

The Other Side of the Bench: Reflections on Ten Years in Family Court

by Angela R. Arkin

Ten years on the Bench is a long time, but it passes in a flash. Actually, it's more of a whirlwind when most of it is spent in family court. That's where I have been for the vast majority of my judicial career. How did I get so lucky (or unlucky, some might think)? A variety of factors led me to this docket, the most prominent being my background as a family lawyer.

Many judges are most comfortable presiding over a docket that covers their primary area of practice—comfortable, because we don't have to start from scratch. "Comfortable," however, does not always equal "favorite." Many judges find that presiding over a specialty of law that is different from the area we practiced as attorneys is appealing, and possibly even preferred. Some of us like the challenge of learning something new. Others find that we are tired of the same old thing, and are re-energized by something different.

Not so for me. I have presided over every type of case, and nothing appeals to me more than the family law docket.

The way our courts address challenges facing children and families has a significant, ongoing impact on our society. Many families come to the courts in distress relating to poverty, substance abuse, mental or physical health problems, spousal or child abuse, and/or domestic violence. As a family court judge, I believe I have the opportunity to contribute to the resolution of these challenges in a positive way. This belief is shared by many of my judicial colleagues who have found their time spent presiding in family court to be extremely rewarding. Some of these judges have valiantly committed themselves to these dockets, including the judges in the Denver Juvenile and Probate Courts and many magistrates around the state. Many district court judges who have never been near a dissolution of marriage in their personal or professional lives, but who now are working in family court, have come to find the family law docket to be intellectually challenging and professionally satisfying. For example, a judge in family court may have an opportunity to identify

resources and perhaps order professionals into a case—such as a family therapist—who could have a concrete, significant, and positive impact on the family's future.

This article discusses the domestic docket in family law court. It presents examples of the opportunities this side of the Bench provides judges and lawyers to have a positive impact on the future for children and families.

Judicial Discretion

The majority of trial judges worked as trial lawyers before moving to the Bench. Trial practice is primarily about the past: reconstructing events relating to contractual agreements, accidents, or criminal acts. Family law (domestic, juvenile, and probate) is the one area of law that is primarily about the future. The past is the context for the decisions the judge must render, but the present and the future matter equally or more than the past.

Domestic relations judges, attorneys, and litigants find the judge's enormous discretion daunting, but it is absolutely essential. The judge in domestic relations court can wear as many as three hats: an equitable hat; a law and rules hat; and, if there are children, a *parens patriae* hat. The judge has to figure out how to balance the various interests of the parties and children while wearing all of these hats.

Every family is unique, and every family comes to the court fully formed. The attorneys and the court had absolutely nothing to do with how that family was created. Two people joined as a family. They decided how to run their finances; they decided whether to have children and how to raise them; and they decided to accumulate assets and debts in every category imaginable. The adults were employed inside or outside the home; they worked for others or for themselves; and they lived their lives with their families as they chose, until one or both adults decided that the intact family must end. That is when they come to court.



About the Author

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When the family arrives, the judge must address these questions:

1. What were the decisions made by the parties that created this family?
2. How will this family move on?

The court has no magic wand to wave away the past decisions and actions of the parties they now regret. The court also is unlikely to accept a party's attempt to fully deny or re-characterize a past decision or action that has significantly altered the family's current circumstances. The court has only its three hats, coupled with the discretion to balance them appropriately in each case according to the applicable law. This can be very tricky, but it also is a wonderful challenge for the judge to find the best solution for this family.

Specialized Knowledge

Judges and lawyers who work on domestic relations cases will say that, although this practice area may have its difficulties, it is never boring. Myriad issues present themselves in every case, and most of them are not covered by specific statutes, rules, or case law. Legal professionals practicing in domestic relations need a great deal of non-legal knowledge to competently do so.

The preamble to the Uniform Dissolution on Marriage Act, CRS § 14-10-104.5, states:

[I]t is in the best interests of the parties to a marriage in which a dissolution has been granted and in which there are children . . . for the parties to be able to resolve disputes that arise subsequent to the dissolution in an amicable and fair manner. . . . [F]urther, . . . in most cases, it is in the best interests of the children of the marriage to have a relationship with both parents and that, in most cases, it is the parents' right to have a relationship with their children. . . . [O]ne of the underlying purposes of this article is to mitigate the potential harm to the spouses and their children and the relationships between the parents and their children caused by the process of legal dissolution of marriage. . . . [W]hen a marriage in which children are involved is dissolved, both parties either agree to or are subject to orders which contain certain obligations and commitments. The . . . honoring and enforcing of those obligations and commitments made by

both parties is necessary to maintaining a relationship that is in the best interest[s] of the children of the marriage. . . . [B]oth parties should honor and fulfill all of the obligations and commitments made between the parties and ordered by the court.

Determining Contested Issues

The judge's job encompasses deciding only those issues the parties cannot. The attorney's job is to narrow the issues the court must decide. If the parties are unable to decide the contested issues for themselves, the judge must create a structured path that the parties will follow, until and unless they are able to arrive at a mutually agreed satisfactory resolution. Unlike the situation faced by judges in juvenile court, where necessary resources are available through the state, the domestic relations judge often is flying without a net, having only the incomes of the parties and the requests of counsel to rely on in bringing experts into the case.

With or without experts, the court must find an equitable financial solution for the parties, and a safe, healthy parent-parent relationship for the children. This requires the attorney and the judge to become familiar with a number of disciplines that are outside the general practice of law, or legal specialties with which they may not be familiar, including, most commonly, attachment theory; adult and child psychology; disabilities; sociology; alcohol and drug addiction, treatment, and toxicology; accounting; business and other asset valuation; tax law, real estate, and bankruptcy law.

The attorney who is presenting and the judge who is deciding parenting time issues need a basic understanding of how emotional attachments are formed between children and their parents. The psychological, physical, and addiction challenges faced by one or both parents and/or the child significantly affect the judge's decisions about parenting time, decision making, division of assets, and financial support. The legal professionals also must fully understand the societal realities the family will encounter—the parties' previous ways of conducting their financial business, the value and liquidity of their assets, and the nature and amount of their debts—so the court can equitably divide the marital estate and ensure appropriate support for a dependant spouse and children.

Knowledge of Ancillary Disciplines

Domestic relations cases are filled with tax issues. Judges and domestic relations attorneys do not need to be tax experts, but at permanent orders, they must identify which assets and payments have tax implications to ensure that the equitable outcome the judge intends is achieved.

Real estate law also is an important area with which judges and attorneys must become familiar, because the parties' marital home is commonly their most significant asset and debt. In addition, a domestic judge has to know enough about bankruptcy to know the assets and income over which the court has jurisdiction while a bankruptcy is pending.

Certainly, making *sua sponte* statements regarding the application of a specialized discipline is not a path the judge is likely to wander down, but when parties are *pro se*, or when experts are providing testimony, knowledge of the discipline provides the court with a context within which to weigh the facts. Attorneys need to know these disciplines to prepare their case and educate the court. The court must reach an equitable conclusion for each family, with or without the assistance of attorneys and experts, and at least a

rudimentary understanding of these ancillary disciplines is required.

Special Procedures

Unlike other civil matters, the domestic relations court has special rules and procedures that litigants must follow to prepare for their dissolution. The court must engage in active case management to minimize the parties' litigation costs, and move toward minimizing the damage that a pending divorce can impose on a family system. C.R.C.P. 16.2 states:

Family members stand in a special relationship to one another and to the court system. It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible. To that end, this Rule contemplates management and facilitation of the case by the court, with the disclosure requirements, discovery and hearings tailored to the needs of the case.

Parties stand in a fiduciary relationship to one another, and must follow these procedures to reach an equitable conclusion to their case, or prepare for the court to enter permanent orders. Full disclosure is required without a formal discovery request, and the assertions often made by parties in other kinds of civil cases that they have the right to protect their client list, trade secrets, or other income or business-related information are generally irrelevant between husband and wife.

The court's primary allies in case management are the domestic relations lawyers who focus on moving parties toward resolution of contested issues. Good domestic relations attorneys help parties memorialize the uncontested issues, identify and settle the contested issues, and help the court structure a process for getting the remaining contested issues evaluated and resolved. This can happen either by agreement of the parties or, at last resort, a court trial. The attorneys assist the court by managing their cases and keeping the parties moving toward the resolution of the case. They also identify problematic issues that, when necessary, require intensive court management.

The most important thing good domestic lawyers do is help their clients create a realistic vision of their future and devise a path to reach it. Good attorneys understand that the parties—not the judge—are the best people to decide their futures. They must be prepared to go to trial if that is the road the case must take; however, good domestic attorneys are always trying to find solutions for their clients that are financially appropriate and in the best interests of the children.

The "Caring Distance"

Some of the reservations expressed by lawyers and judges in addressing domestic relations cases relate to the emotional toll these cases can sometimes take on the professionals involved. Litigants and children may present themselves to the attorney or the court in grave financial or emotional distress, and the resolution of their problems can be very complex and time consuming. Additionally, the legal professionals encounter some cases where there are no good solutions.

It is important for the attorney and judge to care about the litigants and the family so they can promptly provide the best representation or the best decision; however, caring too much is stressful

and difficult, and can lead to burnout in domestic relations matters. Developing a caring distance is essential to a successful family law practice or judging in this area.

Finding a caring distance can be a balancing act. The attorney or judge must be able to empathize with the client or the parties, without expecting that the court process can solve the problems that the family likely carried long before the divorce was filed. For attorneys, getting too close to their clients generally results in the attorney losing the necessary perspective to be able to tell their client the truth—that no one gets everything he or she wants from the divorce process, and that divorce is all about compromise. Attorneys should have good mentors and colleagues to talk with about their difficult cases to keep from losing the perspective that makes them effective in finding the best resolution for their clients.

For the judge, the trap can be thinking that it's possible to do something besides diligently managing the case, hearing the evidence, and entering orders, in hopes that the parties will comply. Certainly, the educated and prepared judge will be in a position to make the best decision possible, but the judge is not always going to hear all of the evidence needed to make the most financially equitable and child-centered choices.

These are the limitations of any litigation process, but they can feel magnified in the domestic docket. Although each judge must make his or her own decision, having another judge with whom to discuss difficult issues can really help. Divorce is about the future, and no one ever knows what that holds. A judge must trust and accept that he or she made the best decision at any given time, and that is the best a judge can do.

Final Thoughts

Family stress often can feel like a heavy burden to be carried by the legal professional. This can be counter-balanced against the satisfaction a judge or attorney may feel when he or she has helped a family move toward a positive resolution of its problems.

From time to time, someone over whose case you presided will stop you and tell you how much he or she appreciated the help you provided his or her family. You will run into a litigant in the grocery store, and hear about a child who is thriving based on your help. Of course, not everyone will remember you fondly; however, on balance, the practice of domestic relations law brings great opportunities for the legal professional to have a positive impact on the lives of others. That makes it most rewarding to me. ■