

























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



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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.

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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Family Law with Skills  
Professors Schepard and DiFonzo

### 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 \_\_\_\_\_ 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 \_\_\_\_\_ 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 \_\_\_\_\_ enjoyed observing the adoption and speaking with Judge \_\_\_\_\_ . 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 \_\_\_\_\_ 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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