

**WHEN
AN**

OTD

**PARENT SEEKS
CUSTODY**

CHILDREN CAUGHT IN THE
CROSSHAIRS OF DIVORCE

It is almost always traumatic for children to witness the dissolution of their parents' marriage and the breakup of the family. Still, when one parent also abandons Yiddishkeit, a child may feel even more shocked and vulnerable. **Martin Friedlander**, a New York-based matrimonial lawyer, is dedicated to helping divorcing couples reach a resolution that's best for their children. **By Rabbi Yitzchok Frankfurter**

You reached out to us last week after a negative film was aired about the Orthodox community, asserting that no one is taking into consideration the children who are caught in the crossfire. What did you mean by that?

When these negative portrayals spread on social media and are highlighted, I think we as a community have to focus on helping the children. These children were raised in a *frum* environment, and now they're being thrown into this tug of war and are being exposed to things they've never heard about or were prepared for, which affects them deeply.

Before we get into that, tell me about your practice.

I'm a matrimonial lawyer; I do family law and matrimonial law, and I've done it for over 28 years. I also have *smichah* from Rav Pam. I've appeared a lot in courts and in *beis din*. I started with Judge Sunshine, who is now the administrative judge for all matrimonial law in New York State. Obviously, my practice has a large *frum* element, because people prefer lawyers who understand what the issues are.

Particularly in divorce it's important to wear both hats—rabbi and lawyer—because they're going to need a *get* and a legal divorce.

Right, and you need to know how to get a kosher *get*, especially if you're dealing with

agunah issues. People have strong gut reactions when it comes to recalcitrant husbands, but even when they propose laws, ultimately if the resultant *get* isn't kosher, they aren't helping anyone. I had a case a few years ago when a woman came to me because she needed a *get*, and he was a *kollel yungerman*, so obviously there wasn't any money there. However, he refused to give her a *get* because of child support related issues. Eventually the judge looked at me and asked what I'm here for. I said, "Do you think I'm here for the \$25 for child support?" She said, "No. So why are you here?" I said, "Because if you don't write the decision properly, this woman will never be able to get remarried." A 120-page decision was issued on this case, and they had nothing—a few pieces of furniture and a few children.

Meaning that she would never get married because the *batei din* could look at it like the *get* was forced.

Yes. She was a *frum* woman who wasn't going to do anything unless she had a proper kosher *get*. But the way we put the award of money for child support based on his testimony helped her receive a kosher *get* within six months.

As an aside, which divorces are more complicated—when there is money or when there isn't?

It's a good question. The problem is that

when it involves children it's beyond money. In the *frum* community people will go around to friends and family to help fund the case and do whatever it takes. If there's money that has to be divided that's a separate issue, but I've had cases where the money issue was settled immediately, and it was the custody of the children that made the case lengthy.

I spoke to a few *dayanim* last week, and they told me that most of their matrimonial cases are done through mediation rather than through judgment.

Absolutely. Very few go *l'din* and sit down to issue a full *psak*. Once you have to have a *yeshivas beis din* everyone is going to take out their calendars and so on, and then it becomes a year or two years, which no one wants. Unfortunately, some *dinei Torah* take longer than the marriage. They all try to mediate. But when it gets there, the way they write it also important. In New York *dayanim* are only mediators in regard to custody. In New Jersey they have the power to arbitrate custody too, if they do it properly. So a New Jersey *beis din* for a New Jersey case can decide the entire case. In New York, however, if they don't do the forensics properly, the court will look at it and possibly force them to start from the very beginning, because they're nothing more than mediators.

So unlike monetary disputes, where

the parties sign arbitration agreements, in New York the parties can still go back to the courts to change things.

That's right. In New York custody isn't arbitrable. The only way a decision can be officially made is if the parents agree or if the court issues a decision. The *beis din* can make suggestions, and the court can look at how it was done, but the court has the ultimate power.

If the couple enters into a settlement agreement through *beis din*, is there a fear that they will say afterwards in court that they were coerced or that they didn't realize what they were signing, etc.?

It used to be that if you had a *psak din* or a stipulation from a *beis din* with an immediate *get*, a lot of people went back to court. People still try it today, but I don't think they're as successful, unless there's really some background. The courts say, "You could have come to court originally, but you didn't." They would have to show that there was unusual coercion. If the case shows that something unusual took place then the courts are more likely to review it, but the person has a higher burden, especially if they signed an agreement and the lawyer who drafted it is representing them as well.

When going through a divorce, there are a lot of issues. For example, when it comes to child support, there's the question of what kinds of government programs are available for the children. So outside the *halachah* and legal issues, there are important things to know.

That's a bigger problem, because the court has a formula for child support, and obviously whatever someone qualifies for, they get. The *batei din* look at these programs as part of the support, which makes the decisions very complicated. In other words, in



L-R: Rabbi Dr. Aaron Twerski, Martin Friedlander and criminal attorney Ben Brafman

New York, for example, it's 17% in support per child, up to \$154,000. In *batei din* it's a flat rate. If someone is learning it's about \$75 per week per child. If the person is working it can be between \$100 and \$150, and then tuition, camp, tutoring and medical are all 100% on the father. But in New York if the *beis din* doesn't write a *psak* that works with the court's calculation, it'll be thrown out and sent back to the *beis din* to recalculate. That's where it's important to understand how to write and calculate it.

So the court is going to exercise its oversight, which can be a problem.

Yes. When it comes to child support in New York, even if there's a stipulation, the court will review the calculations, and if it doesn't make sense they'll send it back.

Will they send it back or overrule it and make their own decision?

In my experience they try not to overrule it. They send it back and say that it has to conform with the child support standards. If you go to court for it, they say, "You went to arbitration, and this is arbitrable, but the *beis din* didn't follow the CSSA." Then they'll send it back for a recalculation according to the guidelines. If the *beis din* refuses, then the court will do it, but in most cases they just send it back.

Then there's another issue—the psychiatric issue, which has many aspects and has to be evaluated by outside professionals.

Right. Sometimes by a psychiatrist, but generally by a psychologist.

Often there are psychological underlying reasons or problems that lead to divorce.

There are many reasons and factors. Unfortunately, we aren't sheltered anymore, and I tell people that every type of divorce that you hear about in the secular world is in the Orthodox world too. And there are cases where mental issues are not disclosed beforehand during the *shidduch* process, which can come out right after the marriage and cause a lot of havoc. The other issues are there, but the courts require forensics when it comes to the children. When I was involved in the drafting of the halachic prenuptial agreement, I took into account all of these considerations—for example, it should always be a sitting *beis din*, not a *zabla* (a *beis din* whose composition is chosen by the two sides), so that there's more accountability. And I also tell the *batei din* to use the experts who are used in the courts, because if they use someone else and end up having to go to court, there's a likelihood that the court won't look at it and will start from the beginning.

Whereas if you have someone who is reputable, the court will at least look at it or ask the expert to report to the court so they can hear their evaluation.

As someone who is both an attorney and has *smichah* I'm sure you're very sought after as both an attorney and a *toein* when it comes to these things.

In the last few years people have been trying to resolve their disputes through *batei din*, but they feel that their attorneys should be there, even if there is a *toein*, to make sure that if they're spending their time and money in *beis din* it will be enforceable so they don't have to come back.

I know that there are men who complain that the *agunos* get all the attention, but their plight—not being allowed access to their children because their wives are using that as a weapon—isn't taken into consideration. Can you comment on that?

There is an issue with that, but generally when a case goes to trial because the father is seeking custody, they receive it. The problem is that we don't have anything in the community for them. We have support organizations for women, but we don't have the same for men.

Do you think they should have?

Yes. Men who are getting divorced need the same support as the women. *Gittin* should never be used as a weapon by anyone, but there are men who suffer as well. I was recently speaking to someone, and I told him that while there are 17- or even 19-year-old cases of women waiting for a *get*, which is atrocious—and my policy is that if a man walks into my office and says that he doesn't want to give a *get* I tell him to find another lawyer—but the statistics out of Eretz Yisrael for the last year from the Rabbanut show that there are more women refusing to receive a *get* than men

refusing to give one. And people don't know that.

Is that because they want to stick it out or because they want better terms?

Unfortunately, the women who refuse to accept a *get* are doing it for the same reason as the men who don't want to give one—they want a higher settlement or better terms. Both men and women need organizational support when going through something like this, and men don't have it. Because of the men who use this as a weapon and the publicity that it gets, the other side isn't shown. That's why it's important for us, as a community, to deal with all of the issues.

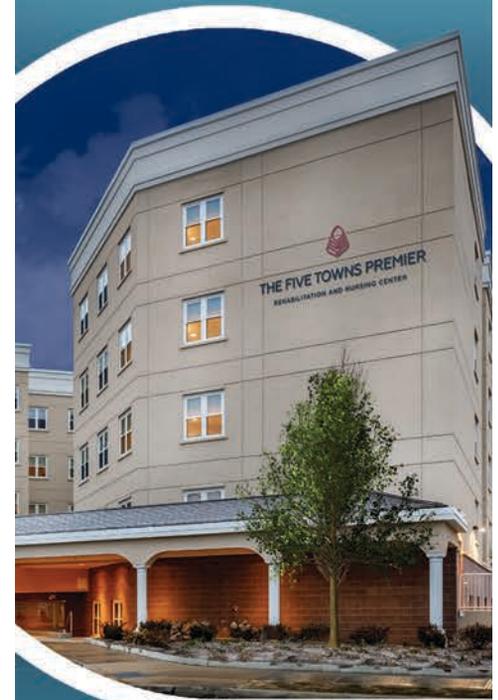
As I mentioned, I met with a panel of *dayanim* last week, and one said that there is an increase in divorces while another said that there isn't. What's your take on that?

There's no question that it's increasing. Is it 50% of the marriages like they say it is in the secular world? No. But even in the secular world, when they say 50%, it's not an accurate number, because they take the number of marriages that year, and then they take the number of divorces for that year, and they come up with that number. So the percentages aren't correct. When I was working with *rabbanim* and *dayanim* on the halachic prenuptial, we met with *chasidische* and *Litvishe rabbanim*. Some of them were saying that the numbers of *gittin* aren't high enough to justify new innovations. But I said, "Even if it's only 600 out of 10,000 families, isn't that a significant number?" When I speak to people about these issues, I tell them, "Come with me to the Supreme Court in Brooklyn. Not only will you see the number of *frum* Jews there, you can *daven* in every *nusach* you want..."

But the community is growing. Is the percent growing with that?

I believe so. If you look at the *batei din* and

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at the courts today, and the amount of Orthodox cases, it's growing.

Is it growing more than the population growth?

I believe so.

When it comes to the issue of OTD, some educators maintain that the numbers are growing because the population is growing, but the percentage isn't growing. I don't know whether that's correct, but OTD certainly creates a problem when it comes to divorce.

It does. I can tell you that while ten or 20 years ago people might not have wanted to make a spectacle about it, or they didn't want it known what they did in their homes, now there are a lot of cases that affect the children. There is an organization called Footsteps that encourages people to go off the *derech* and walks them through it, and they give them free legal help. These people are getting large Manhattan law firms coming in on divorce cases, and it's all pro bono. People don't realize this. I've been dealing with such cases for a number of years. I filed an appeal last week in such a case. I didn't do the original case; I came in as the appellate lawyer.

Before we talk about that particular case, you're saying that people who go off the *derech* have the benefit of having their divorce taken care of by top-notch attorneys at no cost.

Yes. These lawyers might not be matrimonial, but when they're coming from a 500-person law firm, they'll figure it out. I've had many such cases. They get aligned with them and that's it. It doesn't matter what the person is earning; if they're under this umbrella,



Law Journal articles about cases that Martin Friedlander was involved in

these attorneys will take their entire case pro bono.

Do they also have an advantage when it comes to custody because the courts are biased against our way of life, which is portrayed as cult-like and so on?

They try to portray us that way. There was a time when all the cases started off very similar, and they portrayed it as them wanting

spouse who goes off definitely tries to portray it that way, and then it becomes very complicated. A lot of times one side isn't saying that the other side didn't take care of the children; rather, they're saying that they want to take custody because they don't want to maintain the status quo—they aren't going to keep their kids in *yeshiva* or maintain *kashrus*, which is the way they got married and raised the children. That becomes a bitter fight.

THERE IS AN ORGANIZATION CALLED FOOTSTEPS THAT ENCOURAGES PEOPLE TO GO OFF THE DERECH AND WALKS THEM THROUGH IT, AND THEY GIVE THEM FREE LEGAL HELP.

to bring the children into the secular world but aren't being allowed to do so. Now it depends on which court you're in. The judges in Brooklyn, for example, understand what this does to a child being raised a certain way and now having to juggle the differences between houses and parents, etc. But the

If a couple brought up their children and then one of them leaves the fold, who is at a disadvantage in front of the courts? The person who left or the person who stayed?

Obviously the person who left is trying to change. Usually there isn't a fight over whether they were ever really observant. But let's say it's the primary caretaker who left, and now the children don't want to leave that parent, but they also don't want to leave the lifestyle in which they were raised, it becomes very difficult. It isn't as simple as saying that one has an advantage over the other. The older the child, the more aligned with the child's will the court will be.

But if it's young children and both parents were involved in caregiving, it becomes a real fight. Yes, there is a status quo, but there are other issues as well.

Do films portraying the Orthodox community in a bad light put you at a disadvantage?

If you have a judge who isn't educated on the community and then watches something like that, does it give them the perception that we're archaic and backwards? It does.

Have you ever felt the need to walk into a courtroom and say, "Your Honor, I'm also Orthodox," or does it never come to that?

It doesn't come to that. They know who I am. I've been around for a while. But one thing that people don't understand when it comes to all of this is: What about the children? I've been dealing with this in many cases, and I've read the published decisions even when they weren't my cases. The main precedent says, "I don't care if you both signed an agreement that says that both of you will adhere to the tenets of Orthodox Judaism while the children are young. It's unconstitutional. You can't obligate the parent to do anything, even by contract."

I know that there is a prenuptial agreement that's meant to combat that.

I drafted that.

If the prenuptial agreement were to say, "If one of us goes off the derech then the other one gets custody," would that be enforceable?

No. The agreement I wrote gives *kashrus* and Shabbos protocols, which both parties agree is how the children were raised. But going off the *derech* isn't enough on its own to lose custody. In the old days judges would be more understanding. About 30 years ago there was a case where the mother and father, who were Modern Orthodox, wrote an agree-

ment, and the child was transferred when it was violated. The principle used there as precedent was that it was in the best interests of the child.

What was the agreement?

That both parents will maintain Orthodox tradition and comply. And the court said that in the best interests of the child they have to move custody from the mother to the father. Why? The mother turned on the television on Shabbos along with other inappropriate things. They said that it violated Orthodoxy, so the children were transferred to the father. That would not have been decided the same way today. Our courts are much more liberal now, and they won't agree to interpret what Orthodoxy is.

You drafted a prenuptial agreement. What exactly does it say?

It says what Shabbos and *kashrus* means. In other words, it defines the *hechsheirim*—which can be altered when being drafted based on the community for which it's being written—what a *shul* is, what the standards for a *mehitzah* are, etc. It's written in a way that the court no longer has to interpret *Yiddishkeit* or religion, and it says that this is the way the children are going to be raised.

But you can't negotiate that because it's unconstitutional.

That isn't unconstitutional, because you can talk about how the children have to be raised as long as you don't talk about the parent's conduct.

And if one parent violates it they automatically give up custody.

No. First they have to be brought to court, and if they say that they can't abide by the agreement then the spouse can ask for a change of custody based on the violation. But you can't write agreements that say that if one of the parents aren't religious they're going to lose custody. And while you can say

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what the child can or can't be exposed to, you also have to define what that means in very clear terms. You can't just write that they must abide by the tenets of Orthodoxy.

In the appeals case I mentioned earlier, the original judge wrote that the child can't be exposed to anything that is against chasidic tradition. Unfortunately, after the trial the mother went to Footsteps and got an attorney to appeal on two issues. One is that even though the father was awarded sole custody, the *chasidische yeshivos* don't provide a secular education, so she should be allowed to make the decision on education. And the second is that chasidic tradition isn't defined, so now the court is going to decide religion? We responded to that, but then the ACLU came in on the mother's behalf, because she now leads an alternative lifestyle. They said, "How can you bar the mother from acting any way she wants in front of the child," which isn't what the order said, but they said that it was implicit because it would violate his chasidic tradition, and they also said that the court shouldn't be making decisions on religion, especially because it isn't specific.

New York State is a very progressive state, and these are very progressive times. It seems that it's going to only become more difficult to enforce these kinds of provisions.

That's true. Ten to 15 years ago we always wrote these types of provisions in the agreements—"The parents will abide by the rules of schools, etc.," and we put in different parameters. However, the courts have changed their views, so we have to be very careful with the way these stipulations are written, and it's also possibly time for us to pursue legislation. The Catholic church has some similar issues with these things, and it might be time to discuss it with them and come up with some provision. As I always say, is religious freedom a one-way street? If you want to pursue religion are you not protected under the Constitution?



Addressing a Yashar Initiative event

Which type of stipulation are you referring to? A settlement stipulation or a prenuptial stipulation?

A settlement agreement. These were always factors that we would write into the settlement agreements, and we would have to negotiate what the terminology should be regarding the conduct in the house and with regards to the children. There definitely has been a movement now towards a more liberal

legislate?

I think if we sat down as a group with other religious leaders we can get something done. When the Get Law was passed—whether you're for it or have problems with it—we were able to promote it because there was a need. I think this extends beyond *frum* people, because it's important to every type of religious person. When it comes to custody and visitation, the courts should have established ground rules based on what the back-

WE NEED TO MAKE A SUPPORT ORGANIZATION FOR FRUM PEOPLE DEALING WITH A NON-FRUM SPOUSE, BECAUSE THEY HAVE FOOTSTEPS AND OTHER ORGANIZATIONS COMING UP TO BAT FOR THEM.

interpretation in not allowing us to do so. The understanding before was that if a parent gave up their right by signing a stipulation saying that this is the way their conduct will be, it was agreed and that was it. Now, the appellate division is saying that we can't do that.

You said that the way to resolve all these issues might have to be through legislation. What would you like to

ground of the child was previously. Although it's taken into consideration now, if it was enshrined in law it could be written in a way that would allow us to deal with the constitutional issues. And we also have to define things better so the courts don't feel that they're making a decision that encroaches on the separation of church and state. I think the judges would also feel more comfortable addressing this if it were a law.

Whereas now it's either ambiguous or not addressed at all.

Right now it's a factor, but because of these appellate division cases that have been coming down and knocking at it, I think even the judges are concerned about how to draft a decision that's going to keep the status quo.

Did you speak to the Agudah about whether they would be interested in advocating for this?

We're talking about it.

You're addressing the child who is caught in the crossfire, and I'm assuming that you do that professionally as well, because you're trying to ease things. But you won't be able to deny visitation for the other parent, so they're always going to be in that conflict.

Yes. In this case we're dealing with, the child didn't want to sever connections with the mother, the child just didn't want to be exposed to her lifestyle. With children in this type of situation, it's really about helping them maintain what they want to maintain, or if it's a six- or seven-year-old child, who is less established, to maintain what the parents agreed to when they got married—doesn't one of the parents have the right to want to maintain that?

Yet, as I said, even if the frum parent wins custody, it's unavoidable to have conflict and exposure for the children.

The question is whether there will be accommodations for them. Children aren't stupid; they know what each parent is doing, even though in some of the stories they tried to hide it. But the question is, when they go to the houses, will there be kosher food? Will they be able to keep Shabbos? There was one case where the judge spent a lot of time and effort on carving out time in a smart way, and the mother in that case wasn't even not *frum*, she just became more modern. For example, the judge gave the mother Chol Hamoed as opposed to Yom Tov so the children wouldn't have to worry about the differences. He even worked out things like *chalav Yisrael* and libraries and things like that. But very few judges would take the time to understand the nuances as this judge did.

When negotiating a stipulation of settlement—whether in *beis din* or not—you negotiate those terms. And you're saying that it's important to define it in all particulars so there shouldn't be any disputes as to what was agreed.

Right, because the courts won't want to define it.

So even if you write “according to *Shulchan Aruch*,” you can have a liberal rabbi come in and explain to the judge how it's not in violation of *Shulchan Aruch*.

BACK ON TRACK

Chaya* was at home. That was the biggest blessing her parents and siblings could see in the situation. Painful as it was to watch her—confused and troubled—on a downhill slope, they took comfort in the fact that at least she was still living at home. As long as they were able to heap warm, loving attention on their struggling teen, the family knew there was hope. Hopefully one day, Chaya would regain her sense of direction and get off the rocky path she was slipping down on.

That's why her sudden announcement left the entire family reeling. Chaya was leaving home. Her parents' fear mushroomed, their pain was exacerbated.

All their anguish oozed freely over the telephone wires when they called Tehillim Kollel. “Please! Please daven for our Chaya. We need to save her from being lost forever.” They desperately hoped the timeless Tehillim would restore her emotional and spiritual wellbeing to its natural, pure form.

With the greatest faith that the Kol Yachol could turn any situation around, the chashuve Tehillim Kollel members began to daven for this struggling neshamah.

The transformation was quick, almost instant. In an open, heart-to-heart conversation with her daughter, Chaya's mother heard the words she pined to hear for so long already. Chaya admitted that she didn't feel good about the trouble she had been making. She wanted to undo her mistakes.

That was the turning point. Chaya embarked on the road to a serious comeback. Indeed, the power of Tehillim, attentively uttered by Talmidei Chachamim, had an almost instant impact!

*Name has been changed.

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We've had that, but that's why I try to use an organization that has some protocols written down, such as a *mechitzah* being part of the definition of a *shul*. I define Shabbos with particulars regarding driving, electricity and so on. I also explain *kashrus*, not just which organizations are reliable but also how the house has to be. That's the only way. You have to be very definitive if you want to be able to do that.

There are two types of agreements—one is a prenuptial agreement, when everyone is happy and still thinks that they're going to live together forever, and the other is after the fact. Which one is easier to enforce for these things?

In a prenuptial agreement you're hoping that the parties are on the same page when they're getting married, and therefore their *hashkafos* should be the same. It should never be an issue of contention, and if it is then they have a problem right away before their marriage even begins. But in a settlement agreement you're dealing with reality.

But how easy is it to enforce the prenuptial agreement after the fact, once one of them goes off?

It's an enforceable contract. The person agreed that this is how their children would be raised.

So it's as strong as a settlement agreement. But there are a lot of rabbanim who still say not to get involved in prenuptial agreements.

I started this concept a long time ago, when a *frum* professor asked me to do it. But now we have Rav Miller, Rav Hillel David, Rav Forchheimer and other *rabbanim* on board, and the more I speak to local *rabbanim* the more they think that it is a good idea. Some *rabbanim* were initially against it because they didn't like the idea of talking to a couple that's



just getting married about potential divorce. But the *kesubah* is also about how much the husband would have to pay in the event of divorce, and there's a *teshuvah* from Rav Moshe regarding adding conditions to the *kesubah*. However, it's something new, and anything new takes time. We sat down with *rabbanim* and changed things in accordance with any halachic issues that came up, and we gave a lot of power to the sitting *beis din* over issues that the *rabbanim* felt can only be decided after the fact.

We have this concept of separation of church and state, and the courts don't rule on any religious issues because of that. Do you run into that problem at all?

On the one hand, there is separation, but on the other hand, when it comes to custody, religious observance is something that is looked at in terms of the forensic evaluation. In other words, if the child affiliates as *chasidish* or Orthodox and feels comfortable in that environment then that's a factor that the court has to consider if one of the parents says that it isn't their lifestyle anymore. That's

a factor even in local law. In fact, I've lectured with psychologists to judges on how to take religious considerations and the nuances in custody cases, because that can often make a big difference in the way they deal with such cases.

What message do you have for the community?

We have to be aware of these things and how they affect the courts' decisions, and I think there are two things. One is what you mentioned regarding men not having a support unit, and if they would have one it might help things. And I think we need to make a support organization for *frum* people dealing with a non-*frum* spouse, because they have Footsteps and other organizations coming up to bat for them. In the case I mentioned earlier, when the ACLU came in it became very difficult, because we don't have that type of infrastructure. We have to get organizations together to put a reply in, and now we're dealing with a constitutional issue. Fortunately, I was able to get Nat Lewin to come in on it, but we need to have an infrastructure that can deal with such cases for our community.

I find particularly interesting what you said about providing the same type of support that Footsteps provides for those who leave the community.

Absolutely. Maybe it could be under the discretion of a *vaad* with some lawyers to ascertain the details of the case, but we have to do something, because they have lawyers who are working pro bono and can just produce papers, and there's a limit to how much you can respond. On a professional level, it's very difficult to settle a case when one side is paying counsel's fees and the other side isn't, because there's a reality when it costs someone to do the work. And as I said at the outset, we must protect the children who are caught in the crossfire at all costs. ●