



FAMILY LAW LITIGATION

INITIAL INTEVIEW, OVERVIEW, CONTROL AND FOCUS

I. THE INITIAL INTERVIEW

A. Besides getting the relevant personal information it is very important to size up your client.

1. What are their personality traits? Controlling, aggressive, submissive, etc.

- Specific personality traits of your client can determine a course of litigation. Aggressive and controlling clients may tend to steer the litigation on a certain course and be less likely to reach settlement – thinking that they have given up something.

Example: Custody litigation with controlling client who is non-custodial parent will not settle on shared because he wants to see his primary custody litigated until the end, no matter how bitter. When, in fact, moving from partial custody to shared custody then to primary custody is the best course.

- Submissive clients may seek settlement at every corner thus failing to secure certain rights or needs that they would otherwise get.

Example: Submissive and abused Wife wants divorce “over” to obtain “closure” when in fact she may have a claim for alimony which would help her in the future recover and rehabilitate herself.

2. Where does your client come from? Not figuratively as in “they come from the State of Ohio”, but rather “they come from an abusive home”, or “they come from an extended religious family where holiday time is extremely important”.



- Knowing a client's familial history and understanding the road they have personally traveled will provide you with insight on where they are going. Bumpy family life – potholes ahead.
3. How do they speak or carry on the conversation at the initial interview? Is there a family member with them that does all the talking? When they speak do they look directly at you or do they look away?
- The ability to communicate effectively, answer questions that are asked and offer reasonable explanations will provide significant insight on how your client will perform in a Courtroom.
 - RED FLAG: Custody client says "I'm not sure why I am here." And the rest of the conversation is taken over by custody client's parents.
- B. Getting the Client's Objectives - It is important to ascertain what type of end result does your client see. It is primary custody, or if a divorce, do they want the house?

1. Divorce Objectives – Closure vs. Resolution

- Many clients seek immediate closure, or end of the marriage itself, and cannot care as to any equitable distribution issues. (Or so it seems)

Example: Ms. Smith comes in and tells you she has been divorced from Mr. Smith for five years. Bought that divorce kit at the legal store, signed all the papers and in the end, after paying a small nominal fee, each received nifty looking decree with golden seal. Now she wants to sell her house and move in with victim No. 2, Mr. Jones. Problem: Mr. Smith's name is still on house. She had closure now she has tenants in common with old hubby.

2. Custody Objective – Children vs. the Other Parent

- Parents are a strange breed, with tendencies to act irrational under tightly controlled experiments, whereas any other normal Joe with no children will behave rationally and within reason.



- Some parents want custody simply because they love their children, while others seek custody identifying it as a mortal wound to their opponent.

Example: Two relatively normal adults with relatively similar parenting abilities and one parent has a standing appointment with the Judge once per week to address other parents 10 unfounded CYF reports that would have been found had reporting parent been the caseworker as well.

3. Support Objectives – Money vs. Blood

- Payor and Payee (aka he who giveth and she who taketh away) Whether you represent the payor or payee, it helps to understand what has caused Court action to be initiated, where the parties are in the Court process and where are they going...

In a perfect world of support, the payor would generously pay the payee on a monthly basis (bi-weekly is preferred) for their fair share of the cost to raise their little critters. The money of course would be efficiently utilized in food, clothing and shelter for each pup with the remainder to be placed in an interest bearing, low risk college savings fund to be used for when junior heads off to med school. But alas, mom has a transmission to fix in the old station wagon and a meal out is better money spent than on twelve therapy sessions.

Therefore, the parties inevitably end up in Court. The questions become, where do you, the lawyer, end up in this support soup.

Establishment: This gets the process started. The Pennsylvania Rules of Civil Procedure are followed, incomes are calculated, several extra-expenses can be calculated and deviations taken before the magical number appears.

Modification: This is the time where payor thinks they're paying too much or payee thinks they need more money. However, we must remember to be careful for what we ask for. **EXAMPLE**: Mother hears through the poisoned grapevine that Father got a raise at work. Mother files to modify the support order. Father did get a raise at work but now he is contributing to the cost of health care which in turn Mother has to contribute back to Father. End result – Order goes down.



Moral of the Story: Do your homework and stay away from the poisoned grapevine.

Contempt: This is payor's financial purgatory. For whatever reason, payor has not paid per instruction and the parties appear for a contempt hearing. As counsel, the goal should seldom be incarceration since prisons are paying much these days. However, it does provide a large motivation tool. You do tend to see large greenbacks appear when the word jail is thrown around.

CONTEMPT GOAL: Get the payor to pay. Be creative. Can the payor sell something and make a large payment and stave off the soap on a rope? Will the payee accept a thirty day extension for a large payment because payor is refinancing his home? Look at the short terms goals of your client (paying on a purge condition) and look at the long term goals (getting the money coming in consistently.)

- Whether child or spousal support, someone is paying up. Question becomes: How bad will it hurt? Competent computer programs are available for the legal professional to utilize in calculated support, taking into consideration tax filing status, maintenance of health insurance including consideration of cost, dependency exemption scenarios, etc.

C. Finding out Why the Marriage Failed/Custody is in Dispute – Understanding what led to the end of the marriage or why the parties cannot seem to raise Junior together can help you to create a path that can lead your client to the end of the divorce road and on to happier and better times.

1. End of Marital Bliss

- Money woes – Many couples find themselves constantly fighting over finances in the marriage and instead of driving together to a financial planner and being on the same page in the corporate household, they drive separately to divorce lawyers. When the marriage ends due to money problems, be aware that the client will focus on the financial aspect of the divorce, i.e. Who takes what debt? Where did the debt come from? , etc.



- Not tonight dear – Seeking the comfort and affection of someone other than your spouse tends to be a real marriage killer. Problem: Now there are three people trying to get a divorce: Husband, Wife and Third party love interest (commonly known in Court as the “paramour”)

If you represent the injured and innocent spouse also easily identified as the spouse who’s always crying, be prepared to dole out lots of time and counseling along with many tissues.

If you represent the lustful spouse, be prepared to see said paramour at all the office visits offering up their own two cents and how their divorce lawyer did this and did that.

- I hate you – This is the oil and vinegar marriage. They just don’t get along. Eventually someone’s clothes end up on the front lawn. Sometimes an assault occurs.

Anger, bitterness and hate will run rampant through this divorce. The less interaction between the spouses is most likely the best path. This is not the divorce where you want to have a four-way meeting with the opposing party and their counsel. It just lends itself for opportunity to tempers to flare-up.

2. Let’s Cut Junior in Half

- The new baby – These parents cannot agree on anything regarding the new addition to their divided family. For nine months they’ve been at odds only to welcome their new bundle of joy to Custody Court. Nothing says I love you to a new baby than a properly filed Custody Complaint with a shiny Generations Scheduling Order.

These parents have never had a chance to agree to anything of the parenting nature.

Counsel for new parents must be prepared to engage in legal counseling along with impromptu parenting skills class.

EXAMPLE: New Dad must understand that he better have his own car seat and Mother need to understand that Dad knows how to use that car seat.



- Older kids – These parents at one time either did get along with parenting or one of them did all the parenting while the other watched from the sidelines. Not until the parties split did the parents start to disagree as to parenting styles or did the sideliner parent want to get into the game.

It helps as a lawyer to focus your client on the issues that the parents did agree to and then narrow down to those issues important to your client that perhaps an agreement can be reached on. EXAMPLE: The school choice is fine between Mother and Father but let's have religious classes on Father's time not to interfere with Mother's time as that may be an important issue to Dad.

II. THE THREE BIG ISSUES IN FAMILY LAW

A. Custody/Visitation:

1. Best Interest of the Child: When interviewing a client regarding custody matters, it is important for the client to have an understanding of what "the best interest of the child" means. Some people may believe that it is in Junior's best interest to develop and foster a love for motor sports while others may feel it in his best interest to become fluent in French, granny's native tongue. With that said, the "best interest" of Junior may be relative to the life he had when the parents were together (was he taking French classes two days a week for three years so that when they went to Paris to visit Granny he could order his own baguette).
2. Let the Ink on the Custody Order Dry: Not a minute after a custody Order is signed does it seem like your back in Court seeking a change, accommodation, modification or addition of a newly discovered holiday or two for the children to add to their already hectic lives.

As counsel for parents, it is important that custodial litigants be counseled to give the Order a change. Good, bad or ugly, a custody Order is meant as a zip-line between the parties. Gets them started, back and forth, routine is created and then they should develop their own custody bridge. If you're constantly changing the Order, you never give that back and forth a chance.



3. The Non-Believer Client: The following relative case law will empower you as the lawyer to educate your client on the basics of custody litigation.
 - The Best Interest of the Child: The “ultimate guidepost” in a child custody case is the child's best interests. [*Meyer-Liedtke v. Liedtke*, 762 A.2d 1111, 1114 \(Pa. Super. 2000\)](#). Focus must be on what is best for the Child rather than on doing justice between the parties. [*English v. English*, 322 Pa. Super. 234, 469 A.2d 270, 273 \(1983\)](#).
 - Stability: The stability of an individual, economic, emotional, psychological or otherwise, has great impact on the life of a minor child. The value of stability is a factor which should be accorded great weight. [*Snarski v. Krincek*, 372 Pa. Super. 58, 77, 538 A.2d 1348, 1358 \(1988\)](#). The court has viewed maintaining continuity and stability in custody arrangements as important elements in a child's emotional well-being . [*Commonwealth ex rel. Jordan v. Jordan*, 302 Pa. Super. 421, 448 A.2d 1113 \(1982\)](#).
 - Ability to Care for the Minor Child: The court must view the conditions of the parties’ lives and housing as provided by the evidence and testimony at the time of the custody hearing when determining the proper custody of the minor child. [*Brooks v. Brooks*, 319 Pa. Super. 268, 466 A.2d 152 \(1983\)](#).
 - Primary Caretaker: The parent who has served as a primary caretaker for the minor child is a substantial factor which the trial judge must weigh. [*Commonwealth ex rel. Jordan v. Jordan*, 302 Pa. Super. 421, 448 A.2d 1113 \(1982\)](#); [*Brooks v. Brooks*, 319 Pa. Super. 268, 466 A.2d 152 \(1983\)](#). “[T]his court has long recognized that the removal of a young child from his environment is a factor which bears upon its emotional well being Therefore, continued residence of children with one parent may be controlling.” [*Hugo v. Hugo*, 288 Pa. Super. 1, 6, 430 A.2d 1183 \(1981\)](#).
 - Continuity of Current Custodial Arrangement: Modification of an existing custody order is not warranted simply because one parent is unhappy with the current arrangement. The parent who is requesting to modify the current custody has the burden to establish that alteration of the existing custody arrangement is in the child's best interest. [*Jackson v. Beck*, 858 A.2d 1250 \(Pa. Super. 2004\)](#).



B. Asset and Liability Division in Divorce -

1. It is now time to divide the pie: Most if not all married persons destined for the halls of divorce court cannot appreciate the delicate and complex marital pie they are creating while they are living in the fantasy land of marriage.

The Pie Recipe: One cup of assets, three cups of debt, folded into Pappy's inheritance and topped off with a pinch of resentment. Once you can identify those items that belong in the marital estate and those that don't, you can then seek out the sharp blade of equitable distribution.

2. Help in Creating the Pie: A lawyers dream would be to have a client come to the office with a collated, highlighted and tabbed marital asset and liability history checked and crossed referenced in duplicate. But, we can only dream. These are the people you see at your door:
 - *The "I have a few items" client*: This is where you need to take what you can get from the client and carefully create a marital estate using the provided puzzle pieces. Then you can engage in discovery to fill in the blanks.
 - *The "I have the items but am afraid to show you" client. Otherwise known as the liar*: This client will require counseling and an understanding that you will find out sooner or later either from the client, the opposing side your through an authorization signed by the client which only ends up costing more in legal fees.
 - *The "I have the receipts in this shopping bag" client*: This client requires much patients as the shopping bag not only contains coffee stained bank statements but also two years worth of gas point receipts that mean nothing. As an experienced archeologist you must fine tooth comb these papers. Very time consuming but necessary.
 - *The "I have nothing because she stole it all" client*: Don't be afraid of this client. You need simple prepare a complete and concise set of interrogatories and request for production of



documents for the other party to answer. Use your client to craft many questions. EXAMPLE: Where did they bank as a couple? How did their taxes? Etc..

- *The “I’ll be sending it to you later” client:* This client continues to promise that the pension and bank information is on the way. You constantly mention it but the lines of communication are filled with life static. They are simply too busy or too afraid to deal with it yet continue to promise you. Take the high road, or that road containing authorizations that you have your client sign and return. You do the leg work. If not, you’ll never get it and then end up in Court empty handed. (i.e. The client promises to bring the pay stub to the hearing and then “forgets”)
3. Paying \$500 for a \$5.00 hose: Similar to the army’s \$500 hammer, why would anyone pay \$500 for a \$5.00 hose? Because I don’t want to give it to my ex., etc.... But does the client actually pay \$500 for the hose? No, but they will pay your hourly rate to fight that battle. Just so lazy hubby can’t continue to be lazy in the Lazy-Boy recliner.

C. Support Obligations and Guidelines

1. Amount of awarded support is based largely upon each party’s monthly net income. Pa.R.C.P. 1910.16-2.
 - Whether child support or spousal support, each calculation begins with a determination of the party’s monthly net income after mandatory tax withholdings, i.e. federal, state and local withholdings. Union dues and mandatory pension contributions can also be deducted.
 - What’s not deducted? Any non-mandatory contribution to any pension plan, 401K, or savings contribution; any additional monies withheld for tax purposes to insure big refund; any payments on loan directly withheld from pay etc.... Take careful note of those pesky extras.
 - Don’t assume the domestic relations officer can calculate the correct monthly net income. Look at the year to date on the pay stub. Do you see lots of overtime - then don’t just use the hourly rate. Look at W-2s as well.



2. Treatment of SSI Benefits and public assistance.
 - Rule 1910.16-2(b) provides that neither public assistance nor supplemental security income (SSI) shall be counted as income for determining support. RED FLAG: Remember that's our money they're living off. Is it welfare fraud?
3. Earning capacity - Some parties do not maintain employment that is appropriate to their history or ability. The Court can conclude that a party has an "earning capacity" based upon their "age, education, training, health, work experience, earnings history and child care responsibilities" in determining what their potential earning are. Pa.R.C.P. 1910.16-2(d)(4). See also, *Riley v. Foley*, 783 A.2d 807, 811 (Pa. Super. 2001)
4. Voluntary Reduction vs. Involuntary Reduction of income.
Question: Is it a lay-off or is it a vacation from employment never to return again.
5. Dependency Exemption – One of the most requested and coveted items, almost as important as custody itself. But, why? This seemingly innocuous exemption provides tax relief from Uncle Sam. But that, in turn, gives the payor more monthly net income for support. If payee takes it, then payee's monthly net income also increases and therefore less is paid in support to payee.

III. CONCLUSION OF INITIAL CONSULT/INTERVIEW

A. Analyzing and Advising – Goals, Strategy, Order of importance (Custody, Support than Divorce)

- Understand what your client sees as the outcome. Ask them where they want to be in one year or five years. Use that information to create a strategy. Does the homemaker mother see herself as a nurse in five years? Then perhaps a goal of rehabilitating alimony would be appropriate than a lump sum payout.



B. How Long Will It Take? – Many clients look for a time frame. How soon will the support start? When can I be divorced? Etc..

- Give answer to timeframes. Don't avoid the phone calls questioning why the support hearing isn't until next month. Let the client know – support court is backed up. A date in six weeks is good, anything sooner is great. You have no control over the Judge's calendar. Summer = Judge vacation.

C. How much will it Cost?

- Cost is always relative to the client's needs vs. wants.
- Cost is also determinative upon opposing counsel – See who the opposing counsel is. Is it a lawyer you've worked within the past that is a good communicator, exchanges documents without extensive discovery or is it a lawyer who is also adversarial, in court all the time and settles only moments before the hearing, after you have subpoenaed your witnesses and copied your exhibits.

IV. Memorializing your Advice to the File and Client

A. Following the initial interview, provide a retainer agreement and review that agreement with the client.

- Do they understand at an hourly rate, all phone calls are being charged for? No surprises. A well planned for one hour appointment is better than ten sporadic phone calls.
- Also, review the strategy with the client so that the client understands how the case will proceed.