Parental Rights and Responsibilities

By Honey Hastings

October 2005 saw a major change in family law, as the Parental Rights and Responsibilities Act (RSA 461-A) took effect. Most of RSA 461-A is text transferred from RSA 458, with updated terms. The statute includes a statement of state policy that: “Supports frequent and continuous contact between each child and both parents, and encourages parents share in the rights and responsibilities of raising their children.” In addition to eliminating “custody,” the statute encourages mediation (it may be ordered); requires parenting plans; and incorporates all child-related provisions of RSA 458.

Family law lawyers see a lot of men and women facing divorce who are seeking advice and direction. One of the priorities many of them list is “custody.” Similarly, some couples who go to mediation report that their main disputed issue is “custody.” In my office, all get the same answer, “You are not going to get ‘custody,’ as it has been abolished.”

In 2005, Manchester lawyer Marilyn Mahoney was skeptical that changing the terminology would have any real effect on parents’ attitudes when going through divorce, but her experience has been different.

“I have on numerous occasions observed clients process the concept [of parenting], think about their kids from a different perspective, and move from the adversarial, win/lose way of thinking to a more cooperative co-parenting approach. In my practice, there has been a real decrease in litigation about parenting,” she said. “Of course, there are still those high-conflict situations where cooperation and positive attitudes are not going to be successful. Nevertheless, there is beginning to be a shift in people’s attitudes that I think signifies a general societal shift toward less hostility on the parenting issues, and fewer power struggles.”

Hanover lawyer “Cappy” Nunlist says, “I used to think that the change in the words was pointess and politically correct wordsmithing – but have changed my mind. I have a very different conversation with clients when we start to talk about how they are going to take care of the kids than when we talked about ‘custody.’”

Laconia lawyer-GAL John Cameron reports “It is helping put a positive spin on parenting after divotring as opposed to ‘you win, I lose.’” He notes that it is “reducing litigation and competition over children.”

Newport lawyer Lanea Wirkus reports, “Mediation has made the most positive impact as it is an outlet to address the emotional issues that the courts don’t have time for.”

Rye lawyer Patricia Frim says, “I remind parents to carefully read the Parenting Plan form to understand how the law in NH regards what children need and to see the points the state considers important so they don’t think it is the other parent or the lawyer making an issue about details.”

The statute was amended in 2006 and 2007 to restore the mature minor test for modification, which had been mislaid in the transfer from RSA 458 to 461-A.

The most important case decided under RSA 461-A is In the Matter of Muchmore & Joycox, issued 4 December 2009. The Court’s holdings: (1) Under RSA 461-A, there is no distinction between “custody” and “visitation;” both are included in “parental rights and responsibilities.” (2) A court may modify a parenting plan only if one of the RSA 461-A:111 circumstences exist: (a) agreement; (b) interference with parenting; (c) present environment is detrimental; or (d) an equal time schedule is not working. [The Court did not mention the “mature minor” test, likely because the child was age two.] (3) “Best interest” is not sufficient reason to modify; it is the test for what modification is appropriate. (4) An order from another state qualifies as a parenting plan if it “describes each parent’s rights and responsibilities.”

The parties are the unwed parents of a child born in 2006. In 2007, a Vermont court entered a stipulation and order giving mother “primary legal and physical paren- tal rights and responsibilities, with father having weekly contact with the child.” After both moved to New Hampshire, father petitioned for modification alleging grounds (b), (c), and (d) above. Mother moved to dismiss, alleging that father had not met his burden. The trial court denied the motion, noting that while father had not met his burden under (b), (c), or (d), proof that modification was in the child’s best interest was sufficient.

The Supreme Court ruled that RSA 461-A:4 is not an alternate test for modification; any modification must meet an RSA 461-A:11 test. The Court also rejected father’s argument that his request merely sought a change in the “visitation” schedule, as both “custody” and “visitation” are anachronisms.

Since Muchmore, most trial court judicialear officers will not change the schedule unless one of the RSA 461-A:11 factors apply. One short-term solution that some judicial officers are approving is to make a temporary parenting plan. This method may be used for the initial order at the time of the divorce or later, when a change in the schedule is requested. An example of the first situation is a case where the parties have not yet separated and thus have not tried out the parenting schedule. Before establishing a schedule that may be (under Muchmore) non-modifiable, the parties want to try it out. One modification scenario where a temporary order would be useful is when an old parenting plan was made when the child was quite young, but doesn’t fit now as the child enters first grade.

I expect the 2011 Legislature will consider an amendment to address the Muchmore issues.

Honey Hastings is a solo-practitioner in Wilton, NH. She is co-founder of the NHBA Family Law Section and co-founder of the Collaborative Law Alliance of New Hamp- shire. You can reach her at hhastings@nhdivorce.com.

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Merrimack Family Division
To Open in December

By Hon. Judge Edwin W. Kelly

The new Merrimack Family Division will open on December 10 and will be co-located with the Merrimack District Court on Baboosic Lake Road in Merrimack. The remaining caseload in the Hillsborough Superior Court South marital department will be transferred and heard at the Merrimack Family Division as of December 10.

Merrimack District Court Judge Clifford R. Kinghorn, Jr. will serve as the family division judge for this location. Marital Masters David Forrest and Alice Love will each sit half-time at this family division. Marital Master Bruce Dalpra will complete the marital master team for this location. To expedite child support cases, Hearing Officer Lauren Thorne will be assigned two days per week at this location.

The clerk of the Merrimack Family Division will be Lynn Kill Kelley. Lynn is the clerk of the Merrimack District Court who will be adding the family division responsibilities to her current duties. She has been a clerk since 1985. Recently, Lynn successfully oversaw the relocation of the Merrimack District Court to its new facility. Cheryll-Ann Andrews will oversee the coordination, transfer, scheduling, staff supervision, and case processing for this large marital department. Cheryll has extensive experience working with families and their legal matters, including years as a case manager in Brentwood and Derry, and recently as deputy clerk of the Franklin Family Division.

Many efforts are underway to ensure a smooth family division opening. To assist the Hillsborough South marital department complete its work, family division staff from around the state will work together at Hillsborough South between November 15 and December 3, to out-process a backlog of court orders. Similarly, to reduce a backlog of lengthy contested matters that are awaiting hearing dates, several family division judges and marital masters from around the state will be sitting for a few days each at Merrimack Family between opening day and the end of March. These judicial officers will be absent from their own courts on those days in order to assist with this effort in Merrimack. With the reduction in judge-days because of budget cuts, and with a high statewide vacancy rate among clerical staff, the implementation of these two plans will temporarily impact other family division locations.

As painful as those impacts might be, however, in good conscience I cannot allow the Merrimack Family Division to open without this aggressive support.

Should you have questions about the opening of this family division, I encourage you to contact Lynn Kill Kelley or Cheryll Andrews, at 603-424-9916, or Gina Apicelli at 603-271-6418.

Child Support Legal Unit: A Primer

The NH Department of Health & Human Services Division of Child Support Services’ Child Support-Legal Office is based in Concord, consists of 12 attorneys, and supporting staff. Child Support-Legal’s primary responsibility is the establishment of paternity, child, and medical support orders.

After the support orders are established, cases are assigned to a DCSS District Office for enforcement by a child support officer. The child support attorneys also provide legal support for these enforcement activities. Questions from the private Bar regarding a DCSS support case, whether at the establishment or enforcement stage, can be directed to Child Support-Legal at 603-271-4429. CSL staff will ensure that all questions are properly directed for resolution.

All child support services, establishment and enforcement, are initiated at local DCSS District Offices, after the receipt of a DCSS application for services (DCSS Form 725). Even if the child support is ordered payable through DCSS by the court, a completed application must be submitted. Questions about available DCSS services and/or applications can be directed to DCSS Customer Service at 603-271-4427.

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Collaborative Divorce: Resolving Disputes Respectfully

By Catherine P. McKay and Samuel Marwit

Family law practitioners in New Hampshire face many challenges. With the budget cuts in all of the state’s courts, family law clients are faced with significant delays. For many, this means months without temporary orders on parenting or support. For others, it means more than a year’s wait for a final hearing. Family lawyers and their clients must consider alternative dispute resolution (ADR) techniques to avoid these significant delays and resulting harm to the parties and their children. Collaborative law, as its name implies, allows spouses, their lawyers and other professionals trained in the collaborative method, to work together for a customized solution that will benefit the entire family. It also allows families to avoid the court system altogether.

Collaborative law fills an important gap between divorce mediation and litigation. For all its benefits, divorce mediation has some distinct limitations. For instance, in cases where there is little to no lawyer involvement in the mediation process, clients sometimes regret their agreement after learning what their legal rights are. Of course, any mediator will tell you, there are also challenges when attorneys are present in the mediation process. Some lawyers continue to engage in unproductive adversarial posturing during mediation which undermines the likelihood of success. Collaborative law provides clients with all the benefits of mediation plus legal advocacy with lawyers that are trained in the collaborative law process and whose sole interest is the successful resolution of the case.

Collaborative law is a voluntary, contractual ADR process for parties who seek to negotiate a resolution out-of-court with the help of collaboratively trained lawyers and professionals, rather than having a ruling imposed upon them by a court or arbitrator. The lawyers further agree that they will not represent that client further if the matter is not fully resolved in the collaborative process. Known as the “disqualification clause,” this can be a scary proposition for some family law practitioners. Why would a family law lawyer sign an agreement limiting his or her involvement in the case? That lawyer has realized it is best for their clients to resolve their disputes privately, with creative solutions focusing on what matters to the clients.

Without the disqualification clause in a collaborative law agreement, the commitment required by the parties and their lawyers to negotiate a resolution out of court is absent. The threat of seeking judicial assistance is removed from the collaborative process, allowing the parties to focus on resolution, not trial preparation. The collaborative law participation agreement is really just an agreement to provide unbundled, limited-scope services.

New Hampshire family lawyers have been using collaborative law to resolve their divorce and family cases since 2000. Today, collaborative law has transitioned into collaborative practice, and expands the collaborative law process to include mental health and financial professionals, and child specialists and coaches, if needed in a particular case. Using professionals in appropriate cases makes for a more efficient and better outcome. Their involvement recognizes that divorce is not just a legal problem.

During the divorce process, the entire family is in turmoil. Communication skills are often impacted by fears about the process and the changes to come. It is inevitable that all of this turmoil will impact the children. Divorce lawyers must deal with emotion, but in collaborative practice, they don’t have to do it alone. They have the help of mental health professionals, filling the roles of child specialists or coaches.

Licensed as mental health professionals, coaches have special training in the collaborative process (and often mediation) and bring appropriate skills to the table, such as constructive communication, child development, family dynamics, and co-parenting techniques. The coach helps participants prioritize their concerns, process their feelings and differences in healthy ways, and stay focused on neutralizing or minimizing destructive emotions. The coach also works with the couple, their attorneys, and their children, to provide them with tools for positive co-parenting in their post-separation lives. The coach’s psychological expertise supplements the attorney’s legal expertise, allowing participants to move through this difficult life change with dignity, mutual understanding, concern for their children’s welfare, and hope for their own futures.

By determining the client’s “hot buttons,” the coach assesses the client’s ability to handle conflict, then helps the clients learn to manage those hot
The coach addresses a client's needs and concerns in the collaborative process and will help the client to focus on identifying both long- and short-term goals, which parties share with the collaborative team. After the collaborative process is concluded, the coach is not permitted to provide therapy services for the clients, but is permitted to be a resource for the clients and to assist with the decisions made in the collaborative case. In some cases, each party has a different coach, while in others the coach is shared.

The mental health professional is sometimes involved in the case as a child specialist instead of a coach. The child specialist offers guidance and feedback to the parties about their children's interests and will often assist in preparing a parenting plan. If needed, the child specialist can meet with the children to help determine what schedules would work best for them. If the parties have older children, the child specialist might discuss where the children want to live. Similar to the role of a guardian ad litem in a litigated case, the child specialist can offer much needed information to help create the best possible parenting plan for the children.

The role of a financial professional in a collaborative case can be significant. Especially in long-term marriages, we often deal with varied proposals for child support, alimony, and asset division. The financial professional can help the parties project their financial futures and determine how each will likely fare over five or 25 years under the various proposals. This can be very helpful to parties who are trying to balance the level of income between their respective households. A financial professional can also help the parties prepare budgets and figure out how to live within a budget. For a spouse who has never handled the family finances, this budgeting support can be critical to drafting a financial agreement that works.

In today's tough economy, parties look to preserve their assets and don't want to waste their money on expensive litigation fees. Collaborative practice offers those parties the ability to participate fully in their divorce process, spend less money on legal fees (even considering the cost they would need to pay to the mental health or financial professionals), and complete their divorce process in much less time than they would in the family courts.

The next time a client asks for a referral to a divorce attorney, consider referring them to a collaborative divorce professional.

See www.CollaborativeLawNH.org for a list of trained professionals.

Cathy McKen is a partner at Parrell & McKay in Derry and N. Woodstock and has served on the board of the Collaborative Law Alliance - New Hampshire since 2001.

Sam Marweit, Ph.D., is a clinical psychologist. He holds Diplomate status with the American Board of Professional Psychology and professor emeritus status with the University of Missouri-St. Louis. He now serves on the Board of the Collaborative Law Alliance - New Hampshire.