DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

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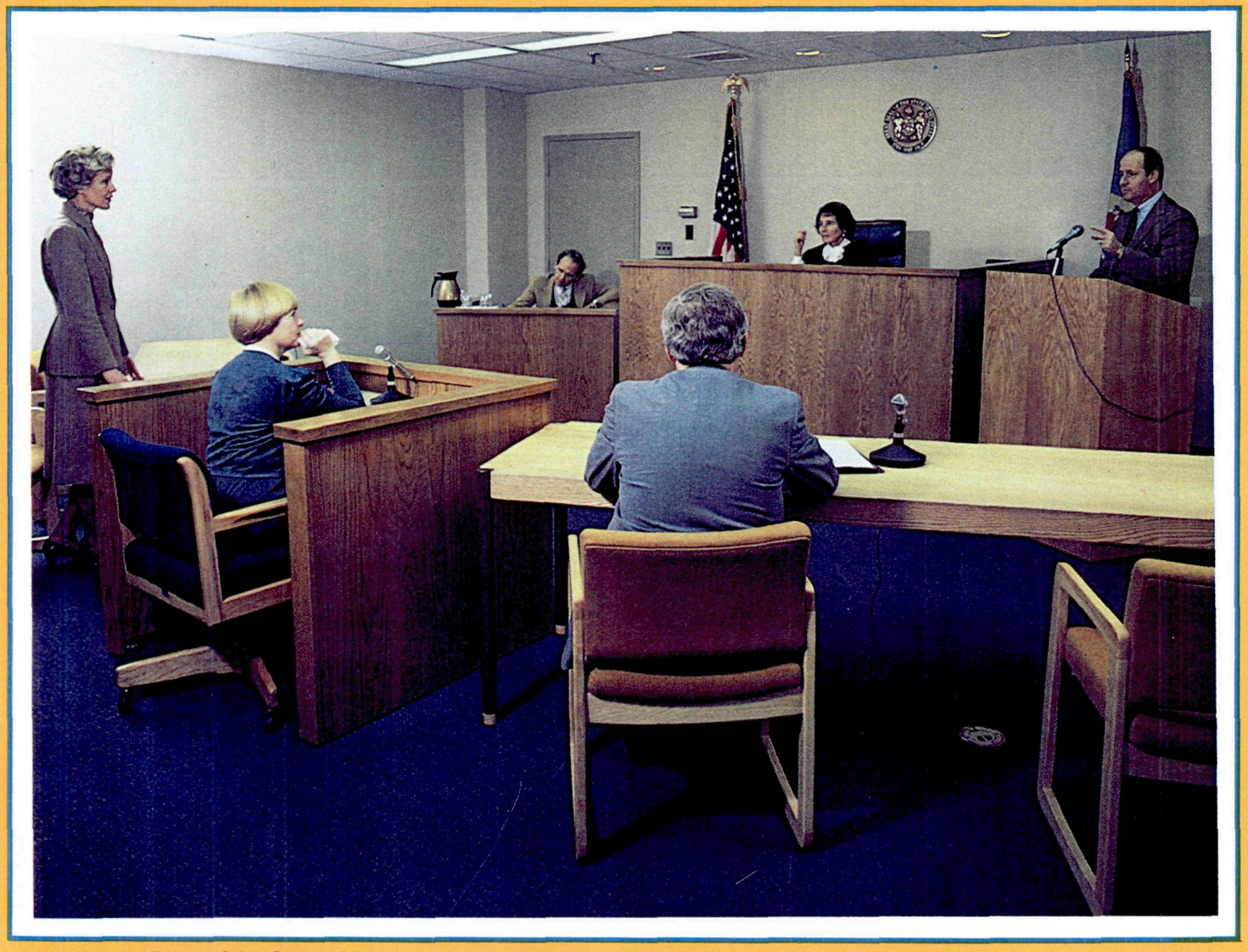

The Family Court of the State of Delaware—The Honorable Roxana C. Arsht Presiding

THE CHANGING LAW OF DOMESTIC RELATIONS

THE CHANGING COURT IN WHICH IT IS ENFORCED

AN INTERVIEW WITH DELAWARE'S FIRST WOMAN JUDGE

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Contents

Our Cover:
Many of us have no idea what a divorce trial underway looks like because these proceedings aren't generally open to public scrutiny. Accordingly, we have enacted imaginary litigation in a real courtroom. Pat Forester of Gauge Corporation is the plaintiff, bent on terminating her non-existent marriage to our fellow editor, David Clayton Carrad. David is represented by Alfred Tarrant, Esquire, a leader of the domestic relations bar. Fred has obviously just done something to provoke an objection from Pat's lawyer, Carol Widing of the Department of Justice. Presiding: The Honorable Roxana C. Arsht, flanked by Mr. Don Norman, Family Court Legal Assistant. We think this photograph fairly conveys the civilized and supportive atmosphere in which this most painful sort of litigation is conducted. This issue of DELAWARE LAWYER, heavy on domestic relations matters, is intended as a tribute to Family Court and especially to Judge Arsht on the eve of her retirement.

Photography by Eric Crossan Studios, Townsend, Delaware.
Eric Crossan

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises and other literary works on legal subjects of general interest to Delaware judges, lawyers and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

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BAR FOUNDATION CORNER

Airing the Consequences

VICTOR F. BATTAGLIA

Much broadcast time is devoted to warning youthful travelers against involvement with illegal drugs when they are visiting abroad. Many foreign countries impose severe penalties, and our media efficiently warn our young people.

The business community has mounted a strong public relations effort to teach that shoplifting is stealing and a crime. The advertising stresses community opprobrium, the agony to one's relatives, the impact of theft on the cost of living, and the probability of punishment.

Sporadic campaigns address drunken driving, and remind us of the potential for great harm, the possible penalties, and the cost to society exacted by the excessive use of alcohol, with or without related driving offenses. Traffic safety councils have been engaged for years in educating the public on the perils of violating traffic laws.

These programs send a no-nonsense message to the community about *some* of our penal laws. *I submit they should go farther.*

Our lawmaking bodies are trying as never before to curtail crime. Almost universally, legislators have increased punishments. Legislators have restricted rehabilitative devices, such as probation and parole. Mandatory minimum sentences proliferate.

I find it bizarre that we concentrate on punishing, instead of *preventing,* crime. We have created statutory compensation awards for victims of crime, but these compare unfavorably with civil damages for the accidentally injured. A victim robbed and beaten over the head is no less victimized because the offender is caught, convicted and jailed. As a taxpayer, the victim foots the bill for this dubious vindication. The system that puts some thug behind bars does not defeat a crime, much less redress it.

Delaware has gone to great pains to increase penal sanctions for crimes, but, unfortunately, no one seems to have taken the trouble to publicize these new severities. If heavy prison terms are to have any deterrent effect, people must know that larger sentences loom in Delaware. How effectively is crime reduced by multiplying penalties if the public doesn't know what they are? What have we achieved if the offender finds out only at sentencing, that his is a crime for which the punishment is now enlarged? How effective is a system, fully informative to an offender at sentencing, but delinquent in notifying the *potential* offender that penal sanctions, once tough, are now decidedly tougher?

While our media have been lavishly informative about shoplifting, drunk driving, and the attractions of Turkish prisons, these vivid and presumably effective devices are not applied to the infractions that constitute the great bulk of prosecuted crime. Advertising should tell a potential violator that he may be not only jailed, but that he risks losing his privilege to vote, his right to run for office, and his eligibility for employment as a police officer. He should realize his chances of gaining professional status as a lawyer, doctor, or accountant will be substantially lessened if he defies the law, and that he may effectively destroy the likelihood of his being employed

in any position in which he is required to be bonded. There will be those who say that it is degrading to our fellow citizen to coerce his obedience through fear. This point of view has the dishonesty of all sentimental arguments. If we can cut the incidence of crime, we may assign that a higher priority than the wounded sensibilities of those who plot offenses against us.

Still others say that offenders do not think of getting caught or punished. They are absolutely right. We permit such thoughtlessness to flourish. My proposal is designed to make consequences of crime a very real concern.

We owe it to potential victims to do everything in our power to prevent crimes against them. The starting point is to remind the public that penalties exist and that they are grave. We should begin by requiring that the general public, initially through our schools, be made aware of crime and what it costs the criminal. At the same time, we must try to educate the public generally about the sanctions, just as we have informed them so fully about shoplifting, drinking while driving, and drug offenses abroad. We must replace the prevailing fear of crime with the fear of *committing* crime, a substitution of the criminal's enlightened fear for that of the innocent.

I do not suggest that these devices will eliminate crime. I do argue, however, that if they are vigorously applied, they may cut down on crime and decrease tragic waste and injury that we suffer to continue.

There may come a time when we shall all have become better people, and we can turn away from a program of which fear is an ingredient. Until that happy day arrives, let us do what we *can* do. □

Victor Battaglia, a prominent Wilmington lawyer, conducts a large and distinguished trial practice. His public service is no less distinguished. Victor is a member of the Board of Directors of our sponsor and parent, Delaware Bar Foundation, and a former President of the Delaware State Bar Association. He serves as a member of the Judicial Nominating Commission.

Victor's concern over mounting crime and the grief and loss it inflicts has led him to the views expressed here. These firm words furnish a refreshing contrast to the hand-wringings and bleats of despair usually provoked by this ugly phenomenon.

EDITOR'S PAGE

William Wiggin, Chairman of the Board of Editors, is rumored to be on unexcused absence from Richards, Layton and Finger, for the purpose of putting out this magazine.

This, the third issue of DELAWARE LAWYER, completes the cycle of a full year of publication. Armed with this experience, we are now prepared to commit to a regular, three-issue-a-year publication schedule. Future issues will be distributed in June, November, and March. Our first three issues were distributed *gratis* to Delaware lawyers and others as a public service of Delaware Bar Foundation. While distribution will continue to be complimentary to members of the Bar Foundation, members of the judiciary, and certain elected and appointed government officials, we reserve the right to reconsider this policy. Individuals and institutions wishing to assure uninterrupted receipt of future issues may subscribe for post-paid delivery at an annual charge of $6.00. A subscription form appears elsewhere on this page.

Richard A. Levine
Managing Editor

In completing our first year of publication we wish to thank readers, friends, and advertisers for the fine reception they have accorded us. It has been, necessarily, a year of experiment and discovery, but it has also been a year of growth. We are especially pleased to conclude our first year by announcing the election to our Board of Editors of Professor Robert D'Agostino of Delaware Law School, a contributor to our first issue. His joining our Board carries with it the prospect of closer ties between the legal community and the fine school where he teaches.

One of the self-imposed duties of DELAWARE LAWYER is the encouragement of responsible debate. We believe Chief Judge Thompson's article may well be the starting place for a useful discussion of the Family Court and its role in our evolving judicial system. The accompanying interview with Judge Arsht also touches on the status of the Court. We believe their views will make stimulating reading.

Because of very tight space, we have had to defer some of our usual features to later issues, and, to our particular regret, David Drexler's selections from the memoirs of Mr. Justice Pennewill. This will be a three-part article, in our judgment a production of considerable charm and historical interest. It will commence in our June issue. That issue will also be heavy on medical/legal topics. Our November issue, already in the advanced planning stage, will emphasize the law and the environment.

We close, reiterating thanks to our friends, and with a fervent plea to our readers: support our advertisers. They make this journal possible.

William E. Wiggin
Chairman

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FACT 2

By Definition:

pro-fes'-sion-al, *n,* **1. a person belonging to one of the professions.**[2]

FACT 3

By Definition:

pro-fes'-sion'-al, *adj.,* **1.** of, engaged in, worthy of the high standards of, a profession. **5.** having much experience and great skill in a specified role.[3]

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Therefore, it is not surprising that the Delaware Bar Association has enlisted the professional services of Blue Cross Blue Shield of Delaware to administer health insurance benefits to its professional members.

Blue Cross Blue Shield offers a choice of health insurance benefits: the new Major Medical 100, Dental, and soon The HMO. For more information, call Fran DiIenno, your Blue Cross Blue Shield marketing representative, or call the Delaware Bar Association.

[1] Black's Law Dictionary, Henry Campbell Black, M.A., Revised Fourth Edition, West Publishing Co.; St. Paul, Minn., 1968.

[2] Ibid.

[3] Webster's Twentieth Century Dictionary of the English Language, Unabridged, 2nd Edition.

THE FAMILY COURT: *Past, Present and Future*

The Honorable Robert D. Thompson became Chief Judge of the statewide Family Court of Delaware in October, 1974 after eight years' service as an Associate Judge of the Family Court for Kent and Sussex Counties. Judge Thompson has labored mightily to see that the Family Court is adequately housed in all three counties. His next great effort will be to raise the Family Court to the stature of a Constitutional Court.

ROBERT D. THOMPSON

In 1971 the Family Court of the State of Delaware became a state-wide unified tribunal replacing three fragmented county courts. Since then the Court has been riding in the fast lane of Delaware jurisprudence.

The Court's jurisdiction has changed dramatically: it now deals with separate maintenance jurisdiction, until 1972 the province of the Court of Chancery; it grants divorces and annulments, formerly the jurisdiction of the Superior Court; since 1980 it has handled terminating parental rights and granting adoptions, an authority also transferred from the Superior Court. In a very short time, Family Court has evolved from a forum of very limited jurisdiction to a full-fledged juvenile and domestic relations Court. Its decisions now affect citizens from all walks of life. Its always heavy case load has greatly expanded.

The shift to Family Court of jurisdiction over domestic relations is paralleled by a profound change in applicable law. Delaware law governing family matters has altered dramatically in the last decade, reflecting great societal changes that have occurred within recent memory. The evolution of up-to-date statutes governing divorce, adoption, child custody, support, and intra-family disputes demonstrates the vitality of our system of government in responding to social change, and is a credit to the Bar, the Legislature, and the Executive Branch.

Let me give you a single example of how changing law keeps pace with changing mores. What is a "family"? The statute defining family as it relates to the Family Court has been amended several times in the past decade. Originally, a family was defined as husband and wife, or cohabiting man and woman, with one or more children, or persons related by blood or marriage residing in one household under one head. The present definition limits the family relationship to a vertical, three generation parent-sibling-grandparent affinity related by either blood or marriage. It excludes aunts, uncles, cousins and great-grandparents. In the not too distant future, the definition may be changed again to include unconventional units not based on blood or marriage. In our volatile society, the conception of "family" changes. The law keeps pace.

Charged with a greatly expanded jurisdiction and confronted by a rapidly altering world, the judges of the Family Court have, of necessity, fashioned new techniques to insure the swift rendition of justice. Family Court now handles 31,000 cases a year. We have had to devise new procedural tools to accommodate that case load. For example, during the last decade the role of masters in the Court has been expanded significantly. Originally they dealt for the most part with child support and juvenile traffic cases. Today our masters are legally trained members of the bar who conduct bail hearings and arraignments, hold fact-finding hearings on misdemeanors, and entertain petitions for support of dependents. They preside over uncontested divorces and annulments. The enlarged master system has resulted in much greater efficiency in case processing.

We have adopted and refined a procedural instrument to encourage settlement of cases that would otherwise come before the Court. We have found that, in domestic relations matters and minor juvenile delinquency cases, non-judicial proceedings administered by trained counselors are more conducive to resolution than adversary proceedings before judges. Since 1977, the Court has employed the "Arbitration Process" to dispose of minor first offender juvenile delinquency

problems such as shoplifting, trespassing, and the like. The proceeding, held before a trained Court hearing officer, is novel and effective. All concerned parties, including the victim, are encouraged to attend, and the dispute is settled without official Court intervention. Resolution may be achieved through informal probation, community work service, or a payment of losses to a victim. Since its inception, arbitration has been a success. It now handles 50% of all juvenile misdemeanor cases, and it enjoys a recidivism rate of only 19%.

More recently the Court has come to use civil diversionary processes in disputes over custody, visitation, support, and claims of imperiled family relationship. Mediation counselors resolve 80% of the cases that come before them without the formality of a Court hearing.

Under revised Court rules, pretrial hearings must now be held before a master in divorce cases to clarify legal issues and to resolve disputes by agreement before the case is heard by a judge. The requirement of a joint asset report by the parties before a pre-trial hearing replaces lengthy and time-consuming discovery that previously typified divorce actions. When a petition for divorce is filed, there is now an automatic preliminary injunction prohibiting the disposition of marital property, the harassment of one litigant by the other, the removal of the parties' children from the jurisdiction of the Court, and the incurring of obligations (excepting the necessities of life) by one party to the liability of the other. This practice has eliminated many of the applications that once came before the Court for relief *pendente lite*. The adoption by the Court of Delaware Child Support Formula, a standardized device in use since 1979, has contributed substantially to even-handed justice delivered with dispatch.

The Court, mindful of the interests of those threatened with loss of parental rights, and equally mindful of the best interest of children in termination cases, has developed detailed affidavits to spell out in clear language the consequences of consenting to the eventual adoption of a child. Concern for neglected, abused and dependent children who may find themselves in Court without their own representatives has led to a volunteer program in which independent legal advocates gather information and report to the Court so as to protect the interests of children. This in turn has led to a highly successful volunteer employee recruitment program, which has furnished an over-burdened Court staff with case aides, typists, receptionists on our floor desks and assistants to those who conduct the victim-witness information program.

Cooperation between the Court and social agencies has grown in recent years. We have encouraged the offices of the Attorney General, the Public Defender, the Bureau of Juvenile Correction, the Division of Mental Health, the Division of Child Protective Services, and the Bureau of Child Support Enforcement to maintain staff at Court. This promotes Court and agency coordination, provides useful information, and results in swifter delivery of better services.

We are proud of our past achievements, but we are not complacent. We have goals for the immediate future. In the 1980's we expect to complete revision of the Court rules, automation of case processing and records management, and standardization of forms. We intend to fine-tune our advanced staff training and our continuing judicial education program.

As we pursue these goals, we also face the likelihood of enlarged jurisdiction. We welcome the challenge. I foresee statutory changes whereby we shall hear appeals from administrative decisions of the State Board of Education concerning the education of the handicapped, where we shall appoint guardians for adults, conduct trials of adults for felony offenses against children, and handle longer term commitments of juvenile offenders now referred to the Superior Court.

We of the Family Court have always looked to improved services to youth, and we continue to seek more: our young population must receive services now unavailable. Residential interagency diagnostic and evaluation centers with outpatient clinics in all three counties for children with multi-disciplinary problems are under way, and residential treatment centers for children with severe emotional problems are in prospect. A training institution for youthful offenders between the ages of sixteen and twenty-one seems inevitable; 85% of those arrested in Delaware are between the ages of fifteen and twenty-four, and males between sixteen and eighteen account for the largest part of that group. Residential treatment for youth with chronic drug and alcohol problems is urgently needed. The development of a community delinquency prevention program actively supported by police, schools, courts, and private citizens claims high priority. We must provide better for juveniles who, on release from a training school, cannot return to their own homes lest they encounter a wide range of social problems in those homes: drugs, alcohol, prostitution, crime, and anti-social peer pressure. As these programs are initiated and grow, Family Court will be inevitably and inextricably bound up in making them work.

To perform the duties now incumbent on us and those we expect to be charged with, we recognize a need that cannot be satisfied by our mere ingenuity and diligence. Let me address a most important concern, and in doing so speak bluntly of a goal to be met if Family Court is to achieve maximum usefulness to the society it services: the Court needs constitutional status. We confront daily wasteful delay in the existing appellate structure. We burden the busy judges of a court of first instance, the Superior Court, with the unamiable duty of rendering appellate judgment on the decisions of their peers. Dealing as we do in a branch of the law where expedition is especially important to justice, we live under a two-tiered, wasteful, and time-consuming process of appeal in which the complexities of domestic law, adjudicated by our specialized tribunal, are reexamined, and not in the scholarly and reflective atmosphere of a true appellate court, but by preoccupied trial judges with limited exposure to and increasing unfamiliarity with that intricate body of law daily enforced by Family Court. Constitutional status for the Family Court, direct appeals in *all* cases, and the dignity of equal rank with our distinguished fellow courts of first instance are essential to the good order of the Court and the effective rendition of justice by that Court which deals with the most intimate and urgent business of our fellow citizens. □

TO THE BENCH, THE BAR, AND THE PEOPLE OF DELAWARE:

A Message From Delaware's New Attorney General

CHARLES M. OBERLY, III

As Attorney General of Delaware, I concern myself with the relationships among the Attorney General's Office, the general public, and the Bar. I have been associated with the Attorney General's Office for over eight years and I have many close friends who are lawyers. My experience has made me highly sensitive to the criticisms I have heard about the Attorney General's Office and its personnel.

I intend to encourage communications between the private bar and this office. For example, I consider it unprofessional for public servants to fail to return phone calls, a practice which has irritated many outside attorneys. I intend to remedy this problem if it still exists. Similarly, I think it is a valid criticism that the Attorney General's Office has changed policies in the past without notice to the Bar, a practice that has caused more than one attorney to be embarrassed before a client. I intend to make our policy directives available to the Bar so lawyers can know what to expect before undertaking a representation.

Throughout the recent campaign I heard several recurrent criticisms of the profession and the criminal justice system. We cannot ignore such criticisms from the public when the reputation of lawyers has probably never been lower. I am proud to be a lawyer, but I believe as an elected leader I cannot ignore these complaints, many of which I consider just.

I am particularly concerned about the treatment accorded victims of crimes. I intend to *listen* to victims and witnesses. While victims will not dictate how a case is ultimately resolved, their opinions will be accorded more respect. I will vigorously oppose any reforms in the criminal justice system that I believe are not in the best interest of victims and witnesses of crime.

I intend to make changes in plea bargaining practices. I will establish a special unit dealing with career criminals and dealing severely with that category of offender. Cases in that unit *will not be routinely pled out.* There will also be a tightening up on pleas involving those with prior records who do not fall within the definition of career criminal. In order to promote more uniformity of treatment, many pleas will have to be approved by deputies other than those directly in charge of the prosecutions.

I look forward to working with each of you and, I seek your advice and help during the coming months.

Charles M. Oberly, III
Attorney General

DELAWARE LAWYER is happy to hear from our new Attorney General. He brings to his office a distinctive point of view and a role philosophy, which he has stated well.

Changing Community Attitudes— Changing Community Law

While the Divorce and Annulment Act, as amended, has eliminated fault in divorce, fault is making a furtive comeback. The wife who used to watch her husband drive off with the kids and his latest love can now fight back.

RODERICK R. McKELVIE

One pleasant aspect of handling divorce cases in Delaware has been that you do not need to get into who did what to whom and how often. In most cases those personal matters are not relevant. That has not always been so, and a pattern of recent court decisions suggests that it may not be so in the future. A renewed interest in fault or misconduct in divorce litigation is one example of a number of recent developments in domestic relations law suits that reflect changing community attitudes toward such issues as sexual fidelity, familial responsibility, and the litigants' interest in preserving their privacy. Here is a brief review of where we have been and where we may be going.

The Uniform Divorce And Annulment Act of 1974

The Uniform Divorce and Annulment Act of 1974 marked a fundamental change in the approach our State has taken to the problems of marital discord and the related issues of the financial and familial rights and responsibilities of its residents. Most of what we have experienced in divorce litigation since 1974 has been the action and reaction of our courts and residents in adjusting to the new course set by this statute.

Roderick R. McKelvie is with the firm of Ashby, McKelvie & Geddes. He is a graduate of Harvard College and the University of Pennsylvania Law School. Following his graduation from law school, he clerked with The Honorable Caleb R. Layton, 3rd, Judge, United States District Court, District of Delaware. He is a member of the Delaware State and American Bar Associations.

The Act reflects a post-1960s interest in limiting the impact our governments have on the social and economic decisions of our citizens. It made three very basic changes in the way our State approached the issues raised by divorce. First, it marked a change in the State's public policy of opposing divorce in the interest of preserving marriage and family life. The statute allowed either a husband or wife to obtain a no-fault divorce, perhaps in recognition that denying a divorce simply would not preserve the marriage.

Second, the Act provided that the issues arising from the divorce and from the division of property were to be handled separately and that the court should divide marital property equitably without regard to the fault of either party.

Third, the Act established alimony in Delaware. While the Act can be called a no-fault statute with regard to grounds for divorce and a division of property, it was very much a fault statute on alimony. In two situations, a wife's right to alimony could be cut off. First, only a respondent could receive alimony. Thus, under this new Act, if a wife needed alimony, she could not be the one who moved for a divorce. Second, a husband could cut off a wife's right to alimony by establishing her misconduct as a ground for the divorce. The Act was really a no-fault statute only for husbands.

Alimony and Fault

It may sound odd, but the major weakness in the Act was that it was not modern enough. Fault as a bar to alimony was preserved in the Act for four years. Then, in 1978, it was eliminated. During the years it was in place, it complicated divorce litigation and confused the litigants.

For example, in most cases where the parties have separated, they will ask their lawyers whether or not they can date someone else. From 1974 to 1978, most lawyers responded: "It depends". If you were the husband, whether or not you dated had no real legal consequence. If you were not careful, however, it might embarrass and annoy your wife and make the litigation and any settlement with her much more difficult.

If you were the wife, it was okay to date if you did not need alimony or support. However, if you were dependent on your husband, then you should not date—for fear of giving your husband grounds for a divorce based on misconduct and, in turn, losing your right to alimony.

Those were the days of the private detective. And the classic situation was when the husband would frustrate and anger his wife by arriving at the house on Friday night to pick up the children for visitation. He would arrive in a highly visible new car with a highly visible new girl friend. This could go on for months while he decided whether or not to sue for divorce.

Alimony and Dependence

The women's rights movement no doubt played a major role in the change of attitudes that brought about the 1978 amendment that eliminated misconduct as a reason for denying a woman alimony. It made our act a true no-fault statute.

The women's rights movement drew attention to a number of other issues that arise in domestic litigation. One was the matter of dependence. This was a short-lived but difficult problem in the late 1970s. It was difficult because there were a lot of women who could deny dependence: they worked and were financially independent. There were more women, however, who even if they did work, were nevertheless dependent on their husband's income to maintain something of the standard of living to which they had become accustomed. All of this made the job of the wife's lawyer a little more difficult. You had to walk the client through a legal conception, "dependency", while at the same time explaining away the narrower interpretation from the husband's lawyer whose negotiating position found support in the rhetoric of the women's rights movement itself.

A more difficult issue relating to alimony has been the duration of payments. This may be the most difficult issue in domestic relations litigation today, and there are so many factors and competing interests involved that it may not be possible to settle on a uniform and consistent approach for some time.

A number of situations can be resolved with relatively satisfactory results. The wife with young children should be entitled to some alimony until she can return to the job market. The nurse who married the doctor should be given some time to adjust to the transition from the Mercedes back to the Pontiac Firebird. But what about the 42-year old wife with no job skills? Under our present statute, if she has been married 19 years, she may receive up to 2 years of alimony. If she has been married 20 or more years, she may receive alimony indefinitely.

This shift away from misconduct and towards provision of financial security for the older woman has minimized the role of the private detective in divorce litigation and replaced him with the accountant and vocational expert.[1] It has also changed the way the courts handle division of property and alimony.

While the women's rights movement may have created the issue of ambivalence about dependency in younger women, it has also turned our attention to the older, dependent wife. The issue has been, how do you protect her financially in a way that is also fair to the husband? One solution was the approach adopted in *R.E.T. v. A.L.T.* (Family Court No. 1934, 1977, Opinion dated October 18, 1978), where the Court viewed the marriage as a "true partnership", divided the marital property equally, and ordered the parties to split their future income equally. While the notion of evenhandedness might seem fair at first blush, that part of the decision which awarded the wife half of any dollar of the husband's future increase in income, has not prompted unrestricted enthusiasm. The approach was subsequently labelled "unique" by a tactful Supreme Court. It has not been followed in other cases.

Instead, it appears that our Family Court has been moving towards another formula of sorts that provides for disproportionate property divisions favoring wives and therefore more limited alimony. During the first few years under the Act, the parties could expect an equal division of property and, when appropriate, some alimony. Now, the pattern followed by the Court seems to be to begin with an award of 60% of the property to the dependent wife. In situations where the wife is older, the Court will, perhaps, increase the award up to 70% of the property and provide for substantial alimony, as well.

No Fault with Fault

While the Divorce and Annulment Act, as amended, has eliminated fault in divorce, fault is making a furtive comeback. If the pattern continues,we shall again need to know what all those engineers out there do when they get home, take the three pens from their shirt pockets, and act naughty.

For example, for the years from 1974 to 1980, most lawyers would tell their lady clients that if their husbands moved for divorces for incompatibility, they had essentially no chance of stopping it. A recent decision from our Supreme Court gives wives a chance to stop a divorce and save the marriage. In *Wife S. v. Husband S.*, 413 A.2d 886 (1980), the Court looked to our former divorce statute and cases decided under it, to revive the notion that one essential element to incompatibility as a ground for divorce, even under our modern no-fault statute, is that the incompatibility must be mutual; that is, the rift and discord that destroyed the marriage relationship must be the result of the conduct by both parties. This decision has given new respectability to a contest to an incompatibility petition. While the decision in *Wife S. v. Husband S.* is our Supreme Court's interpretation of the Act, it also reflects in a sense a renewed community interest in saving marriages. Most of this combat used to take place before the clients got to the lawyers. From 1974 to 1980, at least, most lawyers discouraged marital salvage operations. With this new decision, the lawyers, like it or not, are back in the business of who did what to whom. While the courts may call it something different—fault is the issue.

For the moment, the injection of fault into denying grounds for divorce is an expensive and embarrassing distraction for the parties. What is more important is the injection of fault into the issues relating to visitation, property division and alimony.

Thanks to a recent decision of our Supreme Court, *Elizabeth A.S. v. Anthony M.S.*, Del. Supr., 435 A.2d 721 (1981), the wife who used to watch her husband drive off with the kids and his latest love can now fight back. She can refuse to allow visitation while that hussy is around. It may be that not too many wives could meet the standard of proof to restrict visitation under that case, but a number of them are interested enough and, perhaps, angry enough, to try.

This new twist in the role of misconduct seems to reflect a changing community attitude towards the quick and easy divorce and the extent to which we have ignored the psychological and social damage it may cause.

It may also reflect an unacknowledged interest we have in *revenge*. In adopting the Divorce and Annulment Act—and, incidentally, endorsing individual freedom from control of the State—we may have made it too easy for a husband to leave his wife and family. And imposing an economic cost as our courts have been doing for the past few years, may not have been enough. This pattern of opposing the divorce and visitation may reflect an unspoken interest in adding an

[1]See David Carrad's discussion of the withering away of the house detective in our Inaugural issue of last May.

emotional barrier to this move for freedom. It may also reflect a willingness of litigants to go through the embarrassment and loss of privacy that they would have avoided four or five years ago.

A third—and to some the most important—area where fault has returned to divorce litigation is in property division and alimony. A recent pattern in decisions suggests that the husband who gives up on a long-term marriage must be prepared to pay a stiff price for his freedom. Often he will have to give up a disproportionate share of his property, and also face a substantial alimony obligation for the rest of his life. The truth is that if he has left his wife for another and younger woman, his fault will be an *unstated* factor in the court's decision and usually his wife's faults or problems will not be mitigating circumstances.

Here again, while we are not back in the business of denying a divorce to save the marriage, we are putting a new tax on a party's request for freedom, a tax that may not accurately reflect who was right or wrong in the marriage (if we could ever establish that).

Conclusion

In the eight years since the General Assembly adopted the Uniform Divorce and Annulment Act we have moved through two major phases. It now appears we are entering a third. During the first phase, we dwelt on the wife's role in the marriage and its dissolution. Whether or not a divorce was granted, and, if it was, its financial impact on the parties often turned on the wife's conduct.

With the women's rights movement and a shift in society away from assigning fault to either party, we entered a second phase. During that phase we minimized the barriers to individual freedom for both parties and concerned ourselves primarily with financial issues, including how much alimony, if any, is appropriate following a marriage of 20 years or more.

It now appears that we are entering a third phase in the implementation of our no-fault divorce statute. This new phase reflects an uneasiness or dissatisfaction with our recent experience with divorce on demand. For the moment this uneasiness or dissatisfaction is being expressed in different ways. Litigants are more willing to fight to save a marriage or minimize the emotional damage the breakup might cause. The Supreme Court has been identifying areas where fault and the conduct of the parties is relevant to the issues raised in divorce litigation. The Family Court, by adjusting its approach to property division and alimony, has been increasing the cost a husband must pay for giving up on a marriage and leaving his wife.

We are moving back into the issues of who did what to whom. We may be leaving the era when the accountants dominated divorce litigation, but we are not heading back to the days of the private eye. Rather, it looks as though we are entering the era of the psychologist—who will be telling us the "whys" and "what ifs" of domestic disputes and divorce. □

DELAWARE CUSTODY DISPUTES IN AN INTERNATIONAL SETTING

AIDA WASERSTEIN

En seguida el rey dijo: Partid por medio al niño vivo, y dad la mitad a la una, y la otra mitad a la otra.

Entonces la mujer de quien era *el hijo vivo habló al rey (porque sus entrañas se le conmovieron por su hijo), y dijo: ¡Ah, señor mio! Dad a ésta el niño vivo, y no lo matéis. Mas la otra dijo: Ni a mi ni a ti; partidlo.*

Entonces el rey, respondió y dijo: Dad a aquélla el hijo vivo, y no lo matéis; ella es *su madre.*

1 Reyes 3:25-27.

And the king said, Divide the living child in two, and give half to the one, and half to the other.

Then spake the woman whose the living child was *unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine,* but *divide* it.

Then the king answered and said, Give her the living child, and in no wise slay it: she is *the mother thereof.*

1 Kings 3:25-27.

The wisdom of Solomon yields a great and painful truth, proclaimed with the majesty of Scripture: custody disputes are exceedingly difficult and vexing to resolve.

They are particularly troublesome for parents who are located in different countries or who expect to be. First, it is more difficult to locate a child who has been taken to a foreign country, and there is the additional expense of litigating across national boundaries. Second, the petitioner would most likely encounter different procedural rules and may encounter legal standards different from those prevailing in the United States. Third, although Delaware and other states have statutes that recognize the validity of custody decrees of other nations, and although the Strasbourg Convention covers kidnappings from one European country to another, there is presently no international mechanism incumbent on all countries and ensuring the return of a kidnapped child who has been taken across national boundaries outside of Europe.

In writing this article, I have laid heavy emphasis on the impact of culture on the decider of fact in a custody dispute, the advice that an attorney can give to clients, and the development of the law to date.

The Problem in Delaware and Whom it Affects

It is hard to determine how many people in Delaware may encounter custody disputes across international boundaries because data are incomplete.[1] There have been several cases, however, and there are indications that the problem may be growing. For example, the Asian population in this country increased by 125% to more than 3.5 million during the 1970s, and the Population Reference Bureau projected for the 1980s annual immigration of 795,000 to 970,000, one-half of which illegal entrants from Latin America. To the extent that these immigrants intermarry with United States citizens, but eventually choose not to remain here, the potential for problems exists. It can affect one regardless of race, religion or socio-economic background: a high ranking executive in private industry; a member of the United States Armed Forces temporarily stationed overseas; a college student who has married during a junior year abroad; a low income person married to an illegal alien who returns to the country of origin.

The apt and striking passage in Spanish is characteristic of Aida Waserstein. Aida, born in Cuba, has used her bilingual fluency to the advantage of the Hispanic community of Wilmington, both in the conduct of litigation and in upgrading the quality of public schooling. Aida gained her baccalaureate in sociology at Bryn Mawr College, and graduated from the law school at the University of Pennsylvania. The cosmopolitan wisdom of her insights in this article reflects her training as a sociologist and her bilingual and, indeed, bi-cultural heritage. We are most happy to welcome her as a contributor to DELAWARE LAWYER. Aida is a member of the Wilmington law firm of Bader, Dorsey & Kreshtool. She is actively engaged in civil rights and domestic litigation.

It can also affect any foreign national who contemplates divorce after coming to Delaware. If one party chooses to remain in the United States and the other to return home, a dispute often develops over a child's custody and residence. The problem can arise over vacation plans. If one parent or both come from a foreign country, it is not unusual to vacation there to visit family and to preserve some cultural continuity or foreign language proficiency. During the process of the marital break-up, a lot of tension can arise from one parent's plans for taking a child out of the country. This is particularly difficult in situations where there is a drastic political

change. I know, for example, a Cuban mother in New Castle County who has not been able to bring her son to the United States. She had been divorced in Cuba from the child's father, who would not permit the child to leave in 1972 when she did. An earnest and expensive attempt to get permission from the Cuban government for the young man to leave in 1980 when many Cubans came out failed.

Advice to Couples Who Plan to Marry

Where a couple from two different countries consult an attorney about a prenuptial agreement, it is difficult to address the problem of custody. Under established case law, a prenuptial agreement may not be premised on the possibility of divorce. Given the "best interest of the child" standard and the fact that the child has usually not even been born, one cannot really decide what provisions one would make later. At best, all that the parties can do is suggest what they had agreed to before marriage. Although there can be no resolution, it is important that an attorney counseling such a couple mention the problem so that they can be fully informed.

The Impact of Culture on Custody Decisions

A major complicating factor in disputes across national boundaries is the impact of culture on a finder of fact. For example, the extended family, very common in Hispanic culture, may arouse the skepticism of an American-born judge. He may look askance at an arrangement whereby a grandmother in the home, rather than the mother, has primary responsibility for child care, and the mother's relationship with the child may appear to that judge other than it would to a judge raised in a society where several generations often live together under one roof. A judge raised in a more traditional European or Latin American society may disfavor two types of families common in America today—the single parent family and the two-parent family where both parents work and the child is in day care at a very early age.

The decision-maker's cultural outlook is particularly significant in a custody dispute. Obviously, he must rely on personal and professional experience in evaluating any case in such matters as appraisal of the witnesses' demeanor and veracity. However, his perceptions may be more decisive in a custody dispute because it involves evaluating personality and human development with a view to the long term. This type of case involves making judgments about human values and life styles in a way that no other does.

The possible impact of cultural differences can be sensed in the only reported Delaware case dealing with an international child placement that I have found. *In The Matter of Erich*, 310 A.2d 910 (Del. Ch. 1973) resolved a legal guardianship dispute over a child less than a year old. His parents and only sibling had perished in an auto accident. Possible guardians were the only sister of the child's deceased mother and her husband, who had a four year old of their own; the deceased father's first wife and her husband, who were practicing physicians and who had two girls of their own and a fifteen year old half-sister to the child; a doctor and his wife with whom the child had been placed temporarily, and who had four children unrelated to the child; and the father's only brother and his wife, who had two children, aged 8 and 10. The first three sets of possible guardians lived in the United States, the fourth in Austria. Although the Court considered all qualified, it chose the Austrian family because the father was a blood relative and the wife and mother had no job outside the home. In the eyes of the Court, that family could provide "...the love, affection and attention of a closely knit family... on a personal, full time basis.... [The] wife is a full time homemaker and mother who is able and does devote her time exclusively to her home and family."[2]

Is a child better off in our more rushed, technologically advanced society with a tradition of democratic government or in the Spain of a less hurried, more personal life style with a relatively new socialist democracy and the legacy of Franco's strong, centralized government?

The Court was candid about the difficulties it faced in placing the child outside the United States. It noted that although the child would remain an American citizen, "...there is certainly a chance that an American heritage will be lost...." and admitted that it was "...most reluctant to appoint a guardian under the circumstances in which the child would grow up in a foreign country...."

Although difficult, the *Erich* case was somewhat easier than a dispute between parents. Had there been two natural parents, only one of whom intended to live in the United States, any decision could effectively terminate one parent's contact with the child forever because of the additional expense of visitation and the lack of a binding international enforcement mechanism regarding custody and visitation applicable to all countries.

Furthermore, assuming that both parents are equally capable, how does one go about deciding which society, which standard of living, which culture would be more beneficial to the child? Is a child better off in the more rushed, technologically advanced United States society with its tradition of democratic government or in Spain which may have a less hurried, more personal lifestyle with a relatively new socialist democracy and the legacy of Franco's strong, centralized form of government? Or, depending on the individual case and the parents' heritage, is a child better off in Israel, in Africa, in Japan or in any other country? Such decisions are difficult to make about one's own life, much less for someone else's. Morever, how can one assure the losing parent that the decision was fair?

Where There is No Custody Order

In counseling the client who plans to go abroad or who wonders whether his spouse should take the child abroad when the marriage is in trouble, there are several considerations. Even when there is no custody order, the parent who takes the child without the second parent's consent incurs the risk that the second parent may obtain a court order while Delaware is still the child's "home state" and sue the absconding parent for money damages. If the client still considers taking the child without notice to the other parent, it is important for the attorney to remind the client of the extreme pyschological cost to the child, unable to see the other parent after a sudden separation and of the danger that the other parent may follow the client abroad to kidnap the child back. The client should also be told that there is a

growing tendency for countries to cooperate in child abduction cases. In the final analysis, however, with the exception of a few countries, there is no uniform binding legal mechanism that would force a country to help return a kidnapped child to the United States.

The client should also be encouraged to become informed—before and not after—about the laws and customs governing custody and exit from the country to which he or she may go. Several Latin American and Middle Eastern countries, for example, will not allow a minor to leave the country unless the father consents in writing. In fact, all Middle Eastern countries require the man's consent before his *wife* or the *mother of his child* is permitted to depart. The client should also be warned that any custody and visitation agreement, drafted either here or abroad, should take this type of mobility into account. For instance, an agreement that merely says that visitation will be reasonable without spelling out what it will be if one of the parents leaves the country is meaningless. Instead, the agreement should specify such matters as residence with one parent during the school year, who bears the cost of transportation, and what conditions must be met before the child can be removed. Provision could also be made for the establishment of an escrow account in each country large enough to enable the parent who has been deprived of the child's company to fund the transportation and initial legal costs of locating the child and litigating the matter abroad.

The Importance of Obtaining a Court Order

Most important, the parent should be aware that while a custody agreement ratified by court order or a court decree is the best protection, enforcement can take a long time. In *Schleiffer v. Meyers*, 644 F.2d 656 (7th Cir. 1981), for example, the father brought the child to the United States despite a Norwegian court order awarding custody to the mother. The mother also prevailed in subsequent custody litigation in Sweden and in the Circuit Court of Whitley County, Indiana which recognized the Swedish decree. The Seventh Circuit did not permit the child's next friend to use federal constitutional theories to circumvent a legitimate state decree, and stopped the federal case so that the state court could proceed. Nevertheless, as of the writing of the Seventh Circuit decision, the child was still not returned to the mother three years after the kidnapping and the litigation apparently continued even after that.

The parent should, nevertheless, take whatever steps are necessary to start proceedings as soon as possible, either here or in the foreign country and should file the custody decree with the Office of Citizenship Appeals and Legal Assistance, Room 5817, at the State Department in Washington, D.C. With a court order, the parent can ask the United States Department of State to halt issuance, reissuance or modification of the child's passport. A United States court order may also be enforceable in other countries, and a foreign court order is enforceable in many states, including Delaware, as long as there is a custody decree validly rendered on reasonable notice and with opportunity to be heard given all affected persons. Finally, a parent who takes a child in violation of a court order could be prosecuted for a misdemeanor in Delaware and could be held in contempt of court.

The Present State of the Law and Future Directions

Like many other states, Delaware has adopted the Uniform Child Custody Jurisdiction Act (UCCJA), 13 Del. C. §1901-1925. The UCCJA gives Delaware jurisdiction over custody if Delaware is the child's home state at the beginning of the litigation, or if the child was removed from Delaware by a person claiming custody within the preceding six months. The Act also specifies that the physical presence of the child in Delaware is not a prerequisite for jurisdiction, thereby eliminating an incentive for child snatching. It also prohibits modifications of custody decrees of other states with very limited exceptions and requires summary enforcement of legitimate out-of-state and international custody decrees.

Some Latin American and middle eastern countries will not allow a minor to leave unless his father consents in writing. In fact,* all *middle eastern countries require a husband's consent before his wife can depart.

The Parental Kidnapping Prevention Act of 1980, effective July 1, 1981, also provides that the home state is where the child has lived for at least six consecutive months, and it complements the UCCJA by requiring Delaware courts to give full faith and credit to out-of-state custody orders. Furthermore, it makes the Federal Parental Locator Service available for tracking down child-snatching parents when a request is made by a local official who has authority to enforce child custody determinations. Although this service does not apply to kidnappings outside the United States, there are other ways to locate children out of the country, such as the Worldwide Locator Service of the various branches of the armed services, State Department and Consulate resources, and non-profit organizations such as Child Find, Inc.

Child kidnappings within Europe are covered by the Strasbourg Convention, signed by fifteen countries in May 1980, which applies among the twenty-one Council of Europe nations. The United States and other non-European countries could not be parties to the Convention. Nevertheless, it may be useful in a custody case in the United States if the child has been taken from the United States to a second country with which the United States has enforcement mechanisms, and which has signed the Strasbourg Convention. If the child is thereafter taken to a third country, also a signer of the Strasbourg Convention, the Convention could help retrieve the child to the second country, and the child could then be returned to the United States under arrangements between the second country and the United States. The Strasbourg Convention requires that signatories trace missing children and recognize custody orders from other signatories. It provides for an organization in each country that will return a child removed improperly if the request is made within six months. By June 1981, Austria, Belgium, the United Kingdom, Cyprus, France, West Germany, Greece, Italy, Ireland, Liechtenstein, Luxembourg, the Netherlands, Portugal, Spain and Switzerland had signed the Convention.

Finally, there is some hope for a mechanism that may cover many more countries. The Convention on the Civil Aspects of International Child Abduction (the "Hague Con-

vention"), was approved by the Hague Conference on Private International Law in October of 1980. Twenty-seven countries participated in the proceedings, and the United States, Switzerland, Greece, France and Canada have signed it. Only France has ratified. As soon as two countries have both signed and ratified, the Hague Convention will go into effect. It will probably be presented to the United States Senate for ratification in the spring of 1983. The Convention provides for a "Central Authority" in each country responsible for discovering the whereabouts of kidnapped children, the exchange of information for custody determinations, and prompt judicial or administrative proceedings to return the child. It is subject to limited exceptions: the child need not be returned if he could face grave risk of physical or psychological damage or an "intolerable" situation. Although it is only a beginning, proper enforcement of the Hague Convention may reduce greatly international child kidnappings.

Conclusion

International custody disputes are a challenge to parents, children, attorneys, and the courts. Instead of tests of wits, strategic maneuvers or displays of legal cunning, these disputes should rise above petty squabbles and be resolved for the benefit of the children. In this process, however, it is essential that each parent receive sound legal advice, emotional support, and above all, the protection of a finely drafted court decree addressing the subtleties and complexities of this most difficult type of dispute. □

Aida's article, condensed from a longer scholarly treatise is buttressed by extensive authorities. Space limitations prevent our publishing these. DELAWARE LAWYER will be happy to make them available to readers who wish to pursue the subject in greater depth.

[1] The Du Pont Company estimates that 200-300 of its employees are in a foreign country each year. At ICI Americas, 23 persons from the United Kingdom are assigned to Delaware this year. University of Delaware figures show that of a student population of 19,000 in 1982, 3% are foreign.

[2] The *Erich* case decided in 1973 may also be a good illustration of change in American culture in the last few years. There has been a virtual revolution in knowledge regarding the capabilities of infants and pre-school children, the educational materials for those age groups, and the importance of peer interaction at a very early age. There are also many more day-care facilities, and many mothers who choose to stay at home today start sending their children to pre-school when the children are 2, 3 and 4 years old. In addition, the entry of more women into the formal labor force has greatly increased the number of families who place their children in day care. If *Erich* had been decided in the 1980s, a different judge might well have placed Erich in a family with two professional parents and a fifteen year old half-sister who already had a strong attachment to him. In ruling out this family, the Court considered that the adults were not blood relatives, but it also observed that "...the reality is that both Martha and her husband are fully committed professionals who, understandably, want to continue in their medical careers for which they are trained...." and that the baby would be cared for by a housekeeper. *In the Matter of Erich*, 310 A.2d 910, 912 (Del. Ch. 1973).

Clouded Prophecies

"IN INSECURITY TO LIE
IS JOY'S INSURING QUALITY."

EMILY DICKINSON

SHAUNEEN HUTCHINSON

Nowhere is there a better forum for testing the accuracy of Justice Holmes's observation that "Great cases, like hard cases, make bad law" than a court mediating domestic conflict. The cases confronting the judges invariably involve an array of broken homes and broken lives, broken hearts and broken dreams. The once happy bride and smiling groom often arrive at the courthouse door snarling and ready for combat. And perhaps the very hardest cases are those which center on the children of these shattered marriages.

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We may all lament the growing number of divorces and recognize with some regret that happily is so often not ever after. Our regret is tempered by the realization that the individuals at the center of every divorce are adults who have at least some measure of control over the future course of their lives. Regret becomes far more profound when we view the children of these marriages. Once the property has been split and a divorce decree entered, the most difficult question may still remain. Who should have custody of the children? Battles for custody are often the most bitterly contested, and in fact may well make for the hardest cases of all. Tempers are short, patience limited, and objectivity minimal. Too often, the children are helpless in a war waged around them. I should like to consider that war, those children, and the Family Court of Delaware, and, in so doing, discover just what kind of custody law these difficult cases have made.

Logically, the first place we look for the law of custody is in the black letter pronouncement of the Legislature in Title 13 of the Delaware Code. However, it is important to note at the outset that legislation dealing with child custody varies with the relationship of the parties to the child in question. The rules governing a dispute between two parties differ from those governing a contest between a parent and nonparent or two nonparents. A further legislative refinement may also be imposed if the moving party wishes to modify a prior custody decision. Thus, in tracing the law of custody in Delaware, one must begin by identifying the relationship of the parties to the child involved.

Disputes Between Two Parents

Chapter 7 of Title 13, "Parents and Children," tells us at Section 701 that "The father and mother are the joint natural custodians of their minor child and are equally charged with the child's support, care, nurture, welfare and education." Section 722 further informs us that, "The Court shall determine custody in accordance with the best interests of the child." The Legislature includes five fairly specific factors to be considered: the wishes of the parents; the wishes of the child; the interrelationship of child and parents, siblings and others; the child's adjustment to home, school and community; and the mental and physical health of all individuals involved. Having thus spoken, the Legislature leaves the rest to the Court, and we are left to realize that despite these seemingly explicit guidelines, the legislative standards are of little practical help. "The best interests of the child" does not translate into any workable rule when applied to a particular case. One must look, instead, to the judge who decides just what will be in the child's best interests. An understanding of how standards are used in awarding custody must derive from the opinions of the judges who decide. If standards really exist, their existence and attributes will be found in decided cases.

Custody disputes between parents are certainly the cases most frequently heard in Family Court, and a fairly clear pattern has emerged from the many decisions. The factors enumerated by the Legislature are certainly considered in the process of deciding. For example, the Court does indeed pay attention to a child's preference, but the weight given varies with the age of the child with more deference shown the wishes of older children. Furthermore, the Court seems less

preoccupied with mundane matters than with the attitudes of the parents. Judges are frequently and vocally critical of parents' inability to put aside differences long enough to deal responsibly with their children.

A closely related phenomenon is the increasing tendency of the Court to keep both parents involved in the child's upbringing to the greatest extent possible. To this end, the Court added Family Court Rule 470 in May of 1981. The rule requires that every custody dispute proceed first to mediation with a member of the Court's counseling staff. Judges and counselors have repeatedly emphasized the need to maintain maximum contact between the child and both parents, recognizing that divorce should address only the parent/parent relationship, not that of parent and child. Closely related to this notion is the phenomenon of joint custody, which has gained much attention in recent years. Statistics on voluntary agreements between divorcing parents show that joint custody arrangements are even more common. Such arrangements accounted for 7% of voluntary custody arrangements in Delaware in 1981. By the end of fiscal year 1982, they increased to 22%.

Despite the increase in voluntary arrangements involving joint custody, the Family Court judges, as a group, do not demonstrate any discernible preference for joint custody: the response varies from judge to judge. One judge will view the desirability of joint custody almost as a presumption easily rebutted. Other judges insist that joint custody is rarely appropriate for parties who have resorted to judicial intervention, since they show little promise of being able to cooperate in any joint effort to raise their children. An attorney advising a client about the possibility of a decision to vest custody jointly in both parents should probably begin by finding out who will hear the case.

One important aspect of joint custody which is too often ignored by both parties and their counsel until after a decision is reached is the financial impact which a joint custody arrangement may have. In the case of separating parents, child support obligations are generally structured in accordance with the well-known Melson Formula. The formula is used to set dollar amounts for each parent's child support obligation. Where one parent is awarded sole custody, payments are generally made by the non-custodial parent to the custodial parent. Where custody is joint, however, support obligations may vary directly with the amount of time the child spends with each parent. Arguably, any period of time a child spends with an individual parent should be "credited" to the total amount of support assessed that parent and deducted from that of the other parent. Taken to a logical extreme, this situation could have absurd results; however, as a general proposition, it cannot and should not be ignored.

A second question often asked concerning custody disputes between parents is whether mothers fare better than fathers. The "tender years presumption" which traditionally weighted the scales of justice heavily in favor of the mother has long since been discredited in Delaware. In fact, the Delaware Code specifically states at 13 *Del. C.* § 722(b) that, "The Court shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as custodian of a child..." This legislative pronouncement suggests a lack of bias, but translating it into practice is another matter altogether. Old notions die slowly, and even if the Court were able to look beyond the overt legal bias traditionally favoring a mother, it would still be subject to societal pressure to keep children, especially young ones, with their mothers. Although no clear rule appears in examination of recent cases, the fact that the mother would often have more time available to spend with the child would certainly tip the scales in her favor. Here, also, statistics regarding voluntary agreements may shed some light on how judges act. In fiscal year 1981, of the 792 cases involving voluntary agreements referred to the Court's Mediation Unit, 454 resulted in custody being vested in the mother (57%). In fiscal year 1982, mothers received custody by voluntary agreement in 519 out of 1,127 cases (46%). If judges award custody to mothers in a majority of cases, they are acting pretty much as couples do when left to make their own arrangements.

Because there is no clear standard by which to decide custody disputes, a great deal must be left to the discretion of the judge. Result, every case will leave one bitterly dissatisfied party arguing that the decision lacks precedent, and that party may well be right.

Disputes Involving One or More Nonparents

If the standards applied in custody disputes between two parents are not absolutely clear, they are at least sufficiently predictable to allow an attorney to give a client some estimate of his or her chances. However, in disputes between a parent and a nonparent or two nonparents, even this minimum level of predictability is not possible. These are certainly the very hardest cases, and rather than making for bad law, they currently seem to be making for no law at all. Recent decisions involving custody disputes where at least one party is not a natural parent have focused a great deal of attention on the Family Court; two questions in particular have been raised repeatedly. First, do natural parents enter the fray with a presumption in their favor? Second, how much deference should be given to the notion that a child may grow sufficiently dependent on one person so that he or she becomes a "psychological parent?"

The question of whether a natural parent should benefit from a presumption in favor of custody may have been answered by the United States Supreme Court recently in *Santosky v. Kramer*, ____ U.S. ____, 71 L.Ed.2d 599, 102 S. Ct. ____ (1982). That case involved termination of parental rights, and the Court, holding that parents in such cases have a constitutional right to due process with a full and fair hearing essential, cited the "fundamental liberty interest of natural parents in the care, custody and management of their child..." Judge Spaeth of the Pennsylvania Superior Court took a similar view in *Hooks v. Ellerbe,* Pa. Super., 390 A.2d 791 (1978), *aff'd,* Pa. Supr., 416 A.2d 512 (1980). Of the "best interest" question, Judge Spaeth observed, "[T]he parents have a *prima facie* right to custody which will be forfeited only

if convincing reasons appear that the child's best interests will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the parents' side."

Although this bias in favor of the natural parents has been cited with approval by the Family Court in *Gerald & Margaret D. v. Peggy R.*, Del. Fam., No. C-9104 (11/19/80, Arsht, J.), its limits have never been fully explored and it has never been formally adopted by the Delaware courts. For a time, the Superior Court seemed to have taken quite a different view. In *R.A.D. v. M.E.Z. and B.D.*, Del. Super., 414 A.2d 221 (1980), the Superior Court granted a grandmother standing to intervene in a custody dispute where the natural father was the petitioner and applied a strict "best interest" standard without affording the father a favorable presumption. However, a recent Delaware Superior Court case may shed some light on this issue. In *F.McG. v. L.U.*, Del. Super., 82L-28(H) (decision 10/5/82, Taylor, J.), Judge Taylor stated that Delaware legislation clearly supports "[p]arental preference in custody disputes between a parent and a non-parent." The extent of the preference recognized by Judge Taylor cannot yet be measured; future custody cases may define it more exactly.

The second issue frequently debated in disputes involving nonparents is the theory of the "psychological parent" which has received increasing attention in recent decisions. The theory derived originally from the work of Joseph Goldstein, Anna Freud and Albert J. Solnit described in *Beyond the Best Interest of the Child* (The Free Press, 1973). These authorities emphasize a child's need for continuity of relationships. To achieve this goal, they argue for repose and finality in custody cases so that a child need not be required to make frequent adjustments to new caretakers. To this end, the Delaware Legislature has imposed an almost mandatory "cooling off period." Any party who seeks to modify an existing custody order within the first two years after it is entered must meet the extremely difficult requirements of 13 *Del. C.* § 726(b).

The Goldstein-Freud-Solnit theory has also led to the Family Court's increasing willingness to find psychological dependence in a child who has been cared for by a nonparent for an extended period. Title 13 of the Delaware Code specifies that a custody petition may be brought by a parent; however, under 10 *Del. C.* § 932, "any person" may commence a petition in the Family Court providing it alleges neglect, dependency or delinquency. Read together, these two statutes seem to allow any person to petition the Court for custody as long as neglect, dependency or delinquency can be alleged. The children involved in these cases may well be the saddest imaginable, and these are probably the hardest cases of all. It is here that Justice Holmes's observation would seem to prove most apt because the law, if not bad, is certainly not *a* law but, rather, a series of seemingly unrelated decisions which defy summarization.

Perhaps the single most discussed case on this subject is *Martin v. Sand*, Del. Fam., 444 A.2d 309 (1982), where a babysitter petitioned for custody and won over both natural parents. Certainly enough has already been said about the case, and we need not analyze it further here. It is not the first case where a nonparent has succeeded in gaining custody in a dispute with a natural parent nor will it be the last. The "psychological parent" theory is central to the decision. It has forced the domestic relations bar to ponder the validity of the theory and the extent to which it should be applied in custody disputes. Without advancing either side of the debate here, we may look beyond the facts of the *Martin* case and those like it to the broader difficulty they create. Because there is no absolutely clear standard by which to decide these disputes, a great deal must be left to the discretion of the trial judge. Inevitably, the outcome of every case will leave at least one bitterly disappointed party arguing that the decision lacks precedent. At present, the argument may well be valid no matter which side advances it.

Custody Disputes: Some General Considerations

By facing up to hard questions about the decision-making process in custody disputes, we may begin to move toward answers, or at least socratically fertile inquiries: When judges are confronted by complex, difficult and highly emotional situations, should they strive to adhere to rigid rules appropriate to most legal decisions, or should they embrace discretion as a watchword and seek flexibility at the heart of every resolution? Do we want a forum for adjudicating custody where parents can count on prevailing unless they can be shown to be absolutely unfit, or do we opt for an objective "best interest" standard where all parties are created and remain equal? And when all is said and done, if results always vary with the circumstances of the particular case, is this really a situation so greatly to be feared?

Perhaps if we begin by accepting the fact that the cases and controversies addressed by the Family Court arise in a context far different from the world of widgets and contracts where so much of our law has been forged, we can search for solutions different from traditional rules but nonetheless acceptable. As a first principle, we would have to accept the inevitable tension between predictability and judicial discretion. The more we look to the judges to shape remedies to the cases before them, the more we sacrifice predictability and the less able we shall be to advise our clients of what to expect from their day in Court. On the other hand, if we insist on hard and fast rules, we may have to sacrifice much of the human element which often pervades decisions made in the Family Court. As we achieve predictability, we lose flexibility and the luxury of shaping decisions to fit specific situations; on the other hand, as we allow for greater judicial discretion, we tacitly invite judges to rely on highly personal values and to impose them on the lives of others.

We may achieve a clearer understanding of the way the law operates in the Family Court if we focus on the process itself. Perhaps the single most important factor in the decision-making process is the input made by the experts who interview and counsel all the parties in a custody dispute including, of course, the children. In general, these experts are psychologists, psychiatrists, and social workers on whose expertise the Court relies heavily. Child custody decisions involve a special kind of legal analysis. They differ radically from traditional decisions in that adjudication must be focused on the future. In effect, the judge

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AN INTERVIEW WITH The Honorable Roxana C. Arsht

DAVID CLAYTON CARRAD

The Honorable Roxana C. Arsht, Delaware's first woman Judge, was born and raised in Wilmington—across the street from a saloon at Second and Adams. Her father, who had gone A.W.O.L. from the Russian Army in 1905 at the height of the Russo-Japanese War, arrived in Wilmington shortly thereafter by way of Liverpool and Philadelphia. Her mother (in Judge Arsht's words, "a very independent spirit; not afraid of anything") worked throughout her marriage and raised Judge Arsht and her brother, Dr. Norman L. Cannon. Her father received a Bachelor's and Master's degree in sociology as he was building up a dry goods business and real estate holdings. ings from scratch.

After education in Wilmington's public schools ("Chief Justice Daniel Herrman and Judge Frank E. Melson were high school classmates") Judge Arsht majored in chemistry at Goucher, with a minor in mathematics. (She now professes to loathe the arithmetical calculations involved in property divisions.) She attended law school at the University of Pennsylvania.

In May 1940, while clerking at

Ward & Gray, now Potter, Anderson & Corroon, she married S. Samuel Arsht, now of counsel to Morris, Nichols, Arsht & Tunnell. She was admitted to the Delaware Bar in 1941 while pregnant with her first child. "I knew I was pregnant when I took the oath, and was tempted to reply 'We do.' As it turns out, I should have—that was Adrienne who grew up to become a member of the Delaware Bar."

Her next 20 years were devoted to raising a family and volunteer work with the Visiting Nurse Association and the Red Feather, now the United Fund. She resumed her legal career in 1961 as a Master at the Family Court, then in the basement of the Public Building. After 9 years' service, she was appointed an Associate Judge of the Family Court on July 28, 1971. Despite pleas from the lawyers who appear frequently before her and the members of the Delaware judiciary, she remains adamant about retiring at the expiration of her term this July.

We asked David Clayton Carrad, Chairman of the Family Law Section of the Delaware State Bar Association, a Fellow of the American Academy of Matrimonial Lawyers, and a member of our Board of Editors to conduct this interview.

Our interview with Judge Arsht will conclude in the next issue, when she may be able to indulge in the luxury of a judicial candor not available to those who yearn for reappointment.

Carrad: How old were you when you became a judge?
Arsht: 56—which isn't very young.
Carrad: It's not old for a judge.
Arsht: Well, speaking of age, I think the Court has a good span now. The composition of our Court has changed and I'm very pleased with it. While I'm not bound by what any other judge here says or does in any case, I do think we have a good mix, because we deal with more than just legal issues here. There is the discretionary element by way of alternative dispositions, or approaches. And I think—I *know*—we all benefit by getting perspective as to how somebody else sees it. There is a lot to be said for the differences between the judges, and for rubbing elbows with each other. It's like making a good soup—a little salt here and a little pepper there.
Carrad: When you retire in July, would you like to see your seat filled by another woman?
Arsht: Absolutely.
Carrad: Why?
Arsht: Oh! This court deals with both sexes. With men and women and families. In your approach to handling families and their problems, the broader and the more varied approaches that can be considered, the better our cases are likely to come out. In pure issues of law, where no sex is involved, it doesn't matter whether you're a he or a she. I think Justice O'Connor (of the United States Supreme Court) made some remark along that line when she was being confirmed by the Senate. You're either a qualified lawyer or you're not. It's sex blind.
Carrad: But you do think there should be more women on the Court?

"I think the Court needs more women on the bench, just as it would benefit by having blacks and Hispanics, reflecting community mores and the entire population."

Arsht: Oh, yes. And I think there should be blacks.
Carrad: Fifty-fifty?
Arsht: I'm not going to go into an affirmative action program for equality as far as the numbers in the population. I think the concerns and approaches women bring to problems can be beneficial, and they're frequently different from men's. And since we are dealing with men and women and families, I learn from the men. I think I've learned from the fact that I'm out of the house and working, and I can apply that experience. But I also know what it's like to be home and cook. I think that the age mix that we have on this Court is good. I'm the oldest. There's something to be said for some experience and maturity. But you can be older and more set in your ways and inflexible.
Carrad: I think it's also good to have young judges like Judge James and Judge Poppiti.
Arsht: That's right. Judge Poppiti is only 37. I think he may be the youngest. There are those with young children, those with older children, and those with no children. I'm at the grandmother age although I'm not a grandmother. All I'm saying is that in the areas that this Court deals with, a range of ages can benefit the final outcome. I think this Court needs more than one woman on the bench, just as it would benefit by having blacks and Hispanics, reflecting the community mores and the entire population.
Carrad: Let's say a woman in her forties or fifties comes in and says to you, "Look, I've raised two children, and this is all I know. I married when I was very young. I have no experience, and I just don't want to go out and work." In light of your own experience, how sympathetic a reception does she get?
Arsht: I don't fault her for feeling that way. I look at that marriage, and if it's what the couple wanted, perhaps she's entitled to feel that way. But I will also look at her and think to myself,—"If you can make the adjustment, lady, you're going to be a happier person. It's going to take time to be your own person. You may need help." I think the Legislature is right in talking about at least a two-year rehabilitation; a minimum entitlement to that, because a divorce is often like a death, especially if you're not the one seeking the divorce. I don't ask "What's the matter with you, lady?" because I don't think there is anything wrong with that attitude. But that attitude is on the decline. The present generation, those who are marrying now and those who are in their middle twenties, are in large measure saying "I want to stay in the work force."
Carrad: I've noticed that. Our divorce statute is very modern, liberal, and enlightened, but we apply it to people who are twenty-five and to people who are sixty-five with completely different expectations of life.
Arsht: You're absolutely right! The fifty-five year olds are the ones who never expected that there would be any other way of life but to continue as grandparents. Now if the wife becomes a widow, she won't have the same emotional hangup about what to do with her life. But divorce can be a tragedy for her. I think that it is asking the impossible for some women at the age of fifty-five or sixty to cope easily with divorce. What training do they have? How can they possibly get back into anything that pays and is ego-satisfying? They can't compete. It's demoralizing.

If the husbands in these cases have allowed this situation to develop, they ought to be stopped. If a man has encouraged his wife to stay home, and not to work, to do the cooking, and to go to the country club, *he* has created the problem for her.

Carrad: And suddenly the husband becomes a great convert to women's liberation. He says, "Hey, you should be out working" after he's kept her at home for thirty years.

Arsht: They are often unreasonable. And I think that it can be grossly unfair to expect somebody who has lived in a reasonably comfortable lifestyle to have to be a waitress or restaurant hostess when she has not had to do it before.

Carrad: What are your hopes for the Family Court in the future?

Arsht: There are a number of things I should like to see. First, our appeals should go directly to the Supreme Court. I am particularly crushed at the damage in the custody cases, which hang out there in limbo for years while the children may be suffering through *two* appeals, first to the Superior Court, and then to the Supreme Court.

Carrad: And you can be reversed by one judge instead of a panel of appellate judges.

Arsht: Family Court now has termination of parental rights, adoptions, specific performance of separation agreements—everything. Our jurisdiction has taken everything out of Chancery and Superior Court, but some appeals still have to go to the Superior Court. It doesn't really make sense.

Carrad: Do the Superior Court Judges know how you feel about this?

Arsht: I think they do. But I think that the Superior Court considers that, well, you're only the Family Court and, you know, you deal with the family, but we're *Superior*. And the *Supremes* are over all of us. And I definitely get the feeling that as objective, and erudite, and as above these things as judges try to be, we are still human, we have egos, and we resent certain things.

Carrad: Like getting reversed on appeal, even if it's by five Justices.

Arsht: The first time I was reversed, I cried. My first inkling was when I heard someone say, "We just got a reversal from the Supreme Court because some party was denied due process." I thought, of course that couldn't be *me*. I wouldn't deny anyone due process. Sure enough, it was my case!

Carrad: I hope you don't still cry?

Arsht: No. I don't cry anymore. A good friend of mine who's a Federal appellate judge once told me that any judge who says he's not upset when he's reversed is lying.

Carrad: Any other changes you'd like to see at the Family Court?

Arsht: We are dealing with a lot of issues, a lot of people and their problems through mediation and arbitration. I'm sure that's good. We may come to that more and more in divorces and property divisions, because it may be cheaper than wasting your time with the slow processes of the Courts. I'm all for mediation if you can get an agreement, although I'm not sure that the people who are doing it are as well trained as I should like them to be. I don't think we have enough adequately trained

staff with the time to do the job the way I'd like to see it done. The way I dreamed it could be when I first came on this Court. The way Judge Elwood F. Melson, Sr., dreamed that this Court could be.

I feel we have lost a lot of the human relations in this Court. We may not have succeeded any better in resolving people's problems than we do now, but at least you felt the contact with another human being. You got to know the people who came to your Court, and they came back to you later. You seemed to have a better contact with the cases and the people. And you didn't feel as rushed. Now we're on a very tight schedule. For a few weeks, I'm Criminal and Delinquency judge, and that's all I hear. Then I'm Office Judge, handling only emergencies. Then I go to Dover. When I'm back on the Civil calendar, I deal with property divisions, custody and support appeals.

Carrad: What kinds of cases do you enjoy the most and what kind do you dread? Do you hate ancillary hearings (property division, alimony and all the financial aspects of divorce)?

Arsht: I was a math minor and I took a course in statistics. But I still don't like it. I don't enjoy dividing up furniture, pots and pans. The first time somebody said, "I want the crockpot," I didn't know what a crockpot was!

Carrad: I didn't know what a hutch was.

Arsht: I know what a hutch is. It's a "credenza," or cupboard.

Carrad: I told a client, "Write me a list of what you want out of the house." I went over it with him and came to this item, a hutch, and I said, "That's nice. Your kids have a rabbit." He looked at me out of the corner of his eye and said, "No, it's a *hutch*, you know, a credenza."*

Arsht: I remember there were two things that I didn't know. One was a crockpot and, in a delinquency case, one child had grabbed another's Big Wheel. I didn't know what a Big Wheel was, but around this Court

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**"Credenza"–a word much favored in the lower middle class vocabularies of interior decor, perhaps because it sounds pious and foreign. In strict truth: a plain old sideboard. The Editors.*

"EVERY CHRISTIAN VIRTUE EXCEPT..."

Alfred Thompson, Baron Denning of Whitchurch

JUDITH GRAHAM

Few English judges could ever be described as "popular". Outside legal circles they are, for the most part, unknown, only occasionally brought to public notice by the newspaper report of an unfortunate remark or by the notoriety of a case over which one of them is presiding. English judges are generally regarded—wrongly—as creatures of the Establishment, drawn exclusively from the upper reaches of society, "public" school and Oxbridge educated and then, by reason of their profession as barristers, practicing in the cloistered, often shabby elegance of the Inns of Court in London, divorced and remote from the cares and troubles of the ordinary man. To all this Alfred Thompson, Baron Denning of Whitchurch, is a notable exception. In fact he was and is, in every way, exceptional. Son of a Hampshire draper, he attended the local grammar school before winning a scholarship to Magdalen College, Oxford. There he gained first class honors degrees in both mathematics and law, a notable achievement. He had few of the material advantages but instead a happy and secure home, a father who gave him a love of the English language and literature—evident always in his judgments and in his writings—and four brothers. Two brothers, whom he always describes as being the "best of us", died in World War I. Of the remaining, one became a general, the other an admiral, and Lord Denning became Master of the Rolls, the president of the English Court of Appeal, the most influential and powerful position in the English judicial hierarchy.

Lord Denning's love of and learning in the English common law have contributed largely to the humane growth of the law. His perception of the law as an instrument of justice, rather than a body of principles to be followed slavishly without regard to consequence, has led him to manipulate both common and statutory law in order that justice may be done. His rapid rise brought him to the Judicial Committee of the House of Lords, the final court of appeal. Here, however, he found himself always in the minority, often at odds with his fellow Lords of Appeal. When he was offered the position of Master of the Rolls, he was quick to accept: as president of the Court of Appeal he would be in a position to shape the law and to hear the most important cases of the day. (Not all of them reach the House of Lords.) At the end of July 1982, aged 83, Lord Denning retired from office—against his avowal to stay. Appointed a judge before the compulsory retirement age of 75 was enacted, he was often heard to say, "I have every Christian virtue, except that of resignation".

Lord Denning is remarkable too as a judge who has written books—not so much textbooks or autobiography, but books explaining in his own pithy, lucid style the development of the law and his own legal philosophy. It is perhaps a measure of the man that these books were published without the prior scrutiny of the Lord Chancellor, customary before a judge goes into print. The last of these books, *What Next in The Law* provoked a storm of controversy, for not only did Lord Denning reveal that he had changed his mind about his judgment in the case of *British Steel v. Granada Television* (1980), a case in which a television company was ordered to reveal the identity of the employee "mole" who had passed to a Granada journalist confidential papers belonging to British Steel, but also because of his remarks about juries, provoking a writ for libel by a former juror. Amid the controversy *What Next* was withdrawn and the offending passage removed; a short time later Lord Denning's resignation was announced.

Precedent and Interpretation

It is Lord Denning's use and abuse of the doctrine of precedent that has most incurred the wrath of the House of Lords and many of the profession. His Romanes Lecture of 1959 describes his attitude toward this cornerstone of the common law: he was not content to adhere to the doctrine of *stare decisis* if it were to be interpreted as meaning "Stand by your decisions and the decisions of your predecessors, however wrong they are and whatever injustice they inflict", because "...so interpreted, the doctrine of precedent does nothing to *broaden* the basis of freedom, rather to *narrow* it". Instead "...the principles of the lawyer should be modified when found to

be unsuited to the times, or discarded when found to work injustice". Lord Denning's view of the law as a living, moving set of principles contained in the cases and the statutes to be used *so as to do justice* has, however, introduced a lack of certainty into the law. Unabashed by critics who complain that the means in this case do not justify the end, he answers: "'I am only concerned,' [many a lawyer] will say, 'with the law as it is, not with what it ought to be'. For him the rule is the thing. Right or wrong does not matter. That approach is all very well for the working lawyer who applies the law as a working mason lays bricks, without any responsibility for the building which he is making. But it is not good enough for the lawyer who is concerned with his responsibility to the community at large. He should ever seek to do his part to see that the principles of law are consonant with justice. If he should fail to do this, he will forfeit the confidence of the people. The law will fall into disrepute; and if that happens the stability of the country will be shaken. The law must be certain. Yes, as certain as may be. But it must be just too."

The interpretation of statutes is a thorny subject on which Lord Denning has been at constant odds with the English legal system. In treating this thorny subject he had this to say of lawyers' skills with words:

"[Lawyers] dwell upon words until they become mere precisians in the use of them. They would rather be accurate than clear. They would sooner be long than short. They seek to avoid two meanings, and end—on occasion—by having no meaning. And the worst of it all is that they claim to be masters on the subject."

Such criticism could never be levelled at the author of those words. His judgments are models of clarity. The chapters of his books are set out in precisely the same way as his judgments. Take as an example section 6 of the chapter in *What Next* in which he deals with privacy and confidence. The section is headed "All about the 'mole'," and reads: 1. The *Granada* case. 2. The underlying principles. 3. Adequate remedies available. 4. After the weekend. 5. Lord Wilberforce does a balancing exercise. 6. Would Granada obey the court order? 7. I think again. 8. Private Eye.

Judicial Law Making

Lord Denning's many attempts at judicial law making have encountered in judges the same disapprobation now meted out by the Executive to the United States Supreme Court. Those attempts often triumphed, if only by the eventual enactment of his views by Parliament. By way of illustration, I recount two examples of the Denning method triumphant.

1. The Deserted Wife's Equity

Upon his appointment to the High Court bench, Lord Denning was first assigned to the Family Division. In 1944 the Court was inundated with divorce actions resulting from the enforced separations and ill-advised marriages which were a consequence of World War II. To his relief he was to be there for only eighteen months before being transferred to the then King's Bench Division* where his talents as a common lawyer could be better exercised. However, the experience gained there was to be useful in later years.

His attitudes towards women were in many ways old-fashioned. For example, in the *Due Process of Law* he opens the section on women's emancipation thus:

No matter how you may dispute and argue, you cannot alter the fact that women are different from men. The principal task in life of women is to bear and rear children: and it is a task which occupies the best years of their lives. The man's part in bringing up the children is no doubt as important as hers but of necessity he cannot devote so much time to it. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences in outlook which cannot be ignored."

However, his "old-fashioned" views conceal a very up-to-date sensibility:

"...When she marries, she does not become the husband's servant but his equal partner. If his work is more important in the life of the community, hers is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. *They are equals*." (Italics supplied.)

*Now Queen's Bench. (The Court defers to the shifting gender of monarchs.)

It should therefore come as no surprise that Lord Denning found a way to protect the deserted wife whose husband sought to evict her from the matrimonial home to which he had sole title. In *H v. H* (1947) a wife refused to divorce her husband. As the price of his freedom the husband offered to give her the house but she refused. He sought to evict her. A master of the High Court concluded he was required to grant possession to the husband. Lord Denning disagreed. Because of the importance of the principle, judgment was given in open court. Lord Denning writes of this case: "I did not cite a single case. I dealt with it simply on principle." That in itself was unconventional. His use of Section 17 of the Married Women's Property Act 1882 to achieve justice for the wife was unprecedented.

"In my opinion, at common law the husband has no right to turn the wife out of the house. It was the house which he provided as the matrimonial home. She has behaved quite properly. She has done nothing wrong. He cannot sue her for ejectment, or trespass or for any other tort. He has no right in law to claim possession from her except as may be given him under Section 17 of the Married Women's Property Act 1882. But that section does not, in

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my opinion, give him the right which he is now claiming. It enacts that the judge before whom the application comes may make such order as he thinks fit. The intention is that in the innumerable and infinitely various disputes as to property which may occur between husband and wife the judge should have a free hand to do what is just. That discretion is in no way fettered, though it must be exercised judicially."

Having established the principle and ensured that it reached the law reports (albeit a minor series) Lord Denning was later able, as Master of the Rolls, to follow his own precedent and develop the new principle to meet the needs of later cases. It was 1970 before the House of Lords had a case in which it could review the principle and throw it out on the ground that Section 17 was a purely procedural section not enabling judges to exercise an unlimited discretion by ignoring the legal rights of the parties. Quoting Lord Denning's principle—and condemning it—Lord Hodson said: "To use the language of Coke, this would be to substitute the uncertain and crooked cord of discretion for the golden and straight metwand* of the law (First Institute, p. 41)." However, Lord Denning had developed a second and ultimately more successful principle to protect the deserted wife. He awarded her a right to be in the house, a right which was not only good against her husband but also against a purchaser. In *Bendall v. McWhirter* (1952) the deserting husband told the wife that she could have the house and the furniture. Her maintenance order took that into account. However, the husband subsequently went bankrupt and the trustee in bankruptcy sought to sell the house and divide the proceeds among the creditors. An order for possession was granted. The Court of Appeal allowed the wife's appeal. Lord Denning said:

"Under the old common law, when a husband deserted his wife, or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit for necessaries... One of the most obvious necessaries of a wife is a roof over her head; and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home, the wife should have an irrevocable authority to stay there. This authority like the old one, is based on an irrebuttable presumption of law..."
"...I should have thought the court would have a discretion whether to order possession or not, for that is the only way in which effect can be given to the wife's right as now established. Any other view would lead to a great injustice. It would mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilized community could tolerate such a cynical disregard of the married state. Equity demands that the successor in title should be in no better position than the husband."

A decade later the case of *National Provincial Bank v. Ainsworth* (1962) gave the House of Lords their first opportunity to review this principle—they rejected it, holding unanimously that a deserted wife had no equity to remain in the matrimonial home as against anyone to whom the husband sold or charged it.

However, such was the uproar that Parliament quickly granted a deserted spouse the right to remain in the matrimonial home despite the efforts of the other to sell it, provided a charge was entered on the Land Register.

2. Abuse of Power

The courts' role in interpreting the Constitution was firmly established by the end of the seventeenth century as a result of the conflict between the sovereign and his people in Parliament, in the courts, and finally on the battlefield. The United Kingdom has no written constitution, no specific body of decisions and principles at hand to the task of protecting and interpreting that body of tenets, conventions and felt necessities collectively denominated the "Constitution". Accordingly, the growth of constitutional and administrative law has been somewhat piecemeal in the courts of England. Until 1958, for example, a distinction was drawn between the "judicial" actions of a public authority—where control could be exercised by means of the writs of certiorari and mandamus—and the "administrative" actions of that body—where the courts had virtually no control. Another cause of concern was the apparently unlimited discretion vested in ministers by such statutory phrases as "if it appears to the Minister" or "if the Minister is satisfied".

Lord Denning's crusade against abuses of power by the "big battalions" as he termed them—be they government departments or trade unions, to name just two whose powers could be used against individual or public interests—sought to enforce greater accountability. The result was often sensational, and it is here that he has earned the greatest popular acclaim—and the largest public criticism. The latter has been mounted principally on the ground that he is "anti-trade union". Such an attack is wholly unfair: Denning's concern has always been the preservation of the public interest against any misuse of economic or political power. The definition of the public interest in such cases is of course political in its widest sense, and the task that most judges go to great pains to shirk wherever possible. Not one for pussyfooting around such questions, Lord Denning has been bold, even outrageous and reckless, his critics will say.

The British Broadcasting Corporation is an independent body deriving its income from an annual license fee levied by the Home Office on owners of television sets. In *Congreve v. Home Office* (1976), the Home Secretary announced that there would shortly be an increase in the license fee. Congreve, who just happened to be a partner in a leading London firm of solicitors, bought a new license at the old rate even though his existing license had not expired. The Home Secretary claimed discretionary power under the relevant statute to revoke the new license. When the case came before Lord Denning, the Court of Appeal held that the Home Secretary could do no such thing. The licensee had done no wrong, and the license could not, therefore, be revoked. To allow the Home Secretary to do as he proposed would allow him to exercise discretion for reasons bad in law. A triumph for the ordinary man, the decision received much popular acclaim. Nonetheless, *Congreve* seems downright parochial when contrasted with *Laker Airways v. Department of Trade* (1977). The celebrated "Skytrain" case, affected both Americans and Britons

*Yes, "metwand". A grand old word! Look it up for yourselves to improve your crossword puzzle skills. The Editors.

by permitting Freddie Laker's revolutionary low fare service on trans-Atlantic routes. Laker had already purchased jet aircraft when the Minister for Trade withdrew the designation that would have allowed him to operate his new service. The Minister invoked a prerogative power under a treaty, and asserted that such a power could not be examined by the courts. Drawing on the writings of John Locke, Coke and Blackstone, as well as a recent House of Lords decision, Lord Denning held that there had been a misuse of power, a misuse which the courts could indeed remedy.

"...it seems to me that when discretionary powers are entrusted to the Executive by the prerogative—in the pursuance of the treaty-making power—the courts can examine the exercise of them so as to see they are not used improperly or mistakenly."

For largely historic reasons, English law has extended immunity to trade unions in actions in tort, thus enabling unions to protect or promote their members' legitimate interests by means of the strike weapon. However, the trade union movement now interests itself in matters other than the terms and conditions of employment, and the breadth of the immunity has been drawn in question. In 1978 the Union of Post Office workers announced on a Thursday evening that it would boycott mail to South Africa for one week. A private individual without, it appeared, a special interest, applied to the Attorney-General for his consent to institute proceedings to obtain an injunction. The Attorney-General refused, and by Friday afternoon the private citizen's grievance was before a judge in chambers. The judge declared litigant without *locus standi* and held that the Attorney-General's decision effectively prevented the proceeding. The following morning, the first Saturday sitting of the Court of Appeals during peacetime, Lord Denning and his colleagues with an almost joyful disregard of *locus standi* granted an injunction. Lord Denning spoke as follows:

"...It seems to me that there is an impending breach of the law directed, encouraged or procured by the Executive of the union of Post Office workers...

What is to be done about it? Are the

courts to stand idly by? Is the Attorney-General the final arbiter as to whether the law should be enforced or not? It is a matter of great constitutional principle...

All we are asked to do is to make an order on the union saying that it must obey the Act of Parliament. [It is a criminal offense to obstruct or interfere with the mail.] Surely no objection could be taken by anyone in the land to an order in that form."

The union obeyed. Nonetheless, when the matter came before the House of Lords, it was held that the Court of Appeal had no power to grant the injunction, that the proceedings were misconceived and should have been struck out. Once again, Lord Denning's knuckles had been rapped. There was no authority for what he did, right as it may have seemed, but as ever he remained unrepentant.

How then to sum up Lord Denning? Lord Hailsham, the Lord Chancellor spoke for many when he gave a valedictory tribute on July 30, 1982 on Lord Denning's retirement. His colleagues would miss Lord Denning, he said, for his passion for justice, his independence and quality of thought, his liberal mind, his geniality, his unfailing courtesy to colleagues, to counsel, and to litigants. Above all, they would miss him for his gift for friendship, his strong independence, and his unflagging and effervescent enthusiasm.

The judge to whom the House of Commons paid an unprecedented tribute by passing a motion of thanks and congratulation on his eighteenth birthday was now a part of history. □

What Next In the Law, Lord Denning's latest book, can be obtained from Butterworth & Co. (Canada) Ltd., 2265 Midland Avenue, Scarborough, Ontario, Canada M1P 4S1. It is $24.95 hardback, $14.95 paperback.

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The Editors

It Ain't Nothing But A Piece of Paper

THOMAS ALEXANDER, JR.

Tom Alexander, appearing here as a herald of doom to a parent who has removed a child in violation of a custody order, conducts an endless struggle to reunite children with those to whom they have been entrusted by law. Tom is the Executive Director of Male Parents for Equal Rights in Delaware. A recognized authority on the subject of this article, he testified in 1981 before the United States Judiciary Committee on the Parental Kidnapping Prevention Act.

On Columbus Day 1981, at approximately 12:30 a.m. I discovered "Coon Holler, USA." I was sitting behind a Kentucky State Trooper and a deputy jailer in the back seat of a police car, bucking over the blacktop road that sometimes turned to bare earth and sometimes disappeared altogether in the mountain mist. We were looking for a house, a very particular house. We kept in constant touch with the State Police radio room, where the dispatcher was becoming discouraged by our inability to follow his directions along a road that twisted back and forth across the creek and lured us up blind alleys ending abruptly against the mountain. After two and a half hours, the State Trooper was told to call a halt. He returned me to my car and advised me to get some sleep before trying again in daylight.

I couldn't sleep. Instead, I sat there thinking about the landmarks of which I had been told: crushed cars used to build up a bank along the creek, a chain link fence, two white frame houses sitting close to a small coal mine. It was now almost four o'clock and I was impatient for sunrise. As I had nothing else to do, I asked myself why not follow the road to the end?

The road ended about one hundred feet from the mountain top in an old quarry, and there I met the Kentucky dawn of a bright, chilly day. As I came down the mountain, now cleared of mist, the landmarks fell into place and I knew precisely where the fugitive was.

Now it was time to return to the county seat and register the custody order under the Uniform Child Custody Jurisdiction Act, and then call upon the Sheriff of the county to execute it at a certain address in Raccoon Creek. By ten o'clock the order from Kansas had been registered, along with the Delaware writ of habeas corpus and the bench warrant. Accompanied by a Sheriff's sergeant, I drove back into the "holler".

Mrs. Bolt, who first denied her identity, was taken into custody on the Delaware warrant, and she and the two girls were driven to the county seat. I phoned Mr. Bolt in Wichita, Kansas to tell him that his children had been found—again. Again, I say because they had been found previously in Delaware and had been ordered to appear before Judge Arsht of the Family Court. Mrs. Bolt had disappeared an hour before the hearing. Thus began a six day, two thousand mile search.

This time, to my great pleasure and to the equally great surprise of the lawful custodian, Mr. Bolt, there was no delay. At ten o'clock the next morning the District Court of Kentucky heard the county prosecutor request the enforcement of an interstate custody order. The judge thought for a moment. "What is the position of the State of Delaware?" Since no one else from Delaware was present, I shouldered the civic duty and spoke: the custody order was in fact a Kansas order that had been registered both in Delaware and

Kentucky. Since all parties were present in a Kentucky court, the burden of enforcing the Ohio custody order now fell upon that court.

"You're absolutely right. The Kansas order of custody shall be enforced according to its terms. The children are to be delivered to their father forthwith."

Shortly thereafter the Sheriff's sergeant spoke to me of his concern: The Bolts' little girls were crying and seemed very unhappy. By now I was an old hand at this. I suggested that he watch carefully what happened as soon as the girls were out of sight of their mother. Sure enough, when the goodbyes had been said with many tears, and we departed the Sheriff's offices, the girls began to ask about their home in Kansas, their friends, and their pets. Then one of them said something I have heard over and over again: "Oh, Daddy, I am so glad you found us."

Columbus Day 1980 had been spent in Suannee County, Florida; the previous Columbus Day in Los Angeles, California; two days after Columbus Day 1982 found me in Ocean Township, New Jersey.

Repeatedly, I have been able to observe the relief expressed by victims of parental kidnapping. There was the five year old boy who said "You know what this means—I get to choose who I want to live with." (Los Angeles). There was the six year old girl who said: "Mommy should never have stolen me away from you, Daddy. She was wrong." (Virginia), and the seven year old who had been forced to use a different name in school in Florida. His first words to his father were: "What took you so long, Daddy?"

I make this point, because one thing is abundantly clear to me. These little people want to be found, and they don't want to be hidden from one parent by the other (or by anyone else). Children have an extremely acute sense of justice and look to us big people to see that they receive it. Furthermore, they are pathetically careful not to let the parents who hold them captive know their preferences. They show initial reluctance to be taken by their lawful custodial parents and wait until the absconding parents are out of sight before expressing pleasure at being found.

The search for a stolen child is not an easy task. Bureaucracy does not render assistance graciously, and sometimes when persistent efforts to locate a child lead the investigator to talk again and again to the same office, a question is asked: "What's so important about this child?" All kidnapped children are important. Certainly, a child, kidnapped from her grandmother by her mother and repeatedly ordered to strip naked for whippings with a belt, deserved to be found. When I talked to her she begged me not to tell her mother. If she was ever to have a chance for a full and happy life, *she had to be found.*

Executing a custody order in a foreign state does not always please the local sheriff. After all, the aggrieved, absconding parent is the one who is left in his bailiwick to tell friends and neighbors how mean and nasty the Sheriff's officers were—and they always tell. I have found how to get around this reasonable concern: I tell the Sheriff that I am the one who's executing the order and that his men are there to assist me and to prevent a breach of the peace. This is especially important in small towns.

"Human beings know heartache, and I have seen many a man cry as he holds his child for the first time in months."

In a most recent case I was in an especially favored position. The judge in Pinellas County, Florida had appointed me guardian *ad litem* to enforce the custody order, and there was no need to refer to the power of private investigators under the Parental Kidnapping Prevention Act of 1980. The order was to be executed in New Jersey and I was familiar with the central state registry for custody orders, to my mind vastly superior to registering an order in any county, or the county in which a child might be found. Sometimes, it is impossible to know in which county the child is, or even what state.

A case that took me first to Florence, South Carolina, with a custody order out of Delaware eventually wound up in Columbus, Georgia. We left Delaware at 8:15 p.m. and arrived in Florence at 7:00 the next morning. After we registered the order, the judge of the Family Court ordered the Sheriff to render assistance in enforcing it. Alas, the bird had flown! We spoke to the sister of the absconding parent (without telling her the reason for our investigation) and got an address in Columbus, Georgia. Now we had a new problem: how to get to Columbus, Georgia on a Friday afternoon before the courts closed. I called the attorney in Delaware, Mr. Edwin A. Tos, II, who most helpfully suggested we attempt to register the order in Augusta, the state capital.

As so often happens, the minor functionaries of the court had no idea what we were asking them to do, and they insisted first that we go to the District Attorney. When they could not persuade me, they proposed the Family Court judge. I would have none of that, because, if there is one thing I have learned, it is that no judge has jurisdiction over anything until it has been properly filed in his court. Besides, you only get one shot at a judge, no matter who you are, or where you are.

The problem: how to convince the clerk of the court to register the order in Georgia. Where is the law library? Ask the lawyers in the library where the Georgia statutes are. Find the Georgia version of the Uniform Child Custody Act. Discover the copy machine doesn't work. No librarian on duty. Borrow the necessary volume. Find the clerk of the court. Show the clerk of the court the statute: "The Clerk of Court shall register...." Then come the blessed words: "That will be x dollars, etc." Now I am ready to see the judge, armed with my Delaware order duly registered in the states of South Carolina and Georgia. In a few moments the judge's secretary decides that the matter is too complicated for her. We see the judge. A fine gentleman, but what can he do, our quarry is in Columbus over two hundred miles away. Yes, he might be willing to advise a judge in Columbus that the order has been registered in his court. He gives me the home telephone numbers of all four judges in Columbus and we are on our way again. We arrive in Columbus at 8:15 p.m. and go directly to the Sheriff's office.

"You the deputy from Delaware?" Affirmation.

"Our judge will talk to you right away." After we read the order over the telephone to the Columbus judge, the Georgia deputy confirms

that our order is registered and sealed in the court at Augusta, and we are on our way again, accompanied by two Georgia deputies.

Enforcement is fairly civilized. The new boyfriend, who is visiting and who dearly wishes to depart, is taken aside for a whispered suggestion that "Mother" may need a comforting shoulder to cry on. He decides to stay. Mother cries as she kneels to say goodbye to the little girl, while the little girl, emotions completely in control, says "Gotta go, Mum.—Gotta go."

It is now 9:15 p.m., exactly 25 hours after we left Delaware. We have spoken with three judges in two different states, used the services of two sheriff's departments and traveled 900 miles to execute an order only two days old. We head for Atlanta before exhaustion forces me to stop for the night.

Distance is not the most exhausting part of these custody enforcement trips. There is considerable uncertainty, even under federal law, Public Law 96-611, 28 U.S.C. 1738A (Parental Kidnapping Prevention Act of 1980) whether an order will be enforced, or even registered without a lot of trouble. I ran afoul of one judge in Florida who refused to give a Delaware order the priority of consideration specified by federal law. Fortunately, I was able to find another judge more willing to listen. Of course, the fact that I had met the second judge on a previous Delaware case three years before did help, but the first judge had almost cost the father considerable extra expense and wasted time far from home. In another case the judge made it absolutely clear he would not allow the Sheriff to execute the order without a petition for writ of habeas corpus or a summons. Fortunately, the order directed not only the Sheriff but the State Protective Services Agency to execute the order. Another child was returned to Delaware.

It isn't just the courts, the agencies, and the local sheriffs who wear me down. First of all, I'm the driver. (I don't know the emotional condition or the powers of concentration of the man or woman whose child we are trying to find.) A parent worries about the possibility of failure, and needs constant reassurance. If only parents knew how much reassurance *I* need! Also, I must be on extra special guard that at the moment of recovering the child (some jurisdictions want the lawful custodial parent present) no physical contact occur that might furnish the absconding parent with a pretext for having the custodial parent arrested and jailed, even after the child has been recovered. The torrent of abuse from the absconding parent can be amazing. The custodial parent is described, variously as a "spouse beater", "alcoholic", "child abuser", "sexual deviant", "homosexual", "dope addict", "scum", "trash", "communist", "Nazi" and anything else that the absconding parent can think of on the spur of the moment.

One of the most interesting comments I have heard came from a second husband who told me how hard he had worked as president of a local "Parents Without Partners Organization" so that the children couldn't be kidnapped by their own parents. He was right unhappy when I told him that the federal law which he had worked for had been passed as Public Law 96-611, that President Carter had signed it on December 28, 1980, and that it was his wife that was violating that law. His only comment after that was: "That ain't right. That just ain't right." He declined to explain whether he considered President Carter or the Parental Kidnapping Prevention Act of 1980 at fault. Certainly, it never occurred to him that it was his present wife who was the villain of the piece.

Of course, I have been the subject of much invective, but I wonder what that second husband might have done to me if he had known that the home state, Delaware, would not have retained jurisdiction to amend the original custody order if I hadn't spent some time in Washington. My congressional liaison to the United States Congress was Mr. Henry Rucker. In the fall of 1979 he and I met with Mr. Russell M. Coombs, now of Rutgers University Law School, and then counsel to the Senate Subcommittee on Criminal Justice. I don't know if the others felt the presence of history, but I did, as we sat in the somber splendor of the dining room of the United States Supreme Court, discussing the proposed Parental Kidnapping Prevention Act.

I was determined that a state court should not lose jurisdiction after the issuance of a custody order simply because the custodial parent had

taken a child out of state and had stayed away for six months, as could happen under the Uniform Child Custody Jurisdiction Act. I was also determined that children should not be deprived of their right to know *both* parents. That's why the Act was written to provide for continuing jurisdiction as long as one contestant, or the child, remained in the state of original jurisdiction. Note well: one *contestant* who can be a grandparent, because we recognize that grandparents should not be cut out of their grandchildrens' lives or those children out of theirs. The *state,* not the county of original jurisdiction was selected, so that a mere move to another county in the same state would not destroy jurisdiction. Result: in recent months, nearly half of my interstate custody cases arise from the departing parent's belief that by moving he or she can deny visitation, and his or her subsequent discovery that the home state court will not allow such denial and may change custody.

I don't dwell on statistics, because they poorly express the quality of life. Human beings know heartache, and I have seen many a man cry as he holds his child for the first time in months. But statistics do suggest that most children are removed from the home state in the cynical belief that no one can bring them home. Often in such cases no custody order has been entered and the snatch is intended as a deprivation of the rights of the other parent for purposes of negotiation or for vengeance. The snatch is seldom made out of concern for the child. I have advised many welfare departments of the recovery of children so that welfare could be cut off, or reduced, and I am surprised, when one considers the enormous dollar savings, that foreign states and their bureaucrats do not give greater assistance in helping to locate the children under the parent locator sections of federal and local laws. (I am convinced that a secondary reason for snatching a child is the availability of welfare to any parent with a child who turns up on the door step of some welfare agency.)

Of further interest: when a child is returned to his home state, the parents, if young and not yet divorced, often get back together. The romantic in me approves; the skeptic demurs. Reconciliations also occur when the snatches are intrastate and

the court honors the principle that "the father and mother are the joint natural custodians of their minor child and are equally charged with the child's support, care, nurture, welfare and education." That's the command of the Delaware Code (13 *Del. C.* §701). The statement of policy continues in very clear language: "Each has equal powers and duties with respect to such child, and neither has any right, or presumption of right or fitness, superior to the right of the other concerning such child's custody or any other matter affecting the child." When we start obeying the Code, then and only then will we put an end to child snatching. If courts are firm, parents obey: in only one instance have I found an absconding parent's desire for faraway places so strong as to overrule a return to the original state in order to have some form of relationship with the rescued child. Indeed, my experience convinces me that joint custody should be the preferred device. Each parent has an urgent interest in his child. Each child is entitled to both parents.

Of all the states that I have been in to recover children, New Jersey is my favorite. They have only one place to file an interstate custody order, and while some New Jersey lawyers still neglect to read the law, to their clients' enormous expense, when interstate retrieval is done right it is a relatively simple administrative matter. (Remember that the foreign state has no jurisdiction to amend or alter the terms laid down in the home state). The Clerk of the New Jersey Superior Court, Mr. Robert N. Cifelli, attaches an instruction sheet to the face of the foreign custody order which clearly explains just what the local authorities must do. Of special interest is the requirement that a copy of the "incident report" be filed in the Clerk's office for statistical reporting. Other states would be well advised to follow the method adopted in New Jersey.

Unfortunately, some states are now openly challenging foreign custody orders on the pretense that they may not be valid, that circumstances may have changed, or that jurisdiction may not have been met. This is wrong. If an order was forged, or superceded, then the home state can apply its criminal statutes. If the jurisdiction was faulty in the first state, or circumstances have changed, that issue should be liti-

gated *there*, and the second state should not interfere. The Parental Kidnapping Prevention Act of 1980 expresses the clear intention of the United States Congress that these custody orders are to be given full faith and credit, and to be enforced according to their terms.

Although I have too often been close to failure, I am still batting one thousand. I feel that much credit for my success is owed to the Sheriffs of New Castle County, past and present. These thoughtful and compassionate gentlemen have each seen fit to appoint me as a "Deputy Sheriff", which has greatly eased my task in foreign states. While the powers of that office do not extend beyond the boundaries of the county, the presence of a "Deputy from Delaware" creates a favorable impression and demonstrates how important Delaware considers the recovery of its children. As a result, sheriffs in foreign states and even some of the most reluctant of bureaucrats have extended considerable assistance and professional courtesies that would not have been available to the lawful custodial parent acting alone.

I have a great concern in these matters: they are *civil* matters. There appears to be a national trend toward criminalizing the process. Arrest and prison for an absconding parent must surely inflict immense psychological damage on both parent and child, impairing the hope of reconciliation and a normal relationship. I urge that at least in the first instance of child abduction, we confine our efforts to the much safer process of civil enforcement. But enforce we must. As I said in my title, "It ain't nothing but a piece of paper" until someone *enforces* the custody order. That is what I do. ☐

THE WILEY-WILSON MURDER

(Our promised "Crime of Passion")

In late eighteenth century Sussex County private wickedness was public property.

SENATOR ROGER ALLEN MARTIN

Senator Martin, who represents the 11th Senatorial District, holds a B.A. and a M.A. in German from the University of Delaware. He is a man of wide ranging interests and intellectual curiosity. He serves in the Senate as the Chairman of the Committee on Highways and Transportation. He is active in legislative business involving such diverse topics as energy, natural resources and environmental control. He also pursues the hobby of historical research. He is expected to publish a definitive work chronicling important events in Delaware history from 1776 to the present day, all as seen through the eyes of our Governors. Senator Martin has also compiled a list of all Delaware legislators since 1776, in which he pays special tribute to the eight longest serving members.

A learned man in many disciplines, Senator Martin teaches foreign languages in the Middletown school system. His article, an engaging blend of firsthand research and thoughtful historical speculation, describes an unseemly but fascinating event in Sussex County history that has faded from our collective memory as Delawareans. By reviving and documenting the Wiley-Wilson murder, Senator Martin gives us a vivid glimpse of the very different Sussex County of 180 years ago.

It happened so long ago hardly anyone today knows it ever took place. When present day historians refer to this lurid bit of Delaware criminal law, they are almost always in error. Some time ago I asked Russ McCabe at the Archives in Dover to be on the lookout for anything he could find about the Wiley-Wilson murder case. One day Russ called me to say that he had found some old court records in an uncatalogued box. I rushed over to the Archives and —eureka!—I was looking at the Sussex County Oyer and Terminer Court Session records of 1800 that detailed the trial of James Wiley for the murder of Dr. Theodore Wilson.

The victim was the son of a preacher physician, Matthew Wilson, who during the 1750s had come from New London, Pennsylvania, and had settled in Lewes. Matthew was pastor of the Lewes, Cool Spring, and Indian River Presbyterian Churches, and a zealous patriot during the Revolution in a region where sympathizers to the Crown were highly visible. Wilson's patriotic fervor was so great he named his first son James Patriot Wilson. Theodore, his second son, was born in 1772. When Matthew died in 1790, James was a member of the bar and Theodore was well on his way to a career in medicine in Lewes.

At that time, Lewes was a sleepy little town on the edge of Delaware Bay. It had recently lost to the town of Georgetown the distinction of being County Seat. But, as you shall see, Theodore Wilson was to liven things up quite a bit in this otherwise drowsy community.

In 1792, Dr. Wilson went to Broadkiln (near Milton) to treat an Irish immigrant for fever. In what has been described as their first encounter, Wilson cured his patient, James Wiley, and met Wiley's wife, Nancy. Indeed, there was testimony that while Wiley lay abed with fever, Wilson put out all the candles but one and spirited Nancy away to another room. Wiley recovered, but the cure may have been worse than the ailment.

In the ensuing months, Theodore and Nancy saw more of each other, and evidently one of them infected the other with venereal disease. In 1794, Wiley moved his family into town in Lewes from Broadkiln, and established a tavern. Wiley became well known, and he was celebrated for good character. He appears also to have been of an exceptionally trusting disposition. Wilson's attentions to Nancy continued with some pertinacity.

Eventually, Wiley began to hear rumors of Nancy's affairs with other men. Worse yet, he contracted from her the ailment which she had either given to or had received from the family physician. Wilson, always diligent in his attentions to the fair sex, then proceeded to marry twenty year old Mary Neill Kollock in May, 1794. Theodore's aptitude for messy romances resulted in a very unhappy family life with Mary. Within the year he was telling others he had to get away from her. (His marriage to Mary did not interfere with his attentions to Nancy.)

In April 1799, the unbelievably trusting or inattentive Wiley finally learned that Wilson had made ad-

vances towards Nancy. It is reported that at first he was flattered, a puzzling reaction. Rumors about Nancy and Wilson persisted, and Wiley found them increasingly difficult to disregard. Then his tavern business turned sour, and Nancy left Lewes to stay in Philadelphia with friends. Wiley went after her and brought her home. Wilson went to Philadelphia too and asked Nancy's friends about Wiley's treatment of his inamorata.

By summer the whole town of Lewes was abuzz with scandal. At length, Wiley and Wilson agreed to meet, rather picturesquely at a bridge, to work out their differences over Nancy. Wilson's account of his involvement was that he had heard Wiley had been mistreating Nancy. There was talk of a duel, but Wilson declined the honor of Wiley's challenge, suggesting a little ungallantly that he saw no reason to fight a duel when Nancy's other admirers were no less deserving of the implied compliment. The parley came to naught, and Wilson departed after telling Wiley he was going to take Nancy away from her misery.

By late fall 1799, the situation had become so bad that town fathers decided to step in. Some of Wilson's friends had gently tried to dissuade him from any further involvement with Nancy, but he was far too much embroiled in his affair. In late eighteenth century Sussex County, private wickedness seems to have been public property: not only did the town fathers concern themselves about the Wiley-Wilson imbroglio; the Masons got into the act. They set up a meeting to be held in the early evening of Friday, December 6, at Elliott's Tavern, in order that the affair could be thrashed out and settled once and for all.

It seems the Masons obligingly neglected to tell Wiley that he had been invited to take part in a discussion of his affairs. He learned of it from a slave, who also told him that Wilson would attend. On arriving at the tavern, Wiley found Colonel David Hall, a one-time Delaware governor, and several other prominent citizens in attendance. He also found Wilson, who was sitting in front of the fire, his head bowed and his hands on a small cane. Wiley was invited to sit down by the fire also, but he declined. Instead, he pulled out a pistol, held it behind Wilson's right ear, and fired. Wilson died immediately. Colonel Hall rose from his seat and seized Wiley, who made no attempt to escape.

Wiley was spirited away to appear before Mr. Justice Rodney, and from that evening until the court sessions of mid-March, he languished in jail. In the meantime, his house was confiscated to satisfy the demands of creditors.

Wiley was tried for his life on March 17 and 18, 1800. The Justices Kensey Johns, John Clayton, and Isaac Cooper presided. The jury returned a verdict of willful murder, and after a failed motion for a new trial, Wiley was sentenced to be hanged.

In the meantime, Governor Richard Bassett was receiving petitions urging Wiley's release. Early in April he requested a summation of the evidence from Justice Kensey Johns, who advised the Governor that, while Wiley had indeed slain Wilson, he had been grossly provoked by Wilson's conduct toward his family. Wiley, once a respected citizen, said Johns, had been driven to drink, separated from his wife, and subject to the loss of his business. Governor Bassett reviewed the case and on April 13 he unflinchingly signed a pardon. Bassett, a devout Methodist, laid heavy stress on Wilson's violation of the sanctity of the Wiley marriage.

Upon Wiley's release from prison Nancy took refuge again in Philadelphia, and once again Wiley followed to bring her back. This time he did not succeed. He returned to Lewes, became deranged, and willingly went back to jail, where he shortly died of consumption. Nancy's fate is unknown.

Wilson's widow, Mary, was left with three sons, Simon Kollock, Matthew, and James. Four days after Governor Bassett pardoned Wiley, Mary had the boys baptized at the Cool Spring Presbyterian Church. On December 7, 1802 Mary married again, this time to Dr. Mark Drew of Milford, by whom she subsequently bore three sons. She died sometime before 1810.

The last trace of Theodore's descendants was his son, Simon Kollock Wilson, who also became a physician and practiced in Dagsboro. By 1836 he was a ruling elder of the Lewes, Cool Spring, and Indian River Churches. One mile

north of Millsboro or Route 30 in an area known as Cow Bridge Branch, lie the remains of the Indian River Church. The other churches stand to this day. Behind the ruins of the Indian River Church there is a long chicken house in the woods, and behind that a few graves. One of them is that of Simon Kollock Wilson.

Wilson's brother, James Patriot, who moved his law practice to Georgetown when the county seat left Lewes, was never the same after his brother's death. Some say that immediately upon hearing of the assassination, he tried to kill Wiley. Fortunately he did not, but he was so stunned by the incident, he dropped law altogether and took up the cloth. He served 40 years as a minister in the First Presbyterian Church in Philadelphia. His son, James Patriot, II, was President of Delaware College, which is now the University of Delaware. He served in this capacity from 1847-1850, and was later President of the Union Theological Seminary in New York.

The tavern (Elliott's) in which Wiley slew Wilson probably stood on a plot in the St. Peter's Episcopal Cemetery in Lewes. It was built in 1740 and served as the county court house until the county seat was moved to Georgetown. Thereafter, the building served as a tavern "providing no cards or dice were permitted" until it was razed in 1833. Today a plaque on the wall of the cemetery commemorates the vanished tavern.

In the Presbyterian Cemetery in Lewes, not far from his esteemed father's grave, a tombstone marks the final resting place of Dr. Theodore Wilson. It gives his exact age as 27 years, 5 months, 8 days, and concludes with tactful irrelevance, "Serene & manly hardened to sustain//The load of life and exercised in pain."

Mortuary euphemism is not confined to the twentieth century.

Why is so little known of the Wiley-Wilson murder today—a murder that stirred strong passions, arrested public attention, brought a once respectable and honored man to the shadow of the gallows, and ended in the unprecedented action of a governor's starchy defense of the sanctity of the Christian home? Small towns of course do not like to be remembered for such scandals. A murder involving socially prominent and highly respected principals must have left an even more disagreeable impression upon the community in which it took place. Besides, an event of national importance diverted attention from the killing a week after Wilson breathed his last: On December 14, George Washington died at Mount Vernon, and the Republic went into extravagant mourning for a far nobler decedent. □

The preceding article, more than a merely entertaining account of an obscure bit of Delaware history, is the product of careful scholarship. Senator Martin's bibliography is available on request by those interested in more closely examining this curious part of the Sussex County past.–Editors

CLOUDED PROPHECIES

Continued from page 22

must take past performance and use it as an indication of what the future will bring. The decision-making process involves much doubt, and in order to minimize it, the judges have to rely on the recommendations of experts who have broad experience with the social and emotional questions involved in custody disputes. Mediation in which both parties to a custody dispute discuss the situation with a member of the Court's staff is generally the first step in dispute resolution. Even if mediation cannot resolve the dispute, the counseling staff becomes a part of the decision-making process and stays an important part until a final resolution is made. The legal process in the Family Court is thus necessarily and correctly different from that followed in other courts. Because predicting the future is a tricky business and inevitably involves a great deal of uncertainty, there is little wonder that the results do not always fit into a predictable pattern.

The state of the law regarding custody in Delaware today is at once troublesome and reassuring. Certainly today practitioners, parties, and judges will have difficulty finding easy answers to these very hard cases. Lawyers cannot ever give unqualified advice to clients concerning the probable outcome of a specific case because prediction involves far too many variables and unknowns. In fact, practitioners who wish to enjoy the greatest measure of success may be well advised to study the individual judges and specific cases instead of attempting to argue from general case law. Judges may be able to continue to exercise almost unbridled discretion because precedent exists for nearly every possible outcome. Parents seeking custody can enter a dispute with the knowledge that they always have at least some chance of prevailing. On the other hand, they will have to recognize that no matter how appealing their case, they will also always have at least some chance of failing. These hard cases have indeed made for law that is obscure or even nonexistent at times, but perhaps this is not actually a situation so much to be deplored as accepted as inevitable, and perhaps, in the long run, essentially humane. □

ARSHT INTERVIEW

Continued from page 26

there is always someone who will enlighten you...

Ancillary hearings: I do not enjoy them. They're the ones I find least interesting, except periodically when you get a challenging legal issue, like military pensions.

Carrad: You dislike ancillary hearings. Many readers of this magazine are lawyers, and they'll be interested to know *why*. Does it make a difference to you in such a hearing if two very, very well-prepared lawyers, who know what they want, give you a little schedule and say, "your Honor, here's a balance sheet. We've done this up for you," instead of saying, "Well, we're just going to sit here and talk all day long. You decide what's fair." Does that really make any difference to you?

Arsht: Absolutely. I think all our judges would agree. The ancillary and support proceedings really lend themselves to that approach. The better results will come from lawyers who are well prepared, who give you clear, readily accessible information that they want you to weigh. When lawyers come in well prepared, their clients get a better deal. Their cases are better presented, and they are more likely to get equitable decisions. If you have one lawyer who is well prepared and one who is not, then you have a problem. And when *neither* lawyer presents it clearly...then you have to go back and start from scratch with the pots and pans. Also, you don't have enough time in a block. You start to try to unravel what was presented, then you're interrupted, and you get frustrated and irritated.

Carrad: And start all over again.

Arsht: I don't think there's any judge who does not find that frustrating. As far as I'm concerned, a well-prepared case of any kind is much more pleasurable to deal with. And I think that maybe we judges don't always recognize on the record the attorneys who do a good job and who are entitled to be recognized. I often wonder when a lawyer walks out with his client, how is the client going to feel and what is the lawyer going to have to say to the client, if the decision came straight from the bench? How does the lawyer interpret to the client what happened in court or why the opinion came out this way? I don't make decisions by trying to please both parties, but I think both parties should feel that it was a reasonable, fair decision, if not *quite* the way it should have been. Each should feel that it was close to what he or she wanted, but not quite enough.

Carrad: Do you think that most of the lawyers who appear before you, really have done their homework in educating their clients about what the statutes provide? Do clients come in with puffed up expectations or fairly well prepared for a reasonable decision?

Arsht: That's difficult to answer. I'll say this: when I know that certain lawyers are coming in I can assume that the lawyers *and* their clients are prepared. They have educated the clients to expectations within a reasonable realm. There are some cases in which I feel the client is going to be terribly disappointed because the attorney simply failed to educate the client. I always wonder whether the lawyer is going to say, "That dumb judge. You got a raw deal from her." And, if so, there's no way I can stop it, but I think it's terrible.

Carrad: I sense that a lot of lawyers don't sit down and educate their clients. I've defended custody cases in which, if I had represented the petitioner, the case would never have been brought. I would have said, "This child is 14, she's lived with her mother since she was two. You didn't see her for five years, and the fact is, she's happy where she is. No judge is going to change that unless the child is having serious problems and desperately wants to leave." And yet, I've gone into court and had to defend those cases, and I ask myself "Why would any competent attorney allow that case to be brought?"

Arsht: Yes. That's another area where I get shocked periodically when a lawyer will come and fight for something that's hopeless from the word go. When the final decision is made and you deny the application, you wonder—at least, I do—what view that person is going to have of the court system. What the lawyer will say? Lawyers are officers of the Court and have an obligation. By and large the majority of those who practice here frequently do a good job. There are also those who may be very good lawyers, but who come here seldom. They don't come with the knowledge that the experienced lawyers have. They don't make the effort to educate their clients and the net result is, in my opinion, sometimes very sad. If you think your client's coming in with a very unreasonable attitude, you've got to be strong enough to say, "From my experience, I don't think there's any chance. I think you will do more harm than good."

Carrad: If the members of the Bar were better at that, fewer cases would be brought to Court.

Arsht: I grew up with the idea that lawyers and judges were superior. I use the word "superior" in the sense that they have a greater obligation to contribute. They set the standard of how things should be. I always felt "a man's word is his bond" was what lawyers epitomized. I still think that's their goal, but I'm not sure we now have as much of that sense of obligation to principle.

Carrad: In a state as small as Delaware you get a reputation for professional character very quickly. It's a small enough Bar so that everyone knows exactly who you are and how you conduct yourself.

Arsht: Well, the Bar has grown tremendously. The Bench has not. But I think what we are talking about is—one thing I love about Delaware—the fact that you either grew up, went to school with, or you have had some contact with, everyone, and you don't get lost in the crowd. You live with your own reputation. You can't get away with anything forever. And I think the other thing is, I've heard from people from other states, if you're going to sue in some other state, which Judge can you get? I think our Bench has a better reputation—we are all peculiar, we all have personalities that are different and perhaps we have biases—but there is no feeling of any impropriety here in Delaware. □

TO BE CONCLUDED IN OUR NEXT ISSUE.

DELAWARE LAWYER, in a spirit of eclectic audacity, is including the following passage from an unpublished (and quite possibly unpublishable) novel by a member of the Delaware Bar. The author, fearful of being torn limb from limb by practitioners of domestic relations law, has demanded anonymity. Our lips are sealed.

Since the passage is plucked from a larger narrative, a little explanatory background is in order: Henry, married to Brenda, has been cuckolded by Sheldon, a fat dentist, whom Brenda nonetheless finds irresistibly appealing. ("His mustache enabled him to resemble, in Brenda's uncritical view, a squat Errol Flynn.") The scene is Boston, Massachusetts; the time the early 1970s.

FICTION SHELF:
A Much Better Class of Imbecile

Henry, forgetting that God punishes us by answering our prayers, continued to hope that his wife would come to her senses and return. Then he received a letter marked "Personal and Confidential". It came from a Mr. Scheinswit, an associate with a law firm on Bromfield Street. Scheinswit announced his understanding that Brenda had been driven out of the marital home after indignities beyond imagining. As the wronged party to a domestic controversy she was entitled first to pre-trial alimony, then divorce, then permanent alimony, and finally, a division of property suitable to her station in life. "Would you be so kind as to have your attorneys contact the undersigned?" The letter made a very disagreeable impression on Henry, who had been brought up to believe that gentlemen do not use the word "contact" as a verb. Brenda had sunk low, to be sure, but to engage such a champion was the nadir of her depravity.

Henry reluctantly called his lawyer, the senior partner of a very fine old firm on State Street. Henry's large and complicated business affairs made him an important client. His lawyer, a Mr. Goodale, notoriously arrogant but always deferential to the rich, invited him to come in straight away.

Half an hour later he sat in the reception room of Goodale's offices, waiting for his lawyer, who was sequestered in the men's room. Mr. Goodale, who was seventy-five years old, was foolishly trying to put off an inevitable prostatectomy, and he spent a great deal of his time barricaded in a lavatory booth. When legal emergencies arose, his partners, who depended on Goodale's vast experience and sound judgment, always knew where to find him. They consulted with him from adjoining stalls. Only a week before a knotty problem of corporate reorganization had yielded to the powers of suggestion, when a fortuitous flush of urinals had inspired Mr. Goodale to suggest a downstream merger.

Such an occasion was at hand again. As Henry sat in the reception area pretending to read the Wall Street Journal, Mr. Potter, accompanied by young Mr. Repplier, headed for the men's room. Before swinging the door Potter instructed the receptionist, "If anyone wants us, just say we're in conference." Henry, already much depressed and a little disenchanted with lawyers, wondered if he was being charged for his attorneys' calls of nature. He then rejected the thought as unworthy both of him and of Mr. Goodale. But as he looked around the uninviting reception area, he noted that this distinguished law firm, so old and prominent that it could proclaim its self-confidence by housing in drab quarters, had livened up the decor with Bachrach portrait photographs of departed members, as a group some of the meanest-looking and most transparently rapacious Anglo-Saxon gentlemen Henry had ever beheld. Perhaps his ungenerous suspicion was well founded.

Ten minutes later Goodale emerged from the lavatory, grinning with relief, which Henry, who did not know the reason for Goodale's euphoria, considered a little hard-hearted at the time of his own great trouble. Potter and Repplier, dancing attendance on their senior, followed close on Goodale's heels. Potter was in raptures!

"Asa, that was positively inspired! I just hope I have all the details straight. I keep telling you, Asa, we simply have to hire a male stenographer."

Goodale turned to Henry.

"Come, come now, no long face! Buck up! You're young, you're handsome, and you're rich. I daresay in four or five years this will just seem like a bad dream." Goodale didn't know much about divorce and separation, but he was familiar with the length of the process. He ushered Henry into his office and read Scheinswit's letter with an expression of amused disdain.

"Hah! So her lawyer has offices in Bromfield Street, does he? Heh, heh, heh! Dreadful place. A rabbit warren of pettifoggers perched in cheap suites over second hand jewelry stores!" Goodale then instructed his secretary to get Scheinswit on the telephone, made him wait for a minute or two, and then grandly announced himself. He proposed a conference to discuss Brenda's demands, to which Scheinswit readily agreed. It was to

be held the following Wednesday at Bromfield Street.

At this stage of the battle Henry did not realize that Mr. Goodale, a brilliant lawyer who knew virtually everything worth knowing about corporation law, secured transactions, and maneuvering suspect business combinations through the shoals of the anti-trust laws, was so weak in the law of domestic relations. Probably no one in this august firm was qualified by experience or temperament to handle a mess like this. Goodale, who hoped that his firm name and his own imposing presence would enable him to bluff his way through with these paltry Bromfield Street impudents, was determined to oblige a valued client. Little did Goodale know that he was in for a truly dreadful afternoon as he climbed the dark, steep flight of rickety stairs to Scheinswit's office.

"Wouldn't you know the elevator would be out of order," grumbled Goodale. When they reached their third floor destination he was puffing badly. After catching his breath he examined a plaque that read:

LOEB & LEOPOLD
(Formerly Snyder & Gray)

Beneath this there was a list of six lawyers, Scheinswit's name in small lettering and at the very bottom. Goodale rubbed his hands with satisfaction. He would make mincemeat of this stripling. They entered the reception room, which in contrast to the scruffy staircase and corridor, was as glamorous as Aladdin's cave. The place suggested to Henry nothing so much as a cinematic recreation of a hideaway of affluent gangsters, which in a sense it was. There were thick beige wall-to-wall carpets, a profusion of glossy plants, and several pieces of very good contemporary furniture. Henry and Mr. Goodale sank into opulent club chairs while the receptionist, who had turquoise eye shadow and long orange fingernails, completed a telephone call, apparently with a client.

"Mr. Larkin's appointment was for ten o'clock." (Then reprovingly) "It is now 3:00 p.m." (pause) "Oh, I see. At seven this morning, you say? Please accept my sincere sympathy. You understand there will have to be a charge for late cancellation, unless, of course, we're going to represent the estate." There was a long pause during which the young woman positively scowled at the telephone. Then the line must have gone dead. "Well, talk about bad manners!" The receptionist turned to Henry and Mr. Goodale. "May I help you?"

Mr. Goodale explained their mission and asked the whereabouts of the bathroom. The receptionist deflected his question and announced that there had been a change. Mr. Scheinswit was unavailable. Mr. Loeb, the senior partner, would be handling the matter "personally".

"Henry was that rarity among even intelligent laymen: he knew when and how to fire a lawyer."

This was not as planned. Goodale, who pretended to be ignorant of the very existence of this stygian little firm, was well aware of Loeb and his formidably nasty reputation. Loeb did not specialize exclusively in matrimonial causes, but he was well qualified to handle them, since his major efforts in personal injury and medical malpractice cases also involved the unjustified extraction of large sums from well-heeled innocents. He had attained a national reputation among trial attorneys by writing a scholarly study of recoveries won by people who had slipped in the aisles of supermarkets. His practical advice on how to persuade jurors to hate the A&P was masterly. Lawyers for insurance companies cringed when they heard Loeb's name.

Brenda was indeed fortunate to have Loeb in her corner. She had at first retained Scheinswit (a name that beckoned wickedly to helpless spoonerists) on the advice of her family. Scheinswit's father had once very ably defended Brenda's parents when they were charged with fencing oriental rugs. But Scheinswit was not the powerhouse his father had been. He was a mousey, unassuming sort, of value to Loeb principally because of his uncanny skill in retouching x-rays for personal injury cases. A week before the conference Loeb had reviewed Scheinswit's case load with an eye to increasing it to a point just short of a responsibility calling for larger wages, and discovered that his junior was representing the wife of a very rich man. The fees might be impressive if he handled the case vigorously. Loeb snatched away the file and banished Scheinswit to his darkroom and his portfolio of unimportant cases.

Loeb had planned the conference carefully. His aim was to infuriate Henry into damaging statements and to humiliate the senior partner of the most prominent law firm in town. He knew that his client's case was worthless, but he believed that he could shame, harass, and insult the opposition into a fat settlement just to be rid of Loeb. His first step was to arrange for the elevator to be out of order. Next, he saw to it that Henry and Goodale had to wait forty minutes. A stickler for artful detail, he instructed the receptionist to say that the key to the men's room had been mislaid so that Goodale would enter the meeting in a state of wounded dignity and acute discomfort. (It was well known in legal circles that Goodale now conducted his practice from a succession of rest rooms. Because of his affliction he had been unable to try a case for nearly three years.) Loeb also instructed the receptionist to be sure that the conference was periodically interrupted by a succession of insultingly unimportant matters. He would be as discourteous to Goodale as Goodale had hoped to be to Scheinswit. He would put Goodale in short pants. His final touch was intended to reduce Henry to dangerous and reckless anger: He ordered Sheldon to accompany Brenda to the meeting, and he instructed them to hold hands.

At last Henry and Goodale were admitted to Loeb's office. Greetings and introductions were uniformly chilly, except for Loeb's false bonhommie. He actually dared to address Mr. Goodale as "Asa".

"Do we really need the paramour?" asked Henry angrily, pointing at Sheldon with a gesture of disgust better suited to warning pedestrians against the presence of dog droppings.

"Easy now, boy," cautioned Goodale.

"I'm afraid Mrs. Axelrod insists on his presence," said Loeb. Brenda nodded in agreement.

"His presence is completely unimportant. We couldn't care less," said Goodale grandly, still confident he would have his way. After all, he had noted with disapproving satisfaction Loeb's framed diploma from CCNY.

No client of Hall & Mills was going to be pushed around by this tawdry little suit and cloaker. "Why don't you state your client's position, Mr. Loeb? We have been waiting much too long, and I think we should come to the point."

"I apologize for the press of urgent business," said Loeb very sweetly in order to make Goodale look rude.

At this point Miss Wisniewski broke in, oozing fake contrition for her imaginary disobedience to the "in conference" sign on Loeb's door.

"A Mrs. Monahan says she absolutely must talk to you. It's one of Mr. Scheinswit's cases, but he's over at District Court suppressing a dope peddler's confession."

"I'm familiar with her case, Veronica, but I am in conference."

"She insists on talking to someone." Loeb sighed heavily.

"Please remind her that our latest statement hasn't been paid," said Miss Wisniewski as she left the room.

Loeb shrugged his shoulders and assumed an expression of martyrdom. "So sorry about this." He picked up the phone. Since Loeb parroted back just about everything Mrs. Monahan said to him it was easy to determine that Mr. Monahan was being difficult. He wouldn't sign the separation agreement, he wouldn't get out of the house, and he wouldn't disgorge the savings bonds he had taken from the joint safe deposit box. What was Mrs. Monahan to do? Loeb thought a moment.

"See if you can provoke him into striking you," was his creative suggestion. "*You* shouldn't find that very difficult," he added darkly. "Mrs. Monahan, I hate to remind you of this, but our last statement has not been paid." A pause. "Yes, yes, I understand perfectly and I'm very sympathetic. But isn't this the third time in the last six months you've had to replace your furnace? You must understand, Mrs. Monahan, we can't return those bronzed baby shoes while our bill is outstanding."

Goodale, accustomed to representing a much better class of imbecile, rolled his eyes to heaven in disbelief.

Loeb hung up on Mrs. Monahan. "To respond to your request, Asa, that we state our client's position, I refer you to Mr. Scheinswit's letter to your client. Have you read it?"

"Of course I have read it!" thundered Goodale.

"And what is your response?"

"Our response, in a nutshell is *this*, Mr. Loeb: my client does not intend to stand in the way of Mrs. Axelrod's happiness. He will not contest a divorce, but he sees no reason to shower support and assets on a lady, who in violation of her marriage vows, has elected to cohabit with a more congenial partner."

"That will not do, and you know it. Your client is a very rich man and (though it pains me to say it) a very selfish one, cold, insolent, sexually demanding and insensitive, profoundly difficult to live with. He has driven Mrs. Axelrod to her present unhappy plight." Loeb waxed eloquent over Brenda's misery, suggesting that had she remained with Henry a moment longer her reason would have been unhinged, and only the blessings of therapeutic adultery had saved her from madness. Moreover, she would need extensive psychiatric help, for which Henry must pay. It seemed that Loeb had even retained some professional charlatan, who was prepared to testify that Brenda's frail emotional health was the result of "mental cruelty".

Henry, who had spent fifteen years enslaved by infatuation, was startled and even a little proud to hear himself likened to an ogre. He had quivered in self-reproach at Brenda's slightest displeasure, and now, *mirabile dictu,* he had been transformed in Loeb's fertile and dishonest imagination into a macho monster. Whee! But Goodale, outraged, proceeded to lose his temper.

"This is preposterous! No court in this Commonwealth is prepared to reward strumpetry."

"Just as you wish. We'll do it the hard way." He summoned Miss Wisniewski and handed her some money. "You will buy a box of Fanny Farmer candy and take it to Miss Kelly at the Clerk of Court's office. (We've neglected her recently.) You will tell her that I want an appointment with Judge Simpkins preferably on Friday afternoon. He's usually slightly drunk, and very sentimental on Friday afternoons, in just the proper condition to hear of Mrs. Axelrod's cruel plight, and to sign an order restraining her husband from disposing of any of his assets. You will file the complaint with Miss Kelly along with the sweets."

Loeb then brandished an important looking document and handed it to the receptionist.

Goodale, visibly shaken, plucked carphologically at his watchfob and croaked, "Sir, you are a blackguard! You'll never get away with this."

"Even if we don't, your client will find it extremely expensive and very inconvenient. When I get done, he'll

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be properly trussed and tied up. He won't be able to go to the bathroom without a court order."

"That reminds me," said Goodale in anguish, as Henry took over in defense of his lawyer.

"Do your damnedest, Loeb. Let's get out of here, Mr. Goodale. There's nothing more to discuss."

"Have a nice day!" said Miss Wisniewski as Henry hustled the old man out of the office. "I'll walk down with you," she added. "I'm on my way to the courthouse."

Henry had analyzed the problem far more coolly than had Goodale. He was convinced he should fight and he was certain that no court would hogtie him to the degree Loeb had predicted. He not only understood this; he knew that Goodale did not understand, and, unaccustomed to divorce work, was suffering the terrors of the unknown. Henry, who was as kindly as he was intelligent, forgot his own troubles in attempting to comfort his lawyer. He bundled Goodale into a taxicab and took him off to his club, where there was a really sumptuous bathroom.

When Goodale reappeared twenty minutes later, Henry had sorted things out in his mind, and had made a very wise decision. Henry was that rarity among even intelligent laymen: he knew when and how to fire a lawyer.

"Mr. Goodale, I apologize for subjecting you to an experience beneath your dignity and that of your fine firm. I believe that Hall & Mills is too busy with really important work to undertake this."

"Well," said Goodale, "the litigation department is stretched a bit thin right now, what with all these damned fool tender offers."

"Exactly. I want Hall & Mills in a position to give my commercial affairs undivided attention. Wouldn't you rather send my messy private business to someone who specializes in that sort of thing? Surely you have other clients who have made fools of themselves? I'm certain you can recommend someone in whom you have absolute confidence."

Goodale concurred gratefully. It just so happened he knew the right people for the job. Within a few days after the filing of Brenda's petition, the slightly shady firm of Burke & Hare swooped down from their aerie in Barristers' Hall and started making things disagreeable for Brenda and Loeb. □

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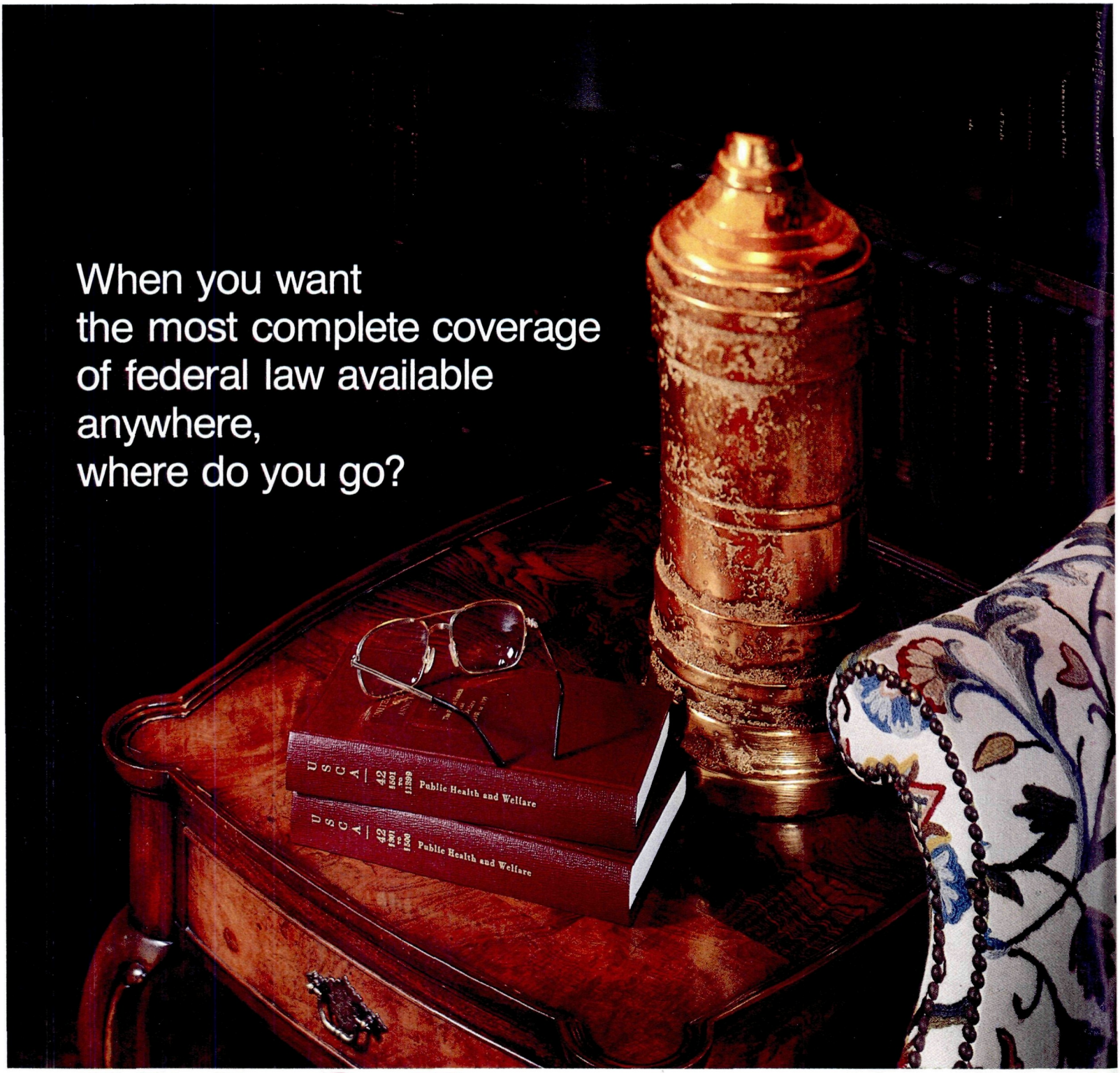

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