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AN OPEN LETTER: A CRITICAL LOOK AT THE CHILD CUSTODY SYSTEM

An Open Letter to a Young Lawyer as She Enters the World of Oz:

A Critical Look at the Child Custody System

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***Editor's Note:** In the commentary that follows, Ms. Kleinman, an experienced family law attorney, who frequently represents battered women, reflects her view of some flaws in the family court system. Other views, comments, and responses are welcome.*

Abstract

This editorial tries, through the use of an open letter format, to raise some of the problematic issues faced by both practitioners and judges who deal with the issue of child custody. One of the flaws occurs when battered women see the court as their potential savior from victimization, while in reality the court, with its inadequate available resources, cannot do so. This editorial raises awareness of the importance of qualified experts and the need for neutrality. It sensitizes the reader to the difficulty that judges have in making difficult decisions on minimal information when custody issues are brought to the court for resolution.

Keywords: Custody, lawyers, custody determinations, judges, status quo

An Open Letter to a Young Lawyer as She Enters the World of Oz :

A Critical Look at the Child Custody System

Dear Jenn,

You are about to graduate from law school. Congratulations! Commencement/graduation—they are both a beginning and an end. Both are ambiguous and straightforward like the law. Your experience has taught you to read differently, to write persuasively, to think resolutely, and to know there are more than two sides to every story. It has taught you that the law is whatever the court says it is, that is, unless someone appeals and the appellate authority changes it. Then it remains the law unless and until a higher authority changes it again or the legislature legislates it differently. Then it remains that way unless or until the Supreme Court determines something was determined incorrectly, misunderstood, or wrong. The law is an evolving, changing concept, subject to social pressure and scientific nuances; subject to change, to modification, clarification, influence, sometimes with a winner, sometimes with a loser; always with a sense of purpose and of hope.

You now feel wise and you should; that you can tackle problems with aplomb; that you can research and come to understand and advocate positions. You feel supported and secure, and well you should. You have spent three years studying diligently and are about to enter a new world, a world where you can confront change, make law, and affect society.

So, as I sat down to write to you, for your special day, I wanted to give you a special gift, a gift that I have given to no one, a gift you can carry with you as you work hard and think problems through, and work to make our world a better place and then decide to share it as well. It is not a feel-good gift, but one that comes from the heart.

Jenn, you care about people. You care about justice. You care that society brings justice to all.

So why have I titled this letter in a way that brings images of fantasy rather than reality? I have done so because I want to tell you about the other face of the law, the face that as a lawyer you will see daily. It is this secret, a rite of passage, I want to share with you.

Jenn, I learned that working for change, one case at a time, is insufficient. A broader approach is needed, one that sensitizes judges and court personnel to the uniqueness of each case and the harm that can result for children from uninformed rulings. You will learn, as I have learned over the years, that family court fails children and society at large, especially when a woman protective of her children is involved and more so where there has been domestic violence.

How? Why?

There are many concerns surrounding the issue of child custody determinations worthy of special attention. Among them are the system's lack of time to attend to critical issues due to the number of cases each judge must attend to; the lack of necessary resources, or sometimes even the ability to assess what resources are necessary; and the requirement that a judge essentially become an expert deciding on the welfare of children and their future, deciding where and how they will live. These all militate to my likening the judicial process to the Wizard's smoke, ropes, and whistles as Dorothy enters Oz and is about to meet him. It is almost as though unless there is the right court, with the right judge, the right lawyers, with the right expert, in the right state and right country, at the right time, that one should stay away from family court.

Judges are mortals. They are placed in the role of determining lives of children when parents are unable to resolve issues for themselves. As soon as one parent places the issue of

custody or visitation before a court, both parents lose their right to direct, select, and determine the lives of their own children.

We place an awesome burden upon that judge to somehow sufficiently understand our lives and the lives of our children and determine who is right, who is wrong, and what is best. We believe that justice will prevail, yet justice for our children requires someone we have never met to understand the nuances of our lives and, when child custody determinations are involved, to assess, treat, and decide with the wisdom of Solomon, the ultimate expert.

Surely, no one could believe that anyone could ever judge these cases to our satisfaction. Surely, our fortitude and belief in the system cannot withstand huge error or continuing error. We revere the judge as Dorothy did the wizard. But judges are people. Cases begin with the creation of adversaries. The husband or wife filing a request to dissolve a marriage or resolve a custody issue becomes a plaintiff; the other party becomes a defendant. Virtually all family matters are resolved without a trial. Rare is the case where parents cannot ultimately figure out how to resolve family differences and create a circumstance in the best interest of their children. But it is this small percentage of cases about which I feel the most concern. It may be a small percentage, but a large number nevertheless, and so many children whose lives are touched.

The system requires a judge, once a lawyer, to take classes with other judges on family law. These are men and women who may never have practiced family law or ever taken a class in psychology. Still, they make interim decisions on where, with whom, and how children should live. Sometimes they do so without testimony of the parents, based only on written and opposing certifications, declarations, or affidavits, with or without arguments of counsel and with no regard for the quality or experience of the attorneys. In sum, a person who does not know the

family and who does not necessarily meet the parents can make virtually blind decisions based on the law and a few pages of writing by a virtual stranger, the lawyer the parent retains.

Since most people do not have dealings with lawyers, most of us do not know how to interview much less select someone competent. Then there are the financial constraints. I hate to sound entirely cynical. Certainly, judges care about making the best decisions for each family. But when I was a law clerk years ago, the county where I worked estimated that 2,000 cases touched a family court judge's desk in a year. How can they care so much or for so many? So, although most cases eventually settle amicably and without a trial, what happens beforehand will impact many young lives, as well as parents who find themselves unwittingly at the mercy of decisions made for them, decisions that they would have made differently if still in charge of their children.

I always believe that as a lawyer, I can change things, that I can right wrongs or help a case gone wrong go right, that I can help parents whose children are jeopardized by a violent or abusive parent.

I learned that working for change one case at a time, before one judge at a time, with thousands of other cases around is really no change at all because it touches too few lives, too infrequently.

I learned that protective parents are often seen as aggressive. These parents naively believe that the system will straighten out the life that they endured; that a judge will understand what they, the protective parent, did not understand while living the marriage. They believe that the judge will fix the circumstance that the protective parent could not fix: where they stayed and, in some cases, endured violence and allowed their children to endure it too.

Like Dorothy appearing before the wizard, I too was naive. Within the family court system, there are many fine resources upon which judges can rely to assist them in making decisions, including men and women with more expertise than the judge on the issues before them. Some are specially trained to mediate, arbitrate, assess, and present solutions. Often they come from teams of probation officers, child welfare workers, or children and youth workers. Parents believe these people will know and understand and help them to protect. These parents reach out and tell their stories to them. The parents ask for help and tell of threats to them and to their children. Too often the protective parent feels that the stories fall on deaf ears. And that is because these specially-trained people do not have the time to deal with the complexity of issues that parents cannot ultimately resolve themselves. They are not “traumatologists” or experts in abuse dynamics or the impact on children of “staying one more day” with a perpetrator, “one more day with a terrorist.” These specialists too are mortals, in a system where most cases settle. This is the system. This is family court justice.

What then of a case that will not settle?

You, as the attorney, may know the adversary parent cannot take “Yes” for an answer: every time your client meets their demands, the other party ups the ante; they change the demand, they want more, and your client eventually says “No.” She has lived with violence. Her children have lived it. But the children are aligning with their father against her. This woman’s whole life has been geared to raising these children. Now they are 6, 8, 10, and 13, and she fears that she is about to lose them.

She gave up her career but was forced by circumstances to take a mere job. She made beds and stayed up at night and helped her husband through *his* career. For everyone, she

balanced the calendar and the checkbook, trying to figure out where to borrow to pay the next mortgage payment since she bought camp clothes for the children.

There were sleepless nights and late-night dinners for her husband after she fed the kids and did their homework, took them to practice, gave them baths, and put them to sleep. She endured no sleep when the kids were sick. After all, her husband had to sleep so he could climb the career ladder. She made dinner, sewed buttons, and sweated through soccer and ballet. She stayed up late at night and begged her husband to come to a game. He seldom did. She urged the children to tell him how much they cared about his spending time with him. And they did care. And he now uses that against her. She begged her husband to spend moments of quality time with their children and he seldom did. She pleaded with him to help with a school project or to go to back to school night or to come to the doctor's office or participate in making any decision with her about the children which he refused to do.

He berated her in front of the children and, for their sake, she took it. He hit her and she stayed. And now, when her husband hit their son, she could not take it any more. So she left, believing the system would now help her. Instead, her husband now wants custody of the children and claims she is unfit. He says she is lying about the violence or at least about its impact. He accuses her of fighting and screaming a lot, which he claims made things worse. He says the kids want to be with him. He demands a custody hearing; she is scared and she is proud and she believes that justice will prevail and the judge will understand and maintain the status quo, with her as the parent in charge of their lives and her husband working and supporting the family and participating marginally in their lives as he has always done.

She goes to court and a judge sends the children to her husband for half the time. Ironically, she could never even get him to one of the kids' games. Now he gets to make decisions he would never even remotely discuss with her for the past 13 years.

Johnny is now in great distress, but she is not permitted to even choose a therapist for Johnny because her husband objects. She is hysterical and upset, and he is calm and demure. The judge sees her and worries about the kids; the judge sees him and knows he will be a good influence. The kids under her care were getting straight A's, and were thriving in after-school activities. She is about to lose her children and her world. But the judge knows best and gives him half time and looks at her askance because she seems hysterical and the judge thinks her husband is right, that she must be crazy.

She is hysterical because she has been abused and battered but the courts do not believe her; he has berated her, hit her, and called her names, all in front of the children, and it has hurt the kids. These experts, the judge and the court personnel who are supposed to know better, have failed.

Where can she turn? Her lawyer tells her the judge needs to maintain the status quo, but this is not the status quo and she is the one who knows it. Who is this stranger making this decision? The word *stranger* is apt indeed.

Jenn, it is this woman and her family I worry about. And it is that case that you too will worry about. It is that part of the system that fails children.

When children are failed, society is failed. Where a judge misreads the signals, assumes he knows the family dynamics, but is wrong or there is no expert who understands and can explain it, and as a result a child (possibly even an abused child) goes unprotected, it is not enough to say it is alright. Thus, I refer to the family court system as the world of Oz. A judge, a

mere mortal, sits in a *high chair*, changing lives. He or she is the ultimate expert in a room still filled with smoke.

We should revere the judge even as we recognize the frailties of the system. The judge is merely a man or woman doing a job with little training. We respond to the awesome power of the court as to the Wizard who is all knowing and smart. But when the whistles stop blowing and the dust clears away, there are too few resources and too many cases. The lawyer's job there is to educate, to help the judge become the Wizard.

The magic is dealing with each case as though it is unique, each child as important, each client with respect and concern. It means finding experts who know and who can be trusted to assist and to educate so the whistle will be soft, not shrill, and the smoke can clear.

Part of the lawyer's awesome responsibility is to counsel wisely. Sometimes that means advising a client to stay away from the system and not to take the risk of the judge doing it wrong. I have not given up my quest for justice. I listen and I urge you to listen too. Stay unafraid; do not become cynical, though that would be easy to do.

Jenn, I reflect back so often on your time working with me: on our daily trips to New York, on leaving early and coming home late after a continuing trial. We talked a blue streak, so often about whether or not you should consider law as a professional option.

We discussed the whys and wherefores and the fact that the law was as wide as your imagination. We discussed the difficulty of evidence issues, and hearsay problems and sometimes what appeared to be different treatment toward the attorneys by the judge. I explained potential appellate issues as they were raised and the importance of strong advocacy. I reminded you of my credo, taught by my law school professor: if you are not pushing contempt, you are

not properly advocating. On all those long conversations about the case and about the law, there is much I did not say then. I hope this letter helps fill some gaps.

I continue to believe that every child has the right to grow up in a safe environment and I ask you to work to try to correct these flaws, to try to find the magic to shift these scenes, clear the smoke, and transform the language, so that these mere mortals can see the wizard clearly and with one voice and one language we all can speak and trust. Then the judge can see clearly too and give all kids a real chance at having their best interests served by the family court.

Jenn, go get 'em!

Author Note

Author's Note: Ms. Kleinman's niece is graduating from Boston University School of Law in May 2004 and worked in Ms. Kleinman's law office as a para legal before attending law school.

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