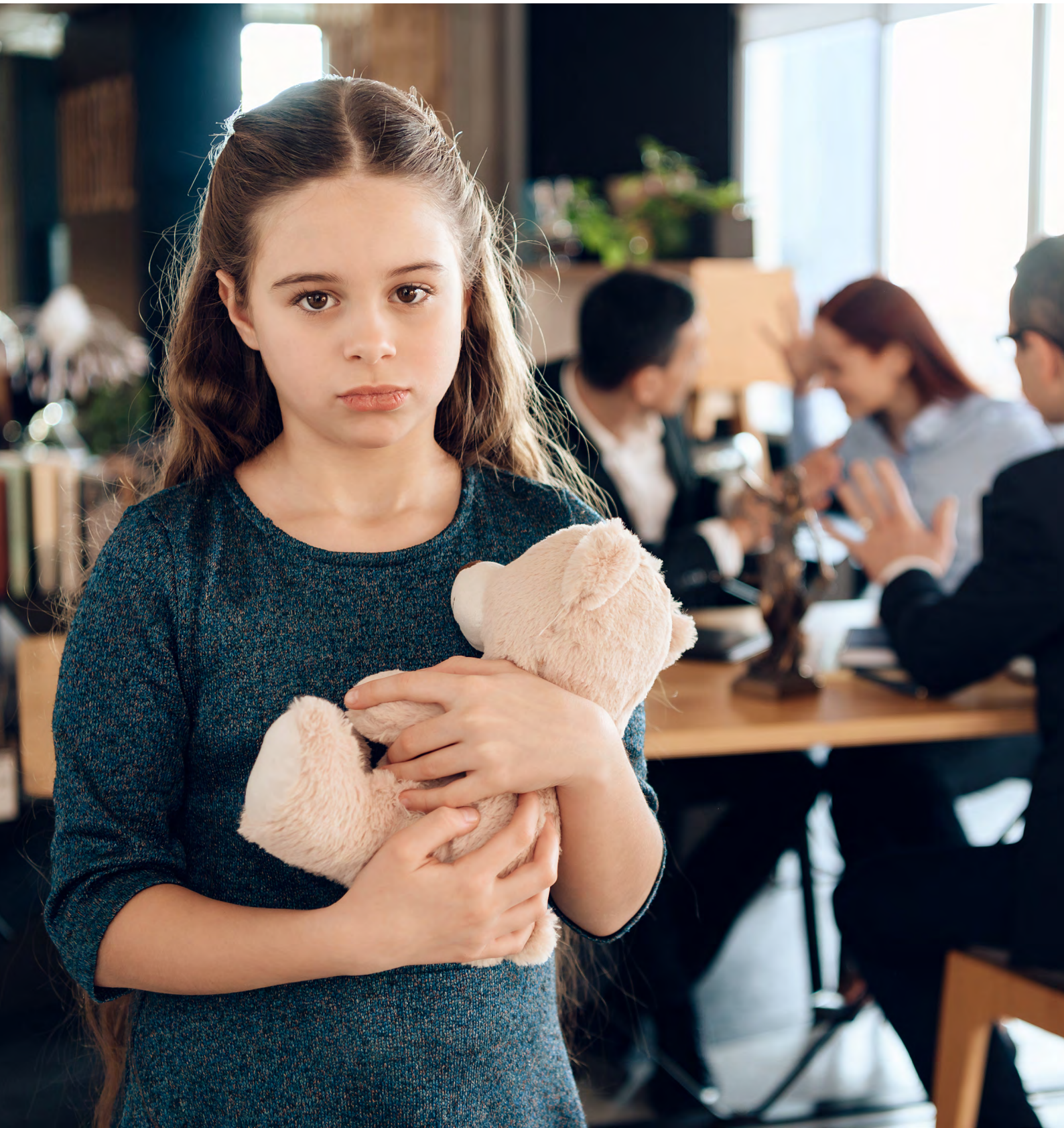

Introduction & Contents

The Family & Divorce Law 2020 Roundtable considers the latest trends and regulatory developments from around the world. It includes expert discussions on high conflict cases, divorce costs, valuation and division of complex assets, international family law, and child custody. Featured countries are: Dominican Republic, South Africa, Turkey and the United States.

James Drakeford
Editor In Chief

Meet The Experts

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David Bulitt focuses his practice on complex family law cases, helping clients in Maryland and Washington, DC, through difficult times, including divorce, custody battles and other contentious domestic conflicts. Clients regard David as both a skilled negotiator at the mediation table and as a staunch advocate in the courtroom. David is also the author of two popular books of fiction.

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I am the owner of the Badanes Law Office, P.C. located in Northport, New York. My law firm is primarily focused in the areas of Matrimonial Law, Family Law, Wills, and Criminal Law (misdemeanors only).

I have written several articles and have been published in the Suffolk County Lawyer. I have presented Continuing Legal Education seminars on Matrimonial Law for both LawLine and Marino Institute for Continuing Legal Education. I am a member of the New York State Bar Association, Suffolk County Bar Association, Nassau County Bar Association, Suffolk County Matrimonial Committee and Nassau County Matrimonial Committee. I am currently the President of the Northport-East Northport Board of Education and a former Director on the Northport Chamber of Commerce.

I graduated in the top ten percent of my class from St. John's School of Law. I was also a member of the St. John's Law Review. Prior to becoming an attorney, I was a computer programmer and computer consultant.

I am admitted in New York State, Southern District of New York, Eastern District of New York, Court of Appeals for the Federal Circuit and the Supreme Court of the United States.

I live in Northport, with my wife and two children. My oldest son is a Veterinarian, currently living in Ithaca, New York.

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Samantha qualified with and LL B in 2010 and a LL M in 2011 (both from the University of the Western Cape). Prior to commencing her articles she was a graduate lecturing assistant in the Department of Private Law at the University of the Western Cape.

Samantha completed her articles at Miller du Toit Cloete Inc and was admitted as an attorney of the Western Cape High Court with right of appearance in 2012. She has a keen interest in and practical understanding of artificial reproductive technologies ("ART)" and the ever evolving legal conundrums that flow therefrom. Her experience in this regard includes but is not limited to the drafting and implementation of South African and cross-border surrogacy agreements.

She remains an ardent researcher and in addition to having written and presented papers at our annual conference, she has also co-written and presented a paper with Zenobia du Toit on Co-Habitation/Domestic Partnerships in South Africa for the International Academy of Family Lawyers Annual Conference (New-Delhi, India 2016) and with Advocate Julia Anderssen of the Cape Bar on Contact and Care in South Africa which they presented at a training workshop attended by Regional Court Magistrates in 2012.

Her paper titled "A synopsis of surrogacy agreements in South Africa" was published in the 2015 International Association of Family Lawyers Annual and her paper short titled"The importance of the genetic link" was published in the 2015 International Bar Association's Annual Committee Newspaper.

Meet The Experts

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Mr. Marchese focuses on realistic problem solving techniques to resolve often times stressful legal situations. He is highly experienced in divorce and family law matters, and he has successfully tried and arbitrated cases in the most contentious matters. 99% of his cases are either resolved at or prior to mediation – this provides the added bonus of saving time, money and emotional distress. Mr. Marchese has been featured in several prominent publications including USA Today and has won over 50 national awards for his excellence in law practice and law firm management.

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Joseph F. Emmerth is a partner in the matrimonial law firm of Sullivan Taylor Gumina & Palmer, P.C., which represents clients throughout Chicago and northern Illinois. Joseph focuses his practice on divorce, prenuptial and postnuptial agreements, and post-divorce modifications. Joseph has been voted an Illinois SuperLawyer, a Leading Lawyer, and a Lawyer of Distinction by his peers for many years. Joseph is also the author of "Winning Your Divorce: The Top Ten Mistakes Men Make and How to Avoid Them." Learn more about Joseph at www.josephemmerth.com or www.stglawfirm.com

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Mert Yalçin graduated from the Dokuz Eylül University Faculty of Law in 2001. As an active student, besides his studies, he was also involved in various organisations including being the President of ELSA's (European Young Lawyers Association) branch in Izmir and on top of that he began to learn the secrets of the profession when he was still a student by completing the internship in various Global Law Firms.

In 2001, he was registered as a lawyer in the Izmir Bar Association and began his professional career in a leading law firm.

In 2002, he enhanced his knowledge by enrolling on various courses and lectures at the University of California, Los Angeles, in the USA.

After returning from the USA, he continued his legal career in Istanbul and became one of the first founders of the prominent leading law firm in its Istanbul branch.

During the year 2005, he had been active in providing legal consulting services to foreign capital enterprises and some Fortune 500 companies which had invested in Turkey in order to give information about new investments or either to be in pursuit of their respective works.

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Catherine H. "Kate" McQueen is a Principal attorney at Offit Kurman, P.A. who focuses her practice solely on family law issues. She is licensed to practice law in Maryland, Virginia, and the District of Columbia and has been in practice almost 20 years. Ms. McQueen's practice encompasses the many legal issues that impact families, including prenuptial agreements and all of the issues arising out of a divorce or separation. She also has extensive experience in guardianship and conservatorship matters for child and adults. She is a compassionate and responsive problem solver who calmly helps clients navigate the difficult path of family disputes. Ms. McQueen understands the value of a reasoned, practical, "big-picture" approach that achieves results without generating additional tensions or costs. Sometimes litigation is unavoidable, and when necessary, she draws on her extensive litigation experience to advocate strongly for clients in court.

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Admitted to practice: Dominican Republic (1993); New York, USA as FLC (2008); Education: Civil Law LL.D. (UNIBE, Dominican Republic); J.D & LL.M (Stetson University College of Law, USA). International Family Law Specialist. Members of IBA, ABA, CARD, HNBA, IABA and NYSBA. Former Foreign Affairs Director of the Dominican Republic Bar Association (CARD). Co- Author: International Relocation of Children; Family Law Global Guides; Jurisdictional Family Law Comparisons; Doing Business Reports for the World Bank & The IFC; The World Justice Project: Rule of Law Index; The Real Statute of Limitation for a Divorce Appeal; The Pronouncement: a vital or obsolete formality; The Importance of Dominican Fast Divorces to the Dominican Republic Economy; A New Divorce Law for a New Millennium; Project of the Dominican Divorce Law Amendment; The Truth behind the divorce publication. Mr. Suero has been the Project Advisory Board expert for the Greenbook for Dominican Republic and has served as Expert witness in Dominican Laws in several high-profile family law cases involving Dominican Republic.

Q1. Can you talk us through the process for divorce in your jurisdiction?


Samantha Lewis

Lewis: A divorce can only be granted after a divorce summons has been personally served on a litigant, and after a settlement agreement has been filed at the court with appropriate jurisdiction or after a trial has been concluded, by a Judge or a Magistrate. Alternative dispute resolution, particularly mediation, will not be heard on an opposed basis in the High Court unless a mediation certificate is filed that the mediation has been successful, unsuccessful or that one of the parties refuse to participate. In Magistrates Courts, a pilot project stipulating that mediation is compulsory at certain stages of the divorce matter is underway in certain areas.

In South Africa, a divorce will typically only be granted if there is an overall settlement of all the proprietary aspects, maintenance and parental responsibilities and rights in regard to the children. In rare circumstances a divorce is granted and the claims in regard to proprietary consequences (particularly where there are not personal maintenance claims or claims in regard to children) will proceed on the same case number.

A court shall have jurisdiction if the parties are or either of the parties is domiciled in the area or jurisdiction of the court on the date in which the action is instituted (or ordinarily resident in the area of jurisdiction of the court on such date and have been ordinarily in the Republic of South Africa for a period of not less than one year immediately prior to that date). A summons is issued and personally served on the Defendant whereafter the Defendant has to enter an appearance to defend within a certain time period and file a plea and counterclaim to the particulars of claim attached to the summons. It is not required to make full financial disclosure in the particulars of claim nor in the counterclaim. Plaintiff may deliver a plea to the counterclaim. Pleadings are then formally closed and the discovery process for disclosure of documents and information by way of notices and requests for further particulars ensues. Case management also commences. After closure of pleadings expert notices and reports are filed.

Ancillary applications for maintenance *pendente lite*, relating to issues around parental rights and responsibilities, for separation of issues, to compel compliance with requests in regard to the discovery process may be filed. During the case management process, the Judge monitors the progress of the matter and decides when the matter is trial ready whereafter a date is allocated for the hearing of the trial.

Very few divorces reach the trial stage on an opposed basis. Most matters are settled by way of round table discussions between the attorneys, perhaps *inter partes*, and through alternative dispute resolution processes.

If the parties settle, a settlement agreement and parenting plan are drafted and incorporated into the final court order.


Juan Manuel Suero

Suero: The process for divorce in the Dominican Republic is regulated by Divorce Law 1306-bis. In our jurisdiction there are three types of divorces available:

- Bilateral or mutual consent divorce.
- Contested divorce for cause (abandonment, adultery, abuse of substance, etc.).
- No fault divorce.

Personal and subject matter jurisdiction is determined pursuant rules and regulations of Dominican Laws 821-27, 1306-37 and 544-14, considering relevant factors such as:

- Where the marriage contract was celebrated.
- The habitual residence of the spouses.
- Last known domicile of the defendant.
- The stipulation agreement for the dissolution of the marriage.

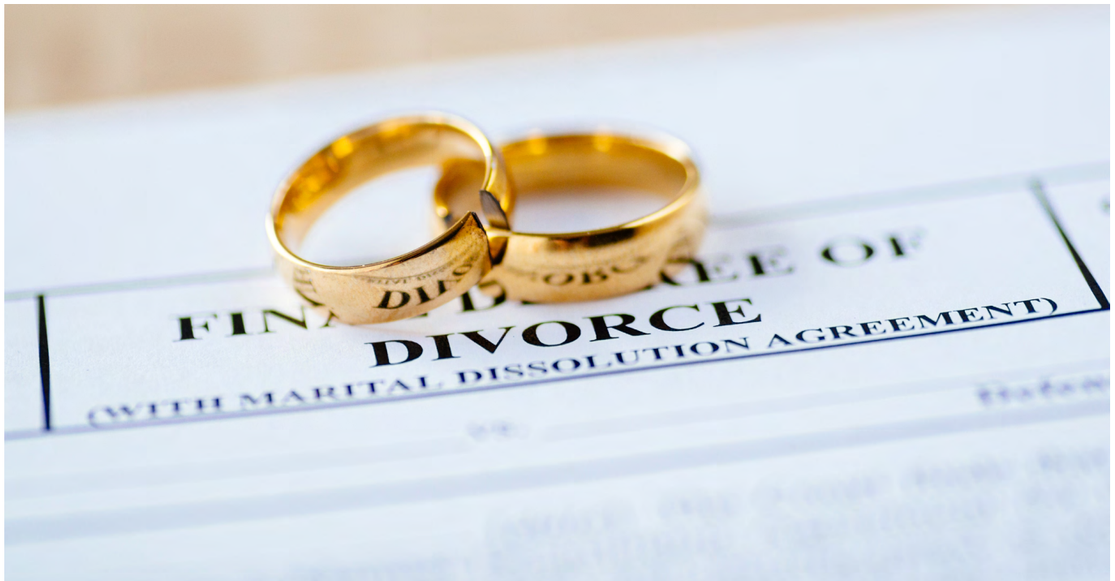
In most cases, the Civil Family Court located in the defendant's jurisdiction is the competent court to hear the divorce, however certain exceptions apply to this rule. Once papers are filed, the defendant-spouse must be served with a copy of the divorce complaint by a court bailiff. If the divorce is contested, the hearings will be in judge's chambers to protect the dignity and privacy of the spouses in litigation.

The amount of time that it will take to finalise a divorce proceeding is subject to the volume of the court's docket and how versed is the plaintiff's divorce attorney. Assuming the divorce petition was filed in compliance to local public policies, if the divorce is an uncontested no-fault or by mutual consent, it can be finalised in as little as four months, but if the divorce is contested the proceedings could take six months or longer.

Finally, all divorces issued by Dominican Family Courts must be booked and pronounced in the Dominican Civil Registrar Office in order to have *res judicata*.


Joseph F. Emmerth

Emmerth: The divorce process begins by filing a petition for dissolution of marriage with the local court. Then you must serve the other party with a copy of the petition and notice that you filed. Once that happens, the other party has 30 days to find their own attorney to let the court know that they'll be representing themselves. Once one of those two things happen, the divorce proceeds in earnest. If there are children involved, the court will send the parties to mediation to try and work out a parenting agreement. If they can't, the court will appoint a child's representative or Guardian ad litem to do an investigation. This results in a recommendation to the court of a parenting time arrangement that is in the children's best interest. During this time, the parties are exchanging all their financial documentation. There are sometimes motions that get filed during this period, depending on the level of animosity between the parties and the circumstances of the case. The case will either end with a settlement agreement or with a trial, and a judgment for dissolution of marriage concludes the case.



Q2. Are you noticing any new trends or interesting developments?


Samantha Lewis

Lewis: Most litigants wish to avoid the trauma of extended proceedings and wish to find alternative dispute resolution means of settling their matter in an economical way without escalating legal costs.

The South African Law Reform Commission has produced an Issue Paper for discussion on reform of certain aspects of family law. Alternative dispute resolutions form a large part of the subject matter of the Issue Paper. It is proposed that arbitration in family law matters, which is currently prohibited in terms of the Arbitration Act (42/1965), should be allowed in family law matters.

There are long delays in divorce matters and an opposed matter may only be heard after approximately three years in the High Courts and approximately 18 months to two years in the Magistrates Courts. Litigants increasingly wish to find their own solutions to their disputed issues.

The COVID-19 pandemic has put the focus on a paperless court system. South Africa has a resource problem and limited courts are paperless. The Gauteng High Court is currently the leader in technological advancement of hearing matters. However, the courts will have to look at electronic means to file documents and hear matters which are possible to be heard electronically.


Juan Manuel Suero

Suero: The divorce rate in the Dominican Republic has substantially increased in the last decade because Dominican women are getting more independent as they have more access to the workforce. Today, Dominican women are more educated than previous generations and they have a better understanding of their legal rights as a woman, as a married woman or as a divorced woman.

We have also noticed that due to the increase of bicultural relationship in the last two decades, the traditional social concept of nuclear family (a heterosexual married couple and their biological children) is changing. Now, the Dominican society accepts and tolerates common law marriages "*sui iuris* marriages", most of them consisting of divorced couples acting as "*more uxorio*", and a growth of "de facto same sex relationship" despite the fact the current Dominican government officials are reluctant to recognise same sex marriages regardless the provisions of the Dominican Republic Constitution of 2015 on equal rights and Human Rights International Treaties ratified by the Dominican Republic.


Joseph F. Emmerth

Emmerth: There are a few trends that we've noticed over the past several years. Divorce between older couples, or "grey" divorces are becoming more common. We have also seen a small surge in the number of couples wanting to call it quits after only a year or two of marriage.

"The COVID-19 pandemic has put the focus on a paperless court system. South Africa has a resource problem and limited courts are paperless."
- Samantha Lewis -

Q3. Are there any noteworthy case studies or recent examples of new case law precedent?


Catherine H. McQueen

McQueen: In the past four years, Maryland courts have overruled precedent and allowed third parties who have filled the role of a parent to seek custody of a child without first showing unfitness of the biological parent or exceptional circumstances, which is the general showing required of third parties. In 2008, the Maryland Court of Appeals held in *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008) that a partner in a committed same-sex relationship of 18 years did not have standing to seek custody of a child adopted by the other partner, even though the parties had raised the child together for approximately five years before they separated. Even though the Court acknowledged that the partner was a de facto parent, th`e Court held that Maryland law did not except de facto parents from the higher standard of proof for third parties in custody cases.

In 2016, the Maryland Court of Appeals in *Conover v. Conover*, 450 Md. 51, 141 A.3d 31 (Md. 2016), overruled this precedent and recognised de facto parent status as an exception to the higher standard required of third parties. While the Court recognised that parents have a constitutional right to the care, custody, and control of their children, the Court also noted the sometimes competing requirement to consider the best interest of the child in making custody determinations. The Conover case involved a custody dispute between two women in a same-sex marriage over a child conceived by artificial insemination before the marriage. The other party was not listed on the child's birth certificate. Relying on the precedent of Janice M., the trial court found that the other party did not have standing to seek custody. The Maryland Court of Appeals, however, examined case law from other states and recent legal developments, including the recognition of same-sex marriage, and found that the Janice M. decision was no longer good law.

In *Kpetigo v. Kpetigo*, 238 Md. App. 561, 192 A.3d 929 (Md. Ct. of Spec. Apps. 2018), the Maryland Court of Special Appeals made clear that de facto parent status is not limited to same-sex couples. In Kpetigo, the Court found that a stepmother had met the burden of showing that she was a de facto parent for the son of her ex-husband born prior to the parties' marriage, but whom the stepmother took a large role in raising. This significant change in the law recognises the changing shape of families and promotes the best interest of the child in custody decisions.


Samantha Lewis

Lewis: In the 2017 matter of *M v. M* (332/2015) [2016] ZASCA 5 (9 March 2017), the Supreme Court of Appeal had to determine whether the assets of certain trusts were valid trust assets or whether they in fact formed part of the appellant's personal estate for purposes of accrual. Prior to this case, the test to determine whether one could "pierce the trust veil" was simply whether the trust was in fact a sham and alter ego.

In this case the SCA took it one step further and held that the main consideration in cases of trusts (and the patrimonial consequences of divorce) is whether the trust-creating spouse had in fact attempted to prejudice the monetary claim of the other spouse by administering the trust in such a manner that it was an abuse of the trust form. In short, the aggrieved spouse had to prove that the appellant transferred personal assets to the trusts and dealt with them as if they were assets of the trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate and thereby evade payment of what was due to the respondent, in accordance with her accrual claim.

The SCA held that in such instances, the assets of the trust in question would be taken into account when quantifying the accrual claim of the aggrieved spouse and in order to satisfy any payment owed to them in terms of the accrual regime.

Q3. Are there any noteworthy case studies or recent examples of new case law precedent?


Juan Manuel Suero

Suero: In the recent case *Rosario v. Diaz*, S.C.J., Pr. S., No. 001-011-2017-RECA-00543, S. 0307-2020 (Feb.26, 2020), the Civil Chamber of the Dominican Republic Supreme Court held that during a divorce proceeding for the specific cause of incompatibility of characters (irreconcilable differences), the trial court can make its decision on the basis testimonial evidence – such as statements of the plaintiff-spouse or the spouses – and other circumstances of the process. The trial court may even constitute proof of the incompatibility on the simple fact that one of spouses has sued the other spouse to appreciate among them a state of unhappiness in their coexistence which constitutes both a cause of social disturbance and sufficient justification for the dissolution of the marriage.

In *Beltre v. Genao*, S.C.J., Pr. S., No.2016-6740, S. 230-2020 (Feb. 26, 2020), the Civil Chamber of the Dominican Supreme Court in a case related to division of community property and compensation of damages due to personal injuries, the court held that in a singular and stable union between a man and a woman, free of impediment marriage, which form a de facto home, generates rights and duties in their personal and patrimonial relationships pursuant to article 55(5) of the Dominican Republic Constitution of 2015. This type of union needs the concurrence of the necessary elements for the existence of conditions for the recognition and legal effectiveness of this type relationship. Those elements are: a) a more *uxorio* coexistence, that is, an open, public and notorious relationship, identified with the coexistence model developed in the homes of families founded in the marriage; b) absence of legal formality in the union; c) a community of life stable and true family with deep ties of affection; d) singularity, that there are no equal ties of affection or ties on the part of the two cohabitants formal marriage with third parties simultaneously; and e) that this family union consists of two people of different sexes who live as husband and wife.


Mert Yalçin

Yalçin: With the latest decision dated 27.06.2018 of The Assembly of Civil Chambers, it is decided that the children who are at least eight years old should be heard to state their will within the scope of the custody cases. It has been stated in the related decision numbered 2017/2-3117 E., 2018/1278 K. that; *"…The case is a custody change case. The transaction to be performed by the court is; to consult him on the custody issue that interests him directly and to provide the opportunity to the child who has been accepted as has the enough power of perception to explain his opinion with its reasons; to make a decision according to this opinion in case it is not contrary to his own best interests. …It is understood that the child whose custody has been requested to be changed is at the age of perception. The Articles 3 and 6 of the European Convention on the Exercise of Children's Rights and the 12th Article of the United Nations Convention On The Rights Of The Child foresee that the opinion of the children who are at the age of perception should be received on the matters that interest them and the necessary importance should be given to these opinions. What really matters in the custody regulations are the best interests of the children and in case there is a conflict between the mother and father's benefits and the child's benefits, the child's benefits should be given priority to. In case the best interest of the child requires so, it is possible to make a decision that is contrary to these opinions. Thus, while it was needed to receive the common child's opinion on custody and evaluate this opinion and make a decision accordingly, it is contrary to the procedure and the law to make such written decision with the deficient examination. …*

In this present case, the common child Efe whose custody has been requested to be changed was eight years old at the filing date, was 10 years old at the decision date, was 12 years old at the date of reversal decision and he has been at the age of perception during all this process. In the statement of the common child who is at the age of perception that is received by the experts; it has been stated that he wants to be with both of his parents and did not make any choice. At the final part of the report dated 17.06.2015, it has been stated that the minor is mature enough to determine his own desires and wills and to express those, thus the statements of the child should be taken into consideration. …With the reasons explained, The transaction to be performed by the court is; to consult him on the custody issue that interests him directly and to provide the opportunity to the child who has been accepted as has the enough power of perception to explain his opinion with its reasons; to make a decision according to this opinion in case it is not contrary to his own best interests."

Listening to the child during a hearing may also harm the best interests of him/her. Thus, the court must first determine whether or not it is in the child's best interest to listen to him/her and with the latest precedent of the Supreme Court, it is believed that an eight-year-old child has enough emotional maturity and capacity to reason and state his/her will on which parent he/she would live with. This latest precedent eases the discussions of hearing the child before the court or not and most importantly, serves to the best interests of the child.

> *" With the latest decision dated 27.06.2018 of The Assembly of Civil Chambers, it is decided that the children who are at least eight years old should be heard to state their will within the scope of the custody cases."*
> *- Mert Yalçin -*


Joseph F. Emmerth

Emmerth: In Illinois, the laws surrounding maintenance (also known as alimony or spousal support) have undergone several modifications. The legislature has taken some of the discretion away from the courts by making the calculation of maintenance more of a formula, to both the amount paid and to the duration of payment. We also recently saw a modification to the calculation of maintenance, based on changes in the federal income tax laws dealing with the deductibility of maintenance payments by the payor.

Q4. What are the key benefits of the different methods of divorce?


Samantha Lewis

Lewis: Litigation is expensive and protracted with cumbersome procedural requirements. A specialised court in handling intricate and complex family law issues exists, although in the usual course certain courts only hear certain types of family law matters. The courts are overcrowded.

Alternative dispute resolution mechanisms are important for the delivery of accessible and quality justice for all, such as court annexed mediation. Alternative dispute resolution processes offer more privacy than court proceedings, is adaptable, and can be used by persons with a spectrum of economic requirements.

The mediator and/or arbitrator with experience in family law matters may be personally selected by the parties. The process is flexible and only a discrete issue may be mediated or informally arbitrated. The parties control the proceedings and meetings can be scheduled at any time, date or venue. In regard to arbitration, the procedure can be determined, it is private and confidential, and can speed up the process with less need for interim proceedings. Collaborative proceedings are also available. More traditional forms of resolution are also practiced, particularly in family groups, community based and traditional culturally based forms of alternative dispute resolution.

Q4. What are the key benefits of the different methods of divorce?

David P. Badanes, Esq.

Badanes: In general terms there are three main benefits:

Simple, Uncontested Divorce:
Typically, this involves a recently married couple or a couple that has no children and no assets. Both parties want a simple divorce and since there are no children and no assets, a written divorce agreement is probably not necessary. The benefit is that the parties can get divorce quickly and they should have very little legal fees.

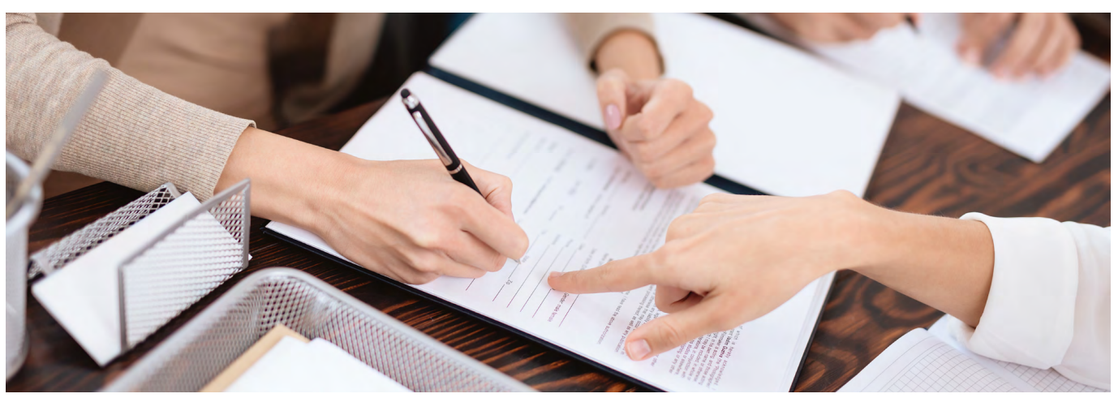
Mediation leading to Divorce:
Both parties want a divorce and both agree that mediation is the right way to accomplish that. The parties need a neutral party to guide them through the process and to resolve any issues involving children or assets. The main benefit of mediation is that it will take much less time than a contested divorce and it will also cost a lot less than a contested divorce.

Contested Divorce (with the parties agreeing to resolve their difference without court intervention):
Here, the parties may not believe mediation is the right vehicle to get them divorced, but, they don't want a long divorce process. The parties can instruct their respective attorneys to resolve their differences without court intervention. In this way, the parties should be able to save money on their divorce.

Joseph F. Emmerth

Emmerth: Alternative dispute resolution, which is a term that encompasses several different approaches, is an essential part of any judicial system's protocol. In Illinois, the judges will almost always send a divorcing couple to mediation first, in an attempt to work out an agreement regarding children's issues, prior to stepping in and appointing a child's representative or guardian ad litem.

In some jurisdictions, the courts and/or the attorneys occasionally employ financial mediators, if the case seems appropriate. There is also an approach called collaborative divorce, in which both parties and their respective attorneys (who have received specialised training and a certification in the collaborative process) sign a contract not to litigate, and work through the issues and resolution of the divorce over a series of four-way meetings, employing professionals like accountants and parenting coordinators as the situation requires. The parties have incentive to proceed and negotiate in good faith, as the contract that they signed at the beginning of the process stipulates that the attorneys must withdraw from the case if either party decides to change their mind and pursue litigation. I suspect that more cases could benefit from this process than are currently employing the option.



Q5. Is litigation or dispute resolution better for high-conflict cases?

Daniel Marchese

Marchese: Litigation is never a preferred solution for our firm or our clients. Divorce and custody issues are some of the most contentious issues in the practice of law. Litigation only serves to tear families apart and causes divisions that will last months, years, or even a lifetime, and the costs of litigation are extremely burdensome and financially devastating for most clients. Especially when children are involved, no one ever wins. Even in dispute resolution such as mediation, which all litigants are required to participate in, no one ever "wins". One of the most influential things I ever heard a judge say was that if both parties settle their case and each party walks away not completely satisfied then the court knows it is a good settlement.

Catherine H. McQueen

McQueen: Litigation and dispute resolution do not have to be mutually exclusive. Clients can attend mediation anytime, even if their case is in litigation. I almost always advise a client to pursue settlement before filing litigation. The biggest benefits of settlement are that the client can control the outcome, the client can negotiate terms that the court will not grant, even on the client's best day in court, and the client saves the time and emotional and financial cost of trial. The money saved by avoiding litigation can pay for retirement, college, or maybe just a post-divorce trip to Tuscany. At the end of the day, even if settlement negotiations are unsuccessful, at least the client will know that he or she pursued every reasonable avenue before incurring the higher fees that go along with litigation.

Some parties, however, need some fire under their feet to make the compromises necessary to resolve a case. The deadline, cost, and other drawbacks of litigation (including undergoing a deposition or the exposure of potentially embarrassing or damaging information gained through discovery) can provide a strong incentive for a party to compromise. Even if litigation has been filed, the parties can pursue mediation at any time until the judge gives his or her decision. Mediation also often provides a more informal setting for information gathering if the case ultimately goes to trial. Settlement negotiations, including statements made by a party during mediation are confidential and not admissible at trial, but facts learned during mediation are not confidential. When negotiating settlement terms, parties often provide facts to justify their position that you may not learn through formal discovery. Those facts may be helpful or may lead to other information that is helpful for the client's case. The client will just have to prove those facts in court with evidence other than the party's statements made at mediation. Ultimately, my advice is to always pursue dispute resolution, before and during litigation, if necessary.

Samantha Lewis

Lewis: Even in high conflict cases, dispute resolution may have excellent results. Discrete issues can be mediated.

The exorbitant cost of litigation makes the continuation of a matter on a purely litigious basis impractical even in the event of a scorched earth policy approach. In high conflict cases alternative dispute resolution often takes place once the matter has commenced to be heard in court. Litigation tends to feed high conflict cases and polarises the parties even further. It is not best for the parties to be heard in a court at all costs. However, if there is no impetus, such as parallel proceedings, often in these high conflict cases there is no impetus for the parties to participate in alternative dispute resolution.

Matters involving children should be resolved as quickly as possible in the interests of the children. In terms of the Children's Act 38 of 2005, a conciliatory process and children should be apprised of matters in which they are involved, and their views depending on their age, development and maturity should be taken into account. They may also join in such proceedings.

Q5. Is litigation or dispute resolution better for high-conflict cases?


David Bulitt

Bulitt: In my view, anytime that people have the opportunity to control their own destiny, they owe it to themselves and their children to explore that option. Alternate Dispute Resolution (ADR), either via mediation or a formal collaborative process is, at the very least, worth a discussion between attorney and client in every family law case, regardless of the extent of the conflict. I tell people that Judges are generally smart, hardworking people who care about their jobs. That said, however, there are an awful lot of cases that are litigated; judges only have so much time to dedicate to each one so even in cases where the conflict levels are up high on the charts, I do my best to convince clients of the financial and emotional savings as well as the overall utility in trying ADR.

Q6. What considerations need to be factored in to the valuation and division of complex assets?


Daniel Marchese

Marchese: Michigan Family Law Courts are equitable courts that generally follow a 50/50 asset division split. Not every time will a case be settled with a precise 50/50 division but our Firm always works toward this goal and that outcome is generally the case. The biggest valuation issues we face are home appraisals and business valuations. Business valuations can be very complex and our Firm and our client's need the right expert to valuate our client's businesses. No one ever seems to agree on values if there are competing valuations, so our experience is that the court or mediator will "split the baby" and take the average of both values. Thus, it is important to find an appraiser or valuator that provides the best financial advantage to our clients in case of a dispute.


Samantha Lewis

Lewis: The personal assets of parties are taken into account in the division of assets which does not automatically include the assets and liabilities of trusts. It is only in very exceptional circumstances that assets and liabilities of trusts may be incorporated in the division of assets. In fact, in practice it is extremely difficult to do so. Assets may be valued in various manners, for example, a net asset value, a price index value, a market related property value, and so on. The asset would be valued as at what it would be likely to fetch on the open market when marketed. The issue of share options is a difficult one, particularly where share options have not yet vested. There are disputes as to who such options should be valued, if at all. Pension interests are valued at its withdrawal benefit at the time of divorce.

The marriage regimes in South Africa are:

- In community of property: where the parties' assets are pooled in a joint estate and each own half undivided shares of such a joint estate.
- Out of community of property excluding any sharing regime: where each party retains his or her own assets and are liable for his or her own liabilities.
- An accrual regime: in terms whereof the parties have a commencement value which is escalated up by inflation at the date of dissolution of the marriage and in terms of which certain assets may be excluded from the application of the accrual regime. Upon dissolution of the marriage by death or divorce, the accrual or growth in the parties' respective estates (not taking into account the excluded assets or any substituted assets acquired by such excluded assets or the fruits thereof) from its commencement value as escalated to its value as at date of dissolution are calculated and the difference between the growth in the respective estates are divided by two and then the monetary value awarded to the spouse with the lesser growth.

There are some marriages pre-November 1984 in regard to which a sharing regime set out in Section 7(3) of the Divorce Act 70 of 1970 based on certain equitable factors and considerations apply.

Q7. What are the biggest mistakes clients tend to make?


Daniel Marchese

Marchese: The simple answer is becoming too emotional and using words that deeply hurt others. Unfortunately, divorce and custody issues are brutally painful for most couples – I know because I experienced it myself. We see some of the most amazing and successful people treat our staff, the court system, opposing counsel, and their spouses terribly and with extreme cruelty. This is shameful and provides no benefit to moving forward and protecting our client's children's best interest. Some things cannot be undone and I don't think people understand the damage they do, whether intentional or not. The second major mistake would be manipulating children against, or withholding children from the other parent, for spiteful and vindictive reasons. It's heart-breaking to see parents using their children as weapons to hurt their spouse or former spouse. Children see and hear a lot more than we think.


Samantha Lewis

Lewis: The biggest mistakes often made by clients is believing misinformation:

<u>The rights of a father are subordinate to those of a mother in regard to parental rights and responsibilities.</u>

- The default position is equal care and contact of children. Domestic partners may be regarded as married in terms of South African common law. However, South African legislation does not recognise automatic rights of maintenance nor of proprietary claims in regard to cohabitants. In certain circumstances commercial partnership claims or unjust enrichment claims may be proved between cohabitants.

<u>If you are married in terms of the accrual regime, you are entitled to half of the other spouse's estate.</u>

- Whilst the accrual regime is a sharing regime, it only comes into operation on death and divorce and if the parties excluded certain assets from the accrual (on commencement of their marriage in terms of a prenuptial contract), these assets are excluded from the accrual regime.

<u>If you married prior to 1984 you will not be able share in the growth of your spouse's estate.</u>

- The Matrimonial Property Act came into operation in 1984 and introduced the accrual regime referred to herein above. Before 1984, spouses could elect to marry in community of property or out of community of property. There was no sharing regime. However, Section 7(3) of the Matrimonial Property Act specifically provides that if parties married out of community of property before the coming into operation of this Act, they may have a claim for a redistribution of their spouse's assets if certain factors are present.

Other mistakes include:

- Clients may litigate in terms of principled issues instead of considering an economic overall settlement in the interests of the parties and also the minor children.
- Parties do not consider the cost consequences of protracted litigation and the uncertainty of the outcome of a matter being heard in a court.
- Parties tend to have different parenting expectations and styles and to involve their children in the mechanisms of the divorce.

Q7. What are the biggest mistakes clients tend to make?

David P. Badanes, Esq.

Badanes: The biggest mistake clients tend to make is not listening to their attorney. Too many times, a client will create their own problems by doing something that is against what their attorney told them to do. The second biggest mistake is not telling their attorney everything, including, any bad acts they might have done (including excessive drugs and/or alcohol).

David Bulitt

Bulitt: A few come to mind. First of all, a client should talk to more than one lawyer before deciding to retain. Working with a lawyer in a family related matter can be very personal – most divorce cases are saturated with emotions, and I think it is important to find a lawyer with whom the client feels comfortable. Of course, if the case is going to be contested and likely litigious, you definitely want to hire an experienced litigator, someone who knows their way around a courtroom.

Second, ask questions. I find that people do not ask enough questions, and then are unsure of what is happening or what might come next. Do not be silent – it is your money – the lawyer works for you, not vice versa.

Finally, I find that many difficulties are caused when the client does not listen to the lawyer's advice. That's not to say you should ignore concerns, related issues, but if I were paying someone several hundreds of dollars an hour for their advice, I would certainly listen to that advice.

Juan Manuel Suero

Suero: In our opinion, the biggest mistake that a client tends to make is not hiring the right lawyer. That mistake always occurs when the client does not ask the proper questions prior hiring a lawyer. Those questions are:

- How long have you been practicing family/divorce law?
- If you take my divorce case, do you have any conflict of interest?
- Considering the facts of my case, how much do you estimate that my divorce will cost?
- What do you think the outcome will be if we settle or if we litigate?
- How long do you anticipate the divorce proceeding will take?
- What are my rights and duties during the divorce proceeding?
- What are my rights and duties during the division of the community property?

Joseph F. Emmerth

Emmerth: Generally, women are more unaware of the family finances than men are and are often under the impression that they are going to be taken care of for the rest of their life. But men are far more likely to make mistakes during their divorce than women are, by quite a wide margin. In fact, the mistakes that men make during a divorce are so common and so predictable (and avoidable) that I wrote a book about it. It's called *Winning Your Divorce: The Top Ten Mistakes Men Make and How to Avoid Them*. You can find it on amazon.com.

The most common mistakes that men make during the divorce include: cutting their wife off financially during the divorce; immediately moving on to a new relationship; and/or shutting down emotionally and ignoring the process.

Q8. Are there any considerations in divorce settlements which clients often overlook or are blindsided by their potential inclusion? If so, how can a client best protect their personal interests?

Daniel Marchese

Marchese: I always tell our clients that the next four to nine months (on average) will be the most important time in their lives to determine their future. I caution all of my clients to be on their best behaviour during the divorce case and to treat their spouse and participants in the divorce process with white gloves. I advise them that one mistake, one hurtful word, one hurtful action, no matter how severe, can change the course of the rest of their lives. However, despite this advice, we continually see clients and their spouse going to war with each other. This drives up the costs of their case and only makes our job harder because we have to spend most of our time dealing with adults who are acting like children.

Catherine H. McQueen

McQueen: One of the most valuable assets that parties have is their retirement, but parties often do not do the work necessary to protect these assets in the settlement agreement. First, agreeing upon how any non-marital interest in retirement accounts (if the parties earned part of their retirement assets prior to the marriage) will be valued and addressed in the settlement agreement will help minimise disputes later, when the retirement orders are being drafted. The parties should decide whether the premarital balance should be increased to account for appreciation and, if so, how they will calculate the appreciation.

Second, parties need to research any retirement interests that they may have. For instance, do they have an interest in a pension from a prior job? Do they have a roll-over IRA? Are there any military retirement benefits that need to be divided? The party should obtain copies of any plan documents that are available. For unusual retirement interests or similar assets, like deferred compensation or stock options, both parties need to understand whether the assets can be transferred. If not, the spouse will need to receive his or her share of the marital value of that asset from somewhere else, and any tax consequences associated with transferring or liquidating an asset will need to be considered. For example, if a spouse is to receive a share of stock options once they are exercised, the settlement agreement needs to make clear that the spouse will receive his or her share net of any tax consequences incurred by the owner spouse.

If a party has a marital interest in a pension, will the spouse receive a shared interest or a separate interest? Is there a survivor benefit that is available to the spouse? If a survivor benefit is not expressly provided for in the settlement agreement and court order, the spouse likely will not be able to receive it. How will the cost of the survivor benefit be paid? Are there restrictions by the plan with how this can be paid? For example, Defense Finance and Accounting Services ("DFAS") does not allow for the cost of the survivor benefit plan to be apportioned between the military service member and the spouse. The settlement agreement should address these issues.

If there are federal or military retirement benefits, it is even more important that the parties' attorneys have the information and experience required to address those issues. Particularly with military retirement, recent changes in the law make it more difficult for the spouse to protect his or her interest in the retirement benefit. The Office of Personnel Management ("OPM"), for federal retirement, and DFAS, for military retirement, have very strict requirements on what must be provided by the agreement and court order for the spouse to receive the benefits that she or he wishes to obtain. If the agreement does not address these issues properly, it may be very difficult or even impossible to make the correction later.

For most retirement interests, a court order providing for the retirement transfer is necessary to avoid unintended tax consequences as a result of the transfer. It is important for retirement orders to be drafted and submitted for approval as soon as possible. The settlement agreement should address who will draft the orders and who will pay the cost of the drafting.

Q8. Are there any considerations in divorce settlements which clients often overlook or are blindsided by their potential inclusion? If so, how can a client best protect their personal interests?


Samantha Lewis

Lewis: If a spouse is awarded personal maintenance and there is no provision in the settlement agreement that the terms and conditions of the consent paper are binding upon the spouses' respective estates, then the maintenance claim would fall away upon the death of the spouse who pays maintenance. If a matter is litigated through a court, the court is not capable of making such an order and in those circumstances automatically the maintenance will fall away upon the death of the spouse who pays the maintenance. It is therefore important to rather settle maintenance claims and incorporate the binding on estate provision than litigate these.

The duration of the personal maintenance claim and the terms and conditions under which it is paid, have to be set out. A court cannot order that personal maintenance be paid in lump sum but can only order periodic maintenance permits. In a settlement, however, the parties can agree on a lump sum of capital in lieu of maintenance payments. If these payments are made over a staggered period, then there should be provision made for the revival of the personal maintenance claim in the event of default of the capital payments as well as the other provisions for security of the capital payments and escalated capital payments in the event of default which should be included in the consent paper. The proprietary claims should be worded in such detail as is required to implement the agreed proprietary claims. If these provisions are not carefully worded, litigation may ensue after the divorce again, which would not be cost effective and prolong the trauma and failed relationship between the parties.

The divorce settlement should be dependent upon the divorce being granted within a certain period. The divorce settlement should pronounce it to be final and binding and that variations may only be made by agreement and in writing or by an appropriate court. Where other entities are involved in the transfer of assets for the allocation of assets to a party or where such entity is guaranteed fulfilment of a spouse's obligations, the entities need to be referred to correctly in the settlement agreement and the necessary resolutions, agreements, sessions, suretyships or other necessary documentation need to be completed and signed simultaneously with the settlement agreement.

If there are on-going relationships between the parties in regard, for example to beneficiary of a trust or a trustee of the trust, these relationships need to be looked at and possibly governed by the settlement agreement.

Alternative dispute resolutions processes are useful to provide for in the settlement agreement in the event of future disputes subject to the overarching jurisdiction of the courts.


David P. Badanes, Esq.

Badanes: Clients often only look at the issues from their own perspective and beliefs. They forget that their spouse has their own point-of-view and that there are often two sides to each issue.


Joseph F. Emmerth

Emmerth: It's always fascinated me that people will spend weeks or months planning to buy a new care, a new home, making an investment decision or other common life decision, but never think to start planning their divorce before they start the process. There are many, many things that an individual can do in the weeks or months (sometimes years) prior to filing for divorce that will place them in a stronger position or give them a strategic advantage once the process begins. Most commonly overlooked areas include the tax ramifications of a divorce, the characterisation and value of both marital and non-marital assets, the effect that the divorce may have on a closely-held family business, and retirement planning.

Q9. How much does a divorce typically cost and do you have any useful tips on how clients can reduce their expenditure?


Daniel Marchese

Marchese: On the low end, for an uncontested divorce, the typical cost will be around $3,500 to $5,000, sometimes less. Generally however, when there is a lot of back and forth with communication, and/or we have to go to court to protect or defend our client's best interests, the median costs when all is said and done is between $5,000 and $10,000. In the most contentious cases the costs usually far exceed $10,000. Clients can reduce costs in several ways, most notably: limiting nonessential communication with our Firm, using phone calls instead of emails, making every effort to avoid fighting with their spouse, and accepting our advice as it relates to experience and what a court may or may not do if they cause to litigate their case.

Unfortunately, even when our clients are the most well behaved and respectful clients we can have, a combative or non-cooperative spouse will only drive up costs and delay resolution of the case. There is little we can do about this. There have been cases where a divorcing couple, without minor children, have spent more on legal fees than their estate was worth. This is because one spouse made every effort to make life as difficult as possible for the other.


Catherine H. McQueen

McQueen: Almost every client asks me how much their divorce will cost. It is an important question for the future of the family, but it is difficult question to answer at the beginning of a case. Some of the cost is within the client's control, and some of it is not. The first way to manage cost is for the client to research attorneys to find a comfort level in terms of experience and cost. The more experienced an attorney, the higher their hourly billable rate and, therefore, the higher the cost of their work. Choosing an attorney solely based on the lowest hourly billable rate, though, is not a smart path either. As they say, you get what you pay for.

The client should have an honest discussion with the attorney about their hourly billable rate and the hourly rate of any other attorney or firm professional, like a paralegal, who will be working on the case. The client should ask who will attend hearings, meetings, etc. and whether the client will be billed for more than one attorney at a time. The client should understand whether he or she will be billed for travel, copies, postage, or other expenses.

The client can engage a mental health professional to work through the emotional issues of your divorce, so that the client will be prepared to approach negotiations in a practical way. The attorney is not a trained mental health professional, and often bills at a higher rate than a therapist. If the client calls the attorney, the attorney will bill for the call, whether the client is crying over something nasty the opposing party said or the client is discussing preparing for a deposition.

The client should prepare a detailed written history of the case. The history should provide a chronological account of what is important to the client and what is important to the other side. The client should provide the attorney with the names and phone numbers of important third-party witnesses. The more information the client gives the attorney, the less time the attorney will have to spend asking questions or spinning their wheels on mistaken assumptions.

The client should gather as many documents as possible and provide them to the attorney in an organised fashion, so that the attorney does not have to subpoena the information, chase it down from the other party, or organise it. The sooner the client gathers the information, the less likely it is that it will be lost or deleted, whether intentionally or by mistake.

"Almost every client asks me how much their divorce will cost. It is an important question for the future of the family, but it is difficult question to answer at the beginning of a case. Some of the cost is within the client's control, and some of it is not."
- Catherine H. McQueen -

Q9. How much does a divorce typically cost and do you have any useful tips on how clients can reduce their expenditure?

Samantha Lewis

Lewis: Divorce costs range from an undefended divorce costing under R20,000 to millions of Rands, particularly if expert accountants and/or psychologist/psychiatrists/employment experts are involved. Clients can reduce their expenditure by alternative dispute resolution and by, for example, resolving discrete issues outside court so that the court process is limited. Agreement should be reached on, for example, expert reports, legal questions, valuations and so forth.

David P. Badanes, Esq.

Badanes: A simple, uncontested divorce can cost as little as $500 (without court fees), but, typically, they cost about $1,000 to $1,500 (without court fees).

Most mediations, in total, will cost about $2,000 to $5,000.

Contested divorces can cost anywhere from $3,000 to $10,000 to much, much more – it all depends on how complex the divorce is.

David Bulitt

Bulitt: That is always a tough question to answer. I do my best to explain to people how fees can change depending primarily upon the issues involved and the degree of dispute over those issues. In one particularly jurisdiction where I practice, the court essentially cuts family cases in two so that custody and the divorce (along with those issues appurtenant to the divorce) are litigated separately. What this means is different discovery deadlines, different motions deadlines, different trial dates. In other words, we are litigating two cases in one and that can become very expensive.

In terms of saving money, I tell clients not to email or call me every day when a singular issue arises. Instead, they should send a consolidated email or set one call when we can discuss all the issues at once. Generally, that is more efficient for the lawyer and less expensive for the client.

Juan Manuel Suero

Suero: First, international spouses who plan to divorce should always consider an experienced international family law attorney because they understand the specific legal needs of a foreign spouse or of a foreign marriage.

To determine the cost of your divorce, several factors must be evaluated by your divorce attorney, such as: a) date and place of the marriage ceremony; b) habitual marital residence; c) duration of the marriage; d) nationality and occupation of the spouses; e) age, nationality and habitual residence of the children; f) grounds of the divorce; g) identification and location of the community and personal property; and h) distribution of community property.

The cost of a divorce (legal and court fees) are unpredictable because each divorce is different. Expect that a mutual consent or bilateral "amicable" divorce or an uncontested "no-fault" divorce is going to be more cost-effective because it could have only one hearing, different to a contested divorce that could have several hearings in the trial court and few more in the court of appeals. Based on our experience the divorce costs can vary from low four digits to high five digits. Legal fees can be arranged on a flat fee basis, per hour basis and contingency basis.

The legal fees of a divorce lawyer are determined by multiple factors, such as: relevant experience in the field, international accreditations, language skills, skills in negotiation and record of success on previous litigated divorce cases. Just remember to always look for a candid and reasonable seasoned lawyer, because you will save a great deal of time, money and headaches.

Q10. How does an international family establish which jurisdiction should hear their case?

Samantha Lewis

Lewis: There is of course foreign shopping between various jurisdictions. An international family should receive legal advice from all the jurisdictions in regard to which it is possible to have their case heard.

In South Africa, a court has jurisdiction in a divorce action where one or both of the parties is or are domiciled in the area or jurisdiction of the court on the date on which the action is instituted or ordinarily resident in the area or jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

A court who has such jurisdiction when a court grants a decree of divorce in respect of a marriage of which the patrimonial consequences according to the rules of South African private international law are governed by the law of a foreign state. The court shall have the same power as the competent court of a foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.

If there is a jurisdiction race, the South African court will decide whether it has jurisdiction and factors of local convenience will also be taken into account. The patrimonial consequences would vary widely from jurisdiction to jurisdiction. In South Africa, as far as spousal maintenance and the responsibilities and rights in regard to children are concerned, South African law will however apply.

Joseph F. Emmerth

Emmerth: If you wish to get divorced in Illinois it doesn't matter where you were originally married or where you have previously resided. Illinois law only requires that one of the parties reside here for more than 90 days prior to filing for divorce. You must really reside in the state of Illinois, however. Coming here to enjoy three months of summer vacation doesn't count. If residency gets challenged in court, generally you can prove your intent to reside in Illinois by producing an Illinois driver's license, proof of a lease or a mortgage, and/or pay checks and utility statements.

Q11. How are child custody rights determined in your jurisdiction?

Catherine H. McQueen

McQueen: There are two types of custody, namely legal custody and physical custody. Legal custody means decision-making for a child regarding the child's healthcare, education, religion, and general welfare, while physical custody means where the child sleeps. There is no statutory presumption in Maryland for sole or shared legal or physical custody. The guiding standard for determinations of both legal and physical custody is what is in the child's best interest. There are not any statutory factors that guide the court's decision as to what is in the best interest of the child.

There are two seminal Maryland cases that guide courts' custody decisions, namely *Montgomery County v. Sanders*, 38 Md. App. 406, 381 A.2d 1154 (1978) and *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (Md. 1986). These cases delineate factors that guide the court's custody decision. For legal custody, the most important factor is the ability of the parties to communicate and reach shared decisions regarding the children. The court's goal is to protect the child from exposure to the parents' conflict.

For physical custody, the court must consider the following factors: (i) willingness of parents to share custody; (ii) fitness of parents; (iii) relationship established between the child and both parents; (iv) preference of the child; (v) potential disruption of child's social and school life; (vi) geographic proximity of parental homes; (vii) demands of parental employment; (viii) age and number of children; (ix) sincerity of parent's request; (x) financial status of the parents; (xi) impact on state or federal assistance; (xii) benefit to parents; and (xiii) any other relevant factors.

Samantha Lewis

Lewis: The Children's Act 38 of 2005 governs parental responsibilities and rights of children and refers to guardianship, care and contact.

In terms of Section 9 of the Act the best interests of children are of paramount importance. The best interests of the child's standard are set out in Section 7 of the Act and takes into account, such as:

- the nature of the personal relationship between the child, the parents, caregivers and other relevant persons;
- the attitude of the parents towards the child and the exercise of parental responsibilities and rights in respect of the child;
- the capacity of the parents or caregivers to provide for the needs of the child, including emotional and intellectual needs;
- the likely effect on the child of any change in the child's circumstances, including separation from the parents or siblings or caregivers;
- the practical difficulty in expense of a child having contact with the parents and whether that will affect the child's right to maintain personal relations and direct contact with the parents;
- the need for the child to remain in the care of a parent, family and extended family and to maintain a connection with the family, culture or tradition;
- the child's age, maturity and stage of development, gender, background and any other relevant characteristics of the child;
- the child's physical and emotional security and his or her intellectual emotional, social and cultural development;
- any disabilities, chronic illnesses;
- the need for the child to be brought up in a stable family environment or an environment resembling as close to is possible a caring family environment;
- the need to protect the child from any physical or psychological harm relating to maltreatment, abuse, neglect, exploitation, degradation, violence, harmful behaviour, inter alia, any family violence and so on.

The child has the right to express their views in an appropriate way if he/she is of such an age, maturity and stage of development as to be adult to participate in any matter concerning them. The parties must first attempt to mediate a parenting plan in which their parental rights and responsibilities, alternative dispute resolution mechanisms and the parents' decision-making rights and responsibilities in regard to the child are set out. This parenting plan may be registered with the Family Advocate, which is a branch of the Department of Justice or in a court and will then be binding upon the parties.

Should there be a dispute about any parental rights and responsibilities, the dispute is referred to the Family Advocate for mediation and/or investigation and/or the parties may elect to appoint a private psychologist or social worker to investigate and report as an expert on the best interests of the child.

A biological father will have automatic full parental responsibilities and rights if he is married to the mother of the child or if he was married to the biological mother:

- At the time of conception;
- The time of the birth; or
- Any time between conception and birth.

In the case where the biological father was not married to the biological mother at any time, he will acquire full parental responsibilities and rights if;

- At the time of birth he was living with the mother in a permanent life-partnership; or
- Regardless if he was or is living with her;

a. The mother consents to him being identified as the child's father on the birth certificate (or he pays damages in terms of customary law);
b. He contributes or has attempted to contribute to the child's upbringing for a reasonable period; and
c. He contributes or has attempted to contribute towards the maintenance expenses of the child for a reasonable period.

Although both parties have equal parental rights and responsibilities, this does not translate into equal contact. Contact will always be subject to a best interest test. In the case of a surrogacy agreement or in the case of an unmarried biological child mother who does not have guardianship rights in the child, the mother will not necessarily have full parental responsibilities and rights in respect of a child.

One parent could be the designated primary carer of the child (i.e. the old custodian parent for purposes of residence only) and the other parent will have reasonable rights of contact. However (unless one of the parent's rights have been somewhat curtailed or varied) both parents will have full parental responsibilities and rights in respect of their child.

In some instances, parents "share the care" of their child wherein equal residency is exercised.

When there is a disputed contact and care matter, a court will look towards input/recommendations by an expert (psychologist, social worker, etc.) or the Office of the Family Advocate. The overriding principle is the best interests of the child and in making this determination, the factors to be taken into account include (but are not limited to):

- the nature of the personal relationship between the child and the parent(s);
- the capacity of the parent(s) to cater for the needs of the child (including emotional and intellectual needs);
- the effect on the child of any change in the child's circumstances in particular separation from one or both of the parents or a sibling, age, level of maturity and stage of development of the child; and
- gender of the child.

Q11. How are child custody rights determined in your jurisdiction?

David P. Badanes, Esq.

Badanes: One of the most important factors in determining child custody is whether or not a parent who is given "custody" will engage or foster a relationship between the children and the other parent. If you can demonstrate, through actions (not just words), that you keep the other parent actively involved in the rearing of the children, then you have a good chance of obtaining custody. In contrast, if you make false allegations against the other parent or you are not willing to foster a relationship between the children and the other parent, then the court may award custody to the other parent.

Other important factors are: (i) who has actually been the de-facto custodial parent; and (ii) which parent will have more time with the children.

Juan Manuel Suero

Suero: In relation to child custody rights, the jurisdiction is determined by the last known habitual residence of the child. Habitual residence is defined as the place where a natural person is established as principal place of abode, even if it does not appear in any registration and even if it does not have a residence authorisation. To determine habitual residence the Dominican courts will take into account the circumstances of a personal or professional nature that demonstrate lasting ties of affection and the best interest of the child to that location. (Dom. Rep. Law 544-14, Art. 6)

In the event of child custody or visitation dispute, the competent court is the Civil Chamber of the Tribunal for Minors located in the Judicial District of the minor's last known habitual residence.
In child custody cases, the court focus is on the child's "best interests". The Dominican courts seek that all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child's dignity, personality, happiness, security, mental health, educational and emotional development into young adulthood; also considering a balance of co-parenting and the child access to both parents.

Therefore, the Civil Chamber of the Tribunal for Minors will determine the custody of the minor to the father, mother or another competent adult third party that could protect the best interest of the child. The court has also the power revoke custody rights permanently if it finds traces of non-compliance of the inherent duties of custody of a minor by the appointed custodian.

Mert Yalçin

Yalçin: Under Turkish Civil Law, it is accepted that child custody has close links with public order and the parents' custody rights begin with the birth of the child and continue until the child is 18 years old which is the legal age of majority in Turkey. The child is considered to be under the custody of both of his/her parents during the marriage and the parents exercise their custodial rights together.

In accordance with the Article 336 of Civil Code below; in case of divorce, the judge will grant the custody to one of the spouses and the joint custody is not regulated under Turkish Civil Law.

Article 336 of the Civil Code – *"(1) Mother and father exercise parental custody together as long as the marriage is continued.*
(2) If the common life has been terminated or separation state has occurred, the judge may grant parental custody to one of spouses.
(3) Parental custody belongs to surviving spouse in case of the death of one of the mother and the father and to the party to whom the child has been left in case of the divorce."

As it is seen above, joint custody is not allowed in Turkish law; there is only sole custody and in cases of divorce, the courts grant custody to one parent. However, according to the Supreme Court's latest precedent, joint custody is accepted within the divorce with the settlement under the consideration of the protection and the best interests of the child. The relevant Supreme Court decision numbered 2016/15771 E., 2017/1737 K. and dated 20.02.2017 is as follows;

"… In summary, the lawsuit has been rejected with the reason that although it is possible to make a decision on the joint custody for the parties' natural child according to their national law; it is contrary to Turkish public order. …In this present case, the dispute that needs to be solved is about determination whether the regulation on 'joint custody' is clearly contrary to Turkish public order or not. …The Protocol numbered Annex 7 of the protocol numbered 11 and the Agreement on Protection of Different Human Rights and Main Freedom signed on 14 March 1985 has been approved with the law numbered 6684 and has come into force with the Official Gazette dated 25.03.2016 and became a part of our domestic law. According to the Article 5 of the Protocol numbered Annex 7; "In terms of the marriage, during the marriage and in case of the termination of the marriage, the spouses are equal from the point of rights and responsibilities that are subjected to private law in the relationship between each other and with their children. This article does not prevent the State from taking necessary measures in the favour of the children."

The international agreements that duly come into force are accepted as law. The applications claiming that these are contrary to the constitution cannot be made to the Constitutional Court. In the possible disputes arising from the facts that the International Agreements on the fundamental rights and freedoms that duly come into force and the laws contain different provisions on the same matter, the provisions of the international agreement shall be based on (The Article 90/final of the Constitution of Turkish Republic).

When the present case is considered in accordance with our domestic law and the concept of "public order"; it is not possible to say that the "joint custody" regulation is "clearly" contrary to Turkish public order or violates the fundamental structure or the fundamental benefits of Turkish community. Thus, while it was needed to make a decision in accordance with the Article 17/1 of International Private and Procedure Law with the consideration of the custody regulations in the common law of the parties who are English citizens and by evaluating the merits and the evidences all together, it is not true to make such written decision by stating that this claim is contrary to Turkish public order and reversal of the decision is needed."

The judge will base his custody decision on the best interests of the child which is an internationally accepted principle. However, besides that, there are no common grounds to determine custody and every case is considered individually. While making the decision, the judge will consider several factors and one of them is the will of the child.

Joseph F. Emmerth

Emmerth: These rights are determined by the courts using the "best interest of the child" standard. If the court must appoint a child representative or guardian ad litem, they will do an investigation into the children, the parents, and anyone else they feel is relevant to generate a report and a recommendation for the court. They will make a recommendation regarding allocation of parental rights and responsibilities, and allocation of parenting time (which we used to call "custody".) While the court is not bound by this recommendation, they tend to give it a substantial amount of weight, as the court is the one who appointed the child representative or guardian ad litem in the first place. If one or both parties are unhappy with the child representative or guardian ad litem's recommendation, they are always free to take the issue to trial, where the judge will make the ultimate decision.

Q12. How important is psychological testing in determining the best residential custody arrangements for children in divorce?


Samantha Lewis

Lewis: Expert reports in determining the best care and contact provisions for the child in the event of disputes are very important. The court will take the expert report into account but will still exercise his discretion as upper guardian of all children to come to a decision in regard to the parental rights and responsibilities.

As parties have been recognised as equal parents, although the default position is not equal care and contact, less expert reports have been required. However, if there is a dispute regarding the periods of contact, then it is important to have an expert report or a report by a Family Advocate. The Family Advocate has been established by the mediation in certain divorce matters Act 24 of 1987 to inter alia provide for mediation and also investigate and report on the best interests of children in regard to parental rights and responsibilities but not maintenance. The expert reports are therefore very important.


David P. Badanes, Esq.

Badanes: Some Judges place little weight to psychological (or forensic) testing in determining custody. The cost is very high, and many times, the testing comes out with an inconclusive result.

Q13. What advice would you give to families in order to minimise the overall impact of divorce on their children?


Daniel Marchese

Marchese: Understand that no matter what your spouse has done or how much you hate them, you will have to have a relationship with them for the rest of your life. You cannot make them go away. Your children are the most important thing in the world and your anger, resentment, and hatred will only make your children's lives worse and will have long lasting and negative effects on your children both mentally, spiritually and physically.

The most important advice is that your children are not pawns in your divorce and that any manipulation, alienation, or other negative impacts that they see and hear, both directly or indirectly, will have long lasting impacts on your children. You cannot make your spouse go away and your children have an absolute right to have a kind and loving relationship with both parents. Lastly, even if your spouse may be a terrible husband or wife, they may be the best possible parent for your children.


Catherine H. McQueen

McQueen: The best way for parents to minimise the impact of divorce on their children is to minimise the children's exposure to the conflict between the parents. Recent research suggests that divorce itself is not damaging to children, but conflict between parents is what is damaging to children. The damage can last into adulthood and impact not just emotional, but also physical wellbeing.

In a study published on 5 June 2017 in the Proceedings of the National Academy of Sciences, researchers concluded that participants who reported that their parents had a high conflict separation were three times more likely to develop a cold when exposed to the cold virus. The researchers studied 201 healthy adult men and women who were quarantined for six days in a hotel, exposed to the cold virus, and monitored to determine whether the participant developed cold symptoms. The participants were divided into three groups: (i) those whose parents stayed together; (ii) those whose parents were separated but remained on speaking terms; and (iii) those whose parents were separated and were not on speaking terms throughout their childhood.

The results of the study showed that participants whose parents were separated but remained on speaking terms were not at an increased risk of developing cold symptoms when compared to the participants whose parents stayed together. The participants whose parents were separated and were not on speaking terms, however, ran a three times higher risk of developing cold symptoms when exposed to the cold virus. The researchers reported that this was consistent with studies finding higher levels of inflammation due to the impacts of stress on the immune system and the autonomic nervous system.

Minimising the exposure of a child to conflict in a divorce requires both parents to prioritise their children over their anger. Opportunities to make this choice range from small moments, such as a parent choosing a respectful tone when talking to the children about the other parent or refraining from using the children as messenger for adult issues in the divorce, or larger moments, such as deciding whether to retain an attorney who is a problem solver and child-centred or an attorney who focuses on fuelling the conflict.


Samantha Lewis

Lewis: Families should absolutely not involve the children in the disputes of their divorce matter. Both parents should attend a parenting course in order to understand how to deal with their children through the divorce proceedings and thereafter and how to co-parent and retain a relationship with each other if only in regard to the children's best interests. They should also respect each other's parenting styles and arrive at an agreement as to how to co-parent the children during and after the divorce proceedings. They should not denigrate each other in the presence of the children nor to third parties and should at all times present a united front to the children. They should not interrogate the children nor blame each other for the divorce. Depending on the ages of the children, consider play therapy or therapy for the children so as to give the children a safe place within which to ground themselves and explain their feelings. The children should not be put in the middle of the dispute and should not be made necessarily to make choices between parents.

A uniform disciplinary approach should be agreed upon. Arrangements should not be made through the children but with the spouses. The acrimony should be kept to the minimum in the presence of the children. If possible, the parental rights and responsibilities should be settled early on in the divorce so that there is certainty for the children, particularly going forward.

If it is impossible for the parties to cohabit in the same house, which is often fraught with difficulty in view of the extended duration of the divorce, reasonable arrangements should be made to separate the parties and interim arrangements regarding maintenance and the children should timeously be put in place. It is of paramount importance that the parties do not use the children as tools in the divorce action and also do not become co-dependent on the children and treat them as adults/allies when they are not.

It is also always best to finalise the divorce expeditiously by way of alternative dispute resolution mechanisms rather than litigate fiercely till the last gasp of the case.


David P. Badanes, Esq.

Badanes: The best advice is to not discuss any aspects of the divorce with your children and also do not disparage the other parent. Indeed, it would be best to actively promote the other parent and state to your child/children that although mummy and daddy are getting divorced, we both love you and we both want what is best for you.

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