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ANALYSIS

The State of New York Divorce Practice

In this article, Alan Feigenbaum questions whether New York matrimonial courts have been provided with the resources necessary to protect children of divorce. He has polled some members of the Bar, as well as a retired judge, to get their views on the matter. To conclude, he shares his own views as well.

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Compassion, humanity and the resources to act promptly are greatly needed when it comes to making sure that the matrimonial courts in New York are able to continue providing invaluable assistance to families in distress. Our matrimonial courts are tasked with protecting the best interests of children across this entire state. If our courts are slow to act due to backlog and insufficient resources then that reality has the potential to enable bad actors to prevail, secure in the knowledge that the courts may struggle to stop them. So the question I have is, have our matrimonial courts been provided with the resources necessary to protect children of divorce?

To answer that question, I decided to poll some of the many upstanding members of our Bar, as well as a retired judge, and get their views on the matter. To conclude this article, I will share my views as well.

Honorable Matthew F. Cooper (Retired)

From my perspective as someone who retired from the bench at the end of 2021 and is now doing divorce mediation, my sense is that matrimonial judges are working harder,

caseloads are getting bigger and divorces are taking longer to resolve. I attribute this in part to a backlog occasioned by the pandemic and in part to a move toward conducting proceedings virtually. Although virtual appearances certainly have their positives, there just is no substitute for having divorcing parties actually in the courtroom in order to move a case forward.

Neil Kozek (Kozek)

Our judicial system has atrophied from a once collegial, respectful and diligent group of hardworking professionals seeking to do justice. A bench and bar demonstrating mutual respect and civility for the other, and a collaborative effort to find balance between our obligation to represent clients zealously while always respecting our role as officers of the court, will go a long way toward repairing a system in need.

Leigh Baseheart Kahn (Schwartz Sladkus Reich Greenberg Atlas)

The delays in the system are the biggest problem that I see. The most glaring example of this is the fact that, in a matter that has been pending since late 2022, I recently got a trial date—for the custodial issues—that is a year away. The financial issues were referred to the Special Referee's part several months ago, and there is no word yet on when even an initial conference will be scheduled, much less trial dates.

It is very difficult to explain to anxious clients that, while they want their divorce resolved as quickly as possible, that simply won't happen if they are unable to reach agreement with their spouses. The only real way to deal with this backlog—which does not seem to be lessening much post-pandemic—is to invest more resources in adding staff and judges to the matrimonial parts to help get these cases resolved and allow litigants to reach closure and move on with their lives.

Siobhan Stewart (Chemtob Moss Forman & Beyda)

Matrimonial courts need the time and resources to hold in-person conferences and dig into the substantive issues to move cases along. In my view, the most useful thing judges can do to spur settlement is to hold in-person appearances and give clear direction about their leanings.

In a prime example, a new judge was recently assigned to a pre-pandemic case that was in its fourth year. The judge held an in-person conference and quickly dismissed the (Ferragamo-clad) father's argument that he should not have to pay $50,000 for his daughter's private tennis lessons because he had never explicitly agreed to them. The judge was so direct in his interactions with the parties that they both left with the sense that the judge would take a pragmatic, no-nonsense approach to the entire case. Armed with that information, they easily settled the remaining issues, including a heated dispute about an ambiguous provision of their prenuptial agreement concerning the distribution of a business interest.

Judy White (Lee Anav Chung White Kim Ruger & Richter)

Recently, in an effort to address backlogs in the court system, both the governor and our lawmakers have been pushing to pass legislation that would lift the "cap" on the number of trial court judges available to New Yorkers. In family law cases, it is crucial that our courts address both custody and financial matters timely. Failure to address these issues quickly is devastating for families and makes our jobs as advocates much more difficult. Our clients need meaningful and prompt resolution and we must find new ways to make this happen.

Daniel Mark Lipschutz (Aronson Mayefsky & Sloan)

Cases post-pandemic have longer lifespans, which can result in more acrimonious litigations. However, the post-pandemic landscape has also opened the options and opportunities for more effective alternative dispute resolution (ADR), especially with retired members of the judiciary.

I also anticipate in the near future that adapting to technology advancements as well achieving an effective balance between virtual and in-person appearances will greatly increase the efficiency of the divorce process in New York.

Dan Rottenstreich (Rottenstreich Farley Bronstein Fisher Potter Hodas)

Pre-pandemic, we had good Judges who care about their cases trying to do their jobs with one hand tied behind their back given the lack of resources. Post-pandemic, we continue to have good judges, but now it is more like two hands behind their back with the growing backlog. It is hard on everyone. As a result, more and more litigants are agreeing to some form of ADR, which can be a silver lining for those with means. It is critical for those without the means to afford ADR that our courts get the resources they need.

Yours Truly

The Judiciary's FY 2025 Budget Request seeks $2.7 billion in State Operating Funds appropriation to enable the courts to "fulfill their mission to deliver justice in a manner that reflects the full measure of New York's commitment to a just society under the rule of law."

To underscore why our Legislature should approve the budget request, I think it is important to remind our legislators about what it is that our matrimonial judges, court attorneys, clerks, court staff, law enforcement and all other court personnel do on a daily basis to facilitate the administration of justice for our New York families. Perhaps an example that shows the horrors and very real dangers our matrimonial courts must address to protect the best interests of children will carry some weight in Albany.

To illustrate my point, I'm going to turn to the recent decision of Justice Edmund M. Dane in the matter of *N.S. v. T.S.*, 2024 NY Slip Op 50604(U) (Sup. Ct., Nassau Cty., May 20, 2024).

In *N.S.*, the plaintiff-wife filed a summary judgment motion concerning custody against the

defendant-husband. The parties were married in 2019 and had a daughter, also born in 2019.

The facts of the *N.S.* case are unsettling, but must be spelled out to highlight the magnitude of what our matrimonial courts do to protect children of divorce. Indeed, sugar coating the facts of this decision—which is frankly impossible—would in my view be irresponsible.

The father suffered a back injury at work, after which he became "reliant on" and addicted to Percocet and Xanax. After being fired from his job, he "turned to heroin"; "amassed a stockpile of weapons"; told the mother he was going to "seriously fuck you up" and called his daughter a "fucking retard"; brought a pit bull into the home which the mother was afraid of yet she was forced to take care of the dog; and, he threatened to "kill the whole family" when the mother questioned the father about his drug habit.

At the peak of this terrifying family dynamic, when the parties' daughter was admitted to the hospital for a tonsillectomy, the father entered the daughter's room at the hospital "high on drugs carrying a loaded firearm…pulled a firearm out from his pocket and pointed it towards [the mother and daughter]…he threatened to kill both of them—his wife, and his child—in front of everyone at the hospital."

The father was arrested and remains incarcerated. A stay away order of protection was issued in favor of the daughter against her father, which expires on Jan. 11, 2039.

The "principal issue" in *N.S.* was whether or not the court was "able" to grant summary judgment on issues of custody and parenting time. The "general rule"—which applies in the vast majority of contested custody cases—is that custody determinations should only be made "after a full plenary hearing."

But as Dane reminds us, "the only absolute in the law governing custody of children is that there are not absolutes…Disputes involving custody and visitation are acknowledged to be among the most difficult the courts are called upon to resolve, for they so deeply affect the lives of children and the parents who love them."

The court granted the mother's motion (supported by the attorney for the child) for summary judgment:

The court cannot, under any circumstance, conclude that these parties can effectively communicate with one another, especially given the threats of harm made…To conclude otherwise would be a legal oxymoron…The court has considered the unrefuted assertion that the defendant called the child a "fucking retard", and has given that undisputed conduct substantial weight. However, the court has given the most weight to the fact that the defendant pointed a loaded firearm at the plaintiff and the child, and threatened to kill both of them. Those facts are undisputed, and it shocks the conscience of the court.

Returning to the subject at hand, while ADR and private judges are proving to be an effective means of resolving cases out of court, the reality is that this more often than not requires the parties to have sufficient means. For the majority of divorcing persons in contested cases, there are likely insufficient resources to go down that route, which means that these litigants must have their disputes addressed by our matrimonial courts. It is therefore critical that our matrimonial courts are empowered with the resources to move those cases along expeditiously.

Indeed, we can all relate to the notion that contested divorce cases often settle on the eve of trial. But for that notion to hold true, it must be a reality that the courts have the requisite resources to move cases as quickly as the families involved need them to be moved.

If our legislators have any doubt as to why it is important that our matrimonial courts have the resources they need, I suggest they read Dane's decision and its recitation of the "tragic facts" of the *N.S.* case. Some cases should not—and cannot—take years before being resolved. Too many family law issues require immediate, and sometimes sustained, attention. These cases are not only about splitting money and Christmas, but about averting tragedy and emotional distress. The *N.S.* decision captures the humanity and compassion that our matrimonial courts deliver to New York families when they have the time and resources to do so.

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