



ALTERNATIVES TO LITIGATION

Creative Suggestions and Solutions for Divorce Without RFO & Trial



Hon. Aviva K. Bobb, Ret.



Hon. Hank Goldberg, Ret.



Hon. Thomas T. Lewis, Ret.



Hon. Robert A. Schnider, Ret.



David Yamamoto, Esq.

Moderated
by



Abbas Hadjian, Esq.

4.23.2020 - noon

zoom service courtesy of  our family wizard

Hon. Aviva K. Bobb, Ret.

**Divorcing Interrupted by Death or Incapacity
and
Observations on Settlements**

I. Dissolution Litigation Interrupted by Death or Incapacity

If a party to dissolution dies after court grants termination of the marriage status, the Family Law Court and Family Code govern issues of support, asset distribution, reimbursements and attorneys' fees and costs.

If client dies, attorney needs new client. Substitute in either personal representative of the decedent's estate or the decedent's successor in interest, e.g. trustee or executor.

I. Dissolution Litigation Interrupted by Death or Incapacity

If a party to dissolution dies before court grants termination of the marriage status, the dissolution case is terminated in the family law court, and further issues of property rights, family support, custody and incurred attorneys' fees and costs heard as a Decedents' Estate or Trust proceeding in Probate Court and generally governed by the Probate Code.

I. Dissolution Litigation Interrupted by Death or Incapacity

In Probate, child support and attorneys' fees and costs are heard as creditors' claims against the decedent's estate or trust. Creditors' claims must be filed within a year of death. Family support can also be awarded. A challenge to the surviving parent's custody is determined in a guardianship proceeding.

I. Dissolution Litigation Interrupted by Death or Incapacity

Bring motion to bifurcate – FC 2337 – to have early termination of the marriage status. Order may subject moving party to indemnifying other party from loss caused by the early trial.

If party is mentally incapacitated, depending on the circumstances, a GAL or conservator will need to be appointed to represent party's interests.

Advise client to have estate planning attorney review estate plan and revoke the plan in a manner that does not violate ATROs.

II. Observations on Resolving Cases without Litigation

In the settlement context, treat opposing counsel as though he/she is your most respected, best friend.

If using a neutral, encourage your client to be at the center of the process and to engage with the neutral. Facilitates the client's developing trust in the process and its outcome.

Exchange acting as mediators with your colleagues

II. Observations on Resolving Cases without Litigation

Successful mediation is a process with observable stages that cannot be omitted:

- Storytelling
- Narcissistic demands
- Reality Testing
- Negotiating
- Closing – written agreement

III. Assisting non-profit law firms:

Levitt Quinn www.levittquinn.org

Harriet Buhai www.hbcfl.org

LA Center for Law & Justice www.laclj.org



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Property Issues

When will we go back to normal?

"There is no light switch here, it's more like a dimmer.... I know you want the timeline, but we can't get ahead of ourselves.... Let's not make the mistake of pulling the plug too early, as much as we want to."

--Gov. Gavin Newsom, 4-14-20

Think Anew

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. **As our case is new, we must think anew and act anew.** We must disenthral ourselves, and then we shall save our country.”

— Abraham Lincoln

What's my chance of an ex-parte on property issue?

- CCP 527(c)(1); CRC 5.151—irreparable injury, immediate danger
- Compare, IRMO Van Hook (1983) 147 Cal.App.3d 970 (ex-parte to restrain judgment creditors); See FL 6325 and 2045

Financial Crisis and Fiduciary Duties

➤ ATRO. Without “written consent” can’t:

- Dispose of property whether CP or SP;
- Exceptions:
 - Usual course of business;
 - Necessities of life; and
 - Attorneys Fees.
- FC 2040(a)(2)(A) and (B)

➤ *IRMO McTiernan* (2005) 133 C.A.4th 1090:

- H sold CP stock. Bad faith not required.

➤ So what to do?

Family law cases—not like fine wine

- Don't get better with time.
- Host of post-separation financial issues arise with delay:
 - Post-separation accounting;
 - *Watts* Charge;
 - *Epstein* Credit;
 - Retro. support.
- Address w/ opposing counsel. If can't agree...
 - in whole, agree in part;
 - If not in part, to procedure;
 - If not procedures, give notice.

Key tip to settling w/out mediator

Communication (and civility)



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Domestic Violence & Child Custody In the Corona Era

presented by
Hon. Thomas Trent Lewis



Anarchy

A state of disorder due to

Absence

Nonrecognition

Of Authority

Andrew V. v. Superior Court (2015) 234 Cal. App. 4th 103

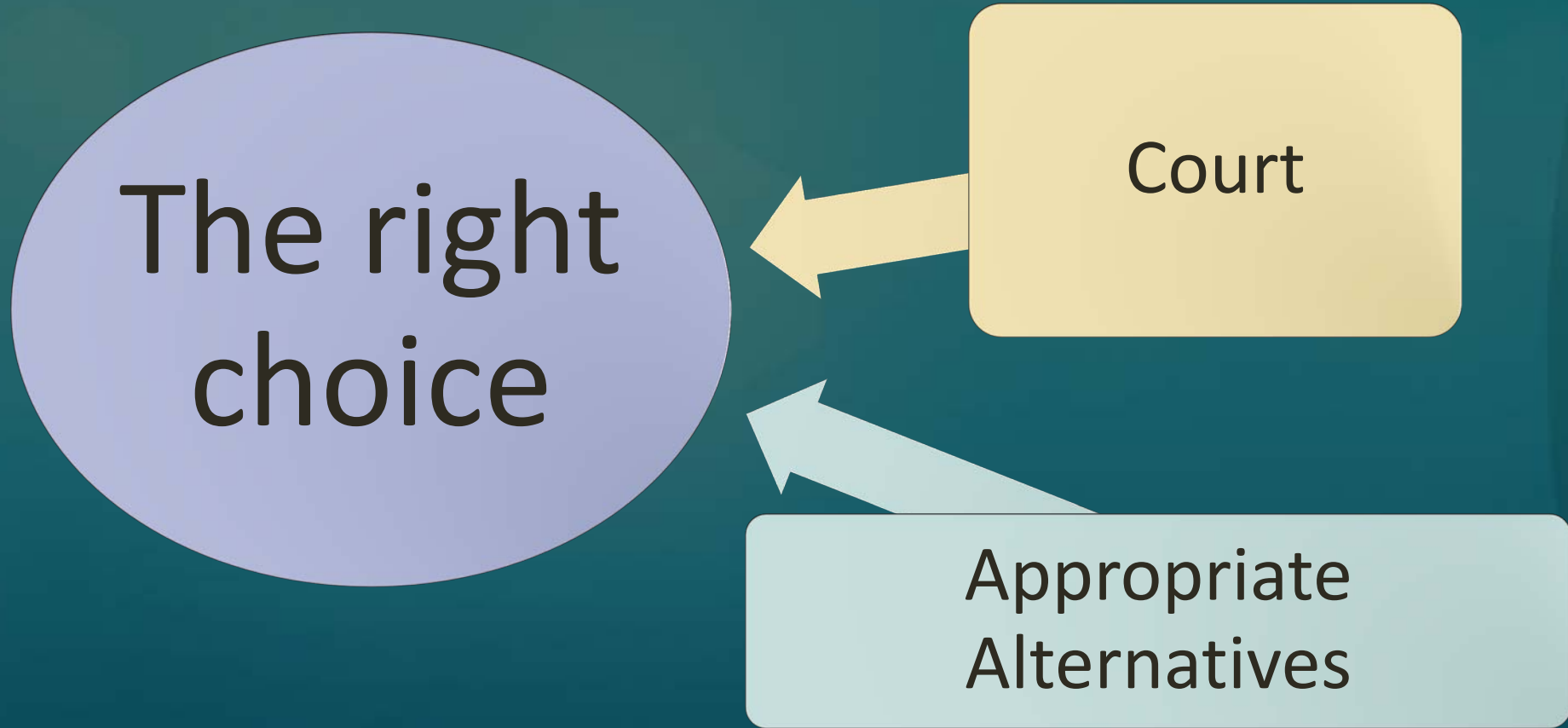
Introduction



Introduction

- Explore alternatives to court process
- Not as a substitute for court action
- When court action is appropriate

Introduction



aaml.org & afccnet.org

Domestic Violence in The Corona Era

Alternatives



Domestic Violence Issues



Risk
Assessment



Counsel's
Recommendation



Client's
Informed
Consent



The P5 Assessment Scale

- 1 Potency of violence
- 2 Pattern of violence
- 3 Primary perpetrator
- 4 Parental competency
- 5 Perspective of child

DANGER ASSESSMENT

Jacquelyn C. Campbell, Ph.D., R.N.
Copyright, 2003; www.dangerassessment.com

Several risk factors have been associated with increased risk of homicides (murders) of women and men in violent relationships. We cannot predict what will happen in your case, but we would like you to be aware of the danger of homicide in situations of abuse and for you to see how many of the risk factors apply to your situation.

Using the calendar, please mark the approximate dates during the past year when you were abused by your partner or ex partner. Write on that date how bad the incident was according to the following scale:

1. Slapping, pushing; no injuries and/or lasting pain
2. Punching, kicking; bruises, cuts, and/or continuing pain
3. "Beating up"; severe contusions, burns, broken bones
4. Threat to use weapon; head injury, internal injury, permanent injury
5. Use of weapon; wounds from weapon

(If **any** of the descriptions for the higher number apply, use the higher number.)

Mark **Yes** or **No** for each of the following. ("He" refers to your husband, partner, ex-husband, ex-partner, or whoever is currently physically hurting you.)

- ☐ 1. Has the physical violence increased in severity or frequency over the past year?
 - ☐ 2. Does he own a gun?
 - ☐ 3. Have you left him after living together during the past year?
3a. (If have *never* lived with him, check here ☐)
 - ☐ 4. Is he unemployed?
 - ☐ 5. Has he ever used a weapon against you or threatened you with a lethal weapon?
(If yes, was the weapon a gun? ☐)
 - ☐ 6. Does he threaten to kill you?
 - ☐ 7. Has he avoided being arrested for domestic violence?
 - ☐ 8. Do you have a child that is not his?
 - ☐ 9. Has he ever forced you to have sex when you did not wish to do so?
 - ☐ 10. Does he ever try to choke you?
 - ☐ 11. Does he use illegal drugs? By drugs, I mean "uppers" or amphetamines, "meth", speed, angel dust, cocaine, "crack", street drugs or mixtures.
 - ☐ 12. Is he an alcoholic or problem drinker?
 - ☐ 13. Does he control most or all of your daily activities? For instance: does he tell you who you can be friends with, when you can see your family, how much money you can use, or when you can take the car? (If he tries, but you do not let him, check here: ☐)
 - ☐ 14. Is he violently and constantly jealous of you? (For instance, does he say "If I can't have you, no one can.")
 - ☐ 15. Have you ever been beaten by him while you were pregnant? (If you have never been pregnant by him, check here: ☐)
 - ☐ 16. Has he ever threatened or tried to commit suicide?
 - ☐ 17. Does he threaten to harm your children?
 - ☐ 18. Do you believe he is capable of killing you?
 - ☐ 19. Does he follow or spy on you, leave threatening notes or messages, destroy your property, or call you when you don't want him to?
 - ☐ 20. Have you ever threatened or tried to commit suicide?
- Total "Yes" Answers

Thank you. Please talk to your nurse, advocate or counselor about what the Danger Assessment means in terms of your situation.

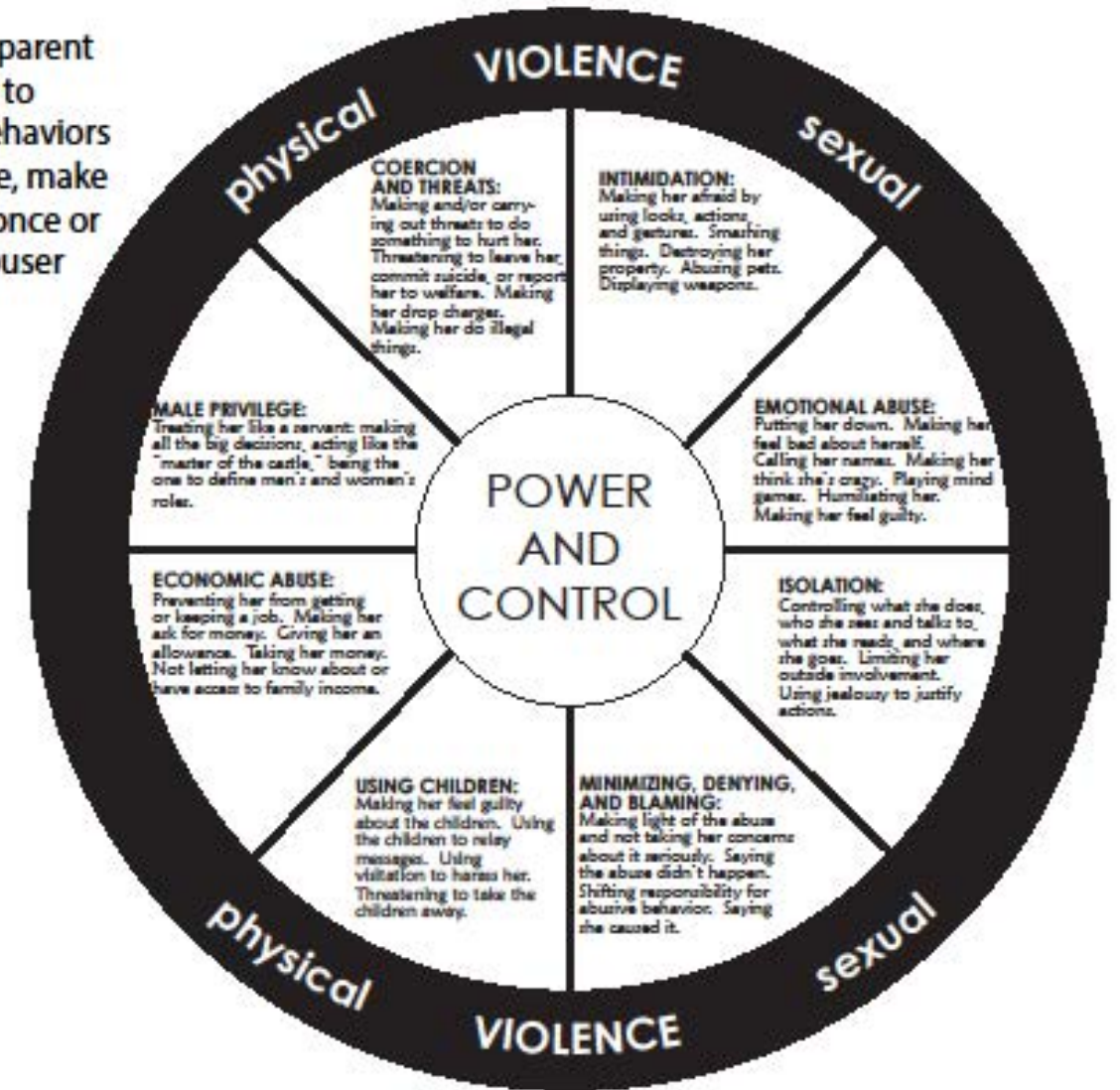
Dangerassessment.com

Danger
Assessment
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Domestic Violence Issues

Physical and sexual assaults, or threats to commit them, are the most apparent forms of domestic violence and are usually the actions that allow others to become aware of the problem. However, regular use of other abusive behaviors by the batterer, when reinforced by one or more acts of physical violence, make up a larger system of abuse. Although physical assaults may occur only once or occasionally, they instill threat of future violent attacks and allow the abuser to take control of the woman's life and circumstances.

The Power & Control diagram is a particularly helpful tool in understanding the overall pattern of abusive and violent behaviors, which are used by a batterer to establish and maintain control over his partner. Very often, one or more violent incidents are accompanied by an array of these other types of abuse. They are less easily identified, yet firmly establish a pattern of intimidation and control in the relationship.



Produced and distributed by:



NATIONAL CENTER
on Domestic and Sexual Violence
training • counseling • advocacy
4812 Shoal Creek Blvd. • Austin, Texas 78756
512.407.9090 (phone and fax) • www.ncdsv.org

Developed by:
Domestic Abuse Intervention Project
202 East Superior Street
Duluth, MN 55802
218.722.4134

Safety Plan



- Does your client have



- A safety plan



- Even if there is an order

Domestic Violence Issues

Types of Jurisdiction

Initial determination jurisdiction

Continuing jurisdiction

Modification jurisdiction

Emergency jurisdiction

Domestic Violence Issues

Fleeing the state because of Domestic Violence

Notify the Child Abduction Unit

Interface with Competent Criminal Counsel

Incident Report

Client entitled to copy of
incident report within

2 days for face sheet

5 days for full report

Fam C 6228

Renewal of Orders

Timely apply for extension

Despite emergency rules

Don't let orders expire at midnight

Electronically Self-Inflicted Wounds

- Warn client about tearing down

- Social media posting

- Risks and benefits

Beware of spoliation of evidence

Domestic Violence Issues

Recording Conversations

Risk of
inflaming

Inform others
you are
recording

Be competent
or get
competent
advice

Enforcement
Risks

The diagram features a yellow upward-pointing arrow on the left and a green downward-pointing arrow on the right. Both arrows have a rectangular box at their base. The yellow arrow's box contains the text 'Enforcement Risks'. The green arrow's box contains the text 'Recognition of Public Policy'. Below these two arrows is a wide, light blue horizontal bar containing the text 'Non-CLETS Orders'.

Recognition
of Public
Policy

Non-CLETS Orders

Domestic Violence Issues

Why wait until after a hearing

Counseling

Batterer's
treatment
program

Parent
classes

Domestic Violence Issues

Why wait until after a hearing

Substance
abuse
program

Compliance
with order
or terms of
probation

Abstaining
from further
abuse

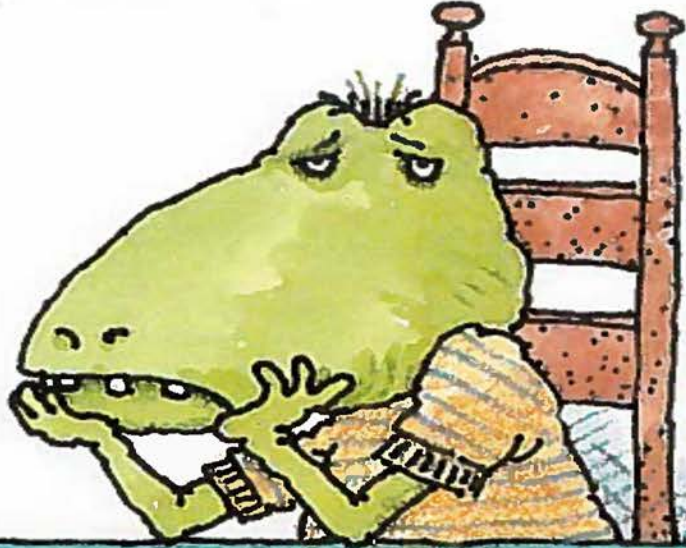
Child Custody Issues In the Corona Era

Legitimate Concerns &
Creating Unnecessary Conflict



What About You?

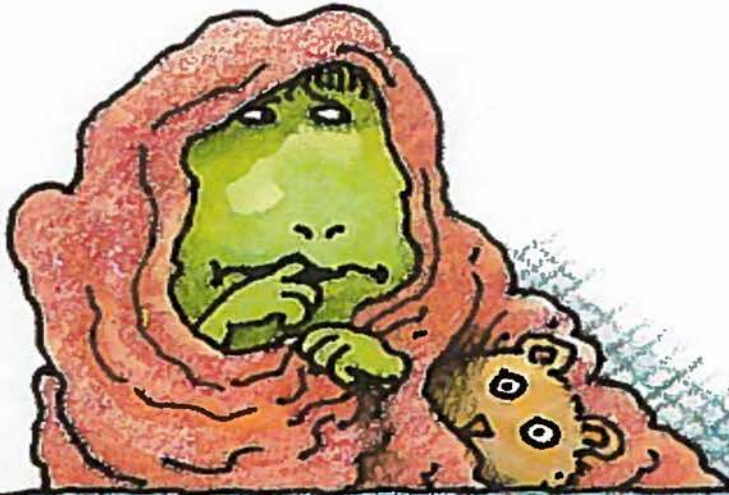
When your parents divorce, it's natural to feel



sad



angry

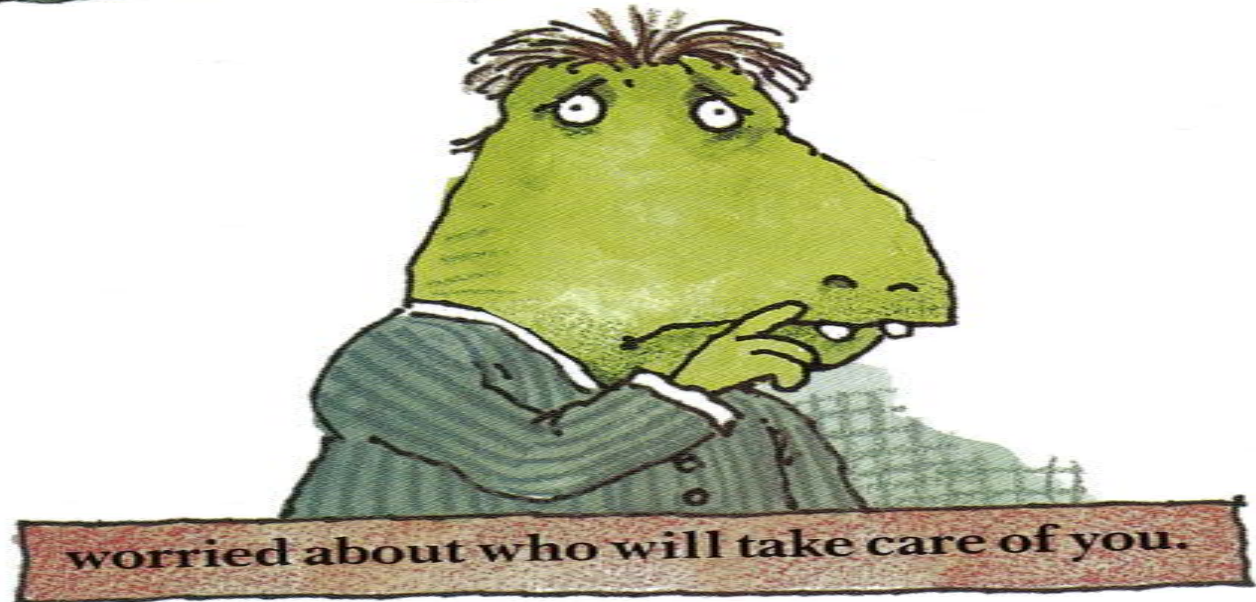
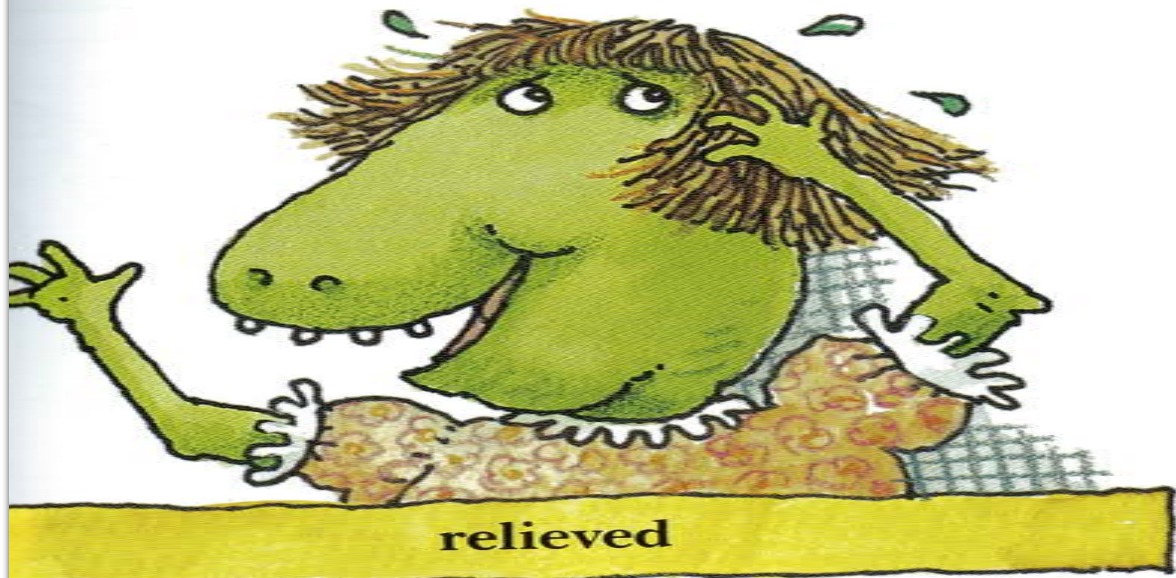


afraid



confused

The Dinosaur's Divorce



Child Custody Issues

Health

Safety

Welfare

What does this mean today?

Child Custody Issues

Of

THE

Child

What does this mean today?

Child Custody Issues



- Specific credible health risk



- Understandable but generalized anxiety



- Leveraging unsubstantiated fear



Motivation

**Specific
Credible Health
Risk**

**Understandable
Generalized
Anxiety**

**Leveraging
Unsubstantiated
Fear**

Motive Matters

Child Custody Issues

When to
intervene



Articulate a specific risk



Safe exchanges



Identified medical need

Criminal Law Implications



Pen C. 278.5 prosecution for interference



With custodial rights of a person



Entitled to custody or visitation



People v. DeJongh (2014) 237 Cal. App. 4th 1124

Child As



Victim



Prize



Ammunition



Anticipate the Questions

Why is your client's home the better option



What realistic safety measures can be put into place



The friendly parent doctrine is not suspended



Document your advice to the client

Final Thoughts

JudgeLewis@SignatureResolution.com

SUCCESS OR FAILURE RESULTS
MORE OFTEN FROM ATTITUDE
THAN FROM ABILITY.

Conventional Wisdom
Growth is 1% inspiration, 99% perspiration.

NASA

RE400027

RE500604

OK 34
3.5





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Support and Fees

1. Reality check

- i. (the question here could be, “Do these suggestions apply to all cases.”)
- ii. Need modicum of good faith

2. Non crisis times

What makes honest people not settle

- a. Unrealistic expectations. From lawyer trying to secure case. Be realistic from start.
- b. From others- Friends who give own results (that don't apply factually)
- c. Uncertainty-what is each party's probable income. Many different scenarios but most common are:

2. Non crisis times

What makes honest people not settle

- i. 2 W-2 employees with overtime-Ostler/Smith. Why not agree? Burden to do. Use less frequent, maybe with loss carry forward. 2 way cart. Help with prepared demo. Defaults for non-cooperation.
- ii. Cash bonus-caps for SS and high earner cap with meet and confer.
- iii. Variable income-The backward looking order. Why a hard sell? Too much hassle. Response-Cost of trial with specifics. Will lie about income. Response-protocols and defaults. Distortion by perks. Response-Agreed categories, agreed numbers or agree overhead percentage

3. Crisis times

- a. Question is, “How can I live on...” Some circumstances have no good answer. The key is, judges have no magic either. Balance of hardships. Proportional modifications, short term review, reserve retro in some cases.
- b. Interim orders taking into account all potential sources. Revise all budgets for survival mode. Allow withdrawal from all assets. Non Retirement first, then Roth, then anything.

4. Attorney fees

- a. Attorneys inciting to raise fees? Reality of attorneys pushing settlement.
- b. Fees as lever. Realistic range for trial fees. Compare to possible gains.