University of St. Thomas Law Journal

Volume 19
Issue 3 *Clemency in 2022 - The Power of the Pardon*

Article 7

May 2023

Finding Utility in Unpublished Family Law Opinions

William B. Reingold, Jr.

ARTICLE

FINDING UTILITY IN UNPUBLISHED FAMILY LAW OPINIONS

WILLIAM B. REINGOLD, JR.*

I. INTRODUCTION

Stumbling upon a helpful unpublished opinion is akin to finding a $20 bill on the ground—you are probably tempted to pocket it, but most of us were taught to leave it alone. Citation to published authority (from both litigants and judges) underpins an adherence to precedent; in turn, this promotes not only uniformity and stability in the law, but also a fairness to future litigants seeking justice born of dispassionate judgment.[1] By contrast, unpublished decisions are nonbinding and can only advance persuasive authority to support one's position.[2] Some courts, like those in California, hasten to admonish the negligent litigant who cites an unpublished case,[3]

* William B. Reingold, Jr., is an attorney in Seattle, Washington, at the law firm Lasher Holzapfel Sperry & Ebberson, PLLC. He exclusively practices family law, though he is an avid legal writer in his spare time. His writing often centers around family law, rhetoric, appellate advocacy, and equity.

1. *See generally* 21 C.J.S. *Courts* § 184 (2019) ("The rule [of stare decisis] represents an element of continuity in law and is rooted in the psychological need to satisfy reasonable expectations but is a principle of policy and not a mechanical formula of adherence to the latest decision."); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Court of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 225 (2001) ("The use of unpublished opinions has triggered concern that inconsistencies among the circuit courts would be hidden in unpublished opinions unlike published opinions that 'facilitate the discovery of conflicts in the law of the circuit.' "); *see also* Stetz v. Skaggs Drug Ctrs., Inc., 840 P.2d 612, 615 (N.M. Ct. App. 1992) (commenting on how public dissemination of judicial opinions espouses transparency and "broader societal interest in the predictable application of legal rules"); *cf.* United States v. DeStefano, 59 F.3d 1, 3 (1st Cir. 1995) (recognizing, in a criminal context, that "[p]redictability and consistency are important in the law, and judges tend to use the same phrases over and over in explaining particular concepts to jurors").

2. Brett R. Turner, *Unpublished Opinions: Precedential Value, Persuasive Value, and Choice of Law*, 18 DIVORCE LITIG. 181 (2006).

3. *See, e.g.*, Westrich v. Higa, No. B293726, 2020 WL 2123356, at *4 (Cal. Ct. App. May 5, 2020) ("Having disregarded the warnings both in published precedent and from defendants in their brief in this case, we conclude sanctions in the amount of $1,100 are necessary to remedy an unreasonable violation of the Rules of Court and deter future noncompliance."); 3405/3407 Slauson Ave., LLC v. Alessi, No. B255137, 2016 WL 1450232, at *10 (Cal. Ct. App. May 9, 2016) ("Citation to unpublished opinions is prohibited except in very narrow circumstances, and

while others are more permissive.[4] Yet, irrespective of the jurisdiction, there is a general consensus to refrain from this type of citation.[5] Family law attorneys across the country know all too well that much of their case law will be unpublished and nonprecedential. In part, this eventuates from a conscious effort by courts and legislatures to preserve case law that consistently advances finality in these distinctly emotional proceedings.[6] Rightfully so: "To judges hearing contested matters, the conflicted couple is not an incidental aberration. The conflicted couple is the norm."[7] This is especially true in matters involving children, inasmuch as protracted litigation

---

we admonish Koenig that a citation for 'illustrative purposes,' his explanation for the citation, is certainly not one of them."); Torres v. U.S. Bank Nat'l Ass'n, No. G051406, 2016 WL 3571014, at *6 n.5 (Cal. Ct. App. June 23, 2016) ("We caution the Torreses' counsel that citation to unpublished decisions may support an award of sanctions, and counsel should refrain from doing so in the future.").

4. *Compare* Bossian v. Bossian, 875 S.E.2d 570, 583 (N.C. Ct. App. 2022) (quoting State *ex rel*. Moore Cnty. Bd. of Educ. v. Pelletier, 606 S.E.2d 907, 909 (N.C. Ct. App. 2005)) ("Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, 'believes . . . there is no published opinion that would serve as well' as the unpublished opinion."), WASH. GEN. R. 14.1(a) ("[U]npublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."), *and* KY. R. CIV. P. 76.28(4)(c) (deleted 2023) ("[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."), *with* State v. Oie, 174 P.3d 937, 939 (Mont. 2007) ("Once again we take this opportunity to stress that unpublished orders and opinions from this Court are not to be cited as precedent. . . . [W]e admonish counsel not to cite to or rely on such orders and opinions in the future. Moreover, when included in briefs, we give no regard to such citations. Our decision here disregards both Oie's and the State's improper citations."), *and* State v. Johnson, 401 P.3d 504, 507 n.4 (Ariz. Ct. App. 2017) ("Rule 111(d) . . . permits citation to decisions of other jurisdictions if permitted in the originating jurisdiction.").

5. *See* Vlahos v. R&I Const. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004); Roberts v. Sewerage & Water Bd. of New Orleans, 634 So. 2d 341, 349 (La. 1994); Dempsey v. Beaumont Hosp., Inc., 38 S.W.3d 287, 290 n.5 (Tex. App. 2001); Brandt v. Lab. & Indus. Rev. Comm'n, 466 N.W.2d 673, 677 (Wisc. Ct. App. 1991); Hannon, *supra* note 1, at 224 ("When a subsequent court finds both published and unpublished opinions of relevance, it should not cite the unpublished opinions; instead, it should cite the same published precedents . . . ."). *But see* J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419 (2005).

6. *See* Cloutier v. Blowers, 783 A.2d 961, 967 (Vt. 2001) (Dooley, J., dissenting) ("I can think of no area where the need to contain the exercise of appellate discretion is greater."); *In re* Marriage of Landry, 699 P.2d 214, 215 (Wash. 1985) (en banc) ("Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality."); *In re* Marriage of Wolford, 789 P.2d 459, 460 (Colo. App. 1989) ("[A] definite public interest exists in assuring the finality of civil judgments through which litigants acquire rights in the judicial process. . . . And, this finality is especially important in family law cases."); *In re* Parentage of N.R.M., No. 34975-6-III, 2017 WL 2955570, at *1 (Wash. Ct. App. July 11, 2017) ("This emphasis on finality and moving forward is reflected in the well-settled standards that govern review of domestic relations cases.").

7. Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective,* 32 FAM. L.Q. 201, 214 (1998); *see also* Henry Gornbein, *Best Practices for Family Law*, 97 MICH. BAR J. 56, 56 (2018) ("Everyone is unhappy in a divorce, and it can be one of the most stressful and traumatic events in one's life. Over the course of my many years working in the area of family law, I learned that some psychologists rank divorce second only to the death of a child or spouse.").

can ultimately hinder their wellbeing.[8] And by the same token, commonsense tells us that people tied together through a familial relation will be linked either indefinitely or for an extended period of time after the case resolves.[9] Appellate courts necessarily yield wide latitude to trial judges handling these cases so that they can do equity under the highly specific facts of each case.[10] Frequent changes to this legal sphere (either through the legislative process or departures in case law) would therefore jeopardize consistency. But does citation to unpublished decisions equally jeopardize the equitable nature of these cases, or is it possible that such citation illuminates murky dissolution issues?

There are competing interests between family law litigants—desiring to cite unpublished law that buttresses their case—and the appellate courts—desiring to stave off inconsistency and drawn-out litigation by keeping such cases unpublished. This article posits a rationale for why certain unpublished family law decisions should be citable, or at least be afforded instructive weight notwithstanding their nonprecedential status. Accordingly, this article will first examine the dichotomy between unpublished and published opinions, then delve into family law cases that would benefit from citation to unpublished decisions.

II. The Grounds for Unpublished Opinions

There are three primary aims of any written opinion: to articulate the court's ruling and concomitant explanations; to make known to those in the legal community possible new developments in the law; and to clarify the

8. *See* Hardcastle, *supra* note 7, at 214; *In re* Parentage of Jannot, 65 P.3d 664, 667 (Wash. 2003) (en banc) ("[W]e recognize that the child's interest in finality distinguishes this case from other, nondomestic relations cases and the interest in finality is best served if an appellate court can overturn a trial court's denial of a full hearing only for abuse of discretion."); Andrew Shepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 Fam. L.Q. 95, 104 (1998) ("Some children benefit when their parents divorce or separate because it enables the children to escape intensely conflict-ridden households. But many children are worse off when their parents divorce or separate as far as the 'three e's' of their existence—economics, emotions, and education.").

9. *See also* Henriquez v. Henriquez, 971 A.2d 345, 357 (Md. Ct. Spec. App. 2009) (acknowledging that these cases "will forever alter the personal relationships and obligations of the litigants to each other"). Basic examples of this include alimony payments, child rearing, child support payments, and the sale of real property as part of their divorce. More complex examples may arise if the parties own a business together or have other professional ties. *See, e.g.*, Coleman v. Coleman, No. W2012-02183-COA-R3-CV, 2013 WL 5308013, at *1 (Tenn. Ct. App. Sept. 19, 2013) ("Over time, Wife began to mistrust Husband's management of the company they both owned. . . . [M]istrust of his management and the parties' disagreement over the valuation of MAE caused disputes which became serious issues in dividing this marital asset in the ensuing divorce.").

10. *See* Gilliam v. Gilliam, 374 S.W.3d 108, 115 (Ark. Ct. App. 2010); Hensley v. Hensley, 204 S.E.2d 228, 229 (N.C. Ct. App. 1974); *In re* Marriage of Foster & Figari, No. A161680, 2022 WL 263297, at *4 (Cal. Ct. App. Jan. 28, 2022).

court's reasoning against the precedents used to reach its holding.[11] Broadly, these objectives comport with the common law tradition that such decisions are not made in a vacuum, but rather, in response to social needs and in the light of the need to reconcile conflicting social values.[12] As an institution, the judiciary benefits from published opinions insofar as an open dialogue with the public "lends legitimacy to [the] decision-making process and also . . . provide[s] guidance to courts, attorneys, and parties."[13]

Aside from published opinions, litigants may seek guidance from other sources. While law reviews and treatises have risen to a reputable (though nonbinding) status,[14] unpublished opinions are relegated to something closer to a second class citizenry.[15] This is true in spite of the nationwide penchant toward leaving cases unpublished.[16] Tomes of nonprecedential decisions have stirred serious discussions about how these cases impact the court system as a whole; indeed, Congressman Howard Berman noted back in 2002 that the issue concerned, *inter alia*, "important questions relating to the U.S. Constitution, the framers' intent, judicial efficiency, and the fairness of our judicial system."[17] Because judges are faced with a back-breaking docket, the argument goes that penning less precedential material allows for "a certain number of cases" to be resolved by way of more laconic,

11. *See* Brooks v. City of W. Point, 639 F. App'x. 986, 990 (5th Cir. 2016) (Dennis, J., concurring); State v. Uyesugi, 60 P.3d 843, 875 (Haw. 2002) (Acoba, J., concurring) ("Only in the light of open debate can the dialectic process take place, subject to the critique of the parties, the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.").

12. Charles D. Breitel, *The Common Law Tradition—Deciding Appeals*, 61 COLUM. L. REV. 931, 936 (1961).

13. *Uyesugi*, 60 P.3d at 875 (Acoba, J., concurring); *see also* 1ST CIR. R. 36(b)(2)(B) ("With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in a cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.").

14. *See* Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 509, 512 (1992) ("[L]aw reviews hold a special place of trust and importance in the legal system and in society."); *see also* Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404 (2012) ("During the first decade of the twenty-first century, on average, one or more Justices cited articles in their opinions in 37.1% of the Court's cases and, on average, the Justices cited 0.52 articles per opinion compared to 0.87 articles per opinion in the early 1970s.").

15. *See* Steve Sheppard, *The Unpublished Opinion: How Richard Arnold's* Anastasoff *Opinion is Saving America's Courts from Themselves*, 2002 ARK. L. NOTES 85.

16. Jeffrey O'Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 423 (2002) ("From October 1, 1999 to September 30, 2000, the federal courts of appeals resolved 79.8% of their merits determinations by unpublished opinion, while unpublished opinions in the state courts numbered in the tens of thousands.").

17. *Unpublished Judicial Opinions*, *Hearing Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the Comm. on the Judiciary*, 107th Cong. 90 (2002).

unpublished opinions to keep pace with the cascade of controversies to be decided.[18]

There are forceful arguments for why these decisions should not bleed into published case law.[19] Judge Alex Kozinski, while still a judge on the Ninth Circuit Court of Appeals, waded into the debate by discerning that "keeping the law of the circuit clear and consistent is a full-time job, even without having to worry about the thousands of unpublished dispositions we issue every year."[20] And because these unpublished decisions presumably regard well-settled principles of law, quickly dispatching run-of-the-mill cases affords more time and resources to decide unsettled principles of law.[21] A litigant's reliance on these unpublished decisions would undercut these rationales,[22] thus marring judicial economy.[23]

Certain grounds for leaving opinions unpublished are tenuous upon closer scrutiny, as demonstrated through the robust debate on the subject.[24] Start first with the "openness" ground to ensure the public and legal communities are apprised of judicial decision-making. It is true, as pointed out in the 1993 case of *Dynamic Air, Inc. v. Block*, that "[a]ttorneys who have access to computerized research systems are able to find unpublished opinions with facts apparently similar to their case."[25] Others lacking such services were "at a disadvantage, as they are unable to find those unpublished opinions supporting their cases."[26] But the year 1993 was three decades ago. Back then, a minority of people owned (or even imagined owning) a

18. Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 259, 260 (2d ed. 2002).

19. Katrin Marquez, *Are Unpublished Opinions Inconsistent with the Right of Access?*, MEDIA FREEDOM & INFO. ACCESS CLINIC (Nov. 19, 2018), https://law.yale.edu/mfia/case-disclosed/are-unpublished-opinions-inconsistent-right-access.

20. Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, 20 CAL. LAW., June 2000, at 43; O'Cooper, *supra* note 16, at 431 ("The need to maintain a rational body of precedent in a court whose lawmaking function is driven by its error-correcting function is part of what motivates Judge Kozinski's argument in favor of non-precedential unpublished opinions.").

21. Roberts v. Sewerage & Water Bd. of New Orleans, 634 So. 2d 341, 349 (La. 1994).

22. *Id.*

23. Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice*, 26 MISS. C.L. REV. 185, 189 (2007) (explaining the argument made by commentators that "judges were spending too much time writing opinions in 'meaningless' cases (i.e., cases that did not meaningfully advance the development of the law), and lawyers were spending too much time researching these 'meaningless' cases").

24. *See, e.g.*, O'Cooper, *supra* note 16, at 431 ("Yet the desired result could be achieved, without the danger of wholly arbitrary decision making that Judge Kozinski's solution presents, if unpublished opinions were treated as persuasive but not binding authority. Such a use of unpublished opinions would allow an early panel presented with a novel legal issue in a less than ideal setting to decide the case before it, as the court's mandatory jurisdiction would require, while avoiding a definitive resolution of the legal issue.").

25. Dynamic Air, Inc. v. Bloch, 502 N.W.2d 796, 800–01 (Minn. Ct. App. 1993).

26. *Id.*

computer; nowadays eighty-five percent of Americans own a smartphone.[27] While it used to be more difficult to track down an unpublished opinion, courts disseminate published and unpublished opinions alike on the jurisdiction's website, so a simple Google search will yield valuable results.[28] Plenty of cases acknowledge this reality while simultaneously castigating the litigants who choose to support their argument with these accessible opinions.[29]

Then there is the concern that "[u]npublished opinions should not be cited for propositions of law for which there is published authority."[30] This argument dovetails with another misconception that unpublished opinions are generally of lesser quality by default, at least in part because the principle of law being addressed has already been settled.[31] These arguments have their opponents as well. Judge Richard Arnold—a venerable leader in the eyes of those who wish unpublished decisions to have precedential weight—observed the elaborate nature of certain unpublished decisions "that anyone would describe as important."[32] Appellate judges (with their status and reputation in mind) presumably do not eschew their legal writing and analyzation skill sets just because an opinion is deemed unworthy of publication, as evidenced by the existence of some exemplary unpublished opinions.[33] Likewise, trying to limit the number of published opinions on a particular topic unless they are of a certain quality is a flawed premise;

27. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), http://pewresearch.org/internet/fact-sheet/mobile/.

28. *See, e.g.*, *In re* Bank, 850 F. App'x. 115, 120 (2d Cir. 2021); Krakow v. Sec'y of Health & Hum. Servs., No. 03-632V, 2011 WL 336851, at *1 n.5 (Fed. Cl. Jan. 10, 2011).

29. *See, e.g.*, People v. Williams, 98 Cal. Rptr. 3d 770, 777 (Cal. Ct. App. 2009) ("We realize that depublished and unpublished decisions are now as readily available as published cases, thanks to the Internet and technologically savvy legal research programs. That does not give counsel an excuse to ignore the rules of court."); Goetzka v. City of Black River Falls, No. 2004AP2917, 2005 WL 2665489, at *9 (Wis. Ct. App. Oct. 20, 2005) (Dykman, J., dissenting) ("Though the majority does not recommend this opinion for publication, unpublished opinions are readily accessible, and may influence potential litigants. It is unfair to mislead those potential litigants.").

30. Cox v. Hartman, 911 N.W.2d 219, 307 (Mich. Ct. App. 2017) (quoting MICH. COMP. L. § 7.215); *see also supra* notes 20–23 and accompanying text.

31. Logan Hetherington, Comment, *Keeping Up with Your Sister Court: Unpublished Memorandums, No-Citation Rules, and the Superior Court of Pennsylvania*, 122 DICK. L. REV. 741, 761 (2017).

32. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 224 (1999).

33. It is true that there is presumably rhyme and reason for leaving the opinion unpublished, and these reasons would be unbeknownst to those outside of the judge's chambers. Perhaps, for example, the record on appeal, unseen by others reading the opinion, was either incomplete or a gallimaufry of irrelevant, confusing pleadings that inhibited meaningful review. *See* Ray v. Ray, No. COA19-959, 2020 WL 5160475, at *7 (N.C. Ct. App. Sept. 1, 2020) (Stroud, J., concurring) ("[A]lthough this opinion is unpublished and thus has no precedential value, parties often cite and rely upon unpublished cases, both before trial courts and before this Court. I would caution that this case should not be relied upon due to its oddities and the failure of the record to explain many of the facts relevant to the classification and valuation of the debt and properties in this case."). Regardless, appellate courts will from time to time adopt the holdings of unpublished decisions to breathe life into a published opinion. *See, e.g.*, Jonna v. Yaramada, 848 S.E.2d 33, 48 (N.C. Ct.

enough published opinions on a particular subject will inevitably lead to an opaque or carelessly written opinion.[34]

All in all, there is plenty of room for people to advocate for citation to unpublished opinions in *some* form or fashion. The question to be discussed is to what extent such citation is practical. With that, I turn to my reasoning for why unpublished family law opinions are ripe for such a discussion.

III. Advocating for Citation to Unpublished Family Law Opinions

Thus far, we have walked through the rudimentary aspects of opinion writing, justifications for leaving certain opinions unpublished, and modern-day realities that chisel away at some of those justifications. However,

App. 2020); *see also* State v. Wilson, No. COA16-1215, 2018 WL 944021, at *3 (N.C. Ct. App. Feb. 20, 2018).

34. As a discursive example, the Washington Supreme Court's opinion in *Westerman v. Cary* set forth the means for determining a nonparty's right to intervene pursuant to Civil Rule 24, and seemingly vacillated between "requirements" (i.e., elements) and factors: "All four of these requirements must be met for reversal to be justified. There is some debate over whether [the intervener's] request for intervention was timely; *however, the other factors are dispositive*." Westerman v. Cary, 892 P.2d 1067, 1081 (Wash. 1994) (en banc) (emphasis added). Subsequent appellate decisions citing *Westerman* are split on whether these are requirements, see, e.g., Wilson v. Mt. Solo Landfill, Inc., No. 44938-2-II, 2014 WL 6068043, at *2 (Wash. Ct. App. Nov. 13, 2014) ("If Keystone fails to satisfy any of these four requirements, we need not examine the remaining requirements and must uphold the trial court's order denying its motion to intervene."); accord Creveling v. Creveling, No. 17670-3-III, 1999 WL 499443, at *2–3 (Wash. Ct. App. July 15, 1999), or factors to be balanced, see, e.g., Columbia Gorge Audubon Soc'y v. Klickitat Cnty., 989 P.2d 1260, 1266 (Wash. Ct. App. 1999) ("The claim of interest factor is then satisfied."). The inadvertent fracturing of case law can be remedied through either the legislative process or by a decision from a higher court, but that could take years, if it happens at all. *See* Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021); Fisher-Borne v. Smith, 14 F. Supp. 3d 695, 697–98 (M.D.N.C. 2014); Tommy Neal, *Learning the Game*, Nat'l Conf. of State Legislatures (June 26, 2018), https://www.ncsl.org/research/about-state-legislatures/learning-the-game.aspx ("Legislative bodies are notoriously slow—some observers might even say inefficient—in going about what they do."). The intermixing of factors and elements, even confined to the issue of intervention, has obvious ramifications. First, it gives litigants room to argue and jockey for a better position with regard to whether they can or cannot meet each element as opposed to a review of the salient factors. And while being able to argue for and against an issue due to a discrepancy in precedent may, to a certain degree, seem liberating, this implicates a second ramification: the uncertainty of an outcome. Attorneys can be adversarial by nature, but they can be counselors at law, too. This is especially so in family law. *See generally* Patrick A. Wright, *The Changing Face of American Family Law*, *in* Strategies for Family Law in Texas: Leading Lawyers on Handling Negotiations, Managing Client Expectations, and Navigating Recent Trends 7 (2014 ed. 2014). The ability to counsel one's client and satisfactorily overview the risk they take when presenting an argument to the court is stifled insofar as subtle interstices in the law exist. Published case law conflating factors and elements no doubt hampers such counseling. *See* Seed Co. v. Westerman, 832 F.3d 325, 337 (D.C. Cir. 2016); David S. Caudill, *Controversial Defenses to Legal Malpractice Claims: Are Attorney-Experts Being Asked to be Advocates?*, 5 St. Mary's J. Legal Mal. & Ethics 312, 341 (2015); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. Cal. Interdisc. L.J. 375, 381 (1997).

this is not an article endeavoring to enlist others for a greater battle to make all opinions binding authority.[35]

My thesis centers upon a narrow prospect of citing unpublished family law opinions for their *factual* backgrounds. Most family law actions are grounded in equity.[36] Statutes governing divorce are purposefully broad. They invite a wide-ranging discretion in making an equitable decision given the ever-changing facts from case to case. "Even when the applicable statutes or case law have not undergone any change—the personalities of the litigants, the needs of their children, and the particular income and asset picture varies from one case to the next."[37] Against this backdrop, let us turn to why certain unpublished family law opinions deserve at least *some* recognition.[38]

---

35. Quite the opposite. It should go without saying that a published opinion that fits your argument should trump an unpublished opinion, and "[a]dding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict." Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001); *see also id.* (quoting Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 196 (1999)) ("Judges have a responsibility to keep the body of law 'cohesive and understandable, and not muddy the water with a needless torrent of published opinions.'"). Overreliance on unpublished decisions should be discouraged. There is no need to divagate from such commonsense.

36. *See infra* notes 45–48 and accompanying text.

37. Kathleen A. Hogan, *Beyond the Boundaries of Family Law*, 32 FAM. ADVOC. 4, 4 (2010).

38. A brief prelude as to the recent growth of family law may be beneficial to setting our stage. Family law has historically been decided by state courts operating under state statutes. *See* Linda D. Elrod, *The Federalization of Family Law*, AM. BAR ASSOC.: HUM. RTS. MAG. (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/. The Supreme Court of the United States tended to avoided family law matters during the nineteenth century, which remained largely unchanged. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 273–74 (2009) (first citing *In re* Burrus, 136 U.S. 586, 594 (1890); then citing Barber v. Barber, 62 U.S. 582, 583 (1859); and then citing Barry v. Mercein, 46 U.S. 103, 116–18 (1847)). And yet, while family law statutes vary state by state, we can glean that an evolving view of the family—as an institution—is followed by an evolving trajectory of the law. *See* Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 601 (2019) ("Family law is in a dialogic relationship with constitutional law, in which the evolution of family law helped to evolve constitutional law, not the reverse."). While the notion that "[f]amily law and its institutions necessarily exclude" is true in a traditional sense, Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEM. 1, 12 (2016); *cf.* Troxel v. Granville, 530 U.S. 57, 68 (2007) (plurality) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."), statutes on both a state and federal level have established modern (and sweeping) conceptions of parentage, marriage, and family itself. Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1519 (2014); *see also id.* at 1482–83 (citing numerous examples of progressive steps taken in this area of the law, including Loving v. Virginia, 388 U.S. 1 (1967), United States v. Windsor, 570 U.S. 744 (2013), and Lawrence v. Texas, 539 U.S. 558 (2003)). Legislation related to alternative dispute resolution techniques have likewise received a warm embrace from family law litigants across the country. *See* George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIM. LAW. 521, 521–22 (2008). In turn, acceptance as to a family's complexion has broadened substantially. *See, e.g.*, Justin McCarthy, *Same-Sex Marriage Support Inches Up to New High of 71%*, GALLUP (June 1, 2022), https://

A. *Distinguishing Facts From Precepts*

For attorneys regularly mired in family law, statutes can often feel like a starting pistol at a track and field event—necessary to commence the litigation, but mostly an afterthought as compared to the facts being argued over. It is hard to overstate the vital role facts play in these actions.[39] Facts "are the core of any family law case," and "the good practitioner knows he can never have too much information"[40] because the facts control the narrative in a realm dominated by narrative.[41] This includes those facts precipitating the divorce (e.g., infidelity or marital wrongdoing in states where fault-based analysis bears upon certain issues), and those necessary to reach an equitable outcome in the future (e.g., determining how a parent's work schedule and historic caretaking abilities affect custody arrangements).[42] In-

---

news.gallup.com/poll/393197/same-sex-marriage-support-inches-new-high.aspx ("Rising national support for legal same-sex marriage reflects steady increases among most subgroups of the population, even those who have traditionally been the most resistant to gay marriage."). To quote Justice O'Connor, "[t]he demographic changes of the past century make it difficult to speak of an average American family," such that "[t]he composition of families varies greatly from household to household." *Troxel*, 530 U.S. at 63; Catharine M. Venzon, *Dangerous Trends in Matrimonial and Family Law*, *in* STRATEGIES FOR FAMILY LAW IN NEW YORK: LEADING LAWYERS ON NAVIGATING CHANGING FAMILY LAW TRENDS, DEVELOPING EFFECTIVE STRATEGIES, AND BUILDING CLIENT RELATIONSHIPS (2013 ed. 2013) (can be found at 2013 WL 941377, at *1) ("Matrimonial and family law has continued to evolve to accommodate a shift in American values and today's diverse family units.").

39. *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1278 (2008) [hereinafter *Repairing Family Law*] ("Narratives of family law bolster the privileging of finality, as courts determine the 'truth' about a familial dispute by settling on a single account of a disputed incident or circumstance.").

40. John E. Harding, *Surviving the Shrinking Family Law Courts*, *in* STRATEGIES FOR FAMILY LAW IN CALIFORNIA: LEADING LAWYERS ON UNDERSTANDING DEVELOPMENTS IN CALIFORNIA FAMILY LAW (2013 ed. 2013) (can be found at 2013 WL 2728954, at *2); *see also Repairing Family Law*, *supra* note 39 ("Although a court will hear evidence on contested facts representing multiple perspectives, the court will ultimately choose one set of facts to the exclusion of others.").

41. *See Repairing Family Law*, *supra* note 39; Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 895 n.19 (providing examples of other legal commentaries decrying trial courts' discretion in these matters).

42. *Compare* Gilmartin v. Gilmartin, 822 S.E.2d 771, 775 (N.C. Ct. App. 2018) ("One of the factors that a trial court must take into account in awarding alimony, when relevant, is marital misconduct."), *and* Wood v. Cooley, 78 So. 3d 920, 931 (Miss. Ct. App. 2011) ("There are three elements that a plaintiff must prove, by a preponderance of the evidence, in a case for alienation of affection. These elements are: (1) the wrongful conduct of the defendant; (2) the loss of affection or consortium between the husband and wife; and (3) a causal connection between the wrongful conduct and the loss of affection or consortium."), *with* Silva v. Silva, 136 P.3d 371, 377 (Idaho Ct. App. 2006) ("We therefore now hold that consideration of a parent's work schedule and need for third-party child care is appropriate in a child custody determination to the extent that these circumstances are shown to affect the well-being of the children. This factor may be irrelevant to the custody decision in many cases, but it cannot be said that it will be irrelevant in all custody disputes."). *See generally In re* Marriage of Crosetto, 918 P.2d 954, 959 (Wash. Ct. App. 1996) ("An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties."); Peter J. Flanagan & Marc S. Toustein, *It's Just a*

deed, one of the most oft-cited foundational pillars applicable to every family law action regards the highly factual nature of these cases.[43] Appellate decisions recounting the details of these cases will usually delineate a thorough factual background needed to resolve the issues presented.[44]

Simple Divorce, 41 ORANGE CNTY. L. 12, 13 (1999) (discussing how "family law attorneys address issues involving historical facts and conduct" as well as "cases involving future conduct, financial liability, and litigation which will affect their clients for many years after the final Judgment in Dissolution").

43. *See, e.g.*, Self v. Dittmer, 619 S.W.3d 43, 48 (Ark. Ct. App. 2021) ("[T]he crux of these cases is that a child-custody determination is fact specific, and each case ultimately must rest on its own facts."); Scott v. Scott, 472 P.3d 897, 906 (Utah 2020) ("The district court's cohabitation determination is a fact-intensive determination of a mixed question of fact and law that is entitled to substantial deference on appeal."); Karmand v. Karmand, 802 A.2d 1106, 1118 (Md. Ct. Spec. App. 2002) ("Whether the post-divorce standards of living of former spouses are unconscionably disparate only can be determined by a fact-intensive case-by-case analysis."); McNulty v. McNulty, No. 711, 2011, 2012 WL 1899843, at *1 (Del. May 24, 2012) ("The Family Court has declined to apply the *Lynn* test as a bright-line rule in a number of recent decisions, instead embracing the latter, more fact-specific analysis."); Cyn Haueter, *"I Can't Afford to Leave Him" Divorcing a Spouse with Superior Financial Resources*, 31 HASTINGS WOMEN'S L.J. 237, 252 (2020) ("The nebulous statutory language and dearth of objective criteria in determining whether to award temporary attorney's fees was likely intended to afford the courts flexibility and discretion in delicate and fact-intensive family law matters."); Dallon, *supra* note 41, at 895 ("Scholars and judges have bemoaned the inconsistent and unpredictable results in divorce property division cases, noting that judges are given little guidance, comparatively few cases are reversed on appeal, and nearly any conceivable division of property is possible."); Edwin J. Terry, Kristin K. Proctor, P. Caren Phelan & Jenny Womack, *Relocation: Moving Forward, or Moving Backward*, 10 J. AM. ACAD. MATRIM. L. 167, 217 (1998) ("Relocation litigation is, perhaps, the most fact-intensive area of domestic relations law, and uniformity is not a realistic goal.").

Literary works outside of judicial writings align with the sentiment as well. Tolstoy most famously recognized this with his incipit to *Anna Karenina*, and countless other literary works in the American canon center upon familial turmoil and/or disintegration. Ubiquitous familial foundering likely serves as an exception to Oscar Wilde's observation that "life imitates Art far more than Art imitates Life." Oscar Wilde, *The Decay of Lying* (1889). The point being that such cases exemplify a markedly personal complexion. *See* Minich v. Cnty. of Jefferson, 919 A.2d 356, 359 (Pa. Commw. Ct. 2007) ("Divorce brings out the worst in every individual; anxiety, emotion, anger, and revenge run rampant."); Sanchez v. Sanchez, 915 S.W.2d 99, 104 (Tex. App. 1996) (Lopez, J., dissenting) ("Divorces are difficult for all concerned, but especially for the children under the best of circumstances."); Hernandez v. Alonso, No. 70675, 2017 WL 6055429, at *4 (Nev. Ct. App. Nov. 16, 2017) (Tao, J., concurring) ("Divorce and custody negotiations can be amicable and smooth. But they can also devolve into contentious, bitter, petty, emotionally and financially draining, exhausting, prolonged wars of attrition . . . .").

44. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1386 (1995) ("When an appellate judge sits down to write up a case, she knows how the case will come out and she consciously relates a 'story' that will convince the reader it has come out right."); *Id.* at 1387 ("In describing the 'facts,' judges are also heedful of relevant or controlling precedent; they will emphasize the facts in the instant case that distinguish it from unhelpful precedent as well as facts that fit earlier helpful precedents."); *see also* Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272 (1999) ("Appellate opinions are only as robust as the facts on which they are based."); *cf. In re* Marriage of Weaver, 505 P.3d 560, 563 (Wash. Ct. App. 2021) ("In a parental relocation case, both court levels must review numerous factors, which, in turn, renders a flood of facts relevant. Thus, even published decisions involving this topic run long.").

Thus, a distinction between citation to family law *facts*, as opposed to concomitant legal principles, serves as a springboard for reliance on an unpublished opinion. Underscoring the facts in an unpublished family law opinion (or published opinion for that matter) as a means to make your case is particularly meaningful given that the details in these cases make it "difficult to develop clear-cut principles."[45] Statutes governing family law proceedings are oftentimes written in broad language meant to afford courts breathing room in reaching equitable decisions.[46] It follows that courts, tasked with the responsibility of doing equity, have the "power to adapt the relief to the circumstances of the particular case" to mitigate the rigidity of strict legal rules.[47] Mindful that "[j]udges are not robots" and "come to the courtroom with their own life experiences, prejudices, opinions, and outlooks of the world,"[48] litigants persuade the court to rule in their favor by paying acute attention to these considerations. In short, an emphasis on equity warrants advocacy steeped in the facts of each individual case, which may call for intensive quarries into a bevy of matters seemingly outside the scope of a divorce.[49]

Utilization of unpublished opinions for the factual backgrounds can open the door to various creative arguments. Being rich in detail and centered upon a bedrock of society (i.e., the family), these cases lend themselves to advocacy via analogy. "Analogies can be suggestive, like metaphors, similes, and parallel plots in literature—devices that analogies resemble."[50] It is not uncommon for courts and commentators to liken as-

45. Anne C. Dailey, *Federalism and Families*, 143 U. PENN. L. REV. 1787, 1863 n.230 (1995).

46. It bears mentioning that discretion in equitable matters must give way to the statutes underpinning an outcome. *See In re* Shoreline Concrete Co., 831 F.2d 903, 905 (9th Cir. 1987) (quoting Hedges v. Dixon Cnty., 150 U.S. 182, 192 (1893)) ("[A] fundamental principle of equity jurisprudence is that 'equity follows the law.' Courts of equity are bound to follow express statutory commands to the same extent as are courts of law."); *cf.* Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina, 36 F.3d 177, 182 (1st Cir. 1994).

47. Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997); *see also* Mont. Co. v. St. Louis Mining & Milling Co., 152 U.S. 160, 167 (1894) ("The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.").

48. Kim L. Picazio, *Tips for Being a Successful Family Law Attorney*, *in* STRATEGIES FOR FAMILY LAW IN FLORIDA: LEADING LAWYERS ON WORKING WITH CLIENTS, CREATING AN EFFECTIVE STRATEGY, AND HANDLING COMPLEX CASES (2013 ed. 2013) (can be found at 2013 WL 2137493, at *15).

49. *See* Margaret Drew, *Lawyer Malpractice and Domestic Violence: Are We Revictimizing Our Clients?*, 39 FAM. L.Q. 7, 9 (2005) ("Numerous other examples of family law counsels hiring outside experts abound within the practice. For example, business, real estate, and pension valuations are commonly referred to experts in those respective fields, as few of us would dare to enter into negotiations without the adequate financial information needed to assess an agreement's fairness."); *see also infra* note 58 and accompanying text.

50. RICHARD A. POSNER, HOW JUDGES THINK 181 (2008); *see also* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) ("In law, analogical reasoning has four different but overlapping features: principled consistency; a focus on particulars; incompletely

pects of family law to shared enterprises and partnerships, corporations, and LLCs.[51] Custody cases can likewise be analogized to fiduciary relationships, recognizing an operable tension between the state's ability to influence and intervene in how parents choose to raise their children—for example, "perform[ing] the services of parenthood with reasonable diligence and 'undivided loyalty' toward their children's interest."[52] Viewing family law facts through the lens of agency principles opens the door to judges exploring unique avenues to ascertain what is equitable under the specific facts of the case before them. To that end, the scores of unpublished decisions—specifically their factual backgrounds—allows litigants to more appreciably analogize, distinguish, and advocate for their clients.

On a practical note, unless your jurisdiction is expressly antagonistic toward unpublished cases, and assuming you rely sufficiently on published case law and statutes, citation to an unpublished opinion is arguably a worthwhile gamble.[53] An opinion's underlying facts occupy a necessary

---

theorized judgments; and principles operating at a low or intermediate level of abstraction. Taken in concert, these features produce both the virtues and the vices of analogical reasoning in law.") (emphasis omitted). *See generally* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 746 n.246 (1999) (surveying commentaries for and against advocacy through analogy).

51. *See* Mahoney v. Mahoney, 453 A.2d 527, 533 (N.J. 1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, marriage is a shared enterprise, a joint undertaking . . . in many ways it is akin to a partnership."); Larry E. Ribstein, *Incorporating the Hendricksons*, 35 WASH. U. J.L. & POL'Y 273, 287 (2011) ("Domestic and business standard forms clarify how relationships to which the standard forms' rules apply are created. Marriage in this respect is treated like a corporation (resting on a formal state process) rather than like a partnership (applying to relationships that meet a statutory definition even in the absence of formalities)."); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 123 (2001) ("A third business entity that shares commonalities with intimate relationships is the limited liability company. Like the partnership and corporation analogies, the LLC analogy is based on doctrinal similarities and has the potential to remedy inequality within relationships and among various types of relationships.").

52. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2418–19 (1995) ("Fiduciaries in law . . . carry a heightened moral and legal obligation to serve the interests of a principal/beneficiary, and . . . to subordinate their own personal interests. . . . In the same vein, a family law regime premised on a fiduciary framework would entrust parents with the duty to raise their children to adulthood, to provide for the physical and psychological needs . . . ."); *see also, e.g.*, Johnson v. City of Opelousas, 658 F.2d 1065, 1071–74 (5th Cir. 1991) (striking down curfew ordinance with no exemption for, *inter alia*, school activities or athletic pursuits).

53. One judge in Illinois concurred separately to offer a *sui generis* insight into this discussion, prompted by the trial judge's reference to an unpublished opinion addressing a case that she (the trial judge) had previously presided over:

> Although it is well known that an unpublished order of the appellate court is not precedential (166 Ill.2d R. 23(e)), it is not unusual, nor surprising, for a trial judge to refer to one of his cases, not as precedential, but perhaps as persuasive authority. The whole unpublished-opinion doctrine has always raised the question, how much deference does a trial judge give to an appellate court's decision on an issue that comes before him again when, like it or not, he has already been given guidance by the appellate court on the same or similar issues. The judge in that situation is obviously under no obligation to follow the unpublished decision because it lacks the force of true precedent. However,

component to the decision without necessarily holding a precedential status, meaning that reference to unpublished facts will not completely usurp the hierarchy of citing published decisions first and foremost. Holdings generally do not extend to the explicitly rehearsed facts leading to the court's analysis,[54] at least not in the context of a family law action.[55] And this accords with the general idea that the "usefulness of cases is not limited to teaching the rules of decision in litigation."[56]

Of course, it is impossible to *only* cite to the facts of an unpublished case in a vacuum. To do so would be nugatory absent an explanation as to why these facts are being cited in the first place, which (logically) is to convince the court to rule a certain way based on how a previous judge applied the law to similar facts.[57] The weight a court assigns to these citations may well depend on the complexity or novel nature of the issue, and how much instructional guidance is needed to render a just result.[58] After

> unlike the decision of a court of another jurisdiction, which normally depends upon the case's legal reasoning for its influence, an unpublished decision on an issue from the same trial judge tends to have a type of hybrid extra persuasive influence. That kind of unpublished decision of a superior court in the same judicial hierarchy causes the trial judge to consider it in the real world. In my experience, trial judges do not simply ignore cases from the appellate court, especially when they were the trial judge, regardless of whether the case was published or unpublished. That approach is especially true when the published opinions on the issues perhaps give less guidance than the unpublished decision. Thus, in this case, where this panel of the appellate court is treating an issue differently than a previous panel in an unpublished decision, it is understandable that at the trial level, the judge made a reference to the earlier case.

People v. Matous, 886 N.E.2d 1278, 1286 (Ill. App. Ct. 2008) (Carter, J., concurring); *see also* Kingwood Twp. Volunteer Fire Co. No. One v. Bd. of Adjustment of Twp. of Kingwood, 640 A.2d 356, 359 n.2 (N.J. Sup. Ct. 1993).

54. There are many examples of courts articulating the scope and specificity of a previous holding. *See, e.g.*, People v. Bonilla, No. E068880, 2020 WL 526001, at *5 (Cal. Ct. App. Feb. 3, 2020) ("The *Soriano* court made no such statement. Furthermore, we note the court expressed at the outset of its opinion that it 'confine[d] [its] discussion of the facts to those which [were] necessarily involved in the resolution of issues raised on appeal.' . . . In other words, its holding was specific to the facts of that case."); Washington v. Ramsey, No. 78666-1-I, 2019 WL 5955016, at *3 (Wash. Ct. App. Nov. 12, 2019) ("The *Jorden* court's holding was specific to the act of checking names in a motel registry without individualized or particularized suspicion. . . . It held that such searches violate a defendant's article I, section 7 rights. . . . Unlike *Jorden*, Creech's search was not random.").

55. More common are decisions that relate to procedure rather than substantive family law. *See, e.g.*, Chitwood v. Chitwood, 433 S.W.3d 245, 250 (Ark. 2014) ("Our holding was specific to the question of finality and the statute of limitations. We held that a noncustodial parent had a 'vested right to rely on the statute of limitations as a defense, and that could not be changed by subsequent legislation.'").

56. Thomas W. Joo, *Under the Sun: Casebooks and the Future of Contracts Teaching*, 66 HASTINGS L.J. 899, 909 (2015).

57. *See* Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MO. L. REV. 1192, 1194–95 (1993) (noting the frequency with which analogy assists courts in decision making); *see also* Amer v. NVF Co., Civ. A. No. 11812, 1995 WL 54411, at *2 (Del. Ch. Feb. 2, 1995) (explaining that the plaintiff sought analogy of his facts to those of another case "where the prevailing plaintiff was awarded attorneys' fees against trespassing defendants.").

58. *See, e.g.*, Meadows v. Commonwealth, 648 S.W.3d 701, 706 n.4 (Ky. Ct. App. 2022).

all, "[d]ivorce, separation, and parental responsibility cases often . . . requir[e] a family court judge to have familiarity with theories and research in disciplines such as social work, psychology, and dispute resolution."[59] To the extent that courts are regularly deluged with domestic cases, supplementary tools such as an unpublished opinion that can aid in decision making might be welcomed by certain judges.

B. Unpublished Facts that Elucidate the Law

The volumes of unpublished family law decisions can also be used to illuminate opaque nooks and crannies in the law. To illustrate this, I will provide an extended example likely unfamiliar to those outside of the Pacific Northwest.

The Supreme Court of Washington has established a unique doctrine known as the Committed Intimate Relationship ("CIR"), an equitable action where unmarried individuals may seek a division of their community-like property as if they were married.[60] It is distinct from a common-law marriage in various ways.[61] The idea is that these people were in a "marital-like state,"[62] so property that would be community in nature (if they were married) can be divided amongst them.[63] Without delving too deeply into the doctrine or how courts determine whether the parties were, in fact, in a CIR, suffice to note that: (1) CIRs do not allow you to petition for alimony,[64] and (2) people can be in a CIR prior to marriage.[65] As an example of this latter point, it may be determined that the parties were in a CIR for four years

59. Natalie Anne Knowlton, *The Modern Family Court Judge: Knowledge, Qualities & Skills for Success*, INSTIT. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 1, 2 (Oct. 2014), https://iaals.du.edu/sites/default/files/documents/publications/the_modern_family_court_judge.pdf.

60. *See* Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) (en banc) ("[T]he property acquired during the relationship should be before the trial court so that one party is not unjustly enriched."); Koher v. Morgan, 968 P.2d 920, 922 (Wash. Ct. App. 1998) ("Under *Connell*, courts apply a community property-like presumption to property acquired during a meretricious relationship regardless of how title was taken."); Lindemann v. Lindemann, 960 P.2d 966, 973 (Wash. Ct. App. 1998) ("The *Connell* case makes it clear that the court is to seek a just and equitable distribution of the property, not apply principles of co-tenancy.").

61. *See generally* Tom Andrews, *Cohabitating with Property in Washington: Washington's Committed Intimate Relationship Doctrine*, 53 GONZ. L. REV. 293, 322–23 (2016).

62. *Connell*, 898 P.2d at 834.

63. *See id.* at 836 ("While portions of RCW 26.09.080 may apply by analogy to meretricious relationships, not all provisions of the statute should be applied. The parties to such a relationship have chosen not to get married and therefore the property owned by each party prior to the relationship should not be before the court for distribution at the end of the relationship.").

64. *See In re* Marriage of Silk and Broadsword, No. 30875-8-III, 2013 WL 6838465, at *4 n.4 (Wash. Ct. App. Dec. 24, 2013).

65. *See, e.g.*, *In re* Marriage of Muhammad, 108 P.3d 779, 785 (Wash. 2005) (en banc) (addressing one party's pension that accrued during the CIR prior to marriage); *In re* Marriage of McBeth & Ketschau, No. 51076-6-II, 2019 WL 4447560, at *1 (Wash. Ct. App. Sept. 17, 2019) ("The trial court found that the parties entered a CIR from December 2005 until they married on May 28, 2011.").

leading into an eight-year marriage, thus totaling twelve years of acquiring community and community-like property subject to division.[66]

In other words, the CIR years may be included in determining the duration of the marriage for purposes of a final property allocation. But, to the former point above, does alimony prepend to a marriage in the same manner? This could have marked consequences to the extent that Washington courts roughly tend to award one year of alimony for every three or four years of marriage—so, depending on how you answer this question, a nine-year marriage with a CIR of three years could (by our rule of thumb) be the difference between three and four years of alimony. The issue has yet to be squarely addressed one way or another by a Washington court.[67]

We can, however, glean that the CIR attaches to the marriage for purposes of alimony based on the unpublished case of *In re Marriage of Maneau*.[68] There, the parties lived in a CIR for twenty-three years before marrying one another; even though the marriage only lasted seventeen years, the wife was nevertheless awarded alimony for as long as her grandchild was alive.[69] This is well beyond the typical scope of awarding alimony based on the marriage's duration.[70] It is notable that, in affirming the order, the Court of Appeals agreed "[t]he trial court reasonably set spousal support" in light of their "40-year relationship."[71] "During their 40 years together, they consistently lived with each other as a married couple."[72] This reasoning makes plain that the award was based on the entirety of their relationship, not only the seventeen years of marriage. Other unpublished cases evidence similar fact patterns in which the award is far too long *unless* the court also considered the time in which the parties were

66. *See* Byerley v. Cail, 334 P.3d 108, 110 (Wash. Ct. App. 2014).

67. One case came close to resolving the issue. In *In re Marriage of Briskey*, the wife sought to prove on appeal that her maintenance award should have been greater in duration because the trial court did not account for her six-year CIR. *In re* Marriage of Briskey, No. 36035-7-II, 2008 WL 2503658, at *2 (Wash. Ct. App. June 24, 2008). She specifically asserted "that the trial court should have included the period of cohabitation before marriage in determining the length of the marriage." *Id.* However, the Court of Appeals resolved the matter without needing to deal with the prepending question because neither it nor the trial court found there to be a CIR in the first place, so there was no need to decide whether any CIR should prepend the marriage. *Id.* at *3. Ultimately, none of this would really matter anyway even if the issue had been decided—*Briskey* was decided in 2008, and Washington only allows citation to unpublished opinions handed down after March of 2013. *See* WASH. GEN. R. 14.1(a), which only accentuates this article's thesis.

68. *In re* Marriage of Maneau No. 36577-8-III, 2020 WL 3533391 (Wash. Ct. App. June 30, 2020).

69. *Id.* at *1 n.1. Based on the fact that the grandchild was adopted by the parties after his mother died shortly after his birth in 2010, the grandchild would have only been around seven years old by the time a petition for divorce was filed.

70. *Id.* at *2.

71. *Id.* at *4.

72. *Id.* at *2.

in a CIR prior to marriage;[73] yet no published decision exists. Why hamstring advocates by foreclosing citation to these facts?

Note also that *Maneau* was decided just a few years ago. For the most part, newer opinions are reliably more detailed than unpublished opinions from over a decade ago.[74] Regardless of whether the opinion is published or unpublished, "[t]he facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented," all the while being cognizant to pretermit any extraneous facts lacking materiality.[75] Yet, "[m]ore and more it seems judges and their clerks write opinions to resemble law review articles, perhaps out of the belief that those articles reflect a fastidiousness that imitation can capture."[76] One upshot to these longiloquent opinions is the profusion of dicta peppered throughout the case law,[77] muddying the waters as to what is and is not of consequence to future cases.[78] None of these concerns are particularly material for our purposes. An elaborate recitation of a case's background does not impermissibly invade the province of established precedent, and those salient facts will be recapitulated and filtered through discretionary statutes and deferential standards of review.[79] So once more, the equitable nature of

73. *See, e.g.*, *In re* Marriage of Silk and Broadsword, No. 30875-8-III, 2013 WL 6836465, at *4 (Wash. Ct. App. Dec. 24, 2013) (ordering five years of maintenance until child turns eighteen for a marriage lasting only seven years, but where the entire relationship, including the CIR, lasted fourteen years).

74. *See* Luke Burton, *Less is More: One Law Clerk's Case Against Lengthy Judicial Opinions*, 21 J. APP. PRAC. & PROCESS 105, 105 (2021) ("[J]udicial opinions are getting longer."); Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, 33 STAN. L. REV. 951, 952 (1981) ("The courts in three-tier states with case-load discretion reversed more often, had more frequent dissents, wrote longer opinions with more citations, shifted from private law to criminal and public law cases, and heard more constitutional challenges."); *see also* Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U. N.H. L. REV. 29, 57 (2014) ("A comparison of the Supreme Court's opinions issued during the 1931-1933 terms and the 2009-2011 terms confirms that the Court's opinions are, indeed, less readable and much longer today than they were three-quarters of a century ago.").

75. Kozinski & Reinhardt, *supra* note 20.

76. Burton, *supra* note 74, at 106.

77. *See* Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 589 (2021) ("Much has been written about the problems dictum creates. . . . Despite this, judges regularly espouse dicta.").

78. *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 224 (2010) ("Even using a liberal definition of holding, which would include the rationale supporting the court's decision, lawyers and judges regularly treat dicta like a case's holding. Many have pointed out the plethora of problems that ensue when the distinction is not preserved.").

79. *See* Ann Laquer Estin, *When Baehr Meets Romer: Family Law Issues After Amendment 2*, 60 U. COLO. L. REV. 349, 360 (1997); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1168 (1986). The immense deference afforded to trial courts on appeal reflects the desire for finality in the cases. *See* Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) ("Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required . . . ."); *In re* Marriage of Stenshoel, 866 P.2d 635, 637 (Wash. Ct. App. 1993) ("Trial court decisions in dissolution proceedings will seldom be changed on appeal.").

these cases should obviate any overall concern that citation to these unpublished opinions will detectably impact case law on the subject.

C. Comparison to Other Areas of the Law

A natural question at this point would be why unpublished family law decisions should be treated differently from, say, tort or contract law. Does the foregoing discussion not also apply to other areas of the law? This article, boiled down to its core, concerns family law facts, and that the facts underpinning these cases make them distinguishable from other fields. And although I exclusively practice family law, and thus lack extensive knowledge of other practices, I will offer a cursory discussion demarcating my subject area here.

As a point of departure, let us note the most obvious; these cases will almost always involve *family members* of some kind—be they spouses, children, grandparents intervening in some way, and even unmarried cohabitants depending on the jurisdiction. Placing relatives at the epicenter of a lawsuit at once separates family law from numerous other disciplines, such as administrative law. Familial relation entails extremely personal feelings toward one another, and intense feelings brought on by such intimate bonds can naturally lead to contentious, perfervid arguments.[80] But this does not rule out various other kinds of cases that may involve family members: relatives enter into contracts with one another, crimes are often committed against household members, estate disagreements run rampant, land disputes between neighboring next of kin can boil over, et cetera. This distinction, therefore, offers little assistance.

Perhaps, then, we turn to the nature of these familial-based arguments in the eyes of the courts. The personal family dynamics open this type of litigation up to various forms of hearsay and other evidence that ordinarily would be prohibited.[81] In the vast majority of states, family law cases will always be subject to a bench trial, and the judiciary presumes as a matter of course that evidence in a bench trial deemed inadmissible will not be im-

80. *See* Valentine v. Lutz, 512 N.W.2d 868, 870 (Minn. 1994) (differentiating "the very personal and family interests" in family law from other "traditional civil actions, such as in contracts and torts"); Messer v. Messer, 194 So.2d 552, 552 (Ala. 1967) ("Under unhappy circumstances such as are involved in custody disputes, they bring out the worst. Each, out of zeal to show that he or she is a fit custodian, does all that can be done to impugn the character of the other. We, unhappily are left with the decision based upon the evidence adduced by each."); Mason v. Simmons, 704 N.W.2d 104, 114 (Mich. Ct. App. 2005) ("There is no question that child custody disputes can be the most heart-wrenching and agonizing controversies our courts are called upon to resolve."); Badescu v. Badescu, No. 18AP-947, 2020 WL 5250484, at *8 (Ohio Ct. App. Sept. 3, 2020) (quoting the trial court's finding that "[w]hile this trier of fact has tried countless high conflict divorces and custody disputes, the visceral anger and negative reaction of [mother's] body language and voice inflection when talking about [father] stands out as memorable.").

81. Ashleigh M. Dunham & Sandra E. Gregory, *Family Law Trial and Evidence Practice Pointers*, 82 ALA. LAW. 26, 28–29 (2021) (discussing the widespread nature of hearsay).

providently used in making a final decision.[82] It follows that we are far more likely to hear testimony and affidavits discussing a child's stated preference, what was said by an in-law years ago, and other forms of "he-said, she-said" with varying degrees of veracity.[83] It may be that these "facts" might make their way into the appellate opinion alongside observations articulated by the trial court on these matters.[84] The personal nature of these cases, in tandem with the fact that extremely personal evidence may be tendered at trial (even those ordinarily in contravention of rules of evidence), creates a situation where the facts in the appellate opinion are all the more meaningful if you can analogize your case to them, whether unpublished or not.

However, plenty of civil and criminal cases may be decided via bench trial; so, let us turn to a final, additional facet of family law: the relief requested. What are we fighting over in a divorce anyway? What is the court of equity to focus on in addressing a divorce, or a child support modification, or a parent seeking to relocate with their child?

"In the broad sense, family law is about the role of the law in defining family ideals and shaping family life."[85] Generally, the state allows for families to remain autonomous once married, while heavily regulating the entry and conclusion of the marriage.[86] As a corollary to this convention, our adversarial system of justice only comes into play when the relationship has blown up, and courts and attorneys are often (though not always) tasked with salvaging what they can from the rubble.[87] Yet divorce actions are not

82. *See* Healy v. Healy, 397 N.W.2d 71, 74 (N.D. 1986) ("[I]n a bench trial it is generally not reversible error for the court to admit incompetent evidence unless there is insufficient competent evidence to support an essential finding or unless the incompetent evidence induced the court to make an improper finding."); *cf.* Margaret Ryzner, *Case Law Development: Jury Trial in Divorce Actions*, FAM. L. PROF. BLOG (Dec. 6, 2006), https://lawprofessors.typepad.com/family_law/2006/12/case_law_develo.html#:~:text=Only%20eleven%20states%20allow%20juries,or%20entitlement%20for%20divorce%20only ("Only eleven states allow juries in any aspect of divorce litigation . . . . Most of these limit the right to a jury to try issues regarding grounds or entitlement for divorce only.").

83. *See* Margaret Price, *The Use of Experts in Custody Cases*, 42 FAM. ADVOC. 23, 25 (2020) ("Family law cases are notorious for 'he said, she said' allegations. Judges learn to expect people to slant the facts in their favor and sometimes flat out lie.").

84. Given the discretion appellate courts defer away, quoting the trial judge's explanations should carry particular weight. *See, e.g.*, *In re* Marriage of Anthony, 446 P.3d 635, 642 (Wash. Ct. App. 2019) (acknowledging the trial court's statement that, in a divorce involving alimony for a middle-aged couple, "even at 25 or 26 years old it's difficult to find gainful employment sometimes, and at 51 it is going to be even more difficult").

85. Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL'Y & L. 385, 392 (2008) [hereinafter *Happy Families*].

86. ERIC. A. POSNER, LAW AND SOCIAL NORMS 68 (2000). *But see Happy Families*, *supra* note 85, at 393 ("The family autonomy ideal creates the false expectation that families can and should raise children without support and that doing so serves the interests of families and the state. Family autonomy can be cast as a positive aspect of family law, giving parents the freedom to raise their children as they want. But for many families, this freedom is simply the freedom to fail.").

87. *See Happy Families*, *supra* note 85, at 394.

trying to make people whole again, as in tort law,[88] nor do they resemble contractual remedies (with the exception of certain prenuptial agreements) that can divaricate into many forms such as reformation or *quantum meruit*.[89] And, now that fault has been eliminated as a threshold for divorce, notions of retribution or payback for marital wrongdoing are not on the table. Insofar as there is no *wrong* that needs to be rectified, there is no winner or loser in a traditional sense of civil litigation.[90]

Rather, courts and legislatures endeavor to facilitate both parties transitioning to the next chapter in their lives, post marriage, so they may get off to a good start. Consider the services family law attorneys are required to offer their clients, which can range from litigation to ordinary counseling, or from arbitration and trial to other (sometimes creative) forms of problem solving. The facts of any given case will commonly extend past simple questions of divorce and support, branching off into other issues such as taxes, pensions, goodwill as it relates to a business, unpaid debts, estate planning, and so on.

The relief afforded in matrimonial actions serve these equitable objectives in a manner separate and apart from other areas of the law. Alimony, for example, generally aims to continue the standard of living enjoyed by the parties prior to separation for a specified period of time,[91] and particularized subsets of alimony (e.g., rehabilitative alimony) fall squarely within this overall objective.[92] Likewise, the allocation of property in a divorce requires a fair and just division of assets, which naturally involves the allocation of liabilities to ensure neither party is unfairly disadvantaged as they exit the marriage.[93] In cases where children are involved, "[t]he entire thrust of the family law system is intended to make the child's well-being the

88. RESTATEMENT (SECOND) OF TORTS § 901(a) (AM. L. INST. 1979) (noting that one of the purposes of tort damages is "to give compensation, indemnity, or restitution for harms").

89. *See* Rachel Paras, *Relief at the End of the Winding Road: Using Third Party Beneficiary and Alternative Avenues to Achieve Environmental Justice*, 77 ST. JOHN L. REV. 157, 170 n.88 (2003).

90. *Compare* Patrick Parkinson, *Family Law and the Indissolubility of Parenthood*, 40 FAM. L.Q. 237, 244 (2006) ("Over the last twenty years, different jurisdictions have retreated from the 'winner-takes-all' notion of custody in different ways."), *and* Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 547–48 (1999) ("Divorce 'mediation' has become a popular subject; education programs, compelling divorcing spouses to attend classes which explain their marital and parental rights and counsel them that custody litigation injures their children, have spread through state legislatures like a virus."), *with Repairing Family Law*, *supra* note 39, at 1279 (asserting that a winner-loser dynamic persists in spite of equitable apportionments of property, finances, and custody, and offering the example that "[p]arents often share custody of a child, but the sense persists that the person with the greater allocation of time with the child has won.").

91. *See, e.g.*, Innes v. Innes, 569 A.2d 770, 774 (N.J. 1990).

92. *See* Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980) ("The principal purpose of rehabilitative alimony is to establish the capacity for self-support of the receiving spouse, either through the redevelopment of previous skills or provision of the training necessary to develop potential supportive skills.").

93. *See* Carter v. Carter, 626 N.W.2d 576, 580 (Neb. 2001).

highest priority."[94] Thus, the outcomes of these cases present remedies distinct from other civil and criminal matters. There are numerous variables that characterize a family law action, and citation (or at least reference) to the facts of a particular, unpublished case should not be summarily dismissed.

IV. CONCLUSION

Assigned the responsibility to do equity for the parties in family law matters, trial courts are generally equipped with the discretion to (more or less) pull the law in whichever direction is necessary to achieve a just and fair result. And where the essential catalyst for these decisions comes from the case-specific facts unique to each family, a lawyer's decision to cite unpublished opinions for their factual underpinnings may be of utility. Caution should certainly be paid to whether your jurisdiction allows for *any* citation to unpublished decisions. But, as explained in this article, for those jurisdictions where there is latitude for this type of persuasive authority, advocacy through analogy to the facts of an unpublished opinion may well serve both your client and the trial judge mulling over an equitable determination.

94. AM. ACAD. MATRIM. LAW., THE BOUNDS OF ADVOCACY (2000), *reprinted in* 21 ELIZABETH A. TURNER, WASH. PRAC., FAM. & CMTY. PROP. L., app. 1, at 515 (2d ed., 2015).