Family Law Forum

A Publication of the Minnesota State Bar Association Family Law Section

Summer 2010

Volume 18, No. 3

Times They Are ‘a Changing: Gender Roles in Family Law

Letter from the Editor — 2
Linda L. Wold

She is Strong, She is Invincible, and She Outearns: Husbands Seeking Spousal Maintenance in the Modern Era — 3
Tara Smith

Is a Stay-At-Home Parent Considered Voluntarily Underemployed? — 8
Lisa A. Pletcher

Women’s Rights in Islam regarding Marriage and Divorce — 10
Imani Jaafar-Mohammad, Esq.

Struggles with Communication and Cultural Differences While Representing an East African Client — 17
Laura Vancura

Hmong Culture and Family Law — 21
Thomas Tuft, Esq. & Elizabeth Lee, Paralegal

A General Overview of Mahr, the Somali Dowry Practice in Minnesota — 26
Kirsten Olson, Esq. and Tracy Reid, Esq.

Immigration & Enforcement of the Affidavit of Support in Family Law Settings — 28
Kirsten Olson, Esq. and Tracy Reid, Esq.

Arrangement + Marriage = :) — 39
Tracy Reid, Esq.

Closure Therapy: Redefining Co-Parenting Relationships in the Context of Changing Gender Roles — 41
Karen Irvin, Ph.D and Judy Sherwood, MA, MBA

The Perfect Storm: Homemaking and Hurricane Katrina — 48
Elise (Elizabeth) F. Buie

The Way We Were: A Retrospective of Family Law and the Issue of Domestic Violence — 54
Judge Mary Lou Klas

Changing Gender Roles in Family Law — 59
David L. Ludescher

MSBA

www.mnbar.org

Letter from the Editor

Linda Wold

This is the final edition of the Family Law Forum for this season. We will have our first issue of the 2010-11 season this fall. The Publications Committee will be working over the summer to determine themes for the 3 editions and to cull authors to write those articles. You can participate too! If you have suggestions for a theme or an author, including yourself, please let us know. We'd be happy to talk with you and will offer whatever assistance we can to make this a good experience for you.

I have some good news to share with all of you, too! The Family Law Section implemented some changes to its by-laws in an effort to expand and offer leadership to a larger body of members. One of the changes involved adding a Co-Chair position to the Publications Committee. It is with great pleasure that I introduce Karen Kugler as the newly elected Co-Chair of Publications. She has been a committee member for some time, has written wonderful articles for the Family Law Forum, and is tirelessly committed to maintaining & improving the Family Law Forum so it remains the most valuable "perk" of section membership. Her contributions and leadership are sure to bring many accolades and an even better Family Law Forum. Thank her when you see her.

And a great many thanks go the committee members who have worked through several issues back-to-back, edited, brainstormed, written articles, attended meetings, have been willing to put the effort into what it takes to make the Family Law Forum an exceptional publication. They have done some "mighty heavy lifting". They are all unique and dedicated individuals that have provided you with exemplary reading material in the Family Law Forum. Be sure to also thank them.

Have a wonderful summer!

Linda Wold

The current roster of the Publications Committee includes the following:

Melissa Froehle	mfroehle@mnfathers.org	651-222-7432
Karen Kugler	karen_atty@yahoo.com	651-628-0265
Mary Kate Kelley-Scheidler	marykatelaw@comcast.net	651-238-2063
Melvin Ogurak	oguraklaw@msn.com	952-352-0778
Linda Wold, Chair	linda.wold@comcast.net	763-425-4217

SHE IS STRONG, SHE IS INVINCIBLE, AND SHE OUTEARNS HIM:
Husbands Seeking Spousal Maintenance in the Modern Era

Tara L. Smith

INTRODUCTION

Nearly forty years ago, when voices such as Helen Reddy's began roaring across America to empower women[1], only eleven percent of women in the United States' labor force held advanced degrees.[2] Yet, the popular 1970s anthem inspired success; women in the labor force holding college degrees more than tripled by 2008, and the numbers are still growing.[3] Recent college enrollment statistics show that women constitute over fifty-four percent of undergraduate and fifty-three percent of graduate students.[4] Often times, college-educated women today earn higher incomes than their lesser educated counterparts.[5] As a result, many contemporary women opt to forego the traditional homemaking occupations of their mothers and grandmothers, for their own roles as primary breadwinners. In fact, due in part to their college educations, married women are out-earning their working husbands in over one quarter of all United States' households.[6] Still, other women stepped into the role of primary wage earner less by choice and more by necessity as recent unemployment rates soared to unprecedented post-war levels for men in comparison with women. This was due in large part to the high concentration of men employed in the economically instable construction and manufacturing industries.[7] Whatever the circumstance, when a wife's income exceeds that of her husband's, important considerations arise in the context of marital dissolution, including whether husbands should seek spousal maintenance from their breadwinning wives as well as the likelihood of encountering gender bias in making such a claim.

BACKGROUND

Proper consideration of these issues requires a brief exploration of the underlying principles of spousal maintenance. Spousal maintenance originated to provide lifelong "nourishment or sustenance" for wives after separation.[8] Historically, husbands promised to care for and protect wives in exchange for their dowries. Although banning the then-believed mortal sin of divorce, ecclesiastical courts granted separations upon a showing of reasonableness by the wife, yet upheld a husband's lifelong obligation to support his wife even after separation. A wife, however, could forfeit that right through wrongful misconduct such as adultery. Under English common law, these basic tenets remained; a husband's duty was to provide for a wife's necessities, while a wife provided domestic services in return. Even the enactment of Married Women's Property Acts in the mid-nineteenth century, which alleviated husbands' control of wives' property, did not waive a husband's obligation to provide ongoing spousal support pursuant to divorce. The underlying foundation for spousal maintenance, then, seems to stem back to a punitive award of damages for an innocent wife injured by her husband's breach of the matrimonial contract.[9]

While historically wives owed no duty of support to husbands, the U.S. Supreme Court

held that view unconstitutional in 1979.[10] Spousal maintenance awards should now be gender neutral. Moreover, with the advent of no-fault divorce, which most states now recognize, the goal shifted from maintaining lifelong dependency to rehabilitating spouses towards self-support.[11] By the 1990s, however, even this approach was modified as it became apparent that not all spouses were capable of self-sufficiency, particularly homemakers in long-term marriages.[12] Today, Minnesota courts consider such factors as the parties' duration of marriage, marital contributions, and established standard of living.[13] In addition, Minnesota courts look carefully at the party seeking maintenance and take into account his or her age, physical and emotional condition; financial resources, including loss of earnings during the marriage and future earning capacity; and skill set as well as his or her ability to enhance those capabilities with further education or training.[14] Even with statutory criteria, however, inconsistencies in spousal maintenance awards abound as courts experience difficulty in applying the factors fairly.[15] The problem in reaching fairness persists regardless of express statutory factors because no one is able to concretely define what fairness means in the context of spousal maintenance. This is due to the complexity of parceling out the modern-day rationale for awarding maintenance. While various theories exist, the American Law Institute (ALI) asserts that courts should compensate spouses for any economic or opportunity losses incurred during the marriage that result in earning capacity discrepancies after dissolution.[16]

ADVOCATING FOR SPOUSAL MAINTENANCE WHEN THE HUSBAND IS YOUR CLIENT

Given that there is no generally accepted or unified theory for spousal maintenance, a family law practitioner may be wary of what to do when a man walks into his or her office with a potential spousal maintenance claim. However, as more and more educated wives tip the household earnings' scales to become primary breadwinners, practitioners should remain mindful of wives' reciprocal duty of support to husbands.[17] Zealous client advocacy warrants raising the issue of spousal maintenance with husbands when wives out earn them, particularly in cases where husbands specifically forgo employment or educational opportunities during marriage. This is true even if those sacrifices were satisfactorily agreed upon by the husband-wife partnership. At dissolution, according to the ALI, the goal is to properly allocate the losses of any such marital agreements which result in income discrepancies between the partners.[18] This applies whether the husband or wife is the primary breadwinner.

Although husbands are as entitled to spousal maintenance as wives, many husbands encounter significant roadblocks in obtaining such awards. In fact, even after the three decades since the U.S. Supreme Court held gender discrimination in spousal maintenance awards unconstitutional, nearly ninety-seven percent of spousal maintenance recipients continue to be wives.[19] Knowing this statistic, which implies the legal system is perhaps biased in favor of wives, may only exacerbate husbands' unease. And, gender bias may very well be to blame. The vast majority (approximately 417,000) of female recipients had a total income of less than $22,499 in 2008.[20] Falling within the same income bracket were all males reporting spousal maintenance income in 2008, which numbered approximately 13,000.[21] These statistics indicate that individuals with incomes at or below $22,499 are more likely to receive spousal maintenance. The statistics do not explain why there are over

400,000 more female recipients at the same income level. Is this representative of gender bias? Or, have the lingering common law notions of a husband's obligation to support his wife for life created an ongoing social stigma that is powerful enough to deter requests for maintenance?[22] Progress has indeed been slow in alleviating the resulting emasculation associated with men requesting spousal maintenance. Men have not only been reluctant to seek spousal maintenance but perhaps even more reluctant to talk about receiving it. Those few that are openly discussing it say the popular image of the so-called slacker-male recipient is unfair.[23] It is unfair, too, that higher-earning wives may retain better attorneys, thus making an award of maintenance seem even more insurmountable.[24]

Despite the apparent odds stacked against husbands, however, attorneys should help husbands navigate the difficult road towards a spousal maintenance award.[25] The first step in assessing whether seeking spousal maintenance will be a viable claim involves conducting a thorough initial interview to obtain a complete work history for both parties. Losses or sacrifices made by your client during his marriage that result in lasting income discrepancies should raise a flag that your client may seek this form of relief. If so, fully discuss the option of spousal maintenance and, if necessary, quell any embarrassment he may feel by explaining the law's gender-neutral application. Explain that although common law notions of a husband's obligation to support his wife for life may linger and promote a social stigma, the Supreme Court ruled it unconstitutional for only wives to receive support thirty years ago.[26] Even so, consider discussing the real possibility that gender bias still exists, despite our legal system's best efforts. Assure your client, however, that husbands no longer have to serve as primary breadwinners since many women are fully capable of that role. Discuss also that just as the numbers of women who are primary breadwinners continue to increase, so too should the numbers of men who receive maintenance awards at dissolution.

Next, since nearly ninety-seven percent of spousal maintenance recipients are female and precedent will be difficult to find, turn to case law, both where wives received and were denied support, and look for similarities or distinctions such as common fact patterns and percentage of income differences. Use these themes to build your client's case as well as retain expert witnesses who may bolster your client's testimony. Expert witnesses will not only establish your client's need but, more importantly, clarify the ongoing gender stereotypes and societal bias surrounding spousal maintenance. Additionally raise the court's consciousness to these sensitive issues by drawing analogies for the judge: "'Your Honor, if Mrs. Smith were presenting the same arguments and facts that Mr. Smith is presenting [many would easily view her role in the marriage as one in which she suffered many economic and opportunity losses that require compensation in the form of spousal maintenance].'"[27] While judges are often reluctant to award maintenance, particularly in dual-earner circumstances where neither party is incapable of self-support, outlining a strategy for your client such as this will enable you to more effectively anticipate arguments as well as engender client trust and preserve your client's rights.

SPOUSAL MAINTENANCE AS A NEGOTIATING TOOL

Outside of the courtroom, spousal maintenance may alternatively serve as an effective negotiating tool, especially in light of its tax implications. Because spousal maintenance is deductable for the payor and

income for the recipient, husbands who receive assets instead of spousal maintenance reduce their tax burden and conversely deny wives their tax benefit. Still, wives may counter with alternative property divisions in order to make a clean break. For example, "[some wives] have happily chosen to pay off their husbands in an effort to maintain their sanity and keep the peace."[28] Others may agree to pay rehabilitative in lieu of permanent or even limited durational maintenance, especially in light of such awards in recent, high-profile cases.[29] Certainly, resolving the issue of spousal maintenance without expensive litigation is favorable, which should additionally give the opposing party incentive to negotiate a maintenance award resulting in a fair outcome for your client.

CONCLUSION

A husband seeking spousal maintenance from a higher-earning wife, especially when sacrifices were made at his expense, is the face of gender equality. The empowerment of women since the 1970s should not be met today with a double standard when seeking and awarding spousal maintenance. Therefore, when suitable, do not overlook thoroughly considering and presenting the option of spousal maintenance to husband-clients. Wives are becoming strong and even, at times, invincible in the workplace. Wives will also increasingly out-earn husbands and their rights need to be considered in awarding them spousal maintenance, too.

———————————

Notes

[1] HELEN REDDY, *I am Woman*, *on* I AM WOMAN (Capitol Records 1972).
[2] U.S. DEPARTMENT OF LABOR, U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK, 1 (2009), http://www.bls.gov/cps/wlf-databook-2009.pdf [hereinafter LABOR].
[3] *Id.* (stating eleven percent of women in the labor force held degrees in 1970 versus thirty-six percent in 2008).
[4] U.S. CENSUS BUREAU, SCHOOL ENROLLMENT, Table 5 (2008), http://www.census.gov/population/www/socdemo/school/cps2008.html (showing female students enrolled full time in undergraduate colleges totaled 6,158,000 in 2008, while male full-time enrollment rates totaled 5,219,000 as well as female students enrolled full time in graduate school totaled 987,000 in 2008, while male full-time enrollment rates totaled 880,000).
[5] LABOR, *supra* note 3, at 2 (stating those women with at least a bachelor's degree average $955.00 per week or nearly $23,000 more annually than high school graduates who earn just $520.00 weekly).
[6] *Id.* (stating twenty-six percent of women in dual-earner households earned more than their spouses).
[7] Ayşegül Şahin et. al., *The Unemployment Gender Gap during the 2007 Recession*, 16 CURRENT ISSUES IN ECONOMICS AND FINANCE (Feb. 2010) (discussing a 2.7% gender gap in unemployment rates in August 2009).
[8] BLACK'S LAW DICTIONARY 80 (8th ed. 2004) (defining alimony).
[9] Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 67 (2008).
[10] Orr v. Orr, 440 U.S. 268 (1979).
[11] Kisthardt, *supra* note 10, at 68.
[12] *Id.* at 69.
[13] *See* MINN. STAT. § 518.552 (2008).
[14] *Id.*
[15] Kisthardt, *supra* note 10, at 64-5.
[16] *Id.* at 72-3.
[17] Orr v. Orr, *supra* note 11 (deciding the imposition of alimony on husbands only is unconstitutional).
[18] Kisthardt, *supra* note 10, at 72.
[19] U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, PINC-08 parts 181 & 91, http://www.census.gov/hhes/ www/cpstables/032009/perinc/new08_001.htm (showing 444,000 female and 13,000 male recipients in 2008).

[20] *Id.* at part 181, http://www.census.gov/hhes/www/cpstables/032009/perinc/new08_181.htm.
[21] *Id.* at part 91, http://www.census.gov/hhes/www/cpstables/032009/perinc/new08_091.htm.
[22] Daniel Clement, *Wives Paying Spousal Maintenance on the Rise*, (Mar. 14, 2007), http://divorce.clementlaw.com/articles/spousal-maintenance/ (family law practitioner acknowledging the social stigma associated with men seeking maintenance).
[23] Anita Raghavan, *Men Receiving Alimony Want a Little Respect*, THE WALL STREET JOURNAL (Apr. 1, 2008), http://online.wsj.com/public/article/SB120700651883978623-wVJmjFPLBLW_KzzQgks74c0dSks_20080501.html?mod=tff_main_tff_top.
[24] *CBS4 Anchor Asks Wife for Alimony*, MIAMI HERALD (Jan. 21, 2007), http://www.aaml.org/tasks/sites/default/assets/File/docs/inthenews/07-0121_CBS4_Anchor_Asks_Wife_For_Alimony_-_Miami_Herald.htm (reporting husband earning $300,000 annually awarded four-month, temporary maintenance award of $36,000 on appeal from wife who earned over $2 million annually).
[25] Anita Bolaños, *Do Real Men Get Alimony?*, 19 FAM. ADV. 27 (2006).
[26] Orr v. Orr, *supra* note 11.
[27] Bolaños, *supra* note 26, at 30.
[28] Betsy Schiffman, *Women Increasingly Paying Alimony*, FORBES (Mar. 13, 2007), http://www.forbes.com/2007/03/13/women-paying-alimony-lead_cx_pink_0313alimony.html (quoting Cheryl Lynn Hepfer, 2005-6 American Academy of Matrimonial Lawyers President).
[29] *See supra* note 25.

Tara L. Smith is an Associate Attorney at Walling, Berg & Debele, P.A, Minneapolis, Minnesota, where her practice is devoted to family law, including dissolution and custody matters, as well as all aspects of estate planning. She is a 2009 graduate of William Mitchell College of Law. Prior to joining the practice of law, Tara worked for twelve years as a manufacturers' representative for commercial building products in the six-state, upper Midwest territory.

Is a Stay-At-Home Parent Considered Voluntarily Underemployed?

Lisa A. Pletcher

Before a court can impute income to a parent, there must first be a finding that the parent is voluntarily underemployed. There is a presumption in the law that all parents should work. Because of this presumption, many parents have argued that the other parent is voluntary underemployment when the other parent is a full-time stay-at-home caregiver for the children. Even though there is a presumption that all parents should work, the court may consider the following factors when determining whether the stay-at-home parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:

1) the parties' parenting and child care arrangements before the child support action;
2) the stay-at-home parent's employment history, recency of employment, earnings, and the availability of jobs within the community for an individual with the parent's qualifications;
3) the relationship between the employment-related expenses, including, but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;
4) the child's age and health, including whether the child is physically or mentally disabled; and
5) the availability of child care providers.

Minn. Stat. §518A.32, Subd. 5. This test does not apply if the parent stays at home only to care for other nonjoint children. In other words, the parent does not get credit for staying home to take care of his or her children if those children are not also the children of the other parent.

There is no hard line rule regarding stay-at-home parents and the imputation of income. Minnesota courts have ruled both ways when looking at stay-at-home parents. For example, In *In Re the Marriage of Brian Welsh and Laura Welsh*, 775 N.W.2d (Minn.App.2009), the Court upheld a district court's finding that the stay-at-home mother was underemployed, thus imputing income to her.

In this case, the stay-at-home mother challenged the finding of the district court that she was voluntarily unemployed, arguing that because she is the caretaker of the parties' children, consideration of the factors listed in Minn.Stat. § 518A.32, subd. 5, establish that she is not voluntarily unemployed. Whether a parent is voluntarily unemployed is a finding of fact, which the Court of Appeals review for clear error. See *Putz v. Putz,* 645 N.W.2d 343, 352 (Minn.2002) (noting that "[t]he primary issue" on appeal was "whether the magistrate erred in finding that [father] was not voluntarily unemployed").

The district court found that, because the minor children subject to the child support order are 13 years old, there is no basis to

reduce imputed income due to caretaker responsibilities." Minn. Stat. §518A.32, subd. 5.

In *In Re the Marriage of Wayne Butt and Eleanor Schmidt*, 747 N.W.2d 566 (2008), the Appellant argued that there was sufficient evidence of Respondent's work history and education in the record to impute income to her. The Court disagreed. The Court looked at the work history of both Appellant and Respondent. The Court found that the parties had three children during the marriage, and that it was undisputed that appellant was the primary breadwinner. Moreover, the Court found that Respondent was a stay-at-home mother and homemaker during the parties' marriage. Although there was evidence in the record that Respondent occasionally worked part time as a daycare provider and as a playground attendant at the local school district, there was nothing more in the record regarding Respondent's education and employment background. The Court held that evidence on these factors is necessary to determine whether Respondent was voluntarily underemployed, and found that the district court did not abuse its discretion in declining to impute income to Respondent.

In Minnesota, courts determine whether or not income should be imputed to the stay-at-home parent on a case-by-case basis, applying the facts to all five of factors listed in Minn. Stat. §518A.32, Subd. 5. Therefore, it is necessary to look at all of the facts of the particular case to determine whether a court will find a stay-at-home parent as voluntarily underemployed for child support purposes.

Lisa A. Pletcher is an associate at Tuft & Arnold, PLLC. Her practice focuses primarily on family law issues, including dissolution, child custody, parenting time, child support, interstate and international child custody, property division, spousal maintenance, adoption, and orders for protection. Ms. Pletcher received her undergraduate degree in psychology from the University of Wisconsin – Madison and her law degree from William Mitchell College of Law. She is a member of the Warren E. Burger Inn of Court, Minnesota State Bar Association, and Ramsey County Bar Association. Ms. Pletcher volunteers at Chrysalis and the Ramsey County Pro Se Clinic.

Women's Rights in Islam regarding Marriage and Divorce

Imani Jaafar-Mohammad, Esq.

Introduction

There are many misconceptions surrounding women's rights in Islam. The purpose of this article is to shed some light on the basic rights of women in Islam in the context of marriage and divorce. This article is only to be viewed as a basic outline of women's rights in Islam regarding marriage and divorce. Muslim clients' situations will vary greatly depending on what Islamic School of Thought (Hanafi, Hanbali, Maliki, and Shafi) they follow, whether they are Sunni or Shiite, their cultural traditions, and a variety of other factors.

It is also important to understand that the religion of Islam and people's cultural traditions are two very different factors. A major pitfall for practitioners is confusing cultural practices for religious beliefs. Many attorneys make the major mistake of assuming that all of a Muslim's manners and practices are related to Islam. In fact, many Muslims are heavily influenced by their individual cultural backgrounds. Islam is an extremely culturally diverse religion. American Muslims alone hail from countries all over Africa, the Middle East, Asia, Europe, and many are born in the United States with a variety of ethnic backgrounds.[1]

It is also important not to over generalize cultural practices. A client's conduct could simply be a family tradition or a common practice in a small region that is not representative of an entire country or people. Islam is by no means a homogenous religion. The most effective advocates who routinely work with Muslims are practitioners who are open minded and take their clients as individuals.

The goal of this article is to give practitioners insight into the basic beliefs of Muslims regarding women's rights in two specific areas: marriage and divorce. Effective advocates learn to be culturally and religiously competent, which does not necessary mean that attorneys agree with the client's practices. Not judging clients based on their cultural or religious practices but merely understanding the client's religious and cultural background is essential to representing Muslims or any other minority group.

Definitions of some basic vocabulary related to Islam and Muslims are needed to fully understand the content in this article. Please take note of the following terms:

- **Islam-** the actual religion; Arabic word that means peace through submission to God (Allah).
- **Muslim(s)-** the followers of Islam; an Arabic word that means one who submits to God.
- **Allah-** the Arabic word for God; Islam is a monotheistic religion that teaches that God has no partners, children, or associated entities.
- **Quran-** the Holy Book of Muslims; Arabic word that literally means the recitation. This is the primary source for the teachings of the Islamic faith.
- **Muhammad-** the last and most important Prophet in Islam, he was the first leader of the Islamic state and the prime example of how a Muslim should live his or her life.

- **Hadith –** statements of the Prophet Muhammad that have been written down and compiled. Used as a supplement to the Quran as a secondary source. There is a science used to authenticate and verify authentic hadiths. Hadiths are referred to as “strong” or “weak” based on their chain of transmission and whether they can strongly be linked to the Prophet Muhammad. This article will cite Hadith as support for the principles described.
- **Sunna –** Actions of the Prophet Muhammad also used to supplement the Quran as a secondary source.

Marriage

Marriage in Islam is viewed as an important and sacred union between a man and woman that fulfills half of one’s religious obligations.[2] A well-known passage in the Quran discusses marriage as follows:

> *“Among His signs is that He created for you spouses from yourselves so that you might find repose with them. And He has placed between you affection and mercy. In that there are certainly signs for people who reflect.” Quran 30:21.*

Marriage in Islam is often referred to in a poetic manner describing the love and mutual rights that exist between men and women.[3] Islam puts a strong emphasis on mutual love and respect between a husband and wife.[4] Men are also specifically commanded to treat their wives with kindness and respect. The Prophet Muhammad is reported to have said: "The most perfect in faith amongst believers is he who is best in manners and kindest to his wife."[5]

Marriage is also viewed as an act of worship to God (Allah).[6] Islam views emotional and sexual expression between a husband and wife as a form of worship.[7] Sexual relations are not solely for procreation but are viewed as a way for a couple to connect, strengthen their relationship, and help relieve everyday stresses.[8] As a result, celibacy is forbidden for men or women even if either happens to be an Islamic scholar or religious leader (shaykh, imam, etc).[9] Fidelity is also highly stressed in Islam.[10] Spouses are expected to be loyal and faithful to one another and seek emotional and sexual pleasure within the bonds of marriage.[11]

Marriage requirements

There are basic requirements for marriage in Islam. First, a couple must mutually consent to the marriage.[12] This requires both a clear proposal and acceptance.[13] A woman also must have a *wali* or legal guardian present during the process.[14] If a *wali* is not present a woman must be past puberty and competent to make the decision to marry. There are no requirements regarding who can propose marriage. One historical event in the Prophet Muhammad’s life reflecting this principle is the proposal of Khadija bint Khuwaylid, the first wife of the Prophet Muhammad.[15] Khadija was the Prophet Muhammad’s employer, and through working with him she grew to respect his honesty and integrity and proposed marriage to him.[16] Khadija was 25 years older than the Prophet Muhammad and in a much better financial position at the time of the proposal.[17] He accepted her proposal and their marriage is known for the love and compassion they had for one another.[18]

This proposal illustrates the ability of Muslim men and women to marry whomever they choose, and highlights the fact that marriages arranged without the consent or involvement of Muslim women is completely contrary to the Islamic tradition. There is a documented decision by the Prophet Muhammad where a girl approached him stating her father forced her into marriage.[19] The Prophet Muhammad gave her the choice to either accept the

marriage or invalidate it immediately due to the duress involved.[20] Although Islam provides many rights to women regarding marital issues, cultural traditions can greatly influence the proposal and acceptance process beyond the Islam requirements and, in some cases, directly contradict Islamic practices.

Once a couple decides they want to marry and an official proposal is accepted in writing or orally, the next required step is to agree on the terms of a marriage contract.[21] The marriage contract in its most basic form reflects the couple's consent to the union without duress and is signed in the presence of competent witnesses.[22] The couple is free to make their marriage agreement as detailed as they like. The contract allows couples to discuss major aspects of their marriage before they become husband and wife and make binding agreements. For example, contracts can include an agreed upon place to live or decisions regarding careers and children. Islamic marriage contracts are very practical tools that allow couples to engage in negotiations to ensure their major goals and philosophies are in line.

Brides are also entitled to a dowry that is typically negotiated at the same time as the marriage contract.[23] The dowry is specifically a gift showing love and devotion to the bride.[24] There are two types of dowry a bride is entitled to: the *mahr* and the *muakhr*.[25] Each dowry will be discussed individually.

First, the *mahr* is the dowry given to the bride at the time of marriage before consummation takes place.[26] She is not required to share this dowry and is free to do what she wishes with the gift. Cultural traditions often shape the dowry gift because there are essentially no requirements other than the actual giving of the dowry.[27] For example, some cultures encourage cash payments while others traditionally give one of the groom's family heirlooms to the bride. The families involved will typically discuss the dowry and their individual expectations. The bride is often asked her opinion to make sure she receives a gift she enjoys. However, the actual *mahr* will take many different forms and practitioners who review Muslim marriage contracts will see a variety of items being given as the *mahr*.[28]

Muakhr is the second type of dowry that is given upon the death of the husband or the couple's divorce.[29] This is also referred to as the "deferred" dowry.[30] *Muakhr* is meant for both financial support and as a large consequence that the couple should consider when contemplating divorce.[31] In situations of death, this amount is paid out before the estate is divided. If the estate cannot cover the entire amount, the wife is entitled to collect the amount from the husband's surviving family members who are also heirs to the estate.[32] She can also waive the obligation for any reason, including hardship on her husband's family.[33]

After the negotiations are concluded, a marriage ceremony takes place. There is no requirement that a religious authority conduct marriage ceremonies, but it is a common Islamic practice to adopt the laws of the land a Muslim lives in as long as the laws do not conflict with required Islamic practices.[34] Many mainstream American Muslim scholars have come to the opinion that the person conducting a marriage ceremony must be licensed by the state in which the marriage is occurring. It is also imperative for the couple to register their marriage properly with the state in addition to executing an Islam marriage contract.[35] The actual marriage ceremony and reception will vary greatly depending on the cultural traditions. It was the example of the Prophet Muhammad for the reception to include providing a meal for members of one's community.[36]

It is important to remember the Islamic framework for the marriage process described above is greatly influenced by an individual's cultural and family traditions. Distinguishing between culture and religion is essential for practitioners who work with Muslim clients, especially in such delicate matters as drafting marriage contracts.

Polygamy

Polygamy is often a misunderstood concept in Islam. The Quran allows polygamy in the following verse:

> *If ye fear that ye shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice. Quran 4:3.*

Historically, the practice of polygamy existed before Islam without restrictions.[37] Islam limited the number of wives to four and established clear rules and regulations for the practice to ensure fair treatment of each wife.[38] Aisha Bint Abu Bakr, a wife of the Prophet Muhammad, was reported as saying:

> *"Allah's Prophet (peace and blessings of Allah be upon him) distributed everything justly amongst his wives; yet after all, he used to say: O Allah! This is the fair way of dividing what I possess amongst my wives. O Allah! Blame me not for what You alone possess while I do not, i.e., the heart, feelings and emotions of a man."* Hadith reported by Tirmidi.

The passages above reflect a strict requirement that a man who has multiple wives must treat each wife equally. This equality is expected in regards to finances, emotions, and even sexual relationships.[39] The Quran unequivocally states that if a man is unable to do this and treat his wives justly he should not marry more than one wife.[40]

Polygamy is an option and not a requirement in Islam. As was mentioned earlier, Muslims must follow the laws of the land that they live in as long as it does not contradict the requirements of the faith. In America, polygamy is illegal. As a result, it is Islamically unacceptable for Muslims in America to practice polygamy. Muslims living in countries where polygamy is legal and practiced may choose to include in their marriage contract that the husband not take any other wives. If a husband violates an agreement not to engage in polygamous marriage that constitutes grounds for divorce and the financial penalties that are typically included in the marriage contract are fully enforceable.

Polyandry, or marrying more than one husband, is not permitted to maintain the children's lineage for purposes of inheritance and protect children's rights as heirs.[41] Monogamy is the normal practice in the majority of Muslim communities due to the financial and emotional burden it carries.[42] It is far more common for American lawyers to see issues involving monogamous marriage and divorce rather than disputes involving polygamy.[43]

Divorce

Divorce existed before Islam, but the advent of Islam made the divorce process much more favorable to women. Women's property is not divided during a divorce.[44] Whatever a woman earns or is given before and during the course of the marriage remains her property if the marriage ends.[45] This prevents men from taking advantage of women's property or wealth through marriage. On the other hand, the man's property is divided if a divorce occurs according to the couple's marriage contract. A woman is

entitled to support and maintenance from her former husband if she requires.[46] There are also special instructions if divorce occurs before the marriage is consummated and before or after the dowry is set.[47]

Islam also instituted a three-month waiting period for women called *Iddah*.[48] During this three-month period women are not permitted to re-marry.[49] The basic reason for this rule was to determine whether the woman was pregnant before she remarried so the proper father could be ascertained.[50] This practice also ensures the child's identity and lineage can be accurately determined.[51] A husband and wife are also allowed to attempt reconciliation during the waiting period.[52] However, men are specifically instructed not to take back their wives to "injure or take undue advantage" of them.[53]

Determining the proper procedure for divorce is highly dependant on the timing of the divorce, the reasons for divorce, the client's Islamic School of Thought (Hanafi, Hanbali, Maliki, and Shafi), whether he or she is Sunni or Shiite, and the circumstances surrounding the divorce. The scope of this article cannot cover all the conceivable scenarios or grounds for divorce but will seek to address the basic requirements for divorce.[54] It is important to keep in mind different schools of thought can cause some variances in the basic structure described below.

Requirements for divorce

As stated earlier, Muslims in America seeking a divorce still have to comply with the laws of the United States. However, most Muslims will seek to follow the laws regarding divorce in America but will also want documents reflecting their religious beliefs and their marriage contract. Either a man or woman can initiate a divorce.[55] Before a Muslim starts official legal action he or she must meet the following requirements:

1. He or she must have reached puberty and be capable of making a decision;
2. He or she must be sane, conscious, alert, and free from intoxication or anger;
3. He or she must be free from external pressure;
4. His or her intention must be clear;
5. Divorce must take place after the wife's menstrual period and no sexual relations have occurred since her period ended.[56]

If all the above factors are present, either the husband or wife can pursue a divorce or they can pursue a divorce jointly and amicably. This will involve going through the normal divorce proceedings according to American law but will also involve reviewing the terms in the marriage contact and drafting language that incorporates prior agreements and ends the contract.

There are also several levels of revocability of divorce in Islam.[57] If a client approaches a practitioner claiming the divorce is revocable the best course of action is to consult an Islamic scholar. This can be a complicated question that will likely require an Islamic scholar to listen to both sides and make a determination. Islam has a strong tradition of alternative dispute resolution that will help resolve complex matters surrounding divorce.

It is also important to keep in mind that although divorce is permitted in Islam, it is not encouraged. The Prophet Muhammad stated of all the permitted acts divorce is most displeasing to God (Allah). The Quran further states: "Live with them (your wives) on a footing of kindness and equity. If you dislike them it may be that you dislike something in which Allah has placed a great deal of good."[58] Muslims truly view divorce as a last result and many Muslims seek counseling and extensive assistance to avoid divorce. If a client is coming to a practitioner to carry out a divorce it has likely been a very long and difficult religious and personal decision.

Conclusion

Working with Muslim clients poses challenges of both a religious and cultural nature. The information provided above is a basic framework regarding marriage and divorce in Islam. However, this framework can be dramatically changed by a client's cultural or family traditions. The best advice for practitioners is be open to learning about clients and do not be afraid to ask questions that will help distinguish between culture and religion. The information provided in this article should be used as a tool to educate practitioners about Islamic practices and give attorneys knowledge of important Islamic concepts regarding marriage and divorce.

———————————

Notes

1 Pew Forum on Religious and Public Life, *Mapping the Global Muslim Population*, (2009), http://pewforum.org/docs/?DocID=450. It is estimated that through Pew's study of more than 200 countries there are 1.57 billion Muslims of all ages living in the world today, representing 23% of an estimated 2009 world population of 6.8 billion. While Muslims are found on all five inhabited continents, more than 60% of the global Muslim population is in Asia and about 20% is in the Middle East and North Africa.

2 Sahih ul-Jaami Hadith: Anas bin Malik, a companion of the Prophet Muhammad, reported that the Prophet Mohammad said," Any man whom Allah provides with a virtuous wife has been helped to half his Deen (religion), so he should fear Allah regarding the other half."

[3] *See Quran* 4:1; *Quran* 7:189. The second cited passage refers specifically to mates dwelling with each other in love.

[4] *Id.*

[5] Hadith reported by Abu Dawoud, a companion of the Prophet Muhammad.

[6] Hammudah Abd al Ati, Family Structure in Islam 54-56 (American Trust Publications 1977).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Quran* 25:68; *Quran* 4:23-24. Take note that *Quran* 4:23-24 details which people in society can marry each other and imposed limits on family members marrying one another that did not exist pre-Islam.

[11] Abd al Ati, at 54-56.

[12] *Id.* at 59

[13] *Id.* at 60

[14] *Id.* at 60-61.

[15] Bihar ul-Anwar, Vol. 16, 56-73.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Jamal Badawi, *The Status of Women in Islam*, Al-Ittihad, Vol. 8, No. 2 (1971), citing Ibn Hanbal No. 2469; Ibn Maja, No. 1873.

[20] *Id.*

[21] Abd al Ati at 60. The importance of reducing all agreements to writing can be seen in the *Quran* (2:282). There is a strong tradition in Islam to make sure agreements are written down and signed to avoid future disputes.

[22] *Id.* at 60-61.

[23] *Quran* (4:4); Abd al Ati at 165-166

[24] Jamal Badawi, *The Status of Women in Islam*, Al-Ittihad, Vol. 8, No. 2 (1971).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] I have personally seen the following items used as dowry: cash, a down payment for the couple's new home, jewelry, jewelry boxes made of mother of pearl, large sets of clothing, coins minted during the Ottoman Empire, the fact that a husband has memorized the entire Quran that he brings to the marriage (he is a *Hafiz)*, and family Qurans that are considered precious heirlooms.

[29] Abd al Ati at 165-166.

[30] *Id.*

[31] *Id.*

[32] *See generally* Abd al Ati. This is a generally accepted practice and the *muakhr* is considered a divine debt that must be paid before an estate is divided.

[33] *Id.*

[34] Abd al Ati at 59.

[35] This information is supported by the oral opinions of known scholars in Minnesota and many other states throughout the United States.

[36] Hadith reported by Ahmad and Abu Dawoud.

[37] Abd al Ati at 98.

[38] Abu Dawoud, a companion of the Prophet, reported the following: Omair al-Asdee was reported as saying: 'When I accepted Islam, I was married to eight wives. I discussed this with the

Prophet Muhammad who said: *"Keep four only, and divorce the other four."*

[39] The Prophet Muhammad's wives each had an assigned night and were entitled to his sexual and emotional companionship unless each wife decided to waive that obligation. For example, some of his older widowed wives chose to use their nights with the Prophet Muhammad to learn from him instead of engaging in sexual activity and they had more platonic relationships with him.

[40] *Quran* 4:3.

[41] Children's rights are highly protected in Islam. Children's inheritance is determined through lineage and Islamic lineage is connected through a child's father. In order to determine without doubt the child's paternity Islam outlawed polyandry. This was not meant to oppress women but to protect children.

[42] For more information on polygamy, Dr. Jamal Badawi's article *Polygamy in Islam* is a good resource for the historical scope of polygamy and its place in modern Islam. It can be found at: http://www.al-islamforall.org/litre/englitre/Polygainis.htm.

[43] In my legal experience I have only seen polygamy practiced among recent immigrants who come to America already engaged in polygamy. This is a very small portion of the Muslim population and it is rare that American lawyers will encounter polygamous marriages in their practices.

[44] *Quran* 2:229; *Quran* 4:20.

[45] *Id.*

[46] *Quran* 2:231; *Quran* 2:241.

[47] *Quran* 2:236-7.

[48] *Quran* 2:228; *Quran* 2:231.

[49] *Id.*

[50] Abd al Ati at 245-6.

[51] *Id.*

[52] *Quran* 2:228.

[53] *Quran* 2:231.

[54] *See* Abd al Ati at 226. Some grounds for divorce can include a wife who accepts Islam when her husband chooses to remain non-Muslim, apostasy from either party, established invalidity of a marriage contract, and violation of a clause in the marriage contract regarding polygamy.

[55] Abd al Ati at 243.

[56] Abd al Ati at 226-7. The final requirement is to ensure that the wife is not experiencing pain from her period, is not pregnant, and has a clear, uncompromised mind to make decisions regarding divorce.

[57] In sum, the levels of revocability are as follows: revocable Sunna divorce, revocable contra-Sunna divorce, irrevocable Sunna divorce, and irrevocable contra-Sunna divorce. Abd al Ati at 237. Again, this can be a complicated determination that will likely need to be made by an Islamic scholar if it arises in a legal matter.

[58] *Quran* 4:19. Prophet Muhammad further stated: "A believing man must not hate a believing woman. If he dislikes one of her traits he will be pleased with another." Hadith reported by Muslim.

Imani Jaafar-Mohammad is a partner at the law firm of Mohammad & Jaafar-Mohammad, LLC. She practices in the areas of estate planning, business law, and criminal defense. Imani received her J.D. from William Mitchell College of Law and her B.A. in English Literature magna cum laude from the University of Minnesota- Twin Cities. She is a former law clerk for the Honorable Judge Lloyd Zimmerman and a former staff attorney for the Legal Aid Society of Minneapolis. Imani is a board member of the William Mitchell Alumni Committee, a board member of the Minnesota Justice Foundation, and a board member of the Landmark Center in St. Paul. She was named an Up and Coming Attorney by Minnesota Lawyer in 2009. She is also a senior speaker for the Islamic Resource Group. Imani was featured on National Public Radio, Minnesota Public Radio, and WCCO Radio. She was also featured in Minnesota Law and Politics magazine. Imani has taught several Continuing Legal Education courses on Islamic issues throughout the Twin Cities and served as an adjunct professor at William Mitchell College of Law in the legal writing and academic achievement departments.

Struggles with Communication and Cultural Differences While Representing an East African Client

Laura Vancura

Minnesota has a long history of being hospitable to refugees and immigrants, and now has a vibrant immigrant community to prove it. Today Minnesota is home to the largest population of Somali immigrants in the United States, and claims the ninth largest population of African immigrants of any state.[1] Minnesota is very attractive to immigrants because of Minnesota's established immigrant communities, opportunities for employment, public housing availability, and easy access to social assistance programs.[2] Somalis represent the largest group of African immigrants with 37 percent of the resident population, but Ethiopian and Kenyan comprise a sizeable portion of Minnesota's East African community.[3] With the number of African immigrants still growing rapidly, it is likely that family law attorneys will represent an East African client at some point in their career.

I recently learned the value of recognizing and understanding the traditions and cultures of Minnesota's East African communities while representing an Ethiopian client in her marital dissolution with children. Researching a client's culture before or at the beginning of representation can help attorneys save time, frustration, and provide more effective representation. My unfamiliarity with these cultural differences made the dissolution process extremely difficult. Specifically, the inveterate gender roles, the influence of community elders, and the difficulties in communicating with my client made this case incredibly challenging.

Traditional Gender Roles Shape Client's Decisions and Decision Process

While research differs on whether Ethiopian women have achieved recognizable gender equality, it is undeniable that women are generally expected to fulfill traditional gender roles.[4] These roles are developed and defined early in life; before the age of ten, children start performing "tasks considered suitable to their gender."[5] Girls are expected to care for younger children in the household, which develops the parenting skills they will need when they marry—often five to six years later.[6] When Ethiopian women marry, there may be negotiations about the compensation, or "bridewealth" from the husband's family to the wife's family.[7] In some parts of rural Ethiopia, women must obtain their husband's permission before receiving any medical care.[8] Many of the gendered Ethiopian cultural traditions seem outlandish or worse in the United States.

Understanding the differences in gender roles is important because they greatly influence how Ethiopian and women of other East African countries respond to a divorce in the United States. First, the traditional idea of the male as the "head of household" will likely mean that Ethiopian women are strongly opposed to or unwilling to work outside the home. Unfortunately, divorce often requires a woman who previously stayed at home raising children to seek outside work. My client was fundamentally opposed to working outside the home because she believed her only job was to raise the children, but she was forced to get a

job at a large retailer to pay her bills after the separation. In this case, receiving maintenance was unlikely since her ex-husband's income was barely enough to cover the child support payments, so getting a job was the only way to support her family.

Secondly, women's lack of education may seriously hinder their ability to make important legal and financial decisions for themselves and their children. Although the literacy rate for women in Ethiopia is on the rise at 41.5 percent (up from 14.0 percent in 1980),[9] women continue to miss out on educational opportunities because they consistently marry and have children at a young age.[10] In rural parts of the country, girls get married at the age of eight or ten, despite a new law that changed the age of consent from 15 to 18.[11] The prevalence of preteen marriage discourages independence and makes it difficult for women who are suddenly alone to make critical decisions. My client had difficulty making important decisions and often asked me to make these decisions for her. After explaining the issues and possible pros and cons of each decision, I gave her recommendations and gently urged her to tell me which course of action she preferred. However, she continued to ask me to make potentially life-changing decisions for her without ever committing to any option.

Another Party To The Case: My Client's Elders

Another challenge to women's independent decision making is the influence of elders. For Ethiopian and other East African immigrants, the attachment to older family generations, or elders, is very strong. Both East African culture and Islam extol obedience and respect to parents and grandparents. The same respect is necessary to elder generations in the community, even if unrelated.[12] Elders are expected to resolve disputes, especially those between a husband and wife, and bringing in police or a social worker is generally unfavorable.[13] Since the opinions and advice of the elders carry great weight in marital disputes, I often struggled to get my client to follow my legal advice, which was sometimes contrary to that of the elders. My client repeatedly resisted my recommendations, the recommendations of court evaluators, and even the recommendations of the court because it was not what the elders wanted.

These women might struggle with making legal decisions for themselves because society is telling them that they are not capable. Although lobbyists have been campaigning for gender equality in five of the East African states, women are still vastly underrepresented in government or parliament positions.[14] Most women are unemployed and illiterate and continue to suffer from discrimination despite constitutional prohibitions of discrimination on the basis of sex.[15] For fifteen years, the Ethiopian Women Lawyers Association (EWLA) has been fighting for women's rights, and in 2000, the group helped reform the Ethiopian Family Law Code to reflect women's status in the family as equal to that of men.[16] Reversing the discriminatory culture toward women in Ethiopia and Somalia is an ongoing process that requires cooperation from the government and women to voice their rights. For women who have been told for centuries that they have no "voice," this may take a long time.

Important Information Lost in Translation

When representing a non-English speaking client, there are two facets to the language barrier: the inability to understand the foreign language, and the inability to understand words with a specific cultural meaning. Communicating with my client was exhausting. First, it required finding an

available interpreter who spoke the correct dialect of her language. Next, I often needed to explain to the interpreter what specific English words meant because there was no counterpart in my client's language. Finally, I had to make sure no important communication was lost among the three of us.

The complexities of the communication problems run even deeper. There are multiple languages spoken in each African country and many countries have regional dialects of each language. Unless the client's language is very popular, it may not be easy to find the right interpreter. Moreover, most interpreters working with a volunteer lawyers' network or government agency are interpreting on a part-time basis and have limited hours. Some interpreters contract exclusively with the counties, so they may not be hired privately. There are also national phone interpretation services, but they are certainly less than ideal when representing a client in a complex divorce.

Another concern is the cost of interpretation services, which average around $40 per hour in Hennepin and Ramsey County, but could be much higher in other counties with smaller African populations. African immigrants have a higher rate of unemployment compared to other Minnesota residents. Many East African immigrants are living near or below the poverty line and require *pro bono* representation.

Finding a suitable interpreter in my client's language that was available to interpret at a time that coordinated with all three of our schedules was next to impossible. Our numerous attempts to communicate in English led to a grave miscommunication of critical case issues and a very frustrated client and attorney.

Our communication problems delayed the timeline of the divorce and also caused serious case setbacks. After two months of representation and frequent telephone conferences, my client did not understand the differences between legal and physical custody. With vast differences in East African cultural traditions, legal systems, laws, and styles of communication, there is a lot that gets lost in translation and interpretation.

Aside from translation problems, the most devastating communication issue was my client's lack of candor, which revealed several "surprises" at very inopportune times. My client failed to reveal crucial information and often gave me untruthful answers to such crucial issues as domestic abuse. It is impossible to know all of the reasons why my client withheld information, but one readily apparent reason was that she was terrified of the community finding out. The only available interpreter was often a male member of the local community. This meant my client had to expose private, embarrassing details to her attorney and a fellow citizen of her tight-knit community. Another reason for her dishonesty is that revealing information about domestic abuse to authorities is frowned upon since it is a problem for the elders.[17] Typical clients often conceal skeletons in their closet to avoid embarrassment, but attorneys, representing East African immigrants, need to be aware that clients may withhold information because it is culturally wrong not to.

As the saying goes, hindsight is always 20/20. The innumerable cultural and communication differences between East African clients and American attorneys present many representational challenges. Some prior research or knowledge can go a long way in mitigating these differences and increasing the chances of effective representation.

____
Notes

[1] NEAL REMINGTON, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, AFRICAN IMMIGRANTS IN MINNESOTA 3 (2008), http://sowtheseedfund.com/iatp/publications.cfm?accountID=258&refID=104335
[2] *Id.* at 3-5
[3] *Id.* at 3 (Ethiopia at 21 percent, Kenya at 8 percent.)
[4] Compare LAUREL CORONA, ETHIOPIA (2001) *with* LEGAL SERVICES COMMISSION, REPORT ON THE AFRICAN COMMUNITIES CONSULTATION FOR THE FAMILY LAW AND CULTURALLY & LINGUISTICALLY DIVERSE (CALD) COMMUNITIES PROJECT (2004), www.lsc.sa.gov.au/cb_pages/images/African%20Communities.pdf
[5] LAUREL CORONA, ETHIOPIA 67 (2001)
[6] *Id.*
[7] *Id.* at 71
[8] *Id.* at 81. (According to Nurse Aregash Ayele, interviewed by Panafrican News Agency reporter Youhannes Rupphael for the news service, Africa News Online.) (Higgins/Women In Ethiopia: A White Woman's Perspective)
[9] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, STATISTICS ON ADULT ILLITERACY 8 (1994), HTTP://UNESDOC.UNESCO.ORG/IMAGES/0010/001055/105526E.PDF
[10] UNITED STATES AGENCY OF INTERNATIONAL DEVELOPMENT, CHILD MARRIAGE: EDUCATION AND LAW DETER EARLY MARRIAGES IN ETHIOPIA 4 (2008) (The legal age for marriage in Ethiopia is now 18, increased from age 15 in May 2005, but in rural areas the age may not have changed.)
[11] IRIN Humanitarian News and Analysis, Interview with Meaza Ashenafi, PEACEWOMEN, Nov.7 2003, http://www.peacewomen.org/news/Ethiopia/Nov03/Meaza.html
[12] HASSAN EIBAKAR, SOMALI PEOPLE FACTS AND FIGURES 11 (2000)
[13] LEGAL SERVICES COMMISSION, REPORT ON THE AFRICAN COMMUNITIES CONSULTATION FOR THE FAMILY LAW AND CULTURALLY & LINGUISTICALLY DIVERSE (CALD) COMMUNITIES PROJECT 5 (2004), www.lsc.sa.gov.au/cb_pages/images/African%20Communities.pdf
[14] Joyce Mulama, *Raising the Bar for Gender Equality*, IPS NEWS, Jul. 13, 2009, http://ipsnews.net/news.asp?idnews=47632
[15] Letter from LaShawn R. Jefferson, Executive Director of the Women's Rights Division of Human Rights Watch, to Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia (Oct. 16, 2001), http://www.hrw.org/press/2001/10/ethiopia-1017-ltr.htm
[16] *Id.*
[17] HASSAN EIBAKAR, SOMALI PEOPLE FACTS AND FIGURES 11 (2000) ("In the Somali culture and due to the in-built hierarchical interdependence, calling 911 to clear misunderstanding at home is not only improper but also counterproductive at times. Involving neighborhood elders able to use cultural spiritualistic means may treat domestic abuse more effectively. This strategy works better when it relates to spousal misunderstanding.")

Laura is a 2008 graduate of Gonzaga University of Law in Spokane, Washington. She is currently doing contract work throughout the Twin Cities, as well as pro bono family law work in Hennepin County.

Hmong Culture and Family Law

Thomas Tuft, Esq. & Elizabeth Lee, Paralegal

While it is virtually impossible to generalize about the Hmong culture, there can be no question that it is important to have an understanding of that culture in representing Hmong clients. Though Hmong have become more "Americanized" over time, many retain a foothold in traditional Hmong culture, recognizing family structures (respect for elders, cultural marriage), gender roles, and other aspects of their traditional culture that sometimes place them at odds with American culture and, in the case of family law, the legal system. The high number of cultural marriages that are not recognized as legal marriages lead the Hmong to have to resolve their issues, through paternity, action for partition, replevin, and other civil processes when they are unable to resolve them through a cultural process.

<u>A Brief Summary of Hmong History</u>

The Hmong lived a nomadic existence for much of their history. There is evidence that the Hmong originated from Siberia with white skin and blond hair.[1] A Hmong oral history includes references to furs and frozen lakes. The first solid evidence of the Hmong were in China from 400 A.D. and earlier. In China, they tried to fight for their independence and lost. The word Hmong became utilized among the Chinese which translated into free or free people. The Hmong then migrated south to Laos with thoughts of freedom in their minds on the mountains of Laos.

In the 1800's, the Hmong migrated to Laos drawn by the fertile farmland and protection of the mountains. In the late 1800's, Laos fell under French and later Nazi control when France fell in 1940. In 1949, Laos became an independent country.

By the 1960's, there were approximately 500,000 Hmong living in Laos. The Hmong became allies of the United States during the Vietnam War under the leadership of General Pao Vang. He led about 30,000 Hmong villagers to fight with the assurances of arms, training, food, the abolition of communism, and the protection of the United States government. The war ended in 1975 and more than half of the Hmong soldiers died in the War. After the War, the communist Lao government retaliated against the Hmong. Many were interred in communist concentration camps for "re-education". It is believed that 100,000 were killed in the aftermath of the War. Many escaped to Thailand for refuge.

By 1980, a majority of Hmong had fled for security in Thailand to live in refugee camps. Some people lived in the camps for up to ten years. Over time, much of that population was relocated to France and the United States. General Pao Vang remains a leader of the Hmong community in the United States. A few thousand migrated to other parts of the world. There are also significant Hmong populations in China and Australia. In 1995, the closing of the refugee camps compelled thousands to move back to Laos. While a few thousand stayed in Thailand, there are accounts of abuse and torture of the Hmong returning to Laos.

At present, California and Minnesota have the highest Hmong populations. From the

2000 Census, California had a growth of 88% from 1990 with a population of 65,095 Hmong people. Minnesota had a 39% growth with a population of 41,800 Hmong people.[2]

Some Hmong Facts

- There are 18 clans in the Hmong community, identified by the last names; Chang, Chue, Cheng, Fang, Her, Hang, Khang, Kong, Kue, Lee, Lor, Moua, Pha, Thao, Vang, Vue, Xiong and Yang. There are some variations of these names.The children, at birth, will take the last name of their father and the clan he belongs to. However, when daughters marry, they gain new identities in their husband's clan.
- Although Shamanism is practiced in many Hmong homes, there is no customary religious ritual followed by all the clans and even some variation within clans. Each clan has their own method of performing the rituals and the families in the clan may have their own approach.[3]
- There are two different (but mutually intelligible) dialects to the Hmong language - White and Green. The White dialect suggests that the family and/or their ancestors lived at the top of the mountains in Laos. The Green dialect suggests that the family and/or their ancestors lived at the bottom of the mountains in Laos.
- The clan leaders are only male adults.
- Hmong clans are exogamous. It is considered forbidden for a person to marry another person with the same last name. They are considered to be in the same clan and related, even if they are not related by blood.
- Traditional funerals in Laos and Thailand can last up to a week, however, funerals in the United States usually last up to three days. In families who practice Shamanism, the funeral homes are usually opened for 24 hours for three days in order to allow the families and relatives to grieve. Food, drinks, and snacks must be provided to ensure that the guests of the deceased are adequately provided for. The Hmong do not believe in cremation.

Roles in Hmong Culture

Again, it is difficult to generalize. However, many Hmong still follow traditional roles within their culture.

Traditional Roles of a son

The sons are expected to know how to properly greet and say goodbye to elders. A proper greeting for the men would be to say "Hello, Welcome" and shake one another's hand. Men will not shake hands with women. A simple greeting is sufficient. A goodbye is usually wishing them well and to come back again.

The sons are given more flexibility in regards to the duties that are expected of them. They have more freedom when it comes to their social life. They are able to freely hang out with friends, to attend events, and to date.

The sons are expected to learn how to pick out and butcher animals when it comes to religious rituals. The parents expect their sons to be able to choose an adequate animal and be able to butcher it, so the ritual may be performed for the parents.

The oldest son is expected to take care of his parents when they are older. The youngest son, when he becomes capable, may take on the responsibility as well. Usually the parents will reside with whichever son they choose, in most cases, that would be the eldest son.

The eldest son is expected to be a role model for his younger siblings by portraying appropriate manners and to help his father keep a good reputation.

Traditional Roles of a daughter

The daughters are expected to learn domestic chores, such as cleaning and cooking. They do not have as much liberty as the sons. They cannot go on dates, unless one of the siblings attends, and they have a stricter curfew than the sons.

The daughters are expected to clean the household and cook, along with the mother. When religious rituals are performed, whether for the parents or at a relative's home, they are expected to cook the butchered meat, clean and set the tables, and clean afterwards. The eldest daughter is expected to act like a second mother to the younger siblings and take care of them.

Traditionally, the women would be the homemakers, making sure that their husband would have a clean home to reside in and food was always ready for him when he gets home from work. The women would take care of the children while the husband was at work. The husband would be the one to make money and provide for the family. The husband would be seen as "unmanly" if he did any domestic chores.

At present, the tradition still expects the wife to handle the cooking and cleaning even if she is working or is the breadwinner of the family. This is especially true if the wife lives with her in-laws. However, over the recent years, expectations have relaxed a little due to adaptations to Western culture. It is now acceptable for the male to assist with domestic responsibilities.

Marriage in Hmong Culture

Marriage between a Hmong male and female can happen in one of the five ways; The first way is the male and female can agree to the marriage with the consents of both parties' parents. The second way is the female can run away with the male who sends out his clan's messengers to relay the news to the female's family. The third way is the female can become pregnant and therefore it is the male's responsibility and obligation to marry the female so the unborn baby will have a "reputable name". The fourth way is the male can "kidnap" the female to his home and have his clan's messengers relay the news to the female's family. This option does not occur frequently among the Hmong - American society, but it still exists in Laos and Thailand. The last way is when the female's parents would force her to marry the male. This can occur in certain circumstances. For example, if one of the parents catches the parties engaging in sexual activities or even if the male kept the female out past curfew.

The way a couple gets married determines the amount of the dowry. The current rule is that the dowry must not exceed $5,000, however, there may be some exceptions. The dowry acts as a contract between the parties' clans. The dowry is negotiated during the two-day marriage ceremony. The first day takes place at the husband's home where the couple is blessed with a "hand-tie" ceremony to welcome the bride into the family. After the ceremony, the bride and groom head off to the bride's home, along with clan leaders persons, to stay the night. The negotiations take place that night at the bride's home, between the chosen clan leaders regarding the dowry and other expenses. The second day starts off at the bride's home to initiate the husband into the wife's family. After the initiation process and a feast, the groom takes his new bride back to his home. Once they arrive at the groom's home and it is not too late, another minor feast is enjoyed while the clan leaders relay to their clan what has been agreed upon. This is just a very general description of what happens during a wedding ceremony.

Culturally, girls can get married as young and 13 or 14 years old, another area that places

Hmong culture at odds with American culture. In the country of Laos or Thailand, the girls can marry as young as 9 or 10 years old. A significant number of married Hmong couples are not legally married because they either married under the age of majority or they have only had a cultural marriage. To them it is more important to be married in the eyes of their culture than in the eyes of the law.

If he is the eldest son, the husband's parents and his unmarried siblings may reside with him and his wife. Traditionally, it would be the wife's obligation to clean and cook for the entire household.

Marriage/Family Disputes

For resolution of disputes, there is a hierarchy one should follow. If the dispute concerns a marriage, the couple should first talk with the husband's parents. The husband's parents will usually provide the couple with some advice. If that does not work, then they couple will talk with the wife's parents. If then, one of the parties is not satisfied, he or she can initiate a call to one of the husband's clan leaders and set up a meeting. Four or five of the clan leaders will attend and listen to the problems of the marriage from both sides and make a determination of what should be done.

Divorce is usually the last option when trying to resolve the problems. The clan leaders give advice to the couple in hopes that the couple will listen and wait a few weeks to set up another meeting. During the second meeting, if the problem has been solved, the clan leaders would depart and everything would resume as it was. If the problem has not been solved, then clan leaders from both parties would join together in an effort to mediate the issues and decide the direction of the marriage.

Divorce was rare in traditional Hmong culture. It is far more common in westernized Hmong communities. If divorce is the only solution, after the divorce has been finalized the wife would take all her personal belongings and return to her parents home. If children are involved, usually the daughters would go with the mothers and the sons would stay with the father. However, an agreement is usually made as to who would have custody of the children. Whatever joint property the couple may own together would be at the discretion of the clan leaders to make the final choice, if the parties have not previously agreed. Child support or spousal maintenance are rarely discussed. If a party wants it, they would have to go through the American court system.

If domestic abuse were involved, the husband would have to pay his soon-to-be ex-wife's clan a monetary amount for forgiveness. If cheating is involved, the cheating party's clan will have to pay a monetary amount for forgiveness to the other clan. A divorced man's reputation will not be sullied as much as a divorced wife's reputation. This is especially true if the wife has children, she may not be approved of in the eyes of the elders.

Conclusion

Hmong, especially the young, remain in a state of transition in their attempt to follow the mores of American culture while still respecting their traditional culture. Hmong women bear the traditional responsibilities for the household (including extended family), yet also take on the additional role of wage earner (and sometimes primary breadwinner) for a household. Hmong cultural marriage practices are at odds with American practices due to the young age of marriage and the circumstances that may surround the marriage. In addition, the marriages lack the legal validity that may affect not only family law, but Social Security benefits, pensions, inheritance, etc.

To resolve the issue of Hmong marriages being recognized as legal, the Minnesota Legislature had proposed the Hmong Marriage Bill in 1990 and 2001. Both proposed bills essentially required that the couple getting married take the extra step of filing a certificate of marriage and/or obtaining a marriage license. Of course there is much more to the bill than this. There were many mixed reactions to this bill when proposed in 1990 and still eleven years later in 2001. Some felt that with this bill, the State was trying to modernize the culture of Hmong marriage, which it shouldn't be allowed to do. Others felt that this bill would provide tax benefits needed and preserve the Hmong culture.[4]

Whether or not Hmong marriages are recognized legally, we still have to realize that confluence of culture and law can create tensions and we need to balance between the needs of a community (respecting its culture and history) and the needs of society at large to find a successful solution.

———————

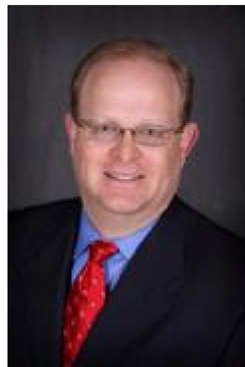
Notes

[1] Portions of this article are taken from History of the Hmong-A Timeline. A 1997 publication of the Lao Family Community of Minnesota. http://www.laofamily.org/pdfs/Hmong_History.pdf

[2] See http://www.uwec.edu/econ/research/hmong/H2000_us_census.htm

[3] See http://shrdo.com/index.php?option=com_content&task=view&id=667&Itemid=9

[4] See http://www.lsej.org/documents/118871hmongmarriage.pdf "Community, Conflict, and Consensus: Responses to the Proposed Hmong Marriage Legislation" By: Amalia Anderson, Hamline University School of Law, Taya Moxley – Goldsmith, Hamline University of Law, and Patrick Ostergren, College of William Mitchell, December 18, 2002



Thomas Tuft is a shareholder in Tuft & Arnold, PLLC practicing primarily in family law. Mr. Tuft practices in all areas of family law, including complex divorce, child support, paternity, and child custody with an emphasis on interstate and international child custody cases. He has been a SuperLawyer® since 2002 and has been named one of the Top 40 Family Law SuperLawyers in Minnesota for the past five years. He has been named to the list of Top 100 Superlawyers in Minnesota and the Best Lawyers in America®. He is rated AV by Martindale-Hubbell. He is a member of the ABA, MSBA, RCBA, Collaborative Law Institute, is a Fellow and Vice President of the American Academy of Matrimonial Lawyers — Minnesota Chapter, and is a past chair of the Second District Ethics Committee. He writes and speaks on the Uniform Child-Custody Jurisdiction and Enforcement Act, Hague Convention on the Civil Aspects of International Child Abduction, law practice management, and legal ethics.

Elizabeth Lee joined Tuft & Arnold, PLLC as an intern in May of 2008 and was hired as a paralegal in July of 2008. Ms. Lee received her A.S. degree from Inver Hills Community College in 2008. Prior to joining the firm, Ms. Lee worked for Wells Fargo Bank. Ms. Lee is fluent in speaking Hmong.

A General Overview of *Mahr*, the Somali Dowry Practice in Minnesota

Kirsten Olson, Esq. and Tracy Reid, Esq.

The authors of this article extend an enormous thanks to Imam Hassan Mohamud from the Islamic Dawah Center who contributed the following informtion concerning the Islamic dowry practice of mahr carried out in the Somali community in Minnesota.

Islamic law has two conditions placed on all marriages and those are the mutual consent to the marriage by both parties and the consent of the *mahram* of the bride. The *mahram* is a guardian or protector of the bride established through a hierarchy. The bride's father is her *mahram* and where he is not able to act in that role, the hierarchy of eligible guardians allows the uncle, brother, or grandfather to fill the role.

Steps Toward Marriage

Information Gathering

Traditionally, the bachelor seeks out a marriage and will find out information concerning his potential brides. After finding a woman in whom he is interested, he is allowed to gather information from the friends and family, and by Islamic law, they must be honest in their responses. By Islamic law, a person is required to be wholly honest when speaking to another about in indivdual in the areas of marriage, leadership, friendship, and business. The man has the right to see the face of his bride, and she will remove her nijib, or veil. The *mahram* may seek out the same information on the potential bride's behalf of her suitor, as is entitled to the same degree of honesty from those interviewed.

The Couple Communicates

If the information gleaned is sufficient, the suitor may ask the *mahram* if he can speak to the woman. With permission, and by her agreement, the two parties are able to communicate while under the protective watch of the *mahram* or other family members.

Consent to Marry

A marriage proposal is directed toward the *mahram* and includes the negotiation of the *mahr*, or dowry. Islamic law requires the *mahram* to obtain the consent of the bride before giving his own consent. However, this prescription is violated, including in the United States and in Minnesota, and some brides are not afforded the option of consent. Imam Mohamud indicates that he and other Imams will not preside over a marriage that lacks consent, as it violates Islamic law. However, those marriags are still performed.

Negotiation of the *Mahr*

The *mahr*, or "marital gift," is a necessary component of a Somali marriage ceremony. It is the right and entitlement of the bride to participate in negotiations of the *mahr* under Islamic law and approve its terms.

Islamic law prescribes that the *mahr,* like the marraige, be freely consented to by the bride

and be paid directly to her prior to the marriage. Imam Mohamud estimates that only 10% of marriages follow this prescription. *Mahr* amounts generally start at $1,000 and increase. Rather, most *mahr* are delayed indefinitely to some time during the marriage under the shafi school of law. An unknown number of these dowries, like marriages, are not consented to by the bride.

Wedding

After the *mahr* is negotiated and consent to the marriage is complete, the couple is permitted to discuss and plan the wedding. There are two stages of the wedding ceremony: the tying of the marriage contract and the reception.

The Tying of the Marriage Contract

The tying of the marriage contract requires the Imam, who performs the ceremony, the groom, and the bride or her representative. The bride's presence is not required for the ceremony but the *mahram* must be present in her place, and express her consent to the marriage. Without having the bride present, some nonconsensual marriages are possible but Mohamud indicates that many Imams in Minnesota will not perform a ceremony without first communicating with the bride and ascertaining her consent to the marriage.

The marriage contract recites the name of the Imam who performed the service, the two male witnesses to the contract, the size of the *mahr* and a recitation of the parties consent to its terms, and a recitation of the consent of the bride to the marriage.

Reception - His and Hers

At the reception, the wedding party and guests celebrate *wanema*, a dinner where men and women eat separately and each hear speeches and pray. Subsequently, the women have a party that can last hours or through the night. At the conclusion of the bride's party, she is delivered to the home of her groom where he waits with his friends. Thereafter, the bride and groom spend seven days and seven nights alone together, both taking off work so they do not part for a moment. American tradition has influenced this process, and the bride will be delivered to the groom waiting in a limousine to take her to the marital home. The time period for the seclusion is reduced to three days for a bride on her second or third marriage. It is said that the parties emerge new people after having been secluded together for the first time for so long.

Imam Mohamud was unable to approximate what percentage of Somali Islamic marriages in Minnesota are made legal, but is aware that Imams in Minnesota advise the couple to obtain a legal marriage and many do not follow the instruction.

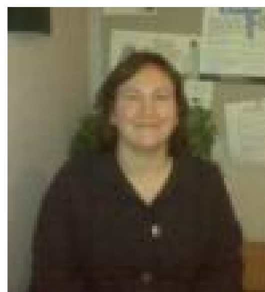
Dissolution

Dissolving the marriage is allowed for any reason. However, by Islamic law the bride will have to return the dowry to her husband if she leaves for an invalid reason. Those reasons include infidelity, illness, jail, impotence, or her husband violating his prayer requirement. Dissolution of a traditional marriage can be done orally- directly by the husband by telling his wife they are no longer married. However, the wife must go to an Imam to obtain her divorce.

In couples where the *mahr* has been delayed, the wife is unlikely to be paid the *mahr* if she seeks a dissolution, and her ability to obtain payment if she is verbally divorced by her husband is also considerably unlikely. Where she has received her *mahr* and obtains a cultural dissolution, she is expected to use her

mahr to make herself self-sufficient, regardless of how many years had passed since receiving the *mahr*.

Somali couples are advised by the Imam that the traditional marriage is not a valid one, and that an Islamic dissolution cannot dissolve a legal Minnesota marriage.



Kirsten Olson is an immigration attorney at the Minneapolis Legal Aid Society and can be reached at klolson@midmnlegal.org or (612) 332-1441.

Tracy Reid practices in the areas of family employment law, and government benefits at Central Minnesota Legal Services and can be reached at treid@centralmnlegal.org or (612) 332-1441.

Immigration & Enforcement of the Affidavit of Support in Family Law Settings

Kirsten Olson, Esq. and Tracy Reid, Esq.

Minnesota has a rich history of immigration. Even before the territory became a state in the mid-1800s, the people of Minnesota spoke dozens of languages and were raised in varied cultural backdrops. The influx of non-citizens, including immigrants, non-immigrants and other foreign born residents has continued to increase over the past few decades as Minnesota became home to one of the largest populations of Hmong and Somali refugees in the United States. As these new non-citizens become part of the community, they also become intertwined with the legal system of the United States.

The dramatic increase of non-citizens causes a steep learning curve for many attorneys who never before considered immigration law to be important. Attorneys accept non-citizens as clients without researching or considering what impact the court proceeding could have on the citizen's immigration status. In many cases, there is no conflict between the non-citizen's immigration status and the law or remedy of the court action. However, sometimes the attorney's failure to understand the requirements of immigration law has a direct and substantial impact on the non-citizen's life. And, as the Supreme Court recently reminded us in Padilla1, in some cases, attorneys who fail to apprise clients of immigration consequences will be subject to penalty.

This article focuses on the impact of dissolution on some groups of non-

citizens. It will also examine the impact of the immigration process on two common themes in dissolution: spousal maintenance and domestic abuse.

Family law attorneys are certain to become involved with non-citizen clients. Negotiations sometimes require understanding of complex jurisdictional issues and consideration of the potential impact of deportation on child custody and child support decisions. For this reason, it is important to be aware of the consequences of dissolution and domestic assault and remedies that may be available to non-citizens in these situations.

Understanding the Terminology

Non-citizens lawfully admitted to the United States are primarily divided into two categories: immigrants and non-immigrants. **Immigrants** are generally individuals or family members who come to the United States and plan to remain in country permanently. Some types of immigrants include asylees, refugees, and conditional or permanent residents. **Non-immigrants** are individuals in the United States on a more temporary basis, such as visitors, students or employees. While people can change from one category to another, there are very specific regulations addressing the rights of each category of immigrant or non-immigrant.

Although immigrants and non-immigrants both reside in the United States, only some of the immigrants are permanent residents. **"Lawful permanent residents**" (LPRs) is a term of art used by the immigration service to describe a person who was lawfully admitted to permanent resident status (an immigrant category) in the United States. Immigrants and some non-immigrants are eligible to file an application to become permanent residents after they have met specific requirements. These requirements vary based on the type of immigrant or non-immigrant category of the non-citizen. Once the immigrant or non-immigrant receives LPR status, the individual is then eligible to begin working towards obtaining citizenship. LPRs are the only immigrants who can become citizens of the United States.

In addition to the two categories of *lawfully* admitted non-citizens, an additional group of non-citizens present in the United States are those present **without legal authorization**. These individuals may have entered the United States without permission, or, they entered with permission but overstayed their authorized period of time in the United States or otherwise violated the terms of their visa.

Practical Implications

Why should a family law advocate care about the legal status of the client? The immigration status of the client raises jurisdictional problems and difficult issues with the enforcement of support obligations or child custody negotiations. Additionally, the termination of the marriage may result in one party forfeiting the right to legally work or lawfully remain in the United States. Loss of family member status (e.g., spouse) can result in the inability to remain in the immigrant or non-immigrant category and the issuance of a notice to appear before the immigration court. Additionally, tangential consequences of family break-up such as child support payments, orders for protection, or termination of parental rights often have negative immigration consequences for clients.

It is vital to know basic information about your client's immigration status, before initiating a dissolution or other family law

action, in order to fully apprise your client of the possible immigration implications arising from the action.

Before jumping into the issues family law attorneys should be able to identify prior to representing a non-citizen in a dissolution, let's look at how some of your potential clients may have come into the United States. The following information is provided to give a general idea of the process. For more specific information, please speak to an immigration attorney.

Entry to the United States

One common misconception is that marriage to a United States citizen or permanent resident of the United States automatically bestows citizenship or permanent residency on the non-citizen. This is not true. Marriage simply provides a path. It is important to understand that the only way for a non-citizen to obtain lawful status as a spouse is through an application. The immigration service requires the U.S. spouse- either citizen or permanent resident- to file an application for the non-citizen spouse to obtain lawful immigration status in the United States. Inaction by the citizen or permanent resident spouse could result in the initiation of removal proceedings against the non-citizen.

Prior to Marriage

Only U.S. citizens can file applications for fiancées to enter the country. In these situations, the U.S. citizen will file an I-129 F "Petition for Alien Fiance(e)" with the immigration service. If approved, the fiancée, on a K non-immigrant visa, will receive permission to enter the United States for a period of 90 days. Within that time frame the couple must legally marry. Failure to legally marry will result in termination of the K non-immigrant visa. After the legal marriage, the citizen is permitted to file applications with the immigration service that, if approved, will bestow an immigrant visa, and, possibly, resident status upon the new spouse. These two applications are the I-130 "Petition for Alien Relative" and the I-485 "Application to Register Permanent Residence or Adjust Status". The I-130 provides the non-citizen with permission to be an immigrant in the United States and apply for permanent residency. The I-485 application, if approved, allows the non-citizen to be a resident of the United States.

If these additional applications are not filed immediately, the non-citizen can be called before the immigration court for failure to maintain proper immigration status. If the applications for immigrant status and permanent residency are filed immediately and approved, the non-citizen becomes a conditional resident of the United States for two years, with the ability to work, the ability to travel outside the United States. This conditional resident status will expire after two years if the immigrant does not file Form I-751, "Petition to Remove the Conditions on Residence". If this application is granted, the conditional resident becomes a permanent resident—and may eventually become a citizen of the United States. If the application is denied, the non-citizen will be required to appear in immigration court.

Post Marriage

When the marriage occurs before any immigration application is filed the type of application filed for the new spouse varies based on the immigration status (generally permanent resident or U.S. citizen) of the U.S. spouse. If the marriage occurred outside the United States, the couple could complete the immigration process prior to the new spouse's arrival to the United States. In this case, that new spouse could enter as a

resident of the United States. If a spouse enters as a resident, the type of resident status again depends on the length of the marriage. Spouses who enter the United States after two years of marriage will enter as permanent residents and will be able to become United States citizens quickly. Non-citizen spouses entering the United States before the second anniversary of their marriage will enter as conditional residents who have to petition the immigration service for permanent status before being eligible for citizenship.

As discussed above, non-citizens can become eligible to apply for relative status and residency based on marriage. However, prior to approval of residency, the petitioning spouse must agree to economically support the non-immigrant. This agreement is set out in a contract called the I-864 "Affidavit of Support". The Affidavit of Support, discussed more fully below, is a contract between the U.S. spouse and the U.S. government, with the benefit going to the sponsored non-citizen. A non-citizen will not be approved for residency without a valid Affidavit of Support; therefore, if the U.S. spouse is not willing to take these actions, then the new spouse will not receive resident status.

Dissolution

Prospective clients who come to your office may be immigrants (asylees, refugees, conditional residents, permanent residents), non-immigrants (letter visa categories), or persons present without current valid immigration status. While a comprehensive discussion of all of these categories is outside of the scope of this article, it is important to understand that in all situations, the dissolution of the marriage will have consequences on the non-citizen. This article will focus on dissolutions involving immigrants and those present without valid status. If you encounter non-immigrants who are present in the United States on employment based visas, student visas or another category, please immediately suggest that your client seek advice from an immigration attorney.

Present Without Authorization

Many attorneys have concerns about whether individuals without lawful status can bring actions in family court. Courts consistently have held that immigration status or lack thereof does not preclude an individual from establishing domicile or residency for purposes of maintaining an action in family court, with limited exceptions determined by the immigration service.[2] Despite this fact, some family courts have been known to request information about a person's immigration status or to use this information when making rulings in family matters. When this issue is brought up in family court proceedings, an attorney should question the relevance of the information and the manner or method of request. It is also important to note that a person's immigration status is temporary and is not indicative of whether the person would qualify for legal immigration status now or in the future or if the non-citizen could be deported now or any time in the future.

In some cases, non-citizen clients are afraid to go to trial or fight for child support or spousal maintenance because they fear detection by the immigration service. These individuals are often told that any legal action will result in their deportation from the United States. While it is true that individuals who are present without authorization are constantly at risk of detention by the immigration service, there are multiple protections afforded to persons who are involved in court actions where there

is an underlying issue of domestic violence. Specifically, immigration officers are prevented from making adverse determinations (e.g. placing a person in removal proceedings, arresting a person due to a violation of immigration laws) based on information furnished solely by persons associated with the abuse.[3] This does not mean that the immigration officer cannot receive information from disgruntled spouses, but it does mean that, before using that information or arresting a person in a sensitive location[4] such as a courthouse, the immigration officer must independently verify the facts from an independent source.

Asylees

Minnesota has a large population of asylees and refugees. These individuals entered the United States fleeing persecution in their home countries. Asylees and refugees receive valid Social Security cards, are able to work legally, enjoy access to government benefits and be permitted to apply for lawful permanent resident status. In most cases, dissolution will not have a disparate impact on the immigration status either partner. However, in some cases, one of the parties in the dissolution will be a principal asylee and the other will be a derivative asylee.[5] The principal asylee is the person who applied for and was granted asylum from the immigration service. The derivative asylee is the family member who benefited (obtained lawful status in the United States) through to the family relationship. The immigration service provides that derivative asylees who lose the familial status with the asylee, will themselves lose the ability to become permanent residents through that grant of asylum status. This means that a derivative asylee who dissolutions will, following the loss of derivative status, have to file their own asylum application (called a "nunc pro tunc" application) and will only be able to apply for permanent resident status following approval of this new asylum application.

Residents

An individual can take many paths to become a resident of the United States. One common path is obtaining residency as an immediate relative (spouse, child, step-child, adopted child, parent) of a United States citizen or permanent resident. Residents have social security numbers and are eligible to work in the United States. Residents have "green cards" or lawful permanent resident cards. Residents who obtained their status through an immediate relative will not have access to government benefits for at least five years after obtaining residency. While there are a few exceptions to the rule against eligibility for government assistance, most residents cannot obtain food stamps, cash assistance or medical assistance due to "sponsorship" through the Affidavit of Support.[6]

As mentioned earlier, the immigration service categorizes residents as conditional or permanent. Individuals with resident cards (also called green cards) that are valid for two years are conditional residents while those with cards valid for ten years are permanent residents.

Although permanent resident status cannot be lost through dissolution of a marriage, conditional residents may suffer negative immigration consequences as a result of dissolution. Conditional residents can be defined as temporary permanent residents. In the late 1980s, the immigration service began to examine the bona fide nature of marriages. There was a belief that non-citizens were abusing the immigration system by obtaining "green card" (fake) marriages to U.S. citizens and residents thereby giving an

immigration benefit to the non-citizens. As a consequence, the conditional status was introduced. Conditional residents become permanent residents after the approval of the I-751 petition. This petition must be filed jointly by both the husband and wife, within 90 days of the expiration of the conditional resident's status. Originally, there was no exception to this rule for any reason including divorce, separation, domestic abuse or death. If the U.S. citizen or resident refused to sign the application for any reason, the conditional resident would lose status.

More recently, the immigration service began to permit a conditional resident to file the I-751 on his or her own, but only if the conditional resident met one of the statutorily listed: the marriage was terminated through dissolution or annulment, the non-citizen was battered by or was the subject of extreme cruelty by the United States citizen or permanent resident spouse; or, the termination of the conditional resident's status and removal from the United States would result in extreme hardship. Conditional resident who remains legally married must file jointly with their spouse unless there is substantiated domestic abuse or extreme hardship.

Separation is not a sufficient ground for filing the I-751. Any non-joint application filed by the conditional resident on the basis of dissolution will be denied unless a finalized decree is filed with the immigration service. This means that conditional residents often need dissolutions to process quickly and they may be at a disadvantage when it comes negotiating. In these cases, attorneys may want to consider bifurcating the dissolution to obtain a finalized dissolution decree quickly.

As discussed above, dissolution can have unplanned consequences on immigration status for certain non-citizens. In addition to being aware of the direct impact of dissolution on immigration status (ability to remain in the United States legally following the breakup of a marriage), family law attorneys should also be aware of collateral consequences such as enforcement of monetary obligations and establishment of cross jurisdictional visitation agreements.
In the next section, we would like to discuss two situations that arise in many dissolutions but that must be examined with more scrutiny in cases involving non-citizens. The first situation is the establishment of spousal maintenance obligations. The second situation is when domestic violence or emotional cruelty are raised as issues in dissolution proceedings.

I-864 Affidavit of Support and Spousal Maintenance

All sponsored immigrants, e.g. spouses, children, parents or siblings, are guaranteed support during the applicable time period through the Affidavit of Support. The Affidavit is signed by the sponsoring citizen and, if necessary, any co-sponsors. It requires the citizen to support the sponsored non-citizen at 125% of the federal poverty guidelines.[8] Where the sponsored spouse has custody of the parties' child, the sponsor will be obligated to support the household at 125% of the federal poverty level.[9] This includes both when the sponsored alien earns less than 125% of the Federal poverty line, and when the applicant becomes a public charge through receipt of a means-tested public benefit. Any co-sponsors who also file Affidavits of Support are also legally and severally liable to support the non-citizen.

An action to enforce the Affidavit of Support can be brought in state or federal court.[10] Remedies can include specific performance, payment of legal fees and costs of collection,

collection agency fees, and corresponding state remedies.[11] See Iannuzzelli v. Lovett, 981 So. 2D 557 (Fla. 3d D.C.A. 2008) denying an award of attorney's fees in obtaining enforcement of the Affidavit of Support in federal court, citing the statute that legal fees incurred in the course of collection can be recovered, but not in the course of establishment of the obligation. A governmental agency may seek reimbursement from a sponsor for amounts expended on means-tested public benefits within 10 years of the last date the sponsored alien received any such benefit.[12]

Fiances entering the United States are also required to have a Affidavit of Support filed on their behalf. However, the Form I-134 Affidavit of Support for fiancés differs from the I-864 Affidavit of Support required for immediate relatives in that the support obligation is morally rather than contractually enforced. If a marriage occurs and the fiancé marries the sponsor, prior to becoming a permanent resident the sponsor must execute an I-864 for the non-citizen. When the I-864 is executed, a binding support obligation is created. See Tornheim v. Kohn, 2002 WL 482534, 3-6 (E.D.N.Y. Mar. 26, 2002) for the principal that form I-134 does not constitute a contract.

Obligations under the I-864 expire when (a) the alien becomes a citizen, (b) has worked, or can be credited with, 40 quarters of coverage under Title II of the Social Security Act (see 8 C.F.R. §212a.2(e)(2)(i)) and did not receive means-tested public benefits during that time period (must file taxes for the quarters worked), (c) ceases to hold lawful status and departs, (d) obtains in removal proceedings a new grant of adjustment of status, or (e) dies.[13] While the binding obligation to support a spouse under the Affidavit of Support is clear, case law also requires the sponsored spouse to mitigate damages and self support. An application must make "reasonable efforts" to mitigate damages under the affidavit of support.[14] When determining the household income and setting the support obligation, the court must calculate income annually, not based on an aggregated calculation. The sponsored income has the duty to mitigate damages and engage in gainful employment commensurate with the immigrant's ability.[15]

The Affidavit of Support has not to date been widely litigated. This author recommends a review of Geoffrey A. Hoffman, Immigration Form I-864 (Affidavit of Support) and Efforts to Collect Damages as Support Obligations Against Divorced Spouses – What Practitioners Need to Know, Florida Bar Journal, October 2009 Vol. 83, No. 9 for a discussion of potential defenses and offsets to the support obligation.

Income received by the sponsored spouse in the form of government subsidies will offset the amount of support paid by the sponsor. Housing subsidies and student grants are income that will reduce the amount of support paid by the sponsoring spouse.[16] The most successful defense to the support obligation, in representing sponsors, to date has been in the reduction of the support obligation due to the setoff provisions outlined in various courts discussed above. Hoffman opines that an annulled marriage would also eliminate the support obligation. However, Minn. Stat. 518.03 pertaining to annulment sets forth that the "rights of spouses, maintenance, support and custody of children on dissolution of marriage are applicable to proceedings for annulment."[17] The Rooker-Feldman doctrine and res judicata have been the basis for denial of support under the Affidavit of Support. The Rooker-Feldman doctrine bars an action from being brought in federal court after having been fully litigated in state court. The

doctrine of res judicata prohibits parties from relitigating issues which were raised or could have been raised in a previous action, after those issues have been decided on the merits. Where parties to a dissolution fully litigate the Affidavit of Support in state court, neither party may then seek to relitigate support under the Affidavit in federal court under both the Rooker-Feldman doctrine and res judicata.[18]

A party may not be barred from asserting an action for support subsequent to a dissolution where neither party presents the Affidavit of Support to the state court. However, judicial estoppel will prevent a sponsored spouse from obtaining support where the sponsored person fails to list the Affidavit of Support as an asset in a bankruptcy proceeding. In Mergia v. Adams, the sponsored spouse was barred from litigating the Affidavit of Support in his dissolution case by the state court.[19] A month later, he filed for bankruptcy and did not list the Affidavit of Support on his Schedule B form. A year later, the sponsored spouse filed an action in federal court to enforce the Affidavit of Support. Denying support, the federal court held that the failure to list the Affidavit as an asset in the bankruptcy proceeding barred him from making a claim on it in the subsequent proceeding.[20] Unsuccessfully, parties have moved to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. [21]

Victims of Domestic Violence and Sexual Assault

In marital situations involving domestic violence or mental abuse, the impact of such a finding can be substantial. Non-citizens convicted on charges of domestic violence may likely find themselves ordered to appear before the immigration court. Domestic violence is one of a number of crimes that could cause a non-citizen to be removed from the United States. Conversely, the immigration service also provides multiple benefits to non-citizen victims of domestic violence or mental cruelty.

If charges of physical, sexual or emotional violence are present in the dissolution, the non-citizen should immediately speak with an immigration attorney. If the non-citizen is charged with a domestic violence or sexual assault crime or is in the process of working through the charges with the courts, it is imperative that the criminal attorney be aware of the possible immigration consequences associated with different pleas and crimes. If the non-citizen is deported from the United States, then the decisions on child support, visitation and other aspects of the family law proceeding will become extremely jurisdictionally challenging.

Non-citizen victims of crime are eligible to apply for a variety of immigration benefits—many of which result in legal status, employment authorization and, eventually, permanent resident status in the United States.[22] The immigration service provides these remedies to non-citizen family members of U.S. citizens and permanent residents as an alternative to the more typical method of family based immigration where the U.S. citizen or permanent resident files status applications for their family members. Additionally, as discussed above, the immigration service sets limits on information it will receive or actions it will take in cases involving purported victims of domestic violence.

I-360

Form I-360, Petition for Amerasian, Widow (er) or Special Immigrant,[23] is called the VAWA, Violence Against Women Act application, by many attorneys and non-

citizens. This is an immigration remedy available to persons who have been abused by their U.S. citizen or lawful permanent resident spouse, parent or child. To be eligible for this benefit, the non-citizen must show the existence of a bona fide relationship to the U.S. citizen or permanent resident. Abuse (physical, sexual, emotional) must have occurred during the relationship and the non-citizen must have resided with the abusive individual. If these elements are present, then the non-citizen may be eligible to file the I-360 petition.

While the petition is being reviewed by the immigration service, the non-citizen is eligible to apply for government benefits. If the application is approved, the non-citizen receives temporary (15 months) permission to remain in the country, the ability to apply for employment authorization and a social security card, and the ability to file an application for permanent resident status.

U-Visa

Form I-918, Petition for U Non-Immigrant Status, is the application to apply for the U visa. The U visa is a non-immigrant visa available to certain crime victims.[24] Whereas spouses of citizens and permanent residents can receive assistance under the I-360, the U visa can be used for spouses of non-immigrants and individuals without lawful status who have been victimized by their partners. Eligibility for the U visa is broadly defined. To qualify, the non-citizen can be in any immigrant or non-immigrant category. The non-citizen must be the victim (direct or indirect) of a specific crime[25] that violated the laws of the U.S. or that occurred in the U.S. (including Indian country and military institutions) or the territories and possessions of the U.S.. The non-citizen must suffer substantial physical or mental abuse as a result of the crime. Finally, the non-citizen must possess information about the crime and must be helpful[26] in the investigation of the crime.

The non-citizen must obtain a certification from the investigatory agency showing his or her helpfulness in the investigation of the crime. In contrast to the I-360 application, there is no access to government benefits while the immigration service is reviewing the non-citizen's application for status under the U visa. However, if approved, the non-citizen receives a visa permitting four years of lawful presence in the United States and four years of employment authorization. In the future, the approved U visa holder may also be able to apply for permanent resident status.

T Visas

In some situations, the noncitizen may express to you that they were brought into the United States under false pretenses and then found themselves victimized by the individual who facilitated their entry to the United States. These people may enter as fiancées and find themselves to be in the role of second wife or indentured servant within the home, or they may come to the United States for work and find themselves trapped in a situation of prostitution or sexual slavery. Depending on the specific circumstances, the person may qualify as a trafficked person.

As defined by the Trafficking Victims Protection Act (TVPA) of 2000[27] and the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003[28] and 2005,[29] "trafficking" referring to "severe forms of trafficking in persons," means:

- Sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced

to perform such an act has not attained 18 years of age; or

- The recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

To qualify for a T Visa, a noncitizen must be a "victim of a severe form of trafficking in persons" who is physically present in the United States on account of trafficking. If over the age of 18, the non-citizen must comply with any reasonable requests for assistance in the investigation or prosecution of the crime. Additionally, non-citizens applying for T Visa status must show that they would suffer extreme hardship involving unusual and severe harm if they were removed from the United States.

Conclusion

The intersection of immigration and family law is a complex and challenging area. While non-citizens enjoy full protection under the laws and access to the courts of the United States, decisions by courts and attorneys can have unintended consequences on the individual. Family law attorneys who work with non-citizens are doing a disservice to and potentially committing malpractice by not understanding the ramifications of legal decisions on non-citizen clients.

____

Notes

[1] Padilla v. Kentucky, 599 U.S.__(2010)

[2] Non-citizens residing in the United States on special non-immigrant visas for foreign nationals and working for international organizations must take additional steps to establish residency. Under some non-immigrant visas (G-4), non-citizens deny residency in order to avail themselves of the special financial benefits offered to World Bank employees who are non-resident foreign nationals on temporary visas. Therefore, these individuals cannot claim residency for family court purposes.

[3] Torres Memo, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005. (Jan. 22, 2007)

[4] See Id. At 3-4. After February 5, 2006, officers must complete a certificate of compliance stating "(1) In general in cases where an enforcement action leading to a removal proceeding was taken against an alien at any of the locations specified in paragraph (2), the Notice to Appear shall include a statement that the provisions of section 384 of the IIRIRA of 1996 (8 USC 1367) have been complied with. (2) Locations. The locations specified in this paragraph are as follows: (A) At a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community based organization. (B) At a courthouse (or in connection with that appearance of the alien at a courthouse) if the alien is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the alien has been battered or subject to extreme cruelty or if the alien is described in subparagraph (T) or (U) of section 101(a)(15) of this title."

[5] INA sec 208(c), 8 USC sec 1158(c); 8 CFR sec 208.21

[6] The Affidavit of Support, Form I-864, is a contractual obligation undertaken by a petitioner who sponsors the non-citizen to enter the United States. In many marriage petitions, the sponsor is the US citizen spouse. The spouse signs a contract with the US government in which the sponsor agrees to economically support the non-citizen at 125% of federal poverty guidelines for a defined period of time. This sponsorship agreement limits the non-citizen's receipt of public benefits and allows for the federal government to recoup any financial assistance given to the non-citizen from the signatory of the Affidavit of Support. Multiple petitioners can sign affidavits of support for a single non-citizen and all signatories are held jointly and severally liable.

[7] IIRIRA sec 551

[8] In 2010, 125% of the federal poverty guidelines for a family of one is $13,538. U.S. Department of Health & Human Services, Administration for Children and Families, 2009/2010 HHS Poverty Guidelines, 3/2/2010, http://liheap.ncat.org/profiles/povertytables/FY2010/popstate.htm.
[9] See Hrachova v. Cook, 2009 WL 3674851 (M.D. Fla. 2009)
[10] 8 USC 1183(e).
[11] 8 USC §1183(b) and (c).
[12] 8 USC 1183(b).
[13] 8 USC 1183(a)
[14]Younis v. Farooqi, 597 F. Supp. 2D 552 (D. Md. 2009).[15] Naik v. Naik, 944 A.2d 713 (N.J. Super. 2008).
15 Naik v. Naik, 944 A.2d 713 (N.J. Super. 2008)
[16] Shumye v. Felleke, 555 F.Supp. 2d 1020 (N.D. Cal. 2008).
[17]Minn. Stat. 518.03
[18]Schwartz v. Schwartz, 2008 WL 5582733 (1st Cir. BAP Aug. 26, 2008).
[19]Mergia v. Adams, 2009 WL 1604706 (E.D. Cal., 2009).
[20] Id. at 8.
[21]Schwartz v. Schwartz, 2005 WL 1242171 (W.D.Okla.). See also Baines v. Baines, 2009 WL 3806131 (Tenn. Ct. App. 2009) denying sponsor husband's claim that enforcement of the Affidavit of Support is unconscionable
[22] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162.
[23] INA sec 201(b)(2)(A)(i), 8 USC sec 1151(b)(2)(A)(i)
[24] INA sec 101(a)(15)(U)(i); 8 USC sec 1101(a)(15)(U)(i)
[25] 8 USC sec 1101 (a)(15)(U)(iii) The following crimes, and any substantially similar criminal activity, qualify a non-citizen to apply for the U visa: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, murder, manslaughter, felonious assault, witness tampering, obstruction of justice, perjury and attempt, conspiracy or solicitation to commit any of the above.
[26] The law is written so that victims can qualify if they have been, will be, or are helpful to Federal, State or local law enforcement *or* to other Federal, State, or local prosecutors *or* to a Federal or State judge, *or* to the United States Citizenship and Immigration Service *or* to other Federal, State, or local authorities investigating or prosecuting criminal activity.
[27] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000) (TVPA)
[28] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193. (TVPRA 2003)
29Trafficking Victims Protection Reauthorization Act of 2005. Pub. L. No. 109-164. (TVPRA 2005)

Kirsten Olson is an immigration attorney at the Minneapolis Legal Aid Society and can be reached at klolson@midmnlegal.org or (612) 332-1441.

Tracy Reid practices in the areas of family and employment law, and government benefits at Central Minnesota Legal Services and can be reached at treid@centralmnlegal.org or (612) 332-1441.

Arrangement + Marriage = :)

Tracy Reid, Esq.

This article is anecdotal and is not a scholarly review of arranged marriage, and does not present the many sides of the discussion and thus cannot constitute legal advice. The views of the author are her own in this piece.

Researching dowry and Somali marriage practices on a plane to Chicago, I began chatting with my seat mate. I told him what I was researching, and he told me he was on his way to marry a woman whom he had met on a prior trip. He was on a work visa in Minnesota doing IT work and was on a connecting flight to India, to his hometown, where he would marry the woman arranged by his parents. Being naturally inquisitive, or more realistically a boundriless interrogator, I did my best to seem as "in the know" as possible and talk casually of his endeavor as though I knew anything at all. My entire flight was spent learning what follows. Because I never got his name, I have no one to thank but the reader.

My seat mate was educated in India in engineering and through a series of job changes is now employed in the IT industry. It was always his mother's job to make sure he marry so it was not something he paid much attention to, but for which he was now quite truly and visibly excited. Modern arranged marriage in India takes place via the Internet and it is common for a son to spend little effort worrying about who he will marry. He explained to me that the parents scout potential brides' photos and online bios and his mother allowed him to eliminate women whose photos indicated a non-match. He vetoed several women before he went to India on a prior trip to screen potential brides chosen by his parents, and in that trip a bride was chosen.

While my seat mate and I were talking, I was reading a Georgetown Law Review Journal on the subject matter of arranged marriage and international law. Specifically, I was reading Prashina J. Gagoomal, A "Margin of Appreciation" for "Marriages of Appreciation": Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law, 97 Geo. L.J. 589, 590 (2009).

The author of this particular journal article, Ms. Gagoomal, questions if she herself is the product of a human rights violation and cites the International Covenant on Civil and Political Rights' mandate that "No marriage shall be entered into without the free and full consent of the intending spouses." Gagoomal, 97 GEOLJ 589, at 590. Her parents' marriage was the subject of an arranged marriage and she was its product. She turns her scholarly attention toward the question of "what is free and full consent?"

Analyzing traditional arranged marriage, its contemporary version, and the laws and spirit of marital jurisprudence, Ms. Gagoomal determined that the purpose of her parents marriage, a marriage of appreciation, is "consistent with the spirit (if not the letter) of human rights norms." Id. at 620. She determined those purposes are "(1) protecting the right to love/care for one's partner and (2) respecting one's self-sovereignty and family while avoiding exploitation or a situation akin to slavery." Id. at 591.

Our flight came to an end and I wished my seat mate well, knowing that his odds for a lifelong marriage are far greater than my own (a smarmy Western divorce attorney). He wished me well with my article.

After landing, I decided to research these web sites. I found www.matrimonialsindia.com, which sorts individuals by "mother tongue, country, religion, and caste." Aside from being sorted by caste, I was intrigued that individuals are pre-categorized and "bride" and "groom." As a person who has unfortunately had to date by Internet, we Americans steadfastly avoid appearing overly eager to marry whereas by definition, there are only "brides" and "grooms" on this site. With "20 million miracles and counting," www.shaadi.com purports to be the world's largest matrimonial service. It also sorts by the mother tongue, country, religion, and caste criteria but features more narrowed searching, including allowing a listing of physical and mental "abnormalities" or other "challenges" of a potential bride or groom. Looking at the narratives about some of the "brides" posted on the site, I saw bios written by parents and siblings. There are also private matrimonial bureaus that provide tech-savvy services to parents seeking a spouse for an adult child. These services will do the profiling and searching for the family and some are run by the web sites to cater to the older arrangement-prone parents who are less skilled in the online media. See Meghana Biwalker, Online Matrimony: A Big Business in India, October 5, 2006, Refiff India Abroad. http://www.rediff.com/money/2006/oct/05spec1.htm

In an article for the New York Times, Farahad Zama reflects on his own arranged marriage and states,

> *"How could you marry somebody you did not know?" is a common question that many people have asked us in the West.*
>
> *The slow discovery of another person and the unraveling of layers of mystery are part of the fun of arranged marriage. This has to be true of all marriages — the husband of five years is not the caring bridegroom, and the mother of a cranky 2-year-old is not the ecstatic bride.*

Farahad Zama, "Modern Love, First Comes Marriage, New York Times, June 5, 2009. http://www.nytimes.com/2009/06/07/fashion/07love.html

In my own experience as a divorce attorney, I am aware that the divorce rate of 50% is debatable, but not by much. In her article inspired by her parents' marriage, Ms. Gagoomal cites studies, anecdotes, and popular culture portrayals of nonfiction love in the arranged-marriage context. She observes the repeating theme that in a Western marriage, the couple falls in love, gets married, and begins a downhill process that would seem reflexive of our high rate of divorce. However, she states that in an arranged marriage, the couple experiences the wedded love dependent on respect and compromise that they began preparing for in nursery rhymes sung as children. Gagoomal, 97 GEOLJ 589, 608-611.

While as a divorce attorney focusing on the area of domestic violence, I am all too aware that many marriages are entered into or sustained based on terms that are not freely negotiated. This article is not about those marriages. As the mother of a disabled child, I want nothing more than to see my own son happily married. For the most part I don't allow myself to indulge that fantasy, because he is severely disabled. For all I know, he will not have the legal ability to marry due to his challenges, and my fantasy feels like a betrayal. But my research makes me smile knowing that somewhere a mother just like me in India with a son just like mine is finding him a nice girl.

Tracy Reid practices in the areas of family and employment law. She can be reached at tracyreid@gmail.com.

Closure Therapy: Redefining Co-Parenting Relationships in the Context of Changing Gender Roles

Karen Irvin, Ph.D and Judy Sherwood, MA, MBA

INTRODUCTION

The authors of this article have a combined 40 years of experience as Licensed Marriage and Family Therapists providing therapy, mediation, parenting consulting and custody evaluations. Since beginning professional practice early in 1976, there have been numerous opportunities to observe shifts in relationship dynamics as well as in services provided to parents experiencing separation and divorce. The authors will refer to fathers and mothers in the context of traditional and changing gender roles. The authors also work with gay, lesbian and transgendered parents, who experience similar relationship difficulties that may present differently due to an individual's gender identity and sexual orientation. Finally, the authors also work with couples who do not have children and acknowledge that Closure Therapy may also benefit these couples. However, it seems that one of the primary motivators for achieving closure to a relationship is the benefit to the children who are negatively impacted by a conflicted relationship between their parents.

GENDER ROLE SHIFTS –

A. Demographics of separating families – Emery (1994, p. 195) predicts that approximately two-thirds of today's marriages are likely to end in divorce. This statistic has been stable since the 1980's and is influenced by variables of race, children's age and length of marriage. One can speculate that there are also a number of cultural and gender role shifts that are related to this high incidence of divorce. For example, women have become more fully employed outside the home, giving them more financial independence than they would have experienced if they had no income. It would appear that women have also pursued higher education more often in the past 40 years than they did prior to that time. There has also been a cultural shift to individualism—a generation that considers individual wants and needs above the needs of a relationship, a partner or a family. These factors, along with numerous others, have led to divorce becoming more commonplace and more socially acceptable. It can also be speculated that divorce itself contributes to the necessity of cultural and gender role shifts. Women/mothers may find themselves needing to pursue higher education and employment outside of home to support themselves and their family once they no longer rely on a husband for financial needs. Men/fathers find that the parenting that they once took for granted by virtue of proximity to their children must now be structured.

B. Rise in non-marital childbearing – Today, 40% of children are born to parents who aren't married, and in some counties in Minnesota there are more never married parents separating than divorcing parents. In many instances, these parents have never been "couples," there is no "relationship," and every aspect of parenting requires negotiation. There simply are no assumptions that either can make about the other—as a person, or as a parent.

B. Employment – With full employment of both parents, it is more difficult to manage the logistics of child care, particularly after parents separate. For example, is the daycare located near the mother's or father's place of work or a location in between? It might have fallen by default to most mothers to research day care and select an appropriate setting for the children. It is possible that this would have been done in consultation with the father, or that the mother simply informed the father of her search and decision, and he would have been satisfied that "due diligence" had occurred, trusting that the mother would make a good choice. When both parents are employed and separated, this may be an area to be negotiated taking into account the changing responsibilities that each parent may have.

Employment of both parents also raises questions about who cares for children or takes them to the doctor when they are ill or do not have school or day care available. It may be a challenge for either parent to leave work or miss work on short notice, and a source of conflict might emerge around whose job or work is more important on any given day, or overall.

C. Primary caregivers – In Minnesota, one of the thirteen statutory criteria in determining the best interests of children in custody matters is that of who has been the primary caregiver (Minnesota Statutes § 518.17, Subd. 1 (3)). Based on observations of many parents in our clinical setting, it seems common that mothers have continued to assume the majority of the child rearing responsibilities when parents live together, particularly for very young children. However, it is clear that fathers are becoming more involved at earlier ages of their children. Given their earlier involvement, it is also more common for fathers to identify with a nurturing role and appreciate the bond that they are able to form with very young children.

At the time of separation, if the mother has been the primary caregiver, she often assumes that she will continue in this role. Fathers who want to maintain or strengthen their relationship with their children are challenged by their former partners for having less than honorable motives (eg, mothers may feel that fathers' motivation may be to reduce child support payments by having more time with the children.) Although mothers may be weary from employment, managing multiple children and keeping a household running, they may have difficulty allowing fathers to relieve them. Some mothers also seem to have concerns that fathers will not be able to manage the day-to-day responsibilities of caring for children and keeping them safe. They see the fathers as effectively playing with the children, but they complain that the children are returned exhausted and without laundry or homework being done. The mothers in these circumstances can become very "territorial" about their role as primary caregiver. Fathers become very frustrated that their efforts to establish or maintain strong attachments seem to be thwarted. Both parents in these circumstances may look to the courts in an effort to find a legal solution to a systemic or relationship problem.

D. Child support – The Minnesota Legislature used a child support guideline for many years that determined child support based on the obligor's income and number of children. Since mothers often had primary physical custody, it was typically fathers who paid child support to mothers. In the past few years, the guidelines have shifted to include incomes of both parents as well as the amount of time children spend with each parent (Minnesota Statutes Chapter 518A). The impetus for this shift and the fairness of it may be topics for debate. However, it does seem, at least in part, to recognize the fact that both parents are wage earners and that fathers are spending more time with their

children than was typical years ago. Again, it could be argued that this shift can be both a result and cause of changing gender roles. If there is a financial benefit for the parents to spend more time with their children, this could contribute to an increase in father's interest and ability to care for the children where traditionally day- to-day care was assumed to be a mother's role. Likewise, mothers may have both a need and the time to invest in their education and employment.

E. Relocation – Another shift that has occurred in Minnesota legislation addresses changes in thinking about parents relocating out of state with minor children. Prior to the Best Interest Standard for Relocation (Minnesota Statutes § 518.175), it was assumed that if the primary custodial parent (usually the mother) requested a move, to deny that move with the children would constitute a change of custody. Given that there were and are separate and distinct criteria for a change of custody, it was the norm that children would be allowed to move out of state if mothers requested relocation. There are now Best Interest Standards that place the onus on the parent requesting relocation to meet the standard (except in cases of domestic abuse, in which case the burden falls on the abusive parent to make the case against the relocation).

F. Domestic violence – There appears to be a shift occurring in thinking about domestic violence as it occurs in intimate partner relationships. Until the last five years, most of the research that had been done regarding domestic violence had used women who were in shelters as subjects of the research. Thus, the primary form of violence was presented as male perpetrated and coercive and controlling in nature. This thinking is reflected in the definition of Domestic Abuse found in Minnesota's Domestic Abuse Act (518B.01). More recent research (Kelly and Johnson, 2008) points to the likelihood that there are many different forms of intimate partner violence. For example, "situational couple violence" may occur in relationships in which conflict is not managed well and periodically escalates into violence. Neither partner is intending to control the other, and there are seldom weapons involved or injuries incurred. To the extent that we have data on situational couple violence, it appears that it is equally initiated by men and women. It also appears that individuals who participate in this form of violence take responsibility for their actions, are embarrassed that they lost control, and that they are not violent in other relationships.

CLOSURE THERAPY – Closure can be defined as, "resolution, finality, conclusion, an end…" (Webster Student Dictionary). Although parents end their legal relationship through a judgment and decree, they are sometimes challenged to end or reach resolution to the emotional bond that they shared. Any of the gender role shifts described above might contribute to ongoing struggles in redefining their relationship. It is likely that they have said and done hurtful things in the context of the relationship and as they separated. It is also quite common that they experienced other "psychic wounds" in their individual histories, as well as the possibility that they have a minor or major mental health diagnosis.

In the view of these authors, closure therapy is a process where the parties can disengage emotionally and focus on moving forward with their lives. It is viewed as brief and time limited, with 4-6 sessions of 1 ½ to 2 hours each. It is likely to be viewed as a somewhat painful process for clients, as they are asked to recall, journal and discuss with their counselor the hurt feelings and anger that were or are part of the relationship with the other parent. However, closure therapy also

gives clients the opportunity to recognize the strengths and good qualities of the former partner and to express appreciation and gratitude for those positive qualities, particularly as they relate to parenting.

A key component of closure therapy is that of forgiveness. Clients are given assigned reading relative to forgiveness. A great deal of the focus is on forgiving oneself for thoughts and acts that might have contributed to the demise of the relationship. Time is also spent on embarking upon a path of forgiving the partner. Clearly, clients who will benefit most from this process are those who are willing to assume responsibility for their role in the failure of the relationship and those who are motivated to create a different dynamic with their co-parent.

Closure therapy provides tools for clients to move forward as parents. For example, time is spent on communication strategies. Clients are given opportunities to learn and practice "active listening" techniques. They may be coached in email communication. They are also given steps to follow to resolve problems rather than escalate them to the point of anger and resentment. This may be a time when parents can discuss their expectations for themselves and for their former partner. These expectations may be a result of changing views of the roles they will assume as single parents.

The last phase of closure therapy involves clients creating a ritual to acknowledge the work they have done to redefine their relationship. Clients are encouraged to have friends and family members participate in this ritual. It seems that during separation and divorce, well-meaning friends and family members feel the need to "take sides." Almost by definition, at least with some individuals and couples, if friends or family members attempt to remain neutral, they are viewed as having betrayed one of the parties. They may take sides in order to demonstrate support of one party, and they may inadvertently contribute to demonizing the other parent in their efforts to be supportive. Family members may place pressure on one or both of the parents to assume more traditional roles in the parenting based on gender. If parents attempt to repair their relationship with each other, it is essential that they allow their support network to be aware of their intentions and learn new ways of being supportive.

If the parties are successful in beginning the transition from conflicted to cooperative parents, they are encouraged to apply their energies to creating a "mission statement" that helps them focus on their children's restructured family. That mission statement will look forward to the contributions that both parents and both households can make toward the positive growth and development of each child.

The authors of this article have used this protocol for closure therapy for approximately two years, so it is a relatively new process. We have only preliminary experiential data on which to base opinions at this point. It is difficult to determine in advance the factors that lend themselves best to success in the process. However, the one variable that all couples had in common was a strong desire to conclude the negative relationship that defined them and replace it with a cooperative, respectful approach to each other. We are determined to track couples who complete closure therapy using this protocol and, in the future, be able to provide guidance as to variables that lend themselves to a successful conclusion.

Case Example – One of the best ways to understand a process is to apply it to "real life." Following is an example of two parents who entered closure therapy and their experiences in the process. This example recognizes not only the process but the

contributions that gender roles played in their relationship and in their resolutions. Names of clients have been changed and identifying information altered to protect the confidentiality of the clients.

Background – Marc, a successful business owner (age 43, never married, no children), and Jill, a financial planner (age 34, divorced with one son age 8) met through their work and had a whirlwind romance: trips, entertaining friends, enjoying each other's company. They were together for approximately two years when Jill became pregnant--a surprise to both, albeit a pleasant one. Jill and her 8 year-old son moved into Marc's house before their son Michael was born. Focusing on the excitement of parenthood brought joy and high expectations to their relationship.

Circumstances changed; they had frequent, volatile arguments. Jill and the two children moved into an apartment. Marc and Jill signed a Recognition of Parentage and filed with the Court for joint legal and joint physical custody of Michael. A custody evaluator was appointed and began her work. The couple had become increasingly hostile towards each other.

Near the end of the process, the custody evaluator advised the couple that recommendations would not be made, and the final report would not be released until they completed the Closure Therapy process.

Closure Therapy – Jill and Marc scheduled 6 sessions and came to the initial meeting with high expectations that the process and therapist would somehow magically "fix" their broken relationship. They were informed that the process is hard work and will bring back memories: happy times, struggles, hurt feelings, joy, sorrow and a sense of grief and loss.

In the second joint session, Marc's expectations were expressed: he thought he would "go through" the process, and at the end be awarded joint legal and joint physical custody.

Marc was advised that a custody designation was not a goal of Closure Therapy; he exploded and stormed out of the session. Jill was in tears.

The next morning, Marc was waiting for the therapist at her office before the doors were unlocked. He wore rumpled clothing, was unshaven, and had dark circles under his eyes. He asked to speak privately with the therapist and began with an apology for his outburst. He'd spent the night struggling with his powerful need to be an important part of his son's life and felt that Jill was "standing in the way" of his parenting relationship. He was angry with her and felt betrayed. He expected that she would stay at home, care for their son and be a traditional home maker until Michael started school. Jill's expectations were different: she intended to return to her career and believed Marc would equally share child care duties.

They began reading the assigned books and writing in their journals. Marc took the process to heart and made a commitment to do the work.

Individual sessions were scheduled for each of them to work through their

dreams, goals and expectations. They had not communicated with each other about these matters, setting the stage for disappointment, anger, frustration and hurt feelings.

At the fifth session, a joint meeting, they shared what they learned about themselves, each other, and their relationship: resentments, unmet needs, unexpressed wishes, lack of understanding and empathy, loss of their dreams. Marc communicated the assumptions he had held when Jill was first pregnant. He also communicated that he had accepted her desire to return to her career and her desire for him to contribute equally to the parenting of Michael. He explained that he was confused and resentful that now that he was attempting to play an equal role in Michael's life, Jill was not allowing it to occur by fighting for full custody. Jill also communicated that she had long ago given up on Marc's commitment and ability to parent Michael and felt Marc only wished to have joint custody to hurt her. Jill expressed fears that Marc would not be capable of taking care of all of Michael's needs. Both shed tears and offered forgiveness.

Finally, at their sixth session, Jill and Marc created an uncoupling ceremony to celebrate their forgiveness, redefine their co-parenting relationship, and express gratitude to each other for their beautiful son. Marc brought a bottle of champagne and two flutes, a gift and card for Jill -- from Michael when he's grown – thanking her for being such a great mom. Jill brought a candle and photos of their good times together and of their son with both parents.

They lit the candle, made a toast, and shared promises to each other:

- They will "make it work"
- Keep Michael safe, feed him well
- Never speak negatively of each other
- Work together as parents
- Fulfill financial obligations
- Be flexible in exchanging parenting time
- Be supportive of each other
- Never undermine each other
- Be good, loving parents.

Both parties were able to summarize the important messages they took with them from the closure therapy process:

Marc: Forgiveness is always the right thing to do.

Jill: You will find, as you look back upon your life, that the moments that stand out are the moments when you have done things for others. (Henry Drummond, page 92, The Power of Forgiving)

SUMMARY – There is ample evidence that gender roles have made significant shifts in the past several years. These shifts, and the ensuing confusion about who "should" do what, can lead to or exacerbate conflict in couple relationships, particularly as it relates to parenting. This conflict becomes even more complex if the couple separates and must again re-define their roles and responsibilities in the context of a legal arena. Closure therapy is one resource for couples, particularly those with minor children, to explore their relationship and redefine it.

It has been the experience of these authors that family law attorneys who represent

clients in closure therapy can contribute to the success of the process in a number of ways. First, it is helpful if the attorney expresses empathy for the individual client's experience (of the relationship, of the separation, of parenting, of changing roles and responsibilities) while recognizing that there are quite likely divergent perceptions for the client's partner. It seems that it is possible to advocate for one's client without "demonizing" the other parent. Second, it is helpful if the attorney can be a voice of reason and present the possible ramifications of protracted litigation. One does not require a degree in family social science to know that the family and parenting dynamics will be permanently impacted if the parties maintain a high level of conflict. The conflict will prevent parties from exploring and expanding roles as parents and recognizing their potential in those roles. Third, help the parties recognize the positive benefit to children of having the parents be able to focus their relationship on parenting. Finally, help parties recognize the cost savings—financial, emotional, psychological—of being able to stop rehashing the past and start reshaping the future.

References:

Henry Drummond. (n.d.). BrainyQuote.com. Retrieved April 30, 2010, from BrainyQuote.com Web site: http://www.brainyquote.com/quotes/quotes/h/henrydrumm100712.html

Emery, Robert. (1994) *Renegotiating family relationships: Divorce, child custody, and mediation*. New York: The Guilford Press.

Kelly, J. and Johnson, M. (2008) Differentiation among types of intimate partner violence: Research update and implications for interventions. *Family Court Review, Vol 46, No. 3, pp 476-499.*

Karen Irvin received her bachelor's degree from Ball State University, majoring in secondary education. After teaching at the secondary level for six years, she obtained her master's and doctorate in Family Social Science from the University of Minnesota. She worked with Hennepin County Court Services Domestic Relations Division in Minneapolis, MN for six years, serving as a mediator, counselor and custody evaluator, and working in a supervisory capacity for four of the six years. Dr. Irvin has been in private practice as the owner and director of Minnesota Mediation & Counseling Center since 1981. She specializes in working with separating and divorcing individuals, couples and families, providing mediation, parenting consulting, and custody evaluations. She has also provided mediation and parenting consulting workshops and training throughout the United States and internationally. Dr. Irvin was on the marriage and family therapy faculty of Argosy University for six years, with a teaching emphasis in ethics, human sexuality and mediation. She is currently adjunct faculty for William Mitchell Law School and St. Mary's University. Dr. Irvin has authored and co-authored articles related to her areas of expertise. Dr. Irvin is approved as a supervisor by the Board of Marriage and Family Therapy in Minnesota and is also an American Association for Marriage and Family Therapy Approved Supervisor.

Judy Sherwood, MA, MBA, is a family and divorce mediator, parenting time expeditor, parenting consultant/coach and custody evaluator. She is also trained and has experience in providing early neutral evaluations. She has a Masters' degree in marriage and family therapy, mediation training from Hamline University School of Law and certified arbitration training at Minnesota Continuing Legal Education. In addition, Judy has a Masters' of Business Administration, having held senior management positions in training/development, communications and marketing.

The Perfect Storm[1]: Homemaking and Hurricane Katrina[2]

Elise (Elizabeth) F. Buie

Sometimes the decision to step away from the full-time practice of law is part of a grand scheme, well thought out and orchestrated, and other times, it hits unexpectedly with the same force and life-changing impact that Hurricane Katrina had upon New Orleans. A new baby, a live-in grandmother with Alzheimer's and a mother disabled by a series of massive strokes collided together creating "The Perfect Storm" convincing this New Orleans' native to "briefly" retire from the legal profession. The real "Perfect Storm," Hurricane Katrina, would forever change the landscape of this author's life. Little did I know when I retired in 1998 that I would be looking for legal work twelve years later in the midst of an economic downturn in the Land of 10,000 Lakes.

The initial retirement, though not part of a well-orchestrated plan, seemed to go off without a hitch. The family grew from two children to four children over the next couple of years. The caretaking duties involving the older generations were being handled with ease and aplomb, well, for the most part. Homeschooling four children (New Orleans' public schools were not known for their stellar educational results), serving on various non-profit boards and caring for the older generations kept this Southern girl quite busy in "The Big Easy" yet wonderfully fulfilled. The storm brewing on the horizon came out of nowhere leaving mass chaos in its geographic path and in the paths of those impacted by it.

New Orleans' natives were always on guard for "The Big One," the "Hurricane Betsy"[3] of the future. Hurricane Katrina did not seem to be it as it headed for the panhandle of Florida in August 2005. Katrina's last minute turn to the west caught New Orleans off guard in many ways. Obviously, entire books have now been written on the subject[4] and much litigation is making its way through the courts in an attempt to place blame somewhere.[5] But, back in New Orleans, the summer of 2005 was like any other; swelteringly hot and humid with a multitude of hurricanes traveling off of the African coast headed to parts unknown. Plans were in place for me to return to part-time work for financial reasons. That part-time employment, however, never materialized. Instead, Hurricane Katrina slammed into South Louisiana devastating New Orleans and forced the evacuation of our family to the in-laws' home in South Georgia. When we hastily awoke our children at 4:00 a.m. to flee the only home they had ever known, not one of us appreciated the fact that we would never sleep in those beds, in those rooms, again. So, what started as a "brief retirement" to care for young children and ailing relatives in Louisiana morphed unexpectedly into an immediate evacuation, an unplanned move across the country and unemployment spanning more than a decade. The effects of Hurricane Katrina, beyond wind, rain and flooding, are still felt daily, almost five years later, here in Minnesota.

Almost everyone I meet asks "how did your family choose to move to Minnesota?" The answer is embarrassingly simple; good public

schools, four seasons (we were unaware of road construction at the time) and a progressive community with a variety of opportunities. Our first two years as Minnesotans were spent assimilating ourselves into our new environment which included enjoying many of the novel opportunities available; traveling ski clubs, knitting, canoeing, kayaking and competitive swimming.[6] We also used our first two years in Minnesota to recover from the deep emotional scars of suddenly losing our home, our friends and our extensive support network. Once our family was settled and healed[7], this attorney-turned-homeschooling-mom registered the kids in the superior public school system in preparation to re-enter the legal profession. After a decade of homemaking, caretaking, homeschooling and emotional rebuilding, it was now time to on-ramp, time to re-enter the legal profession with the hopes of contributing both to the Minnesota legal community and the Buie bank account.

On-ramping has been much more complicated than I ever imagined. Though my resume contains many of the desired qualities sought after by employers such as superior academic credentials - Law Review, National Moot Court, and Best Orator on the National Moot Court Team – and several years of hands on experience - a two-year Federal Judicial Clerkship and two years as a litigation associate in a mid-sized insurance defense firm - securing legal employment has been both slow and frustrating. The combination of limited contacts, prolonged time away from the law, the misconception about Louisiana's "Civil Code"[8] and the sluggish economy makes finding meaningful, legal employment seemingly impossible at times. Though I have not secured the perfect legal position as of this writing,[9] Hurricane Katrina has taught me a few things about on-ramping after an extended absence from the law.

I do not have the space to share all that I have learned from Hurricane Katrina and its aftermath but I will attempt to share the salient points as they relate to reentry after an extended absence from the legal profession. As I write this article, I await news of several potential positions and continue to interview in hopes of finding a great re-entry position. Finding fulfilling legal employment is not guaranteed. What is guaranteed, however, is my positive attitude. The lessons I learn from each encounter are quite valuable. Interviews are an excellent opportunity to make additional legal contacts which, as everyone knows, is the key to employment. Research suggests that most jobs are found through those personal contacts. Indeed, "your network is your million-dollar Rolodex."[10] Each interview also teaches me something more about myself and my vision for practicing law. The better I know myself, my strengths and weaknesses, the better I become at targeting the positions that are best-suited for my skills and personality.

In 1998 when I "retired," much less was written on the topic of on/off ramping and work/life balance than is currently.[11] Though alternative schedules and family-friendly policies were in place, many attorneys "were reluctant to take advantage of those policies because they feared professional repercussions and that they would be perceived as less seriously committed to the profession than their full-time counterparts."[12] Indeed, I attempted to create such a policy in my firm. The partnership agreed to modify my schedule so that I could arrive at 4:00 a.m. daily and leave at 4:00 p.m. to spend the early evenings with my young children. I did my part - arriving at 4:00 a.m. on a daily basis - but I was often at the office long past 4:00 p.m. and on the days that I did make it out according timely, I somehow managed to feel guilty. "According to the 2006 ABA commission report, the work/life equation is

quickly sprouting new complexity, with the emergence of the 'sandwich generation,' which has an increasing number of women lawyers shouldering the burden of caring for children and aging parents while trying to 'sandwich' time for a legal career between those responsibilities."[13] During my "sandwich" time and before the unexpected life-lessons offered by the storm, I made certain unintentional career errors that are now easily avoidable; pack two swimsuits and know that beans can be cooked in limitless ways.

When Evacuating, Pack Two Swimsuits

My mom always said "pack a swimsuit when you travel even if you don't expect to swim." So, when faced with packing my kids' clothes in advance of evacuating, I dutifully packed a swim suit for each of them. My in-laws live out in the country in South Georgia; no malls, no organized activities, no pizza delivery, no neighborhood friends, no parks. So, we spent our time homeschooling, watching news of New Orleans and swimming in their beautiful pool over the next couple of months. Our suits were threadbare within a couple of weeks from daily use. It turns out, Mom, one swimsuit is just not enough. Two swimsuits are essential to any successful evacuation.

Similarly, on-ramping is much easier if certain conditions are met. First, maintain an active law license if at all possible during your tenure as an "at-home" parent. Maintaining an active license not only allows for reentry into paid legal employment - assuming someone is hiring - it allows you to take advantage of many legal opportunities while enjoying a career detour. Next, do not limit yourself by identifying as either a stay-at-home parent or as an attorney. Both identities are possible, practical, necessary and, likely, more reflective of the reality. Indeed, both identities are critical if you intend to successfully and quickly on-ramp in the future. While waiting to land the perfect reentry position, go ahead and practice law. There are so many worthwhile pro bono activities that any attorney, experienced or not, can get involved in. Since obtaining my Minnesota license in October, 2009, I have volunteered with the Anoka Public Defender's Office, The Guardian ad Litem Program, The Children's Law Center of Minnesota, The Safety Project, The Immigrant Law Center of Minnesota and The Volunteer Lawyers Network. Through these organizations, I have been able to attend many CLE's either free of charge or at a much reduced rate thereby improving my legal knowledge, skills and marketability. Each pro bono activity and CLE provides the opportunity to make additional contacts which will eventually amount to a new legal support network that I will look to for advice and mentoring as I continue to develop professionally as a new Minnesota attorney. In addition to my selfish motives for doing pro bono work, it feeds my soul and enhances my intellect as I learn new areas of the law, brush up on old skills and help regular people with their legal problems.

Someone who understood that these two identities, parent and attorney, were both critical to her success and, in fact, bound together as part of her whole was Justice Sandra Day O'Connor. Justice O'Connor, a wife and mother of three sons, combined a successful legal career with a fulfilling personal life long before such a course was feasible or acceptable. In fact, Justice O'Connor took several lengthy breaks from the practice of law and even worked part-time for several years.[14] Despite the untraditional trajectory of her legal career, we all know how that career turned out: she became the first woman appointed to the United States Supreme Court.

Beans and Rice Can be Cooked in Unlimited Ways

After a few weeks of sleeping on air mattresses and watching the devastation in New Orleans from afar, it became obvious to us that our evacuation was probably more of a move than an evacuation. We realized quickly that conserving money was going to be critical to our success in navigating through the unknown. Our family coined the phrase "evacuation budget." The first budget item to slash was groceries. The easiest way to save was to limit meat purchases and replace them with beans and lentils. We were quite familiar with Red Beans and Rice as most New Orleans' natives eat Red Beans and Rice (with heaping amounts of sausage) every Monday; it is the staple special on every Monday lunch menu in downtown New Orleans. What we did not know, however, was just how many ways beans can be prepared and the vast variety of beans available.[15] Beans are amazingly versatile, nutritious and quite inexpensive.

Just as I did not know beans can be prepared in so many tasty ways, I was similarly unaware of the limitless opportunities to stay involved in the law while "retired" and the importance of doing so. Keeping your foot in the door will provide for a smooth re-entry when the time is right (or when a natural disaster strikes). Stay active in the law while enjoying your time away from the law. The following is a non-exclusive list of ideas on staying active in the legal profession while enjoying on off-ramp career detour:

1. Write a legal book.
2. Become an adjunct legal professor.
3. Get involved with a non-profit board and serve as their counsel.
4. Write legal articles for Bar Association publications.
5. Volunteer to be a Guardian ad Litem.
6. Begin a part-time practice from home.
7. Stay abreast of legal developments weekly.
8. Become involved in the Bar Association by joining or leading a committee.
9. Attend CLE's beyond what is required to maintain your license.
10. Find Pro Bono projects that interest you and volunteer.
11. Subscribe to legal publications to stay abreast of legal developments.
12. Identify legal technological advancements and master those advancements.
13. Start a legal blog.
14. Sign up for listservs to follow a particular area of law.
15. Network, network, network, network, network, network.
16. Consider doing some minimal contract work with past employer.
17. Contact local law schools and volunteer your time to work with clinics.
18. Offer to write an article on an unfamiliar but interesting area of the law for a law review and/or bar association publication.
19. Serve as a Mock Trial coach for a local high school.
20. Conduct seminars of interest to other stay-at-home parents on hot legal topics.

Don't Be Scared of the Storm, Just be Prepared for It

One of the most contested questions of the feminist movement of the 70's and 80's is "can mothers who opt out of work opt back in when they want to go back."[16] In my humble opinion based on my own experience, the answer to that question is yes but only with unabashed tenacity, boldness, creativity and perseverance. "Life is either a daring

adventure or nothing," Helen Keller so wisely told us. The same is true of the practice of law. The decision rests solely with each individual lawyer but knowing the available options is necessary to making the correct decisions. Off-ramping might allow you to enjoy some of the most meaningful relationships of your life. There is no value that can be placed on developing and understanding yourself. Creating genuine relationships with your children that can weather the storms of adolescence and young adulthood is similarly priceless. But, these relationships will not pay the mortgage nor put food on the table. Do not let the fear of finding employment, however, keep you from off-ramping but do let that fear guide you in making wise decisions about your transition; maintain your legal license, keep one foot in the legal profession by staying active in the law through Pro Bono work, CLE's, Networking, Bar Association membership, blogging, etc. Don't let life's storms catch you off-guard. Instead, know that everyone will suffer their own personal "storm of the century"[17] at some point. Preparation and attitude will be the deciding factors between those who falter because of their storm and those who choose to use their storm as a stepping stone to a better life.

————————

Notes

[1] Sebastian Junger, *The Perfect Storm* (1997).

[2] "Hurricane Katrina was the most catastrophic natural disaster in our nation's history." US Department of Homeland Security, FEMA. See Douglas Brinkley, *The Great Deluge, Hurricane Katrina, New Orleans and the Mississippi Gulf Coast* (2007).

[3] Hurricane Betsy was a Category 4 storm that devastated New Orleans in 1965. It is coined "Billion Dollar Betsy" as it was the first billion dollar storm.

[4] Some of my favorite Hurricane Katrina books: See Jed Horne, *Breach of Faith, Hurricane Katrina and the Near Death of a Great American City* (2008), see also Chris Rose, *1 Dead in Attic: After Katrina* (2007), see also Michael Eric Dyson, *Come Hell or High Water: Hurricane Katrina and the Color of Disaster* (2007).

[5] Judge Stanwood R. Duval's decision, 2:05-cv-04182-SRD-JCW, Document 19415, Filed 11/18/09, *In Re Katrina Canal Breaches Consolidated Litigation* (Interestingly, I served as one of Judge Duval's first clerks from 1994-1996 when he was appointed to the Federal Bench in 1994).

[6] I currently serve as President of the Board of Directors of a 501c(3), USA Swim Team, the North Suburban Aquatic Club, NSAC, which serves the North Metro area.

[7] Survivors of Hurricane Katrina will likely have life-long residual effects from the sudden impact that the storm had on every aspect of their lives. See Douglas Brinkley, *The Great Deluge, Hurricane Katrina, New Orleans and the Mississippi Gulf Coast* (2007).

[8] Louisiana law is based on Roman Law, specifically, Justinian's Code. Justinian's Code was a result of Emperor Justinian's desire to codify all of the existing Roman Law in a clear code. It is also based on French and Spanish law as opposed to English Common Law.

[9] While I studied for the MN Bar Exam, I began substituting at NE Metro 916, an Intermediate School District which responds to the unique needs of special education students with innovation, quality, and trusted experience. I have continued working with NE Metro 916 in addition to doing a variety of volunteering with the Anoka Public Defender's Office, The Safety Project, The 2d Judicial District Guardian ad Litem Office, The Children's Law Center and The Immigrant Law Center.

[10] See M. Diane Vogt, *Preparing for Reentry* 84 (2009).

[11] See Emma Gibley Keller, *The Comeback, Seven Stories of Women Who Went from Career to Family and Back Again* (2008); see also Sylvia Ann Hewlett, *Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success* (2007).

[12] American Bar Association, Commission on Women in the Profession, *Charting our Progress: The Status of Women in the Profession Today*

(2006), www.abanet.org/women/ChartingOurProgress.pdf

[13] Julie Tower-Pierce, *Staying at Home, Staying in the Law* 12 (2008).

[14] See Ann Carey McFeaters, *Sandra Day O'Connor: Justice in the Balance* (2006).

[15] See Andrea Chesman, *366 Delicious Ways to Cook Rice, Beans and Grains* (1998). Though we did not resort to road kill, we found this cookbook while living in South Georgia, see Buck Peterson and J. Angus Mclean, *The Original Road Kill Cookbook* (1987). We sure did get a lot of laughs if not cooking ideas.

[16] Julie Tower-Pierce, *Staying at Home, Staying in the Law* (quoting Eve Conant, *Trying to Opt Back In,* Newsweek, May 28, 2007).

[17] Life events such as job loss, divorce and death can cause similar psychological effects to those caused by Hurricane Katrina. See Martin E. P. Seligman, *Authentic Happiness* (2004) for insight into psychology and the practice of law.

Elise F. Buie earned her Juris Doctorate in 1994 from Loyola School of Law, New Orleans, LA and was admitted to the Louisiana Bar in1994 and the Minnesota Bar in 2009. She is a member of the Minnesota State Bar Association – Children and the Law, Family Law, Criminal Law Sections, the Ramsey County Bar Association, Youth and the Law, Judicial Ride-Along with Judge Ostby, a member of the Hennepin County Bar Association and the Minnesota Women Lawyers, Professional Parents Committee. She is presently a volunteer attorney in the Anoka County Defender's Office, and the Immigrant Law Center of Minnesota. She also is a Guardian ad Litem in Ramsey County and a volunteer at the Children's Law Center. She can be reached at elisebuie@gmail.com.

The Way We Were: A Retrospective of Family Law and the Issue of Domestic Violence

Judge Mary Lou Klas

When Chief Justice Douglas Amdahl called, in 1988, to appoint me to a fourteen-member committee to monitor recommendations of the Task Force on Gender Fairness in the Courts, I was honored, excited and hopeful:

> Honored and excited because I recognized the hard work in which the Task Force had engaged to ferret out the existence of gender bias in Minnesota courts – hearings throughout the state, surveys to judges and lawyers, consultation with experts of every stripe.
>
> Hopeful because I was confident that with the Supreme Court's help the recommendations of this august body would not sit, moldering, on a shelf.

When the Implementation Committee met for the first time in the spring of 1989 to receive the 94 *draft* recommendations of the Task Force, we agreed to take the material home and, each according to his/her own "lights," rank the recommendations, When we reconvened, I was amazed to find that the family law and domestic violence recommendations were at the top of *everyone's list*.

Now, twenty years later, reflecting on those 94 recommendations, I can report that they did not, indeed, "molder." There is good news and bad news – no surprise.

Good news:

> The term "rehabilitative maintenance" disappeared from the lexicon; permanent maintenance amounts more closely meet an approximation of the dependent spouse's need.
>
> The revised child support laws attempted to reduce the disparity between parents' households; they now include costs for child care, health insurance and post secondary education.
>
> Enforcement of child support orders has been enhanced and strengthened.
>
> Stereotypical assumptions about proper roles for women and men that disadvantage both fathers and mothers in custody determinations have, to a large extent, disappeared.
>
> Family law is now one of the subjects covered on the Minnesota Bar examination.

Not so good news:

> Many older women, still relying on spousal maintenance, can't afford a lawyer, have trouble with cost of living adjustment procedures, are often without recourse if the obligor retires or becomes unemployed.
>
> Deviations downward from the child support guidelines continue to be much more common than deviations upward; the guidelines themselves adversely

impact low income women and children. In addition, linking child support with time spent with each parent, together with the push toward *joint physical custody,* has led to lower awards to the economically disadvantaged parent.

Regarding access to the courts, the Task Force found that it is extremely difficult for poor people in Minnesota to obtain legal representation in family law matters; the inability to obtain counsel affects women more severely than men and the reluctance of judges to award reasonable temporary attorney's fees and costs prejudices the economically dependent spouse. Unfortunately, all of these findings are still valid.

As *mixed* as the above realities are, none impacts family court litigants as profoundly as the change in attitudes toward child custody.

In this respect, the Task Force Report Summary is *prescient*:

"These studies (gender issues studies in other states) showed that in a delicately balanced system of justice, relying heavily on judicial discretion, residual gender bias could circumvent the intent of law reform." (Report Summary, pp S1-S2.)

The Task Force made the following findings:

3. "Some judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases;

4. Fathers sometimes use the threat of joint custody to obtain an economic advantage over mothers;

5. Judges are sometimes too willing to order joint custody where there is no evidence that it is in the best interests of the children to do so," (Task Force report, p. 864)

The *custody* referred to was joint *legal* custody. Twenty years ago there was no premonition that in 2009 the single most pressing issue facing battered women in the courts is losing *legal and physical custody* of their children to their abuser!

The Task Force was legitimately concerned about what it found in custody negotiations and recommended that:

7. "Judicial education programs should examine the effects of joint custody orders.

8. Judges should use great caution in deciding to order joint custody; it should be imposed over the objections of one of the parties only where the court makes specific findings which identify the reasons why such an order is in the children's best interests." (Task Force Report pp. 864-5.)

The *effects of joint custody orders* are, indeed, a legitimate area of study. However, until recently, there has been little research upon which judicial education programs could rely.

Bills proposing enactment of a joint physical custody *presumption* have been before the Legislature for several sessions. Because of the importance of the issue, the 2008 Legislature directed the court administrator to convene a study group to "consider the impact that a presumption of joint physical

custody would have in Minnesota. The evaluation must consider the positive and negative impact of adopting this presumption, and the experience of other states that have adopted a presumption of joint physical custody. The study must consider data and information from academic and research professionals." (Minn. Laws 2008, Chapter 299.)

In its November 14, 2008 submission, the Domestic Abuse Committee of the MSBA Family Law Section submitted its answers to the two questions the Study Group proposed:

1. Should there be a change in Minnesota's custody laws to favor a presumption of joint physical custody?

Answer: "No. In order to serve the best interests of children, joint physical custody should be *reserved* for cases where the arrangement is in the best interests of the child and where both parents agree to it. The proposal will increase the number of families with joint physical custody. Such arrangements have long been known to be inimical to the interests of children in families where domestic violence has occurred. Minnesota's *legal custody* statute recognizes this reality. Because it would primarily be applied to contested cases, most of which involve domestic violence, child abuse or serious substance abuse, the proposal would result in more children from abusive homes being placed in harmful custodial arrangements."

2. What are the pros and cons of the state(sic) adopting a presumption of joint physical custody in law?

Answer: "A. A history of domestic violence is common in contested custody cases and therefore, the presumption will primarily be applied in domestic abuse cases. Our experience as family law practitioners shows that while many couples reach agreement through negotiation, assisted or otherwise, a large number of the cases which are highly conflicted (and which are, therefore, the more likely to be subject to the proposed presumption) are those which involve allegations of domestic or child abuse or maltreatment.

"Research on this issue is remarkably consistent and demonstrates that the majority of contested custody cases have a history of domestic violence. For example, in her seminal book about 'high conflict' divorce, Janet Johnson, one of the nation's leading researchers and writers on child custody, cited a study which found that among custody litigants referred to mediation, '(p)hysical aggression had occurred between 75% and 70% of the parents . . .even though the couples had been separated . . (for an average of 30-42 months).' Furthermore, '(i)n 35% of the first sample and 48% of the second, the violence)was denoted as *severe* and involved battering and threatening to use or using a weapon.' Janet R. Johnson, 'High-Conflict Divorce,' *The Future of Children*, Vol. 4, No. l, Spring 1994, 165-182."

(Author's note: the American Judges Foundation found "Nationally, abusive fathers are estimated to be more likely to seek sole custody than non-violent fathers and are successful about 70% of the time." Domestic Violence and the Court House: Understanding the Problem. . .Knowing the Victim, available at http://aja.ncsc.dni.us/domviol/page5.html.)

"B. Joint physical custody is not appropriate in most cases involving domestic violence. In fact, experts in the field agree generally that 'one size fits all' approaches to developing post-divorce parenting arrangements are

inappropriate and may be harmful to some families. Johnston, Kline and Tschann's longitudinal research on the subject shows that children who are court-ordered into joint custody in highly conflicted families and in those where there has been *domestic violence* are negatively affected and are likely to be more emotionally disturbed as a consequence. Johnston, M. Kline & J. Tschann (1989) 'Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access.' *American J. of Orthopsychiatry* 59(4) 576-592.

"C. A presumption will hand to parents who are perpetrators of domestic violence a very effective tool with which to continue their controlling and punishing behavior long after separation.

"D. Joint physical custody is not appropriate, even in non-violent families, unless the parents agree that the child will be able to thrive under those conditions.

"Judith Wallerstein, who is among the most respected psychologists doing *longitudinal* research on children of divorce, concludes "\'(c) hildren raised in joint custody arrangements that result from a court order in the wake of bitterly contested divorces seem to fare much worse than children raised in traditional sole custody families also torn by bitter fighting' <u>Second Chances: Men, Women and Children a Decade after Divorce,</u> Judith Wallerstein, Houghton Mifflin (1996) pp. 271-273.

"E. A presumptive joint custody law will increase litigation. "The experience in California, which moved *away* from presumptive joint physical custody after several years, demonstrated that post decree litigation had increased under operation of the presumption.

"F. A statutory exception for domestic violence cases will not suffice to keep those cases from being forced into joint custody arrangements. Increasingly, family law litigants are *pro se*. Unrepresented victims of domestic abuse will not understand that the presumption does not apply to their cases; they will stipulate to joint physical custody under pressure or threat of violence or loss of custody. Their abusers are more likely to have the financial ability to hire attorneys to litigate the issue. Under those circumstances, even though the arrangement will not be in their children's interests, victims will capitulate."

The Domestic Abuse Committee, backed by research and experience in other states, concluded there is ample evidence to show that children would be hurt by such a joint physical custody presumption. And the children who would be most hurt would be the children with parents who are physically or emotionally abusive.

The Study Group invited testimony from Mindy Mitnick, Ed.M., M.A., Licensed Psychologist. She said she "wanted to reaffirm the nation that one size does not fit all children of separated parents and make three major points:

1) The parents best suited for joint physical custody don't need a presumption.
2) Infants and toddlers are at risk in equal parenting time schedules.
3) Never married parents are generally not good candidates for joint physical custody." (Mitnick Presentation to Study Group 10/27/2008.)

The Study Group cited its frustration with the lack of data concerning Minnesota child custody outcomes and recommended that the Legislature fund the collection and integration of data over several years. In

addition, the Group recommended that "any changes" allow for "cooperative agreements between parties, provide for the ability for the court to consider the individual needs of children and families, the essential importance of the safety of children and parents, and making clear that current law provides no presumption for or against joint physical custody except in cases of domestic abuse, in which case there would be a rebuttable presumption against joint physical custody."

(Author's note: I leave to others the task of marshalling the reasons for supporting this legislation. My soon-to-be-fifty years of practicing law, with the last thirty or so involved keenly in the operation of Minnesota's family law, have convinced me that each family approaching the court is unique, endowed with its own virtues and vices. Therefore, stereotypes, presumptions and bias have no place in the court's handling of these cases.

The recommendations of the Task Force are as valid now as they were when written twenty years ago:

8. "Judges should use great caution in deciding to order joint custody; it should be imposed over the objections of one of the parties only where the court makes specific findings which identify the reasons why such an order is in the children's best interests."

The Study Group could not identify any reasons why such an order would be in the children's best interests and, obviously, neither do I.)

A graduate of The College of St. Catherine and William Mitchell College of Law, Mary Louise Klas served for fourteen years on the Ramsey County trial court bench. Since retirement, she formed ISAIAH's Domestic Violence Task Force which was one of the collaborating agencies to bring St. Paul's Blueprint for Safety to fruition. She has trained on family law and domestic violence issues in this country and abroad.

Changing Gender Roles in Family Law

David L. Ludescher

"What are the changing gender roles in family law?" presents three separate questions:

A) "What is family law?",
B) "What are its gender roles?", and
C) "How are the gender roles changing?".

What is Family Law?
This question does not present a simple answer. A "family" is not specifically defined by any Minnesota Statute.[1]

A review of the yellow pages reveals that family law lawyers practice in a wide variety of areas of the law including divorce/ dissolution of marriage (§ 518 et. seq.), child support (§ 518A et. seq.), domestic abuse (§ 518B et. seq.), paternity (§ 257 et. seq.), custody (§ 518, §256 and § 518D et. seq.), spousal maintenance/alimony (§ 518.552), and prenuptial agreements (§ 519 et. seq.). In these areas of law, different terms are used to describe "family law" relationships. Dissolution of marriage deals with dissolving the marital contract; child support and paternity deal with a parent/child relationship; adoption deals with a legal but not biological relationship. The domestic abuse statute has perhaps the broadest definition. That statute includes marital, biological, residential, romantic and sexual relationships as being familial relationships.[2] §517 et. seq. (marriage) has perhaps the oddest definition of what constitutes a personal relationship – a contract which requires licensure by the state.[3]

What are its Gender Roles?
Minn. Stat. § 517.01 is the only statute that specifies clear gender roles. One person must be a man and the other person a woman. Moreover, § 517.03, subd. 1(a)(4), specifically prohibits marriages between individuals of the same sex. § 517.03, subd. 1 (b), provides that marriages of same-gendered individuals which may be valid in other states are unenforceable in Minnesota.[4]

How are these Gender Roles Changing?
This question makes the most sense, considered in the context of the § 517 contract. Therefore, an analysis of possible § 517 changes is appropriate.

Same-gendered marriages are gaining greater acceptance by the public. Courts and legislatures in other states have already granted same-gendered couples the right to contract in marriage. The passage of same-gendered marriage in Minnesota seems likely. There has been a concerted effort in the legal profession to remove this remaining gender role. The Family Law section of Minnesota State Bar Association recently passed a resolution encouraging the Bar Association to urge the Legislature to permit same-gendered marriages.[5]

The extent that same-gendered marriages will affect the family law practice remains to be seen. Initially, I would expect little change. More marriages probably mean more divorces. However, same-gendered divorces will present additional challenges for the practitioner. Because federal law does not recognize same-gendered marriages, any practice touching upon federal law will need careful consideration in drafting.

Challenges for Practitioners

For example, regulations regarding mandated insurance coverage (COBRA) for married couples will not apply. Pension and retirement requirements offering protection to spouses (ERISA) may not apply. Federal employees and their same-gendered Minnesota spouses may need to be especially careful.

Marital Termination Agreements will need to consider the federal tax code and its implications. Treatment of spousal maintenance, daycare expenses and child support could present drafting challenges. As we all know from our practices, sometimes the lack of the marital status can work hardship on our clients; it can also provide a windfall. Competent lawyers on both sides will need to consider the collateral consequences of an inconsistent federal/state definition of marriage.[6]

Forward-looking same-gendered couples could overcome some of these difficulties by drafting antenuptial agreements to ease this problem. However, given the small percentage of antenuptial agreements between opposite-gendered couples, it is likely that most of our same-gendered couples will face their dissolution without an agreement.

Opportunities for Clients

Significant "marital opportunities" that already exist should be more apparent after the adoption of same-gendered marriages. The opportunity to be "married" and receive the benefits of the laws should cause all family law lawyers to look for ways to assist our clients.[7] Our clients should be made aware of the advantages and disadvantages of the civil "married" status.

Let's assume that Adam and Steve are attending a high-priced college. After talking to a financial aid office, they realize that their married counterparts have a distinct financial advantage. Adam and Steve go to their local family lawyer, who after researching the law and the college's policies, determines that Adam and Steve could get married. The attorney drafts an antenuptial agreement. The next year, thanks to their new marital status, Adam and Steve each receive substantially more financial aid. Thereupon, Adam and Steve decide that they will stay married until graduation.[8] After graduation, they divorce.

There may be other opportunities with more compelling circumstances. For example, you represent Thelma in a divorce action. Upon her dissolution, she will lose her husband's insurance coverage unless she pays the COBRA rate, which she cannot afford. Her best friend, Louise, is employed and has great benefits. Thelma and Louise get married immediately after Thelma's divorce.

Corresponding with § 517 opportunities to get married, our clients may be well-advised to consider legal separations rather than dissolutions. Assuming the same Thelma scenario, a lawyer advising Thelma may want to negotiate with her husband in the dissolution action so that the parties can get legally separated rather than divorced. Thelma may want to consider asking her husband for a legal separation to keep the insurance coverage. In turn, Thelma's husband can receive the tax deductions associated with her and the three children. By doing so, both parties gain.[9]

It is this author's experience that most of our clients are so wound up in the emotional and religious aspects of being married that they need a lawyer to explain that a civil "marriage" is just a contract. Presenting the options to Thelma in an unemotional and non-religious manner may be just the help Thelma needs.

The last area of practice presenting opportunities for growth is divorces of convenience. Suppose David and Nancy are filing their federal application for student financial aid in anticipation of the children attending college. In the process of filling out the form, they discover that the expected family contribution for a married couple would be based upon the parties' joint income. If the parties were divorced, the family contribution would be based upon the custodial parent's income. Because Nancy is a part-time employee at a local non-profit organization, she agrees to assume the custodial role. David and Nancy divorce. David and Nancy continue to live together. As a result of their divorce, the children receive substantially more financial aid. The desired result is achieved with little or no disruption in family unity.[10]

Conclusion

The changing societal expectations of personal relationships, has resulted in "families" that represent more than just the traditional one man/one woman committed relationships that once characterized family law. The law now defines families by the biological, contractual, residential, sexual and even romantic relationships.[11] The roles in family law have been changing for a number of years. If same-gendered marriages are permitted, which is quite likely, gender roles will be eliminated. It is difficult to anticipate what the future will be for family law lawyers. We will be presented with some additional challenges. However, if we are willing to advise our clients on the full extent of the law, we may be able to find opportunities for our clients that had previously escaped all of us.

————————

Notes

[1] The larger sociological question of what constitutes a family is best left for other fields of study and practice. In this article we are concerned with the legal definitions and the changes that are likely to occur in the coming years.

[2] The legislature did not provide us with much guidance in determining what constitutes a romantic or sexual relationship significant enough to constitute a family, under § 518B.01, subd. 2 (b)(7). The question is almost metaphysical. How much romance or sex does one need to have a familial relationship?

[3] "Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman . . ." § 517.01. Interestingly, the statute does not define what the terms of this contract are.

[4] While the marriage would be unenforceable in Minnesota (between same-gender couples), presumably the marriage would still be enforceable in the state of marriage. In addition, it is possible that the marriage contract from another state would be enforceable under general contract principles in Minnesota. However, the contract's breach would not be litigated under the dissolution statute. Presumably, a divorce decree from another state also would not be enforceable under § 518, but might be enforceable in contract law.

[5] "RESOLVED: That the Minnesota State Bar Association urges the Minnesota legislature to permit same-sex couples access to civil marriage . . . with all its attendant legal rights and responsibilities . . ." (I prefer the term same-gendered to avoid confusion regarding sexual preference).

[6] For example, if a Minnesota court requires a spouse in a same-gendered relationship to pay spousal maintenance, the amount paid will probably not be considered a transfer of income from one spouse to another but rather will be considered a gift transfer for federal tax purposes. If the amount is significant, gift tax returns may need to be filed.

[7] Under the definition of marriage which defines it as being between one man and one woman,

social norms have generally considered marriage to be sacred even though the law defines marriage as a mere contract. The removal of another social taboo regarding personal relationships should make the strictly contractual nature of civil marriage more obvious.

[8] Under current law this scenario is not permitted for Adam and Steve, but would be permitted for Adam and Eve. However, social and religious taboos may have discouraged opposite-gendered couples from pursuing the legal advantages associated with getting married.
Some readers may think that I am advocating abusing the law. Such arguments have no legal basis. Our legal obligation is to advise our clients on how they may take full advantage of the law, not to second guess the legislature or the law.

9 We are all familiar with the common scenario that our clients are divorcing near the end of the tax year. We advise them to get professional tax advice to decide which tax year presents the most advantageous tax benefits for them.

[10] Estate planners are aware of this strategy for making applications for government assistance, especially Medical Assistance. Careful planning is critical.

[11] This article is not intended to set public policy on marriage or family structure. The article could be considered an indirect critique of the same-gendered marriage movement. However, the critique is intended to be a fair presentation of the contract we call marriage. This author notes that the law's current definition, especially in the area of marriage, does not seem well-designed to protect the interest of either the government nor the most vulnerable of its participants. The expansion of § 517 to include same-gender couples, while well-intentioned, and perhaps necessary to achieve justice may create unintended societal consequences, which lawyers should be prepared to address.
Perhaps the day will once again come that the law will honor the solemn promise, often made before hundreds of witnesses, that the marriage participants will love, honor and cherish each other, in sickness and in health, for richer or for poorer, for better or for worse, until death do them part. Until or unless the law changes, part of our job as lawyers is to help our clients understand that those promises made with the greatest sincerity and hope are not part of the law's hollow marital contract.

David L. Ludescher has been an attorney for 21 years in private practice with Grundhoefer & Ludescher, P.A., in Northfield, Minnesota. He is a general practitioner including a substantial "family law" practice. He may be reached at info@northfieldlaw.com or dludescher@northfieldlaw.com .