

Getting Started

The Challenge

How do you know what you say you know? This is the question you should continually ask when evaluating the reports and testimony of mental health experts, their methods, and the materials that support their conclusions and opinions. This challenge fuels the *PLAN Model* (**P**sychology **L**aw **A**nalysis **M**odel), a practical, caselaw-based legal analysis model presented in this book. Applying the *PLAN Model* will enable you to handle difficult psychology-related issues and materials effectively and to hold mental health experts accountable for their methodology, reasoning, conclusions, and opinions.

Although our question seems straightforward, probing its layers with experts unveils a host of ill-defined, yet often used, theories and terms, particularly in divorces that involve children. These include notions about the importance of a primary caretaker, child access schedules, parenting plans for infants, so-called abuse syndromes, parent alienation, and parent relocation.

Divorce is a legal event infused with conflicting emotions whose seeds germinated during the marriage and whose byproducts will weigh—sometimes heavily—in the spouses’ lives for several years. Divorce evokes deep psychological feelings and reactions, and because the legal divorce is “no fault,” child custody and support disputes may become proxy battles for parents dealing with the emotional issues that attend the breakup of their marriages. As a result, lawyers often get drawn into the spousal recriminations and thereby find themselves limited in their ability to effectively manage the psychological aspects of these cases.

Consider the bread and butter of family law: husband and wife, after seven years and with two children, decide to divorce. For family lawyers, most of these cases are quite manageable. Much of the time, parents divide their property

amicably, agree on how they will deal with their children after the divorce, and settle on the conditions and access schedule under which the noncustodial parent will spend time with the children. Often, these parents, with their lawyers, “bargain in the shadow of the law” as they consider how the court might rule on their divorce issues and then factor that understanding into their agreements.¹

After the divorce, many of these parents and their children adapt well to their new post-divorce living arrangements. Some parents use their agreed-upon child access schedules flexibly, depending on their work or other demands or on the children’s wishes to spend more time with the noncustodial parent. Other parents, valuing more predictability, adhere strictly to child access schedules while continuing their heavy involvement with their children. Still other parents, while continuing to bear resentment from the marriage and divorce, nevertheless separate their relationship problems from their children’s needs and dutifully carry out their parenting responsibilities, albeit in parallel fashion.²

However, a small group of divorce or post-divorce modification lawsuits become more complicated. While some of these are solely financial—child support or alimony—others carry psychological concerns that significantly escalate tensions and ill-will. For example, what if one spouse does not favor getting a divorce and resists efforts to dissolve the marriage? Or what if one spouse is depressed or angry, or overly emotional, even impulsive, when interacting with the other? What if both parents use the child as a go-between for adult divorce issues that they have difficulty resolving between themselves? What if the child resists spending time with one parent and openly favors one over the other? What if the child has been experiencing emotional or behavior problems since the separation or divorce?

Given these difficult, psychologically oriented concerns that might arise in a conflict-ridden divorce, how can you distinguish what are common reactions to divorce from other emotional problems that may compromise the children’s well-being, during the divorce and after? Then add the possible layers of substance abuse, domestic violence and child abuse allegations, new marriages, additional siblings, and past counseling to confound the matter.

As complex divorce problems intensify, lawyers may have difficulty understanding, organizing, and addressing the attendant psychological concerns. Lawyers typically begin to seek relevant information through discovery by obtaining financial records, previous psychotherapy and medical records of family members, reports of previously conducted evaluations, children’s school reports, and other parent-supplied documents. But obtaining this information is only the first step when managing the psychological issues of a complicated family law case. Knowing what to make of the information, how to organize it,

1. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

2. See Joan B. Kelly, *Children’s Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 *FAM. PROCESS* 35 (2007).

and how to use it to address the relevant mental health concerns is the next step. Doing this competently improves the lawyer's abilities to grasp essential issues and to craft a competent and convincing legal case. To do this, lawyers often retain mental health professionals (MHPs) to help them manage the materials and provide expert court testimony.³

Although MHPs may help lawyers understand, organize, and address psychological issues in these cases, some writers have proposed that MHPs have little, if any, reliable basis upon which to testify when the issues focus on the "best interest of the child"—the primary standard all state courts use to decide child custody cases. For example, because psychological research generally compares groups rather than individuals along different dimensions, questions arise about whether such findings apply to a specific family in court and to that family's legally relevant questions.⁴ Other writers contend that psychology's empirical knowledge base is too limited to predict consequences of MHPs' child custody recommendations in a particular case. These writers criticize MHPs for basing expert opinions on personal biases rather than on accepted research, for utilizing poor evaluation methods, and for misunderstanding the importance of distinguishing the role of a court-involved, or forensic, MHP from that of a therapeutic clinician involved with the litigant.⁵

Differences between law and social science styles and methods of reasoning also raise questions about how MHPs fit in the child custody process in court.⁶ For example, a court's order is prescriptive, directing people how to behave; the social sciences are more descriptive, seeking to describe behaviors as they occur.⁷ Also, a court focuses on the facts of the single case before it to reach its decision, whereas the social sciences focus more on principles and relationships derived from experimental studies of groups of people.⁸ Further, legal decision-making values certainty that leads to final decisions in which one party prevails. In contrast, social science conclusions are framed in probability terms. As a result, MHPs tend to qualify findings and statements and are more likely to view a person's behaviors as determined by multiple factors.⁹

Despite criticisms of MHPs in child custody cases and differences in the ways that MHPs and the legal system view data and issues, MHPs continue to play a significant role in the family law process. Legislatures and caselaw have enabled the legal system's reliance on MHPs in child custody cases. For example, note that while the best interest

3. Throughout this book, unless noted differently, "MHPs" references include psychologists, psychiatrists, social workers, licensed counselors, and marriage and family therapists.

4. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS* 12–13 (2d ed. 1997).

5. See William T. O'Donohue & A. R. Bradley, *Conceptual and Empirical Issues in Child Custody Evaluations*, 6 *CLINICAL PSYCHOL.: SCI. & PRAC.* 310 (1999); see also Robert E. Emery, Randy K. Otto, & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 *PSYCHOL. SCI. PUB. INT.* 1 (2005).

6. C. Haney, *Psychology and Legal Change: On the Limits of Factual Jurisprudence*, 4 *LAW & HUM. BEHAV.* 147, 158 (1980).

7. *Id.* at 163.

8. *Id.* at 164.

9. *Id.* at 164, 168.

of the child standard is “the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child,”¹⁰ this standard is generally ill-defined, and the trial court has wide discretion when applying it.¹¹ Consequently, legislatures and courts have tried to guide best interest of the child considerations by freighting their language with psychological terms or constructs. For example, although Michigan, in its Child Custody Act of 1970, identifies ten factors for a court to consider when making a child custody determination,¹² no definitions are provided for the words “love,” “affection,” “other emotional ties,” and “moral fitness,” among other concepts. Also, the Uniform Marriage and Divorce Act (UMDA)¹³ identifies five factors for a judge to consider when making child custody determinations: (1) the wishes of the child’s parent or parents as to his or her custody; (2) the wishes of the child as to his or her custodian; (3) the interaction and interrelationships of the child with the parent or parents, siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to home, school, and community; and (5) the mental and physical health of all individuals involved. The UMDA also allows courts to consider any other criterion that might be important in discerning the child’s best interest.¹⁴ Clearly, prevailing “best interest of the child” definitions and guidance—as indeterminate as they appear—in essence require the involvement of MHPs in child custody cases as consultants to lawyers, as retained experts, and as court-appointed evaluators and experts.

To that end, many MHPs in the past several years have focused on developing child custody work as a specialty. Several professional organizations have developed standards and guidelines for MHPs involved in these cases;¹⁵ consequently, MHPs have become more sensitized to ensure that their professional relationships with families, lawyers, and courts do not compromise the validity of their methods and opinions. Research, writing, and workshops have mushroomed to address evaluation methodology and psychological aspects of difficult cases.¹⁶ In sum, rather than shying away from the criticisms, many MHPs have addressed the complaints by seeking to define their expertise in the contexts of social science’s research and professional literature.

10. Tex. Fam. Code § 153.002 (parallels language of the best interest standard in most jurisdictions).

11. See *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982).

12. Mich. Comp. Laws § 722.23.

13. UNIF. MARRIAGE AND DIVORCE ACT (1973), 402 9A U.L.A. 561 (1988) [hereinafter UMDA].

14. *Id.*

15. American Academy of Child and Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY (1997) [hereinafter *Psychiatry Parameters*]; American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOL. 863 (2010) [hereinafter *APA Child Custody Guidelines*]; Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70 (2007) [hereinafter *AFCC Child Custody Standards*].

16. See, e.g., journals such as *Family Court Review*, *Journal of Child Custody*, and the *Journal of Divorce and Remarriage*.

Meet the Challenge: Understand Three Key Perspectives

To best flesh out our central question for MHP experts—How do you know what you say you know?—and meet the challenge of evaluating MHPs’ reports and testimony, you should understand, separately *and* jointly, three key perspectives: the emotional, the legal, and the psychological. Considering each perspective separately allows you to draw upon unique information that each perspective offers for understanding and using the work and testimony of mental health experts. Considering the perspectives jointly, using this book’s *PLAN Model*, offers an integrated framework that orients analysis of mental health testimony, directs deposition and courtroom examinations of experts, and shows the court a roadmap for oral and written arguments about the expert testimony. So, what does each perspective address separately?

The first critical perspective, *the emotional perspective*, addresses the emotional dynamics of divorce that underlie spouses’ mindsets and behaviors. These dynamics provide useful insights about spouses’ actions and motivations in a given case and sensitizes the lawyer about what issues might address the children’s best interests. Also, key events leading to the marital separation may foretell issues that facilitate or frustrate resolution of the divorce. In addition, understanding the nature of impasses that stall progress in settling tough issues can help you fashion constructive and creative steps to move a case forward.

The second critical perspective, *the legal perspective*, addresses legal principles that test the reliability of mental health reports and testimony. Examining mental health testimony from the legal perspective presents challenges. In most state court jurisdictions, *Frye*¹⁷ or *Daubert*¹⁸ principles help the court test the reliability and determine the admissibility of expert testimony.

But family courts have not been awash with *Frye* or *Daubert* challenges to proffered expert mental health testimony. Neither *Frye* nor *Daubert* requires trial judges to raise questions of admissibility of expert testimony on their own initiative. As with other evidentiary issues, trial lawyers are responsible to identify and object to such issues.¹⁹ Yet many lawyers are uncertain about how to apply the *Frye* or *Daubert* principles to mental health testimony. Also, a lawyer may fear that raising *Frye* or *Daubert* concerns with opposing counsel’s mental health expert may offer opposing counsel a roadmap to undermine the lawyer’s own expert’s testimony.²⁰ In addition, *Daubert* requires the judge to be the evidence gatekeeper. The appellate standard of review for assessing a trial court’s decision to admit an expert’s testimony is whether the court abused its discretion by acting without

17. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

18. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

19. Daniel W. Shuman & Bruce D. Sales, *Daubert’s Wager*, 1 J. FORENSIC PSYCHOL. PRAC. 69, 71 (2001).

20. John A. Zervopoulos, *Robinson/Daubert and Mental Health Testimony: The Sky Is Not Falling*, 64 TEX. B.J. 350, 352 (2001).

reference to guiding rules and principles.²¹ Thus, the lawyer may believe that appealing a judge's *Frye* or *Daubert* hearing decision to admit an expert's testimony would be futile.²²

While lawyers must weigh these admissibility concerns, this book's approach takes the legal perspective beyond admissibility. In the end, the finder of fact is always weighing whether to trust expert testimony—even after testimony is admitted. The practical, case-law-based *PLAN Model*, introduced in Chapter 3 and developed in this book, organizes *Frye* and *Daubert* principles into a four-step framework to help you test the trustworthiness of expert testimony at all trial stages and to marshal caselaw-based arguments to support or challenge that testimony.

The third critical perspective, *the psychological perspective*, uses psychology's literature, professional practice guidelines, and ethics to address mental health experts' conclusions and the methods and reasoning that experts use to reach those conclusions and resulting opinions. The analysis can be confusing because of the layers that must be addressed. For example:

- Mental health experts come to court with different kinds of professional qualifications; not all are equivalent. What do these qualifications mean, and what level of competence is defined by a particular qualification?
- How may lawyers evaluate the methods by which mental health experts arrive at their conclusions and opinions?
- How do experts use psychological testing results to support their opinions?
- How have experts guarded against the influence of biases when gathering or evaluating the data that informs their opinions?
- How do experts handle special issues—allegations of domestic violence, child abuse, child resistance to visitation, and interference with custodial access, as well as concerns about access schedules for young children and relocation—that complicate child custody cases?
- How do experts justify their child access schedule recommendations? And how might a prospective relocation of one parent with the children affect the schedule and the children's relationships with each parent?

Understanding these three key perspectives separately—the emotional perspective, the legal perspective, and the psychological perspective—is critical to sorting through the mental health issues, materials, and testimony in family law cases. The next step is to join the contributions of each perspective into a framework, the *PLAN Model*, that will

21. See *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996); see also *General Elec. Co. v. Joiner*, 522 U.S. 136, 138–39 (1997).

22. Zervopoulos, *supra* note 20, at 352.

organize your approach to mental health experts and their work and to guide your written or oral legal arguments.

Meet the Challenge: Apply the PLAN Model

Jointly applying the three key perspectives empowers you to highlight strengths or confront shortcomings of mental health evidence. The *PLAN Model*, a four-step, practical, caselaw-based framework presented in this book, weaves together these perspectives to meet this challenge: The legal perspective, drawing from caselaw and the rules of evidence, provides the *PLAN Model*'s skeleton; the psychological and emotional perspectives, drawing from professional psychology's ethics code, practice guidelines, and literature, put meat on the bones. By applying the *PLAN Model*, you will enhance your abilities to test the quality of mental health materials and testimony; to devise effective direct and cross-examinations; and to sharpen your courtroom arguments, whether in *Frye* or *Daubert* hearings or in trial when testing the quality of already admitted mental health evidence. In the end, you will be able to address most effectively the central question for mental health experts: "How do you know what you say you know?" Let's look at this book's roadmap to meet these goals.

The Roadmap

This book is divided into three parts. Part One—Chapters 2, 3, and 4—addresses the three critical perspectives you should understand to manage mental health materials and expert testimony. Chapter 2 introduces the emotional perspective, addressing emotional dynamics of the divorce process that clarify the underlying personal and relationship concerns of your clients and their spouses that could facilitate or impede the progress of a particular case.

Chapter 3 examines mental health testimony from the legal perspective. First, we discuss the *Frye* and *Daubert* lines of cases, noting key evidentiary principles in each. From these principles, we develop the practical four-step *PLAN Model* as a framework with which to organize and analyze experts' methods and testimony.

Chapter 4 uses the *PLAN Model* to address the psychological perspective in family law cases. From an admissibility standpoint, *Watkins v. Telsmith, Inc.* states, "[T]he district court should ensure that the opinion ... will have a reliable basis in the knowledge and experience of the discipline."²³ Understanding what standards, methods, and ethics MHPs

23. 121 F.3d 984, 991 (5th Cir. 1997).

bring to family law cases is essential for lawyers who will evaluate and manage mental health materials and expert testimony. We will explore how MHPs' views of each step in our *PLAN Model* can help you construct more informed direct and cross-examination questions by discussing several key issues:

- Experts' professional qualifications
- The critical issue of the roles mental health experts adopt in their forensic tasks
- The methods experts use to gather their data, including the use and misuse of psychological testing
- Experts' use of research in their testimony
- The debate about whether mental health experts should offer opinions on the ultimate issue in family law cases

At the chapter's end, we will show how mental health experts should conceptualize child custody evaluations, to illustrate how you may focus experts on the objectives of such evaluations rather than on concerns less relevant to the parents' capacities to care for their children.

Part Two of this book will help you address the most challenging of the *Frye-Daubert* tasks when dealing with mental health testimony: exposing analytical gaps in the empirical and logical reasoning that tie experts' methods and data to their opinions. Courts may view opinions with analytical gaps that are too wide as unreliable and thus inadmissible.²⁴ With that in mind, we will first discuss the scientific-critical thinking mindset that provides the prism through which *Frye-Daubert* questions should be considered. We will then use that mindset to describe six ways in which mental health experts may hide analytical gaps in their empirical and logical reasoning. As a result, you will learn to expose analytical gaps hidden by:

- Overly abstract psychological concepts
- "Common sense" notions unsupported by empirical or logical reasoning
- *Ipse dixit* assertions whereby experts offer opinions devoid of support
- Reliance on general acceptance factors absent other support
- Judgment biases that color, if not corrupt, experts' conclusions and opinions
- Misapplication or misrepresentation of research
- Confirmation bias
- Misused DSM-5 diagnoses that support experts' testimony.

24. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The topics of the pernicious effects of judgment biases and the misuse of *Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition* (DSM-5) diagnoses are addressed in two new separate chapters that were not included in this book’s first edition. The judgment bias chapter helps you identify biases that experts bring to their work and offers an approach—the *REAL CHECK*—for challenging those biases when you depose or examine experts. The DSM-5 chapter offers a lawyer’s approach to examining experts whose opinions rely on DSM-5 diagnoses. Too often, lawyers get “lost in the weeds” of the numerous psychiatric diagnoses, trying to out-psychologize the expert by focusing solely on particular diagnoses. The DSM-5 chapter’s approach will help you examine experts more effectively by stepping back and understanding the purposes, structure, and methodology of the DSM-5, as well as its cautions about its use in court.

Part Three of the book includes an expanded, rewritten chapter on issues that arise when lawyers seek to obtain mental health records. Lawyers often encounter roadblocks when they try to negotiate the interplay of patient confidentiality, privacy laws represented by HIPAA—the Health Insurance Portability and Accountability Act²⁵—and the psychotherapist-patient privilege. Questions about whether and how psychologists should release test data to lawyers add to the mix. We will look at how these concerns overlap and outline ways to manage them.

Finally, Appendix A presents a short essay on deconstructing a typical research article published in an American Psychological Association journal (note that many social science journals adopt the APA’s article format). In addition to showing you how to read an APA-published article section-by-section, questions are provided to help you assess the quality of an article’s study, the study’s limitations, and whether an expert is making use of the study’s findings properly. Appendix B lists Internet sources for relevant mental health ethical codes and practice guidelines.

Dealing with mental health issues and information in family law cases may, at times, seem confusing and even daunting. But appreciating important emotional dynamics of divorce and organizing the legal case and arguments around the practical four-step *PLAN Model* presented in this book will provide the support you need to pose the key question to mental health experts—“How do you know what you say you know?”—and meet the challenge of evaluating experts’ work, their reports, and their testimony.

25. Pub. L. No. 104-191, 42 U.S.C. § 1320d-1 *et seq.*

Part One

Develop Your PLAN— Three Critical Perspectives

*The Emotional Perspective: Emotional Dynamics of
Problem Divorces*

The Legal Perspective: Building the PLAN Model

*The Psychological Perspective: Filling Out the
PLAN Model*

The Emotional Perspective

Emotional Dynamics of Problem Divorces

Why must family lawyers appreciate the emotional concerns of their clients when handling a divorce case? Although the question may seem elementary, you dismiss these concerns at your peril. At such times, relatively straightforward cases with an extra twist or two may become more difficult, and issue-laden cases, particularly those involving children, may spin out of control. Older research measuring the effects of life changes over a twelve-month period noted divorce and marital separation as the second and third most stressful experiences to which people might be exposed.¹ More contemporary findings confirm conventional wisdom that spouses' decisions to divorce are rarely easy and that the divorce process exacts a heavy emotional toll.² High divorce rates increase the likelihood that people will be aware of these emotional concerns from their own experiences (as adult spouses or as children of divorce) or from the experiences of family members and friends.

Any lawsuit is imbued with emotional elements. But as matters become more personal and intimate, the parties' emotional lives may, unexpectedly and dramatically, impact the lawsuit. Family law issues entangle spouses' current difficulties—marital problems, child-related issues, financial concerns, and decision-making patterns—and may invoke ghosts of childhood experiences. Problems from previous marriages and relationships may further roil the waters.

1. See Holmes & Rahe, *Holmes-Rahe Life Changes Scale*, 11 J. PSYCHOSOMATIC RES. 213 (1967).

2. See E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 2 (2002).

While most people who divorce eventually find their emotional bearings, attorneys encounter their clients at the beginning stages of the process.

In sum, divorce is more than a legal concern. Pauline Tesler, in her work on collaborative law, notes that a divorcing couple must address their “relational estate” as well as their property and other legal interests.³ The relational estate includes the spouses’ emotional dynamics and the respect spouses give each other in their interactions and co-parenting tasks. This notion is particularly important because a divorce that includes children, while a significant life event in itself, is really a transition within the family’s overall timeline. Children generally benefit when they can understand divorce as a transition from one kind of family relationship to another, rather than as a time when their relationship with either parent was severed. If you learn to appreciate the relational estates of your clients’ divorces, even apart from other pressing legal issues, you will manage your clients’ cases more effectively. As a result, whether considering mediation or settlement options or when preparing for trial, you will be less likely to become entangled in your clients’ emotional struggles. An added benefit may be the appreciation of a satisfied client whose divorce was handled competently and sensitively in the midst of a trying time.

The Emotional Effects of Divorce and Resiliency

Much research and writing in the past 20 years—including countless books and articles in the popular press—have explored the emotions in family relationships affected by divorce, including spouses’ relationships with each other, parents’ relationships with their children, and how these relationships are affected by the family’s new realities. Much of this literature focused on the negative effects of divorce on children.⁴ But later research using quantified measures of adjustment and comparisons with non-divorce families paints a more nuanced picture of the long-term effects of divorce on family members.

While the experiences of separation and divorce may upend family members’ emotional lives in the short term, the experiences for most spouses do not leave lasting negative emotional effects.⁵ In fact, many divorced spouses, over time, use the stressful and confusing divorce experiences to grow personally and seek new opportunities.⁶

Psychologists who have studied divorce point to the notion of resiliency to explain how many adults adjust their lives after divorce. They note that protective factors and risk factors interact to affect post-divorce emotional and life adjustments. These factors

3. See PAULINE TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001).

4. See, e.g., JUDITH S. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989).

5. See HETHERINGTON & KELLY, *supra* note 2, at 5-7 (2002).

6. *Id.* at 65.

determine a person's *resiliency*, or capacity to adapt, when encountering difficulties and recovering from perceived or actual setbacks.⁷ Protective factors include social maturity, emotional autonomy, self-confidence, social support, work satisfaction, and a new intimate relationship. In contrast, risk factors include behaviors associated with antisocial personality, impulsivity, anxiety and ongoing depression, promiscuity, and continued obsessive attachments to the former spouse.⁸ People with more protective factors do better; those with more risk factors do worse. But even this balance is contextual: a protective factor appropriate at one time may not be so at another time.⁹

More recent research on the emotional effects of divorce also paints nuanced pictures of the long-term effects of divorce on children. In the short term, children often are confused about why their parents are separating and divorcing, and even children with strong emotional attachments to caring parents may become quite distressed.¹⁰ Many children express surprise and sadness at their parents' decision to divorce, even though they may have witnessed loud and aggressive arguments or physical altercations between their parents. Commonly, children pine for their parents' reconciliation. In addition, these children may become depressed and anxious, act out behaviorally, or blame the parent whom they perceived "broke up" the family. But the research shows that though divorce increases children's risk of psychological, academic, and social problems, the great majority of children whose parents divorce function, over time, with the same competence as children whose parents are married.¹¹

As with adults, the notion of resiliency—encompassing protective and risk factors—helps us understand how children may adapt to the life changes of divorce. Good parenting that balances emotional warmth, reasonable limits, and consistency may be the most important protective factor for children whose parents are divorcing.¹² Such authoritative parenting, in contrast to overly indulgent or authoritarian styles, creates predictability in the child's home life, fosters mutual trust between the parent and child, and engenders respect of the parent by the child.¹³ In addition, children with easier, adaptable temperaments tend to adjust more readily to the changes wrought by divorce. Children with more difficult temperaments—demanding, anxious, impulsive—are more challenging to parents under the best of circumstances—even more so during a divorce.¹⁴ Also, children with good social skills tend to attract others who will support them, whereas children who experience difficulties relating with others may find themselves with less support to help navigate the

7. *Id.* at 71.

8. *Id.* at 67–93.

9. *Id.* at 89.

10. See JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP* (1980).

11. ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE* 66 (2004).

12. HETHERINGTON & KELLY, *supra* note 2, at 127–28.

13. *Id.* at 128.

14. *Id.* at 147–48.

troubling effects of their family breakups.¹⁵ Notably, persistent conflict between parents following separation and divorce is a prime stressor and risk factor for children.¹⁶

Some writings have emphasized long-term negative emotional consequences of divorce on children.¹⁷ Emery noted that these writings were based primarily on clinical interviews during which the children expressed their pained feelings about the past divorce, leading the researchers to focus primarily on the children's distress. In addition, those researchers did not compare the adjustments of children of divorce with those of children from non-divorced homes. In contrast, Emery concluded—from his and others' research based on quantified measures of mental health problems among young adults from both divorced and non-divorced homes—that most young adults whose parents divorced when they were children did well but still had painful memories about the divorce. Emery found that the resilience of these young adults grew around the pain, not in its absence.¹⁸ Hetherington noted from her research that most young adults from divorced families looked similar to their contemporaries from non-divorced homes and observed, “[A]lthough they looked back on their parents’ breakup as a painful experience, most were successfully going about the chief tasks of young adulthood: establishing careers, creating intimate relationships, building meaningful lives for themselves.”¹⁹

In sum, divorce is an emotionally difficult period. Adults and children may express their unsettledness during that period through emotional symptoms and uncharacteristic acting-out behaviors. However, most adults regain their emotional bearings, and, over time, the life adjustment of most children whose parents divorced is no different from the adjustment of children whose parents did not divorce. It appears that emotional resiliency in adults and children contributes to the likelihood of good post-divorce adjustment: people with more protective factors do better, whereas those with more risk factors do worse.

Three Keys to Understanding Problem Divorces

In addition to understanding normal, long-term emotional responses to divorce, you should note three key issues when trying to understand problem divorces:

15. *Id.* at 148–49.

16. See Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *PSYCHOL. BULL.* 310 (1982); see also Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 *FAM. REL.* 352 (2003).

17. See, e.g., ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); see also WALLERSTEIN & BLAKESLEE, *supra* note 4.

18. EMERY, *supra* note 11, at 81.

19. HETHERINGTON & KELLY, *supra* note 2, at 7.

1. The spouses' different perceptions of their marriages and the effects of those perceptions on the decision to separate and divorce.
2. The emotional impact of events around the marital separation.
3. The sources of impasses or impediments to resolving the divorce.

Of course, underlying these key issues is the reality that many people during divorce experience difficulties managing their emotions in situations they might have handled more appropriately during the marriage or in their lives in general. Anger, sadness, guilt, anticipation, shame, embarrassment, humiliation, and relief are but some of the emotions mixed in the divorce cauldron. Also, in addition to the increased tension and verbal sparring, couples may even engage in isolated, uncharacteristic post-separation physical altercations—at times, witnessed by the children—that become fodder for later domestic violence allegations.²⁰ Divorcing spouses vary in their capacities to understand and manage these difficult divorce-engendered feelings. How the spouses manage their emotions in the context of these three key issues will give you insights about your clients and your clients' spouses during the legal divorce process.

The First Key—“His” and “Her” Marriages

Spouses often view their marriages differently: what has been referred to as “his” and “her” marriages.²¹ Differences in life experiences, resources, perceptions, and coping styles contribute to these different views of the marriage. These differences create dissimilar styles by which spouses relate to each other and seek to meet their marital needs and expectations.²² As the couple experiences more problems, their different views and expectations of the marriage may diverge further, and “his” and “her” marriages may take on lives of their own, retrospectively redefining the meaning and goals of the marriage in each spouse's mind. At such times, spouses may feel both justified and shamed by their behaviors with each other. If the problems persist and the spouses harden their own marital view as “the way it was,” the conflict may become entrenched. These spouses will experience more difficulty when they seek to resolve their divorce issues.

The notion of “his” and “her” marriages also helps us understand emotional dynamics of the marital separation and post-separation period. At the separation, few spouses mutually agree that a divorce is best for the marriage. In most troubled marriages, the separation occurs when one spouse leaves and the other is left. The leaver and the spouse

20. Janet R. Johnston & Linda E.G. Campbell, *A Clinical Typology of Interparental Violence in Disputed-Custody Divorces*, 63 AMER. J. ORTHOPSYCHIATRY 190 (1993).

21. See JESSE BERNARD, *THE FUTURE OF MARRIAGE* (1975). See also Walter R. Schumm, Anthony P. Jurich, Stephan R. Bollman, & Margaret A. Bugaighis, *His and Her Marriage Revisited*, 6 J. FAM. ISSUES 221 (1985); Maureen R. Waller & Sara S. McLanahan, “His” and “Her” Marriage Expectations: Determinants and Consequences, 67 J. MARRIAGE & FAM. 53 (2005).

22. HETHERINGTON & KELLY, *supra* note 2, at 23–42.

left behind are usually at different places in their feelings and thinking about the marriage or the specter of divorce.²³ Typically, the leaver has thought about divorce for some time: emotionally grieving the marriage loss; thinking about how life will be after the separation and divorce; and, often, considering living arrangements and accommodations for the children.

The spouse left behind is in a different emotional place. Typically, this spouse is surprised, even stunned, by the leaver's separation announcement and departure. While the leaver contemplated divorce for awhile, perhaps even for years, the spouse left behind, although perhaps recognizing that the marriage was troubled, may not have anticipated the sudden end to the marriage. These spouses become depressed and uncertain about why the marriage is ending, and they often offer to do whatever may be necessary to reconcile the marriage.²⁴

The interactions between these separated spouses take on characteristic styles.²⁵ Plaintive pleas for reconsideration and promises of change by the left-behind spouse often pervade interactions between the spouses early in the separation period. The leaving spouse may then feel guilty and respond to the left spouse's appeals. But as the left spouse's hopes for reconciliation are then raised, the leaving spouse rebounds away from the relationship, sometimes in anger—and the cycle continues. Clearly, at the separation such spouses will not be at the same, stable emotional place; they will not be for a while. But it is during this time that the spouses retain their lawyers to start the task of obtaining a legal divorce. While most spouses will, over time, adapt to the reality of their divorce, many spouses during the separation period still struggle with their cycling emotions: the leavers, wishing to move ahead quickly with the divorce process (perhaps too ready to accommodate unreasonable financial and child custody demands); and the left-behind spouses, aching to pull the reins on a perceived unrestrained process.²⁶

In sum, understanding that spouses perceive their marriages differently is the first key that can help you gain further insight into what is happening with your clients and their spouses during the divorce process. These divergent marital perceptions predictably generate distinct emotional reactions by the time the spouses contact their lawyers. Those reactions may then become rigid and define positions that frustrate subsequent problem-solving during the divorce process.

23. See CONSTANCE R. AHRONS, *THE GOOD DIVORCE* 89–92 (1994); see also ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS* 33–40 (1994).

24. See AHRONS, *supra* note 23, at 89–92.

25. *Id.*

26. See EMERY, *supra* note 23, at 36–40.

The Second Key—The Marital Separation Events

What happened during the marital separation day is a second key you should understand when weighing the emotional dynamics of the divorces you handle. Most couples view the separation day as the day their marriage ended. Couples often cannot recall the date their divorce was final, but they clearly recall when they separated. Usually, the separation is a time of major emotional, and often physical, disruption, even disorganization. The family's future at the time is unknown.²⁷ What happens at the separation strongly influences the post-separation perceptions spouses will have of each other. Understanding what happened on the separation day often provides insight into the later motivations, thinking, and behaviors of both spouses.

The private and the public aspects of the marital separation contribute to generate spouses' emotional reactions. Johnston and Campbell described two types of separations that decrease the likelihood that the spouses will appropriately manage their post-separation emotions to resolve the divorce: the unexpected, traumatic separation; and the ambivalent separation.²⁸

Unexpected, traumatic separations include those of sudden desertion, humiliating involvement of a lover, or uncharacteristic violence. In response, the aggrieved spouse may experience an enormous betrayal of trust and may react in uncharacteristic ways. Subsequently, the spouses will begin to redefine each other's character in polarized, negative ways and "rewrite" the history of the marriage. Over a short time period, countless ambiguous interactions during the marriage that were resolved with good will, the expectation of good intentions, or forgiveness begin to be reinterpreted around the new negative, pejorative theme. As a result, these spouses may claim that they finally discovered who the other spouse really was; "his" and "her" marriages—discussed in the first key to understanding problem divorces—then show themselves in graphic detail. If these "redefinitions" stand uncorrected, they will provide rationales for distrusting the other spouse's motivations, for resisting agreements that could resolve key divorce issues (whether related to money, property, or children²⁹), and for seeking vindication in court.

A second kind of marital separation that may characterize divorcing couples is the ambivalent separation. In these separations, couples have difficulty making decisions about the divorce because they cannot let go of the marriage and, as a result, resist settlement decisions or finalizing their divorces. Their post-separation periods are characterized by repeated separations and reunions. Essentially, these couples cannot live together or apart.³⁰

Although the different separation styles may begin as private marital struggles, the separation and decision to divorce eventually become public. Then both the "leaver" spouse

27. See AHRONS, *supra* note 23, at 109–18.

28. JANET R. JOHNSTON & LINDA E.G. CAMPBELL, *IMPASSES OF DIVORCE* 14–15 (1988).

29. *Id.*

30. *Id.* at 15.

and the “left-behind” spouse must deal with reactions of family, friends, workmates, and, at times, religious or other communities in which they have been involved.³¹ Often, the spouses kept their marital troubles under wraps, sharing their problems with only a select few friends or counselors. But after the separation, other friends and acquaintances may be unsatisfied with generic answers of incompatibility in response to questions as to why the couple are divorcing. In the face of this ambiguity, the leaver spouse may bear the primary “blame”—after all, the leaver chose to leave. In contrast, the left-behind spouse often is viewed as the one trying mightily to reconcile the marriage. When perceived that way, the left-behind spouse may hold fast to the victim role in order to maintain the moral edge in the marital conflict and, possibly, to extract guilt-induced concessions in later settlement negotiations or mediation. Each spouse has his or her constructed story that in a bitter divorce may form rationales for trial strategy or settlement accommodations, or develop into entrenched, negative myths about the other.³²

In sum, understanding what happened at marital separation is a second key that can help you gain further insight into what is happening with your client and your client’s spouse during the divorce process and after. What happened at the separation may lead spouses to redefine their partners in new, often more negative, ways and frustrate the development of even the modicum of trust that is important to negotiate divorce agreements.

The Third Key—Recognizing Sources of Impasses to Resolving the Divorce

Recognizing the sources of impasses between the spouses that heighten tension, and thus impede resolution of the divorce, is the third key to understanding the dynamics of a difficult divorce. Couples are at an impasse when they are stuck or entrenched in their positions, and problem-solving seems dead in the water. The divorce negotiations cannot move forward without working through that obstacle. At such times, spouses’ positions have hardened—at least as they see it—and neither is willing to concede anything. Each spouse reinforces the other’s hardened positions in cycles of mutual behaviors that only “prove” the other’s views.³³ Johnston and Campbell provide a useful model to help untangle these dynamics and target the sources of impasses. They posit that elements of impasses may occur, separately or jointly, on three levels: the external, the interactional, and the intrapsychic.³⁴

At the *external level*, significant others may stoke the conflict by supporting the spouse’s claims, particularly as those claims reflect one-sided, negative accounts from “his” or “her” side of the marriage.³⁵ For example, extended family members, including parents,

31. AHRONS, *supra* note 23, at 90.

32. *Id.* at 91.

33. JOHNSTON & CAMPBELL, *supra* note 28, at 12.

34. *Id.*

35. *Id.*

grandparents, and siblings of the spouse, may weigh in on the divorce problems, sympathetically resonating with the loved one's pain. In child custody modification actions, new spouses may seek to rescue their aggrieved spouses from the "bad" former spouse. In addition, therapists who misunderstand their roles and professional obligations in their clients' child custody cases may give cover and support to spouses who feel they must hold fast to their hardened positions. Such mental health professionals (MHPs) may assert that a child is fearful of the noncustodial parent or has been abused by that parent even though they have not interviewed that supposedly feared parent or seen the child with that parent. Or, such MHPs may opine that a child has been abused by a parent with whom those professionals have had no contact. In addition, such MHPs—without knowing the family's history or marital dynamics—may urge the client parent to withhold the child from the other parent's contact in violation of court orders or otherwise encourage the client parent to continue the child custody fight when realistic negotiated options are possible. Even lawyers may become so emotionally overinvolved in these cases that they lose professional perspective and exacerbate the conflicts. Spouses who over-rely on these significant others on the external level deflect responsibility for decisions or negotiation options by invoking the advice of these strong advocates, with hopes that these advocates will help them prevail in court.

At the *interactional level*, the second impasse level, continuation of the spouses' conflictual marriage relationship may cause impasses when these spouses try to resolve an important divorce issue. If the couple fought often during their marriage, saving face by not yielding to the other spouse's hardened position, particularly during this emotional period, may just reprise previous problem-solving situations. In addition, marital separation dynamics (the traumatic separation or ambivalent separation types discussed earlier) and the resultant feelings of humiliation, loss, betrayal, and fear of the future may contribute to impasses at the interactional level. Finally, a child's emotional and behavioral problems may contribute to an impasse at this level.³⁶ For example, two parents may fight to a standstill over their child's misbehavior, one parent accusing the other of poor discipline, and the other upset that the accuser will not see the necessity for the child to be examined for attention deficit hyperactivity disorder.

At the *intrapsychic level*, the third impasse level, the spouses' individual emotional reactions to the separation or divorce may create barriers leading to impasses in resolving certain divorce-related issues. Because spouses experience a number of different emotional reactions during this period, they are unlikely to be at the same emotional place in the divorce emotional cycle. In addition, not everyone deals with stress—divorce-related or otherwise—similarly. Some people are better able than others to manage conflicted feelings and difficult circumstances. Other people may be so ready to escape the marriage

36. JOHNSTON & CAMPBELL, *supra* note 28, at 12–13.

that they summarily dismiss—too readily, too harshly, and with little, if any, insight—their spouses' emotional reactions to the changed circumstances.

In the extreme, the feelings of some spouses may energize characteristic, enduring patterns of thinking and behaving that are inflexible and self-defeating.³⁷ Such spouses may seek to protect themselves emotionally from the perceived emotional hurts of the separation or divorce by refusing to settle or by seeking personal and public vindications by taking the custody case to trial. They may cast their battle as good versus bad. Often spurious abuse allegations are traced to emotional or personality disorders of bitter spouses or those seeking vindication in court;³⁸ these allegations must be distinguished from credible allegations through careful and reliable evaluations. Finally, some couples experience such ambivalence about the divorce that they impede efforts to resolve important issues that would bring the divorce process to an end.

In sum, identifying whether sources of impasses are external, interactional, and/or intrapsychic will offer insights into the actions and motivations of your clients or your clients' spouses. Still, just having these insights may not suggest easy impasse resolutions. For example, if an impasse source points solely to the influences of a spouse's parents (external), that concern might be easily addressed. But if the impasse also relates to a traumatic separation (interactional) and other individual emotional problems (intrapsychic), all three levels would be implicated, making the impasse more entrenched. Keep in mind that impasses arise from coping strategies—albeit often self-defeating—that spouses use to protect themselves from the emotional effects and uncertainties of the impending divorce. In such cases, you might seek the advice of an MHP knowledgeable about marital and divorce dynamics to help fashion strategies that either break down or sidestep the impasse.

Summary

Family law matters involve personal and intimate concerns of spouses that may significantly impact the legal divorce or modification actions. You will better understand the context of conclusions and opinions by MHP experts when you recognize and monitor the emotional effects of divorce during the course of a contentious family law case.

37. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION 647 (2013) [hereinafter DSM-5].

38. JOHNSTON & CAMPBELL, *supra* note 28, at 16.