

2020

## Marriage Story: Ensuring the Interests of the Child Are Represented in Domestic Relations Cases

Meghan Kasner

Follow this and additional works at: <https://lawcommons.luc.edu/clrj>



Part of the [Family Law Commons](#), and the [Juvenile Law Commons](#)

---

### Recommended Citation

Meghan Kasner, *Marriage Story: Ensuring the Interests of the Child Are Represented in Domestic Relations Cases*, 40 CHILD. LEGAL RTS. J. 169 (2021).

Available at: <https://lawcommons.luc.edu/clrj/vol40/iss2/10>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

*Review:*

***Marriage Story: Ensuring the Interests of the Child Are Represented in Domestic Relations Cases***

*By: Meghan Kasner*

*“This system rewards bad behavior.”*

**I. INTRODUCTION**

Noah Baumbach’s 2019 *Marriage Story* follows a soon-to-be former couple as they work through the stages of a long and arduous divorce. The film was met with critical acclaim; it received six nominations at the 92<sup>nd</sup> Academy Awards, with Laura Dern taking home the Oscar for Best Supporting Actress for her portrayal of an attorney for one of the spouses. In addition to its wide acclaim, the film is noteworthy for its accuracy in portraying many of the ways in which dissolution of marriage cases can unnecessarily sour as a result of not only the parties’ actions, but those of their attorneys as well. Specifically, *Marriage Story* can be viewed as a cautionary tale to divorcing co-parents of how easily the best interests of their children can be swept under the rug. Had the parties in the film taken a less litigious approach, like mediation or collaborative negotiation, they likely would have been much better equipped to come to an agreement that was truly driven by the best interests and desires of their son, Henry. Alternatively, when it became clear that the case was becoming increasingly contentious regarding issues of parenting time, the judge should have stepped in and ordered a child representative for Henry that could ensure such an outcome.

**II. MARRIAGE STORY: HOW PARTIES AND ATTORNEYS WHO USE CHILDREN AS PAWNS SET THEMSELVES UP FOR FAILURE**

From the opening moments of the film, it is clear that despite their differences and looming separation, Charlie and Nicole Barber still have a lot of respect for one another. Because of this, they initially agree that they will work out the details of their divorce on their own, without the help of attorneys. This changes when Nicole becomes frustrated with Charlie and contacts Nora Fanshaw, Dern’s character, who urges her to file for divorce in Los Angeles, California, even though the family had been primarily residing in New York for all of Henry’s life. When Nicole expresses concerns about whether it is fair to move Henry to Los Angeles, Fanshaw tells her not to worry about this and to focus on what is best for herself. While encouraging one’s client to focus on her best interests is hardly fault-worthy behavior for an attorney, it does illustrate how easy it can be for family lawyers to push the desires of the children to the wayside in favor of those of their clients.

Soon after Charlie is served with divorce papers, Fanshaw contacts him and urges him to find an attorney and file his response. Her tone sounds nurturing, but in the same breath she threatens to push for Nicole to get full custody through a default judgment if

Charlie does not file a response immediately. Though legally she is correct in asserting this option, it is contrary to every intention and desire that Nicole expressed to her regarding joint parenting of Henry. More importantly, as the film progresses, Henry directly expresses his desire to spend more time with his father, and the film makes great effort to highlight the ways in which Charlie is a very positive influence on Henry's life. In threatening to seek full custody, Fanshaw acted in opposition to the desires of her client and the interests of the child for the apparent sole purpose of speeding along the case. Not only was this unnecessary, but it also set a combative tone to the case from the start.

Seeking his own attorney, Charlie first consults Jay Marotta, whose even more combative approach and pricey rates initially drive Charlie away. During this consultation, Marotta's primary focus is always money, and how Charlie can maximize how much of the marital estate he walks away with. At one point, he suggests that they attempt to bring Nicole's wealthier mother into the case by threatening to withhold Henry from her. Charlie responds that "Nicole's family has always been my family" and thus inherently Henry's family, but Marotta encourages him to forget about that and focus on the financial stakes. By this point in the film, we have already seen how important and beneficial an influence that Nicole's mother is on both Charlie and especially Henry, which illustrates the fact that Marotta, like Fanshaw, is more than willing to push Henry's needs aside in favor of the client's (here, in favor of financial needs that don't even directly relate to Henry). Marotta further predicts that Fanshaw will argue that Charlie is a "neglectful, absentee father" in attempt to encourage him to retain. Here again, the threat of losing his son is used to persuade Charlie to buy into a more litigious approach. Similarly, at another point in their meeting, Marotta cautions Charlie against listening to Henry's desires, advising him that Henry is "just telling him what he wants to hear." While that may be true to some extent, it emphasizes that he is not interested in what Henry wants, and that he does not believe the court will be either.

Weary of Marotta's aggressive style, Charlie hires Bert Spitz, whose blunt yet collaborative approach seems in direct contrast to Marotta's. Wanting to avoid court, Nicole and Charlie have a four-way meeting with their attorneys in an attempt to work through the issues preventing them from settling; namely, allocation of parenting time and in which states it will take place. In the meeting, Spitz tries to maintain a collaborative approach to negotiating, but when it does not appear to be working, Fanshaw is quick to imply that Charlie is not making efforts to be a good father to Henry in California. After the meeting, Charlie voices that he "needs Henry to know that he fought for him" to live in New York. Spitz responds that as Henry grows up, "he's gonna have opinions on the subject" and that Charlie should respect that. Here, for perhaps the first time, an attorney appears to place importance on Henry and what he may want. Charlie, however, is too focused on "fighting for" what he wants for his son. Frustrated with Spitz' honest belief that a court will not view them as a New York family, Charlie fires him and retains Marotta.

Fanshaw tells Nicole that everything has changed now that Marotta is on the case, because she perceives domestic relations court as "a system that rewards bad behavior."

She accordingly adopts a much more combative approach to the case, and as Marotta predicted at the beginning, paints Charlie as an abandoning father in court. Meanwhile, Marotta portrays Nicole as an alcoholic danger to Henry. The parties, meanwhile, exchange hurt looks, and appear uncomfortable and ashamed by their attorneys' tactics. Through all of this, Henry's best interests are only discussed in relation to those of his parents, and often under thinly veiled ploys to secure more money for either attorney's client. At the end of the film, when the case is finally settled, Fanshaw discusses with Nicole some of the details that were hammered out while the parties were not present. She brags to Nicole that she was able to get her 55% of the parenting time, and in response to Nicole's protests that she had never wanted that, tells Nicole to focus on the fact that she "won."

Overall, Fanshaw and especially Marotta represent many of the common pitfalls that family lawyers can create when approaching cases like the one presented in *Marriage Story*. Often, in an attorney's unfaltering pursuit of what she perceives to be a "win," she resorts to using children as mere pawns to gain leverage, even in aspects of the case that have nothing to do with the children. Such litigious strategies often fail to truly consider the needs and interests of children; the very people whose voices are already least likely to be heard in court. When this happens, not only are the present needs of the children ignored, but the parents are trained to view their coparent as the enemy in the war that is their divorce, which sets them up for failure as coparents in the future. Accordingly, Marotta's approach of treating divorce court as a battleground from the start, and Fanshaw's insistence on fighting fire with fire when it erupts in the courtroom, should no longer be tolerated as a norm in domestic relations courts. Instead, the remainder of this article will briefly postulate three alternative approaches that might have been used in Nicole and Charlie's case to ensure that Henry's needs were at the forefront of their divorce.

### III. ALTERNATIVE ONE: MEDIATION

*Marriage Story* opens with flashbacks of happier times in Nicole and Charlie's marriage, narrated by letters that the parties wrote to one another about the things they like about each other. Many of the things they mention – Nicole's ability to play with their son; Charlie's odd enjoyment of the so-called perils of parenting – indicate that each views the other as a good parent. When they are finished reviewing the letters they wrote to each other, we are brought back to their present: a mediation session set very early in the course of their separation. The mediator indicates that they are to read the letters they wrote out loud to the other person, because he thinks it is beneficial for divorcing couples to be reminded of why they got married in the first place. However, Nicole refuses to read her letter, stating that she does not like what she wrote. The mediator encourages her to reconsider in the interest of avoiding unnecessary contention in their divorce, but Nicole gets angry and leaves.

Obviously, this mediation did not end up being beneficial to the parties. Though mediation is naturally thought of as a more peaceful form of dispute resolution than litigation, it can be (and usually is) still is a lengthy, grueling, and emotional process. At

the beginning of the film, Nicole and Charlie were still in the very early phases of their separation. The initial feelings that accompany separation were still raw, and neither party had yet hired an attorney who could prepare them for the mediation. Thus, despite their desire to work things out civilly, and the mutual respect evidenced by their letters, it was too early for them to mediate successfully, and the resulting stress compelled Nicole to leave the session.

This initial shortcoming in settling the case through mediation was therefore not the fault of the mediation process itself, but rather the timing at which it occurred. Once the parties had retained counsel, their attorneys should have encouraged them to give mediation another try, and then appropriately prepared them for mediation if they agreed. This preparation would have given Nicole and Charlie a better understanding of the mediation process and its benefits; including lowered costs, a more civil atmosphere, and most importantly, the ability to more directly discuss the best interests of their son. The parties also would have been better prepared to endure some of the more unpleasant aspects of mediation than they were at the beginning of the film. If the attorneys had pushed for mediation and prepared their clients accordingly, they would likely have had a mediation session in which they could truly address the needs and interests of not only themselves, but also of Henry. The mediator, as a neutral third party, would likely point out that their interests and goals for Henry were nearly identical. In highlighting this common ground, Nicole and Charlie likely would have been more willing to be collaborative in nailing down the terms of their settlement.

With the help of their attorneys and the mediator, Nicole and Charlie would have had much more room to use creative problem solving to come to an agreement that truly reflected Henry's best interests. Additionally, instead of leaving a courtroom feeling guilty and embarrassed by the exaggerated and hostile language of their attorneys, they could have left a mediation session with maintained mutual respect and a settlement agreement that truly considered Henry's desires and interests. This would have been a much better outcome for Henry, and for Nicole and Charlie's ability to successfully coparent him moving forward.

#### **IV. ALTERNATIVE TWO: COLLABORATIVE NEGOTIATION**

Similarly, if Nicole and Charlie's attorneys had stuck to a collaborative model of negotiation, their settlement could have been reached in a way that left the parties more prepared and enthusiastic about the prospect of coparenting. In the four-way meeting we see in the middle of the film, Spitz and Fanshaw seem to take a fairly collaborative approach. While they both remain steadfast in representing the desires of their clients and the strengths of their cases, they refrain from direct attacks aimed at either party, and seem to genuinely consider the interests of the opposing party. Both attorneys even compliment the opposing party at different points in the conversation, highlighting the importance of mutual respect. Their tone seems to have an effect on the parties, whose facial expressions seem to indicate that they have been reminded of their own mutual respect.

Despite this, the parties are unable to settle at this point because of their continued disagreement over where Henry will reside. In a sidebar, Spitz comments on Fanshaw's "harshness," while Charlie becomes frustrated with Spitz' encouragement that he give up on arguing for Henry to live in New York. It is obvious that a stalemate has been reached at this point, with neither party willing to cede pushing for Henry to live in their home city. It is at this point that Charlie fires Spitz and hires Marotta, and the case transforms from collaborative meetings to name calling in court.

As we learn later in the film, Henry prefers his life in Los Angeles. Had Charlie stuck with Spitz, Spitz' job would therefore become a matter of helping Charlie come to terms with the fact that Henry living primarily in Los Angeles was in his son's best interests, and in line with Henry's desires. Spitz then could have worked with Fanshaw to come to a settlement that reflected the parties' and Henry's needs and interests, with room for creativity and continued mutual respect. When Charlie instead hired Marotta, Fanshaw now had the opportunity to be the one to push for continued collaborative negotiating. Instead, she completely reframed her strategy to mirror that of Marotta, including using Henry as a pawn to secure what she thought was best for Nicole. Henry's needs again became unimportant in a way that likely would not have been the outcome if Spitz had stayed in the case, or if Fanshaw had maintained a collaborative style.

#### **V. ALTERNATIVE THREE: CHILD REPRESENTATION IN OVERLY LITIGIOUS CASES**

It is easy to speculate in hindsight on how the case in *Marriage Story* might have been better resolved in a way that reflected Henry's best interests if the parties or their attorneys had taken different approaches. However, the overall failure to respect those interests does not fall solely on them. In the scene in which the parties finally appear in court, the judge in this case is presented with two opposing attorneys who repeatedly name call, argue unverified and irrelevant defamatory information, and generally display a complete lack of respect for each other and each other's client. Specifically, he hears both sides claim completely opposite arguments about where Henry should live, allegations of danger to Henry, and consistently blurred lines between the parenting and financial issues.

In response, the judge remarks that the parties "have not exhausted in good faith the arguments in the case of the child," and orders an "expert evaluator who knows much more about young children" than he. We see the evaluator's visit with Charlie and Henry, which includes a very brief conversation with Henry. The evaluator asks Henry what he likes about living in Los Angeles, and how he feels about each of his parents. Charlie is able to hear the conversation, and in fact interrupts it multiple times. The lack of confidentiality in this conversation, coupled with the fact that the evaluator's role appears to be limited to reporting her findings to the judge, pales in comparison with the duties and ability to influence a court that would have been possessed by either a child representative or guardian ad litem. Given the contentious nature of the parenting issues in this case, the judge should have opted to appoint one of these representatives in lieu of a mere evaluator.

While the evaluator's opinions were no doubt helpful to the judge in getting a better understanding of Henry's true best interests, they cannot have given the judge (or the parties) the full picture. As a result, any judgment or settlement agreement that was reached could not be said to truly reflect what Henry wanted and needed. There is no indication that the evaluator ever interviewed Henry outside the presence of either parent, meaning that he was never able to confidentially divulge whether he would prefer to live in Los Angeles or New York, and his opinions on any other issues. As Marotta reminds us in the film, children are prone to saying what a parent wants to hear when they know that the parent is listening, and so anything Henry told the evaluator during her observation could very easily be biased. Furthermore, given Henry's young age and the short amount of time that the evaluator spent with him, there is no indication that it was ever explained to him why the evaluator was there and what effect his statements to her might have on his life. Despite that young age, if he had had an advocate for himself, efforts could have been made to help him better understand these things and feel comfortable enough to share his feelings on the matter. Thus, in order to ensure that Henry's opinions and interests be voiced in his courtroom, in lieu of the parties' ability to grapple with them through alternative dispute resolution, the judge should have appointed a representative for Henry.

## VI. CONCLUSION

Despite the several shortcomings and missed opportunities of the players in *Marriage Story* detailed above, the film ends on a positive note: Nicole, Charlie, and Henry all spend Halloween together, laughing and cooperating despite their prior conflicts. Charlie seems comfortable and willing to make a connection with Nicole's new boyfriend, and Nicole agrees to give Charlie an extra night of time with Henry. It is clear that both parties have regained considerable respect for each other; willing to put aside their differences because of trust that the other also just wants what is best for their son. Accordingly, this article does not posit that use of mediation, collaborative models, or child representation are the only paths to successful coparenting that are focused on the interests of the child. Rather, it encourages divorcing parents, attorneys, and judges to consider these options with great deference so that this goal may be reached sooner, and in a manner that best sets the parties up for a respectful, appreciative, and collaborative experience as coparents to their children for the rest of their lives.

## SOURCES

CAL. FAM. CODE § 2020 (West, Westlaw through Ch. 372 of 2020 Sess.).

CAL. FAM. CODE § 2336 (West, Westlaw through Ch. 372 of 2020 Sess.).

Suzy Eckstein & Annemarie Wall, *Advocacy within the Collaborative Process: A Comparative Case Study*, 45 MD. B.J. 4 (2012).

David R. Hartwig, *Co-Parenting with a Non-Cooperative Parent; Potential Alternatives to Reduce Conflict*, 30 UTAH B.J. 18 (2017), [https://www.utahbar.org/wp-content/uploads/2017/11/May\\_Jun\\_2017\\_FINAL.pdf](https://www.utahbar.org/wp-content/uploads/2017/11/May_Jun_2017_FINAL.pdf)

*MARRIAGE STORY* (Netflix 2019).

Jeffrey C. Melick & Karen W. Stuntz, *The Role of Child Counsel in the Attorneys Representing Children Programs in the Probate and Family Courts*, 95 MASS. L. REV. 223 (2013).

John David Meyer, *The "Best Interest of the Child" Requires Independent Representation of Children in Divorce Proceedings*, 36 BRANDEIS J. FAM. L. 445 (1998).

Mark A. Snover & Marcus M. Kasper, *Maintaining the Child's Best Interest in the Determination of a Child Custody Dispute*, 96 MICH. B.J. 18 (2017).

Michelle M. Tetreault, *The Benefits for Children in Choosing a Collaborative Divorce Process*, in *COLLABORATIVE LAW: PRACTICE AND PROCEDURES* (Amy C. Connolly ed., 2014).

Thomas D. Vu, *Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with their Clients*, 47 FAM. CT. REV. 586 (2009).