



The Custody Lawyer/Mediator/Evaluator as Storyteller: Shaping Narratives to Help Decisionmakers Craft Individualized Parenting Plans

Leslie Ellen Shear, J.D. (custodymatters@earthlink.net)

Diane M. Goodman, J.D. (diane@goodmanmetz.com)

Skilled storytellers organize complex facts into an interesting and coherent narrative that helps decisionmakers develop a practical parenting plan.

Humans understand the world through storytelling. Custody professionals (lawyers, mediators, and evaluators) tell the stories that decisionmakers (parents and judges) use to craft a parenting plan. Effective custody narratives present the facts decisionmakers need to craft a parenting plan for a specific family, and help frame a new paradigm for the family's changing relationships.

Lawyers tell custody stories in negotiations, declarations, and testimony. Mediators have developed models of narrative mediation. Custody evaluators paint word portraits of families in their reports and testimony.

This workshop will take a multidisciplinary look at the powerful role of narrative, and teach child custody professionals how to use the SUCCESS (Simple, Unexpected, Concrete, Credible, Emotional, Stories) principles to become better storytellers.

Reflections From Many Perspectives: The Power of the Stories We Tell

“The Hmong have a phrase, *hais cuaj txub kaum txub*, which means ‘to speak of all kinds of things.’ It is often used at the beginning of an oral narrative as a way of reminding the listeners that the world is full of things that may not seem to be connected but actually, are; that no event occurs in isolation; that you can miss a lot by sticking to the point; and that the storyteller is likely to be rather longwinded.”

Anne Fadiman, *The Spirit Catches You and You Fall Down: A Hmong Child, Her American Doctors, and the Collision of Two Cultures* (Farrar, Straus and Giroux, 1997)

“Telling stories and listening to stories are the activities that most distinguish our species ... Storytelling is in the genes. It follows, therefore, that the most effective structure for any argument will always be story.”

Gerry Spence, *How to Argue and Win Every Time* (St. Martin's Griffin, 1996)

“The story is the most efficient vehicle for delivering facts and conveying information. An old allegory teaches that when Truth is born and goes among Mankind, the people turn their backs on him. One night, sitting by his fire, Story comes to him. She asks, ‘Why are you out here, alone and depressed?’ Truth replies, ‘I am Truth, but when I went among Mankind, they would have nothing to do with me.’ Story observes that it is no wonder. ‘Look at you, you’re naked!’ She then says, ‘I am Story, I have many cloaks and robes. They come in all sizes and colors. Wear one of these and go among the people.’ Truth, clothed in one of Story’s garments, returns to the people and is immediately accepted. It is said that since that day no matter how harsh, hard, or cruel Truth may be, when he comes clothed in a story, he is accepted.”

Jim M. Perdue, *Winning With Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures* (State Bar of Texas, 2006)

“...[E]very decision maker’s story begins before all the facts are in the record, and usually long before. (This is even more true of judges and mediators due to their early exposure to written references to the case story, and greater experience with the process.) The story each decision maker constructs controls the sorting of facts by significance within that story; it determines how much each fact will be emphasized, and even which facts have more perceived *use* within the story constructed.”

Eric Oliver, *Facts Can’t Speak for Themselves: Reveal the stories that give facts their meaning* (NITA, 2005)

“*War stories* is the phrase used by academic lawyers to disparage the ways practicing lawyers talk about their experiences. Still, much of what matters about law eludes most academic writings. Perhaps, as a consequence, legal scholarship is awash in new methodologies designed to illuminate how law shapes and is shaped by its enforcers, interpreters, and those it regulates.”

“The approach that particularly interests us in these new inquiries is best described as participant-narrative. Celebrating storytelling, books by lawyers and law review articles for more than a decade have featured autobiographical accounts by lawyers, law professors, and law students; tales of fiction, fantasy, or allegory; retelling of strategies and tactics in famous cases; and reflections on the role of storytelling in conventional law practice. But despite this flowering of such narratives, stories of the actual experiences of clients and lawyers in concrete legal contexts remain few and far between. ...[W]e believe

that only such stories can convey how law is used and experienced by people enmeshed in its workings ...”

Gary Bellow and Martha Minor, *Law Stories* (University of Michigan Press, 1996)

“The account is of major psychological importance to the separated, not only because it settles the issue of who was responsible for what, but also because it imposes on the confused marital events that preceded the separation a plot structure... and so organizes the events into a conceptually manageable unity.”

Robert S. Weiss, *Marital Separation* (Basic Books, 1975)

“‘Getting over’ a relationship does not mean that we are relinquishing the part of our life that we shared with another, but rather coming to some conclusion that allows us to accept and understand its altered significance. [FN] Once we develop such an account, we can incorporate it into our lives and go on.

“Over time, partners’ accounts change from the self-blame that characterizes first attempts to understand this experience. When partners believe they are at fault, they assume the relationship can be saved – for what they have ruined, they can also fix. As they come to the conclusion that it is unsaveable, their accounts will correspondingly justify the relationship’s demise on the basis of something beyond their ability to correct. [FN] ... [P]artners conclude that the failure was the result of an unavoidable external circumstance, or some fatal flaw in the relationship – or perhaps the seeds of destruction were in their beginnings.

“...The partner will define the relationship as unsaveable in ways that reduce both the personal sense of failure and the possibility of social stigma. When the partner develops an account that seems to be complete and makes sense, the time spent in reflective thought and conversation about the relationship diminishes.

“When people have truly uncoupled – established a life confirming their independent identity – they will again be free to see both the positive and negative qualities of the former partner and the relationship. Negative definitions are essential to transition, but they are often temporary. When people achieve a valid self-identity, they no longer have to work at dissociating by focusing on negative attributes and displaying discontent. They are then able to reconstruct the history of the relationship to again include the good memories of time shared. [FN]

“Each partner’s account of the relationship’s demise makes still another shift, as each arrives at a stable explanation that either removes them both from blame or joins them in the responsibility. [FN] As independence frees the partners to see both positive and negative aspects of the other, so eventually they are able to look back and assess their own contribution to the fall. They’re aided by their discovery of who they are without the other person, for chances are they’ve learned some things about themselves that alter their view of the past.”

Diane Vaughn, *Uncoupling: Turning Points in Intimate Relationships* (Oxford University Press, 1986)

“I’ve been married three times— and each time I married the right person.”

Margaret Mead

“It’s not what you say, it’s what people hear.”

Frank Lutz, *Words That Work: It’s Not What You Say, It’s What People Hear* (Hyperion Books, 2007)

“Contentious public discourse becomes a model for behavior and sets the tone for how individuals experience their relationships to other people, and to the society we live in.”

Deborah Tannen, *The Argument Culture* (Random House, 1998)

“If you limit your view of a problem to choosing between two sides, you inevitably reject much of what is true, and you narrow your field of vision to the limits of those two sides, making it unlikely you’ll pull back, widen your field of vision, and discover the paradigm shift that will permit truly new understanding.”

Ibid.

“There is also a cautionary dimension to the interdisciplinary commitment reflected here: the consideration of narrative in law must take explicit account of the distinctive context in which legal narratives occur. Storytelling in law is narrative within a culture of argument. Virtually everyone in the legal culture – whether a trial lawyer presenting her case to a court or jury, a judge announcing his findings about what happened in the case, even a law professor writing an article – is explicitly or implicitly making an argument and trying to persuade. Storytelling is, or is made to function as, argument.

“In addition, the stakes of legal narrations are high, certainly in litigation. The goal of telling stories in law is not to entertain, or to terrify, or to illuminate life, as it usually is with storytelling outside the legal culture. The goal of storytelling in law is to persuade an official decisionmaker that one’s story is true, to win the case, and thus to invoke the coercive force of the state on one’s behalf.”

Paul Gewirtz, “Narrative and Rhetoric in the Law” in Peter Brooks and Paul Gerwitz, *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996)

“For an idea to stick, for it to be useful and lasting, it’s got to make the audience:

1. Pay attention
2. Understand and remember it
3. Agree/Believe
4. Care
5. Be able to act on it.

This book could have been organized around these five steps, but there’s a reason they were reserved for the conclusion. The Curse of Knowledge can easily render this framework useless. When an expert asks, “Will people understand my idea?,” her answer will be *Yes* because she herself understands. (“Of course. My people will understand ‘maximizing shareholder value!’”) When an expert asks, “Will people care about this?,” her answer will be *Yes*, because she herself cares. Think of the Murray Dranoff Duo Piano people, who said, “We exist to protect, preserve, and promote the music of the duo piano.” They were shocked when that statement didn’t arouse the same passion in others that it did in them.

The SUCCESs checklist is a substitute for the framework above, and its advantage is that it’s more tangible and less subject to the Curse of Knowledge. In fact ... the framework matches up nicely:

- | | |
|--------------------------------|------------|
| 1. Pay attention | UNEXPECTED |
| 2. Understand and remember it: | CONCRETE |
| 3. Agree/Believe | CREDIBLE |
| 4. Care | EMOTIONAL |
| 5. Be able to act on it: | STORY |

So, rather than guess about whether people will understand our ideas, we should ask, “Is it concrete?” Rather than speculate whether people will care, we should ask, “Is it emotional? Does it get out of Maslow’s basement? Does it force people to put on an Analytical Hat or allow them to feel empathy?” (By the way, “Simple” is not on the list above because it’s mainly about the Answer stage – honing in on the core of your message and making it as compact as possible. But Simple messages help throughout the process, especially in helping people to understand and act.)

Chip Heath and Dan Heath, *Made to Stick: Why Some Ideas Survive and Others Die*
(Random House, 2007)

WORKSHOP OUTLINE

1. Stories and the human brain.
 - a. Professional writing styles and formats – abstract and dull.
 - b. The power of story: neurobiology, linguistics, research on the divorce process, triggers for high-conflict custody disputes
 - c. SUCCEs: Simple Unexpected Concrete Credible Emotional Stories that stick.¹
2. Telling stories to the “deciders” (parents and judges).
 - a. Lawyers: negations, declarations and testimony, and advocacy.
 - b. Mediators: models using the power of narrative.²
 - c. Evaluators: adapting clinical report formats so that form follows function.³
3. What story needs telling?
 - a. Organize the facts and analysis around the components of a parenting plan.⁴
 - b. Unique family v. fact patterns
 - c. The particular matters more than the general.⁵
4. From the “account” of the relationship at separation (“He done me wrong” songs.) to the new narrative of co-parenthood.⁶
 - a. The separation narrative resolves ambivalence thru polarization.
 - b. Vulnerability, parental identity, and narratives of control and capitulation
 - c. Feeling heard – one’s day in court.
 - d. Shame and humiliation, high-conflict litigation, compromise and capitulation.⁷
 - e. John Gottman: love maps, shared success narratives, effective complaints and complaint resolution.⁸

¹ Chip Heath and Dan Heath, *Made to Stick* (Random House, 2007)

² John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* (Jossey Bass, 2000)

³ Leslie Ellen Shear, “Painting Family Portraits for the New Paradigm: The Modern Art of Parenting Plan Evaluations,” in American Bar Association Family Law Section and the American Psychological Association, *Children, Divorce and Custody: Lawyers and Psychologists Working Together*, Vol. 3, (ABA/APA, 1997)

⁴ Leslie Ellen Shear, “Chapter 4: Parenting Plans” in CEB, *California Child Custody Litigation and Practice* (2007)

⁵ Constance Ahrons, *We're Still Family: What Grown Children Have to Say about Their Parents' Divorce* (HarperCollins, 2004)
Mavis Hetherington, *For Better or for Worse: Divorce Reconsidered* (W. W. Norton & Company, 2002)

⁶ Robert S. Weiss, *Marital Separation* (Basic Books, 1975)

⁷ Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?* Paper presented at the conference “Children of Embattled Divorce Symposium” sponsored by the University of Arkansas at Little Rock School of Law, September 17-18, 1999 and at the Los Angeles County Bar Association Family Law Section Child Custody Colloquium September 2001.

⁸ John M. Gottman and Julie Schwartz Gottman, *10 Lessons to Transform Your Marriage* (Three Rivers Press, 2006)
John M. Gottman, *The Marriage Clinic: A Scientifically-based Marital Therapy* (W.W. Norton and Co., 1999)

5. Organize the facts into a conceptually manageable unity to produce action:
 - Simple (core + compact);
 - Unexpected (surprise gets attention);
 - Concrete (help deciders understand, remember, and coordinate);
 - Credible (help people believe);
 - Emotional (association, self-interest, identity);
 - Stories (real people, not abstractions);
 - Stickiness (what gets remembered).
6. Let's try it ~ Using SUCCEs as a custody professional.
 - a. Parent's declaration.
 - i. Prefatory language
 - ii. Overview
 - iii. Details and history
 - iv. Use examples
 - v. Demonstrate parental judgment and decisionmaking
 - vi. Hearsay to explain subsequent conduct and parental state of mind
 - b. Uses of narrative in mediation (and negotiation).
 - c. Evaluation Report
 - d. Judicial Statement of Decision
 - e. Parents' emails and co-parenting communications