

**COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
PROBATE AND FAMILY COURT DEPARTMENT  
HAMPSHIRE DIVISION**

**FAMILY RESOLUTIONS SPECIALTY COURT  
FLUENT IN FRSC—LAWYERING IN A NEW LANGUAGE**

Legal representation of family members has changed drastically over the last 30 years in response to the increase in our knowledge about the effect of divorce and the effect of the traditional legal system on adults and children. We lawyers who like the challenge of practicing in family court are participating in that change. To participate effectively (and with professional gratification), we find ourselves testing out unfamiliar skills and mastering a new professional language. That language has verbal, non-verbal, intellectual and emotional elements, all of which can serve us well in the ever-changing arena of family law.

The Family Resolutions Specialty Court in Hampshire (FRSC) is one example of life in the new arena. The process designed for FRSC requires us to make changes in the way we represent our family court clients. This article invites examination of the changes as part of our ongoing effort to refine our professional tools in the service of children and families.

**Overview of the FRSC Model**

The FRSC model is focused on the primacy of the parents' voices. It supports their effort to guide themselves and their children through the disruption of divorce toward a future carved out of a series of assisted conversations. The conversations take place with members of a team that includes the parents, their attorneys, an attorney for the children, a mediator, a Family Consultant who is a mental health professional and a Team Coordinator.

FRSC is based in greater informality than we expect in the traditional court. The informality includes "conferences" with the judge rather than hearings, a relaxation of the Rules of Evidence, and the flexible interaction of the collaborative team. The team is focused first (both in time and emphasis) on making sure that the needs of each family member are addressed so that the family is at the top of their game in planning the transition from one household to two. The whole team is responsible together for maintaining that emphasis. For us as attorneys, the shift at the outset from a focus on the rights of the individual client to the needs of everyone in the family forces us to examine some of our deepest professional assumptions.

(For a detailed description of the model, see the Flow Chart, the Description of FRSC, the Description of the Role of the Family Consultant, the Description of the Role of the Team Coordinator, and the Description of the Role of the Child's Attorney).

## FRSC and Legal Ethics

We are steeped in the gladiator model of the practice of law. We are trained to a system in which we advocate for individual rights on the poles of the spectrum that separates Plaintiff from Defendant. We count on the judge to determine which of our polarized views is legally correct or which spot on the spectrum achieves fairness for the parties.

In family law that model (though sometimes necessary) often works to the disadvantage of both parents and the children. This is so because very often both parents value the hope of working together in the ongoing project of parenting their children into adulthood. For many parents that goal supersedes in importance the goal of vindicating individual rights to the detriment of the other parent in a perceived zero sum game.

If such parents glide automatically into the gladiator system at the beginning of their divorce, the traditional system can derail their wish for a collaborative future. This happens when the early stages of the process are clad in words and actions of competition, adversarial positions and sometimes downright hostility. And it happens even though statistics show that most divorcing parents reach an agreement by the end of the process. It is the process itself that can poison the hope for that collaborative future.

How can an attorney shed the cloak of the gladiator without running afoul of the legal requirement in Massachusetts for zealous advocacy? In Hampshire's FRSC program, there are 3 ways to think about this:

1. The client requests the FRSC form of advocacy. Before joining the program, the parent signs a consent form to participate in FRSC. The consent includes a description of the FRSC model, a commitment to participate in mediation, a description of the parent's participation in the process, and a description of the non-traditional lawyer's role. As long as the parent has had a full opportunity to consider the pros and cons of the traditional process and of FRSC – that is, as long as the parent's decision to participate in FRSC is knowing and voluntary, the FRSC attorney for the parent is providing zealous advocacy because the attorney is following the explicit instructions of the client.
2. The model has been approved by the Massachusetts Trial Court in its very acceptance of the Specialty Court. You may want to review the application the Hampshire Division submitted for approval of the Specialty Court and the acceptance of the application signed by Chief Justice of the Trial Court Paula M. Carey and Court Administrator Harry Spence.
3. The Board of Bar Overseers reviewed Probate and Family Court Standing Order 1-10. Hampshire's Standing Order contains a description of the lawyer's role that is similar to the role of the FRSC attorney. While the FRSC lawyer's role differs in some respects from the more limited role described in the Standing Order, there are significant parallels, especially that the focus of the Standing Order, like one of the main focuses of FRSC, is on the needs

of the family members. The BBO was satisfied that nothing in the Standing Order violated the lawyer's obligation of zealous advocacy. When the Standing Order was first adopted, the Court consulted the BBO to ensure that attorneys practicing in the Hampshire Division were fully in compliance with their ethical obligation of zealous advocacy to clients. Some members of the bar may recall that a representative of the BBO appeared at a bar conference in Western Mass and assured the assembled attorneys that their work as described in the Standing Order was in compliance with the mandate of zealous advocacy.

In the FRSC model, even with its emphasis on needs, the rights of individuals are not forgotten. They are simply arrived at in a different way. The agreement the parties reach (or the decision the judge may have to make) in FRSC is subject to the same laws of fair outcome that guide traditional cases. But the journey toward the agreement or judgment takes place without allegations of fault, with fewer procedural formalities, with greater openness regarding facts, and with a commitment to a joint search for solutions. The "victory" at the end of the process is not of one parent against the other but of the parents together against the looming risk that they become enemies.

### **The Tasks of the FRSC Lawyer**

The FRSC lawyer has 4 main responsibilities.

1. Introducing FRSC to your client. In your regular first meeting with a new client, you may not make many changes from your normal procedure. You should use your own professional judgment to determine whether or not to offer FRSC as an option for each individual client. If your client expresses an interest in FRSC (or in trying to solve the divorce in a non-adversarial way), you may want to begin to explore your client's observations of his or her own needs, those of the other parent, and those of each child. Needs may be financial or medical, educational or psychological or any type of concern that the client may have. The client may have a need for information about the family finances or about a child's condition – or about anything. It is useful for you to begin to understand those needs from your client's perspective. It is also useful to remember (and to help the client remember) that in FRSC, everyone will need to remain open to learning how the other parent describes his or her needs, too, and how the attorney for the children will describe the needs of the children. It will be helpful for the client to know about all the elements of FRSC process, including the openness that is required right from the beginning in the First Team Meeting, in the assistance available through the Family Consultant (FC), in the requirement of early mediation and the nature of the Court Conference. It may be useful to review the consent form with the client as a method for zeroing in on the elements that the client will have to agree to if he or she chooses FRSC.
2. Giving Legal Information to the Parent. The FRSC parent will need a great deal of information from you about all the issues you normally address, such as the law of divorce, property distribution, debt, health insurance, child support and parenting. In the FRSC case, even though the parent will be speaking for himself or herself more than usually happens in the traditional case, the parent still relies on you to be a principal source of legal information

on which the parent will be able to base sound decisions. Your role in providing that information is not much different from the same responsibility to your traditional clients or the way you might prepare a client who is entering mediation.

You may also give your client your opinion with regard to your client's rights in the circumstances as you understand them from your client's perspective. In the FRSC context, though, you would alert your client from the beginning that the process will make both parents' perspectives the subject of discussion and fold in the child's perspectives as well. And that you will be part of the Team's effort to listen to and respect the perspectives of both parents and to support the parents' work in solving the issues and co-parenting together.

3. Counseling/Coaching/Supporting. This is where your FRSC role veers in a new direction. Because the parents' voices are the primary voices in this model, the attorneys will talk less than we usually do. For example, the parents attend the Guided Interview with the FC without their lawyers. In the Court Conference the judge talks directly to the parents and expects to receive the greatest amount of information directly from them. This is not an easy adjustment for us as attorneys. We become supporting players rather than the leads in this drama. We have to plan ahead, helping the clients get ready for these events. And because we are charged by our clients to represent them in the FRSC model, we have to think about how we coach them. We help them move toward language that will not inflame; we avoid angry descriptions of the flaws of the spouse. We provide and we foster ideas that will open up possibilities for productive discussion rather than demands for "bottom lines". We help prepare our clients for mediation and for court conferences. We sit back in those conferences and give the parents the floor. When we do speak in the Court Conferences and other meetings, we do so with restraint, with respect for both parents, with suggestions framed respectfully that we hope both parents can "hear." We remain *quiet guardians of our clients' rights*.

Here are just two examples that could occur as early as the first interview with the client – but could become part of a routine approach to FRSC cases throughout the process:

The tone and the vocabulary of your discussion with your client may differ from the tone and words you might use in traditional cases. For example, in FRSC you might not talk about "getting the house." Instead, you may talk about "what are your housing needs?" "What are your spouse's housing needs?" "Do you have ideas for ways that both of you could be adequately housed?"

Similarly, your strategy may differ. You might ask about the facts of the family financial situation that may be unknown to both parents (or to one) and consider ways that the parents could cooperate to get those facts – rather than plan formal Discovery.

There are many other examples of nuanced opportunities for you to use your legal counseling skills in place of your litigation skills.

It will help to approach the counseling function in FRSC with PATIENCE and CURIOSITY.

We'll need to be patient because it is very, very hard to sit quietly and listen through a series of meetings when our own ideas are not the main focus of the meetings. This is especially true at the beginning of the FRSC process when we might meet together more than we do in the early stages of traditional cases. We meet early (and sometimes often in FRSC) because FRSC sets the expectation for each member of the team to be a learner in the process – to learn from the others about what these particular family members need. If we learn what is important about the family early in the legal process, we have a better chance to understand the other parent's perspective as well as our client's own, to respond wisely in discussions, and to be instrumental in assisting their progress toward agreement.

And that's where curiosity comes in. It is useful to think that in traditional cases, we almost never know much about the other parent's story until much later in the process – or we know it only through our own client's perspective or through hurried allegations in motion hearings. We always run the risk that we will immediately side with our client and then have to be surprised in a later hearing when the family reality is not as one-sided as we suspected – and a whole lot more complex.

The FRSC model gives us a chance to see the complexities of the family early on so that we can shape ideas for solutions in a realistic context and with everyone's suggestions. If we stay open to that learning, we will be able to assist our client to understand the other parent's perspective, to figure out ways to talk about it that will enable real communication, and to make good use of all the resources that the team can provide.

Patience and curiosity figure in another way, too. In traditional cases, almost every time we get together with “the other side,” the goal is to try to reach an agreement on one or more issues. In FRSC, the early meetings have almost nothing to do with settlement. No one will complain if some agreements arise from the early meetings, but that is not their purpose. Learning about the family is the purpose: finding out what may be needed to help create a calm atmosphere for the children; discovering whether there are long-term issues anyone is facing that may be assisted by a referral for some kind of individual service or a service for the parents together; figuring out what experts they may need to consult to learn about their assets and debts; etc. Some of these early issues are the “stuff” of traditional temporary orders, and in FRSC, the judge sometimes does issue temporary orders. But the early meetings are meant to surface the immediate issues in a collaborative examination of the family's current situation rather than in a “see you in court” atmosphere. And the early introduction of mediation provides a source for mutual problem solving from the very beginning.

Here's another way to look at it: In FRSC, just about the only thing missing from traditional system (from the attorney's point of view) is the “versus.” That is, FRSC eliminates the

pressure on you to ensure that your client will get more than the other parent in the end (more money, property, time with the child, decision-making authority, etc.). It also eliminates the expectation that you have to use your oratory to get your client to that place. All the other functions of the zealous advocate remain in place – though at a lower decibel level: information-giving, information-getting, coaching, analysis of individual rights, review of agreements for fairness – all remain fully intact. The elements of zealous advocacy in FRSC are all flying under the banner of the client’s instruction to achieve the divorce with everyone’s dignity and the effective co-parenting relationship intact.

Finally, in carrying out your role as the client’s coach and supporter, if you learn anything in the course of the process that leads you and your client to believe that it is inappropriate for your client to continue in FRSC, the process establishes a method for opting out. For example, you might consider opting out if your client finds that the process doesn’t feel right for him or her or if you learn something that suggests your client needs to make formal use of the Rules of Evidence.

4. Communicating with the Team. Openness and transparency are hallmarks of FRSC. Of course, the lawyer’s confidential relationship with the client remains intact in the FRSC process, but if there is information relevant to a sound resolution of an issue in the divorce or modification (regarding money, property, parenting or any other issue), FRSC expects that the information will be disclosed so that the team can deal with it openly. The process requires completed financial statements at the outset so that the parents and the probation officer in the introductory meeting can discuss the requirements of Rule 410, and make a reasonable plan for exchange of the required information. Part of the lawyer’s responsibility is to ensure that updates in financial and other information are disclosed to the team in a timely way.

In addition to openness, the team needs consistent sharing of procedural information. After each Team Meeting, the TC or other team member will send a brief summary of the meeting to the full team setting out agreements reached, issues you’re working on, date of the next meeting, etc. For example, if the FC and the parents decide to meet together for one or more sessions following the Guided Interview, it is important that the FC communicate that decision to the full team. Similarly, if the parents decide to suspend mediation for a while, they should let the whole team know of that decision. Or if one of the lawyers learns that a vacation schedule of one of the parents will affect a decision the parents have to make immediately, he or she should alert the full team. There are many more examples, but this kind of information exchange is the key to effective team functioning. Although there might be exceptions, the rule of thumb in FRSC is this: Aside from private confidential communications with your client, any communication you make in regard to FRSC process or content should be made to the entire team.

## **SUMMARY**

In FRSC, the parents and the child are at the center of the process. All the other members of the team, including the parents' lawyers, share the obligation to support the primacy of the parents' voices and the focus on the needs of all family members. The attorney's role is to give information; to assist the parent to take part in the FRSC events to the best of the parent's ability; to encourage and demonstrate a willingness to listen and learn about the needs and perspectives of both parents and the child; and to review the decisions the parents are making to be sure they are fair under the law and under the specific family's expressed wishes.

Welcome to practice in the Hampshire Division's Family Resolutions Specialty Court.