

Family Law with Skills

Professors Schepard and DiFonzo

May 9, 2011

**Course Portfolio**

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Family Law with Skills  
Professors Shepard and DiFonzo  
March 11, 2011

### Family Court Observation Memo

On March 2, 2011, I observed a neglect hearing at Nassau County Family Court. Judge \_\_\_\_\_ presided over the hearing. This was not my first time observing a case in Judge \_\_\_\_\_ courtroom as I interned with Judge \_\_\_\_\_ this past summer. I was eager to return to his courtroom to observe a case in light of the family law knowledge that I have gained.

I remember walking into Nassau County Family Court for the first time in June. My first impression was that the building was in dire need of repair. It was in worse condition than I had expected. The hallways were crowded with people. There was not enough space in the waiting rooms. The courtrooms were not spacious either. Judge \_\_\_\_\_ courtroom consists of a single table in the middle of small room where the attorneys and the respondents appear before the Judge. There is children's artwork displayed on the walls, which creates a nice atmosphere. There are only a few seats in the back of the courtroom for people to observe the proceedings. During the summer there were times when there were not enough seats for everyone who came into the courtroom. I think that the lack of space in the courthouse only added to the frustration of the litigants. It was apparent to me that Nassau County Family Court building is in desperate need of an update.

As I sat in Judge \_\_\_\_\_ courtroom waiting for the hearing to begin, I took note of the interaction between the clients, the attorneys, and the court personnel. The attorneys and the court personnel spoke to each other in a friendly manner. The respondent mother quietly spoke with the Legal Aid attorney. The attorneys all seemed to know each other well. In fact, I recognized two of the attorneys from when I interned for Judge \_\_\_\_\_ during the summer. Clearly



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the family court consists of a fairly small community of attorneys and judges. The interactions were less formal compared to what I had observed in Nassau County Supreme Court. Although the atmosphere was a bit more relaxed, the attorneys still maintained a sense of professionalism.

The 1027 hearing in Judge L            courtroom began at 3 p.m. The hearing was scheduled for 2:30, but the Deputy County Attorney was prepping her witness. The purpose of the 1027 hearing was to determine whether the children would be in “imminent risk” if they were returned to their mother. Three children had been removed from the mother’s care because one of her children had sustained a serious injury, a fractured femur. The doctors claimed that the injury was inconsistent with the mother’s account of what happened. There were three attorneys at the hearing: the Deputy County Attorney (sitting on the left side of the table), the Legal Aid attorney (sitting in the middle of the table with the respondent mother), and the Attorney for the Child (sitting on the right side of the table). The attorneys were all wearing suits, while the respondent mother was wearing jeans and a leather jacket.

The caseworker from Child Protective Services (CPS) was finally ready to testify. She took her place at the witness stand while the Deputy County Attorney took the podium in order to begin her direct examination. The Deputy County Attorney began by asking the witness about her educational background and her employment at CPS. The caseworker testified that she had been notified of this case after a call came in through the State Central Registry. The caseworker was told by her supervisor to go see the child at the hospital. She testified that the mother told her that her two-year-old son fell from the top bunk bed while she was in the other room. When the mother woke up the next morning, she found her son in her bed. The boy fell when he tried to stand up. Thereafter, the mother took the child to the pediatrician because he would not stop crying. The caseworker testified that the doctors told her that the child’s injury was inconsistent

with the mother's story. According to the doctors, the boy would not have been able to sleep through the night and walk to his mother's bed with a fractured femur.

What struck me about the caseworker's testimony was that it mainly consisted of hearsay. Much of what she testified to was what the detectives and the doctors had told her. In addition, the witness did not always remember what these people told her. Judge        allowed the caseworker to refresh her recollection and look at her notes when she needed to. The Legal Aid attorney asked the Judge to instruct the witness not to look at her notes until the Judge let her do so. The defense attorney also made sure to object to leading questions. The Judge sustained many of the defense attorney's objections. The defense attorney seemed to be a competent attorney because she carefully listened to the Deputy County Attorney's line of questioning and objected when appropriate.

The caseworker also testified about the interview she conducted with the brother of the injured child. The Deputy County Attorney asked the caseworker if she established rapport with the child, and whether the child knew the difference between a truth and a lie. I thought that it was important to elicit this information because it might go to the child's credibility. The caseworker testified that the child did not know the difference between a truth and a lie. Furthermore, she stated that the child told her that he often watches his brother while his mother is busy. I wondered what the child meant by this statement. Was the mother busy because she was in another room or because she was not home to supervise the children?

Once the Deputy County Attorney completed her direct examination, Judge        decided to speak with counsel. The witness and the mother stepped out of the courtroom. The Judge told the attorneys that he thought that this was a good place to take a break as the defense attorney's cross-examination would most likely take a significant amount of time. The attorneys agreed that

it would be best to adjourn the case and pick up the next day. The mother returned to the courtroom, looking as stoic as ever. She seemed relieved when she heard that the case was going to be adjourned for the day. The proceeding appeared to be weighing very heavily on the mother. Although the allegations were neglect and lack of supervision, the facts of the case were only beginning to emerge. Judge            would have to piece together the story and ultimately make a decision as to whether the children would be in imminent risk of harm if they were returned to the mother.

I found my family court observation to be very interesting. Now that I have taken certain courses such as Evidence and Child Abuse and Neglect, I was able to follow what the Judge and the attorneys were saying. It was exciting to see the Rules of Evidence come alive each time the defense attorney made an objection. As I left the courtroom, I thought about how the Judge's decision would greatly impact the mother and her three children. Family law cases are not easy to handle, which is why I came away with a renewed appreciation for what family court judges and attorneys do every day.

## MEMORANDUM

To: F.H.F.  
Fr: t  
Da: February 23, 2011  
RE: Journal Assignment No. 1 – Allen Client Counseling

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Today I met with my senior partner, \_\_\_\_\_, to discuss our law firm's approach to the client counseling session. \_\_\_\_\_ shared many valuable insights about how to plan for the upcoming session with our client, Lynne Allen. I \_\_\_\_\_ suggested that the associates focus on the major elements of a matrimonial case, namely: (1) divorce grounds, (2) child custody, (3) child support, (4) maintenance, and (5) equitable distribution. I thought that this was an effective way to structure the counseling session and address the pertinent legal matters.

After some discussion, the associates in our firm decided that the counseling session would be more productive if we added a few elements and divided the interview into segments. Each associate will be responsible for discussing one segment with Lynne Allen. Our group did not want to feel pressured to get through all the issues during the client interview. My fellow associates thought that dividing up the interview would give each associate an opportunity to fully prepare his or her legal issue. We agreed on the following counseling session segments: (1) attorney introduction and client intake sheet, (2) legal process choices (negotiation, mediation, arbitration, collaborative law, and litigation), (3) client goals and divorce grounds, (4) custody and child support, (5) equitable distribution and maintenance, and (6) attorney fees and interview conclusion. I am responsible for handling the third segment, i.e. Lynne Allen's personal goals and the possible grounds for divorce in her case.

The number of issues that came up in the course of preparing for the client counseling session surprised me. I have come to see that a matrimonial attorney must research numerous

aspects of the case as well as be mindful of the attorney-client relationship. In order to be an effective advocate, an attorney needs to spend a substantial amount of time gathering the facts and understanding the case. This process may require even more time than one might expect due to the complex nature of the issues. Thus, the most difficult aspect of this exercise was finding a way to cover all of the issues in a single client counseling session. In my view, our law firm came up with an effective way to manage the client counseling session by dividing the session into separate segments. My colleagues did not seem to have any trouble identifying the main issues or understanding the facts of the case. The real challenge was figuring out how to logically organize the counseling session so that it would fit the constraints of the exercise.

I think that I adequately prepared for this exercise. I read all of the material in the Allen case file. In addition, I made an outline of the important legal issues in a matrimonial action and listed the salient facts of the Allen case. I started to connect the substantive legal issues with the facts of the case. I also thought about how to approach the case strategically. Finally, I reviewed my class notes in an effort to be as prepared as possible for the meeting with the senior partner.

I enjoyed this exercise because it gave me an opportunity to start applying matrimonial concepts and it put me in contact with a practicing attorney. \_\_\_\_\_ gave me a good sense of what she does once she is retained in a matrimonial case. She made me realize that in practice attorneys need to consider the substantive issues as well as other issues related to the case, such as attorneys' fees and ethical obligations. This exercise might be improved by providing the senior partner with further clarification about the nature of the exercise.

Nevertheless, \_\_\_\_\_'s involvement with the exercise put the legal issues in perspective and made the Allen case come to life. I appreciate the fact that \_\_\_\_\_ / listened to all the members of our group, and I am looking forward to working with her this semester.

## Client Counseling Evaluation Sheet

### TO BE COMPLETED BY STUDENT ATTORNEYS:

Supervisor/  
Professor: \_\_\_\_\_

Student Attorney: \_\_\_\_\_

Client: Lynne Allen \_\_\_\_\_

#### PORTRAYAL OF CLIENT

Appeared to be well prepared as client

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
unsatisfactory	satisfactory	excellent	

Acted appropriately & effectively

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
unsatisfactory	satisfactory	excellent	

Where applicable to your assigned portion of the interview, please rate yourself in the relevant categories by using a scale from one to five points for each category:

- 5 = outstanding;
- 4 = very good;
- 3 = good;
- 2 = fair;
- 1 = needs work; or
- n/a = not applicable

**NOTE:** Please provide further explanation to your answers on the comment space.

#### CLIENT COUNSELING SESSION

##### Opening and Updating:

- 5 Greeted client appropriately
- N/A Confirmed facts from last meeting
- 4 Requested any new information

##### Comments:

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##### Assessing the Client's Legal Position:

- 5 Clearly identified the legal issues
- 5 Clearly prioritized the client's interests and needs
- 4 Concise review and update/summary of client facts
- 4 Provided an objective and well reasoned summary
- 5 Appropriately recognized and responded to the non-legal facets of the client's case

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**Discussing Options:**

- 5\_ Provided sufficient information to enable client to make decisions effectively \_\_\_\_\_
- 4\_ Explained all the different legal process choices (e.g., negotiation, mediation, litigation, etc.) \_\_\_\_\_
- 5\_ Used language the client could understand \_\_\_\_\_
- 4\_ Drew connections between the client's goals and preferences and the applicable legal process choices \_\_\_\_\_
- 4\_ Informed client of the risks and benefits \_\_\_\_\_
- 4\_ Listened to, received and properly answered all of the client's questions \_\_\_\_\_

**Making Predictions:**

- 4\_ Took account of various factors \_\_\_\_\_
- 4\_ Made a complete statement of legal assessment \_\_\_\_\_
- 5\_ Sound description and evaluation of most probable options \_\_\_\_\_
- 4\_ Sound statement of prediction as to the likelihood of success as to each option \_\_\_\_\_
- 5\_ Accurately described what success means \_\_\_\_\_
- 5\_ Alerted client to reasons for vague predictions \_\_\_\_\_
- 5\_ Provided reasonably definite information, e.g., ranked options \_\_\_\_\_
- 5\_ Explained factors underlying predictions \_\_\_\_\_

**Assisting the Client in Making Decisions:**

- 5\_ Respected the client's decision making authority \_\_\_\_\_
- 5\_ Matched goals and options \_\_\_\_\_
- 5\_ Advised client appropriately \_\_\_\_\_
- 4\_ Explained where no legal basis for a claim existed and if a certain option could not be exercised \_\_\_\_\_
- 4\_ Summarized the client's legal options in order of the client's priority \_\_\_\_\_
- 4\_ Reframed the risks and benefits of the client's choices, where necessary \_\_\_\_\_
- 4\_ Combined options, if appropriate \_\_\_\_\_

**Effective Handling of the Client's Challenge:**

- 5\_ Recognized and understood this challenge \_\_\_\_\_
- 5\_ Acted ethically and effectively \_\_\_\_\_

**Closing the Session:**

- 5\_ Explained what lawyer will do next \_\_\_\_\_
- 4\_ Stated when lawyer will next contact client \_\_\_\_\_
- 5\_ Stated what client will do next, as appropriate \_\_\_\_\_
- 4\_ Provided appropriate reassurance \_\_\_\_\_



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**Professionalism:**

- 5\_ Confident
- 5\_ Respectful
- 5\_ Articulate
- 5\_ Organized
- 4\_ Knowledgeable
- 5\_ Proper attire

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**COMMENTS:** Please describe what worked for you and what did not work for you during this exercise. Also, describe the feedback that you received during this exercise and discuss whether or not you agree or disagree, including in your answer a detailed explanation as to why.

I felt that I was prepared to answer Lynne Allen's questions. I began by asking Lynne what her goals are and what she wants to get out of the experience. Maintaining eye contact and actively listening to the client really helped the conversation move along.

Overall, the discussion unfolded smoothly. Lynne had a lot of questions about the different grounds for divorce. I tried to answer all of her questions to the best of my ability. However, there were times when Lynne did not seem satisfied with my response. At some points, I found myself being unable to give her the definite answers that she was looking for.

During the exercise, Lynne often interrupted me or did not let me finish my sentence. I was not always able to stick to the agenda that I had prepared for the counseling session. Nevertheless, I took this as an opportunity to adapt to Lynne's needs. I listened to her emotional concerns and candidly presented her options. I also tried to stay away from legalese and legal labels such as "custody" in order to get at the heart of what Lynne wants.

My senior partner told me that I did a good job. She was pleased that I explained to Lynne that sole custody meant that her husband would still have parenting time. My senior partner emphasized the importance of going over the pros and cons of every option, even if an option seems favorable to the client. I agree with my senior partner suggestion because clients cannot make informed decisions unless they know about all their options. My senior partner provided constructive feedback about our group's performance, which helped me better understand the nuances of client counseling.

## MEMORANDUM

To: FILE

Fr:

Da: March 6, 2011

RE: Journal Assignment No. 2 – Allen Client Counseling

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During the counseling session, I had the opportunity to play the attorney as well as the client. As the attorney, I only had fifteen minutes to listen to Lynne Allen's goals and to explain to her the grounds for divorce in New York. Fifteen minutes was barely enough time to cover my topic and address all of Lynne's concerns. Lynne had many questions about the different grounds for divorce, including New York's new no-fault divorce provision. She also wanted to know if it made a difference whether she filed for divorce first or her husband filed first. I told her that it did not really matter, however filing the action essentially "started the clock." Therefore, I told her that she should be reasonably sure that she would not reconcile with her husband before she files. After explaining the different divorce grounds, I told Lynne to take some time to think about everything. I sensed that Lynne appreciated it when I said that I would try my best to get her what she wants within the context of what was realistically possible.

The most difficult aspect of the counseling session was not being able to provide Lynne with concrete answers. I gave her the legal advice that I could, but she did not seem to be completely satisfied with my responses. I recognized the source of her frustration, but I wanted to ensure that Lynne understood that often times there are no easy answers when it comes to divorce. All I could do was give her my honest opinion and present all the possible options. I made sure to mention the option of custody mediation even if she decided to litigate. In addition, I felt that it was challenging to keep up with what the client wanted to discuss. Although I had an outline prepared, the client wanted to discuss issues in the order that she wanted. Therefore, I needed to adapt to the client's requests while still trying to be sensitive to her needs.



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When I played the part of Lynne, I found myself feeling rather overwhelmed. The attorney was discussing emotional issues with me such as child custody and visitation. There were times when I thought that the attorney spoke too much about the law. I felt that the attorney needed to bring the issues down to earth so to speak. Although the attorney explained to me that the court takes various factors into account when deciding custody, I felt that I did not have a good sense of what was going to happen. The experience of playing the client made me realize that the attorney should be mindful not to talk down to the client. The client should be included in the decision-making process whenever possible, and the client should be viewed as the attorney's counterpart.

I enjoyed playing the part of the client because it allowed me to see the case from another perspective. As the client, the issues suddenly became much more personal. I came to see that therapy could play a critical role in the client's life during the divorce process. The attorney should remind the client that therapy is a healthy way to deal with emotions that may arise during the divorce process. Playing Lynne Allen allowed me to better understand the emotional issues that clients experience during divorce. Moving forward, I will try to keep the client's perspective in mind as much as possible.

## MEMORANDUM

**To:** FILE

**Fr:**

**Da:** November 20, 2009

**RE:** Journal Assignment No. 3 – Allen Mediation

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I thought that the mediation exercise was extremely valuable. I was able to see how attorneys and clients work together to come up with practical solutions. I liked the fact that the parties had control over the process as they are in the best position to determine the outcome. There were times, however, when the client's emotions overtook the mediation session. When my client, Lynne Allen, became overwhelmed I had to step in and take her aside. I tried to calm her down and help her better understand the situation. As the attorney, it was challenging to advocate for my client as well as appeal to the other side. Nevertheless, I think that the mediation process is effective because it allows attorneys to directly communicate with the parties and facilitate a positive resolution.

During the mediation exercise, I was surprised by how little the mediator was involved in the process. I know that a transformative mediator is not supposed to push the parties to a solution. However, I expected the mediator to do more than clarify and reframe the clients' statements. The mediator in my session let the parties speak to each other and stayed out the conversation as much as possible. When the issue of Norma came up, the mediator spoke to each client separately in order to calm the situation. I thought that the mediator made an important contribution to the discussion when she identified the fact that David Allen was looking for some sort of consensus as the end of the session. The mediator reflected the fact that David needed some sort of resolution in order to feel that the session was worthwhile. The parties were able to agree on the

childcare arrangements during the school year. They decided that the children would be involved in extracurricular activities since both David and Lynne would be working after school hours. Although this was not a major resolution, the fact that the parties were able to agree on something was encouraging.

The aspect of the mediation exercise that I found most difficult was allowing the client to speak without first consulting with the attorney. As the attorney, I wanted to protect my client and advocate for her. During the mediation, I needed to step back a bit and let Lynne express herself. Although Lynne and I prepared for the mediation session, there were times when she made statements that we had not previously discussed. It was not easy to represent my client and let the client lead the process at the same time. The difficulty in mediation is that the attorney cannot approach the session with an adversarial mindset. I think that I still need to learn how to shift my perspective so that I am less adversarial during a mediation session.

I found it less difficult to clarify statements for the parties. During the mediation, David Allen suggested that Norma watch the children after school. My client, Lynne, did not approve of this idea. At first, Lynne did not understand why David was refusing to hire an outside caregiver. I was able to explain to Lynne how David felt. I told her that he wanted Norma to watch the children because it was a cost effective solution. I also explained to David why my client had an emotional reaction to his proposal. I told him that Lynne feared that Norma would replace her as the children's mother. I thought that I was able to adequately identify and clarify each side's position, which enabled the parties to better understand the other perspective.



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My view of mediation is that it can be an effective dispute resolution process as long as the parties are willing to commit to the process. Certain issues such as child custody may be well suited for mediation since the divorcing couple, rather than a judge, can decide what is best for their children. Mediation may also engender less hostility between the parties compared to litigation. Although mediation has many advantages, I believe that there are some cases that should not be referred to mediation. If there is a power imbalance or domestic violence has occurred, mediation may not be the best option for the parties. If one parent feels unable to express himself or herself during the mediation process, then the case is better suited for litigation.

I found this assignment to be very helpful. It gave me greater insight into what mediation involves. I appreciated the fact that I was able to take a hands-on approach and counsel my client through a mediation session. The only issue I encountered was that I felt somewhat unsure of my role as the attorney. It was not always clear to me when it was appropriate to step in. I did not want to hinder the transformative mediation process by not letting the clients be at the forefront of the session. It would be helpful if the students were given more guidance in terms of their role as the attorney in the mediation session.



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### Alternate Assignment: Shadowing An Attorney for the Child

I spent a day shadowing an attorney named \_\_\_\_\_ graduated from Hofstra Law School. She currently works at Lawyers for Children in Manhattan. As an attorney for the child, \_\_\_\_\_ represents youth in child abuse and neglect cases as well as custody and visitation proceedings.

On the day that I met \_\_\_\_\_, she was scheduled to appear in court. She was filling in for another attorney whose client is a 3-year-old girl named \_\_\_\_\_ told me that \_\_\_\_\_ had been placed in foster care one week after she was born with a positive toxicology for cocaine. Initially \_\_\_\_\_ was placed in a non-kinship foster home, but she was eventually transferred to the kinship foster home of her maternal aunt. The court had entered a finding of abandonment against \_\_\_\_\_ mother and freed \_\_\_\_\_ for adoption. Today \_\_\_\_\_ was going to be adopted by her aunt.

\_\_\_\_\_ showed me a letter that \_\_\_\_\_ attorney had written to the Judge expressing her support for the adoption. The attorney wrote that the aunt's home was a suitable place for \_\_\_\_\_ per the social worker's report. The social worker had conducted a number of home visits at the aunt's residence. The attorney also stated that \_\_\_\_\_ aunt was the most appropriate person to adopt \_\_\_\_\_ as she is the only mother that \_\_\_\_\_ has ever known.

I was eager to meet \_\_\_\_\_ and her aunt at Manhattan Family Court. The social worker involved in the case came to the courthouse as well. I saw \_\_\_\_\_ and her aunt in the waiting room. \_\_\_\_\_ went over a few details with the aunt before we entered the



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courtroom. The aunt said that she was delighted that this day had finally arrived. She was grateful that [redacted] was going to have a sense of permanency. Personally, I felt very lucky to be witnessing such a special moment in this child's life.

[redacted] case was called. The parties stated their names and affiliations on the record. The court officer confirmed the aunt's signature on a number of documents and asked the aunt if she had a chance to review all of the documents with her attorney. Judge [redacted] asked [redacted] her opinion regarding the adoption. [redacted] said that she fully supported adoption, and felt that the adoption was in the best interest of the child. The Judge seemed to take [redacted] words seriously. Then Judge [redacted] asked [redacted] how old she was and whether there was anything she wanted to say. [redacted] took hold of the microphone and proudly told the Judge that she was three years old. After that, Judge [redacted] announced that the adoption was approved and that it was final today.

The entire proceeding did not take much time. I had expected the process to go on for longer. I understood, however, that this was the last phase in a case that had gone on for years. As we left the courtroom, [redacted] told me that I had just observed one of the happier cases in family court. Many of the cases that she handles in family court are quite heartbreaking. Yet this had been a positive day for [redacted] and her family. [redacted] said that she hoped to take part in more cases like this in the future.

After the adoption proceeding, [redacted] and I observed a case in another courtroom. The attorney for the Administration for Children's Services (ACS) contended that two children should be removed from their home. The Judge, [redacted], denied the attorney's request to remove the children. He said that there was not enough evidence to establish that the children were in "imminent risk of harm." Judge [redacted] told the

attorney that he would not order the removal of the children unless he felt confident that this standard had been met.

Following the case, the Judge asked me why I was sitting in his courtroom. I told him that I was shadowing an attorney for the child, and that I was interested in pursuing a career in family law. Judge [redacted] then proceeded to tell me about some of the difficulties associated with practicing family law. He explained that many of the cases in family court are very emotional, and that many attorneys get burnt out from handling these cases. He told me that if I was going to practice family law, I needed to learn how to be an effective advocate without internalizing the cases. Judge [redacted] also pointed out that most of the individuals who come before him are not bad people. Rather, they are individuals who are struggling to find their way. He told me to remember that the family court system is not perfect and that no family is perfect. I appreciated the fact that the Judge took time out of his busy day to share his views with me. I will be sure to bear in mind what he said as I continue to learn more about family law.

Overall, I had a fantastic experience shadowing [redacted] enjoyed observing the adoption and speaking with Judge [redacted]. I am glad that I had the opportunity to go to Manhattan Family Court and see the kinds of cases that an attorney for the child handles on a daily basis. Before I left, I told [redacted] that I would be seeing her again this summer, as I will be interning at Lawyers for Children. I am looking forward to learning more in the next few months. So far I have come to see that the attorney for the child serves an important function in family law matters. Without an attorney for the child, the child's voice is not heard in these cases. I hope that one day I will be able to be an attorney for the child, and serve as a legal advocate for children in need.

## MEMORANDUM

TO:

FROM:

RE: Mary and Peter Yarrow; Surrogacy Agreement

DATE: March 30th, 2011

### 1. LANGUAGE MODIFICATIONS

#### ISSUE #1:

Paragraph 1 of Warranties: This wording in this paragraph might be problematic because it may not allow the Parents to tell the baby about her conception since she is not a "party" to the action, should they choose to do so. Conversely, it assumes that the Surrogate and her husband will not be able to contact the baby. These risks and terms should be expressed to the Parents to make sure that this is what they want. Furthermore, the confidentiality terms must be in line with Texas adoption confidentiality rules as that is what the statute requires, otherwise the Agreement could be held invalid.

#### ISSUE #2

Paragraph 2 of Warranties: This language in this paragraph requires that the Parents be married at the time of the agreement. This is in line with the Texas Family Code. However, the language of the contract, nor the statute, addresses what the consequences might be in the event of the Parents' divorce or death of either the Genetic father or Genetic mother, or both of the Parents, during the Surrogate's pregnancy. This language needs to be written clearly to anticipate such circumstances so that we know what will happen to the pregnancy and baby should one of these events occur. If we fail to leave it out, the Agreement might be held invalid if such an event occurred.



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## ISSUE #5

Paragraph 11 of the Agreement: This paragraph might be problematic because it requires the Surrogate to assume all risks, while the Texas Family Code specifies that in order for a surrogacy agreement to be valid, it may not limit the right of the Surrogate to protect her health or the health of the embryo. Therefore, the language could be more specific, allocating the Surrogate's rights according to the code, in order to prevent an argument of invalidity.

## ISSUE # 6

Paragraph 14 of the Agreement: The boilerplate language may be problematic. The language expresses that if any part of the Agreement is void, the rest may still be enforceable. Instead, we should make our provisions specific enough to ensure that we have all risks allocated adequately, without requiring this boilerplate language. This would allow the court to consider the effect that a void section of the contract would have on the other provisions of the contract before making a determination about whether the remaining terms should stand. (However, some of the members of our group thought this portion should be included as it is standard in most contracts).

## ISSUE # 7

Paragraph 5 under the Agreement: The language in this section should more precisely explain that the Surrogate will relinquish all rights, rather than that she "intends" to relinquish all rights. This way there is no basis for a "change of heart" argument.

## II. OMISSIONS

### 1. Additional Provisions:

The Agreement does not include a termination clause. Pursuant to Section 160.759 of the Texas Family Code, before the Surrogate becomes pregnant, all parties

(including the Surrogate, the Surrogate's husband and both Parents) shall have rights to terminate the Agreement. Furthermore, the Surrogate will not be liable to the Parents for a breach of contract, so long as she terminates in accordance with the statute. Also, the Agreement does not specify who will be liable for health costs associated with the pregnancy, should it be terminated. This code requires this.

The Agreement also does not include a provision about an exchange of health information throughout the pregnancy. This is required by Section 160.754(a)(4).

Additionally, the Agreement does not say anything about the possible testing of genetic defects or consequential abortion in the event of genetic defects. Although the code allows the Surrogate to protect the health of the embryo, a developing baby is no longer an embryo after eight weeks. Thus, the Agreement must specify who has the rights to terminate the pregnancy beyond this point, and who has what obligations should one party resist a request for termination of the pregnancy.

The Agreement should describe the statute's requirements regarding the parties' residency. The code requires all parties to be in Texas 90 days before the Agreement is signed. Also, the Agreement should anticipate circumstances of whether the Surrogate is allowed to leave the state during her pregnancy. The Parents should consider requiring a clause which mandates the Surrogate to stay in the state during her pregnancy so that the chosen hospital will be guaranteed as the birthplace.

Although the Agreement requires the Surrogate to abide by the health recommendations of the Medical Center, the Agreement should enumerate any reasonable health or lifestyle choices that the Parents would prefer the surrogate to follow during her pregnancy. For example, if the Parents are vegetarians and wish for their child to also be raised as a vegetarian, a provision requiring the Surrogate to eat

only vegetables during the pregnancy would be important. This may present some constitutional issues, such as limiting the Surrogate's freedoms to do as she wishes with her own body (i.e. Her liberty interest). However, this is an Agreement between two private parties in which one party is allowing the other party to "rent" her womb. Therefore, such restrictions, so long as reasonable, may be allowed.

The Agreement should have a choice of law provisions, which specifies that all disputes will be settled under Texas Family Law.

### III. RECCOMENDATIONS:

The Parents should not sign the Agreement unless all changes have been made or at least explained to them, and they accept the risks inherent in the Agreement. Furthermore, this Agreement should be signed in the offices of an attorney, after thorough review and explanation to all parties of the terms. It is also recommended that the Surrogate and Surrogate's husband have an attorney present as a safeguard to any disputes of informed consent.



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