



Association of Family and Conciliation Courts WISCONSIN CHAPTER NEWSLETTER

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A Word From the President

AFCC Wisconsin is an inclusive community of interdisciplinary professionals dedicated to improving the family court system and its outcomes for children and their families.

Welcome to the new year. I wish I could say new beginnings; however, 2021 is looking eerily familiar to 2020. While we may be starting to glimpse the light at the end of the tunnel, we remain in this holding pattern. At the start, the haze of uncertainty created a completely different world from what we all had been used to. Over the last year, the collective heaviness of life combine with our work likely made it more challenging for us to stay grounded and managing our own needs. Needs that in the past were often met by our connection to others who can share the knowledge of what it means to be in the trenches. This is why many of you choose to be a part of AFCC-WI.

Now, as we wait this out, even with more knowledge in our pockets, uncertainty of the future still plagues us. We are questioning what our new normal will look like and when we might actually get to the new normal. And the overarching theme, what will the long term impact be on the families we serve and how will this shape the work to come.

While I mourn the lost moments from last year (I was so looking forward to Vegas), I believe some of the things we've discovered will actually help us in the long run (who knew zoom home visits could be so valuable). We will continue to adjust as we navigate through the continuous shifts we had not planned. My hope is AFCC-WI will be part of your journey to resettling the ground beneath you. I am optimistic this year we will be able to host our program in September in-person. I anticipate AFCC-WI will honor our safety while bringing you opportunities to expand your knowledge and most importantly, the much needed connection with each other over the passion we feel for this work.

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Conference Corner

Please note that the AFCC-WI Fall educational event has been cancelled because of COVID19.

AFCC NEWS:

Please read notices from AFCC with regard to webinars and other events because of the fluid nature of planning these days.

Be sure to read News about Members for member Attorney Gregg Herman's new edition of his superb book on settlement negotiations.

Quote of the Month: "No rational argument will have a rational effect on a man who does not want to adopt a rational attitude." Karl Popper

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WIPCOD HAS SENT NOTICES OF ITS SPRING 2020 CONFERENCE, WHICH IS PLANNED TO BE VIRTUAL.

KATHLEEN MCNAMARA, PHD
presenting in the morning
and
BILL EDDY, LCSW, JD
presenting in the afternoon

APRIL 29 AND 30, 2021

In this issue of our newsletter, Sue Hansen has submitted a timely article reflecting changes because of COVID-19 in her mediation practice. Thank you, Sue. We again appeal to members to write brief articles for the next edition of the newsletter. We know that there are some very bright people in our organization who have been to special programs, read useful books or have had enlightening experiences to share with the other professionals in our organization. Please answer the call and submit to kenneth.waldron13@gmail.com.

We also have as a goal to continue to build an AFCC-WI community by sharing information about the jurisdictions around the state. Not only might you write about something that you have done, or a program in your community, but writing about others who are providing innovative approaches would be interesting and helpful to others. Perhaps one of the judges in your jurisdiction is taking innovative approaches to help our clientele.

Absent other submissions, I have written an article that I hope helpful. This is another view of the more troubling cases with which we deal: the high conflict divorce with children.

As we slowly climb out of the COVID hole in our work and home lives this year, we all owe a big thank you to the scientists around the world who have accomplished nothing short of a miracle. First, those scientists ignored the political divides and were actively in touch with and giving information to one another across national boundaries to speed the development of vaccines, ignoring any political divides and rhetoric. Second, they developed vaccines in record time. The prior record was with measles – four years. COVID – less than one year. Five years ago, who would have guessed that scientists could construct RNA and inject it to tell cells what proteins to make to stimulate

an immune system response. The future of medicine is molecular biology and the possibilities are staggering. When you read this, take a moment to applaud the men and women who have worked overtime in labs around the world for the good of mankind.

Are People Rational?

Ken Waldron

Karl Popper is a modern philosopher, with a major focus on science, who is well worth reading. His is the quote of the month but almost every sentence in his works is quotable. When I read the quote above, I was reminded of the gap between us professionals and many of our clients, parties struggling with post-separation challenges. The professionals involved with these clients often make rational arguments, particularly about the effects of destructive conflict on their children, to no avail with some clients. Our explanations for this gap often involve accusing parties of having mental health difficulties, particularly personality disorders or at least personality problems. Karl Popper explains the problem as some people who do not want to adopt rational attitudes. When we are involved with amicable parties, which come to attorneys, mediators and counselors, but rarely appear in litigation disputes, we find it so refreshing as they listen to and adopt our rational arguments. In a joint group of mental health professionals and divorce attorneys that used to gather for lunch many years ago in Madison, one discussion involved an attorney's question, the substance of which was: "We see people headed down a path of self-destruction and nothing we do seems to stop them. What is going on." The attorney was hoping for an explanation from one of the mental health professionals. Alas, we had little to offer by way of an answer.

Since then, I and my dear friend, divorce attorney Allan Koritzinsky, became involved in addressing divorce conflict from the perspective of Game Theory, a branch of mathematics that studies how and why people make the choices that they make. The assumption that sticks in the craw of many readers of Game Theory is that Game Theory principles and mathematics only work if people are rational. In Game Theory, rational is defined as: people will make choices that have the highest expected utility (i.e., payoff). In other words, people might or might not get the payoff that they hope for, but they choose behaviors that they believe give them their best shot at that payoff. The other side of this assumption is that Game Theory would not apply to people who are irrational. Bernie Meyer, one of the reviewers of our book, *Game Theory and the Transformation of Family Law*, heaped praise on the book, but added the caveat, "but not all people are rational." Many of you know that Bernie Meyer is an expert on conflict and in one of his books even included a chapter on Game Theory. You might also know that in Gregg Herman's comprehensive book on settlement negotiation, he too includes a chapter on Game Theory.

The problem with the assertion that some people are not rational is that observers might simply not understand the expected utility for which people are playing. As a result, rational people might appear to be irrational only because the observer thinks that the person is not playing for what should be the expected utility. For example, a professional might think that a party should be playing to make their children's lives better. Pleading with the parent to consider the effects of the conflict on the children should lead to change, but does not. This brings us to 50 years of research on Game Theory, much of which has been an attempt to answer the question: are people rational? I could go into great detail on that research and give numerous examples, but the upshot is that people are rational, but the expected utility at play is not necessarily obvious. This is particularly true when examining the subjective payoffs at play. Everything has both an objective payoff value, which can usually be obvious, and also a subjective payoff value, that is obvious at times but not obvious at others. A simple example is \$50. The objective value is obvious: \$50. The

subjective value varies: it is a lot of money to a homeless person, who might go out of their way for that money. \$50 is almost meaningless to a uber-wealthy person who might not even stop on the street to pick it up.

The lesson is not to be too quick to assume that a party is irrational, but rather to look more closely for subjective expected utility that explains the behavior pattern. When Ken and Allan began to apply this to their work with real cases, we found that we could turn around many of those on self-destructive paths and find solutions to problems that prior to that seemed to have no solution. We did this by spending time learning the subjective expected utility at play for the parties. For example, in one case, the man was playing for maintaining power over his ex-wife as he pursued a relationship with the woman with whom he was having an affair and his other interests, which had little to do with his children. Understanding this, we were able to redirect the negotiations to appear to satisfy that goal, while freeing the woman and their children from his grasp.

This is no panacea because Ken and Allan also discovered that the expected utility for some people had nothing to do with easing pain and frustration for themselves and others. In one case, we settled a dispute in what appeared to be a dispute with no solution, only later to find out that one of the parties ignored the agreement, playing for the payoff of getting what they wanted by breaking rules. This was extremely disruptive for the other party and for the children, but the expected payoff of getting to do what she wanted mattered more to her. Unfortunately, getting what you want by breaking rules sometimes works.

However, this approach, looking for the subjective expected utility of choices, has paid off in a large number of cases for us, and for others who have read our books. In other words, even many of our clients who initially appear to be irrational, might be rational if we understand their expected utility. This is something to think about. By understanding the expected utility at play, we can make interventions that work. When facing what appears to be impasse in a case, it might be worth sitting back and wondering what the expected utility at play is, or at least thinking about how to find that out.

Online Mediation: Pandemic Pivot and Beyond

By
Susan A. Hansen

Online Mediation: Pandemic Pivot and Beyond

My practice is focused on family law mediation with self-represented parties (SRP). A year ago, online mediation was a rarity in Wisconsin. I was one of the mediators who thought in-person meetings were essential to effectively mediate with couples. Then came COVID-19.

I had to quickly decide whether a pandemic pivot was possible. Within two weeks (and with help from Paul Stenzel in our office), I shifted my mediation practice exclusively to Zoom. ShareFile, a software program for document sharing and electronic signing, became an integral part of my mediation process. With the Supreme Court Rule permitting lawyer mediators to draft, register, and eFile, all case processing occurred electronically.

There were numerous bumps and a steep learning curve as I learned about meeting security, screen sharing, breakout rooms, and other Zoom features. Despite occasional hiccups and the challenges of seeing myself constantly onscreen, Zoom has become my entire practice.

While I miss the nuances and connection that comes with in-person meetings, I have found Zoom, with proper preparation, structure, and time limitations, to be surprisingly effective. The parties, either on separate screens or together, tend to be very focused during online meetings. They also appreciate the efficiency of meeting without the drivetime, missed work, and childcare required for in-person meetings. I work in an interdisciplinary process, and joint meetings with child/family specialists and financial neutrals are easily integrated into the online format.

We know the pandemic has triggered an increase in domestic abuse for some couples. For others, it has prompted more communication and increased faith in their ability to reach mutual agreements about their family and their finances. Online mediation can be a positive option for couples to consider, especially for those contemplating proceeding pro se.

SRP numbers continue to rise—estimates in various counties range from 60%-80%. As fewer parties choose to retain or can afford lawyers, mediation is a bridge between do-it-yourself and a two-lawyer process. While competent safety screening and process design are essential, SRP mediation supports increased access to justice by providing legal education and guidance for many couples to help them navigate the court process at a reasonable cost. Online mediation increases the ease of access and reduces the geographic challenges for couples who might otherwise proceed pro se.

While the growth of online mediation was spurred by the pandemic, I believe it will remain a significant part of the future of family law. Hopefully, more professionals will get training and experience to meet this growing need. Increased professional support and access for SRPs will benefit families, professionals, and the courts.

Susan A. Hansen is a partner at Hansen & Hildebrand S.C. and co-founder of Family Mediation Center (a reduced cost mediation service for Self-Represented Parties).

Other news about members:

The American Bar Association Family Law Section has now published a second edition of “Settlement Negotiation Techniques in Family Law: A Guide to Improved Tactics and Resolution” by Attorney Gregg Herman.

The book provides practical advice and information on successfully negotiating family law matters, including preparing a client for settlement negotiations, handling emotions, mediation, positional negotiations and much more.

The second edition adds chapters on settlement research, gender issues and domestic violence as well as an expanded look at the application of game theory principles to divorce negotiations (with the assistance of Ken Waldron).

Gregg Herman is a family law attorney with Loeb & Herman, based in Milwaukee, Wisconsin. He is a former chair of the family law section for the Milwaukee, Wisconsin and American Bar Associations. He is also a certified family law and divorce mediator.

Ken Waldron and **Allan Koritzinsky** have been focusing game theory thinking on divorce conflict and have been writing booklets addressing this tough area of our practices. **They have just published a series of booklets focusing specifically on the application of Game Theory to Mediation.** The booklets are available for free on our blog site: www.thedivorcedoctor.net/booklets. There are also blogs for parties at that site. There are no costs for these materials and no advertising.

Request for Submissions

The list-serve continues to be an active forum for ideas, discussions, and referrals. If you are not part of the list serve, AFCCWI@googlegroups.com, contact Kip Zirkel and he will make sure that you are included. Unlike some professional list-serves, our list-serve is perfect—not overwhelming or too silly, but active and interesting! Thank you to all of you that have participated, and let's keep the discussions going!

With your involvement, the Wisconsin Chapter can be the community that, together, can make a difference for children and their families. Please be active in the growing Chapter's activities above and help improve the family court system and its outcomes for children and their families.

We want the Newsletter to represent all professional interests and all areas of the State. Please Submit comments, opinions, or articles for future issues by sending them to Kenneth H. Waldron, Ph.D. at kenneth.waldron13@gmail.com

Please submit information about your personal publications, presentations, involvements in programs, and even personal information about activities separate from family law work – anything that you think might be of interests to other AFCC-WI Members.

As always, we are interested in expanding the reach and the scope of our Association. Feel free to share the Newsletter with colleagues and others whom you feel might be interested in joining AFCC and the Wisconsin Chapter.