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### Leaving Home

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# Leaving Home

By Paul Nassar,\* Bernard Rothman\*\* & Andrew Schepard\*\*\*

**Authors' Note:** This article was stimulated by a Conference on the same subject with the same title and format, organized and presented by the Interdisciplinary Committee on Mental Health and Family Law, held at Lenox Hill Hospital in New York City on June 8, 1987. The Interdisciplinary Committee, of which two of us are members, is a working group of appointed liaison representatives from legal and mental health organizations concerned with promoting discussion between the respective professions on family law related topics. To our knowledge, the Conference was the first time the law and mental health professions exchanged ideas on the leaving home problem in a formal academic setting in the New York City area. Two of us and other members of the Committee made presentations at the Conference. While the content of the article has been revised and expanded since the Conference, certain of the material here had its origins in what transpired at the Conference. We thank the members of the Committee and the Presenters at the Conference who were Rona Shays, Esq., Program Moderator; Paul Birzon, Esq., Hillell Bodek, CSW, Sandra Jacobson, Esq., Kenneth Kemper, Esq., Dr. Ruth Ochroch, Dr. Paul Nassar, Bernard Rothman, Esq., who made contributions to stimulating our thinking.

Responsibility for the analysis, conclusions and recommendations of the article, where such differ from the presentation of the Committee are, however, exclusively ours.

We also thank Professor John Gregory of Hofstra Law School for his editorial comments.

## INTRODUCTION

Home is where the heart is, when marriage and family thrive. When a marriage begins to dissolve, however, the heart may leave home, but legal doctrine compels the body to remain.

Conflict and turmoil run high when a marriage begins to disintegrate. The emotional health of parents and children can deteriorate if embattled spouses remain under the same roof. The well-being of all family members may be best served if one spouse leaves. Legal doctrine, however, virtually forecloses this often sensible alternative.

The spouse who "voluntarily" moves out suffers serious damage to his or her legal position in the upcoming divorce. To stay, however, results in a continuous and disabling conflict for the adults and children involved. In effect, productive existence is suspended while the legal process slowly wends towards resolution.

## SUMMARY

We are a psychiatrist, a practicing matrimonial lawyer and a law professor who believe the "leaving home" issue should receive more concentrated thought from law and mental health professionals, the courts and the Legislature. Our view is that the legal system's tools for dealing with the "leaving home" problem are deficient and mired in a fault-based system that does not benefit the families it affects.

Our thesis is that the courts and the Legislature should explicitly authorize a spouse to leave the marital home voluntarily on the basis of proven emotional harm. Neutral mental health professionals, with access to parents and children, should assess whether a family is suffering sufficient emotional harm to warrant a "leaving home" authorization. The authorization must be without prejudice to the departing spouse's legal position in the upcoming divorce. Equitable awards or agreements on custody, child support and temporary maintenance are essential preconditions to a "moving out" authorization.

One purpose of this article, then, is to stimulate the reassessment of governing doctrines and procedures that determine whether a spouse, in the midst of marital discord, can leave home. Another is to offer suggestions for lawyers and therapists who find themselves providing conflicting advice to common patient/clients. We believe the "leaving home" dilemma is a frequent cause of crossed signals between professionals trying to help the same person survive a divorce.

We illustrate the "leaving home" dilemma through a case study of the fictional Miller family. The Millers are a composite of families with whom we have worked, with names and other identifying features changed to preserve confidentiality. We believe them to be reasonably typical of dissolving families in which the "leaving home" problem arises.

Following presentation of the Miller family history we:

- (1) Provide a brief summary of the advice of their therapists and lawyers. Our analysis suggests that professionals with the same goal—serving the patient/client's interests—place the object of their common concern in a position of irreconcilable conflict;
- (2) Explore the public policy reasons behind current "leaving home" doctrines and find them insufficient;
- (3) Suggest how the involved lawyers and mental health professionals can work together to reduce stress on families like the Millers. We also briefly outline what the objections may be to our suggestions and how they may be overcome;

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- (4) We acknowledge that there are limits to what even the most conscientious and cooperative professionals can accomplish to relieve the "leaving home" dilemma under current legal doctrines and procedures. Thus, the final section of this article makes recommendations for change through judicial decision and new legislation.

### THE MILLER FAMILY

#### Family members:

HOWARD MILLER,	age 36
DIANE MILLER,	age 35
JASON MILLER,	age 9 1/2
SARA MILLER,	age 7

**Family History:** (condensed from interviews with Howard and Diane Miller and their children and review of relevant legal documents).

Howard, the second of four children of a middle class couple, grew up with a strong sense of right and wrong. He was a Merit Scholarship finalist and an Eagle Scout.

Howard has been married twice. He first married the daughter of a close family friend. Just before the wedding, he had serious misgivings, but refused to call off the ceremony because he could not hurt his fiancée.

While Howard has many acquaintances he thinks of as friends, he does not feel particularly close to any of them. He keeps personal problems to himself, and withdraws, if someone angers him. He sees any display of negative feelings as a failure on his part.

Howard divorced his first wife in 1970. Four years later, he met his present wife, Diane.

Diane Miller was born January 10, 1952, in Yonkers, New York. She is the youngest of three children, having two older brothers. Her mother was a housewife, who never had outside employment. Her father, a heavy drinker, worked as a salesman.

Diane completed commercial high school, taking secretarial courses. She did not have many close friends, and preferred to stay at home, helping and being with her mother.

#### The Miller's Marriage

Howard and Diane married on May 28, 1975, in a civil ceremony.

Both describe the first few years of marriage as financially difficult. Howard began an MBA program shortly before his father became seriously ill. After his father died, he dropped out of school to take over the family business.

Howard stated that from their earliest time together, he would take care of Diane, whom he saw as fragile and vulnerable. He helped with chores around the house, spent time shopping with her, planning meals and organizing the apartment. She in turn would ask his advice about decorating, buying clothes, etc. Howard felt flat-

tered and proud to be so needed by Diane. He became more and more intense about his relationship with his wife, neglecting friendships and outside interests.

Diane enjoyed her life with Howard. He was attentive, kind and dependable. Although she worried about having children, (including how pregnancy might affect her looks and the condition of her body), she felt certain that Howard would be available to help. She encouraged Howard to become involved in various business endeavors, expressing confidence in his ability. Although she wished her daily life to be more active, she did not seem to have the energy for increased activities.

After his business improved, Howard sold it and went into insurance/investments as an independent agent. Being good at what he did, by 1978 Howard was earning \$100,000 per year.

The Millers moved from an apartment in Mt. Vernon to a house in Katonah, N.Y., at about the time their first child, Jason, was born in October, 1978. Diane stayed home and cared for the child. Because of flexible work hours, Howard kept his business prospering, while still looking after his wife and child.

Two years later Sara was born. Howard became even more involved in child care and planned his time to minimize being away from home. The family purchased a year-round vacation home in Greenwood Lake, N.Y.

In 1983, Howard felt stuck in a rut professionally, and decided to complete his MBA. Diane expressed fears that school would take Howard away from the family.

#### The Deterioration of the Marriage

Howard completed his degree in 1985. At about the same time he became romantically involved with the mother of one of his son's classmates, whom he had met through the PTA. Previously divorced, his lover is a successful architect.

After one year of this secret affair, Diane learned of her husband's infidelity through an anonymous phone call. About 11 years after their marriage, Howard asked Diane for a divorce.

At first shocked, unbelieving and hurt, Diane was nonetheless hopeful that Howard would change his mind. Howard, for his part, felt increasingly guilty about Diane's sadness and concerned about how a divorce would affect their two children. He sought professional counseling and encouraged Diane to do so.

Early in Howard's therapy, a pattern of behavior emerged. Howard would angrily insist upon a divorce, then would retreat in guilt when Diane expressed sadness or undying love for him. In confusion, he would return to his old helper role and would become increasingly frustrated and angry, leading to another confrontation. The children were beginning to show signs of distress, adding to his guilt.

Diane eventually became convinced that Howard would not change his mind about the divorce. She became more adamant that she would never consent to a divorce, and that he would have no access to the children if he left.

Howard and Diane both consulted attorneys. Initially,

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Howard proposed a separation with generous terms for both the division of assets and maintenance, if Diane would agree to joint physical custody of the children. Diane, however, insisted the children belonged at home with her, and would not agree to any other arrangement.

Diane became more openly hostile to Howard, and more uncooperative and unpredictable. She often provoked confrontations. When feeling depressed, she confided in neighbors, teachers at the children's school and local shopkeepers, evoking much sympathy.

The children became visibly upset. Jason would side with whoever spoke to him first, while Sara withdrew and became more distant. Howard insisted upon consulting a child psychiatrist. She suggested therapy for the children, and that the parents resolve their differences as soon as possible either staying together or getting divorced.

The arguments escalated. Howard became more openly angry and verbally threatening. Both Howard and Diane sought to prove how uncaring or how poor a parent the other was. Howard compared Diane to other women, while Diane provoked frequent arguments, often in front of the children.

On one occasion, Diane had the locks changed on the home and Howard smashed a patio window to gain access. On another occasion, Diane threw a bowl of salad against the kitchen wall, claiming that Howard had prepared the salad to prove to the children that he was the better parent. As Diane became more hostile, Howard became concerned for his safety. Diane hinted that he was not safe when he slept.

Upon advice of his attorney, Howard had a lock put on the guest bedroom door, where he had been staying for over 6 months. In order to decrease contact with Diane, he would spend evenings either with the children in the den, kitchen or their rooms, or locked in his room. His sleep deteriorated. He showed signs of anxiety and of clinical depression. Although he was able to do his work, his concentration was poor. He became increasingly upset with the children, especially if they became involved in the arguments. After a particularly hostile confrontation with Diane, Howard absentmindedly drove through a red light and struck a car, resulting in his receiving minor injuries.

Diane frequently called the police during arguments. She registered ten different complaints, but the police were loath to become involved. On at least four occasions, Howard was awakened by the police answering 911 calls to the home where he was allegedly beating Diane. Although the police were sympathetic to Howard, (they found no evidence of violence but did find an obviously disturbed Diane), they suggested he leave home to allay the situation.

Diane sought an order of protection. Howard, in turn did the same. Diane delayed hearings on the orders, claiming she was ill.

## **THE THERAPISTS' GOALS**

We summarize the treatment and goals of the therapists for the members of the Miller family:

## **Howard's Therapist**

When Howard first came into treatment, his reasons were two-fold. The present marriage was the second heading for divorce, and he felt compelled to examine his role in choosing unsuitable mates. However, the primary reason he gave was to gain knowledge about how to minimize any trauma for his present wife and children caused by his decision to end the marriage.

Initially, Howard was "reasonable" and intent upon settling his present dispute. He denied any anger towards Diane, stating only that the marriage was a mistake. He was however, unconsciously hostile and provocative towards Diane, which inflamed their arguments. As he expressed his anger more openly, these provocations lessened.

His therapist however, is becoming increasingly concerned about Howard's depression and impulsive angry outbursts. He now demonstrates a severe sleep disturbance but he refuses sleep medication. He is fearful and suspicious about Diane's hostility and what she might do.

Howard feels isolated in his home. He feels hurt and embittered by the neighbors' rejection of him, and their seeming acceptance of Diane's complaints and lies.

The despair that the fights will never end, that divorce never will come, and that a normalization of relations with the children will never evolve, leaves Howard hopeless and frustrated. The therapist rejects medication as a "quick fix", feeling it would not address the situational causes of Howard's problems. His attorney insists he remain in this stressful household. However, his therapist sees further erosion to Howard's personality and capacity to function if he remains in the home. He encourages Howard to confront his attorney and to force some alternative.

## **Diane's Therapist**

Diane's therapist sees a victimized patient who is struggling to overcome her passivity and dependence upon a man who no longer loves her. He encourages Diane to assert herself, gain support of friends and increase her self-esteem by staking a claim to the marital home (and responsibilities).

At the therapist's suggestion, Diane started a modest business at home selling a nationally distributed chain of health and beauty products.

Diane is harmed by delay in resolving the marital dispute, as it allows her to hope that Howard will change his mind. Diane's therapist is convinced Howard will not do so.

Diane's therapist is pressing Diane to request her attorney to have Howard removed from the home before something violent happens. Although the therapist has suggested that Diane take the children to a relative if relations become too threatening, Diane reports that her attorney does not support this action without actual bodily harm having occurred. Diane's therapist is also concerned that Diane's attorney may have subtly suggested that Diane provoke Howard to hit her.

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## **The Children's Therapist**

The therapist met with both parents as part of her evaluation. She found that both children are suffering, albeit in different ways.

The parental fighting has become an ever-increasing source of fear and sadness for the children. Howard has assured them that although he wishes to leave their mother, he has no intention of leaving them. Diane, meanwhile, explains to the children that their father wishes to leave her and the family. At times each parent has asked the children to act as witnesses against the other.

Jason's response has been to agree with the parent with whom he has last spoken, often changing positions, feeling confused by his mother's tears or his father's demand for loyalty. He has experienced nightmares. Before his parents' conflict, Jason's school performance was above average, and he had important friendships. Now, for the first time, he has angry outbursts in school and at play, although he has yet to lose friends.

Sara has become more quiet and reserved. She refuses to take sides when asked to by either parent and appears almost indifferent to the struggles. In school she daydreams and does not participate in activities, but denies problems. One obvious symptom that something is troubling her is that she began wetting her bed, after not doing so since age 3.

The children need certainty about the future. They are attached to both parents, and are fearful because these relationships are deteriorating. Time is working against the children. As their symptoms worsen, their parents are becoming less able to deal with them.

## **THE LAWYERS' ADVICE**

We summarize what Howard's and Diane's lawyers are likely to have told them:

### **Howard's Lawyer's Advice**

The essential problem is that if you voluntarily move out of the marital house you will be unable to return. You will, in effect, agree that your wife should be the children's primary custodian.

It is highly unlikely that you can obtain exclusive occupancy of the house by evicting your wife. To do so you will have to show physical or mental abuse or its likelihood that makes eviction necessary to protect life or property.<sup>1</sup> Though your wife is hostile and confrontational, and has hinted of future physical violence, her conduct has not been serious enough to make a credible case compelling a court to evict her.

If you leave voluntarily you will almost surely not be able to return. All that your wife need show to keep you out is that your return is likely to cause domestic strife.<sup>2</sup> She should be able to do so, given that she doesn't want you back.

Furthermore, if you leave voluntarily you will reduce to virtually zero your chances of obtaining custody of your

children. The standard for determining custody is ostensibly the sex-neutral test of the best interests of the child.<sup>3</sup>

In reality, most courts still favor the mother as the custodial parent for young children, unless she is clearly unfit.<sup>4</sup> Many courts have rationalized their preference for mother custody with a sex-neutral "primary caretaker" presumption.<sup>5</sup> Although you have been involved in your children's day-to-day care, your wife is still unquestionably Jason's and Sara's primary caretaker.

If you move out, you concede that your wife is a fit custodian for your children. Otherwise, you risk their health and welfare by moving out. If you move out and leave your children in the care of an unfit parent, you call your own parental fitness into question.

In addition, by moving out you make a statement that the children are better off living with your wife. Courts try to maintain stability in a child's life. You face an uphill fight to convince a court that you should be the children's custodian after you leave. New York courts give priority to the child's first custody arrangement, whether it is reached voluntarily or by court order after preliminary litigation.<sup>6</sup> It is very likely that a voluntary temporary arrangement will become permanent.

While it may be in your emotional interests to move, doing so will seriously compromise your legal position. Stay put, despite an anticipated long and unhappy conflict. Use your therapy to deal with the strain.

### **Diane's Lawyer's Advice**

You do not have a serious chance of getting a court to order your husband out of your house. Your complaints of your husband's physical violence are not corroborated by objective evidence. Your repeated and unfounded calls to the police will weigh against you. The court is likely to view them as an attempt to create a "strawman" of physical abuse for litigation purposes and, thus, not believe any of your testimony.

You could offer your husband the option of moving out voluntarily and a "non-abandonment" letter. This letter would state that your husband's moving out is without prejudice to future determination of who should exclusively occupy the house or who should have custody. You can offer your husband additional visitation as an inducement for moving out, as well as exclusive use of the summer home.

I do not, however, want to hold out too much hope that your husband will accept this offer. His lawyer will advise him that the court will look upon his moving out as concession of custody, no matter what the letter says.

You face the same problems as your husband, if you voluntarily move. I thus cannot advise you to do so.

Your problems will not be resolved quickly. Stay active with friends and neighbors. Use them and your therapist as a support group.

## **THE PUBLIC POLICY CONFLICT: LEGAL AND MENTAL HEALTH PERSPECTIVES IN TENSION**

In essence, while a therapist would likely state that it is in everyone's emotional interests that one of the par-

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ents move, their lawyers would advise to the contrary. A court, furthermore, is not likely to order either spouse to move.

What conception of public policy justifies binding the Millers to live together in endless disharmony and deteriorating mental health?

Authorizing a spouse to move from the marital residence is obviously a serious determination. The state, through its courts, in effect, provides official sanction for what society regards as the actual end of the marriage relationship, even if legal formalities remain. Under current law a court compels one spouse to move from the marital residence only when they are indisputably "at fault" in the marriage, in the sense of posing a threat to the physical well-being of other members of the family.

One possibility is that courts may not regard emotional harm as a serious enough basis upon which to make a determination that a spouse should be allowed to leave home. We thought, however, that society stopped regarding emotional trauma as imaginary long ago. Continuous turmoil for parents and children debilitates their capacity to cope and their productive role in family and society. The courts and the Legislature should recognize the need for a legal remedy to relieve the stress and pain of the Miller family.

Another concern may lie in problems of proof. Medical history and records can usually verify physical abuse. No such obvious source of verification exists for emotional harms. Courts may fear that a standard of emotional harm could deteriorate to the point where it became a unilateral showing of emotional incompatibility.<sup>7</sup> No fault divorce would, de facto, arrive through the back door of a moving out authorization.

If the problem with providing relief for the Millers is the fear of fabricated or trivial claims of emotional harm, we should ask how such claims can be proven to a reasonable degree of certainty. Problems in defining and proving emotional harm do not justify ignoring it. Credible mental health testimony is, however, obviously essential to the proof process.

An unarticulated conception of the children's best interests may also be the basis of the present rule. A court may believe the Miller children are better off if their parents live under the same roof, even if they are in conflict. Wallerstein and Kelly's research establish that the physical separation of the parents is the child's most tumultuous and stressful moment in the divorce experience.<sup>8</sup> From this finding a court could conclude that the children are better off if the parents stay under one roof, even if they are in state of perpetual emotional war.

This analysis, however, does not consider the child's long range welfare. While a child may be immediately and severely stressed by the parents' physical separation, that does not mean that in long run the child is not benefited. We know of no long term, fully methodologically reliable studies which compare the quality of life of children of divorce with the quality of life of children who grow up with two intractably conflicted parents living under the same roof.<sup>9</sup> We suspect that the critical variable is not whether the parents live under the same roof, but how they manage their conflicts.<sup>10</sup>

Before Howard or Diane is authorized to leave the home<sup>11</sup>, the children must be protected. Their interests are best served by a stable custody and support arrangement which assures them access to both Diane and Howard's emotional and financial resources, even if one parent lives separate from the marital residence. The parents agreement to — or the court's imposition of — a carefully constructed custody and support arrangement should be a precondition to authorizing a parent to move.

A moving out request should automatically break down the bundle of issues involved in a divorce. Child custody and support and temporary maintenance should be separated from property division, permanent maintenance, counsel fees and grounds for divorce, and decided first.<sup>12</sup> Emotionally embattled parents and their lawyers must make the children's welfare the first item on the agenda for resolution.<sup>13</sup>

Finally, the current rule may also be supported by a court's fear of altering the balance of negotiating power. If his request to move out is granted with parental rights essentially preserved, Howard will gain a substantial advantage in negotiations. In effect, Howard has his children, his girlfriend and a new home free from Diane's presence. Diane, on the other hand, will lose a great deal of leverage. Howard's incentive to make economic or custody concessions to Diane will be dramatically reduced.

Certainly, the court's setting adequate maintenance and child support payments should be a prerequisite to permitting Howard to move. Howard must meet his basic economic responsibilities to his wife and children if he wants the right to leave the marital home without penalty.

Assuming the court sets adequate levels of child support and temporary maintenance, the Miller children's welfare should not be a bargaining chip to better the negotiating position of one spouse.<sup>14</sup>

We also question the notion that a court hearing an individual case should project the likely effect of a result on the bargaining position of the parties and consciously try to equalize them. Every preliminary court determination burdens one litigant or the other, as does every resource differential between them (including differences in the competence of their counsel). There are no standard cases from which courts can draw generalizations about comparative negotiating power of typical spouses. Courts are not in the business of equalizing resources. Courts are in the business of resolving matrimonial disputes while promoting the best interests of the innocent children of divorce.

## **SUGGESTIONS WITHIN THE CURRENT SYSTEM**

What can Howard and Diane's lawyer and the involved mental health professionals do to ease the Miller's crisis?

There are two basic prerequisites. First, each profession must understand the outlook of and ethical constraints on the other. Second, each profession must also be willing to communicate with the other, within the limits of their confidentiality obligations and their professional responsibilities.

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**Possibility One:** Diane's [or Howard's or the children's] therapist could ask his patient for permission to meet with her attorney.<sup>15</sup> The purpose of the meeting would be to underscore the emotional harm that the patient/client is suffering and to push for immediate resolution.

Attorneys should realize that most therapists have serious concerns about speaking to them. Therapists often do not understand the goals and tactics of their patient's attorney and view the attorney with suspicion. Therapists are also concerned about breaching their confidential relationship with their patients, though the patient's permission to contact the attorney alleviates much of that problem. To further allay confidentiality concerns, the patient should be informed that the discussion between lawyer and therapist took place and what transpired.

The therapist also worries about complicating the therapeutic relationship. As a result of the therapist's active intervention with the attorney, the patient may perceive the therapist as the patient's advocate. One of the principal tools of therapy is analysis of transference—the patient's response to the therapist. A patient "transfers" onto the therapist his feelings about relationships with emotionally significant people in his past. Therapists consciously try to maintain a position of neutrality with their patients to foster and not distort transference.

A patient's feelings of obligation to a therapist turned advocate may lead to the repression or denial of feelings which may confuse the transference process. Thus, the whole therapeutic relationship may be undermined. The therapist must weigh these risks against the benefit of the lawyer's full understanding of the emotional health of his client. It is possible that a shift from therapy to advocacy will mean the end of treatment.

The lawyer should welcome a call from a therapist who can address these obstacles. After learning the extent of the harm of being legally locked in the house is doing to his client and the children, the lawyer should be willing to reconsider his advice against moving out. The lawyer should consider whether there are higher goals than winning a case, such as protecting the welfare of children, and address those issues with his client. He must also devise a program to control the legal damage resulting from moving out. The lawyer might also explore settlement options more seriously than before as a result of the therapist's call.

**Possibility Two:** A joint meeting between the therapist, the patient and the lawyer to exchange information and explore alternatives.<sup>16</sup>

**Possibility Three:** A joint meeting between the therapists for Howard, Diane and the children to assess the harm being done to the family and to recommend a unified course. **Caveat:** This meeting raises serious confidentiality concerns. This option indisputably places the therapist in the role of an advocate. The participants all have primary allegiances to different parties with adversary interests. All three therapists, no doubt, have

learned confidential information which each might divulge to the other therapists. Each therapist might, in turn, reveal the confidential information to their respective patients. They might also have to testify about the discussion at the meeting. Obviously, a joint meeting should not be organized without explicit consent from all the clients and their attorneys. Advance written agreement to the ground rules for the meeting is essential.

**Possibility Four:** Howard, Diane or the children's therapist (or all three) might jointly meet with Howard and Diane's attorneys.

**Possibility Five:** A meeting between the lawyers, the parents and some or all of the other therapists.

Possibilities Four and Five depend on the willingness of the parents to discuss the family crisis with professionals identified with the other side. Confidentiality is obviously a major concern in such meetings, but one that can at least partly be assuaged by advance written ground rules.

All of the consultations and conferences should aim at agreement on a stipulation which permits one of the parents to move out and provides for custody, child support and temporary maintenance. The stipulation must explicitly negate prejudice to either party for future applications for modification of any of its provisions. No presumption concerning permanent custody arrangements should be made from the stipulation. Issues of property distribution and divorce grounds will be deferred for a later date. The stipulation should serve as the basis of a future separation agreement, but could not be converted into a divorce one year later.<sup>17</sup>

## LAW REFORM

The interdisciplinary conferences previously suggested are more likely to result in a moving out stipulation if they take place within a sympathetic procedural and substantive background. We offer the following suggestions for further consideration by the courts and Legislature:

(1) (a) Explicitly recognize emotional harm as a basis for allowing one parent to leave the marital home without prejudice; and (b) create an expeditious motion and evaluation procedure to authorize a parent to move out without prejudice to future modification of custody.

The purpose of this suggestion is to break the Catch-22 in which the parents cannot live together but neither can, without prejudice, move out.

The notion that leaving the marital home is a voluntary agreement for the other spouse to have custody is, at best, a fiction. A parent may want to move out only to preserve his own mental health or the mental health of the other members of the family. The courts, however, pile fiction upon fiction by giving the custody "agreement" reached through moving out, "priority" in future custody determinations.<sup>18</sup>

The parent seeking the right to move out must make a preliminary showing detailing the emotional harm he

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and the other family members are suffering. He also must provide the court with detailed, realistic plans for custody, child support and temporary maintenance.

The preliminary showing would trigger expeditious investigation by an independent mental health professional whose explicit purpose is to examine the entire family for emotional harm. Establishment of a panel of independent mental health professionals to do "moving out" assessments should ameliorate the dilemma for treating therapists of whether to treat or to advocate. It also eliminates the problem of treating therapists having to reveal their diagnosis, treatment plan and confidential communications in an adversarial setting.

Once chosen, a panel professional must have access to whatever family members he deems necessary to do his assessment. The panel member should submit a written report and recommendation to the court, including a recommended custody plan.

The standard for allowing a parent to move out should be based on the risk of serious emotional harm to one or more family members if the spouses remain under the same roof.

If either or both parents oppose the expert's recommendation, the court should schedule an immediate hearing at which the expert will testify.

(2) Re-examine the law regarding confidentiality of communications between lawyers and therapists working with a divorcing couple.

Obviously, the threat that what therapists for different family members say to each other and the lawyers for the parents will be disclosed to an adversary inhibits communication between the professions. The threat of disclosure minimizes the patient/client's interest in a coordinated approach to his problems by the professionals serving him. On the other hand, full disclosure serves an important social interest in promoting a court's informed decision making on the children's welfare. We do not presently have an answer as to how the balance between these competing values should be drawn. We do believe, however, the question of confidentiality of interprofessional communications concerning common divorcing patient/clients is worthy of further study.

(3) Routinely appoint an attorney for children in custody disputes.

We are aware of the conceptual and practical problems with appointment of an attorney for children enmeshed in a custody dispute.<sup>19</sup> However, if properly instructed by the court, the child's attorney can provide useful advocacy on behalf of the children's interest. If nothing else, he can ensure that the moving out requests stay on a fast track towards resolution.

(4) Experiment with court connected mediation programs for custody disputes.

The moving out issue is usually framed in an adversarial milieu that detracts from the search for mutually acceptable solutions. We encourage experimentation with alternatives.<sup>20</sup>

## CONCLUSION

Neither lawyers, therapists nor the courts have a monopoly on wisdom concerning how to help the Miller family through its crisis. Nor do we. We do suggest, however, that the professions must not work at cross-purposes if they are to achieve their common goal of alleviating the distress of their patient/clients. Even more significantly, we need to begin an open dialogue between the professions, the courts and the Legislature to revise the legal system to be more responsive to the Miller's pain.

## Footnotes

1. *Delli Venneri v. Delli Venneri*, \_\_\_A.D.2d\_\_\_, 507 N.Y.S.2d 855, 856 (1st Dep't 1986); *Hite v. Hite*, 89 A.D.2d 577, 452 N.Y.S.2d 235 (1st Dep't 1982); *Scampoli v. Scampoli*, 37 A.D.2d 614, 323 N.Y.S.2d 627 (2d Dep't 1971).
2. *Judell v. Judell*, \_\_\_A.D.2d\_\_\_, 512 N.Y.S.2d 699 (1st Dep't 1987); *Delli Venneri v. Delli Venneri*, \_\_\_A.D.2d\_\_\_, 507 N.Y.S.2d 855, 857 (1st Dep't 1986); *Wolfe v. Wolfe*, 111 A.D.2d 809, 490 N.Y.S.2d 555 (2d Dep't 1985).
3. N.Y. Dom. Rel. L. Sec. 246 (McKinney 1986).
4. We base this statement on a recent empirical study of custody results in the Denver metropolitan trial courts. Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. Fam. L. 703, 716 (1982-83). We know of no comparable study of custody results in New York. We have no reason to believe results in Denver are different than those in New York. Custody results in reported appellate cases are more equal. Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 Fam. L.Q. 1 (1984). We can only speculate about why results at trial and on appeal differ. Fathers may contest custody in trial courts knowing they have no significant chance of winning to increase bargaining leverage on economic issues. Alternatively, fathers who lose at trial may be discouraged from appealing by the prevalent belief that courts favor mothers; thus, only the strongest father custody cases are appealed. National results like those in the appellate survey also lump together states in which the mother always wins with states in which results are more equally divided.
5. See Atkinson, *supra* note 4, 18 Fam. L.Q. at 16 ("one of the most important factors in a child custody determination is who has been the primary caretaker of the child."). The leading case nationally is *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See generally, Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev. 687, 724-34 (1985) [hereinafter cited as "Taking Children Seriously"].
6. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 94, 447 N.Y.S.2d 893, 896 (1982); *Savas v. Savas*, \_\_\_A.D.2d\_\_\_, 511 N.Y.S.2d 378, 379 (2d Dep't 1987); *Meiowitz v. Meiowitz*, 96 A.D.2d 1030, 466 N.Y.S.2d 434, (2d Dep't 1983).
7. Cf. *Hessen v. Hessen*, 33 N.Y.2d 406, 410, 353 N.Y.S.2d 421, 426 (1974) (legislature intended courts to distinguish "marital misconduct to constitute cruel and inhuman treatment" from "mere incompatibility, and that serious misconduct be distinguished from trivial").
8. J. Wallerstein & J. Kelly, *Surviving the Break-up: How Parents and Children Cope with Divorce*, 33-54 (1980).
9. The problems of designing such a study are monumental. See *Taking Children Seriously*, *supra*, note 5, 64 Tex. L. Rev. at 703, n. 61; Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 Psych. Bull. 310.
10. See *Taking Children Seriously*, *supra*, note 5, 64 Tex. L. Rev. at 744-45; Emery, *supra* note 9, 92 Psych. Bull. at 313; L. Franke, *Growing Up Divorced*, 54-55 (1983).
11. This article is concerned only with the situation where one of the parents makes an application that he or she be allowed to move out. A different — and more difficult — problem arises when each seeks authorization to move out or to compel the other spouse to move out.

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## Leaving Home

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12. See *Law Revision Commission Report*, *supra* note \*\*\*, Proposed Statute sec. 242 (b) (5), 19 Colum. J. L. & Soc. Prob. at 132 and Commentary, *id.* at 144.
13. It strikes us as ironic that the Legislature has recently ordered courts to set a valuation date for marital assets "[a] soon as practicable after a matrimonial action is commenced", DRL Sec. 236 B (4) (b), but has given no similar command for custody determinations. The Law Revision commission proposed a similar provision for early determination, *Law Revision Commission Report*, *supra*, note \*\*\* Proposed statute Secs. 242 (b) (2)-(b) (5), 19 Colum J.L. & Soc. Prob. at 131-32 and commentary, *id.* at 1144. The Legislature's priorities seem to us to be inverted, emphasizing the importance of property issues over the welfare of children.
14. See generally, *Taking Children Seriously*, *supra* note 5, 64 Tex. L. Rev. at 731 - 32.
15. The suggestions that follow assume that the therapist is the professional who initiates the meetings and contacts. It is just as appropriate for the attorney to do so, although more likely, in our judgment, that it will be the therapist. We write primarily from the therapist's perspective so our lawyer-readers will understand that a call from a client's therapist should be considered a significant and unusual event to which a high degree of attention should be paid.
16. For a discussion of the confidentiality issues raised by a joint lawyer-therapist mediation see Schepard, Philbrick & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 Alb. L. Rev. 616, 645-50 (1984).
17. The stipulation should also be "so ordered" by the court so that there is no dispute about its binding force.
18. See cases cited in noted 6 *supra*.
19. See *Taking Children Seriously*, *supra* note 5, 64 Tex. L. Rev. at 746-50.
20. See generally, *Law Revision Commission Report*, *supra* note \*\*\*.

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