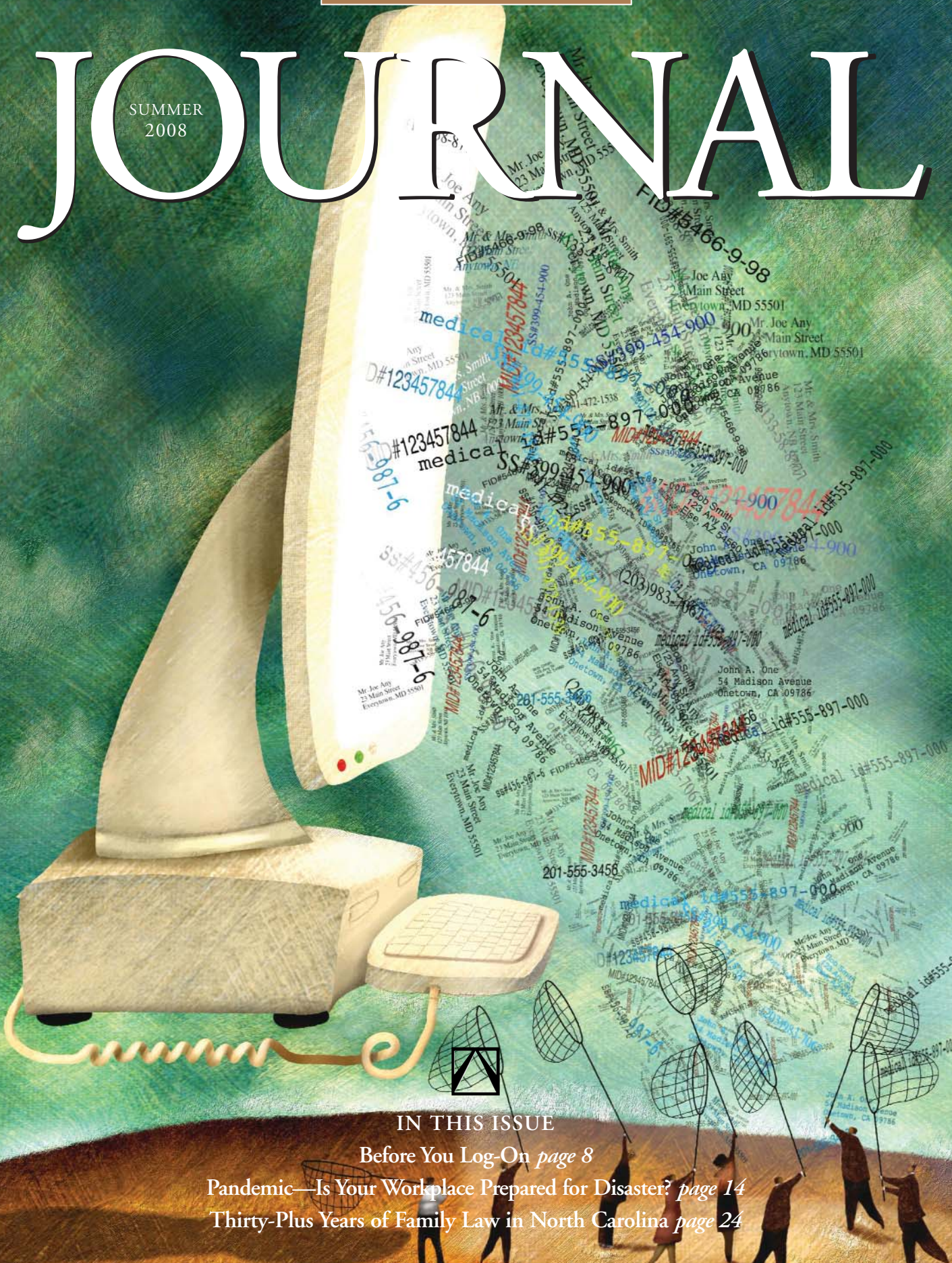


JOURNAL

SUMMER
2008



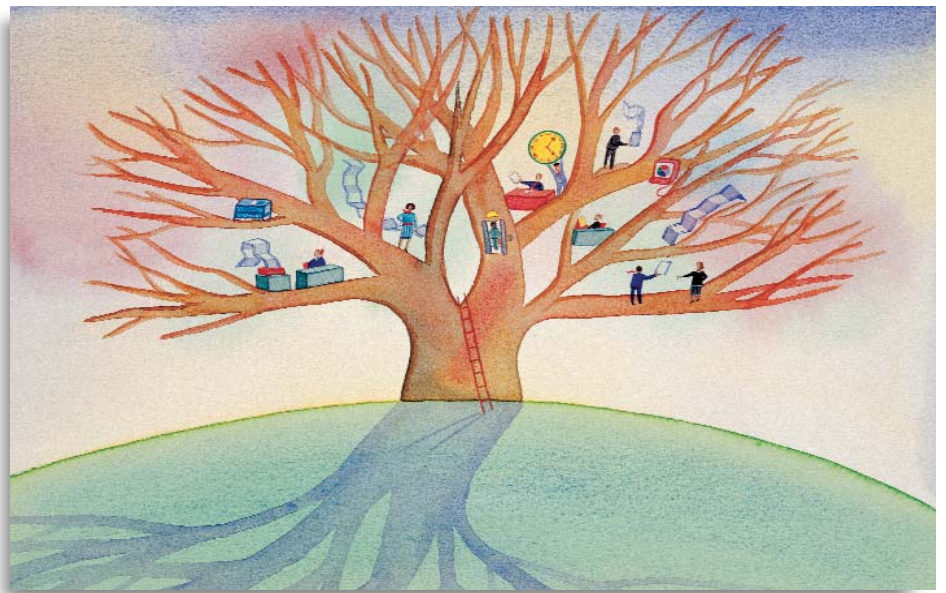
IN THIS ISSUE

- Before You Log-On *page 8*
- Pandemic—Is Your Workplace Prepared for Disaster? *page 14*
- Thirty-Plus Years of Family Law in North Carolina *page 24*

Thirty-Plus Years of Family Law in North Carolina

BY HOWARD L. GUM

Lawyers who practice in my arena are called many things, some merely descriptive of the type of cases we handle and some ascribing to us attributes that contain moral judgments that are generally less than



flattering. Of the former variety, we are known as divorce lawyers, family lawyers, or more currently matrimonial lawyers. In the United States we are most generally referred to as engaging in the practice of family law.

I began the practice of family law in the mid 1970s. The landscape in which I practice has changed dramatically as I am well into my third decade. During my early years, North Carolina did not have an Equitable Distribution Statute, there was no such thing as "no fault" alimony, and we commonly dealt with legal concepts now generally considered quite antiquated. You seldom hear terms such as recrimination, divorce *a mensa et thoro*, or divorce *a vinculo matrimonii*, used in today's practice.

At that time there were no family courts, the "tender years" doctrine generally reigned

supreme in custody matters, and none of us had even a passing acquaintance with mediation, arbitration, collaborative law, neutral evaluation, or other current forms of alternative dispute resolution.

Our district court division was a recent creation and all family law matters previously heard in the superior court were now transferred to the district court division (much to the relief of every superior court judge in the state!). Our district court judges had little or no special training in family law matters and were expected to handle those cases in the same fashion they handled

motor vehicle accident cases, summary ejectments, misdemeanor criminal cases, and all other matters that fell within the jurisdiction and purview of the district court. Abandonment and non-support of one's wife or children were criminal offenses routinely prosecuted in order to establish at least minimal levels of support for dependent wives and children. Most of these were "private" prosecutions, with the district attorney standing aside to let the attorney for the prosecuting witness present the case.

Since we had no Equitable Distribution Statute to allocate the material wealth

acquired during a marriage, property rights were determined by common law title principals. Stated differently, whoever held legal title to an asset owned it. Family law practitioners of that era became adept at utilizing other equitable remedies. We became familiar with purchase money resulting trusts, constructive trusts, express oral trusts, unjust enrichment, quasi contracts, and other ancient equitable remedies now only rarely utilized in the practice of family law.

While the married women's property acts of the early 20th Century removed most of the historical disabilities of married women, there were still lingering effects of that 19th Century history. For example, husbands were still entitled to all the rents and profits from property owned jointly with their wives as tenants by the entirety. A wife's contributions to her husband's business were deemed gratuitous absent some express written contract to the contrary. Thus, a wife working from dawn to dusk seven days a week for no salary, no benefits, and no retirement plan, for a corporation whose sole shareholder was her husband, acquired no property rights or accrued benefits of any kind with respect to said business. Upon divorce, the husband kept sole ownership of stock and business assets and the wife had no claims thereto.

Divorce lawyers in the early years of my career were litigators. Of course, good litigators are also effective negotiators, both then and now. However, in the early days of my practice almost all negotiations were based upon litigation that was already pending or the threat of litigation which always promised to be bitter, humiliating, and designed to subject at least one if not both of the parties to the scorn of the public.

Alimony was "fault based" and the rules of pleadings required that each spouse's misconduct be plead exhaustively and in detail. Thus, in virtually every complaint (and responsive pleading) there were allegations of adultery, cruel and barbarous treatment, indignities such that one's life became burdensome and intolerable, physical abuse, drug and/or alcohol addiction, abandonment, and other marital offenses all plead with premeditation and malice aforethought.

Child custody cases were decided on the basis of the aforementioned "tender years doctrine" (which held that young children naturally had to be with their mother) or with respect to which parent appeared to

STEVE MINOR

PERSONAL PROPERTY APPRAISALS

*Equitable Distribution for Divorce or Estates; Insurance Coverage; Donation;
Estate Planning; Antiques and Fine Art*

Reasonable Rates - Rapid Turnaround
ESTATE SALES

P.O. Box 12511
Raleigh, NC 27605

(919) 622 -4184
sgminor@mindspring.com

have committed the fewest number of marital offenses despite the fact that the case law directed that such decisions be made with the child's best interest as the "polar star" to guide the court's decision.

In short, a divorce practice routinely involved bare-knuckle litigation and tough, no holds barred negotiation.

Since those early years of my practice many things have changed. These changes have encompassed both significant amendments to the substantive law and the advent of various techniques under the umbrella of alternative dispute resolution.

Changes in the substantive law included the enactment of the Equitable Distribution Act in late 1981 and a complete overhaul of our alimony and spousal support statutes in 1995. Other statutory changes came as well. For example, husbands were no longer exclusively entitled to the rents and profits from property held as tenants by the entirety and those profits are considered to be jointly owned by the spouses.

Equitable distribution completely altered the manner in which property is allocated as part of the dissolution of a marriage. Equitable distribution is analogous to, if not entirely synonymous with, the concepts of community property that had been long extant in many of our western states. The inquiry shifted from who held legal title to the property, to a concept that marriage as an economic partnership acquires property that is presumptively to be divided equally between the parties as part of the marriage dissolution.

Equitable distribution in North Carolina, as elsewhere, was largely in response to the changing role of women in families, society, and politics. Equitable distribution allows both spouses to share in the wealth acquired

by the marriage and created a whole new and very fertile ground for lawyers to apply their skills on behalf of their client.

The advent of equitable distribution also required lawyers to acquire new skills and different tools. Lawyers in this field now must become experts in business valuations, real property law, tax law, partnership and corporate law, and acquire a keen and thorough knowledge of accounting and finance. Since equitable distribution also authorizes the division of various retirement and other deferred compensation arrangements, family lawyers also found themselves in need of a working knowledge of ERISA and the arcane language and procedures used by actuaries and pension plan administrators.

North Carolina's alimony and spousal support laws were turned upside down. Prior to 1995, for a woman to receive alimony from her husband she not only had to prove that she was actually financially dependent on her husband for support but, in addition thereto, had to prove that she had "grounds" for alimony. This meant she had to prove that her husband was guilty of some type of marital misconduct as that was defined in our statutes and case law. Adultery, abandonment, cruel and barbarous treatment, indignities, drug and/or alcohol addiction, etc., not only had to be pled but proved. The 1995 revisions to the alimony law deleted the requirement that a dependent spouse prove that she or he had "grounds" to receive alimony. The inquiry shifted to one of financial dependence to determine initial entitlement. Fault still plays a role in our alimony scheme inasmuch as the trier of fact can consider each spouse's marital misconduct in determining the amount and duration of alimony that would otherwise be awarded. The one exception that is still a holdover

from the early days is that if a dependent spouse has committed adultery prior to separation and the supporting spouse can prove that adultery, the dependent spouse will have forfeited any and all rights to receive alimony. Even here there is some retreat from adultery as an absolute bar. Adultery is not an absolute bar to a spouse receiving temporary alimony (currently called post separation support) and if both spouses have committed adultery prior to separation, a court may, in its discretion, award or deny alimony.

Our law currently focuses more on an equitable restructuring of families' finances as part of the divorce process and less on the relationship issues that lead to the demise of the marriage. While the debate continues in our society as to the merits of either of these approaches, it is clear that in North Carolina and elsewhere across the country, the courts are much less concerned with relationship issues than they once were and are much more concerned with treating the marriage as an economic partnership and attempting to make an equitable restructuring of assets, debts, and income streams as part of the divorce process.

As a result of this shift, I have, for several years during my initial contact with a potential client, taken great pains to explain the difference between the emotional divorce and the legal divorce so that early in the process a client begins to understand that the courts will devote little time, nor award much importance, to the misbehavior of a spouse.

Another dramatic change driven by statute is in the area of child support. For approximately the first half of my practice (thus far) child support was determined on a case-by-case basis. We litigated issues of marital lifestyle, reasonable expenses for children, incomes of the parties, a reasonable allocation of responsibility to meet children's expenses, etc. This was a separate and complex trial in each and every case. Somewhere in the late 80s was the advent of the North Carolina Child Support Guidelines. Most cases involving child support are now determined by an application of the guidelines, a formula approach based on the family's income, number of children, etc. There are still cases that are litigated individually when there are very high incomes or unusual problems in determining income, as is often the case for self-employed families and individuals.

These significant statutory changes

require lawyers handling divorce cases to acquire some very new, very sophisticated, and often very complex skills and knowledge bases.

The challenge presented to lawyers and their clients by these sweeping statutory changes also dramatically affected our judges and court system. The number of case filings rose exponentially and our judges were required to acquire the same knowledge and skill sets that family lawyers were required to obtain. An inevitable result of the need for lawyers and judges in possession of such skills was specialization.

Lawyers began specializing in family law much as lawyers had historically specialized in patent law, admiralty law, tax law, commercial real estate law, and others. Specialization in the legal world continues to mimic the specialization that has been occurring for decades in medicine.

Specialization extended to the courts. We now have a growing number of judicial districts in North Carolina that have been designated as Family Court Districts. This requires a specialized administration and specialized judiciary in response to the increasingly complex nature of these cases, and the increasing volume of these cases with which our courts are faced on a daily basis.¹

Therefore, those of us who practice in Family Court Districts have been required to "re-learn" how we handle family law litigation. Prior to the advent of the family court, litigants determined what issues would be scheduled for hearing or trial and when. The family court wrests this prerogative from the litigants and their lawyers and places it within the court itself. Now the court schedules hearings based upon predetermined timetables set out in the family courts mandate. Family court has also largely dispensed with the time honored tradition of "judge shopping," which was publicly declared to be an inappropriate activity in which lawyers should not engage, but whose prohibition was honored much more in the breach than the observance. When a case is filed it is assigned to a family court judge and that judge handles all aspects of the case until its conclusion.

Family lawyers still need to be good litigators and good negotiators—or do they? Another significant branch in the evolutionary tree of the practice of family law has been the advent of alternative dispute resolution techniques, the most commonly used of

which is mediation. Other types of alternative dispute resolution techniques have received much attention but less universal acceptance in family law. These include arbitration, neutral evaluation, and the newest kid on the block, collaborative law. We are also seeing various types of fusion of these techniques. In my opinion, the most effective family law mediators are those who are also in a position to offer a neutral evaluation of an issue that is the subject of the mediation. While in my experience neutral evaluation is seldom used as a "stand alone" process it is nearly always a part of mediation in any complex family law case.

There are also those, myself included, who are experimenting with something called "med-arb." In this construct, the lawyers, their clients, and often expert witnesses meet with a neutral who begins the process as a mediator. If the mediation is unsuccessful in resolving all of the issues, the mediator morphs into another type of neutral entity and becomes an arbitrator, thus shifting from the mediator's role of assisting the parties and their lawyers in reaching agreement to the arbitrator's role of decision maker and actually making the decision much as would a judge.

Collaborative law, as its label suggests, presupposes an agreement between the parties and their lawyers that they will collaborate in an effort to resolve the legal issues. The collaborative law arrangement, while having some variants, contemplates that the parties and their lawyers agree that they will make a full and complete disclosure of all information pertinent to the issues. In equitable distribution, child support, and alimony matters this means a full and complete disclosure of all financial information necessary to analyze the case. In child custody matters it means a complete disclosure of all matters necessary to assist the parties and any experts in making appropriate parenting recommendations.

In the collaborative process the parties agree that, if expert witnesses are needed for any purpose (business valuation, tax calculations, psychological advice or evaluations, etc.), the experts will be jointly retained so that only one expert for each such issue will be employed and the fees of such expert allocated in some agreeable fashion between the parties.

Perhaps the most controversial aspect of collaborative law is the agreement by the par-

ties and their lawyers that they will not go to the Court with any of their disputes. If either party withdraws from the collaborative process and desires to resort to the court system, then both lawyers must also withdraw and both parties must retain new lawyers with their former lawyers being prohibited from having any further involvement in the case.

Arbitration of family law disputes is also gaining traction. In the last few years, North Carolina has enacted a special statute to deal with this issue. The Family Law Arbitration Act sets forth the procedures for some or all of the issues presented in any divorce case (within the exception of the divorce itself) to be submitted to an arbitrator chosen by the parties and conducted in accordance with procedures and rules also selected by the parties and their attorneys. The parties can select one or more arbitrators who have special knowledge and experience to address particular issues in their case.

Arbitration typically streamlines the process of having decisions made as to which no agreement can be reached and allows these decisions to be made in private. An arbitrator's award can be confirmed by the court and, thereafter, enforced as a court order. In effect, the parties and their lawyers can use their judge, their rules of procedure, their choice of applicable law, and in effect have a designer court determine issues relative to their divorce.

However, of all the various arrows in the quiver known as Alternative Dispute Resolution, mediation has thus far played the most significant role. Mediation first began to be used extensively in child custody matters. The truth is and always has been that the courtroom is an extraordinarily poor place to make custody decisions. Lawyers being advocates for their client (generally on several matters and not just custody) could not be neutral nor do they truly represent the interest of the children. Mediation provides a process where a trained mediator (often from a mental health background with emphasis on families and children) could work with the parties to assist them at arriving at a custodial arrangement without the collateral damage that is inevitable from a custody trial. To the surprise of some and relief of many it has been hugely successful. Most districts in North Carolina now require that the parties participate in a formal child custody mediation process before they are even

allowed to present their case to a district court judge.

The success of mediation with these difficult and highly charged parenting issues lead to mediation of family financial issues. The model is typically somewhat different. In custody mediation only the mediator and the parents participate. The lawyers stay home! The theory behind having the lawyers stay home is the belief (a correct one) that the parents really know all they need to know to come up with a satisfactory custody arrangement. Lawyers would likely be an impediment rather than help in this process since the lawyers can really bring nothing by way of specialized knowledge about the children to the table. There are those who have and continue to disagree with this premise, but I am not among them.

Mediation of equitable distribution, spousal support, and even child support matters typically has lawyers being actively involved and present with their clients as the mediator steers the process of attempting to assist the parties in reaching a resolution of the disputes between them. Often other parties are present at the mediation. If there are disputed real estate values, business or professional practice values, concerns about tax implications and various proposals, or other outside knowledge that would be helpful to the process, then those folks participate.

I am both a mediator and a lawyer who represents clients in mediation, and have found the process to be one with a high probability of success. If successful, a mediated settlement always leaves the parties feeling better about the process and the result than a verdict rendered by a court after a bitter and expensive trial.

Thus, the advent of these various techniques of Alternative Dispute Resolution has required family law practitioners to acquire new skills in utilizing those techniques for the best interests of their clients. The success of Alternative Dispute Resolution, and especially the success of mediation, has helped lessen the burden on the court system. Recognizing this, family courts require that parties and their lawyers attempt to resolve financial issues as well as custodial issues in mediation before permitting the parties to present their case to a court for determination.

Being able to obtain a fair settlement of a case without the financial, psychological, emotional, and temporal expenses associated with a trial is certainly a goal worthy of

those of us who represent people in these difficult cases.

Nevertheless, I continue to believe that one has to be an effective trial lawyer willing and able to make a persuasive presentation of a client's case before a court. However, the cumulative effect of the substantive changes in the law, the specialization of lawyers and courts, and the advent and utilization of various alternative dispute resolution techniques has made the process for litigants and their lawyers less brutal and more likely to result in some type of negotiated settlement that does not require a public blood letting or the expense, delay, and risks of trial.

There are those who disagree with my premise that to be an effective family law practitioner you need to be an excellent trial lawyer. The jury is still out on how many cases are really appropriate for approaches such as collaborative law; certainly, collaborative law and whatever variations of that process evolve have a place at the table. However, there are going to be cases that have to be tried, cases that have to be submitted to an arbitrator, cases that will only be mediated while litigation is pending, and cases that can be resolved by wise and experienced counsel without the intervention of any third party neutrals. Those cases have been, and will continue to be, handled by knowledgeable and experienced family law practitioners who know their way around the courtroom. ■

Howard L. Gum is a board certified specialist in family law with the firm of Gum, Hillier & McCroskey, PA, in Asheville, North Carolina. Mr. Gum has been active in many professional organizations including the Family Law Section of the North Carolina Bar Association, the North Carolina Board of Legal Specialization, and the North Carolina Chapter of the American Academy of Matrimonial Lawyers. Mr. Gum is currently the State Bar Councilor from the 28th Judicial District.

Endnote

1. The passage of various domestic violence statutes and related legislation has created a tremendous burden on the court system with little or no additional funding from the General Assembly. This is not to suggest that these laws are not needed nor that domestic violence is not a significant societal problem. Handling these cases also involves family lawyers. But to delve in any adequate way into the problems associated with our legal system's attempt to deal with domestic violence is beyond the scope of this undertaking.