ILLINOIS STATE BAR ASSOCIATION

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Family Law

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair column

BY MATTHEW A. KIRSH

Just say yes.

This simple mantra has been in my brain for about a week now. I recently saw something that bothered me and I cannot get it out of my head. A *pro se* litigant was attempting to obtain a default judgment for dissolution of marriage. After the judge refused to grant her request, she asked me for some help. I looked at her documents and she had everything she needed to obtain a default judgment. She had proof of service by publication, a draft Judgment, a default order, etc. An attorney could not have done it better. I explained to her how she should present the documents to the court and advised her to have the case recalled. An hour later she called my office to tell me the judge had once again denied her request for the entry of a default judgment.

The reason for the denial of her request was nonsensical. I have no idea what the judge's motivation was, but I do know what it wasn't. It wasn't "Just say yes". The law exists for many reasons, including providing people an orderly way to solve their problems. The litigant I observed

Continued on next page

Best legal advice given—From a colleague, senior lawyer or layperson

BY ARLETTE PORTER

On February 23 and 24, 2016, another set of "hopefuls" will sit for the Illinois Bar Exam. If all goes well, their registration number will be listed on April 1, 2016. I recall having checked the website and seeing my number appear. My next thought was—NOW WHAT? As a newbie, I needed sound, legal advice on how to get this thing started. I sought out ISBA members inthe area that I intended to practice. The advice given to me was priceless—and I still remember (and practice) most of it a decade later. A few yearsback, I invited ISBA members to share with me some of the best legal advicethey received from either a colleague, senior lawyer or layperson.

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Chair column

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had a problem, had researched the solution to the problem and followed the rules. It seems to me that the judge's first thought should have been "How can I help this woman solve her problem?'

Judges, please do not get me wrong. Most of you, I believe, would have entered the default judgment. Too often though, it seems that form is exalted over substance. Too often, it seems, the court's reflex reaction is "No," when maybe it should be "Why not yes?"

Lawyers should just say "Yes," too. When a pro se litigant asks us for help, too often our initial reaction is to keep on walking or tell that person we do not have time. If we think about it, we probably do have the time. If we stop and think about how intimidated that person feels being entangled in a judicial system that is incomprehensible to most people, finding the time seems a little easier. Giving a stranger a few minutes of our time is an easy thing to do.

In keeping with my theme for the year, I am going to apply the "Just say yes" mantra to the Cubs and us Cubs fans. Do not hesitate to get excited. Get on board and enjoy the ride. Do not worry about heartbreak, even though you have 108 good reasons to worry. Just say "Yes" to enjoying what could be a special season. Eamus catuli. ■

Best legal advice given

CONTINUED FROM PAGE 1

Everyresponse received was and is valuable for those who will be embarking on anew career come April 1st. While this list is not exhaustive, it is insightful forthe new and less seasoned lawyer. Enjoy.

Mark Palmer, Champaign—Know the "gatekeepers"—Get to know and be friendly with the clerks, court reporters, bailiffs (or court security officers), etc. Learn their names, ask them about their family, and so on. It can really come back to help you at times and, most importantly, it makes our job and theirs more fun.

Joe Mirabella, Wheaton—The clients are going to come and go. We will be together for a long time. Your reputation is dependent upon your relationship with other lawyers.

Bill Scott, Rantoul—At least once a year, fire a client. If every time you flinch when you see their number on your caller ID or when you touch their file...that is the one to fire, just because. It is a service to you and to your client.

Brigid A. Duffield, Wheaton—Trust your gut...You will make mistakes ...we all do. But trust and choose to do what makes the most sense for you. Take risks ...you are a risk taker, you wouldn't be a lawyer if you weren't.

Melissa Maye, Yorkville—There are no good writers. There are only good re-writers AND if it isn't worth it to the client to give up half a work-day, then it isn't worth it for you to give up your weekends or evenings.

Deidre Baumann, Chicago – If you feel you can't do anything, do something.

Thomas Bruno, Urbana—Return all of your phone calls promptly and acknowledge all of your emails promptly. Be civil and humble. Be honest to your clients, to the court, to other lawyers and to everyone else you encounter in your legal practice.

Michelle Preiksaitis, Bethany —Never judge a book or client by its/their cover. The worst dressed clients can be the best return-mail bill payers you'll have. Good character doesn't always wear fancy suits.

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Ted Birndorf, Chicago by way of Jack Klepak—There is nothing more important to a lawyer than his reputation.

Cynthia Loos, Pinckneyville—Get your money up front. You can't care more about your client's case than he/she does.

James Ahlberg Rochelle—A client is stuck with the facts he brings into your office. We can emphasize some and suggest others are insignificant. We can argue that the law applies this way or that. But if the case is going to be won or lost on the facts, your client is still stuck with what he came with.

Jim Foley, Westmont by way of Richard Giangiorgi—With regard to billing, never let the hook tum. Don't ever get in a position where clients owe you so much money, you need them more than they need you.

Paul Storment, Belleville -Clients look at their criminal cases in two ways: either they get convicted-which is your fault; or they got a great deal (or acquitted) which because they didn't do anything wrong in the first place, you as their lawyer did nothing!

Justin Raver, Kewanee—"The client will never compliment you on how brilliant you are, but time and time again they will compliment you for being fast."

Suzanne Wells, Monticello—Vou never learn anything in court without getting a bloody nose now and then.

Carl Draper, Springfield —Confront your problems. Even if your depression or your risk of addiction is based on genetic factors, take responsibility for your own problems by getting the help you need. Check out help on the Lawyers Assistance Program. There is confidential help available.

Carl Draper by way of Richard Thies—A lawyer is only as good as his staff sometimes. Hire and train good staff because even a small clerical error can be serious.

Karl Winkler, Rockford—Know your story. At the most, you only have one thing going for you m every case. Do not lose sight of it no matter what the other side does or brings up. Tell your story.

Christine Rhode, Chicago—If I had had more time, it would have been shorter.

Ronald Runkle, Grayslake —As for office management , I suggest a lawyer use colored files. Easier to locate a missing file: green is for wills, blue is for trusts, red is a real estate sale, yellow is a real estate buy, brown is misc.

Richard F. Sarna, Elmhurst—Retain us—yes, use us—never.

Ronald Wiesenthal, St. Louis, Mo. A lawyer is not a city bus. Just because someone is standing on the corner and waves at you, you do not have to stop and pick them up.

Laura Kern, Elmhurst – You eat the elephant one bite at a time.

Bob Downs, Chicago—Opening files is easy. More important is closing them.

Gary Schlesinger, Libertyville by way of Stephen Katz -Clients are like Dobermans, you can raise them, feed them, be nice to them, but one day they will turn on you.

Daniel Deneen, Bloomington—Principle is a word attorneys love to hear. It means their clients really want to do what is right. However, your principle won't pay my bills, so I must have a retainer before I can proceed on your case.

Elizabeth Factor, LaGrange —Always be on time, and always be prepared.

Janice Pea, Champaign-In most disputes, both things are true. If you can see the truth in your position (or your client's) but still acknowledge the truth of the other side, you can solve a lot of problems. It is the rare situation when one side of an issue has a monopoly on truth.

Richard Zuckerman, Peoria —No good deed goes unpunished.

Paul Prybylo, Oak Park—The courtroom is yours. Treat it as such. ■

Enter, the long-ignored caretaker

BY PAULA E. PITRAK

While one purpose of the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") is to separate two divorcing parties economically, its other intended purpose, ensuring the continued caretaking of minor children, should not be ignored. Toward this end, the recent changes to the IMDMA have placed a gender-neutral importance on the caretaking functions when determining the allocation of parental responsibilities and maintenance awards.

When the 1993 version of the IMDMA ("1993 Act") went into effect, there was a clear shift in the valuation of the homemaker. The 1993 Act attempted to balance property distribution and to make women economically independent, and it also preserved women's ability to simultaneously receive maintenance.[1] When first recognizing the importance of the homemaker, the Illinois Appellate Court defined marriage as "a partnership, not only morally, but financially."[2] It further explained that "[s]pouses are coequals, and homemaker services must be recognized as significant when the economic incidents of divorce are determined."[3] The 1993 Act's increased focus on financial independence, however, created the unintended consequences of minimizing the importance of the primary caretaker and obfuscating the separation of caretaking functions.

The most recent version of the IMDMA ("2016 Act") accounts for the societal shift towards both parents sharing the economic and caretaking responsibilities of marriage. The legislature has removed all references to custody, a concept which has been replaced with the allocation of parental rights that fall under two umbrellas: decision-making and parenting time.

Section 600(c) of the 2016 Act defines "caretaking functions" as "tasks that involve interaction with a child or that direct, arrange, and supervise the interaction with and care of a child provided by others, or for obtaining the resources allowing for the provision of these functions." It includes the following non-exhaustive list of caretaker functions: 1) being responsible for the children's routines, personal hygiene, social involvement and aptitude, safety, and transportation; directing the children's developmental needs (including toilet training); 3) providing discipline, assigning chores, and overseeing the children 's behavior and self-restraint; 4) ensuring school attendance, supervising homework, and making available special educational services; 5) fostering the children's abilities to establish interpersonal relationships; 6) scheduling and making available necessary medical appointments; 7) providing moral and ethical guidance; and 8) arranging for alternative care. The 2016 Act also considers each parent's involvement in and "the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities or, if the child is under two years of age, since the child's birth."[4] This newly added section finally highlights the importance of maintaining the status quo not just with respect to lifestyle and financials but also with respect to the rearing of minor children.

A newly trending, albeit unfortunate, issue in divorce cases arises when the primary breadwinner requests that the court order the primary caretaker to commence full-time employment and then uses that employment against the primary caretaker when petitioning the court for parenting time. When spouses are the primary caretakers, particularly of young children, it is typical for them either to work part-time or to defer employment. This arrangement allows for families to save money on child-care expenses while allowing the parents to raise their children and to fulfill the caretaking functions. When a court is determining the new parenting arrangement, these pre divorce life choices affect whether a spouse may receive maintenance and continue working part-time while actively being caretaker of the parties' children. *In re Marriage of Hensley* stands for the principle that part-time employment coupled with acting as homemaker for children is equivalent to obtaining full-time employment and placing children in day care.[5] A parent who chooses to remain the caretaker for the sake of the children may be allowed to stay in that role if it's in the best interest of the children.

While the 2016 Act may not have been drafted for the purpose of valuing the caretaking function, it likely will affect whether the primary caretaker can remain employed on a part-time basis and continue actively raising children. If the primary caretaker is compelled to work full time, the function of caretaker may not be fulfilled by either parent, creating a situation which likely does not serve the best interests of the children. Parents should not be compelled to forego hands-on caretaking with their children solely because of divorce. Regardless of which spouse fulfills the caretaking role, it is important that the pre-divorce arrangement between the parents about child-rearing be given fair consideration by the courts. Given that the modern family takes many different forms, the best interests of the children can be met only after assigning adequate value to both the economic and caretaking responsibilities contributed by both parents. ■

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1. *See,* Barry A. Schatz & Jacalyn Birnbaum, 80 Ill. B.J. 610, New State Promotes Homemakers' Rights (December, 1992).

2. *Id.* at 611-12 (referencing *In re Marriage of Hart,* 194 Ill. App. 3d 839, 853, 551 N.E.2d 737, 745 (4th Dist. 1990)).

3. *In re Marriage of Hart,* 551 N.E.2d 745.

4 750 ILCS 5/602.7(b) (3) (2016).

5. 210 Ill. App. 3d 1043, 1052, 569 N.E.2d 1097, 1102, (4th Dist. 1991).

Why doesn't she just leave?

BY SALLY K. KOLB

This is a question that has been repeatedly asked regarding domestic violence victims by judges, attorneys, police, members of society, etc. Without training and education on the issues and complexity of domestic violence, it is a very understandable question. It is, however, a question without a simple answer.

Domestic violence is a very complex issue. It affects men far less than it affects women as far as victimization is concerned. National statistics show women are six times more likely than men to experience domestic violence. A victim in a domestic violence relationship may attempt to leave and return to the abusive relationship numerous times before the relationship is finally ended. For individuals who have never been in an abusive relationship, the seeming reluctance of the victim to leave is baffling. For those with training in the issue of domestic violence, that seeming reluctance makes abso lute sense.

Domestic violence runs a gamut of severity. The Illinois Domestic Violence Act of 11986;; defines abuse as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a child by a parent or person in loco parentis." Many people interpret the term domestic violence to be equated to physical assaults and abuse. Some domestic violence relationships never reach a point of physical abuse. Regardless of whether the abuse reaches a physical level or not, the toll it takes on the victim, their families, their children, and society in general are, nonetheless, extensive .

In many violent relationships, the abuser is someone who sweeps the victim *off* their feet. The stereo-typical knight in shining armor. The abuser often will maintain a friendly, pleasant facade, often one that they are able to maintain for a lengthy period of time. This will often catch a victim *off* guard. This may be the nicest, most charming individual that victim has ever met. Violent relationships often move very quickly and become very intense very fast. It is not uncommon to see the parties moving in together or getting married after dating a very short period of time .

Very often, the abuse begins in a very subtle way. Often, comments regarding attire, makeup, behavior, etc. of the victim are made to alter the victim's behavior. This is an attempt to control the victim. It may be comments like "don't wear makeup you look cheap when you wear it" or "don't wear that blouse, it makes you look heavy." This behavior is often played *off* by the abuser as something in a way of helping or guiding the victim, something done because they care. It is likely to then progress to comments that break down the victim's self-esteem even more.

The abuser may then proceed to begin alienating the victim from their friends and family.

Suddenly, the victim needs permission to a have her parents or her friends over to the house. She may no longer be allowed to have male friends (or any friends). Many victims will go along with the abuser's demands regarding things like that simply because it often is just not worth the fight. At this point, the victim still thinks the abuser is a good partner. This may occur over the course of weeks, months, or even years.

It is not uncommon for domestic violence victims to have children with their abusers. It is not uncommon in abusive relationships for abusers to either pressure their victims to bear their children or to sabotage birth control. Abusers will use statements like "if you really love me you'll have my baby." There may also be promises of a happy life and a happy family together. Abusers can be very manipulative and can make these promises seem very genuine to their victims.

Physical abuse can occur at any point in the relationship. As stated earlier, it may never occur . If, however, a victim does bear the child of their abuser, she will then face one of the two most dangerous times of an abusive relationship. A victim is most in danger while pregnant or when she tries to leave the relationship. There are many theories as to why the victim is in such danger when she is pregnant, many focus on the fact that she is now paying more attention to someone other than the abuser (the baby) and the abuser is jealous of the lack of attention and takes it out by abusing the victim. When she attempts to leave the relationship, the power and control the abuser wields over the victim are in jeopardy. That can equal danger for the victim.

By this point in the victim's life, the chances are strong that they are no longer employed or are not consistently employed. Abusers typically sabotage their victim's employment. That can come either by prohibiting the victim from seeking employment, or sabotaging employment that they do receive.

Methods that abusers can often use to sabotage the victim's employment include preventing the victim from going to work, battering them such that they are unable to go to work due to visible bruises and injuries, showing up at their workplace and creating a disturbance repeatedly, disabling automobiles (which is just really another way of preventing them from going to work), or engaging in sleep deprivation such that they oversleep and fail to make it to work or are just too tired to try. The more dependent the victim is on the abuser, the less likely the victim will leave that relationship.

Abusers often lie to their victims. Abusers often portray themselves as larger and more important than they are. Whether this is due to a grandiose perception of themselves or whether this is yet another attempt at manipulating and trapping the victim is unclear. Abusers will often tell their victim that they have important connections, implying that

the victim has nowhere to turn. This may include claiming to be friends with law enforcement in the community. Sometimes those claims are true, sometimes those claims are false. Regardless of how it's done, this often leaves a victim feeling as though they have nowhere to go. They are also often repeatedly told no one will believe them.

Sometimes that is attributed to the victim's behavior as well. Over the years, many victims will lie and cover up their abuser's behavior. There are numerous reasons for that including shame, social stigma, wanting to protect the abuser, wanting to protect the children, wanting to protect the abuser's family, and sometimes, just not wanting to acknowledge what is happening. There's a strong desire to believe the abuser is not an abuser, but is rather, still, that knight in shining armor. That this behavior is temporary and that that abuser can go back to being the knight in shining armor . Victims often do not go to police for a variety of reasons, many of which are listed above. Another reason victims often do not go to police, however, is the abuser may be the sole source of income for the household. If the abuser is thrown in jail, the income stream cuts off, and the victim now has to worry about how to feed the children plus has to fear the retribution once the abuser is inevitably released from jail. Shelters are often full and many victims do not want to yank the kids out of their home and put them in a shelter which, while safe, may be crowded, chaotic and unfamiliar.

With children to feed, no friends and family to turn to (because they've slowly been cut out of the picture by the abuser), no job, nowhere to go, and diminished self-esteem and sense of self, a more logical question might be why would she leave? This is by no means to suggest that a victim should stay in a battering relationship. This is merely to illustrate just the tiniest fraction of challenges and barriers in the way of a victim who should leave a battering relationship. Unfortunately, the biggest barrier of all has not yet been listed. Love. The victim fell in love with this individual. Or at least, the victim fell in love with the facade this individual portrayed. It could happen to anyone. There were good times in this relationship. Society focuses on the bad things that happen in the relationship, the victim often clings to the good things that happened and the good qualities that the abuser has. The victim often clings to hope that the knight in shining armor is still there and that they can help the abuser get back to who they really are. The problem is the abuser never was that individual.

Domestic violence is a cycle. It often flares up and calms down. Even when a victim is able to leave the relationship, abusers often stop at no means to attempt to reach the victim. If they are successful in this, very often they can be successful in convincing the victim to return to the relationship. This may be through many false promises such as counseling, cessation of the abuse, flowers, crying. It may also be through engaging the victim's church, community, friends, family, and/or, most importantly, children in attempts to win the victim back. If promises and enticements do not work, sometimes threats are used. Many victims return to the relationship to protect their children out of fear that they will not be awarded possession of the children in a family law case or that insufficient safeguards will be ordered for the abuser's parenting time.

When a victim does finally leave, the challenges are overwhelming . Some are able to make it and stay out of the abusive relationship but many are not. Many return to the battering relationship. Victims face so much stigma and difficulties finding employment due to either spotty or nonexistent employment history. This effects their ability to obtain housing and provide for themselves and their children. They often have no money, no car, poor coping mechanisms, and compromised problem solving skills all due to the abuse they have suffered in the control of their abuser. And, when the victim reaches out for help, the skepticism that they often find themselves facing (if this was happening all along, why are you just now talking about it) merely reinforces the abuser's message that no one will believe them.

Domestic violence cases are always tricky, as there is rarely much, if any, evidence to corroborate a victim's version of the facts. It is typically a crime that occurs behind closed doors and in secret. If there are witnesses, which could be neighbors, friends, etc., they often "don't want to get involved." Judges are left to sort through allegations which may contain years of abuse the victim never reported for any number of reasons. It comes down to credibility.

This article gives an example of an abusive relationship and abuser tactics, however, every relationship is extremely different and has different facts and patterns. Our society has made strides in the past 30 years on how we treat domestic violence. We still, however, have strides to make in how we treat victims of abuse. Until we can get to a point where our society begins asking the question "why does he abuse" as opposed to "why does she stay" we still have work to do. By asking "why does she stay," we focus on the victim's implied culpability in the situation, which is completely misguided. Asking "why does he abuse" focuses our energies where they belong. Rarely does society ask a robbery or homicide victim why they got mugged or why they got killed. We do it to victims of domestic violence every day. Then, we still manage to ask "why doesn't she just leave?" ■

Sally Kolb is a Senior Staff Attorney with Land of Lincoln Legal Assistance Foundation, Inc. She has handled exclusively family law matters, primarily those involving domestic violence, since joining the practice in 1999.

"Good to Go" (and return!) Part 2: The sailor and the perfect storm

BY MARK E. SULLIVAN

[The previous section of this article covered the ground rules for protecting and advising a military custodian as to mobilization, sea duty, deployments, and other military absences. It also outlined the key points in maintaining military custody for a parent in uniform, dealing with the custody claims of the other parent during a military absence, appointing a step-parent or relative as alternate custodian, and to resuming custody when your client returns from overseas.]

Despite good planning, many military custody cases hit a "bump in the road" and overturn. Sometimes there's good planning, and sometimes there's NO planning. The results—which usually involve the absence of the military custodian with no legal back-up custodian outside of the other parent—lead to heartbreak, surprise, legal expenses, and sometimes child endangerment.

The reality in military life is that travel and reassignments are constant factors. No one stays in one place very long. Plans must be made for the day when a military custodian cannot be there to take care of the child due to military duties.

But some military custodians, it seems, do little planning for the eventual day when "military absence" removes them from caring for the minor child or children. Sometimes it's aremote tour, such as to Iceland, Korea, Turkey or other places where military rules designate theassignment as "unaccompanied." Sometimes the mission is called TDY, or temporary duty;often these assignments are unaccompanied. Assignments to combat zones and hostile fire areasare likewise without dependents. Any military absence can become a stumbling block in a casewhere the parent in uniform has sole or primary custody of the child. Here's an example from mid-June 2014:

Submarine duty no defense in child custody

By Dennis Pelham, Daily Telegram Staff Writer, The Daily Telegram —Adrian, MI [reprinted with permission]

Being posted on a submarine in the Pacific Ocean does not exempt a father from obeying child custody orders, a judge ruled Monday in Lenawee County Circuit Court.

If Matthew Hindes is not available, then his current wife should have returned his daughter to the girl's mother, said Lenawee County Circuit Judge Margaret M.S. Noe. She ordered last week that the child be placed in Angela Hindes' custody in Adrian pending the outcome of a hearing on a custody petition she filed last year. The 6-year old girl, Kaylee, is in Washington state with Matthew Hindes' wife, Benita-Lynn Caoile Hindes.

Attorney Rebecca Nighbert of Adrian asked for a stay in the case under the federal Servicemembers Civil Relief Act. The law provides a 90-day stay in civil court proceedings if military service affects a member's ability to participate. Matthew Hindes is a petty officer in the United States Navy, currently assigned to the *USS Michigan.* The submarine is now somewhere in the middle of the Pacific Ocean, Nighbert said. She presented a letter from a Navy administrative officer to confirm his duty posting .

Noe denied the motion for a stay, ruling that he could have arranged for his wife to bring the child to her mother. "At this point, I don't think I have any alternative but to enter a bench warrant for his arrest," Noe said. "Ifthe child is not in the care and custody of the father, the child should be in the care and custody of the mother" ....

Nighbert said the wife has put together money to pay for a flight from her home in Washington, but does not yet have money to rent a car to drive to Adrian from the airport. Angela Hindes offered to drive to the airport to pick up her daughter. Noe agreed to waive an existing order that the wife not be present during the transfer of custody for parenting time.

Noe delayed her order for a bench warrant until Friday to allow the wife to bring the child to the airport. Noe also ordered the pre-trial hearing in the custody case to continue at 9 a.m. Monday, June 23.

Matthew Hindes was given custody of his daughter in 2010 after she was removed from Angela Hindes' home by Michigan Department of Human Services' Child Protective Services. An Oct. 1, 2010, divorce judgment gave him permanent custody, but Angela Hindes petitioned for a change in the custody order in August last year.

Analyzing this article requires guessing

about a lot of facts, rules and information. There are certainly more questions than answers here. Not much is revealed in the article about the relationship of the parties, the terms of the custody order, the logistics of the divorce settlement negotiations which probably led to dad's getting custody, whether the father requested a stay of proceedings under the Service members Civil Relief Act (SCRA), and the provisions—if any—for the child should the father become unavailable due to military absence (remote tour, deployment, TDY—temporary duty- or other reasons). Here are some of the questions about which the reader remains clueless:

- Did the custody order mention the protective order which removed the child from the mother's home? If not, why?
- When the divorce court granted the father custody, did it grant visitation to the mother? If so, why?
- If the mother's actions were serious, why didn't the father go to court and demand termination of the mother's parental right? Or at least termination of her visitation rights?
- What recitation, if any, is in the current custody order about what mom did to merit intervention by Child Protective Services? Was it a temporary lapse of judgment, or serious endangerment? Is it likely to happen again?
- When the father received notice of his impending sea duty, usually months in advance of the mission, did he immediately schedule a court hearing so that he could testify about the situation, the child's needs, and why he wanted to have the child bar any contact with the mother, or at least order supervised visitation?
- Was the mother's visitation, if granted by the court, structured as supervised visitation? If not, why? Did the father demand a hearing on this so that, while we was in court and available in person, he could press his case for NO visitation or—at least—supervised visitation?
- Did the father, upon being given custody, simply consent to the order and drop his otherlegitimate demands, such as the payment of child support and the restriction of mom's access to the child (in favor of his new wife as alternate custodian)?
- Was there perhaps a trade, which is common in domestic cases like this—custody to the father in exchange for no mention of the mother's wrongdoing and the waiver of child support from the mother? What were the terms of the bargain?
- Did the father ask for a stay of proceedings under the SCRA? If so, did he provide the essential parts of a stay request (i.e., a communication stating how his duties prevented his participation in the court hearing, as well as a date when he could be present, and a communication from his commanding officer stating that his military duties precluded hisdeparture for the hearing and that he would not be granted leave)?

However the court order was written, it clearly did little to protect the child during the period when dad was at sea. Such duties for sailors are expected. They are part of the job description which begins, "You are now a member of the United States Navy ...." All Navy personal—"sailors"—are expected to serve at sea regularly.[1] It is hard to imagine a judge's overlooking this fact of life, or the attorney for the father leaving out any plans for "sea duty" from the custody order which he or she either drafted or reviewed before it was signed by the judge and filed.

Note also that no custody order is ever permanent. Such orders may be adjusted when there is a change of circumstances. Who would argue that the incapacity of the father, to whom custody was given, to care for the child is not a change in circumstances? To put it another way, ask any military parent who has visitation (not custody) whether the inability of the custodial parent to care for the child should result in his having custody. The answer, by an overwhelming majority, is YES.

Clearly the father left his wife, the stepmother, in the worst possible position —unarmed against the demands of the child's mother and without the sailors presence, protection and testimony in a contest with a strong-willed judge who became aware of the absence of the designated custodian. Like virtually all judges, this one probably ruled that there is a constitutional preference for parental custody, when one parent is absent the other is expected to care for the child, and only when one parent is proven to be unfit by virtue of abandonment , abuse, neglect or such other conduct as is inconsistent with parental responsibilities may the court designate custody in a third party.

There are few exceptions to the parental preference doctrine. One of them is consent. If a parent consents to the award of custody, on a permanent or temporary basis, to a third party, then that decision will be binding upon the parent. Another is waiver. If a parent, by his actions or inaction, waives the rights which the parental preference doctrine gives him then he cannot later step into court to demand their protection and enforcement.

The Servicemembers Civil Relief Act (SCRA) provides some protections (such as a stay of proceedings under certain circumstances) for members of the military in civil lawsuits. The Act was passed to protect the rights of those in uniform. But what rights would be protected in this case? The father was given the right, nay, the duty to care for and protect the minor child in the custody order. How can he exercise this right when he is on a submarine in the middle of the ocean? Why would the SCRA be employed to protect rights which he no longer has? Why should the Act be used to keep the child with his new wife, who is not protected by the SCRA, when he cannot care for the child due to military duties? Why would the father try to use the act to defeat the rights of the mother of the child? It's not even clear that the servicemember-father asked for a stay, since the only reference to this is a statement that the stepmother presented "a letter from a Navy administrative officer to confirm his duty posting." This is not sufficient ask for a stay; there must be a communication from the sailor's commanding officer.

Use of the Servicemembers Civil Relief Act in such a custody case is almost universally

> rejected by the courts. The reason is in a doctrine known as "The Sword and the Shield." A good example of this equitable rule can be found in a New York military custody case, *Diffin v. Towne.*[2]

The SM-mother in that case, as in the Michigan case, also urged the court to find that a stay of proceedings barred the entry of a custody order, even on an interim basis. She said that that her new husband should take care of the child of her former marriage. This case, absent the information (or lack of information) about child protective services, is a close parallel to the newspaper scenario above involving sea duty for the sailor-father.

> The mother in *Diffin v. Towne,* a member of the Army Reserve, had remarried after a divorce from the child 's father about four years previously. She was served in April 2004 with a motion from her ex-husband asking for custody of their child in light of her upcoming mobilization to Fort Drum, New York.

The mother tried to defend against the motion by asking for a stay and pointing out that she had prepared a military Family Care Plan (which is required by military regulations) designating her new husband and her mother as guardians for the child .

In addition she argued that a stay of proceedings (requested under New York statutes that are similar to the SCRA) bar the judge from proceeding with any temporary or permanent relief.

Finally, the Reservist-mother claimed that the stability derived from their child's continued education in the Fort Plain School District was more important in the child's life than living with the father. The new husband also petitioned for temporary custody.

The court in its opinion reminded the parties that a stay of proceedings is simply intended as a shield to protect SMs, not as a sword with which to deprive others of their rights.[3] In the absence of extraordinary circumstances , such as abandonment, unfitness, or persistent neglect, the court must grant custody to the secondary custodial parent in a case such as this when the primary custodian cannot fulfill his or her custodial duties. Finding no such disqualifying circumstances, the court swept aside the mother's argument that her new husband should take care of the child pending her return from an indefinite mobilization period, stating that:

> the step-father has no legal or moral obligation to support the child, has no legal ability to obtain medical care for the child, and has no legal ability to inquire as to the education of the child.[4]

Here it should be noted that the court in Michigan could, if given the opportunity, hold a hearing on fitness and make a ruling as to the qualifications, ability and fitness of the mother for extended care of the child as the alternate custodian. The problem with this solution, of course, is absence of the best witness for the child, that is, the child's father. How can the dad argue and testify about the mother 's conduct and ability (or lack thereof) to care for the child when he is in the middle of an ocean? Why did he not anticipate this possibility when the custody order was entered initially?

The New York trial court opinion went on to explain that the court had the power to enter a temporary order pending the final resolution of the matter regardless of the entry of a stay of proceedings because children of military personnel are not only entitled to receive support during their parent 's tours of duty, but . . . they are also entitled to stability with regard to their care, upbringing and custody.[5]

Finally , the court noted that it was being asked to leave the child with a step-parent until such time as the mother is able to proceed. This is not in the child's best interest and the law requires this Court to enter a temporary order pending the trial of this action. To fail to provide for the child's legal physical custody during the pendency of the stay would result in an untenable situation where the child would be living with his step-father, a legal stranger to him, and his natural father's rights would be subrogated to the step-father. The Court agrees with the father, that the child should be allowed to complete the current school year in New York and then physical custody should be transferred to the father, the available natural parent, until such time that the mother is no longer on active duty in the military or a trial is held on this matter.[6]

Similar results, granting application of the stay prov1s1ons of the SCRA but allowing placement or temporary custody of the child on an interim basis, occurred in *In re Marriage of Grantham.*[7] In that case, the father attempted to give custody through his military Family Care Plan to the child's paternal grandmother, and the mother obtained temporary custody while the father pursued an appeal that was ultimately unsuccessful. It is not difficult to understand why the court affirmed the trial court's transfer of custody and upheld its denial of the father's stay motion. Inequitable conduct by the servicemember-parent, turning the Act's protective shield into a sword, usually will result in a denial of a stay request, even though there is nothing in the SCRA stating this or even mentioning misconduct by a party. The SCRA is intended to protect the rights of a servicemember. It is hard to argue that a sailor who has been given custody of a child by the court, but who is now absent from his custody duties due to military assignment, still has rights to protect. What are those rights? In virtually every custody order, one parent is granted primary care and custody of the child. This is intended by the court to be exercised in person. Most courts expect that, if a parent is unable or unwilling to fulfill the heavy duties which come with custody, he will give them up and transfer them to the other parent, or else the other parent will ask the court to perform this function.

[The final part of this article will discuss a prescription for avoiding disaster by crafting the court's custody order with an eye to the future and a plan for who gets custody when the military member is absent.] ■

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DIVORCE HANDBOOK (Am. Bar Assn., 2d Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at mark.sullivan@ncfamilylaw.com.

1. *See, e.g., Schmalhofer v. Schmalhofer,* 2003 Tenn . App . LEXIS, at 7 (case involving Navy mother in which her supervisor testified that someone in the mother's position "was usually scheduled to work 48 months on shore, then 36 month s at sea").

2. Diffin v. Towne, 3 Misc. 3d l 107A (2004) (unpublished).

3 Diffin v. *Towne,* No. 504650, Slip Op. at 2 (2004 N.Y. Misc. LEXIS 622 at 5).

4. Diffin v. *Towne,* No. 504650, Slip Op. at 6 (2004 N.Y. Misc. LEXIS 622 at 17).

5. Id. at 20 (citing *Gilmore* v. *Gilmore,* 185 Misc. 535, 536, 58 N.Y .S.2d 556, 557 (1945) and *Kelley* v. *Kelley,* 38 N .Y.S.2d 344, 348-50 (1942)) (cases providing for family support while rest of matter was stayed).

6. Id. at 21.

7. *In re Marriage of Grantham,* 698 N .W.2d 140, 2005 Iowa Sup. LEXIS 75 (Iowa 2005). For a contrary result, *see Dilley v. Dilley,* Chancery No. CH04-195, 2004 Va. Cir. LEXIS 235 (Cir. Ct., Shenandoah Co., Nov. 2, 2004) (trial-level decision granting continued custody to the SM-mother and maternal grandmother despite the mother's absence overseas, allowing the mother's stay request, and denying the father's motion for temporary custody).

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