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LAW DAY

WMDs in the Family Court

A few parents in contested custody cases exploit the system and tie up judges.

This is the third of several articles written by state judges and legal experts commemorating Law Day (May 1) in Hawai'i.

By Douglas S. McNish

Because courts are where disputes about our legal rights and responsibilities are decided, it is to be expected that some litigants will be unhappy with the decisions.

Family disputes, particularly disputes about custody and visitation of minor children, present special problems for our courts. The legal standard for deciding these cases is "What will be in the best interest of the child?"

In recognition of the dynamic nature of families, family court is set up to permit reconsideration of decisions when there has been a significant change in circumstances. This process, designed to benefit families, can be abused by those determined to do so.



McNish

Decades of research about children of divorced or separated parents have established that parental conflict is the single factor most associated with bad outcomes for children. Yet, court trials are the epitome of parental conflict. Suffering from the emotional trauma of a failed relationship, parties in custody and visitation cases often have feelings and complaints about the other person that they are not allowed to express in the courtroom.

Legal rules and procedures designed to discourage consideration of unreliable information often prevent litigants from telling all they want to tell. Parties leave the court frustrated, angered and deeply hurt.

Recognizing that resolving these disputes outside the courtroom lessens such frustration and anger, Hawai'i's Family Courts systematically provide services and programs to encourage and help families do this. These efforts to divert custody and visitation disputes from the courtroom are largely successful.

Of the approximately 5,500 divorce cases filed in the state annually, it is estimated that less than 20 percent are contested in court. Of that 20 percent, the majority settle before the actual trial, with varying levels of court involvement. Most of the remaining 20 percent reach finality with a court trial. A few move on to be reviewed by our appellate courts, if either of the litigants believes the judge has made an error.

A few, probably not more than a dozen each year, do not move on.

These litigants are the "weapons of mass destruction" in our Family Courts. They are unsatisfied with having their grievances addressed in the established safeguard mechanisms (appellate courts for judge errors and the Commission on Judicial Conduct for ethical violations by the judge).

They exploit the legal principle that requires the court to consider anew what is in the best interest of a child when there has been a significant change in circumstances. Claims of changed circumstances are made when none exists. Parties not represented by attorneys also tend to file numerous motions, the purpose and basis of which cannot be discerned without extensive review by the judge.

Sometimes they allege that judges are biased because of the multiple rulings against them, even though all those rulings are essentially on the same issue that they bring before the court multiple times.

Their destructiveness is widespread. Children must live with interminable parental conflict. The opposing party is dragged into court over and over, suffering enormous emotional and often economic cost.

In addition, it wastes valuable court resources. Court time and judge time is in short supply. Because judges deal with the welfare of children, they cannot simply ignore allegations, even those made by a litigious party.

Other community resources are stressed, as these same litigants make numerous contacts to police, who must file reports about their complaints, even though there may be nothing for them to act upon. They sometimes seek to enlist prosecutors, legislators and public officials to their causes with incomplete and misleading information about their cases.

Fortunately these people are few in number. There is little that can be done to curtail them if we desire a court system that remains open and seeks to be available to reconsider the "best interests" of children from time to time as circumstances of the children and families change.

Douglas S. McNish is a retired Maui Family Court judge.