Divorce Trial Memorandum of Decision

1. Destroying a family in order to save it.

In the name of fighting for the best interests of their children, Marjorie Cottell and Milton Plant have bankrupted them. It didn't have to be.

In 2022 Cottell sued Plant for a divorce. The couple have four children who are in or approaching their teen years. This case is supposed to be about them. If it really had been about them, this matter could have been tried long ago and without all of the preliminary skirmishing.

But it hasn't been. It has been a 16-year forensic analysis of the raised voices, the name calling, the push that led to the shove, the broken glass that was the fault of one parent followed by the broken glasses that was the fault of the other. Was it a slap from one and two punches from the other? Or two slaps on the face from the husband versus two punches in the face from the wife? Did she force him to have physical relations or did he force her? Which one of them was lying or exaggerating more?

None of this should have been the focus. This case has been poured over at great length and expense by court staff, a special master, the Department of Children and Families, a guardian, outside experts, lawyers, and judges. Yet none of this scrutiny has revealed that either of these parents—in anyone's opinion—is unfit to be an active parent. Indeed, neither of them claim the other is unfit. Instead, they agree that they should have joint physical and legal custody of all four children.

But Cottell and Plant have refused to recognize that this as the case's central reality. Instead, in fighting over the primary residence of the children, Cottell and Plant have

tried to show that they are a better person than the other and therefore should have the children sleep mostly at their homes. They have been given the impression that the parent the court finds slightly better—the one who shoved a little less—the one who yelled louder but less often or who yelled more often but not as loud—should win this test of wills between them with the children as the grand prize.

They have spent mightily in this quest. Indeed, they have spent until they could spend no more. Abetted by a system that has come to accept this kind of destructive spending, they have lost over $350,000 of their income, savings, and what loans they could take. The money has gone to or is owed to lawyers, the guardian, mental health professionals, and other experts.

This might be less tragic if this were some sporting divorce—an amusement or revenge drama for the rich. But it isn't. Cottell is a clerical worker. As a respected architect Plant has the prospect to make a good living, but he has never had money to throw away. Yet, as his wife shoved in court. He pushed back. Now virtually all their money is gone. The mortgage is in default. The children are on Food Stamps (SNAP) and have received state subsidized health care. Their retirement savings has been spent. The credit cards are maxed out. They are proposing to sell the family home so they can pay the guardian ad litem.

Meanwhile, Plant is sitting on his hands while things get worse and the months tick by. Some of the financial problems are his fault. He admits he could close his small business and take a job with a major company at good pay. He has claimed that he has been too upset, too busy, and too financially drained because of this case to do a proper job. He pledges if everything goes well he can get things moving again, including taking

a job if needed. Challenged by the court, he also pledged to stand behind that claim even if he doesn't like the court's orders.

2. The parents will share custody equally.

But let's get back to the children—these four bright and energetic boys. Yes. You can compress Cottell and Plant's catalogue of complaints into the custody considerations listed in General Statutes §46b-56 (c). Under them, temperament matters. Past interactions among family members matters. Mental health matters, etc. But the statute says the court is to consider them holistically, and it is not required to assign specific weights to specific factors when deciding where the children would live best most of the time. Even though the statute says only that the court "may" consider them, the court has considered all of them, and its ruling reflects the product of that consideration.

What factors matter most for the four boys—what should be focused on in this case—is that both parents have stable homes not far from each other where the children may live—provided they have enough money left to keep them.

Cottell has the family home. Plant has an apartment. Both places have been inspected by the children's guardian ad litem and have been found suitable. Attorney Jan Yosman, the GAL, also believes that both the parties and the children have the emotional stability, the mental health, the time, the willingness, and the capacity to function apart but in coordination to make a satisfactory life for these children. Cottell's testimony, Plant's testimony, and all of the other evidence at trial convince the court that this is so. This is what matters, not the parties' punishing review of their most unpleasant moments.

And that is why the court agrees with the GAL's analysis but disagrees with the GAL's recommendation. The GAL's opinion reflects a belief that that, while both are suitable, the mother is "better" at collaborating and is less manipulative. The GAL didn't volunteer this. Cottell's lawyer pressed her on these points.

From her testimony and demeanor, the court didn't believe the GAL was stating the firmest of convictions nor seeing a very large gap between the two options. Instead, what the GAL said struck the court as consistent with the perception that courts want GAL's to pick a side even when there is nothing substantially wrong with either parent. Some may think that the "best" interest of the child means the slightly "better" parent rather than understanding that this may easily be overridden by the need to unite all children equally with both parents. Perhaps this unconsciously reflects courts giving GALs the message that the court's factors are a weighing contest that should result in a winner—a process the statute expressly says to avoid.

Whenever it can be avoided, picking a winner is the wrong thing to do. Where the parents are both rational, both trying, and not wildly disparate in what they can provide, there is nothing in the factors that prevents a court from treating them as roughly, equally good for the children. This reflects that it is more important to foster the children's bond with both parents than it is to favor the slightly better of the two.

Indeed, the powerful precursor to the statutory factors encourages courts to give equality priority. The statute commands the court, subject to what the parents want and what they can do, to order "the active consistent involvement of both parents." While the GAL leaned toward Cottell, she thought both parents sharing equal access would be

the ideal world for these children. The court agrees with her and sees no reason not to strive toward that ideal.

Where possible, equality is always a good idea. But equality makes sense here for another reason too. The GAL recognized it. Indeed, all of the participants in the trial understood that one fact alone will inevitably overwhelm all of the others. It is a fact reflected in the statute's concern for the children's adjustment, their status, and the stages of their development. It is a fact fraught with peril for the whole and the fractured family alike—the existence of teenagers.

The boys in this case are 11, 12, 13, and 15. While they try to adjust to life in the wreckage left by these needlessly destructive proceedings, they will also be entering what already would have been the most challenging period of their young lives. Challenging to them. Challenging to their parents.

The GAL says they are all smart. The GAL says they are all thoughtful. The GAL says they are all strong minded, and they have shown themselves to be strong willed. Already, they have—even with court orders to the contrary—switched sides more than once between mother and father, and the parents are partly to blame for allowing them to think side switching was okay.

The score was once 0-4 between mother and father, then 4-0, and now 3-1. Regardless of what the court has ordered, four of them are living with their mother and one of them is living with their father. Both parents must reflect on the reality that this could change again sometime soon and change again after that. No court order can save them from this.

The evidence shows that these children need both of their parents. The parents would do well to absorb this before it's too late. They may as well get used to it. They may as well—if they love the children the way they say they do—actually help make this equal, if inevitably nuanced, relationship a reality.

All of this means that the best message the adult world can give to these children is to urge them to be fully part of both of their parents' lives. Two homes have been set up where they can live and be loved. As every expert and party agreed, they—not us—will have the ultimate decision over where they are and when. The court will send no marshals to bundle them off for mandatory time with either parent. The parent who is – for the moment—on the outs will merely have to be patient—very patient—and available when their next chance comes.

Which brings us back to the issue of what the parents—as opposed to the children—will do. What they must do. The court does have power over them. It will require them not to undermine faith overtly or covertly in the other parent.

They both promise to do so. But a guerilla war could easily start here with each side blaming the other for starting it. It has happened on both sides in the past. The evidence —some of it not heard by the GAL—suggests that Cottell may have more to work on here than Plant, including an episode where the children joined her in openly mocking their father to his face. But they both have to work on it, and, even during this trial, it hasn't been going too well.

If it is shown that one parent is acting in bad faith, the court doubtless has the power to do things about it—financially and otherwise. But let's face it. Another five contempt hearings from now the battle could still be waged—if only in the subterranean caves of

family life. The only real way to stop is for each parent to act on what they say they believe—they must put the love of their children before their bitterness toward each other.

Cottell and Plant agree they should have joint legal and physical custody. The only geographic thing they are fighting over is the children's primary residence. The court's judgment will reflect that the children will share primary residences equally between their parents with the parties respecting the children's informed preferences. The details will be in the order and judgment.

On top of equal custody, Plant wants a long period in the summer to bring his children to Scotland to visit his family. This is a laudable thing, but Cottell, without supporting evidence, suspects Plant may take the children and never return. The court will not act on these unsupported suspicions. But, for now, Plant's career is not grounded well enough and neither are his finances sufficient enough to make foreign vacation travel immediately feasible. The same is true with Cottell. Therefore, neither party may take the children out of the country without the other party's permission or court permission until June 1, 2026.

There is almost no way to fairly split who has primary decision-making authority with respect to the children when the parents disagree. In the end, these boys will increasingly decide things for themselves. The GAL understandably threw up her hands on this issue and could only latch on to the current living arrangements as a basis. After all, you can't have decision making authority passing back and forth temporarily. It would only invite endless manipulation. So, the court agrees that, for now, the only real basis is the reality on the ground. Therefore, Cottell will have final decision-making

authority for the four oldest and Plant will have final decision-making authority for the youngest.

3. Plant will pay child support based upon realizing his earning capacity.

While Plant wants an equal share of the primary residence, he knows he must bear an unequal share of the expense of supporting his children. He is an experienced and capable architect with commercial expertise. While he isn't making that much money now, he concedes that he currently has an earning capacity of $85,000 a year. Plant recognizes that in the immediate past he has made much more than this, so this is plainly a realistic—if not minimal—baseline assumption.

Based on his current $1,121 in weekly income the parties agree that Plant's presumptive current support amount under the mandatory guidelines would be $212 per week. The parties also agree that the court should deviate from this amount because of Plant's earning capacity.

Plant has two options to realize this earning capacity. For around eight years he has been running his own consulting firm. He says it hit the skids in 2022 because its funds were siphoned off for this litigation and because his emotional strength was sapped by concern for his sons. Plant thinks the business can make a comeback. He has variously talked about one, or two, or four years.

But he has another alternative that wouldn't take so long. Plant admits that he could make around $150,000 by going to work for a company in Connecticut. Two former co-workers' testimony supports that number and more. They say he could also work remotely for companies outside Connecticut and make significantly more than that

amount relatively soon—indeed maybe as much as $100,000 more. All of the testimony agrees that Plant has valuable skills and that the market is favorable.

So, if Plant can't quickly get his company on its feet, he has other ready opportunities that mean he has the capacity to earn at least $150,000 within a few months.

The court will take an incremental approach. It agrees with Plant that he has an earning capacity of $85,000 now. It believes that no later than six months from now—from his company or another—he could earn $150,000. So the court will phase in its gross earning capacity assumption over that time, gradually increasing the assumption and doing a bit of rounding as follows:

For the weeks of October 4 , 11, 18, and 25
and the weeks of November 1,8, 15, 22, and 29, 2022:

$85,000 annually ($1,635 weekly)

For the weeks of December 6, 13, 20, and 27, 2022
and the weeks of January 3, 10, 17, 24, and 31, 2023:

$107,000 annually ($2,058 weekly)

For the weeks of February 7, 14, 21, and 28, 2023
and the weeks of March 7, 14, 21, and 28, 2023:

$129,000 annually ($2,480 weekly)

For the week of April 4, 2023 and weeks following:

$151,000 annually ($2,900 weekly)

Taking these gross income assumptions, the court then used the Family Law Software used by Family Services and its assumptions to calculate a deviation from the

presumptive support amount based on the parties' net incomes.[1] The court entered as an assumption into the software that the four children were living with their mother and thus the numbers that follow flow from the software's corresponding assumptions about taxes, etc.

Of course, in deviating from the presumptive amount the court isn't required to use this or any other specific technique, but it found this approach a helpful way to deviate toward an equitable amount. In any case, here are the child support payments that resulted:

For the weeks of October 4 , 11, 18, and 25, 2022 and the weeks of November 1,8, 15, 22, and 29, 2022:	$320
For the weeks of December 6, 13, 20, and 27, 2022 and the weeks of January 3, 10, 17, 24, and 31, 2023:	$377
For the weeks of February 7, 14, 21, and 28, 2023 and the weeks of March 7, 14, 21, and 28, 2023:	$438
For the week of April 4, 2023 and weeks following:	$493

The court will order Plant to pay these weekly amounts rather than the presumptive support calculated from his current income. It believes this deviation from the presumptive amount is justified under the deviation factors in Reg. Conn. State Agencies §46b-215a-5c because of its earning capacity findings. It also believes the deviation, including the calculation using Cottell's home as primary residence, is justified by the children's best interests and other equitable factors.

[1] The guidelines worksheets are in Appendix 1 to this decision.

First, in shared custody matters, the parent with the larger income can still better bear the parents' combined support burden. The court knows also that despite its orders, the physical reality of where the children live leans toward Cottell now even though it might vary from time to time as the children grow through their teens and become harder to influence.

The deviation also reflects that the court has given Plant financial slack by phasing in its beliefs about Plant's earning capacity to give him time to save his business before taking employment elsewhere. The assumption in the calculation that the children live with their mother takes up a bit of that slack without taking it away. The slack has been granted because the court believes Plant when he says his company's goal is to make him more money than he might make elsewhere while giving him the flexibility to spend more time with his daughters. These are equitable considerations the court has deemed important.

These are practical amounts. The court is convinced that the large immediate assumption Cottell asks for would not yield the cash she seeks and simply embroil the parties with the courts more while pushing off financial stability for the four boys even farther into the future.

4. Plant will pay alimony—but not yet.

Likewise, Cottell's demand for immediate and substantial alimony is impractical. Plant agrees he should pay alimony. He proposes it as a contingency. *If* he makes more money, Plant says Cottell should get a share. But *if* isn't good enough. Given his earning capacity, only *when* will do.

By July of 2023, the court believes Plant should be closer to his peak prior earning level of around $185,000. This means he would be earning over four times what Cottell makes and no one suggests she will ever make much more.

Plant proposed that Cottell be given 15% of the growth in his income. If it grew by around $100,000 as the court predicts, this would translate to around $15,000 of maximum alimony per year or $288 per week—assuming the money comes in and lesser sums if it doesn't.

Cottell assumes an overly optimistic earning capacity of $350,000 for her calculations. She wants $1,270 a week for eight years or $66,000 a year—19% of what Cottell thinks is Plant's gross income.

Cottell is being unreasonable on multiple levels. She assumes an earning capacity Plant has never had and may never achieve. She also takes an unfair percentage of his total income in light of the statutory criteria and other burdens.

The factors the court must consider for alimony are in General Statutes §46b-82. As the statute requires, the court has considered all of them, but some stand out here. The financial factors plainly favor alimony and Plant doesn't dispute this. But the small role to be played in this particular case by fault must be considered here.

This returns us to the nine days the parties mistakenly spent dissecting the unpleasant moments in their marriage. Much of it was cumulative, a waste of time, or was so utterly reciprocal as to cancel each other out.

To the extent any of it matters, the court was struck by Plant's convincing testimony about his wife's regular attacks. Plant convinced the court that Cottell's vocal dissatisfaction with some large things and some small things was a toxic stream running through the marriage. With undue frequency, vehemence, and persistence, Cottell

complained about significant things like Plant's work obligations but also complained and bullied him about things like when Plant might read bedtime stories and which children could be present. Plant said this happened nightly, and that he and the boys suffered under it for years.

Cottell recognized it got out of hand. She apologized for the worst episodes. The evidence shows that in one particular episode she was highly intoxicated and wound up in the emergency room where doctors gave her recommendations about the value of sobriety. The court believes Plant about these incidents and recognizes that the two parties are not merely equal in this regard—Plant got the worst of it. This behavior was a serious factor in destroying the marriage.

But then again, Plant did something that removed all doubt that the marriage would founder, and this can't be ignored either. Plant recorded dozens of family incidents to show how bad Cottell's behavior was. Plant said he feared she would wrongly accuse him. He feared he could never prove how bad things were for him without them.

But he failed to consider what a violation the tapes were. The privacy of home life is one of the things that every person counts on. With information about all of us, all of the time, surging around the internet and being exploited, people cherish the sanctity of the home now more than ever. By betraying the boundary of trust that begins at the front door, Plant bound himself to do irreparable harm to his marriage. He thought he had no choice. The court understands this. It has taken this claim into account.

But he did something worse that he clearly did have a choice about. The children knew about the taping. He didn't shield them from it. This inevitably harmed them. At first it seemed to turn them against their mother, but later this may have contributed to them turning against their father. Worse yet, Plant played the tapes for some family

members and friends and offered to play them for others. Regardless whether he thought of it as a bid for help or justification, this humiliation of his wife was inexcusable. Whatever, useful thing it might possibly have led to was greatly outweighed by the trust that it breached and the humiliation it forced Cottell to endure.

Because the prejudice these tapes might cause greatly outweighed their probative value, the court sustained Cottell's objection to them under Code of Evidence §4-3. As Cottell pointed out, the tapes show her at her lowest points. They also show only what things Plant decided to tape, and Cottell never made any tapes of Plant's acknowledged misbehavior to offset them.

Finally, the court refused to admit the recordings because it believed that this kind of taping should be discouraged as prejudicial to the administration of justice. With most everybody holding a camera and a microphone in their hands all of the time—in the form of a cellphone—it would be wrong to admit this evidence without the most extraordinary justification. Otherwise, the court could encourage couples to trap and tape each other, leaving the courts pressured to find in favor of the spouse with the better audio-visual skills. It is better instead to promote privacy and mutual respect even among those whose relationships are collapsing.

Therefore, the court did not and will not hear these tapes. No later than October 4, 2022, both parties will transfer all copies of any tape recordings discussed at this trial and still in their possession to their attorneys. Their attorneys may not use these tapes for any purpose without court permission.

To return to alimony, Cottell's wrongdoing mitigated by Plant's wrongdoing to expose her wrongdoing snapped this relationship. Alimony—merited above all by the

financial considerations— is appropriate, but it won't be at the level merited by the wholly innocent.

Consequently, beginning the week of July 4, 2023, Plant will begin paying Cottell $325 in weekly alimony. Because it is nowhere near the amount Cottell sought and maybe less than Cottell needs for comfort, the court will not order it reduced over the years. Instead, the alimony will last until the youngest daughter is around eighteen. Specifically, it will last seven years until July 4, 2029. It may be modified as to duration and amount if circumstances change.

The court had to pick a number. The number will never be equitable to a mathematical certainty. Equity is art, not engineering. We can only do rough justice. But some rough calculations support the court's conclusion that the $325 number is fair.

Let's assume that from his future $180,000 that Plant is left with about 67% of it after income taxes. This would mean he would have around $120,000 left. The court has already ordered him to pay by April of 2023 $493 a week in child support. That will take around $26,000 away, leaving him with $94,000. At $325 a week, he would lose another $17,000 and thus he would have $77,000 to live on or about $1,480 weekly.

The guideline software calculates that Cottell will net $744 a week. While her affidavit suggests her net would be $705 a week, the court's view wouldn't change if this were correct. In any case, with the combination of child support and alimony amounting to $818, she would have a total of $1,523 to live on or (using $744 weekly) $1,562 to live on—either way, more than what Plant will get. This may be fair given the court's belief that Cottell will likely bear more of the children's expenses, but the court doesn't believe the statutory financial factors when weighed against fault justifies any more.

5. Plant will pay some of the parties' debts.

This is especially so since the court intends to make Plant responsible for some of the couple's key debts. Plant has both agreed and been ordered to assume responsibility for most of them already. The Costco credit card Cottell was using for living and some medical expenses has a balance on it of around $13,000. The bill for the GAL in this case is over $20,000. The home mortgage is in arrears and in default. Plant has been ordered to pay these things but has almost entirely stopped paying. He has made a largely unrebutted case that he couldn't pay because his business drought coincided with orders to pay Cottell's attorneys' fees.

The court may suspect Plant could have come up with more money and that his financial affidavits have been inaccurate, but there isn't enough to find that he could have made the payments and is in willful contempt of the court's orders. Therefore, the motion at docket entry 152 is denied, and the court's prior orders are modified as necessary to be consistent with the findings and orders in this decision.

In any case, Plant is still the only one who can possibly deal with most of these debts. So the Costco card debt, the GAL fee, and the mortgage arrearage are his responsibility. He can only hope to negotiate with these creditors because the court understands that he hasn't the ready cash to pay them.

From now on, the parties will pay their own attorneys' fees. Therefore, Cottell's motion at docket entry 191 is denied.

Plant has already paid a substantial amount of Cottell's fees and has no resources to pay more. It would be futile to order Plant to pay them. Cottell will soon have more money than Plant and will be more capable of paying her lawyer's fee. The fees here are very large and both lawyers have descried them.

Because it is not requiring Plant to pay more of Cottell's fees, the court will not spend time on Plant's request to find Cottell's lawyer engaged in abusive pre-trial practices. The court denies the motion at docket entry 145. Without punishment by the court, this case should be enough of a lesson for both lawyers to seek judicial economy. Their prospects of being paid for a bitter and protracted battle aren't very good. The answer was to get this case to trial far earlier.

There will be one exception to this ruling on attorneys' fees. As this drama unfolded in family court, Plant filed a civil suit against Cottell for assault and emotional distress. The court has stayed that case pending the resolution of this one. Plant has no money to prosecute it, and Cottell has no money to defend it. If Plant chooses to press that case, he will pay for Cottell's reasonable attorneys' fees and reasonable expenses associated with her defense of the civil lawsuit.

The parties will keep the vehicles in their possession. Neither party can afford to pay off any loans. Therefore, the court will not order Cottell to pay off her car loan or remove Plant as an obligor. She must hold him harmless with respect to the loan payments.

Let us now turn to the family home and its defaulted mortgage. Cottell wants to sell it and use the hoped-for equity to pay the GAL and then subsidize her move. Plant agrees the home must be sold to pay the GAL but wants any leftovers to be divided equally.

There is no mistaking the painful irony here. This request means that the parties have accepted the notion that to pay for advice about making a happy home, the home will have to be sold. Of course, this isn't the GAL's fault. They agreed to hire her, and Plant agreed to pay her. In that sense, maybe it's the court's fault. In future it might do better to better understand the parties' finances before accepting their untutored

agreement that a GAL must be retained and must be given a broad range of responsibilities.

Neither party explained their desire to sell the house. Some evidence suggested it had physical flaws. The court can only hope that the parties thought it was best to leave this home behind and seek a better place for Cottell to live. But absent an explanation, the court is unwilling to order it now. The parties should move for permission to sell—no briefing required—and seek an early date to be heard remotely—and briefly— on whether this is good for the boys.

Which brings us to how they would go about moving. With equally shared custody, it matters where the parties might move. Cottell and Plant live in the same town. There is no issue about schools. If they move, there might be one. They should try to agree about this. If they do, they should file a stipulation. If they don't, the party seeking to move should apply for court approval.

6. Plant may seek some of the personal property he left behind.

There are many things the parties agree on and of which the court approves. The orders on those subjects are incorporated in the judgment and those orders are incorporated here by reference.

The parties still dispute some smaller matters. One of them is about Plant's personal property. Plant made a list of demands. He says he has only asked for things small in value and high in sentiment. The parties didn't give the list to the court but asked for some procedure.

So here is one. No later than October 11, 2021, Plant will submit to Cottell a final list of personal property in her possession that he seeks. No later than October 18, 2021, Cottell will give Plant a list of what she is willing to give him. If they agree, then Cottell

should provide the items to Plant no later than October 25, 2021. If they do not agree, then no later than October 27, 2021 each side should file its "List of personal property to be provided to defendant Plant". No argument. Just a list describing the items well enough for the court to know what they are.

The court will look at the two lists and pick the list that appears to be the more reasonable of the two. It will not hold a hearing on the question. The court will only choose between lists. It will not mix and match. Therefore, each party has a strong incentive to be reasonable, and the parties can avoid further fees they cannot pay for, along with court time they do not need. Plant's list as submitted to the court should not include, as he suggested it might, the children's umbilical cords. The comparative attachment a mother would have had to these is literally and obviously far greater than that of a father. If Cottell wants them, Cottell will have them.

7. A case study of what not to do.

This case is a remarkable illustration of mismanagement. The apportionment of blame for this outcome recalls the terms Stanley Baldwin used nearly a century ago to explain British government failings in the 1930s.

Whatever responsibility there may be, that responsibility is not that of any single participant in these proceedings. It is the responsibility of the participants as a whole. We are all responsible, and we are all to blame.

The court should have forced the case to trial earlier. The scope of the GAL's duties should have been narrower. The parties' willingness to compromise should have been broader. They shouldn't have spent money they didn't have on experts. When the clients didn't listen, their lawyers should have withdrawn before their fees ruined the family and damaged their law practices.

But that has all gone by the board. Instead, overwhelmed by debt, Cottell and Plant will crawl forward, unhappy with the court's ruling, nursing their grudges, unable to provide adequately for their children— while the world turns, while no lessons are learned, and while their children grow up and leave them and all of us behind.

BY THE COURT

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Moukawsher, J.