

Divorce sucks (a view from the trenches) – Part V

Trial Strategy – Constructive or Nonproductive

Throughout the tenure of a divorce or custody suit, strategies are employed to improve the strategic position of a spouse before the court or a civil jury.

A non-all-inclusive list of such pursuits of a spouse and his or her attorney may include the following non-productive trial strategies:

- False claim of child abuse – frequently attorneys and/or their clients will make artificial or transparent claims of child abuse either directly to a jury in a trial or through the filing of a frivolous Child Protective Services complaint. Such ineffective claims may include claims of physical abuse (when in truth is a properly administered and appropriate corporal punishment for grievous conduct dangerous to the child), false claims of injury (whether it be normal scrapes and bruises occurring from play, garden variety accidents all children have, or fractures to the arm or leg occurring through no real fault of either spouse). Frequently, the claims are exaggerated with photographs and close up shots and, on occasion, artificial support from the minor child through the coercion of a spouse. Jury's are very resentful of this approach and will hold the party asserting such frivolous claims accountable at the end of the day.
- False claims of alcoholism, substance abuse and/or prescription drug excess – painting a picture of a spouse as an alcoholic or a danger to his or her child based on a glass of wine at an Italian restaurant is frequently a ploy attorneys will use given great social resentment to alcoholism, DWIs and general drug abuse. Certainly, if the abuse is real the claim is valid and is constructive. However, frequently clients will exaggerate social alcohol consumption that is reasonable and is looked upon by the jury as a waste of their time and they will frequently hold the party falsely alleging such abuse accountable.
- WAR by financial attrition - if there is insufficient community property to adequately fund both sides of a divorce, one spouse may use outside sources of income in the form of family loans, gifts, spend thrift trust disbursements or other disbursements from relatives to financially bring the opposing spouse to his or her knees and demand agreement to terms that are unreasonable and not productive for the underfunded spouse or the children of the marriage. Regrettably, the divorce process is part of the adversary system of justice and leaves this unfair loophole open in such circumstances. Though not outright unethical, such conduct and strategy does not pass the smell test.
- Cookie cutter witnesses – preachers, rabbis, soccer coaches, parents, grandmothers, grandfathers, brothers and sisters generally bring a yawn from the jury or the court. If their testimony is direct, short and fact driven on an important core issue in a divorce or custody suit, they are necessary. In general, the jury's perspective is, "what do you think a preacher, grandparent or soccer coach is going to say about the child in their care...that the mother or father they support are bad?"
- Use of the children as spies – attorneys or clients that use the children to spy and give testimony before a court or jury almost always fail in their goal. Most judges and a majority of juries are highly resentful for bringing minor children into the fray and such a strategy is doomed to backfire before the judge or jury. Clearly, if a relatively mature child is the ONLY source of information that is core to the case and IF there is no other third party professional or other source to support the issue, sometimes the testimony is necessary. This is especially true in cases of real

abuse, parental alienation and other destructive conduct that is fundamental to the issues of the case.

Productive strategies:

- Here is a novel idea. How about truth and sincerity. It has been this writer's experience that a jury will give some ear to experts, social workers, teachers, coaches, doctors, preachers and other witness with personal knowledge. Inevitably, the final result is driven by the truth and sincerity of the spouse testifying. With predictable regularity a jury will make their decision based squarely on the shoulders of the spouse testifying and the honesty and forthrightness of their testimony.
- Experts – psychologists, psychiatrists, social workers, doctors and other professionals will be given credibility to some degree by a jury IF their opinions are based on acceptable, acknowledged predictable science and IF they have spent sufficient time with the minor child and/or both parents to render a believable opinion. Rent-an-expert's testimony is disdained by most juries and seen for what it is - as an opinion for hire. The longer the relationship between the testifying expert and the minor child, the greater the likelihood will be that the opinion is fairly received and considered by a court or jury.
- Election by a minor over 12 years of age- any child over the age of 12 may sign an election (affidavit) of their preference of primary caregiver. The courts will strongly consider these elections and in the large number of the cases make a decision based on the child's wishes. Juries will favorably consider such elections so long as they are based on believable facts and parental propriety. However, the securing of such an affidavit when in conjunction with a new car, a new wardrobe, or a loose, undisciplined parental attitude towards control of the child will result in the opposite of what the spouse seeks in obtaining such an election. The elections are not binding on the court, but if they are legitimate and based on fact, they are highly cogent evidence which the court and the jury will strongly consider.
- Depositions of paramours, IRS agents, psychologists, doctors, ex-wives, employers, secretaries, etc. – well thought out, terse, and to the point testimony on facts that support a claim revealed in depositions is far more effective than hearsay or other testimony that is not likely to be received well by the jury. It is important that such deposition testimony be short, to the point and dispositive of a real issue in the case.

The above is not an inclusive list of strategies employed during the divorce proceeding, however, if properly employed or excluded may be instrumental in a positive result for the client during this very difficult time.