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Is the Current Family Law Legal System Facing Extinction?

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Inflection points should not be ignored. In mathematics, there is a concept called the *inflection point*, which describes the point at which a curve on a graph changes directions. Business has adopted this concept, sometimes known as the *strategic inflection point*, referring to when a change occurs that requires a business to change direction in order to survive. Changes occur in technology, in the customer base, in the business area (such as increased competition), in regulations or in all four. Companies that heed such changes and reinvent themselves have a chance of thriving. Companies that do not, often find themselves headed for extinction.

If you think this is theoretical, think of Polaroid and Kodak. Kodak is particularly disturbing because they had invented a digital camera in 1975, but rather than pursue that technology, Kodak sold the intellectual property and hung on to the chemical film business. Bookstores are another example of pending extinction. Think of neighborhood bookstores that did not see the inflection point when the large bookstore chains blossomed. Think of the Borders bookstore chain that did not see the emergence of digital books as an inflection point that would dominate the market. Those *inflection points* were changes in technology. Other changes can be in the customer base and, the way products are sold. How would you like to have owned a string of rental video stores 15 years ago? People still watch movies, but the way they watch them has changed dramatically. Or think of Equal Exchange, which built a for-profit Fairtrade worker-owned cooperative with great success, on the basis of paying its growers more and charging customers more. The change in the customer base was that customers were willing to pay that premium for the feel-good of being fair to the farmers who grew the coffee.

Changes in regulations can be the inflection point. In the late 1970's, when airlines were de-regulated, the shift in the customer base was from level of service to cost of the ticket. Southwest Airlines, a small regional airline at the time, saw the inflection point and thrived. What happened to Pan Am and TWA?

In the early 1970's, there was a gas crisis caused by shortages in the supply. There were gas lines, and prices rose rapidly. The big three auto makers also relied on planned obsolescence for repeat sales. Cars were manufactured to provide between 60,000 and 100,000 miles to their owners. A motorcycle company, Honda, began selling small, gas efficient cars that lasted twice the mileage. Soon Datsun and Austin Healy were doing the same. Ford and General Motors saw the *inflection point*, but Chrysler missed it. Chrysler would have gone bankrupt and faced extinction had the United States government not stepped in and had Lee Iacocca not taken over, who fired 16 of the 17 vice-presidents and invented the mini-van.

Does the current family law legal system face inflection points? Family law is a business; some have called it an industry, not only subsidized by taxpayers for the family law court system, but also by plenty of for-profit professionals and their staffs. To our knowledge, there are no good estimates of the average cost of a divorce, because the cost range regarding legal fees is vast and because the budgets of jurisdictions for family law court costs are difficult to ferret out of the total budgets for the court system. However, it is an industry that consumes millions of dollars each year.

What are the current family law legal system inflection points? There have been several *inflection points* in the area of family law, which could spell the end of the system as we know it today. Are they being ignored? What are they?

- Community property states
- The emergence of no fault divorce
- The change of role-based marriage to the egalitarian nature of modern marriage, in which both spouses work and parent
- The dramatic changes in the cultural view of children since the 19th century, from being family property to being a class of citizens with their own independent interests
- The statutory presumption and/or case law regarding joint custody and/or equal physical placement

- The statutory guidelines for calculating child support, and possible future guidelines for calculating spousal support
- The statutory presumption and/or case law regarding the equal division of marital property
- The statutory presumption and/or case law regarding equal income sharing when determining spousal support, especially in long term marriages
- The introduction of technology, where *pro se* divorces have become easier and more accessible
- The introduction of free legal services and forms sponsored by state bar and local bar associations, again making it easier for parties to proceed without lawyers
- The cost of legal services, which continue to rise, and in high conflict cases, make lawyers unavailable because they are unaffordable
- The continued marginalization of divorce lawyers, compounded by an undeserved reputation problem that lawyers are not helpful players in the process and may make matters worse

Kodak and Polaroid ignored the inflection points. Kodak ignored rapidly decreasing sales of film and cheap cameras, despite clear evidence that an *inflection point* threatened the very existence of a company that had a lock on photography for 100 years. They filed bankruptcy, and now are trying desperately under new leadership to reinvent themselves. Polaroid ignored the *inflection point*, but unlike Kodak, did not own valuable patents and is gone.

Will the family law system ignore the inflection points? In the family law system, does the rapid growth of *pro se* divorces, and alternatives such as mediation and private judging, mirror Kodak's lost sales. Is the family law system traveling down the same path as Polaroid, Kodak or Borders Books?

Thomson Corporation did not ignore the inflection points. Neither did IBM or GM. Thomson Corporation was a highly successful publishing company, publishing some 200 newspapers and trade publications in North America and the United Kingdom. In 1997, Richard Harrington, the President and CEO, saw the industry changing with on-line publications; he saw an *inflection point*. The company was doing well, but he nevertheless changed the whole direction of the company, shedding regional newspapers and buying hundreds of businesses that better fit his future vision. Although the company took a major short-term hit in costs and lost revenues, Thomson reinvented itself and rose to substantial success

in the modern era. IBM and General Motors are two other companies that (finally) saw an *inflection point* and reinvented themselves into having a second rising.

Can the current family law legal system reinvent itself from the bottom up, without a leader? Can family law reinvent itself into a useful aid in the gut wrenching transition from marriage through divorce? What needs to be done cannot be done by one person; there is no visionary CEO in the family law system. There is no Lee Iacocca, Warren Buffett, Ted Turner, Steve Jobs, Mark Zuckerberg, Elon Musk or Richard Harrington poised to take the reigns of the family law legal system.

There are few examples of businesses changing from the bottom up. Perhaps the National Football League will change from the bottom up as the customer base becomes increasingly concerned with the injuries inflicted. Some systems have changed in history as the result of revolutions, or in the case of South Africa, as the result of financial pressure reflecting a change in attitudes towards Apartheid.

Can the current family law legal system reinvent itself in time? Having worked in the family law system for over 35 years, we proffer the opinion that the family law system may be heading for extinction, as we know it, having failed to recognize important *inflection points* that changed our “customer base.” We have seen the legal system make changes to try to do better, but many of these changes are like coming up with new slogans. They are not substantial and fundamental changes to the business model:

- We change the wording “custody plans” to “parenting plans” like a failing business redefines “best practices.”
- We change “custody” to “physical placement” or “parenting responsibilities,” but parents still dispute who get the children.
- We force parents to attend classes intended to help prevent conflict and then usher them into a system in which conflict is the method of choice.
- We invent Collaborative Divorce in which settlement rates are the same as the traditional system and in which prevailing is simply attempted in a different forum.¹
- We use various forms Alternative Dispute Resolution, but all of the alternatives are methods of **dispute** resolution, and not a goal based planning process.

¹ Under Collaborative Divorce, the parties not only “bargain in the shadow of the law,” but also “bargain in the shadow of losing their lawyer.” This presents another challenge under this process.

The government will always regulate marriage and divorce, but what will that look like in the future if the divorce industry fails to reinvent itself? People will always read books and watch movies, but could we have foreseen what those markets would look like twenty-five years ago?

In the face of inflection points, what is needed to make serious change? Would Kodak have survived if it advertised chemical film as “The artful way to take pictures” or prettied up the edges of its photographs? Doubtful. Slogans, changing wording in the laws or tinkering around the edges of the family law system will not save it. We worry that fewer and fewer good lawyers will go into or remain in family law. Courts will continue to streamline on-line do-it-yourself divorces. Spouses will continue to avail themselves of cheaper and less conflictual alternatives.

Lawyers can change the rules and change the game, but will they? The sad part of this story is that divorcing spouses would do much better to have informed guides and planners to help them through this process. We call them **LAWYERS**. Rather than seeing divorce lawyers as professional fighters who end up with the children’s college education money, spouses could see lawyers as guides who help them plan for their futures and the futures of their children, with a much better chance of an optimal outcome than the current alternatives in the market.

There are obstacles. **Inertia** is the drive to do things the way they have always been done. **Group think** is the self-reinforcing interaction of the people in the system. **Leadership vacuum** is the absence of a person or group to take the lead in transforming the system. **Tragedy of the Commons** is that people focusing on self-interest, such as lawyers with at least a moderate level of success, will engage in behavior that in the end is to everyone’s detriment, including their own. **Encrusted mindset** is the inherent resistance to changing our view of reality. In order to change our view of reality, we have to unload unquestioned assumptions and standard operating procedures. We perceive what we expect to perceive.

Can this change come from inside the system? It can, but the real question is, “will it?” Kodak suffered not from a lack of bright talented people. It suffered from inertia and a drive to keep doing things the way they always have been done.² Will the current family law system take that Kodak path? We hope not. Or, will it take

² Thinking about this notion reminds us about how Albert Einstein defined insanity: doing something over and over again and expecting a different result.

the Thomson path and reinvent itself as a valuable system for its current customer base? We hope so! Time will tell.³

³ Our book, *Game Theory and the Transformation of Family Law*, introduces a pathway for lawyers to “take back their legal system” (to coin a popular phrase) and become planners applying Game Theory principles and skills in negotiation and mediation.