

WEDNESDAY, MAY 20, 2020

PERSPECTIVE

Family law and resilience: A time to carry on

By Scott M. Gordon
and Thomas Trent Lewis

“Sometimes carrying on, just carrying on, is the superhuman achievement.”

— Albert Camus

Family law is built on resilience. The family law bar and bench helps parties’ transition into the next phase of their lives in the best circumstances possible, no matter how challenging the present. Several times, the courts in the United States in which the courts have been drastically changed due to some external crisis, but none as significant as COVID-19.

Change made during a crisis is complex and important questions are without the luxury of time. Our purpose here is not simply critique but to hopefully generate some thought and discussion within the family law community on how to work in this new environment and to assist in the recovery of our courts.

As we face the future, and struggle to assure timely equal access to a functional justice system, it will be necessary to triage cases through a deliberate plan focusing the resources to adjust to theurgeon demand upon the system. Our family law system will effectively have been shut down from March through July, creating two bundles of cases —

cases with court dates pushed into the future, and cases where litigants could not get to court. In allocating resources, difficult decisions must be made. Which case goes first? And why?

Family law is prospective

Our family law system will effectively have been shut down from March through July, creating two bundles of cases — cases with court dates pushed into the future, and cases where litigants could not get to court. In allocating resources, difficult decisions must be made. **WHICH** case goes first? And **WHY?**

— making restraining orders, orders for parenting time and support. They are premised on the principal that past conduct is predictive and instructive of future. We must reconfigure how we look at the issues before us and work to find reliable sources of information to assist in making orders.

Courts are functioning under more limitations and resource restrictions ever before. Even the rigors, rationing and changes brought on during World War II did not force the courts to cope with the public health risks to judges, staff, litigants and the public. So, while the courts are open for ex-parte applications, it should be assumed

that the court will strictly apply the “immediate risk of harm” test. The balance between what ex-parte applications are “important,” “urgent” or tactical litigation and those that are “exigent” and/or posing an “immediate risk

of harm” has always been a challenge for judicial officers in family law.

In these clearly challenging times, what constitutes exigent circumstances will be viewed through the lens of these difficult times for the court. Lawyers should assume that family law judicial officers will be evaluating ex-parte applications with the circumstances and resources in mind. Family law lawyers face the daunting task of explaining to clients why their case will be heard later or even last. This pent-up demand will strain not only the judiciary, but the family law lawyers. The temptation to promise a prompt resolution will probably not be rewarded.

Some litigants may resort to a form of self-help. If they don’t like the order, they just won’t comply, because it would be difficult for the other side to enforce the order. For the most part, parenting cases should be measured in the long term and not the immediate. Certainly, there are exceptions of immediate need and those should and will be dealt with in appropriate and justified ex-parte applications. However, as Browning reminded in 1842 in “The Pied Piper of Hamelin” — think of your actions now because you must pay the piper.

Family Code Section 3040 (a)(1) states that in making an order granting custody, *the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent.*

Changes like social distancing will be part of our social fabric foreseeable future. Here are other “corona courtesies” worthy of consideration.

How will the family law bar reaffirm its dedication to our family law courts? More than any other discipline, family law has 50 years of sustained and recognized volunteerism through bar association efforts to protect victims of domestic violence, settling

cases, and judge pro tem service. The energy of the family law bar will bring talent, dedication, and vision as we move forward. Let's join hands with all of our bar associations and find solutions.

How is the current situation affecting the way we interact? Allowing personal frustrations and legitimate concerns infect the way we practice with one another is a serious risk. Family law comes with a great load of vicarious trauma as help clients with crucial needs for safety, support, and parenting time. We must provide and be mindful of self-care.

Are we aspiring to be our best selves? You may not think you are a leader, but you are. You lead by example. Your clients are looking to you for inspiration and careful but courageous responses. However difficult things may seem, the Golden Rule is not tarnished by the circumstances we face. Showing professionalism, extraordinary courtesy, and patience are skills should be the new normal.

Will we model civility? *In re Marriage of Davenport*, 194 Cal. App. 4th 1507 (2010,) contains a stark reminder about family law proceedings: "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy and cooperation. They are not mutually exclusive." The temptation to take short cuts or test the civility boundary will only increase as economic pressure and the strain on the judicial system increases as we move from self-quarantine to the reopening of the economy and legal system. Things will not be

magically better because the restrictions are lifted.

We have faced difficult times before. We will make it. Earthquakes have brought devastation to court buildings resulting in tremendous strain on "access to justice." The 1904 San Francisco earthquake destroyed the building where our California Supreme Court maintained its records and chambers. The 1933 Long Beach Earthquake destroyed the statuesque "Redstone courthouse at Spring & Temple. The 1987 Whittier Narrows Earthquake caused great disruption to the family law division at Stanley Mosk Courthouse in Los Angeles. On the morning of the earthquake, Department 2's calendar was held in the Grand Park. Just because the courthouse is closed doesn't mean access to justice is suspended. If we do not lead with honor and courage, we strain the public's confidence in our legal institutions.

Being supportive doesn't mean we are weak. The family law community should speak up about the prioritization of the needs for our citizens and its court. Working on the assumption Los Angeles County has 3 million children and 9 million adults, it's easy to imagine that 1.5 million children are directly affected by the resources devoted to family law to assure their protection, support, and meaningful and safe parental access. Of the 9 million adults, how many have found their way into a family law case? They need access to a court system that will provide for and protect their children, provide protection from

domestic violence, assure support orders, and help families fairly and promptly resolve their family law concerns.

Based on the innovations we've implemented how will family law be different? Crisis stimulates innovation. We've turned Zoom into a verb. Will we continue to use video technology? Perhaps the better question is: *Why wouldn't we use it?* Many of us have signed documents using docu-sign when purchasing real estate. Shouldn't our stipulations include language permitting signature by Docu-Sign. Service of documents is now frequently made through a Dropbox or ShareFile link. So long as all the documents are made available, these electronic tools can reduce the need for paper files. Many of us are learning how to review documents using Adobe Pro DC or apps like Trial Pad. What other technologies should emerge from this crisis that will improve the way we deliver services? One thing is certain — technology will improve our profession.

Conclusion

While we might repair to the lyric from the Allman Brothers, "I'm trying to make a living and doing the best I can," we must do more than just make a living. We must help the civil justice system do more than just survive. Our judicial system has weathered times of crisis and adjusted to meet the needs of an accessible civil justice system. We can emerge stronger and more innovative after this crisis. In his second inaugural address, Abraham Lincoln addressed a nation torn apart by the Civil War. He coined these immortal words, "*With malice toward none, with charity for all.... Let us strive on to finish the work we are in, to bind up the nation's wounds ... to do all which may achieve and cherish a just and lasting peace among ourselves.*" This is our high calling. Though stark and foreboding, our choices are clear: will we move forward with vigor or collapse in fear.

We are all in this together and will come out of it together. ■

Hon. Thomas Trent Lewis (Ret.) and Hon. Scott Gordon (Ret.) are both former Supervising Judges of the Los Angeles Superior Court Family Law Department and are now neutrals at Signature Resolution.

