

Divorce Magazine Interviews Judith S. Charny

Judith Charny explains child custody laws in New Jersey including interstate relocation, college costs, post-divorce modifications and different approaches to divorce settlement.

Judy Charny has been practicing law since 1984. She's a partner at the law firm of Charny, Charny, Karpousis, a South New Jersey firm that is focused in the area of divorce and family law. As a divorce litigator, Judy aggressively represents her clients. But she has a practical mindset which is essential at what is such an emotional time. She advocates for clients who are stay at home parents, wage earners, consultants, executives, professionals and business owners, and their spouses. And as a business owner herself, Judy is especially sensitive to the concerns of business owners and professionals who are facing a divorce.

Judy's firm offers alternative divorce process for their clients including litigation, mediation and collaborative approaches to divorce as well as arbitration. Miss Charny is a master in the Thomas S. Forkin Family Law Inns of Court, and is on its executive committee. She is a matrimonial early settlement panellist in the superior court of New Jersey for both Camden and Burlington counties, and has served on the District Four Ethics Committee of the Supreme Court of New Jersey.

Miss Charny is a frequent guest on national, regional and local media, TV, radio, magazines and newspapers. She has received too many awards and accolades to start listing them here. Visit the firm website to read about Judy and her colleagues. It's very impressive.

If one spouse feels that the other spouse is not fit to take care of their children, what are the chances that one spouse will get sole custody of the children?

That's a very good question. In New Jersey, we have two types of custody, legal custody and physical custody. The overwhelming majority of parents have joint legal custody which means that the child has two parents for school, for operations, for religion. He has a father, has a mother.

There are situations in which DYFS is involved where there may be a finding that a parent is unfit. In the normal divorcing situation, that's not the case. Parents get joint legal custody. From the beginning of the divorce, the first thing that gets established is an understanding of how the children are going to live, whether they're going to live 50/50, four days on, three days off, whatever the parenting arrangement would be. That's the physical custody part. There's a parent of primary residence who deals with the day to day children, child rearing issues, and the parent of alternate residence which is the other parent. As I said, joint legal parents.

It has changed so much in this stage since I started practicing. It's almost always very close to 50/50. Parents are very involved. The statute in New

Jersey even states that parents have equal rights to their children. It's highly unusual, unless it is an abuse case or neglect case, that one parent would have sole custody of a child. It's very, very unusual in divorce situations.

There are situations where there's a parent who has a problem but there would have to be evaluations. That occurs if a parent has DUIs and can't drive the child or if there's a reason for supervised visitation. It's not static. There's a lot of different arrangements, and all of the arrangements are to be made in the best interest of the child, not in the best interest of the parents.

The fact that one spouse feels that way doesn't necessarily mean that fits the best interest of the children. Almost always, the first piece of the divorce is to somehow see where the common ground is in terms of the children. Most of the counties, if not all of the counties in New Jersey, refer divorcing parents first to a parenting class where they discuss how to co-parent, and then to mediation before the court will establish whether or not there's going to be a custody evaluation done.

Would you be the one who would recommend the custody evaluation and the professional that would be used, or does that have to be done by the court?

That is a request depending on the case. Again, a lot has to do with experience. We're a very experienced firm that has seen hundreds of custody cases and hundreds of divorces. We get a sense of how to handle each case depending on the facts. If the case necessitates a custody evaluation because the parents cannot agree on any type of custody arrangement and they've been through mediation, we try to have a sit down with the other attorney. We try to do everything we can to avoid a custody evaluation and a custody battle, which is certainly not in anyone's best interests.

We'll usually ask the court to recommend someone so it's a joint expert, because if you don't have a joint expert, if I have my own expert and the other party has their own expert, then it becomes a battle of experts. The court really wants to have a guidance in this regard. They'll want to be involved in picking someone and they want it to be joint. If it's a really egregious situation where a child is afraid of a parent, won't visit with a parent, that sort of situation, the court may appoint a guardian for the children to give the court guidance.

So what happens if one spouse wants to move and take the children to another state?

Yes, in New Jersey we have what's known as a removal procedure. You cannot move your children out of the state without the consent of the other spouse or a court order. In order to get a court order, you have to make what's known as a removal motion and you have to give your reasons for wanting to move. They are first analyzed on whether you want to get away from the other spouse. There has to be a better reason. It can't be a reason that, "I don't want my spouse to see the children ever again."

As long as the reason is not inimical to the other parent's visitation, there are factors and evaluations. It's the same type of process as the original custody. A lot depends on what the original custody was. If the original custody was a situation where the one parent has the majority of the time and wants to move the child, the standard's a lot lower because the visitation, the connection and the visitation of the other parent wasn't strong. As it gets higher, such as like a 50/50 split, it's very difficult to move and not cause the other parent to lose the connection with the child.

It is a process and an evaluation. It's a very big process, and you need someone who is very experienced to know how to handle this.

It's very important that a parent does not take a child without either a court order or a consent, because they will be arrested and they will be brought back from whatever state. I've had it happen and it will happen, so that's a really important thing to know. The judge will not look kindly upon your visitation when it comes time to setting a visitation plan after you've taken your child out of the state against the court order and against the rules basically.

How do the cost of college or the cost of teaching specially talented children get covered and who determines that in a divorce case?

If the child is involved in something called an extraordinary extracurricular activity, it's something to be discussed outside of the child support guidelines. Normally we use the child support guidelines of New Jersey, and theoretically, they are supposed to cover regular extracurricular activities, recreational activities. That is the theory behind the guidelines.

However, when there is a child who participates in very expensive sports like hockey, dance and they spend so much money in this direction, that's something that needs to be taken outside of the guidelines and discussed separately in terms of how that's going to be handled. It can be handled differently in each case depending on the party's resources.

College is very different. We do have factors. There's a very important case in New Jersey called Newburgh vs. Arrigo. There are factors involved when a child goes to college, how it is to be handled. They're no longer on the guidelines, so the guidelines have to be reevaluated. There has to be a consideration for keeping a home for the child if they go away, because the child would still need to come home for vacations and summer.

One or both of the parents has to maintain a home. But the guidelines get really calculated because they're not applicable to college students living away. It's very controversial in New Jersey actually because a lot of states do not order parents to pay for their kids' college. If you're an intact family, who's going to order you to pay for your kid's college?

It is controversial, but we do in New Jersey order parents to contribute to college, especially in a situation where if they were intact, it's a college family. It's parents who've gone to college, grandparents who've gone to college, a kid

who excels. There are factors. This is a very frequent case judgment motion, college expenses. I've seen hundreds in the past year. Sometimes we try to handle it at the time of divorce, but if the child is not of the age that he's going to college, it's very difficult to craft a formula that may change when the time comes.

I always recommend to try to reach out to the other person and see if we can get together and craft an arrangement rather than go to court because it's very uncertain how it's going to come down.

Can you just tell me a little bit about post-divorce modifications?

In New Jersey we have modification, unless you have a non-modifiable divorce, which you can have depending on the situation. Sometimes there are non-modifiable situations. But generally in New Jersey, we have modification based on what is a substantial change in circumstance. Every situation is different. It requires arguing. If you are the person who has the changed circumstances, it's your burden to bring forward your change in circumstance. In other words, if you lose your job, you have to come forward and show that you've tried to get a job in the same area. What steps have you taken to get the job? Did you get a severance package? Do you have other assets that you could use?

There's a lot of indicators as to whether or not there's a real change in circumstance, or whether or not you just don't want to pay what you're supposed to pay. You have to come forward first. A judge then will make a decision whether or not they find there to be a change in circumstance. There's usually a discovery period where you go through interrogatories and production of documents to make your case. The court will normally have a hearing to determine whether or not there's a change and what that change will mean.

Again, we're very much moving towards mediating and settling, arbitrating the post judgement issues rather than keep them going back to court for the motions. It's just so time consuming, by the time the court hears the motion and rules on the motion, it's been months.

What if one spouse is unhappy with the custody arrangements either because of a change of their circumstances or just because they want to see the children more?

Simply that they want to see the children more, may not be enough. Custody is fluid because as children get older, things change. When they're 15, they have more of a say in where they want to be. But courts are not in any rush to make big changes to settlement arrangement unless there can be shown a substantial change in the circumstances of the parties.

If one party feels that the settlement is unfair and that they should have done better, what happens in that case?

That's a very good question. It makes me very sad when people come to me after the fact because there's very little I can do if they've struck the bargain, put

it on the record, signed their name and there's no change in circumstances, there's very little that can be done. If you don't think it's fair, you don't sign it and you don't put it on the record, you don't go with it. That's the bottom line. I've had many people say to me, "Well I just wanted it to be done." I said, "Well, that's the cost though," because you made that deal. There's really nothing that can be done unless it's unconscionably unfair, which is really unusual, especially if you had lawyers, there was negotiation and discovery, and everything got put on the record. When it gets put on the record, the judge asks a lot of questions to make sure that you know it's fair. So it's difficult to amend or change unless you have a substantial change in circumstances.

What if one spouse is not complying with the terms of the agreement though, either in terms of paying the other spouse or providing the spouse access to children?

Yes, you can make a motion to enforce litigant's rights. If the judge finds that the other spouse is wilfully breaching the agreement, they will assess attorney's fees against them.

Can you tell me what mediation is and how that process works?

There's a lot of different kinds of mediation, but it's basically alternative dispute resolution. People will go to a mediator and basically the mediator will discuss with them how they can resolve all the different issues in divorce between the two of them without going to court. Normally in mediation, once a bargain is struck, there's something called the memorandum of understanding that the mediator will drop and give to the parties. Then the parties will bring it each to their attorney's and there usually is some sort of back and forth to put it into the right form for a property settlement agreement.

It's less costly than litigation. The people can talk to each other which is very important, because even once they get divorced, if they have children, they really need to know how to communicate with each other. They're not going to be rid of each other if they have children. They're going to have a different relationship, but they still have to communicate. So mediation does help because they can make their own agreement instead of an order being imposed on them by a judge who doesn't even know them.

It has a lot of advantages in that regard. The parties have more control over the process. They communicate with each other. It's statistically shown that if you come to your own agreement, you're more likely to abide by it than if you're told by a judge what to do.

Tell me a little bit about the members of your firm who are trained in mediation and act as mediators.

Four out of seven lawyers are trained in mediation. Two are trained in collaborative. So we all are on the court list to do mediation, because by court rule a lot of cases have to be mediated before they go to a judge.

We tried in the realm of family law. The courts and the Supreme Court have given us a lot of opportunities to settle before we go to trial. It's not a litigation heavy practice in that regard. We all do mediation. And two of us do collaborative which is a different form of mediation.

Tell us a bit about collaborative divorce, the process, and how that works.

Collaborative divorce is similar to mediation, with teeth. In mediation, there are not a lot of rules in terms of discovery, in terms of what you need to produce in discovery, what you need to do to make the process work. You really walk away whenever you're not happy. There's nothing keeping you in the process.

Discovery is exchange of documentation and understanding of assets and liabilities in the marriage. There are no guidelines with mediation. There are in collaborative, and they're mandatory. Part of the collaborative process is that a forensic accountant is involved in the team of experts. There's two collaborative lawyers, one for each party. There's a forensic accountant to help with the financial aspects, and there is a therapist/divorce coach to help with the parenting piece, so that it's a team effort. It's like a contract that basically says it's a binding process. We're not going to go to litigation. If this doesn't work out, nothing that has been used in collaborative law can be used in the litigation. And you can't use the same attorneys or experts. It's only for the collaborative.

So you're really engaged in wanting this to work. You pick your team and you really want to make it work, whereas in mediation, if they can't do it, they walk away. You can walk away at any moment and all of that work is for naught.

I've always enjoyed mediation. I like it very much. But I felt like there's no hammer, there's no reason for anybody to stay in it because they don't have to.

What happens in a case where a couple just can't stand to be in the same room, whether it's mediation or collaborative? Doesn't it necessitate that the couple be there and communicate with each other in either of those models?

In mediation, yes and no. I've done mediation with attorneys which is similar to collaborative in some respects. In a situation where they really can't speak, we can do a caucus. One attorney and one party will be in one room, and another party and the other attorney will be in the other room. And the mediator will kind of go back and forth and try to bridge the gap.

Caucus does work if you can't really be together. And collaborative, there's enough people on the team. You each have your own attorney, you have the forensic, you have the divorce coach. There's usually not so much need for a caucus because we're all there for a reason. When one person gets out of hand, there are ground rules in the collaborative, so we just bring everybody back.

My experience is that mediation and collaborative will work except in the extreme case of abuse. When there is documented abuse or final restraining order, it's not going to be an option generally.

What happens in the case where one spouse thinks the other one is hiding assets and not being truthful in either the collaborative model of the mediation model?

In the mediation model, it can't. The mediation is completely destroyed. You can't do it because there's no mandatory discovery. In the collaborative, the forensic accountant who's on the team is neutral. If he feels that's going on, he'll investigate. That's part of the process because discovery is mandatory. You have to turn over everything. The person who reviews everything is the forensic accountant, and he's basically going to report back to the team, "We got a problem."

If they want to stay in collaborative, they have to cooperate. If they don't want to stay in collaborative, then they're litigating. They've just spent all this time in collaborative and now go to litigation. Another reason why they would want to stay in collaborative is because of confidentiality. Everything stays. There's no public record of finances. And usually if there's a business involved or adultery or just sensitive issues, you don't want your dirty laundry aired. And that's another reason why collaborative is very enticing for people.

Tell me a little bit about arbitration. How does that process work?

Arbitration is a binding situation. We have an arbitration statute. It's really just going to a judge, only instead of going to a judge, we choose an arbitrator to make the call. The only problem is it's not appealable. So if I and another attorney decide this is a case for binding arbitration and we pick an arbitrator and we sign the documents for binding arbitration, and the person who we chose makes a call, that's it. There's no appeal on that call.

It's as if he went to a regular judge, is that what you're saying?

It's as if he went to a regular judge except a regular judge's decision is appealable and arbitration is not.

And your firm has experience in all of these areas.

All of these areas and understanding which one is best for the client. That's the key, because we have so much experience between us, we know what we're doing. We know a good case, a bad case for arbitration, a good case for collaborative. We know the people out there who are good at arbitrating, at mediating, at being involved. We know the right experts. It comes with experience, we know how to help our clients.