

Family Law Education Reform Project

Problem Seven – Divorce and Custody

OVERVIEW

This exercise is the final exercise in a series of seven. In this exercise, students are given background information, supporting law and financial statements to assist them in their exploration of collaborative family law and divorce/custody.

EXPLANATION AND COMMENTS

Students are part of a law firm that practices collaborative family law, and the parties have agreed to collaborative resolution of their divorce. Students are to write a memorandum to the senior partner handling this case. She wants to know (1) what issues the students see in this divorce, and their analysis of the issues as a backdrop to considering how to best manage a collaborative settlement; (2) what are the interests of all relevant parties and how might those be best served in a collaborative resolution of the dissolution of this marriage; and (3) the student's recommendations for a settlement, substantiated by reasons why this is the best resolution of this couple's divorce.

ABOUT THE AUTHOR

Nancy E. Dowd

Chesterfield Smith Professor of Law
Co-Director, Center on Children & the Law
University of Florida, Levin College of Law

Nancy E. Dowd is Chesterfield Smith Professor of Law at the Fredric G. Levin College of Law at the University of Florida, and Co-Director of the Center for Children and Families at UF. The author of *In Defense of Single Parent Families* (1997) and *Redefining Fatherhood* (2001), and a reader on feminist legal theory, she has published extensively on non-traditional families, work/family issues, civil rights, and feminist theory.

Problem Seven

This problem is based on the divorce and custody final exercise for fall semester 2007. We will discuss the problem in class December 2; you should prepare the problem with your partner.

YOUR ASSIGNMENT:

You have been retained by one of the clients in the following problem. Your client assignment will be based on who you represented in Problem Six. *If you represented Les, then you represent Nellie. If you represented Patty, then your client is Jack. We will discuss the problem in class December 3.*

[**Note:** When this problem was used as the final divorce and custody exercise last year, the following instructions were given for the memorandum. When you prepare for the negotiation, you may wish to create a rough draft that would be responsive to these questions in order to review for the final paper.

You are part of a law firm that practices collaborative family law, and the parties have agreed to collaborative resolution of their divorce. You are to write a memorandum to the senior partner handling this case. She wants to know (1) what issues you see in this divorce, and your analysis of the issues as a backdrop to considering how to best manage a collaborative settlement; (2) what are the interests of all relevant parties and how might those be best served in a collaborative resolution of the dissolution of this marriage; and (3) your recommendations for a settlement, substantiated by your reasons why this is the best resolution of this couple's divorce. Please use statutes, cases and any other relevant course materials to persuasively substantiate arguments or proposals in your memo.

Attached is a statement of facts, an agreed summary of the parties' financial situation and the report of the therapist jointly hired who has talked to the children.

GOVERNING LAW: The applicable law is the law of the State of Florida. Florida cases and statutes studied in this course are controlling authority. Non-Florida materials studied in this course are persuasive authority to the extent they do not conflict with Florida law. If materials conflict with Florida law, they may be considered as a better alternative or interpretation, as long as that would not require statutory change.

Statement of facts

Jack and Nellie met when he was on sabbatical in London. Jack, a philosophy professor, was doing research and teaching some classes when he met Nellie, who was completing her PhD. Nellie grew up in Bermuda but had done her undergraduate and graduate degrees in the U.S., and was completing her degree in Chinese history, with her thesis focused on the history of Buddhism in China. Jack's work had begun to look at the intersection between philosophy and religion, with a particular focus on Buddhism, and they met attending the same small seminar geared to experts in

the field. Jack, who had had many relationships in his life but who had never married, was strongly attracted to Nellie, and they had a wonderful time exploring London together. When they both returned to the U.S., Nellie went back to New Haven where she was completing her degree at Yale, and Jack returned to Gainesville, where he was on the faculty. Jack regularly flew to New Haven to see Nellie. Nellie defended her dissertation and because she was a top student, had a fabulous job offer for a tenure track position at Berkeley. She accepted the job, and Jack kept traveling to see her, although now that she was working, she also made some trips to Florida. In her field, it was important that she convert her thesis into a book, and she started work immediately on that. When it was published at the end of her first year at Berkeley, it was very favorably reviewed, and she was invited to teach as a visitor at Duke. Jack contacted an old friend who taught at Duke and wangled a visit as well, so for a year they were able to live together. At the end of that year, he asked her to marry him. The big challenge was figuring out how to merge their academic careers. Nellie had an offer to come as a visitor to UF for a year. She decided to take that offer, and they agreed to decide what to do next after that year. Jack was 50; Nellie was 27 on the day of their wedding.

During the first year of their marriage Nellie got pregnant and gave birth to their first child, Daniel. Neither of them had wanted to have children right away, but both were delighted and happy. Jack was absolutely besotted with his son, and was surprised at how powerful his feelings were about being a father. Since he was fairly well established in his career, it was not difficult for him to cut back a bit and have time to spend caring for Daniel. Nellie continued to work on her scholarship, since it was important for her to publish if she were to maintain her status on the job market. As they were sorting through their career options, Jack was also pushing to have another child. He loved being a father, but he was also getting older, and wanted to have children as soon as he could. Nellie would have preferred to wait until she was more settled in her career or even until after tenure, but that would have meant as much as 5 more years. So they just let whatever was going to happen, happen. Nellie committed to a year visiting at the University of Chicago, and a month later, Nellie found out she was pregnant. She commuted home monthly from Chicago, and Daniel stayed with his dad in Gainesville. She hated being away from Daniel, and accepted a second visit from UF rather than several other more prestigious jobs. Their second child, Caroline, was born just before Daniel turned 2.

Just after Caroline was born, their pediatrician ran some tests on Daniel due to some concerns they had about his development, and he was diagnosed as autistic. Both Jack and Nellie threw themselves into learning about autism in order to do the best for Daniel. Nellie took a leave of absence in order to spend more time with Daniel, and at least temporarily, put her career on hold.

Three years later, Nellie was still home full time, although she occasionally taught as an adjunct at UF, roughly one semester per year, and she had done some limited publishing in those three years. Taking care of Daniel was challenging, and Caroline was not the easiest child either, since she suffered through asthma problems triggered by the Florida climate. Jack continued to be strongly involved with both children, and had turned down speaking engagements and conferences that used to be typical of his year, in order to be with the children and help with the demands particularly of Daniel. The stress on both of them was difficult, and was exacerbated by the financial pinch that they felt, from the cost of consultations with experts for Daniel, and the lack of income from Nellie. The stress wore on their marriage, and finally Nellie told Jack that she wanted to separate.

Despite Jack's help, Nellie is feeling very isolated. She is from a large extended family, all still located in Bermuda, and the only time when she has felt well supported have been when they have visited with her parents and siblings in Bermuda. As she faces the challenges of parenting Daniel, she would like to have the support of her family, and would be willing to sacrifice her further academic career, if necessary, in order to be within that family support structure. If she lived with her family, she would have no housing expenses and help with childcare, and would be able to work parttime.

In the alternative, Nellie feels that she is on the verge of losing forever the market position she had three years ago. She would like to maximize her position and take the best job that comes along, irrespective of location, in order to get back into her career and be able to contribute to the resources necessary for the care of both children, including the special resources needed for Daniel. She would like Jack to follow her, or allow her to make such a move, because he has achieved a favorable position in his career that might make it easier for him to move to be close to her, or might allow him to retire and take a second job after retirement. She would like to co-parent the children but if she must continue being the primary caretaker, she would like to do so with the broader support that she can have with her family, while still allowing Jack lots of time with the children in the summers.

Jack feels like he has reoriented his entire life since he and Nellie got married. He made tremendous sacrifices, and continues to do so, because he loves being a father. But it is difficult being the sole wageearner. He would like Nellie to stay in Gainesville, and work towards a permanent, tenure track position at the community college, or teach as an adjunct. If that avenue does not work out, she will have to find some other work, since once he retires, his income will drop, and they simply will not be able to support the children solely on his income.

Jack also does not want to leave Gainesville. He has lived here most of his adult life, and does not want to relocate. If Nellie felt she needed to leave to pursue her career he would understand, and he admits it would relieve him from a lot of financial pressure. He feels the children would benefit from the stability of staying in Gainesville. He would not want the children to live in Bermuda. He would be unable to see them regularly except in the summer. He acknowledges the strong extended family that Nellie has there, but does not want his children to be so far away. He would ideally like both of them in the same place, co-parenting the children. He is not sure that he would be able to get another job in the places where she is most likely to get another job, but he is willing to explore that option. He worries, however, if one or more moves are good for the children. At least in Gainesville, they have a good support structure in place.

Jack and Nellie have been separated but so far are functioning in one house. When Jack is able to be there, he relieves Nellie, and they each stay with friends when the other one is staying overnight. Nellie spends the bulk of the nights with the kids to accommodate Jack's schedule.

One other concern that Nellie has is that whatever arrangement they work out, that it involve the minimal disruption for the children in terms of a weekly schedule. Nellie thinks that both of them benefit from the stability of always sleeping in the same bed, and living in the same house. If she and Jack stay in the same town, she wants to maintain that arrangement if at all possible; if they are

in different places, then she wants to establish that routine in a way that minimizes the number of transitions for the children.

Jack is eligible for a sabbatical for the next academic year, and he could defer that entitlement for a year or two; his next sabbatical after that will be after another six years. Sabbatical entitles him to full pay for a semester or half pay for a academic year. It can be combined with a visiting professorship or grant money for a full year away. Because of his long years in the university retirement system, he is eligible to retire at 60.

Finally, although neither one of them is dating at the moment, Nellie has more interest in seeing other people than does Jack. Jack sees himself as resuming his bachelor life, but as an involved father. Nellie, on the other hand, imagines herself eventually getting involved with someone else. Right now, she is very casually seeing someone her same age, just someone to hang out with, and he and Jack do not get along at all.

By the time the divorce will be final, Jack will be 58 and Nellie will be 35; Daniel is 7 and Caroline is 5.

Statement from agreed upon family therapist, Jim Bird, who has specific expertise with special needs children

This is a very loving couple who have two challenging, high energy children. Both parents are very dedicated to the children. Jack became a father late in life, and clearly has surprised himself at how important this is to him, and how engaged he is. Prior to this he was a very chased-after bachelor who left behind many broken hearts. After his years of pursuing Nellie, and then having the children, he is very disappointed and disheartened that they are splitting up, but he is also strongly committed to staying involved with his children and engaged with his ex-wife in a positive way.

Nellie is equally committed to parenting in a positive way, but is worried about how they will be able to do so. Her primary concern is working out the living arrangement in a way that either maximizes her support structure, even if it means ongoing, permanent impact on her career and employability, or that allows her to recapture the position she had before having her kids and being at home full time to deal with Daniel. She does miss her career, and if it is necessary for her to work to support the children, in light of their needs and Jack's retirement, then she would like to make that move now while she still has some market value, and can maximize that value by a willingness to move. She would like to do so with Jack's support and if possible, with him moving to be in the same place.

The issue of where the parents live and the parenting arrangement is a difficult one. The children so far have been largely shielded from the impact of the impending divorce because of the practice so far of keeping the children in one place and shuffling the parents in and out. Daniel in particular benefits from as few disruptions to his routine as possible, and consistency in his environment. Caroline benefits when things go as smoothly as they can for Daniel, because it insures that there is time for her as well. Her ear infection problems appear to be subsiding, but her asthma will

continue to be a challenge, and it is exacerbated by stress. She loves her big brother, and he loves her; they are very close siblings.

The long term outlook for Daniel is good. He is a high-functioning autistic, and therefore will likely be mainstreamed in school, and will be able to expect to live a normal life. It will not be clear until he is a teenager, however, just what the boundaries are in terms of any limits that he might have. He is benefited by the extra care and attention that his parents have been able to provide, and in the future likely will benefit from additional tutoring and one-on-one help to assist him in succeeding. It is not likely that this will generate high costs, but there will be some costs for evaluation and various therapies that may not all be covered by insurance. It is, however, vital that the parents consider insurance every step of the way in order to be sure that they will be able to meet his needs. It is also vital to recognize that raising Daniel requires a high degree of parental involvement, to which both of these parents are committed, and that the strength of the support structure for the family is critical.

I am attaching some additional information concerning autism that might be helpful should my assessment be used in a court proceeding.

There is no definitive answer to the parties' concerns about the best custodial arrangement. Strong, ongoing contact with both parents is definitely important, but consistency is also extremely important, especially for Daniel. But there is no single custodial scheme called for in this situation. Some experts would recommend one primary parent and a single home, with the second parent working around that consistency. Other experts would find no difference in any of a number of possible schedules that would approximate 50-50 care as long as they are subject to review depending on how the children are doing.

Information on autism

Autism encompasses a broad range of brain disorders that, by conservative estimates, affect 1 in 500 children. Autism Spectrum Disorders (ASD's) include Asperger's Syndrome, Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS), Rett Syndrome (which affects only girls) and autism.

Autism Spectrum Disorders impair three main areas of human development: **speech, communication, and social interaction**. These impairments may range from mild to severe.

Individuals on the autism spectrum may lack speech altogether or may be delayed in their acquisition and use of language. They may repeat words (echolalia) in place of normal verbal communication and they may recite entire lines of text from books, movies or computer games out of context for no apparent reason. Some individuals with autism never develop gestures such as pointing to requested objects or waving good-bye. Individuals with ASD's may find it difficult or impossible to hold a conversation or may compulsively steer the conversation to one subject.

In the area of social communication, there may be a lack of response to verbal requests or no response when the person's name is called. Similarly, they often fail to connect to the names for other people and they often confuse pronouns. Almost universally, individuals on the autistic continuum are unable to interpret facial expressions or emotions. They may establish only fleeting

eye contact, if they any at all. They also often experience difficulty transitioning from one activity to another.

Many individuals with autism lack interest in socially interactions. For children, there can be a lack of imaginative play and a preference to engage in repetitive activities for extended periods of time such as rewinding videos, stacking blocks, or lining up toys. Many individuals on the spectrum are perceived to be aloof or indifferent to other people.

High functioning autism is not an official diagnostic term, though it may be used as such. It tends to describe people who have many or all of the symptoms of autism but did not develop language typically. It's a helpful diagnosis that can help guide appropriate treatment and school placement.

On the other hand, it is important to be sure that a "real" diagnosis (that is, one that is described in the official diagnostic manual) is also placed in the child's records. It is this "real" diagnosis which may pave the way to medical and Social Security benefits down the road.

Autism is one of the most commonly diagnosed developmental disabilities in children. It is a lifelong disability that is usually diagnosed before the age of three.

In the U.S, each school district is mandated to offer intervention programs to assist children with this disorder. Establishing an individualized educational and therapy plan is the first step in treating children with this disorder. Since autism is not a disease, there is no single solution to addressing it. Rather, a series of therapies must be mapped out for the affected child. These include development of social, behavioral, communication, and motor skills. An Individualized Educational Plan, or IEP is formulated through teacher, specialist, and parent inputs. It is this plan that lays the groundwork for the child's necessary therapy and academic training.

High-functioning autism is an informal term; may simply refer to autistic people who have normal overall intelligence; that is, are not cognitively challenged. A diagnosis of high-functioning autism exists in neither the DSMR IV TR nor the ICD-10, which have diagnoses of autistic disorder and childhood autism respectively. The term high-functioning autism started out as shorthand to describe diagnosed autistic individuals who could nevertheless speak and carry on with many day-to-day activities like eating and dressing independently. *Low-functioning autism* was the conceptual opposite. Researchers then began using *high-functioning autism* as a quasi-diagnostic label itself, to distinguish relative levels of adaptation and development.

Although they may have an adequate vocabulary, high functioning autistic children may have a delay in communicating events and use less emotional content in their speech. They may also appear not to notice non-verbal cues from others such as when others have become bored with the topic of conversation they appear oblivious and continue. As with people elsewhere on the autistic spectrum, people with high-functioning autism generally prefer routine and order, and this usually begins in early childhood.

Another tool often used in training these children is that of a schedule. Because many autistic children resist changes and disruptions in their routines, it is important to provide them with a plan so they know what activities are first, next, and last. If they are unable to read, then a picture schedule can be provided. These children also need advanced notice of impending changes. For example, using the phrase "in five minutes, we're going to put away the puzzles, and read a story" will assist them in transitioning to this next activity.

In addition to special academic training, the high functioning autistic child may require additional therapies in speech, and language. Despite the fact that these children can be quite verbal, additional

work is often needed to correct specific letter and word pronunciations. If necessary, language skills are addressed so that the child learns how to respond appropriately to certain phrases and questions. This type of therapy is often administered on an individualized basis, by a speech and language therapist during the course of the school day.

Many children may also require some degree of occupational therapy to deal with motor skill and sensory integration problems. These sensory problems may cause children to be overly sensitive to certain textures, noises, smells, and sounds. An occupational therapist that is specially trained in this field can treat the child with sensory issues. If the child has problems with fine motor skills that interfere with writing and other necessary tasks, therapy is used to address these problems as well. As in speech and language therapy, the child can often receive occupational therapy at school if he or she has demonstrated a need for it.

Treating a child with high functioning autism has become easier thanks to the discovery of new strategies and techniques that have been successfully proven to work. Through early testing and intervention, these children can learn to overcome their difficulties and grow up to become successful and productive members of society.

Financial statement:

House: Jack's house in Gainesville, 3BR/2BA, which he bought 25 years ago; the title and mortgage is solely in his name, and he has made all mortgage payments. Current value \$228,000, remaining mortgage \$3,000.

Jack's pension plan, vested, current value of \$450,000, pre-UF retirement account, \$80,000; Nellie's unvested retirement account from her initial full time teaching, \$45,000

Jack's stock account, from investment of a graduation gift when he got his PhD \$100,000

Jack's salary, currently \$85,000/year plus benefits that include a health plan that covers the entire family

Nellie's salary, from occasional teaching, currently \$10,000/year and no benefits; full time community college salary estimated to be \$60,000 plus benefits; salary for associate professor at a university, \$75-98,000 plus benefits, depending upon the school and the geographic location

Cost of childcare if both work full time (covered up to now with Jack and Nellie's care) \$15,000/year

Nellie's investment account, from investment of high school graduation gifts \$20,000

Savings account: \$10,000

Checking account: \$3000

Debt: no credit card debt, but there is an outstanding doctor bill of \$8000 from consultations and testing with another specialist about Daniel. The estimated annual cost of services for Daniel that are not covered by insurance is currently \$2,000/year.

2000 Honda Civic value \$6000

2004 Honda Odessey van value \$17,000

Nellie's parents, both retired from a thriving business that they sold 10 years ago, are both willing to provide childcare; they are in their mid-50s. Nellie has two sisters and a brother who all have families, all of whom are in Bermuda.

Jack's parents, who live in Gainesville, are both in their 80s and love being grandparents, but they are not a resource for childcare. David is an only child.