

THE ANATOMY AND THEORY OF "HIGH CONFLICT"

The first step in truly understanding family law is realizing that family law is not about law. With few exceptions, family law is fundamentally about relationship problems, behavior problems or both.

Virtually every case filed in a family court system involves a relationship problem or a behavior problem or both. The law is mostly secondary and often provides few answers, if any at all, to this myriad of relationship and behavior problems.

Some examples illustrate the point:

Divorce – A marriage is the most intense personal relationship we know and a divorce is the failure of that relationship. That failure may be the result of certain dysfunctional behaviors or the fact of the divorce itself may cause dysfunctional behaviors. Examples include adultery, domestic violence, etc.

Annulment – another failure of the marital relationship. In some instances, the relationship is good but not permitted such as when an annulment happens because the one of the spouses was still married to someone else at the time of this ceremony of marriage.

Unmarried couples with or without children – same as a divorce but without the legal ties of a formal marriage. Again, it is a personal relationship that is dissolving regardless of the formality of the relationship.

Adoption – the failure of a personal relationship; the creation of a child but without being around to support it, take care of it, etc.

Guardianship – the inability of an adult ward to take care of himself/herself, the inability of a parent or parents to take care of a minor ward, etc.

Abuse and neglect – self explanatory.

Juvenile cases – behavior problems for dysfunctional but not criminal behaviors that put a child at risk; criminal behavior problems; bad peer group relationship problems.

At the very outset of the case, try to understand the basic behaviors that got the person (potential client) to your office or got the case filed in court. Virtually every single case will involve a relationship problem, a behavior problem or both. Rare indeed is the case that does not have any of these elements. Only a simple adult name change seems to lack these elements.

A. STATUTES AND CASE LAW HAVE FEW, IF ANY, ANSWERS

Throughout law school and the practice of law, lawyers are taught and assume that the correct answer in any given case has to be a "legal" answer and that if we simply understand and apply the law correctly, we will ascertain the correct "answer."

There are very few hard and fast principles of law in domestic relations. Most domestic relations statutes and cases provide general guidelines or points to consider but little in the way of education on how to interpret and apply the principles.

Instead of clear black and white answers, most cases involve many shades of gray as to the facts and as to which principles of law to apply in a given situation. What may work well in one case may be a disaster in another.

Here are some examples of this conundrum in the everyday practice of law and why it is important to have a good working knowledge of conflict theory. Consider the legal factors in NRS 125.480(4) that a Judge is supposed to consider in making a custody decision:

4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.
- (b) Any nomination by a parent or a guardian for the child.
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.
- (d) The level of conflict between the parents.
- (e) The ability of the parents to cooperate to meet the needs of the child.
- (f) The mental and physical health of the parents.
- (g) The physical, developmental and emotional needs of the child.
- (h) The nature of the relationship of the child with each parent.
- (i) The ability of the child to maintain a relationship with any sibling.
- (j) Any history of parental abuse or neglect of the child or a sibling of the child.
- (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
- (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.

Much is said about domestic violence in family law cases. The Nevada Legislature created a presumption about domestic violence and child custody in NRS 125.480(5, 6):

5. Except as otherwise provided in subsection 6 or NRS 125C.210, a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child. Upon making such a determination, the court shall set forth:

(a) Findings of fact that support the determination that one or more acts of domestic violence occurred; and

(b) Findings that the custody or visitation arrangement ordered by the court adequately protects the child and the parent or other victim of domestic violence who resided with the child.

6. If after an evidentiary hearing held pursuant to subsection 5 the court determines that each party has engaged in acts of domestic violence, it shall, if possible, then determine which person was the primary physical aggressor. In determining which party was the primary physical aggressor for the purposes of this section, the court shall consider:

(a) All prior acts of domestic violence involving either party;

(b) The relative severity of the injuries, if any, inflicted upon the persons involved in those prior acts of domestic violence;

(c) The likelihood of future injury;

(d) Whether, during the prior acts, one of the parties acted in self-defense; and

(e) Any other factors which the court deems relevant to the determination.

In such a case, if it is not possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies to both parties. If it is possible for the court to determine which party is the primary physical aggressor, the presumption created pursuant to subsection 5 applies only to the party determined by the court to be the primary physical aggressor.

The application of that statute has to be integrated with the statute that defines domestic violence in Nevada law:

NRS 33.018 Acts which constitute domestic violence.

1. Domestic violence occurs when a person commits one of the following acts against or upon the person's spouse or former spouse, any other person to whom the person is related by blood or marriage, any other person with whom the person is or was actually residing, any other person with whom the person has had or is having a

dating relationship, any other person with whom the person has a child in common, the minor child of any of those persons, the person's minor child or any other person who has been appointed the custodian or legal guardian for the person's minor child:

- (a) A battery.
- (b) An assault.
- (c) Compelling the other person by force or threat of force to perform an act from which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.
- (d) A sexual assault.
- (e) A knowing, purposeful or reckless course of conduct intended to harass the other person. Such conduct may include, but is not limited to:
 - (1) Stalking.
 - (2) Arson.
 - (3) Trespassing.
 - (4) Larceny.
 - (5) Destruction of private property.
 - (6) Carrying a concealed weapon without a permit.
 - (7) Injuring or killing an animal.
- (f) A false imprisonment.
- (g) Unlawful entry of the other person's residence, or forcible entry against the other person's will if there is a reasonably foreseeable risk of harm to the other person from the entry.

2. As used in this section, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context.

The child custody factors in NRS 125.480(4) is nothing more than a list of factors that must be considered by the trial judge when making a child custody decision.

Beyond that, there is little or no guidance on what those factors mean, how they should be applied individually or how they should be applied and considered in light of all of the other applicable factors.

Consider the factor #4, the level of the conflict between the parents. What is the conflict and how does one determine "levels" of conflict in a custody case. Is it a quantitative or qualitative determination or some elements of both? There certainly is some level of conflict in every divorce and more so in those with a custody issue. What

the standards for determining levels of conflict? Who determines and describes “levels” of conflict?

Even if you determine a level of conflict, do you determine who is at fault for the conflict? Are both parties equally at “fault” or is one party more prone or apt to promote the conflict and the other party is defending himself or herself?

Another factor is the mental and physical health of the parents. Fine. What does that mean? Some clear examples of this factor might include whether one of the parents has ever been committed to a mental institution for treatment of a major mental health problem. A typical example is someone who has exhibited schizophrenic behaviors, paranoid/delusional behaviors, serious depression issues, etc. Clinical depression is very common in society and occurs so often that it is called “the common cold of mental illnesses.” Depression can be unipolar or bipolar, seasonal, hormonal (postpartum) and often is correlated with alcoholism or drug use.

The more difficult “mental” problems for one or both parents personality disorders. Personality disorders are more common in the general population than is realized. For lay persons, personality disorders may be difficult to recognize and diagnose. We all know some people who are unduly difficult, unreasonable, and prone to violent, abusive and irresponsible behaviors.

One of the enduring myths in family law is that in high conflict cases, both parties must be equally bad and are equally at fault for the level of conflict in that particular case. That is just an excuse to be intellectually lazy and ignore the deeper sources of conflict.

It is true that there are some cases in which both parents have problems that

propel their conflict. Both could be alcoholics, depressed, drug addicts, etc.

What is more likely to be true is one parent has a major mental health or personality disorder problem along with drug or alcohol issues and is very difficult to get along with and may be violent and abusive. The other spouse may have to act to protect himself or herself from that abuse and violence and to protect their children.

A classic example of this is the wife with a borderline personality disorder. We know them by the slang term used in the legal business: "drama queens." A person with borderline personality disorder exhibits extreme behavior and mood swings and is very difficult for spouses and children and others to cope with in social interactions.

Another factor with no specifics is the physical, developmental and emotional needs of the child. What does that mean? Again, no guidance from the statute and little from the courts. Sometimes, what we get from the courts is incomplete or just plain wrong.

The same points can be made with every other factor listed in NRS 125.480(4). They are all vague, general guidelines with little to supplement them.

The same is true of the domestic violence and child custody presumption. Nevada has a "one size fits all" statutory presumption that is very problematic to apply in many cases. What incidents qualify as "domestic violence," how far back can such incidents go, what if no one was arrested or some one was arrested but not charged, what if the incident happened but no one filed for a protective order, etc.

Furthermore, what is needed to prove DV by "clear and convincing" evidence and, since the presumption is rebuttable, what evidence qualifies to rebut the presumption?

B. TWO ENDURING AND INACCURATE MYTHS REGARDING HIGH CONFLICT

As noted above, there are two major myths of analysis by both lawyers and judges in high conflict cases. First is the notion referred to above that since both parties argue and fight, they both must be bad people and thus deserve each other. This shorthand rationale is often invoked because it allows the lawyer or judge to ignore the deeper underlying causes of the high conflict. One person may be by far the largest source of conflict in the relationship and the other party may be coping with the bad behaviors or defending themselves against the bad actor.

The second enduring myth in high conflict cases with children is that if we just award joint legal and physical custody to both parents, the conflict will diminish and the parties can live on happily ever after just like in fairy tales. A judge may not have the intellectual capacity or knowledge base to determine which of the parties is the most difficult and may not want to assess blame or be perceived and/or accused of gender bias in the case.

The assumption is that the children will best thrive if they have frequent and continuing associations and time with both parents. As a general statement, it is true. However, the outcome for the children is highly correlated with the levels of conflict of the parents. Children do much worse in joint custody arrangements in high conflict cases. Children of divorce are already at great risk from the consequences of a relatively normal, low conflict divorce. High conflict maximizes that risk.

Forcing the parties to share joint legal and physical custody in a high conflict case is a recipe for disaster. Children will likely be better off with a primary custody or even a sole custody arrangement in certain high conflict cases.

C. THE BEGINNING OF DIVORCE AND CONFLICT DIFFERENTIATION

There has been an explosion of social science research on divorce, child custody, and behavior issues in the last forty years. While the earlier articles are helpful, most of the really good research material has come about within the past ten to twenty years. This research is not just emanating from the social science professions, mainly psychology and sociology. There are also major contributions from the emerging research in neuroscience. This research is made possible with MRI, CAT scans, etc. that measure differences in the brains of drug addicts, alcoholics, and traumatized children and adults.

There are many levels of conflict in a typical divorce case. These levels vary with the type of person involved in the divorce, the stage of the relationship transition process (entirely different from the legal process), the experiences of the divorce process (both the legal and personal process), the means by which the divorce is formally resolved, and the post decree transition and personal adjustment process.

We human beings are a tribal species. We are biologically designed to be in relationships with other human beings. Those relationships are many: family, friends, co-workers, neighbors, interest groups and social associations. But the relationship that we crave most of all is a close, intimate relationship with a member of the opposite sex. Of course, there is a small percentage of people who desire same sex relationships but they seek those relationships for many of the same reasons as opposite sex couples.

One fascinating book I read some years ago is *Uncoupling: Turning Points in Intimate Relationships* by Diane Vaughn (Oxford Univ. Press 1986). She went through a personal divorce after a long term marriage and she was personally and academically

fascinated by the psychological way that people get into and then leave personal relationships (her definition is a relationship of living together and being sexually intimate).

Ms. Vaughn describes the beginning of the intimate personal relationship (whether married or living together) as when a couple decides to renegotiate who they are with respect to each other and to restructure their lives around each other. They redefine themselves as a couple for legal, social and personal reasons. They view themselves and others view them as a singular unit, i.e. a committed couple.

When a relationship is ending, the process is reversed: a person in the relationship starts thinking of himself or herself as a separate entity again. Giving up a relationship is hard and entails the disentanglement of belongings, responsibilities and identities.

The relationship transition process is vastly different than the formal legal divorce process. A divorce does not start with the filing of a complaint. It actually starts much earlier when one of the parties decides in his or her own mind that for whatever reasons they may have, they no longer wish to remain in a marital relationship with the current spouse. The emotional process may start out with a vague feeling of unhappiness with the marriage, of feeling trapped by circumstances, that the other spouse has changed in some negative ways, and that the marriage or relationship seems to be a dreary, dead end existence. Some couples just grow apart and change over time. Others will seek to end abusive relationships before it is too late.

Those feelings of unhappiness or unease may grow over time and progress to the point where the spouse is not sure if the grass is greener on the other side but is

no longer going to remain in the marriage or relationship. These feelings will grow to a point where that spouse decides to leave the marriage or relationship.

The spouse who first decides to leave the marriage is sometimes referred to as the “dumpor” and the spouse who is being left is the “dumpee.” The latter may or may not have any idea that the marriage or relationship is in trouble. The couple may have tried marital counseling in an effort to work out the marital conflicts. Many times, though, the “dumpee” spouse is blind sided by the other spouse who decides to finally tell the other spouse that the marriage is over. Sometimes, one party moves out suddenly and without warning.

Other divorces are started in more abrupt fashions. One spouse may discover evidence of infidelity or an affair by the other spouse. Sometimes, there is a violent incident of domestic violence, a criminal arrest, or some other sudden event that triggers the desire to obtain a divorce.

Just as a divorce does not begin with the filing of the complaint, it does not end with the filing of the decree of divorce. A divorce is really a serious personal transition process. One perspective is that a divorce is nothing more than a restructuring of the relationships between the adults, between the adults and their children, and a restructuring of their assets, debts and finances.

Dr. John Gottman is a professor emeritus in the Sociology Department of the University of Washington. For more than three decades, he and his colleagues have studied by observation and other methods the interactions of couples. Based upon their observations and assessments, Dr. Gottman and his colleagues were able to forecast with a strikingly high rate of accuracy, around 90%, which couples would eventually

divorce. The book I read and recommend is *Why Marriages Succeed or Fail: what you can learn from the breakthrough research to make your marriage last*, (Simon and Schuster 1994). From his years of research, he pinpointed the six signs or behaviors that will very likely lead to a break up of the marriage:

1. When one partner begins a discussion with the other partner using a harsh startup such as being negative, accusatory or using contempt, the discussion is doomed to fail.

2. A harsh startup can lead the discussion down a path of negative interaction. There are four types of negative interactions that are lethal to a marriage: criticism, contempt, defensiveness and stonewalling.

3. The third sign is “flooding” which is when your spouse’s negativity is so overwhelming and sudden that it leaves the recipient shell-shocked. Recipients often protect themselves by disengaging or stonewalling.

4. The fourth sign is body language which he describes as the physiological changes in the body that coincide with flooding. These changes include increased heart rate, secretion of adrenalin, and an increase in blood pressure.

5. The fifth and final sign is failed repair attempts. Repair attempts are efforts made by the couple to de-escalate the conflict and means any method the couple tries to use to prevent the negative emotions from spiraling out of control.

6. The sixth sign is bad memories. That occurs when a couple recalls their past life with a negative view. Excess negativity leads to a distorted perception that can affect the past, present and future of a relationship.

The bottom line in marriages: negativity kills relationships.

There are three main stages in the divorce process: marital conflict and unhappiness, marriage dissolution, and the post decree period. The rule of thumb in counseling circles is that the post decree adjustment to the divorce takes anywhere from six months to three years. This time span is usually shorter for the “dumpor” person who emotionally started leaving the marriage at a much earlier time than the “dumpee.”

It has also been said that there are actually six divorces in a single divorce: emotional divorce, legal divorce, economic divorce, co-parental divorce, community divorce and psychic divorce. A divorce is a major emotional process. It represents a personal failure and generates powerful emotions such as anger, hurt, anxiety, revenge, fear, loneliness, and depression. A divorce is a rejection of one spouse by the other. Sometimes, it is a mutual rejection. How it all plays out is directly correlated to the characteristics of the couple, the history of their relationship, the presence or absence of mental health issues, personality disorders and substance abuse issues.

D. IMPASSES OF DIVORCE

One of the first major books in conflict theory of divorce, and still a landmark publication was written by Janet R. Johnston and Linda Campbell, *Impasses of Divorce*, (Simon and Schuster 1988). The authors were part of an incredible collection of psychologists and mental health professionals in the San Francisco bay area who started working there in the 1970s. They all worked in divorce mediation, custody assessments, etc. Several members such as Judith Wallerstein, Joan Kelly and many others conducted extensive research and wrote many of the best books and professional journal articles on domestic relations conflict theory.

In this pioneering book, the authors identify three main sources or levels of conflict in domestic cases: tribal, interactional, and intra psychic. The “tribal” theory refers to those circumstances in which family, friends, new lovers, etc. align with and support one spouse in the divorce/custody conflict. The litigating spouse gets all kinds of advice and support, sometimes financial support, from those sources.

At the interactional level, the authors identified two broad kinds of disputes: those that were the legacy of a destructive marital relationship and those that were a product of traumatic and ambivalent separations. In simple terms, the parties carry on the crazy fighting and arguing they did during the marriage but do so during the separation and divorcing stages.

The third level is labeled “intra psychic” and it describes the conflicts engendered because of a person’s inability to engage in rational decision making and cooperation during and after a divorce. Divorcing parents may have differing capacities to manage and integrate divorce engendered feelings. These tend to be psychologically vulnerable people less able to manage their feelings in the divorce context. A large portion of the people in this category had indicators of personality disorders.

In chronic conflict cases, the authors found sources of conflict from all three levels. *Impasses of Divorce* is one of the most insightful books you will ever read about divorce conflict theory. Your understanding of domestic relations conflict will increase manifold and you will see patterns of behaviors never before recognized and understood. The other materials in this outline integrate well into the conflict theories described by the authors.

This graph is an illustration of high conflict theory and its implications for both case processing and case management. The center bar represents the population of divorcing couples. This is an illustration graph only and does not represent any hard and fast empirical data on the population of divorcing couples. It represents the general estimates from social science research.

The lists for normal functioning adults and low functioning adults are generalized lists only. They are not mutually exclusive or limited. For example, there are some individuals who are well educated and may have good jobs or businesses but are ultimately diagnosed as narcissistic in domestic cases. Some well educated professional people suffer from alcoholism or occasionally drug use.

There are also poorly educated people who work at steady but still low skill jobs for other employers. Thus, there is nothing magical or exclusive about these generalized characteristics of normal functioning and low functioning adults. There are many occasions when an individual goes from the left side to the right side. An example is a person who is well educated, usually employed, etc. but whose life gets ruined by drug abuse, alcoholism, a mental illness developing later in life, etc.

But what does hold quite true is that one or both parties in a genuine high conflict case will have one or more of the characteristics from the right side list. These parties are the most challenging for lawyers and judges. Their behaviors and problems may be intractable and untreatable. The other dilemma is that the problems may be treatable through counseling or therapy, etc but they lack the resources to pay for the services or the voluntary willingness to be in any programs. Public and private assistance agencies may lack the resources to help those who most need the services.

These problems are rarely isolated. The problems often come in clusters. A person with alcoholism or drug addiction problems may be prone to domestic violence, abusive behaviors, unable to keep a job and provide for family, have a criminal history, etc. The truly challenging cases are those few (thankfully) where both parties have major behavior/addiction problems. Many of those people seem to be able to get together only with like minded, like acting relationship partners because no one else is willing to get involved with them.

In a later section, we will learn about co-occurring conditions, sometimes also called co-morbidity. Substance abuse and mental illness are often found together.

This chart helps illustrate the choice of decision making process. We know from years of experience that about two thirds of the divorce cases that go to mediation end up with full settlements and another 10%-14% in partial settlements. In collaborative divorce, about 90% is the average settlement rate. These numbers correlate well with the left end to center right of the bar graph. That is, normal functioning adults have significantly high likelihoods of resolving cases through non-adversarial methods because they have the capacity to adjust to the divorce and work through the transition and adjustments necessary to go from married to single adults and continue normal life.

For illustration purposes, the next segment, from 75% to 90%, of the adults in divorce process represents those who may have behavioral problems but not to the same extent as the ten percent on the far right side of the graph. This middle segment may also represent those who did not settle in mediation or other ADR process because they may not have been personally ready to do so. People in this segment may ultimately settle along the lines of what may have been proposed in earlier ADR

processes and they may be assisted by additional education and counseling measures.

We are now left with the remaining ten percent segment that is most difficult, the most intractable and the most time consuming for the court. The need for assessment and treatment services far exceeds any other segment of the divorcing population.

It is mostly in this segment that you will find people with personality disorders, substance abuse problems, mental health problems, domestic violence, negative criminal histories and a collage of these problems. It is in this segment where you find many of the abuse and neglect, domestic violence, parental alienation, and high conflict cases. Welcome to this world.

F. THE FIVE DEADLY PERSONALITY DISORDERS

Over the past thirty years, social science researchers and psychologists engaged in custody evaluations and assessments have concluded that there are five personality disorders common to high conflict domestic cases: histrionic, borderline, narcissistic,, anti-social, and paranoid. These personality disorders are all recognized as such in the Diagnostic and Statistics Manual IV, the “bible” index of mental health disorders. The DSM-IV, as it is commonly called, is the product of the American Psychiatric Association which has assembled this product after years of deliberation, study and debate in the psychology and psychiatry professions.

This manual is revised every several years and the DSM -V is now in discussion.

It is important to note that a personality disorder is not the same as a mental illness. Mental illnesses include the most common forms such as depression, schizophrenia, etc. Mental illnesses can be treated with medications and professional mental health therapy. There are many FDA approved medications for these illnesses.

Personality disorders are different. In a nutshell, a personality disorder is an altered way of thinking and looking at the universe differently from others and reacting to it differently. Personality disorders are NOT treatable with medications and only some forms of counseling, usually cognitive behavior therapy, have any chance of working with people who have personality disorders. The main problem is that the disordered person does not think that they are thinking or doing anything wrong. Everybody else is wrong, not me.

These are the general characteristics of personality disorders: enduring patterns of behavior, starts in early childhood or adolescence, extreme thinking, extreme emotions, extreme behavior, interpersonal dysfunction, impulse control problems, and outside of cultural norms. Disordered people generally lack self-awareness about why they are the way they are and how they contribute to their own problems. They also lack adaptation coping skills and tend to exhibit rigid behavior patterns and have no sense of self-responsibility.

The presence of one or more of the five deadly personality disorders in a domestic case can be a real nightmare. The first major problem for lawyers and judges lies in even understanding that such behaviors exist and how to spot those behaviors in a court proceeding. A legal court proceeding is not an assessment process. The technical matter before the court is a motion, return date, evidentiary hearing, etc. But with some training and experience, lawyers and judges can be taught some rudimentary recognition techniques and can use the court proceedings as preliminary assessments of the possibility of personality disorders.

The United States National Institutes of Health sponsored survey research

starting in 2001 to determine the prevalence of personality disorders in the general population. Other studies had been done but not to the full extent of a national survey.

The results were released in 2007 and have been commented on since then. The study identified the approximate percentages of the general population with personality disorders. Although personality disordered people are a small percentage of the population, they constitute the large bulk of patients for mental health professionals.

1. Borderline Personality Disorder – BPD are the “love you, hate you” types who have a fear of abandonment and may be clinging or manipulative. They have dramatic mood swings and can exhibit sudden and intense anger that is out of proportion to the circumstances. They engage in impulsive, risk taking self-destructive behaviors. In domestic cases, they are sometimes seen as seeking revenge and vindication. BPD is found in 5.9% of the general population. Women tend towards BPD more than men.

2. Narcissistic Personality Disorder – The narcissist believes in a very superior self-image, is absorbed into themselves, their needs and their own viewpoints. A narcissist feels entitled to special treatment and lacks empathy for others. They have a fear of being inferior or powerless. Narcissism appears in 6.2% of the general population and tends heavily towards men.

3. Antisocial Personality Disorder – These are the “con artist” types who have a fear of being dominated and are driven to dominate others in weaker positions. They exhibit a disregard for social rules and laws and their behaviors are often manifested by constant lying and deception even when they are easily caught. Antisocial types have a

lack of remorse and some even enjoy hurting people. This PD appears in 3.6 % of the general population.

4. Histrionic Personality Disorder – These are the “always dramatic” types who fear being ignored and left, drive to be the center of attention, are constantly dramatic and theatrical, exaggerate and may make up stories and have difficulty focusing on tasks or making decisions. This PD appears in 1.8% of the general population.

5. Paranoid Personality Disorder – These are the “I’ll never trust you” types. These types have a fear of being exploited, have endless doubts about friends, professional people, etc. They misinterpret ordinary events or comments as demeaning or threatening, maintain long term grudges and fear and expect conspiracies against themselves. They often misperceive others as attacking them and thus may counterattack first as a form of pre-emptive strike. This PD appears in 4.4% of the general population.

Most people have what is euphemistically referred to as a “surge protector” for our emotions. It is emotional self-regulation that allows a person to control his or her emotions, i.e. keep them in check. People with personality disorders often lack that emotional “surge protector” and act out impulsively and inappropriately.

Of all these five deadly personality disorders, the consensus seems to be that borderline personality disorder is the worst one and the hardest to manage. People with personality disorders may have their lives and psyches complicated by other related problems such as alcohol or drug use in addition to the personality disorder.

Personality disorders may not appear as a singular forensic diagnosis. There may be overlapping behaviors and multiple personality disorders.

G. MENTAL ILLNESS FACTS AND STATISTICS

The most common mental illness you will encounter in family law cases is depression. What we are talking about here is not just having a bad day or a bad week. This concerns depression to the clinical point where daily functioning is impaired and there has been a chemical alteration in the brain that impairs this daily functioning.

There are multiple kinds of depression: unipolar (person is mostly down); bipolar (person has both high and low mood swings), seasonal affective depression (think wintertime blues); postpartum depression which is women only following the birth of a child and is normally hormonal in nature; and dysthymia which is a chronic low grade depression.

There can be multiple causes of depression: genetic, situational, medical, substance abuse related. A divorce can be a very depressing event for many people and that adds immeasurably to the stress of the divorce.

Depression affects about 10% of the adult population. Many adults will have at least one depressive episode during their lifetimes. Depression affects people of all ages but women tend to suffer depression about twice as often as men. There is plenty of literature about depression available on the internet from multiple reliable sources.

The implications for lawyers and judges is recognizing individuals with depression. Depressed people may seem lethargic and have problems with thought formation and articulation. The process of divorce alone may push some people into a depression episode.

Fortunately, depression is treatable by both medication and mental health counseling. There are several anti-depressants on the market.

The more difficult form of depression is bi-polar, a condition in which the person has extreme highs and extreme lows. At the high end, the person is hyperactive and may have poor judgment and impulse control. Bi-polar disorder is treated with different medications than unipolar depression.

Schizophrenia is sometimes encountered in the domestic case. It is a serious disorder of the mind and is commonly associated with people who are hearing "voices." People with this disease may have delusions, thought disorders and hallucinations. This disease is found in approximately 1.1% of the adult population which still equates to a lot of people. While schizophrenia is not curable, it is treatable and there are several medications on the market that can help treat and manage the symptoms of this disease.

H. SUBSTANCE ABUSE FACTS AND STATISTICS

Like it or not, Americans love controlled substances of many kinds. There is the traditional alcohol which has been around for thousands of years. So too has tobacco use. Those two substances are by far the greatest addictive drugs found in society today. Both are multi-billion dollar industries catering to millions of users worldwide. Both also cost billions of dollars in health care costs, shortened life expectancies, reduced productivity and disrupted family patterns.

Over the past century, we have added more substances thanks to the miracles of modern chemistry and the greater ease of growing drug crops and distributing drugs through a vast underground market.

Nearly one in ten Americans report regularly using illegal drugs including

marijuana, cocaine, heroin, hallucinogens, inhalants or prescription drugs in recreational drug usage. Marijuana is the most commonly used illicit drug with some 17 million plus regular users. This increase may be the result of multiple states approving marijuana for medical use.

1. Alcoholism Alcohol continues to be the drug of choice of the overwhelming majority of people who use any substances. Alcohol is a historical drug which has been developed and used for hundreds of years in many cultures and countries. There is a ton of research and literature on alcoholism and its effects. According to the Centers for Disease Control, excessive alcohol use is the third leading lifestyle related cause of death in the United States, approximately 80,000 deaths per year. Excessive alcohol use results in about 1.2 million emergency room visits and 2.7 million physician office visits are due to excessive drinking. Excessive alcohol consumption is economically costly to the United States to the tune of billions of dollars each year in health costs.

Alcohol use is associated with high levels of domestic violence and is a leading factor in child maltreatment and neglect cases.

In the 2011 National Survey on Drug Use and Health, researchers found that slightly more than half of Americans age 12 and older reported being current users of alcohol. That means about 133 million people. About a quarter of the population had participated in binge drinking. That is about 58 million people. Another 6.2% reported heavy drinking usage. That is about 15.9 million people.

In domestic violence, it is not just the perpetrators who use alcohol. Sometimes the “victims” of domestic violence are also higher users of alcohol as well. Alcohol fueled incidents of domestic violence are commonplace to police.

The highest risk age category falls from late high school to age 25. Those are the party years for young people and heavy alcohol use including binge drinking is much more common. Alcohol usage is a major component of social culture in many ways.

2. Methamphetamine. Meth is a central nervous system stimulant that is similar in structure to amphetamine. It has a high potential for abuse. Although it can be legally prescribed, its medical uses are small and the prescription doses are small.

It is a terribly addictive drug that is relatively easy and cheap to make and sells for a high profit margin. Due to aggressive drug enforcement, meth use is down across the United States.

3. Prescription drug abuse. According to the National Institute on Drug Abuse (NIDA), an estimated 52 million people in the United States have used prescription drugs for nonmedical reasons. There has been a dramatic increase in prescription drug abuse in recent years.

Three classes of prescription drugs that are often abused include opioids used to treat pain, central nervous system depressants (valium, xanax, klonopin, etc.) used to treat anxiety and sleep disorders; and stimulants such as adderall or ritalin used to treat attention deficit disorder and narcolepsy.

Danger abounds in different ways from prescription drug abuse. Many of these drugs are dangerous when mixed or used with other substances such as alcohol or other drugs. A person with a valid prescription may end being addicted to the prescribed drugs. About half of those misusing prescription drugs are women and about one-third are juveniles aged 12 to 17. The older adult population also is susceptible since more prescriptions are issued for long term and multiple drug uses.

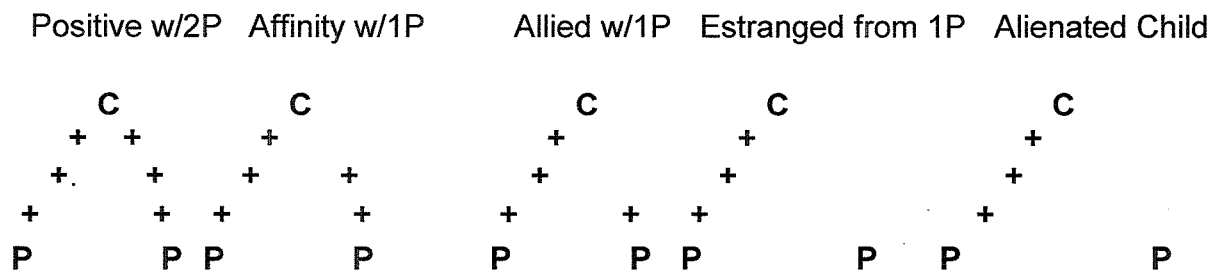
I. PARENTAL ALIENATION ISSUES

Parental alienation is common in most divorce/child custody cases but it is the degree of alienation that makes it a crucial part of a high conflict case. The best current article on the subject is Joan B. Kelly and Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 *Fam. Ct. Rev.* 249 (2001).

Kelly and Johnston reject the parental alienation syndrome as created by Dr. Gardner and have created the concept of the alienated child. They have created a continuum to show the distinctions between the different concepts of parent-child relationships after divorce and separation. This continuum as I have diagrammed it runs from the most positive on the left to the most negative on the right.

THE PARENT-CHILD RELATIONSHIP CONTINUUM

AFTER SEPARATION AND DIVORCE



DISTINCTIONS

Alienated child: defined "as one who expresses, freely and persistently, unreasonable and negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent." P. 251. Focus begins on the child's behaviors and the

parent-child relationships whereas PAS focused on the alleged alienating parent.

Positive w/2P: This is the healthy and benign end where majority of children have positive relationships with both parents and want to spend significant (and sometimes equal) amounts of time with both parents.

Affinity w/1P: Child has affinity with one parent but desires continuity and contact with both parents. Still considered healthy and positive. Affinity may be due to temperament, gender, age, shared interests, sibling preferences of parents, and parenting practices. Child still wants contact with and love from both parents.

Alliance w/1P: Child has developed an alliance with one parents and often want limited contact with nonpreferred parent after separation. Child does not completely reject the other parent or seek to terminate all contact. Child may express some ambivalence toward other parent, including anger, sadness and love as well as resistance to contact. Alliance may arise from intense marital conflict, etc. where child encouraged to take sides, carry hostile messages. Tends to arise in older school age children and may involve the child's own moral assessment and judgment about which parent caused the divorce, who is most hurt and vulnerable or needs the child's allegiance and support. Key distinction between allied child and alienated child is that allied child is able to acknowledge that they love the other parent but don't like

to be with other parent or want that much contact. Child does not engage in the fierce remonstrations and/or cruel behaviors commonly observed in the alienated child.

Estranged from IP: Child who is realistically estranged from one parent as a consequence of that parent's history of family violence, abuse or neglect. Child who has seen DV or was target of that DV. Child may feel safe only in being away from the violent or abusive parent. This child does not harbor unreasonable anger and/or fear of the other parent. It may be reasonable. Estrangement may arise from response to other severe parental deficiencies — emotional abuse, physical abuse, very rigid or poor parenting styles, psychiatric problems (mental health) of parent that seriously interferes with parenting functions, drug use, etc.

Alienated child: Child who expresses rejection of other parent stridently and without apparent guilt or ambivalence, strongly resists or completely refuses any contact with rejected parent. Child has grossly negative views and feelings that are significantly distorted and exaggerated. This child goes far beyond alliance or estrangement in the intensity, breath and ferocity of behaviors towards the rejected parent. Profound alienation occurs most often in high conflict custody disputes.

The following lists were adapted from Fidler, Bala, Birnbaum and Kavassalis (2008) Chapter 7: *Child Custody Assessments, Recommendations and Judicial Remedies Regarding Alienated Children, In Challenging Issues in Child Custody*

Disputes: A Guide for Legal and Mental Health Professionals, Carswell Thomson.

ALIENATION: TYPICAL BEHAVIORS EXHIBITED BY CHILD,
FAVORED PARENT & REJECTED PARENT

Typical Behaviors Exhibited by Child:

1. view of parents one-sided, all good or all bad;
2. idealizes one parent and devalues the other
3. vicious vilification of target parent; campaign of hatred
4. trivial, false and irrational reasons to justify hatred
5. reactions and perceptions unjustified or disproportionate to parent's behaviors
6. talks openly to anyone about rejected parent's perceived shortcomings
7. extends hatred to extended family and pets (hatred by association)
8. no guilt or ambivalence regarding malicious treatment, hatred, etc.
9. a stronger, but not necessarily healthy, psychological bond with alienating parent than with rejected parent
10. anger at rejected parent for abandonment; blames him/her for divorce
11. speech is brittle, a litany; obsessed; has an artificial quality; affect does not match words; no conviction; unchild like, uses adult language; has a rehearsed quality

12. stories are repetitive and lacking in detail and depth
13. mimics what siblings report rather than own experience
14. denial of hope for reconciliation; no acknowledgment of desire for reconciliation
15. expresses worry for preferred parent, desire to care for that parent; or, defensive denial that child is indeed worried about parent

Typical Behaviors Exhibited by Favored Parent:

1. allows and insists that child makes decisions about contact
2. rarely talks about the other parent; uninterested in child's time with other parent after contact; gives a cold shoulder, silent treatment, or is moody after child's return from visit.
3. no photos of target parent; removes reminders of the other parent
4. refusal to hear positive comments about rejected parent; quick to discount good times as trivial and unimportant
5. no encouragement of calls to other parent between visits; rationalizes that child does not ask
6. tells child fun things that were missed during visit with other parent
7. indulges child with material possessions and privileges
8. sets few limits or is rigid about routines, rules and expectations

9. refuses to speak directly to parent; refuses to be in same room or close proximity; does not let target parent come to door to pick up child
10. no concern for missed visits with other parent
11. makes statements and then denies what was said
12. body language and nonverbal communication reveals lack of interest, disdain and disapproval
13. engages in inquisition of child after visits
14. rejected parent is discouraged or refused permission to attend school events and activities
15. telephone messages, gifts and mail from other parent to child are destroyed, ignored or passed on to the child with disdain
16. distorts any comments of child that might justify accusations
17. doesn't believe that child has any need for relationship with other parent
18. when child calls and is quiet or non-communicative, parent wrongly assumes pressure from target parent, or that child is not comfortable with target parent; evidence of bad parenting, does not appreciate that child is uncomfortable talking to alienating parent about target parent

19. portrays other parent as dangerous, may inconsistently act fearful of other parent in front of child
20. exaggerates negative attributes of other parent, and omits anything positive
21. delusional false statements repeated to child; distorts history and other parent's participation in the child's life; claims other parent has totally changed since separation
22. projection of own thoughts, feelings and behaviors onto the other parent
23. does not correct child's rude, defiant and/or omnipotent behavior directed towards the other parent, but would never permit child to do this with others
24. convinced of harm, when there is no evidence
25. false or fabricated allegations of sexual, physical and/or emotional abuse
26. denigrates and exaggerates flaws of rejected parent to child
27. says other parent left "us," divorced "us" and doesn't love "us"
28. over-involves child in adult matters and litigation
29. child required to keep secrets and spy or report back on other parent

30. child required to be messenger
31. overt and covert threats to withdraw love and affection from child
unless other parent is rejected
32. extreme lack of courtesy to rejected parent
33. relocation for minor reasons and with little concern for effects on child

Typical Behaviors Exhibited by Rejected Parent:

1. Harsh, rigid and punitive parenting style
2. Outrage at child's challenge to his/her authority
3. Passivity or withdrawal in face of conflict
4. Immature, self-centered in relation to child
5. Loses temper, angry, demanding, intimidating character traits, but
not to level of abuse ? Counter-rejecting behavior
6. Lacks empathic connection to child
7. Inept and unempathic pursuit of child, pushes calls and letters,
unannounced or embarrassing visits
8. Challenges child's beliefs and/or attitudes and tries to convince them
otherwise
9. Dismissive of child's feelings and negative attitudes
10. Induces guilt

11. May use force to reassert parental position
12. Vents rage, blames alienating parent for brainwashing child and takes no responsibility

PROCESSES AND STRATEGIES USED BY ALIENATING PARENTS

(adapted from same book cited above, Chapter 6)

1. Badmouthing of the other parent's qualities, parenting, involvement with child; may or may not include abusive behavior (reduces parent's importance to the child).
2. Other parent sometimes portrayed as dangerous, e.g., harmful, angry, mean (instills fear and rejection of the other parent, fosters dependency on and need for protector in alienating parent).
3. Other parent portrayed as having abandoned the child, as not loving or caring for the child (creates hurt, resentment, emotional distance, fosters dependency on the alienating parent).
4. Withdrawal of love: love of alienating parent is conditional upon the child's not showing positive feelings or desire for the other parent (fosters child's insecurity, dependency, need to please the alienating parent, and feeds their narcissism).
5. Minimizing actual and symbolic contact with the other parent (eradicating

the other parent from child's life and awareness).

J. DOMESTIC VIOLENCE

Domestic violence is another “hot button” topic in family litigation. There is substantial social science research showing that children are at serious risk in families with a serious history of domestic violence. Children of divorce are at risk enough just due to the fact of the divorce but domestic violence can significantly exacerbate those risks.

For many years, the professional literature seemed to focus on men as the “perpetrators” of domestic violence and women as the “victims” of domestic violence. After all, the major federal legislation is named the “Violence Against Women Act” and many law review articles on domestic violence, written mostly by female advocates, assumed that men were the perpetrators and that if women were violent, it was only because they were defending themselves.

Those contentions did not mirror the street realities and more recent research has dispelled these notions and has produced more precise and useful social science articles.

The current state of the art in social science research can be found in Joan B. Kelly and Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam. Ct. Rev. 476

(July 2008). Various studies in the past fifteen years have shown that there are different patterns of domestic violence and understanding that may greatly assist the lawyer and judge in decision making.

The worst form is what they describe as coercive controlling violence which is a pervasive pattern of power and control. That form of DV includes certain distinctive factors such as emotional abuse, economic abuse, coercion and threats , intimidation, isolation, assertions of “male privilege”, and minimizing, delaying and blaming behaviors. Abusers may not use all of these tactics but may use a combination of them that seems to work for them.

The abuse perpetrators in this type of DV are overwhelmingly male, perhaps as high as 97% of the reported and studied cases. However, the number of cases where coercive controlling violence is present is a minority of the total number of DV cases.

Situational couple violence is the most common type of DV and is perpetrated equally by both men and women. It is not a lesser version of the coercive controlling violence behavior pattern because it differs significantly in the type of violence and has different causes and consequences.

Another separate category is “separation-instigated violence” and emanates almost equally from men and women. It is perhaps best described as a traumatic

reaction to the separation of a couple at the time of a divorce or unmarried couple separation, accusations of infidelity or sexual abuse, or public humiliation. It tends to be limited to one or two episodes at the very beginning of a case and diminishes when the parties are adjusting to the separation and court proceedings.

Domestic violence has substantial correlations with substance abuse and personality disorders. There are multiple articles on these correlations that are well beyond the scope of this presentation here.

K. CO-OCCURRING CONDITIONS

In the prior pages, the discussion was on several discrete topics. That is the divergency analysis portion: the art of breaking a case down to its component parts. At this point, we now focus on synergistic thinking: i.e. the assembling of the component parts as part of a coherent forensic diagnosis of the problem behaviors and patterns.

In the reality of high conflict cases, you will likely find that many of these separate components are present together. We call this phenomenon “co-occurring disorders or co-morbidity disorders. In common terms, it means a person who has a substance abuse disorder and a mental health disorder at the same time.

Alcoholism and depression are often found in tandem. Alcohol use may deplete key brain chemicals which leads to a clinical depression. Conversely, a

depressed person may self-medicate with alcohol to escape the mental and physical prison of the depression feelings.

According to SAMHSA, approximately 8.9 million Americans have co-occurring disorders but only 7.4% are receiving treatment for both conditions. Another 55% receive no treatment at all. It is estimated that about 4.2 million Americans have a substance abuse disorder and a serious mental illness disorder. There is a substantial correlation between a substance abuse disorder and a mood disorder, anxiety disorder or personality disorder.

Many of the people with co-occurring conditions are homeless, incarcerated juveniles, or prison inmates. They are generally people with multiple problems that are hard to treat even with the cooperation of the patient.

L. IDENTIFYING HIGH CONFLICT ISSUES

When I served as a Family Court Judge and after I had gotten more familiar with the psychological dimensions of domestic conflict, I found it to be very helpful to engage in conversations and discussions with the parties in the case in open court sessions. I had already read the moving papers and affidavits so I had some ideas about the parties before the start of the court session. These generally were folksy style, non-threatening discussions about the case at that point in time and were designed to elicit factual information needed to make the decisions necessary for the

task at hand. I wanted to get to know the litigants a little more personally and to gauge their responses to my questions. During this process, I could get a quick although incomplete “snapshot” of their mental functioning.

These were pointers I was looking for during these conversations:

1. Were the responses factually appropriate or did it seem like someone was trying to hide something, gloss over bad problems, make themselves too good and the other side too bad, etc.
2. What was the tone of the response? Was there anger, frustration, vindictiveness, hate, or bitterness that permeated the responses? Was there an acknowledgment of good points or attributes about the other party? Was there any acknowledgment of fault or shortcomings on your own behalf that may have lead to the court fight? Was there a willingness to consider various solutions or was it a “my way or the highway” approach?
3. I also considered the person’s employment status and stability and their education. Have they been on the same job for quite awhile? Did they have any positions of responsibility and management skills? Were they unemployed now or were they lacking in job skills?
4. There is always a varying degree of anger, hurt, bitterness and fear in a typical divorce case. After all, each person is going through a major personal adjustment

that may have serious financial and personal consequences. A person is transitioning from the “we” of the couple in marriage to the “me” as a newly divorced, unmarried person.

As a judge, what I looked for was signs of conflict that were much extensive than what I considered the normal level of conflict in a divorce. Were serious allegations of misconduct made in the motion papers and affidavits? Did anybody allege domestic violence and what were the essential facts or circumstances? Did anybody have a criminal history, history of substance abuse, history of conflict with other people whether it be in prior relationships, extended family members, in jobs or businesses, etc.

5. I would also look for the allegations of misconduct were more extreme in nature than and whether there was something sensible that corroborated it like arrest histories, serving prison time, being medically treated for mental or physical problems, reports to child abuse agencies, prior court cases, etc.

Allegations in court cases are easily made but not always easily proven. It is often hard to discern the truth of what actually happened. Some good arrests are made but a prosecutor may not file a criminal case or may drop it later for reasons unrelated to the merits of the case. Sometimes, corroborating records may be sealed or unavailable to the parties or to the court.

Another major problem in the legal system today and it is especially true in family courts is rampant perjury. There are people who will willingly lie about events or accusations regardless of the truth of them. People like this will take the chance that no one will catch them in the lie or be able to prove the contrary. This is especially true of the “he said, she said” allegations.

People with personality disorders may be more willing or able to lie in court. Lying, cheating and manipulating are a way of life to them and the court environment is no different than the outside world as far as they are concerned.

People with substance abuse disorders are also common liars. They will lie about their addictions in many ways. Denial seems to be a common symptom of the drug/alcoholic lifestyle.

6. Conversely, many allegations are made by vindictive spouses trying to get an “edge” or an advantage in the current litigation. Such allegations may be based upon faint, doubtful events or outright fabrications. I always wanted to know if there was any independent evidence that would tend to prove or disprove the allegations. I have seen a number of cases where home or business surveillance cameras captured the scene and conclusively proved or disproved one side or the other. The same thing has happened with objective, independent witnesses.

It has been well documented before in high conflict child custody cases in

which the mother will accuse the father of sexually molesting a child. Allegations of sexual molestation can be as high as four times the reporting of molestation in non-custody circumstances.

7. I was particularly concerned with trying to find pattern evidence regarding the behaviors or the accusations. Were there any repetitions in the alleged behaviors or extreme presentations of the allegations (you “always” or you “never”) and is there any corroboration of the allegations?

8. I also looked for existing medical and mental health records. Is this person using licit or illicit drugs? Is there a history of mental commitments, mental health treatments, etc.

What I really looked for at the end was whether the allegations made any sense at all. I have seen ordinary, credible people accused of really bad behaviors with nothing at all to support it. That would lead me to believe that the accuser has a real problem, not the accused. It was necessary to do these preliminary assessments because it would affect the next steps in the judicial process. Most people would be sent to mediation. Those needing evaluations would be referred to an outside custody evaluator. There are different levels of evaluators and I would send the really difficult cases to a forensic psychologist. Lower level conflict cases could be referred to a marriage and family therapist or licensed clinical social worker evaluator.

M. JUDICIAL MANAGEMENT OF HIGH CONFLICT CASES AND PARTIES

Competent judicial management of high conflict cases is a true art form. There are no absolute right and wrong ways to manage high conflict cases. It all depends on the nature of the conflicts, the duration of the conflicts and their intensity levels. And it depends on the knowledge base and skill level of the judge.

Nevertheless, there are important principles of high conflict case management:

1. understanding what the conflicts are and their likely sources;
2. understanding what assessment resources are available to you;
3. understanding whether the assessment and/or treatment resources can be paid for and how;
4. understanding whether outside medical and mental health providers can actually help one or both of the parties;
5. understanding whether the children need their own services and counselors and how those services will be provided and paid for;
6. crafting precise, understandable controlling court orders and making it clear that a violation of the court order may result in contempt sanctions;
7. crafting a behavior order that delineates certain prohibited and desired behaviors of the parties in order to reduce the potential for more conflicts;
8. requiring ongoing participation in counseling, therapy, or extended educational

programs and having status checks from time to time to monitor that progress;

9. considering the appointment of a monitor such as a parent coordinator to assist in managing the conflict out of the court system and independently documenting the conflict and communication problems;

10. understanding how the conflict is affecting the children and how best to get them out of the conflict and protected from future harm, if at all possible;

11. understanding that in a select few cases, neither joint legal and joint physical are not going to work and to have the backbone to order sole legal and physical custody and terminate or greatly restrict the other parent's access to the children; and

12. understanding that in a few select cases, the child should be placed with a non-parent instead of a biological parent.