

BEARING WITNESS: VOICES FROM FAMILY COURT

By
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Daniel's Story

“Don't You Think I Am Too Young To Know All of This?”

Whenever I begin to write about this work, I think of the following story. About ten years ago I was working as a court mediator in a southern California family law court. As usual, the waiting area was packed. Parents who were in the grip of divorce, separation or some conflict about their children were assigned to this particular day for an appointment with a mediator. Depending on the court calendar, I would see as many as five couples on any given day. This would mean that I would meet with the parents, listen to as much of their stories as I had time for, talk with their children and either write a report or testify before the judge who would hear the case. This morning, as usual, I read over the case file and went into the hallway to call the parents into my office. They are young—early thirties. The child “at issue,” Daniel, is five. The parents divorced because Dad had an affair and Mom found out. (In mediation, parents are referred to as “Mom” and “Dad.” This simplifies the petitioner, respondent labeling and creates an illusion of familiarity).

Mom begins to tell me how Dad had this affair with his co-worker and immediately after the divorce was final, he married her. She is now Daniel's

step-mother and cares for him frequently, as Dad has continued his workaholic pattern into his second marriage. She cries. She admits she know she sounds like a hysterical, abandoned wife, but pleads that Daniel is terrified of Barbara and does not want to go for his custody time with Dad. Through tears she claims that Daniel has started wetting the bed and coming into her room every night talking about monsters. She wants Dad's time suspended until this is resolved. Dad, she admits, is a good father. Even though he doesn't spend enough time with his son due to his work, they have a tender, close relationship. Dad speaks. He is outraged. How dare she!! The jealous B____! Of course she would say these things. She said when he left her that she would get even. Yes, Barbara takes care of Daniel much of the time, but she tells Dad she will grow to love him as if he were her own. He has never seen her be unkind to Daniel. She doesn't spank him or yell at him.

Impasse.

It is Daniel's turn to speak. I excuse the parents and go to the children's room to sign out Daniel. The room is full of children who are there waiting to be called by the mediator in their parents' case. Many of them are over seven or eight—clearly old enough to begin to understand that what they say to the “lady” could mean they may not see one of their parents for a long time. They are old enough to know that they might have to choose between their own safety and a relationship with a parent. Daniel is not quite old enough to get what is at stake, so unless he has coached, he will probably just tell his story. We talk about kid

stuff for awhile and play on the floor. The conversation eases into his home life. He is talkative and tells me about himself. I began to bring up Barbara a little at a time. I ask him about the incident he had while in the car with her. He tells me that he was going to the store with her one day. He had to go to the bathroom, but he didn't want to make her mad. He wet his pants. His clothes were soaked and so was the car seat. She saw what had happened and pulled over to the side of the road. She got out of the car, went over to his side and opened the door. He had been munching on some chips. She took them out of his hand and threw the chips in the dirt. Then she took him out of the car and told him to get down and eat the chips off of the ground. He remembered her telling him something like, "You are a little dog, so eat like a little dog." He didn't cry. He stopped for a few seconds, then looked up at me.

"Don't you think I am too young to know all of this?" was his question.

The judge who presides over this case will never hear Daniel's question. He will never hear the interaction between Daniel's mother and his father. At no time before he makes the final decision about what will happen to Daniel, will he have the opportunity to listen to what I have witnessed. The judge will not hear the desperation in Daniel's mother's voice in talking about the deterioration of her child's behavior and his psyche, or the terror disguised as self-righteous indignation in his father's words, as he grapples with the realization that his choice has caused his son such suffering.

How did Daniel's story begin? It began like most young love stories, about six years before the day in court. A man and a woman in their late twenties meet at a party and are attracted to one another. Nothing that transpires is extraordinary to the rest of the world, but to them, a miracle has occurred in their lives. They have found true love. They share their stories of the past. Who they each were and how they each arrived at this point in time where they meet is a divine intersection. How amazing that they each want the same things---a home of their own, two children (preferably one of each), careers, college and retirement funds, holidays with family, and a dream vacation once a

year. Definitely possible, and it is not too much to ask of life at twenty-something.

The dream continues. A fairy-tale wedding, a mortgage and eighteen months later a perfect son. Daniel. Now on the coffee table are a wedding album and a baby book. Later these will be used as evidence in a paper trail of broken promises, innocence and guilt, along with house and car titles, credit cards bills and membership in Cosco, but not yet.

Love still lives here, in what we refer to in the research as an intact family. It functions as a unit, and the language of custodial time-sharing or right of first refusal for child care are from a distant, foreign territory.

Intimacy, trust and commitment deepen as this family creates a language in its own country. Pet names and idiosyncrasies become its custom. New traditions are made—Santa will come on Christmas morning instead of Christmas Eve. Late night bed-time talks about what Daniel learned that day, and how he is already exhibiting each of their best qualities, when he should be toilet-trained, and where he will go to preschool are its rituals. He is adored. His protection and happiness define their daily routine.

Then, the routine begins to define them. They are so many selves other than “Mother” and “Father.” Career ambitions, job transfers, long commutes, broken dryers and rear-end collisions seep into their inexperience like leaky plumbing. The business of life takes over. Getting up at six o’clock to get ready for work, preparing Daniel’s lunches and diaper bag for his day at daycare,

making sure his cold medicine is included, taking out something for dinner, waking Daniel and dressing him for the day, rushing through “I love you” and “have a good day,” pecks on the cheek to be in the car by seven punctuate the morning. The evening is overcrowded and burdened with its own demands.

What happens next is a mystery. It is like soil erosion in the earth of the human heart. It is how each of us is human in our own way. It will be pecked to pieces by attorneys, counselors and psychologists who are explorers on the trail of failure, blame, culpability and neglect. No one in this scene is evil or malevolent. The decline of the relationship begins with a moment—sometimes as benign as a caring word or look from an associate. Sometimes it is as deliberate as a search to fill an unfamiliar vacuum. It is not meant to be hurtful.

In this instant, it has *nothing* to do with Daniel.

The unraveling of this relationship is as commonplace to the outside world as the way it was woven together. Dad was given a promotion and began to travel frequently. Often, he would be accompanied by certain female associates, one in particular. Mom was tied to her own career and Daniel's routine and stayed behind. This was an arrangement mutually agreed upon by Daniel's parents. This fact would be the focal point for the attorneys who would follow in its wake. Small deceptions led to bigger ones as Dad formed a relationship with someone who “finally understood him.” Mom formed her own allegiances

with friends and co-workers who offered endless advice and tips for “warning signs” of betrayal. Each of these parents is bolstered and barraged by media of every kind. Their scenario is played out nightly on prime time television.

Standing in the supermarket line, *People* and *Us* plaster their glossy covers with jilted loves and who will be next. Self-help books abound.

In this instant, it has *nothing* to do with Daniel.

By the time there is talk of separation and divorce, a liturgy of alienation and isolation will have emerged from devastated emotions and feelings. A point in time exists between couples who separate and divorce when there is no going back, the proverbial “point of no return.” This moment is not often arrived at simultaneously, but rather one person will decide the relationship is finished, while the other comes to grips with what this will mean in their lives. Couples do not only divorce one another, but also each other’s families and traditions. Grandmothers, grandfathers, aunts, uncles, cousins, brothers and sisters feel both the quake and long lasting after-shocks of the loss and the deliberate reconstruction around who is missing. Divorce creates an enormous imbalance in the family as a system, second only to death. Its members struggle to once again find their places. Holidays during the first years of its aftermath are excruciating. Death, at least, is accompanied by acceptable language and rituals. The rage can be railed against accident, disease, or even

God, but not one another. Family and friends bring food, send flowers and cards. It is public, and there is no shame.

Divorce and separation are riddled with humiliation and failure. It is talked about in muffled, cryptic conversations and whispered telephone calls. Children are asked to leave the room for “grown-up talk.” Without exception, after the age of four, children know that something terrible is happening. They see their parents try to hide tears, rage, the mail and the papers on the table. They instinctively know that if their house had a storm shelter, now is the time to go there and seal the door. Though more than half of the couples who marry today will end up divorcing, the stigma surrounding it is embedded deep in our social structure. The wound eventually heals. There is *always* a scar. Age is no exemption.

For Daniel’s parents the decision has been made. Each of them stands at the trailhead of this journey which will lead them in different directions to separate destinations. Attorneys are consulted and retained, and the landscape inalterably changes. Daniel’s parents no longer communicate with one another, but have abdicated their individual and collective voice to virtual strangers who charge by quarter hour. The lawyers will be both their guides and translators as they make their way through this foreign and treacherous terrain.

In this instant, it has *everything* to do with Daniel.

The legal system has its own language, protocols and rituals. It isolates life experiences, solidifies and formalizes them, and then uses them to build a

case. The events in a crime can be broken down and sequenced. Often there are witnesses and evidence. When it works, the criminal justice system convicts and exonerates by determining guilt and innocence in an adversarial process. It protects us. Its sharpened sword cuts through the grey areas building proof and arriving at a judgment. Its purpose is the truth. Each day we depend on it working.

The written law that governs family law cases cannot accommodate the infinite variations and moves we make in our lives. Our lives are about change. We initiate and adapt to it constantly. Our nuclear and extended families are the electrons that create a pattern surrounding our center; yet each of us is that center. When families enter family law it is like extracting one frame from a movie, freezing it and using the frame in front of you to decide the characters, plot and how the story should end. The still picture itself may be colorful, clear and well-defined. yet no rewind button is included to show how these characters arrived at that particular moment, and certainly there is no fast-forward button to know what the future holds. There is only that moment, and in that moment, the decision will be made.

Once Daniel's parents have taken the first step into the legal system, what happens next is dictated by the system itself. Whoever files for the divorce will now be called the "Petitioner," and the other parent is the "Respondent." Collectively they are a "case," and the "parties." Their divorce is an "action." They have a case number. They have officially entered the system. The

gateway back to where they were has closed, and the process will move them along, based on dictated timelines for filing documents and hearing dates. Under the direction of their respective attorneys each of Daniel's parents will file Income and Expense Declarations. They must declare under penalty of perjury what each of them earns. They will itemize all property they have acquired in the last six years they have been married—including their home, cars, appliances, sofas, dining room sets, big screen televisions, stereos, Visa, and Master Charge debts.

And Daniel.

A popular and pervasive myth exists in the world of family law regarding each parent's time with a child. The myth is: time does not equal money. It does. There is a direct correlation between time sharing and child support. Computer programs exist so that the judge can sit on the bench, and while taking testimony in a certain case, "punch in the numbers" and arrive at a child support order. Other variables like medical insurance, school tuition and daycare expenses are calculated and entered in the formula as well, to arrive at a "fair" amount. But each parent's time with the child weekly drives the equation. For example, if Daniel's father sees him every other weekend from Friday to Sunday and every Wednesday, that is ten days, or one third of the month. Support will be calculated accordingly. Overnights are worth more than just a day. Summers and holidays are deal-breakers. Bloody battles are waged over three-day weekends. Attorneys brandish their swords and take up a client's desperate plea

for Christmas Eve. A “fifty-fifty split” creates a tie. It is the Holy Grail in a custody war.

Daniel is terrified that Santa will not know where to leave his toys.

After Daniel told his mother about the incident in the car with his new step-mother, and she chooses to take action, her only avenue for a solution is to return to the legal system. She is driven instinctively to protect her little boy, while at the same time, she is faced with going back to an attorney and to court. This will cost her money, time, and sick or vacation days at work—things she struggles to save for Daniel. This is merely her initial dilemma. When her attorney files with the court on her behalf, it will be presented to the judge as a modification to an existing custody and visitation order. Then how does Daniel’s protection and peace of mind translate into a modification of time with his father? Daniel looks forward to the time he spends with his Dad. He is pivotal in Daniel’s life. Can she bear the responsibility of damaging that attachment? What would that do to Daniel?

For Daniel’s father, life has become a living nightmare. He never meant for any of this to happen, and he would never intentionally do anything to hurt his son. He kept telling himself through his separation, divorce and remarriage, this was not about Daniel. He stayed close to Daniel through all of it. Nothing would come between them. He loves Barbara. He recognizes that she hasn’t “taken to Daniel” as quickly and smoothly as he would have wanted. He knows her life has been hard, and she would have preferred to have him all to herself, for at

least the first year of their marriage. He knows she resists the word, “step-mom.” He believed his love and Daniel’s sweet tenderness and affection would eventually make it all right. Now he is looking straight in the eye allegations of child abuse, failure to protect, possibly two failed marriages and Daniel’s terror of being in his home. He is at risk of losing everything.

Many courts, in an effort to decrease the overwhelming cost of litigation, for the clients and the court itself, require parents to attend at least one mediation session before their hearing date. The desired outcome for offering mediation to parents is that, with the mediator’s direction and support, the parties might come to an agreement. This would defer the court costs and decrease the judicial officers’ workload. Mediation also allows each parent to talk, to tell his or her story. It is the only time Daniel will tell his story.

The morning that Daniel’s parents come into my office for mediation, they will be discussing the event that occurred with Daniel’s new step-mother. A year earlier when they were divorcing they had attended mediation and arrived at a joint custody arrangement in which they alternated weeks. This is commonly called “one week on/one week off.” They had each established their respective residences close to one another and in the same school district for Daniel’s sake. Each of them, under tremendous emotional, financial and physical stress, had made every attempt to focus on how to make these cataclysmic changes in his life with as little disruption possible. However, neither of them were prepared for what has happened.

Daniel's parents will not reach an agreement with me. The sacrifice for each of them would be too great. Each perceives Daniel as that sacrifice. Daniel's mother cannot find a middle ground regarding her son's safety in his father's home with Daniel's step-mom present. There is no way for Daniel's father to promise her Daniel will not be mistreated. Daniel's father would be forced to choose his new wife and their future together which includes a family of their own, not seeing Daniel, or spending time with him away from Barbara, who insists that Daniel blew the event out of proportion. If he is separated from Daniel, he feels like he will break into a thousand pieces. He cannot get there from where he sits. He believes he can make it work and keep Daniel safe. The chasm is too wide and too deep. Neither of them could ever have anticipated that they would arrive at this moment. They cannot do it.

Not even for Daniel.

Judges are judges because they were lawyers first. Their expertise is the law. Most judges will admit that family law is the toughest assignment they can have, and most would pick another branch of the law if given a choice. Criminal, civil and even juvenile law do not function in the vast, empty no man's land of family law. As in the case of Daniel's parents, neither of them has *legally* done anything wrong. There is no evidence. Barbara, who is technically "not a party to the action," denies everything. Daniel, whom the judge will not speak to, is only five. The attorneys are like race horses at the chute. If, in the hearing, the judge

ventures outside of the parameter of the rules, one of them will appeal his decision.

He listens intently to the attorneys on each side. They are compelling. They build their arguments around the power of a mother's love to protect and the necessity of a father's influence. Each cites convincing research by experts in the field to support their respective cases: the detriment to a child without frequent contact with a father; the definitions of child abuse, and its warning signs in children; an abandoned wife's vindictiveness and an adulterer's guilt. Each makes a riveting plea about the validity of Daniel's story and the power of a child's imagination.

To the judge, Daniel's case is typical, if not routine. Most judicial officers will hear more than twenty such cases in a day. In some courts, they may hear forty. Family law courtrooms are overflowing and understaffed. The supply is limited and the demand is endless. Because of their heavy case load, they render a decision at the end of the hearing and move on to the next case. Unless there is an obvious threat of imminent harm to a child, molestation or abuse, most judges generally take a stand in the in the gray, soft, undefined, middle zone, as did the judge in Daniel's case. This is not from a lack of caring. Sometimes it is against their own sentiment and innate sense of what is needed. They themselves are judged by the law, which is written in black and white. *It is not personal.* A law can set a direction for the future, but it cannot predict or enforce what we each do in our own lives, nor would we want it to.

How will Daniel remember these events from his childhood? What stories will he tell about them? How did they shape who he is today?

To you, Daniel, the answer to your question is “yes.”

You are too young to know all of this.

The decision was the following:

- a.) **Joint custody and the current visitation schedule would remain in full force and effect.**
- b.) **Respondent (father) and his current wife would seek counseling regarding the proper discipline of Daniel**
- c.) **Mother would take Daniel to a counselor agreed upon by both parties and parties would share the cost.**
- d.) **If the counselor had concerns about Daniel, she/he would make that available to the Court at the review in six months.**

