Family Law's "New Normal"

A. Holland Houston

Where do we go from here? Now that all of the children are growing up? How do we spend our time? Knowing nobody gives us a damn.

By the time this went to print, and you read it, my hope was we would all be back to court trying to outwit each other as we are paid to do. Alas, my hopes were dashed faster than you can say "2021? I can't get a hearing on this until 2021?" when I received yet another court closure notice, this one through May 31, 2020.

The new normal is upon us, as if there ever were any normalcy to donning a suit in the morning and rushing to argue the most intimate and safe guarded details of people's lives—their kids and their money. Is the real difference now that we're doing it in our kitchens and living rooms with better coffee sans suits? Or is this a harbinger of technology replacing in person court appearances altogether?

Family law has been disrupted, to be sure. Both the process and the assumption that the nuclear family is the average family structure has eroded slowly over the last half century. A quick look at social trends according to the Pew Institute yields these nuggets:

- Approximately 1/3 of children in the U.S. live with an unmarried parent.
- More people aged 18-44 have lived with a significant other than have ever married.
- Marriage rates among 18-year-olds and older are between 48 percent (2020) and 53 percent (2019).

Additionally, according to the most recent statistics Pew cites about cohabitation and non-nuclear family structures, Americans' acceptance of gay marriage, single parenting and cohabitation is on the rise.

Dig a little deeper and it gets increasingly interesting (but not surprising for those of us who have been "home cooked" out in the counties with a "nontraditional" case) the openness of your attitude toward the new structures is in direct proportion to the area in which you live within a state. The more urban the area in which you live, for example, the more likely you are to be in a "non-traditional" relationship and thus, the more accepting of fluid roles and structures. Conversely, the more rural, well, we have a long way to go there.

COVID-19 or none, whether the law and the processes governing divorce, custody and parenting have evolved far enough to adequately meet the needs of the changing American family amid the next technological age remains to be seen.

To wit: When I began practicing family law in 1997, joint custody was a relatively new option for courts to input as a legitimate form of custody with the imprimatur of the Kentucky Supreme Court. The test was basically two pronged: 1) a parent had to be fit (not actually insane, not incarcerated long term and not a drug addict or alcoholic with little chance of sobriety, not a domestic violence perpetrator or a child abuser) and 2) joint custody had to be in the best interests of the child.

A singular statute, KRS 403.270, controlled custody determinations without more. A different statute, KRS 403.320, controlled visitation. It would be at least a decade before we began talking about parenting time instead of visitation and another decade before the legislature would amend KRS 403.270 in 2018 to create a rebuttable equal time presumption for parents with additional factors to consider for custody determinations.

Inasmuch as Jefferson county is likely as urban as Kentucky gets, our family courts considered and input parenting schedules long before 2018 that deviated from what was the traditional every other weekend to one parent, with all other time to what was deemed the parent with "primary custody" at the turn of the 21st century. Whether we called it equal time, half time, shared parenting or referred to it only in numbers to define a certain schedule, i.e., 2-3, 3-4, 2-5 alternate, 2-2-5 with nesting or 2-2-5 with parents switching M,T and W,Th each week with the weekend to at-tach to W,Th, we made inroads to statutes that remained static because that's what met the children's best interests.

The legislature, in its wisdom, left the core of KRS 403.320 intact over the years with its directive to attorneys to prove serious endangerment to a child as a prerequisite to restrict parenting time according to what I have always referred to as time, place and manner restrictions. The statutory framework governing initial custody determinations and modifications of parenting time didn't evolve much over the years, while the caselaw filled in the gaps.

Along the way, to be sure, we could always count on the appellate courts to confound us with their magical maneuverings to make desired legal outcomes fit cases before them. The evolution of joint custody and parenting schedules to match parties' lives is grounded in caselaw, as was establishing rights of same sex parents with holdings pre *Obergefell v. Hodges*, 576 U.S. __(2015).

The Kentucky Supreme Court has taken on modifications of equal parenting now it seems in *Layman v. Bohanon, Jr.*, 2019SC-000364-DGE, rendered March 26, 2020. Mr. Bohanon, Jr. and Ms. Layman divorced in 2016, then parents of a four-year-old and seven-year-old. They agreed to joint custody and equal time. Mr. Bohanon, Jr.'s work schedule shifted and the parties modified their parenting agreement by changing from a week on and week off schedule, to days certain during each week to keep the equal time, but failed to memorialize it. Bohanon, Jr. moved to enter the new schedule they practiced for two years. Layman objected and moved for less than equal time. The Supreme Court held that equal parenting time can be modified pursuant to KRS 403.320(3) "if it is in the best interests of the child, but it can only order a 'less than reasonable' timesharing arrangement if the child's health is seriously endangered." In a 20-page opinion, Bohanon, Jr. lost his equal time motion because the Supreme Court held it was not error to find a modification to less than 50 percent parenting time is reasonable pursuant to KRS 403.320(3). "Under our caselaw, less than reasonable does not necessarily mean less than 50 percent parenting time."

The applicable subparts of KRS 403.320 appear as follows: KRS 403.320. Visitation of minor child:

> (1) A parent not granted custody of the child and not awarded shared parenting time under the presumption specified in KRS 403.270(2), 403.280(2), or 403.340(6) is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child…
> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

While at the outset the case is meant to distinguish between the statutes governing custody and parenting time and how to establish and modify both, it adds a reasonableness standard to KRS 403.320(3) when parents have equal time to modify parenting time that doesn't exist in the sub-section.

The Supreme Court in *Layman v. Bohanon, Jr.* borrows from previous decisions to define the word "restrict" found in KRS 403.320(3) to mean "to provide [either] parent with something less than reasonable visitation." In dicta, then, it tells us how much it loves the rebuttable presumption for equal time amendment to the custody statute, in my humble opinion.

> There is no set formula for determining whether a modified timesharing is reasonable; rather it is a matter that must be decided based upon the unique circumstances of each case. Drury, 32 S.W.3d at 524. For example, it doesn't necessarily mean that a parent has less than reasonable timesharing just because he or she spends less time with the child than under the original timesharing arrangement. *French, 581 S.W.3d a 50; see also Kulas, 898 898 S.W.2d 529.*

One thing we can always count on is the tried and true "case by case" approach to family law. No matter how the world changes, people will still fall in love, break up, get pregnant and everything else that goes with it. I pulled this quote from Anne Morrow Lindbergh from *Womankind*, a magazine about western women in India, as I contemplated an ashram in my post COVID-19 future:

"Only in growth, reform, and
Change, paradoxically enough,
Is true security to be found."

#StayHealthy everybody. We have a lot of work to do!

A. Holland Houston is an Attorney at Law and vice-chair of the LBA's ADR/ Mediation Section. ■

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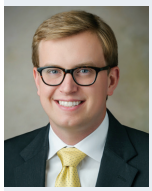

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Straw-Boone Doheny Banks & Mudd is pleased to announce the new location of its offices. The firm has moved to 400 W. Market St., Ste. 200, Louisville, KY 40202. Visit its website at *www.divorceky-in.com*.

The Greater Louisville Market of the March of Dimes has appointed Stites & Harbison attorney **Brian Bennett** to its Board of Directors. The March of Dimes is a nonprofit dedicated to leading the fight for the health of all mothers and babies, through research and innovation, education and programming, and advocacy and support initiatives. Bennett was also named the 2020 event chair for the Greater Louisville March for Babies. Bennett is a member (partner) of the firm in the Creditors' Rights & Bankruptcy Service Group. His practice focuses on financial institutions, real estate, and complex commercial litigation in state and federal courts, in addition to banking and financial services compliance.

Stites & Harbison is pleased to announce that attorney **Steven Henderson** has been appointed chair of the firm's Construction Service Group. Henderson is a member (partner) of Stites & Harbison in the Louisville office. His practice is devoted to representing contractors, owners, and design professionals in all aspects of the construction and design process, ranging from drafting and negotiating various types of contracts to resolving complex disputes through informal negotiation, mediation, arbitration, and litigation in state and federal courts throughout the country.

Morgan Pottinger McGarvey is pleased to announce that **Charlie Otten** has been promoted to senior associate. Otten supports several of the firm's practice areas, including banking and finance law, business law and litigation, employment and labor law, and real estate law. Otten serves on the Junior Achievement of Kentuckiana's Young Professionals board and executive committee. He also completed Louisville's Fund for the Arts NeXt Class in 2019. Otten received his J.D. from the University of Kentucky College of Law. ■