The View from My Side of the Desk: Sex in the City—One Episode Too Many

Herman Tarnow
Managing Member
Tarnow Law Firm

ASPATORE

There was a time when fact patterns, presented by divorcing parties, were predictable. How many times did the husband come into the office explaining how he had fallen in love with someone else? Or, the husband was no longer willing to stay in a sexless marriage? That pattern started to change over the years. Now it is just as common for the wife to come into my office explaining how she has a new lover and is no longer willing to stay in a sexless marriage!

Clearly, this is just one cause of marital discord. There is often a combination of factors, including financial, emotional, and familial influences.

In matrimonial law, the process unfolds in real time. A divorce disrupts the parties' lives, and finances become stressed and restructured. Also, children face hard, emotional responses throughout the divorce. This is unlike criminal law, where the crime has already taken place.

When it comes to handling family law cases, the only rule that I insist upon concerns children. I secure, from my clients, a promise that they will never say anything negative about their spouse in front of their children. This is a hard and fast rule.

No matter what the other parent has done, I will not accept any negative comments that the parties' children can hear. I do not care how cruel or vicious my client perceives the other spouse to be. If an existing or potential client cannot accept that rule, I do not want to be their attorney.

My first responsibility as the attorney is to avoid creating unrealistic expectations about the results that a client can get as a result of the divorce process. That means helping the client to understand what their life is going to be like following the divorce—i.e., whether they will be able to afford ski vacations or trips to the Caribbean; how they are going to divide their assets; and how they need to deal with a family business or a closely held corporation. Those, and many other issues, require a certain degree of understanding and expertise on the part of the matrimonial law attorney.

When I work with a family law client, I tell the client that he/she is the chief executive officer in our client-attorney arrangement. I am the chief. operating officer. The client always has the right to terminate me at will. We can disagree about any number of issues. But it is the attorney's obligation to give the client the information needed to understand the legal implications of his or her decision. The client must make an informed decision.

To achieve the best possible resolution for a client, I believe that you have to weigh a series of factors. You have to determine the economics and longevity of the marital relationship; whether one party gave up their ability to earn a living; who has been the primary parent of the couple's children in terms of being responsible for their well-being; and if the parents are interested in pursuing a timesharing arrangement with respect to custody of their children.

What I enjoy most about my work is watching people move up the emotional ladder, and often, achieve happiness. My clients tend to seek my services at one of the worst times in their lives. They are upset and scared, they have little information, and they do not know what is going to happen next.

I always try to help my clients understand the factual circumstances of their marital life. Having had so many years of experience, it is rare that a new fact pattern emerges. We are all snowflakes with different patterns, but that does not mean that we are not all snowflakes at heart. From time to time, certain individuals are going to need some extra help, so I often recommend therapy if necessary.

In many instances, a client has come back to see me or wrote to me after their case is over to express their appreciation of how our team comforted them and made them feel so much better while going through a difficult process. At our firm, we focus on explaining to the client what is going to happen to their lives as they go through the legal process. I take into account that many of the issues they will be facing are not found in the four corners of the domestic relations law.

Both men and women may have been the subject of both physical and mental abuse. They look back upon their marriage and wonder why they did not deal with these problems early on.

The financial issues, once I obtain the information, are the easiest of all the issues to deal with. But custodial issues, also called parental law, are the most difficult. So often a mother or a father believes that they are the only one who knows what the children need. It has been my experience that, when there is no violence, alcohol, or drug abuse, children can adapt fairly easily to changing circumstances.

Time Sharing/Child Support Arrangements

Another important trend in Florida family law is the legislative push to have 50-50 timesharing arrangements. This will, by way of statute, impact the child support calculations.

To not confuse those of us who practice under the reign of "custody and visitation," we now use the phrase "parental responsibility." The proposed statute takes the concept of timesharing to a new level and states, "equal time-sharing with a minor child by both parents is in the best interest of the child . . . ."[1]

In general, the standard for overcoming the presumption includes: the well-being of the child, extenuating circumstances, incarceration, physical distance, domestic violence, or a permanent injunction regarding contact.[2]

I am certain that there will be far more custody litigation than currently exists as a result of this new legislation. After all, if you are with the child 50 percent of the time, you will have to pay the other parent less child support. I believe that this will be the motivating factor in many cases. Even currently, without the statutory presumption, there is a growing trend on the part of the paying parent to get past the parenting time threshold, which would reduce that parent's child support obligation under the child

support guidelines. I believe that 50-50 timesharing arrangement is an artificial concept. After all, it hardly ever exists in an intact home. Two parents living together never divide "parenting time" equally. There are typically zones of interest—i.e., there will be one parent who is responsible for making sure that their children get their homework done, go to the doctor, and attend after-school activities and play dates, while the other parent is primarily responsible for earning a living to keep the family funded.

There is no way a working parent is spending 50 percent of his time parenting the children. Even with two working parents, it is my observation that one parent generally assumes all the secondary responsibilities with respect to the children, and I call that individual the primary parent.

Timesharing should not be confused with decision making and parental responsibility. Even if the children live with one parent more than the other, both parents make decisions about the child's life. Issues of school, health, extracurricular activities, and even religion, become sources of conflict when the parents cannot work together. It is not uncommon for parents to use this right of joint decision making as a cudgel to extract an agreement on any one issue. The courts routinely award joint parental responsibility, and the abuses are rampant. Unfortunately, I have had cases where one parent refused to allow a certain medical procedure to take place or to allow the child to enjoy certain extracurricular activities. In such cases, I have engaged in litigation to establish that my client should have decision-making authority. And when there is high-conflict litigation (and parenting is always high conflict), the needs of the children are often compromised.

Parent coordinators shine a light on an issue that allows for the parent to better understand the situation. I have had any number of clients tell me that they find the use of the parent coordinator to be beneficial. As is true in every aspect of matrimonial law, parties can abuse the use of a parenting coordinator.

To ensure that a parent does not abuse the right of decision making, or even the over use of a parent coordinator, I try to negotiate a mediation clause in a parenting agreement. To avoid abuse, the "prevailing party provision" is very helpful. The parent whose position is ultimately adopted in mediation is the "prevailing party," and the other parent must pay the expenses of the mediation. This has had a salutatory effect.

Family law litigation is quite different from other types of civil or criminal litigation. After all, this is a real-time process. Support needs to be paid, assets need to be valued, and children's needs have to be attended to. The issues evolve and crises are not uncommon. They are being litigated. Since the litigation is very real and very sensitive, the judge who was assigned the case becomes an active participant in the process—not a detached reviewer of the facts.

I have found that having the client in the courtroom to observe the judge who will be ruling on their case can be eye-opening as to the vagaries and demeanor of the court. Each judge is different.

When initiating a divorce suit, I always create a chart to find out the nature and value of the marital assets. Of course, as the case proceeds, we will modify this chart. It is not uncommon for one spouse not to know the true nature of the marital estate or the expenses of the home. It is important, as a family lawyer attorney, to reassure a client who expresses concerns about a lack of knowledge of household or business financial information that those feelings are neither uncommon nor warranted. The information will be learned as a result of the process available to either side. It is this

information gathering process that is the most critical aspect of a family lawyer's obligation to the client. You must know how to be "forensic" about learning from the material that is available to you. Tax returns, cancelled checks, credit card records, and now, information from social media such as Facebook, present treasure troves that a lawyer can mine through to learn the true nature of the marital estate.

In one matter I was involved in, it was clear that there was far more income available than the spouse had reported. In that case, the husband owned a closely held corporation that did millions of dollars in sales. We hired forensic accountants and we went to the company headquarters to review for a specific period of time all the checks written by the company. We correlated all the checks to the company's books and records. We found an inordinate amount of checks that were not deposited into an account, but rather cashed. This struck the accountants as interesting and that led to an understanding that the husband was writing checks to fictitious individuals, cashing them at his own bank, reporting the checks as though they were business deductions, and pocketing the money.

In another matter, the husband, during a deposition, was obliged to disclose that he had purchased a new car using a "certified check" for $40,000. This did not appear in any of the banking records he had previously produced. We were only able to learn about this transaction after a review of his credit card records that showed a change in the pattern of spending for gasoline. The failure of the husband to report available funds became an important factor in that matter.

Again, each case is unique when it comes to the discovery process and the creation of the mosaic that is the marital estate.

Another key issue in the family law area pertains to prenuptial agreements. While I am a proponent of such agreements, I realize their limitations.

When asked by a prospective bride or groom about whether they should have a prenuptial agreement, my answer is always the same. I let that individual answer the question. First, I ask them whether they would ordinarily have a will and distribute their estate as they see fit or would they rather have the state distribute their fortune in accordance with legislation already in place. Without exception, the answer is they would rather have a will.

I then move on to ask them what they think would happen if they were to get divorced without a prenuptial agreement. Most often they have no idea what would take place. At that point, I talk about what I describe as the biggest consumer fraud that I know of—everyone has a prenuptial agreement even if they do not know it.

Whether you have crafted a prenuptial agreement, with your own terms or not, the terms of a divorce are already in place in the complex statutory scheme known as the Domestic Relations law. Every state has a statute that defines just what will take place with the division of property and support, should you find yourself in a divorce proceeding. So when you say, "I do" at the marriage ceremony, whether you know it or not, you have already agreed to the terms of the end game. A prenuptial agreement allows the bride and groom to set the rules themselves while they are still very much in love and not antagonistic. Either way, the parties will have to play by a set of rules—their own or the state's.

Current family law practice in Florida demonstrates that the reasons for divorce are the same between men and women. In my opinion, there is no longer any significant difference, based on gender, as to the initiation of a divorce proceeding.

It is the legal and emotional issues we, as family lawyers, must resolve with our clients. There is no such thing as a quick divorce. It is my hope, through this chapter, that I have shown not just the procedural niceties, but also the impact that a family lawyer can have on the management of expectations for the client.

The alimony law is, in my opinion, going to change and will require litigation to define the meaning of the new statutes as has been the case with every other new legislation.

Notwithstanding the emotional pitfalls and crises that your client will experience, I have found that, quite often, there will come a day when you have a client walk into your office and simply say thank you—thank you for being there for me, and thank you for looking after my children when I thought all hope was lost. This moment of happiness is shared by both former husbands and former wives. It is that moment that will make you thankful for the preparation that is required in all cases. It is that moment that continuously motivates me to do my best every day.

A graduate of the Syracuse University College of Law with more than forty-five years of experience, Herman Tarnow, an AV rated lawyer and managing member of Tarnow Law Firm, limits his practice to family and matrimonial law matters in Florida. A Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, Mr. Tarnow has delivered lectures to and participated in programs on matrimonial law with several Bar Associations including the American Bar Association, the Collier County Bar Association, and the Association of the Bar of the City of New York.

Mr. Tarnow is the author of legal articles, including a discussion on matrimonial law entitled, "Distribution of Collectibles in Divorce Proceedings," and the "Tax Reform Act—a Matrimonial Lawyer's Guide," both of which were published in the National Law Journal.

Acknowledgment: *This chapter was the product of the thoughts of Ryan Tarnow, a third-year law student at University of Miami and a law clerk at the Tarnow Law Firm; Susan Hayes, the office manager; and Kristen Finley, the principal paralegal at the Tarnow Law Firm.*