Family Law Armageddon: The Story of Morgan v. Foretich

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FAMILY LAW ARMAGEDDON:
THE STORY OF MORGAN V. FORETICH

June Carbone and Leslie Joan Harris

Introduction

Elizabeth Morgan and Eric Foretich’s decade-long war over custody and visitation with their daughter Hilary was the largest and most expensive case the D.C. court system had ever handled. The parties racked up more than $4 million in attorney fees, the trials and hearings generated more than 4,000 pages of transcript, and more than 1,000 articles about the case were published.1 The case began with a whirlwind romance and an elopement to Haiti, followed quickly by disillusionment, divorce, and a custody fight that involved the grandparents’ flight across the globe to hide the child from her father and the mother’s multi-year imprisonment for failure to disclose the girl’s whereabouts. It took an act of Congress to release the mother from jail, and a second Congressional act to permit mother and daughter to return from New Zealand. In 2003 the Court of Appeals for the D.C. Circuit held the second piece of legislation unconstitutional,2 but by then Hilary had reached the age of majority and escaped the reach of the courts.

The case arose in the mid-eighties, amid a shift in custody law from the maternal presumption to a preference for shared parenting and the discovery of and almost immediate backlash against allegations of childhood sexual abuse. Morgan and Foretich met in 1981 in a Virginia hospital, where they were both doctors on staff. Elizabeth Morgan, who had grown up in a Virginia suburb of Washington, D.C., was an academic prodigy who skipped kindergarten and third grade and entered Harvard at 16. She went to Yale Medical School, and by 1981 at age 34 was one of the top plastic surgeons in the D.C. area. She had published two books on her life as a woman surgeon,3 wrote a medical column for Cosmopolitan magazine, and regularly appeared on TV as a commentator about health issues. Eric Foretich was also highly accomplished. Growing up in Virginia, he had gone to William and Mary and done his residency in oral surgery in New York before opening his practice in Virginia.

Several years older than Morgan, Foretich was married for the second time and the father of a baby daughter when they met. His marriage was foundering, and he and Morgan fell in love. By December 1981 Morgan was pregnant. The next month the couple flew to Haiti, where they married after Foretich obtained an ex parte divorce.4

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4 Whether a U.S. state would recognize the Haitian divorce is questionable, since neither party was domiciled in Haiti and Foretich’s wife did not participate in the divorce. In 1989 a newspaper story quoted Foretich, “We had a ceremony in Haiti, and as soon as I came back I found out it was never a legal
Foretich later told a reporter that he married Morgan because she was pregnant. "It was the noble thing to do, but it was the wrong thing to do. I wanted to give my baby a name."\(^5\) Morgan and her mother, who had separated from Morgan’s father, moved into Foretich’s home in Great Falls, Virginia. The relationship was stormy from the beginning, and Morgan moved out a week before Hilary was born in August 1982. She divorced Foretich in Haiti in November.

Elizabeth Morgan had returned to her practice before she filed for divorce, leaving Hilary at a babysitter’s home, where Foretich visited her several days a week. By March of 1983 the parents were in court, fighting over custody.

**Child Custody Law in the early 1980s**

Throughout the first part of the twentieth century, U.S. law generally presumed that young children should be in their mothers’ custody unless the mother was unfit.\(^6\) By the early 1970s, however, the formal maternal preference was giving way to a neutral best interests of the child standard. Most states provided that custody should be determined on the basis of the child’s best interests; some statutes included a list of factors that judges might consider in applying the standard.\(^7\) The law of most states also strongly protected the access rights of the noncustodial parent; generally a court would deny visitation only if it found that contact with the parent would seriously endanger the child.\(^8\)

The District of Columbia courts determined custody on the basis of the child’s best interests, but case law in the early 1980s still recognized a weak maternal preference with regard to young children. The then-leading case on custody, *Coles v. Coles*,\(^9\) involved a dispute over a four-year-old child. The trial court found both parents to be suitable custodians and that granting custody to the father best served the interests of the child. On appeal the mother argued that the maternal preference could be overcome only by a finding that the mother was unfit. The appellate court disagreed, holding that a finding that the child’s best interests were served by placement with the father overcame...
the preference for the mother. The court also reiterated that the standard of review on appeal was whether the trial court had abused its discretion in making its findings.

Case law from the D.C. Court of Appeals expressly disapproved of joint physical custody orders as inconsistent with a child’s need for stability, but the court had repeatedly ruled that “the law favors visitation,” and that "the denial to a parent of [her] right of visitation with [her] children, who are in the custody of the other parent, is a drastic action . . . justified only in extreme cases."

The initial trial court orders regarding Hilary Foretich’s custody were consistent with this case law, although they illustrate the difficulties intrinsic to a custody dispute over a very young child. Morgan’s pregnancy had prompted the marriage, and she and Foretich parted before the birth. Thus, they faced shared parenting of an infant based on a limited relationship with each other that provided little basis for mutual confidence or trust. Not surprisingly, each sought custody. Morgan, in Custody: A True Story, a book she wrote describing the early litigation, expressed shock at the prospect of losing Hilary and relief when the court awarded her temporary custody. However, Foretich received liberal visitation, with overnight visits beginning when Hilary was 10 months old.

Morgan expressed reservations about extensive visitation between Hilary and Foretich from the outset. She told her lawyer that ideally she would not want overnight visitations until Hilary was five, and she wrote, “I am utterly convinced that when a little child is taken from its loving mother, even for visitation, it may lose its natural protector and its security. Men are all very well, but nature didn’t make men for rearing little children.” She reported that Hilary reacted badly to overnight visitation from the beginning, screaming for hours and suffering nightmares.

It was Morgan’s father who first suggested that Foretich might be abusing Hilary. When Hilary was less than a year old, he insisted that Morgan take her to the emergency room to be examined for sexual abuse because her thighs were red when she returned from an overnight visit. The doctor on duty diagnosed diaper rash from riding in a car on a hot day. Morgan initially rejected her father’s suspicions, but by January 1985, when Hilary was two-and-a-half, she too had begun to allege that Foretich was sexually abusing Hilary and on that ground sought to reduce or eliminate his visitation rights.

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14 Elizabeth Morgan, Custody, supra note 12, at 252–253.
17 Id.
18 Id.
Sex Abuse Claims and the Courts’ Responses

During the early 1980s in the U.S., the once unmentionable topic of child sexual abuse became “something of a national obsession.”20 Scholars at the time attributed the increased awareness of and attention to child sexual abuse to the general “discovery” of child abuse beginning in the 1960s, the enactment of child abuse reporting laws, the corresponding increase in reports to child protective agencies, feminist concerns about sexual assault, and much-publicized cases of child molestation in day care centers.21

While public discussion of sexual abuse once focused exclusively on stranger misconduct, reports of intrafamilial abuse now mushroomed.

The American Association for Protecting Children found that there were 18 reports of sexual abuse to state child protection agencies for every 10,000 children in 1985, compared to fewer than one in 10,000 in 1976.22 In three-quarters of the cases the alleged abuser was a close relative, most often a father or stepfather. A respected researcher, David Finkelhor, estimated that one in five females suffered from sexual abuse as a child.24 The Fourth Circuit Court of Appeals in one phase of the Morgan v. Foretich litigation observed, “Figures from 1976 to 1983 reflect an 852% increase in the number of child sexual abuse cases reported. However, in two-thirds of child abuse cases, the incident is never even reported. Even when the incident is reported, prosecution is difficult and convictions are few.”25 The McMartin preschool case, which involved claims that the owners and employees of a prominent preschool in Los Angeles had systematically abused more than 350 children over a five year period, hit the news in spring 1984,26 and the nation’s news media carried hundreds of stories about it over the next several years.

In hindsight, given the heightened concern about child sexual abuse and the changes in custody law that maximized judicial discretion, an increase in sex abuse

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24 *David Finkelhor, Sexually Victimized Children* 53 (1979). Other estimates were even higher, suggesting that one out of four American girls are sexually abused before the age of eighteen. See Michael deCourcy Hinds, *Child Abuse Parley Deplores Fund Cuts*, New York Times, Apr. 8, 1981
25 *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988) (*Morgan v. Foretich IV*).
26 See, e.g., Lynne Olson, *A Nightmare that Won’t Go Away by Itself*, Working Woman, Aug. 1984, at 68,
claims in divorce disputes seems inevitable. A study in the mid-1980s sponsored by the National Center on Child Abuse and Neglect estimated that about two percent of custody or visitation disputes involved allegations of sexual abuse.²⁷ The Family and Law Program at the University of Michigan Medical School found that about sex abuse claims were made in 30 percent of the most complex custody cases with which it was involved.²⁸

The backlash against this trend began almost immediately. By the mid-1980s experts were claiming that many fathers were falsely accused of sex abuse and that lawyers were using false claims tactically.²⁹ The head of the Michigan program reported that more than half of the allegations in custody cases were false.³⁰ Psychologist Richard A. Gardner in The Parental Alienation Syndrome, published in 1987, claimed that the vast majority of children who allege sexual abuse are liars. While a respected researcher concluded in 1989 that no systematic evidence showed that the number of sex abuse allegations had increased dramatically or that a substantial number of allegations were fabricated,³¹ the perception of false abuse claims in private custody disputes persisted.

Elizabeth Morgan lodged her initial allegations at the height of the increasing publicity about child sexual abuse, and the litigation unfolded just as the backlash against such allegations was taking hold.

The Evidence in Morgan v. Foretich

According to Morgan, when Hilary was almost two-and-a-half, she began making inappropriate, sexually explicit comments, in addition to continuing to cry after her visits with her father.³² Morgan took Hilary to a psychiatrist, who concluded that Hilary’s anger was a response to the tension between her parents. He did not ask the child about sexual abuse but reported the allegation to child welfare authorities. The social worker

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²⁷ Lewin, supra note 22, at 34.
²⁸ Id.
³⁰ Lewin, supra note 22, at 34. The head of the Kempe National Center for the Prevention and Treatment of Child Abuse and Neglect reported that another study of sex abuse charges in 18 bitter custody disputes found only three false charges. Id. Prof. Susan Apel analyzes the distinction between untrue and unfounded claims as follows: “In a famous study oft-cited by persons who believe the furor over child abuse is simply a witchhunt, sixty-five percent of all reported cases of child abuse were determined to be ‘unfounded.’ ‘Unfounded’ does not, however, mean ‘untrue.’ Rather, there are not enough trained professionals (i.e. social workers, psychologists, or physicians) to investigate the claims adequately.” Susan B. Apel, Custodial Parents, Child Sexual Abuse, and The Legal System: Beyond Contempt, 38 Am. U. L. Rev. 491, 500 (1989).
³² Paula Chin, Jane Sims Podesta & Linda Kramer, Vowing to Protect Her Child from Rape, Elizabeth Morgan Faces Her 23rd Month in Jail, People Magazine, Jun. 12, 1989, at 113; English, supra note 4, at 16.
³³ English, supra note 4, at 16; Susan Baer, Hilary’s Dad Also Accused of Abusing Her Half-Sister, New Jersey Record, Mar. 18, 1990.
who investigated the case labeled it “unfounded with reason to suspect” because Hilary was too young to give an account of what had happened but other evidence suggested that she might have been abused. The social worker also talked to Foretich’s daughter by his second wife. This girl, who was older and more verbal than Hilary, made statements that prompted the social worker to label the allegation that she had been sexually abused as "founded," meaning that she thought the evidence was sufficient to warrant further investigation. Foretich appealed, and an administrative review panel upheld the finding, but the commissioner of the agency ordered the case closed and the file destroyed in 1986 for reasons that were not reported. Virginia police did not press charges against Foretich.

Trying to convince the authorities that her suspicions about Foretich were correct, Morgan then took pictures of Hilary in sexually explicit poses and sent them to the social worker, claiming that they showed Hilary acting out in response to what had happened to her. The photos were forwarded to the D.C. police, who opened a pornography investigation of Morgan, but eventually dropped it.

Foretich vehemently denied the allegations of sexual abuse, voluntarily taking and passing two lie detector tests. He argued that he could not possibly have harmed the children because his mother, his new wife, or a housekeeper was always present when either child visited.39

We do not know how much of this evidence was admitted in the Morgan v. Foretich custody litigation because, beginning in November 1984, the hearings were closed and the record sealed at Foretich’s request and over Morgan’s opposition. In November 1985 Judge Herbert Dixon ruled that Morgan had not proven the allegations of sexual abuse and denied her motion to suspend visitation rights. Morgan did not appeal this order.

Nonetheless, Morgan believed that Hilary’s emotional condition continued to deteriorate, and in January 1986 she began taking the child to a new therapist, Dr. Mary

39 English, supra note 4, at 16. Foretich’s parents confirmed that they were present when he was visiting with his daughters. Donohoe, supra note 38.
40 Morgan v. Foretich I, 521 A.2d at 249. Morgan did not appeal this order, but she appealed from the judge’s refusal to open a later hearing on a motion to hold her in contempt for violating a court order. The D.C. Court of Appeals held that a civil contemnor has a qualified right to public trial and that to justify closing the hearing, the judge must make findings balancing the right to an open hearing against the interests of the child and the other parent in having the hearing closed and remanded the case for findings. Id. at 253. On remand, the trial judge ruled that the hearing should be closed because of the graphic and detailed evidence that Morgan offered in support of her claim of abuse, which would be damaging to the child. The court of appeals affirmed the order. Morgan v. Foretich, 528 A.2d 425, 426 (D.C. App. 1987) (Morgan v. Foretich II).
Froning, a staff psychologist with the Chesapeake Institute, a national resource center on child abuse.\textsuperscript{42} Dr. Froning met with Hilary 87 times and said that hers was one of the clearest cases of sexual abuse that she had seen among the approximately 100 with which she had been involved over the preceding five years.\textsuperscript{43} She recommended that Morgan stop allowing Hilary to visit with Foretich because, she concluded, the child had suicidal feelings and post traumatic stress disorder and was developing multiple personalities.\textsuperscript{44} Morgan began to follow this advice in February 1986.

Foretich promptly filed motions to hold Morgan in contempt and to change custody. Morgan responded with motions to suspend visitation and for discovery.\textsuperscript{46} Judge Dixon appointed a guardian ad litem for Hilary and held hearings on the motions in June, July, and August of 1986. The guardian ad litem opposed visits on the basis that they jeopardized Hilary’s mental and emotional health and repeatedly asked the court to order a multidisciplinary sex abuse evaluation of Hilary and her parents. Morgan supported this request, while Foretich opposed it, and Judge Dixon denied the motion.

After a closed hearing on the merits of the contempt and modification motions, the judge found the evidence about whether Hilary had been sexually abused inconclusive and granted Foretich unsupervised visitation. When Morgan refused to obey the order, the judge rejected her argument that her action was justified to protect Hilary but ruled he would not hold her in contempt if she would comply by July 19. She again refused, and the court entered the contempt order in August 1986. The order was stayed pending appeal. While the appeal was pending, Judge Dixon again ordered that Foretich be allowed visitation, Morgan again refused to comply, and Judge Dixon again found her in contempt. She was jailed for two days in February 1987, and after her release she allowed Hilary to begin visiting again. Judge Dixon gradually expanded Foretich’s visitation, and by April Hilary was spending weekends with Foretich. In June 1987 the D.C. Court of Appeals upheld the contempt orders, holding that the findings that Hilary had not been sexually abused were not “clearly erroneous.”\textsuperscript{52}

Immediately after Judge Dixon first held Morgan in contempt in August 1986, she sued Foretich and his parents for damages in the federal district court in Virginia, claiming that they had all participated in sexually abusing Hilary.\textsuperscript{53} Foretich

\textsuperscript{42} English, supra note 4, at 16; Kathryn Kahler, Mother Finds Jail No Big Price to Protect Her Daughter, New Orleans Times Picayune, Feb. 5, 1989. See also Mark Mathews, Experts Contradict Each Other in Accusations of Child Abuse; Case Raises Issues on Investigation of Molestation, Buffalo News, Mar. 4, 1990.
\textsuperscript{43} Mathews, supra note 43. Dr. Froning said that continued visitation would cause Hilary’s “psychological destruction.” Kahler, supra note 43; English, supra note 4, at 16.
\textsuperscript{46} Morgan v. Foretich III, 546 A.2d at 408.
\textsuperscript{52} Morgan v. Foretich II, 528 A. 2d at 429.
\textsuperscript{53} Her claims are detailed in Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1543--1544 (4th Cir. 1994). This case is an interlocutory appeal on the issue of whether the grandparents were public figures for purposes of their defamation suit against ABC, based on a docudrama about the case.
counterclaimed for defamation. At this trial, which was not closed, the mother of Foretich’s older daughter filed a deposition claiming that Foretich had sexually abused the child. Morgan also offered the testimony of Dr. Charles Shubin, who had examined both Hilary and her older half-sister without knowing that they were related. Dr. Shubin would have testified that vaginal scarring in both girls indicated that they had been abused. The trial judge excluded all this evidence as prejudicial, while admitting the testimony of Foretich’s expert witnesses, including a Johns Hopkins Hospital pediatrician who testified Hilary's injuries could have been self-inflicted.

The federal court jury found for Foretich on Morgan’s abuse claims and for Morgan on Foretich’s defamation claims. Morgan appealed, and in May 1988 the Fourth Circuit reversed the judgment regarding the abuse claims, holding that it was error to exclude the evidence pertaining to Hilary’s half-sister. The court said, “[T]his evidence was highly relevant to disputed issues in this case. Fundamentally, this evidence was essential in that it tended to identify the defendants as the perpetrators of the crime against Hilary since only the defendants had access to both girls. No other piece of evidence could have had a comparable probative impact as to the identity of Hilary's assailants. This evidence also negated several defenses raised by the defendants: Hilary's injuries were caused by Dr. Morgan; were fabricated by Dr. Morgan; or were caused by self-infliction.”

The Fourth Circuit also ruled it was error to exclude evidence of statements Hilary had allegedly made to several people that supported the claim of abuse, saying they should

57 Morgan v. Foretich IV, 846 F.2d at 944--45. After the social worker concluded that the allegation of abuse as to this child was “founded,” Foretich voluntarily agreed to suspend visitation with her. In 1987 a Virginia trial court concluded that the girl’s mother had not proven that the child had been sexually abused, based on conflicting expert testimony, but the judge ruled that visitation should not resume immediately because she was so frightened of her father. The judge ordered her into therapy with the goal of resuming visitation. Baer, supra note 34. See also Paula Chin, et al., supra note 32. In December 1990 a Virginia judge concluded that Foretich had not sexually abused the girl but that she believed he had and that he should not visit her because of the emotional harm she would suffer. Susan Baer, With Hilary Foretich’s Half-Sister, a Parallel Battle Has Turned on Issue of Abuse, Baltimore Sun, Dec. 21, 1990.
have been admitted as excited utterances or statements made for the purpose of medical
diagnosis or treatment. The court remanded for a new trial on the tort claim. By that
time, however, Hilary was in hiding, and Morgan refused to comply with discovery
orders relating to her whereabouts. Her suit against Foretich and his parents was,
therefore, dismissed, and her charges against them were never resolved.

After Hilary began weekend visitations with her father, in compliance with Judge
Dixon’s order in the D.C. custody case, her emotional health deteriorated, and her mother
and her therapist decided that she had become suicidal. Hearings on the custody
and visitation dispute continued in the D.C. court, and in August 1987, Judge Dixon, who
had excluded all evidence related to Foretich’s alleged abuse of his older daughter, found
that the evidence regarding his alleged abuse of Hilary was in “equipoise.” He then
granted Foretich two weeks of unsupervised visitation with Hilary, over the opposition of
her guardian ad litem.

By then Morgan had come to believe that Judge Dixon would never rule in her
favor and that he was determined to order unsupervised visitation. She had also come to
“a profound spiritual awakening.” She had decided that she would do whatever was
necessary to protect her child.

**Hilary Goes into Hiding and Morgan Goes to Jail**

Judge Dixon had confiscated Morgan’s passport so that she could not leave the
country. However, her parents were willing and able to help her hide Hilary. Her mother,
Antonia, was born into an upper class British family. She graduated from Oxford with a
master’s degree in the classics and earned another masters from the University of London
in education. She spoke six languages -- English, French, Spanish, German, Italian and
Maori -- and could write essays in Latin and Greek. Morgan’s father, William, was a
poor boy from Rochester, New York, who changed his last name from Mitrano as a
young man to avoid anti-Italian prejudice. He worked his way through Yale graduate
school in psychology and joined the Office of Strategic Services during World War II,
testing and training spies in London. He also parachuted into occupied France to organize

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58 Morgan v. Foretich IV, 846 F.2d at 945-950.
F3d 1198, 1206 (D.C. Cir. 2003).
60 Morgan v. Foretich III, 546 A.2d at 410.
61 Id. at 409. While the guardian disagreed with the visitation order, she told the court of appeals that she
could not “argue that the order was without evidence to support it or an abuse of Judge Dixon’s discretion.”
Id. at 411.
62 Interview conducted by June Carbone with Elizabeth Morgan in Los Angeles, California, on March 1,
2006. This interview is the source for the materials in the next section, except where noted.
63 Yvonne Shinhoster Lamb, *Antonia Morgan; Fled U.S. with Granddaughter*, The Washington Times,
Apr. 21, 2006.
64 Robert McG. Thomas Jr., *William Morgan, 85, Part of Famed Child-Custody Case, Dies*, New York
Times, Mar. 5, 1996.
guerrilla attacks against the Germans and fought the Japanese in China. The Morgans met and married in Britain during the war. After the war they had a private practice in Virginia, testing and counseling school children. The couple had been separated but reconciled for purposes of helping hide Hilary. Because of his OSS experiences, William knew just what to do.

Morgan feared that the D.C. authorities would seize Hilary without waiting for her to miss the scheduled visitation with Foretich. Therefore, William moved Hilary and her babysitter to Virginia a week before the visitation was to begin. When Morgan went to visit them, she realized she was being followed. As she pulled into the parking lot of a tavern out in the country, the car following her pulled in too. Police came out running at her, guns drawn. She drove off in her high-powered car at 80 m.p.h., keeping her headlights off. She turned off the road and hid in the bushes, watching the cars go by and then return. She waited awhile longer, and then went on to visit her father and daughter.

After Hilary disappeared, Morgan believed that if she did not allow the guardian ad litem to verify that the child was alive, she might face murder charges. To limit the risk that the guardian ad litem would take Hilary away from her, she arranged a meeting at a restaurant in Virginia outside the jurisdiction of the D.C. police. Her father “armed himself to the teeth” for the meeting, wearing a vest with guns visible. He sat and watched as the guardian ad litem met with Hilary. Morgan did not want her father to appear with guns, but he told her “to just butt out.” He believed that the D.C. police would not take Hilary if they believed it meant risking a “gun battle in a Warrington diner,” a public place with bystanders outside of their jurisdiction.

After the meeting, William took Hilary to his home in Virginia. When he realized that police were stationed outside the house, he orchestrated a “confusion and drama” to create the opportunity to spirit Hilary away. For the next two days, William and his brother, who looked like him, brought trucks to the house, loaded them and unloaded them, drove off and returned. Sometimes they left together; more commonly, they left separately, on and off throughout the day. Then, William called a cab company and asked the company to send a cab every hour for the next several days. Sometimes the cabs came to the front of the house, sometimes to the rear. During one of the cab visits to the rear of the house, William and Hilary got into the backseat, lay down on the floor and took off. They drove straight to National Airport, where Antonia was waiting, and all three flew to the Bahamas, using their own names and passports. Meanwhile, the cabs continued to come and go from the house for another day. When the cab traffic stopped, the police came to the house to search it. William’s brother was there to let them inside. Morgan said, “I thought my father was crazy. But it worked.” She did not know where they had gone. Only her older brother, who handled the finances, knew.

Because Morgan failed to send Hilary to Foretich on the appointed visitation day and refused to disclose her whereabouts, Judge Dixon found her in contempt effective August 28, 1987. He sent her to the D.C. jail and ordered that a bond of $200,000, which she had previously posted, be forfeited at the rate of $5,000 a day. Hilary was still in

68 Thomas, supra note 65.
70 Morgan v. Foretich III, 546 A.2d at 412.
hiding and Morgan was still in jail when the District of Columbia Court of Appeals denied her appeal a year later.

On appeal Morgan first argued that Judge Dixon’s conclusion that the evidence about whether Foretich had abused Hilary was in equipoise was “clearly wrong,” constituting a “clear abuse of discretion.” Without discussing specifics of the evidence presented, the court of appeals simply said that “there was probative evidence on both sides of the issue of abuse,” and the trial judge’s finding was not clearly erroneous.

Morgan also argued on appeal that the trial court erroneously rejected her criminal law necessity (or “choice of evils”) defense, a claim that her violation of the trial court’s order was justified to avoid the greater harm of her child being abused. The court of appeals recognized the existence of the defense and said that to prevail a defendant must show that “the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant’s breach of the law.”74 While the court said that the defense “does not require proof that harm is actually occurring, but only that the defendant have a reasonable belief that harm is imminent,” it cannot be claimed by one who has a reasonable opportunity to avoid violating the law.75

However, the court held that Morgan could not successfully assert the defense because the trial court had specifically addressed and resolved the conflict upon which her claim was based. The court said, “Civil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance.”76 As a practical matter, then, “the defier acts at his or her peril in so doing.” The court concluded:

A Kikuyu proverb tells us: “When elephants fight it is the grass that suffers.”

Here, the grass is a little girl who will be six years old this month. For almost a year, she has been deprived of the company of both father and mother. She is the principal figure in a drama of appalling proportions, no matter what the outcome. …… Probably neither our courts nor any courts anywhere in the world can deal in a perfect way with matters so intimately linked to a family unit formed and dissolved. We can but try. The little girl H grows older day by day. It is she, first and foremost, to whom the courts must seek to render justice as the process moves on.77

The Supreme Court denied Morgan’s petition for a writ of certiorari in January 1989,78 and Morgan remained in jail, steadfastly maintaining that she would not reveal Hilary’s whereabouts unless Judge Dixon relented. He, just as consistently, insisted that the visitation order would stand.

75 Morgan v. Foretich III, 546 A.2d at 411 (citations omitted).
76 Id. Compare Model Penal Code § 3.02(1)(c)(defendant may not claim the choice of evils defense if a legislative purpose to exclude the claim “plainly appears”).
77 Morgan v. Foretich III, 546 A.2d at 413--414.
The same month that Elizabeth Morgan went to jail in 1987, she became engaged to Paul Michel, whom she had met the previous year. Michel, an attorney and aide to Republican Sen. Arlen Specter, was appointed to a seat on the Second Circuit later in 1987 and confirmed in February 1988. Before going on the bench, he helped engage a new attorney for Morgan, Stephen Sachs, who would craft a more politically savvy defense. Sachs, a partner in the prominent Washington, D.C. law firm of Wilmer, Cutler and Pickering, portrayed Morgan as the victim of an unfair process, who, because the hearings and records of the proceedings remained closed, had been imprisoned after a secret trial. Her new legal team also argued that Judge Dixon had developed personal animosity toward Morgan. At the 1987 contempt hearing, Morgan had asked that the judge recuse himself on the basis of his bias against her, but he declined, and his decision was upheld on appeal.

In September 1988 Morgan’s attorneys filed a habeas corpus petition for her release, arguing that it was now clear that she would never comply with the order to give information about Hilary and that, therefore, her incarceration had become punitive rather than remedial. In other words, they argued that she was effectively being held for criminal rather than civil contempt without having had the procedural safeguards mandated by statute and the Constitution. Judge Dixon rejected her claim, saying that Morgan “believes she can undermine court orders. . .by the mere allegation of such an offense as repulsive as child abuse…It is now more probable than not that Dr. Morgan has recently been hit by the thought that she may have to seriously consider the orders in

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80 Don Kowet, The Friends of Elizabeth Morgan: How a Strange Alliance of Washington Insiders, Feminists and the Religious Right Freed the Controversial Doctor, The Washington Post, Oct. 17, 1989. After his appointment, Michel limited his participation in the case, though in December 1988 he testified before Judge Dixon that he regretted having advised Morgan to obey the court’s orders for overnight visitation. Foretich filed judicial misconduct charges against him for this testimony, but the chief judge dismissed the charges without a hearing as “frivolous, unsupported, irrelevant, and conjectural.” Gellman, supra note 78; English, supra note 4, at 16.
82 Morgan v. Foretich III, 546 A2d at 411-412.
83 Morgan v. Foretich, 564 A.2d 1, 2 (D.C. 1989) (Morgan v. Foretich V). In 1988 the Supreme Court had addressed the distinction between civil and criminal contempt in Hicks v. Feiock, 485 U.S. 624 (1988), holding that the constitutional requirement of proof beyond a reasonable doubt applies to criminal contempt proceedings. Id. at 625. Criminal contempt defendants are also entitled to claim the privilege against self-incrimination, the right to jury trial, and other criminal safeguards. See Int’l Union,United Mine Workers of America v. Bagwell, 512 U.S. 821, 826--827 (1994). The classification of a proceeding as civil or criminal does not depend on the nature of the proceeding or the nature of the alleged contemnor’s conduct. Instead, the critical distinguishing factor is “the character of the relief that the proceeding will afford….If the relief provided is a sentence of imprisonment, it is remedial if ‘the defendant stands committed unless and until her performs the affirmative act required by the court’s order,’ and it is punitive if ‘the sentence is limited to imprisonment for a definite period.’” Hicks v. Feiock, 485 U.S. at 632.
this case. . . In that sense, the coercion has just begun."84 Morgan appealed, and after oral argument the court of appeals remanded for additional fact finding.85

Six months after Morgan was jailed, a group of women who had seen TV stories about her case formed the Friends of Elizabeth Morgan (FOEM) to support her. They held the first of many candlelight vigils outside the jail in March 1988 and embarked on a national publicity campaign on her behalf. By June FOEM was picketing in front of the D.C. courthouse. The same month U.S. News & World Report published an article by Morgan and ran her picture on its cover.87 The National Organization of Women rallied to her support, calling her case a symbol of “this infamy against mothers and children in America.”88

The media coverage combined the image of Morgan as a brave mother defending her child with the idea that the case had become a struggle between the judge and the mother. In June 1988 a Washington Post columnist wrote that the judge had “ignored evidence he didn’t want to hear, then tossed the key away on a mother trying to protect her child.”89 In October 1988 the Legal Times, a Washington-based newspaper, wrote, "The Morgan case typifies Dixon's reputation as a stern disciplinarian and tough sentencer who is unsympathetic to women's issues."90 In November 1988 Glamour magazine published an article, “Hiding Hilary,” that was very sympathetic to Morgan and unflattering to Foretich.91 With the permission of Glamour, FOEM reprinted the article and handed it out at public events. In December 1988 New York Times columnist Anthony Lewis published two columns about the case, challenging the judge’s decision to order unsupervised visitation, after the judge found that the evidence regarding sexual abuse was in equipoise.93 Syndicated columnist Mary McGrory also published a column sympathetic to Morgan.94 People magazine ran pro-Morgan stories in January and June 1989. Glamour named her one of its women of the year and Mother of the Year in 1989. A few publications covered the story from Foretich’s perspective,97 but by August 1989 a reporter sympathetic to him wrote, “a media-savvy Elizabeth Morgan is winning in jail

85 Morgan v. Foretich V, 564 A.2d at 4.
88 Kowet, supra note 79.
89 Id.
90 English, supra note 4, at 16, quoting the Legal Times.
94 Mary McGrory, When a Judge and a Mother Collide in Court, Newsday, Dec. 16, 1988.
what she couldn’t win in the courts – the public relations battle to have Hilary’s father presumed guilty.”

The case also caught the attention of Washington-based Christian evangelical groups, including Prison Fellowship Ministries, headed by former Watergate defendant Charles Colson, which sent staff members to visit Morgan in prison. In March 1989 Colson published an article in the Fellowship’s newsletter, asking readers to write to their representatives and to Congressman Ron Dellums, who chaired the House committee that oversaw the D.C. judiciary. At Colson’s suggestion, James Dobson, host of the national Christian radio show Focus on the Family, interviewed Morgan from jail. Another key supporter was H. Ross Perot, a billionaire Texas businessman who ran for President as a third-party candidate in 1992 and 1996. He read about Morgan in the New York Times and began lobbying senators on her behalf. Republican Senator John Heinz of Pennsylvania told a reporter that Perot said “the woman was being courageous and the judge was clearly exceeding his authority.”

Rep. Frank Wolf, a Republican from Virginia, also took up Morgan’s cause, even though he had never met her. He said, “I followed it in The Washington Post and I began to think about it.” His friend Colson sent him the piece from the Prison Fellowship newsletter, and in April 1989 he introduced legislation to amend the D.C. code to free Morgan. In June, Utah Senator Orrin G. Hatch introduced a similar bill in the Senate after receiving calls from, among others, Ross Perot.

After the legislation was introduced, the Washington Post published a letter from Foretich offering to support Morgan’s release from jail and drop his request to terminate her parental rights if Morgan would produce Hilary. He proposed that she would be placed in a foster home with both parents having supervised visitation, a multidisciplinary team would evaluate both parents, and a psychiatrist would evaluate Hilary to determine whether it was in her best interests that he give up visitation and Morgan to determine if she should have custody. He also insisted that Morgan agree not to seek any more media coverage and not to write books or authorize movies about the case. In an interview published the next month, however, he said that the experts who said that Hilary had been abused were “the bottom of the barrel” and that that the doctor who said that both girls had vaginal scarring was a fraud. He claimed that his second wife had brainwashed his older daughter and that Elizabeth Morgan had abused Hilary. He said he was preparing to sue Morgan for “libel, slander, violation of my civil liberties and my child.”

98 Donohoe, supra note 38.
99Kowet, supra note 79; Myron S. Waldman, An Exception to the Rule Congress Doesn’t Usually Consider Legislation to Benefit Only One Person, but, with Prodding from Charles Colson and H. Ross Perot, They’ve Made an Exception for Elizabeth Morgan, Newsday, Jul. 31, 1988.
102 Kowet, supra note 79; see also Waldman, supra note 98.
103 Waldman, supra note 98.
106 Foretich, supra note 96.
107 Reynolds, supra note 96.
Meanwhile, Morgan’s lawyers continued to seek her release. After a series of hearings in summer 1989 on the habeas corpus petition claiming that her incarceration for contempt had become punitive rather than remedial, Judge Dixon agreed that "[i]t is unlikely that continued incarceration will cause Dr. Morgan to deliver the child directly to Dr. Foretich at any time within the foreseeable future if for no other reason than Dr. Morgan's personal pride." However, the judge concluded there was still a possibility that she might be induced to accept an alternative he had offered – turning Hilary over to the D.C. child welfare agency. He held, therefore, that incarcerating her continued to have a remedial purpose. Morgan appealed yet again, and the court of appeals ruled in her favor in 1989, finding the evidence insufficient to support Judge Dixon’s finding. His order was vacated so that the case could be reheard by the court sitting en banc.

Two days after the oral argument before the full court, Congress unanimously passed legislation to free Morgan. The District of Columbia Civil Contempt Imprisonment Limitation Act of 1989 limited the amount of time that a person could be jailed in D.C. on civil contempt charges for failure to comply with a court order in a child custody case to 12 months; it expired after 18 months. President George H.W. Bush signed it the next day, and Morgan was released two days later, on September 25, after spending 759 days in jail.

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108 Morgan v. Foretich V, 564 A.2d at 10. At this series of hearing Judge Dixon also threatened to hold Morgan’s brother Robert in contempt for refusing to answer questions about the whereabouts of Hilary and his parents. He refused to answer questions 27 times. Three days later he was placed on administrative leave from his job with the U.S. Attorney’s Office in Washington, D.C., pending resolution of the matter. He had already turned in his resignation. See English, supra note 4, at 16; David Grogan, Jane Sims Podesta & Margie Bonnett Sellinger, Elizabeth Morgan’s Brother Risks Jail as He Joins Her in Defying a Washington Judge, People Magazine, Jul. 3, 1989.

110 Id. at 2. The court observed that the option of turning the child over the child welfare agency had always been available and that Morgan had made clear that she would not comply with this alternative order either “because of the risk that unconditionally turning the child over to the court will result in eventually turning the child over to Foretich.” Id. at 10.

Four months later, in February 1990, Foretich’s investigators found Hilary and her grandparents living in Christchurch, New Zealand.

The Custody Fight Comes to an End

On the day that Hilary and the Morgans flew out of National Airport, they began what one news article called “A Life of Strangers and Seedy Motels.” They went to the Bahamas for six weeks and then stayed briefly in Canada while Antonia obtained medical care. They moved on to a suburb of Plymouth, England, where they were careful not to contact friends or relatives, even though Antonia knew many people there. Hilary, who had chosen the new name Ellen Morgan for herself, attended a private school and flourished. However, because English immigration law prohibits indefinite stays and her grandparents became worried that Foretich would find them in England, they left after eight months.

The Morgans headed to New Zealand, where Antonia had once visited, because it was far away and offered the prospect of stability. Ellen enrolled in the Selwyn House School in Christchurch on the less populated South Island. While in New Zealand, William and Antonia decided to remarry. Until New Zealand television broadcast a documentary on the custody battle, few of her friends or neighbors knew Ellen's true identity. After the television show, many New Zealanders figured out the truth about the American family and were very protective of them and resentful of intrusive press inquiries.

Foretich learned of their likely whereabouts from two sources. After seeing the documentary, a teacher at Ellen’s school contacted the producer, and Foretich obtained a court order requiring the producer to give him the information from the teacher. In addition, police sources informed Foretich that the Morgans had applied to immigrate to New Zealand. Foretich immediately flew to New Zealand, two and a half years after Hilary and her grandparents had disappeared from Virginia.

Within a few days of Ellen’s discovery, and with the concurrence of the D.C. Court of Appeals, Judge Dixon released Morgan’s passport, enabling her to go to New

114 Carbone interview, supra note 63. The police had seized Morgan’s address book from her cell and used it to get in touch with her English relatives. Id.
115 Saundra Torry & Barton Gellman, Morgan’s Daughter Found in New Zealand; Focus of Custody Fight is with Grandparents, The Washington Post, Feb. 24, 1990; Bill Hewitt et al., The Little Girl in the Middle, People Magazine, Mar. 12, 1990; Kantrowitz, supra note 1, at 78.
116 The Morgans contacted an old friend who attempted to have a private bill introduced in Parliament to protect Morgan’s parents, but Morgan believes “it was too little, too late.” Carbone interview, supra note 63.
117 Carbone interview, supra note 63.
118 Cropp, supra note 112; Abby Karp, Normal Delights Have Guided Hilary, St. Petersburg Times, Feb. 28, 1990; Hewitt et al, supra note 114; Kantrowitz, supra note 1.
119 Torry & Gellman, supra note 114; Cropp, supra note 112.
Zealand. At the hearing on the motion to return the passport, the guardian ad litem appointed years earlier unsuccessfully urged the judge to attempt to retain jurisdiction because she believed that William Morgan was unstable and a danger to his granddaughter’s best interests. The elder Morgan’s behavior did not help his image; he continued to make public statements harshly critical of the D.C. legal system and Judge Dixon. For example, he told reporters, “The D.C. Court of Appeals is a lazy, incompetent body, concerned and interested in protecting this judge. He’s (Dixon) a black, and six of the nine (judges) on the D.C. Court of Appeals are black.”

As soon as it became clear that Foretich had found them, the Morgans obtained a temporary custody order from a New Zealand court, which also appointed an attorney for Ellen and ordered Foretich not to see his daughter until it could be determined whether a visit would be psychologically harmful to her. Child custody proceedings in New Zealand are confidential, and the parents were told not to make public comments about the case. Although the U.S. was subject to the Hague Convention on International Child Abduction when Ellen was found, New Zealand had not yet acceded to it. Therefore, the New Zealand court was free to decide Ellen’s custody based on her best interests.

In late 1990, the New Zealand family court found that Ellen’s physical, educational, spiritual and emotional needs were being met and that she should stay with her mother in New Zealand. The court made no finding on the sex abuse allegations, but it concluded that Ellen believed that Foretich and his parents had abused her, whether or not it was true, because she had been told this so often. The court therefore forbade Foretich from visiting to prevent disruption of her emotional security. Foretich did not contest the ruling.

After the New Zealand family court awarded custody to Morgan, she and Ellen remained in Christchurch because they could not leave New Zealand without permission from the court, and even if the court gave permission, they could not safely return to the U.S. because Judge Dixon’s visitation order was still in effect. Morgan, who could not get a license to practice surgery in New Zealand, began studying for a doctorate in psychology in order to qualify for a student visa. She based her dissertation on her experiences in the D.C. jail. Paul Michel remained in the U.S., but visited Elizabeth and Ellen in New Zealand twice a year.

By the middle part of the decade, Morgan decided she had to return to the U.S. because she needed to work to support her daughter. In 1997, more than seven years

125 Walsh & Torry, supra note 17.
126 Torry & Ge llman, supra note 114; Cropp, supra note 112; Felicity Barringer, Child’s 15,000 Mile Odyssey in a Troubling Custody Case, New York Times, Feb. 25, 1990; Hewitt et al., supra note 114.
127 Kantrowitz, supra note 1, at 78; Hewitt et al., supra note 114.
128 New Zealand acceded to the Hague Convention, and the U.S. accepted the accession in 1991. The text of the Hague Convention, as well as current information about what countries are bound by it, can be found at http://www.hcch.net.
129 Barringer, supra note 125, at 22 (quoting a New Zealand family law attorney).
131 Carbone interview, supra note 63.
132 Rep. Frank Wolf from northern Virginia, who had supported the earlier legislation on Morgan’s behalf, was one of the chief sponsors.
after Morgan went to New Zealand, Congress for the second time intervened to help her, enacting legislation that deprived the D.C. courts of jurisdiction over Ellen’s custody or visitation with her. The provision, a rider to the Department of Transportation and Related Agencies Appropriation Act of 1997, provided that for a limited time any child who was 13 or older could choose whether to visit a noncustodial parent. Ellen, who was then 13, submitted a written statement to Congress saying that she believed her father had sexually abused her and that she did not want any kind of contact with him.

Foretich challenged the constitutionality of the law on the basis that it was a bill of attainder, that is, legislation that targets an individual for punishment. In 2003 the Court of Appeals for the District of Columbia ruled in his favor, saying, Congress singled out Dr. Foretich on the basis of a judgment that he committed criminal acts of child sexual abuse. The Act thus embodies legislative determinations that Dr. Foretich was a danger to his child and that the custody dispute had to be resolved against him in order to protect Hilary from future harm. In making those determinations, Congress both inflicted extraordinary reputational injuries upon Dr. Foretich that support our jurisdiction over this lawsuit and imposed “punishment” within the meaning of the Bill of Attainder Clause.

By this time, however, Ellen had come of age, and the custody litigation that started shortly after her birth was over.

Custody and the Courts Revisited

In retrospect, the Morgan case was as much about the intractability of custody disputes as the difficulties of resolving sex abuse allegations – and only small progress has been made on either front. As the case began, the courts were shifting from what Martha Fineman has termed the “old, tested gendered rules that permitted predictable, inexpensive decisions to be made without protracted litigation” to an insistence on the continuing involvement of both parents in a child’s life. Under the older system, the mother would have received custody, the father’s relationship with the child would have depended on his ability to secure the mother’s consent, and highly charged allegations of abuse were unlikely to arise.

By the late eighties, however, shared parenting and shared parental decision making had won out “as the only truly acceptable custody policy,” and that remains the case today. Within such a system, the courts need – and they continue to lack – a way

137 As Susan Apel observes, “Culturally, child sexual abuse is such a taboo that most of the participants in the legal (and perhaps other) system(s) want to turn away from it. No one wants to believe it is true.” See Apel, supra note 30, at 499.
to identify cases in which shared responsibility is inappropriate. Child abuse is one of relatively few factors that clearly disqualify a parent from a presumption of continuing involvement in the child’s life, but making such allegations is the equivalent of initiating nuclear war.\footnote{See, e.g., Joan S. Meier, \textit{Understanding Judicial Resistance And Imagining The Solutions}, 11 Am. U.J. Gender Soc. Pol'y & L. 657, 676--77 (2003). As Meier describes it, “In contrast to a presumption of equal fitness, allegations of domestic violence or child abuse seem to frame the parties at the start as ‘innocent victim’ vs. ‘evil perpetrator.’ This makes such allegations appear almost unfair, tilting the scales before a court hears and sifts all the evidence. Courts may resist such allegations because to accept them can have the effect of replacing the exercise of the court's unconstrained discretion under the ‘best interests of the child’ test, with an implicit presumption of one party's unfitness (effectively erasing judicial discretion). Courts are reluctant to cede their discretion and judgment in this manner.”}

A parent who suspects abuse often believes she must press the claim to avoid continuing harm to the child, even though allegations are notoriously hard to prove and often suspect. Conversely, false allegations inflict great damage on those wrongly accused, and the charge itself is likely to convince the accused parent to fight back with every conceivable weapon, regardless of whether the claim is true or false. When, as in the Morgan case, the court concludes that the evidence is in “equipoise” -- the allegations neither proven nor disproved -- it has no way of resolving the dispute satisfactorily. Morgan believed that to permit Foretich to have continuing contact would harm Hilary severely, and so she resisted the court’s visitation order. Yet, if she defied the order, it was very likely that the court’s eventual response would have been to switch custody to Foretich and, indeed, the experience of other cases shows that persisting in such allegations while violating a court order carries a considerable risk of a switch of custody to the alleged abuser.\footnote{Amy Neustein & Ann Goetting, \textit{Judicial Responses to the Protective Parent's Complaint of Child Sexual Abuse}, 8 J. Child Sexual Abuse 103, 105 (1999) (national study of 1000 cases). A smaller study of 300 cases over ten years found that alleged child sexual abusers received unsupervised visitation or shared custody 70% of the time, and over 20% of cases resulted in the mother who alleged child sexual abuse losing visitation rights altogether. Kristen Lombardi, \textit{Custodians of Abuse}, Boston Phoenix, Jan. 9, 2003. E.g., Liz Galtney, \textit{Mothers on the Run}, U.S. News & World Report., Jun. 13, 1988; Liz Galtney, \textit{Running Hard: A Case History}, U.S. News & World Report, Jun. 13, 1988; Susan Baer, \textit{Underground Railroad for Abused Kids: A Determined Woman Breaks the Law to Save Children from Sexual Slavery}, San Francisco Chronicle, Mar. 19, 1989; Irene Sege, \textit{Some Say Ruling Will Silence Other Women}, Boston Globe, Jun. 22, 1989; Linda Castrone, \textit{Runaway Moms: Women Flee Underground When Fathers Molest Children}, Rocky Mtn. News, Dec. 26, 1990.}

Morgan’s was one of the earliest and certainly the best known of hundreds of cases in which parents (usually mothers) who could not convince judges that others (usually fathers) were abusing children sent the children underground rather than comply with the orders.\footnote{See Children of the Underground Watch, a website opposed to the underground, at http://members.aol.com/underwatch/.} This “underground railroad” is named after the clandestine network that spirited runaway slaves out of the South before the Civil War. It uses techniques borrowed from the federal witness protection program, which provides new identities for government witnesses. The “railroad” apparently continues to operate,\footnote{E.g., Kate Muir, \textit{Children’s Crusade; Investigation}, Times (U.K.), Jan. 15, 2000.} domestically and internationally,\footnote{E.g., Kate Muir, \textit{Children’s Crusade; Investigation}, Times (U.K.), Jan. 15, 2000.} though publicity about it has abated since the mid-1990s.
Nonetheless, its effectiveness is impossible to document, and a series of changes have made flight less likely to succeed and more difficult even for the few women with the resources Morgan could bring to the effort.

The first of these changes is the widespread adoption of the Hague Convention on International Child Abduction, mentioned above. Had the Convention been in effect between New Zealand and the U.S. when Ellen was found, Foretich could have sought her return to D.C., and New Zealand would have been obliged to comply with the request unless it concluded that the U.S. was no longer Ellen’s “habitual residence” or that there was a grave risk of harm if she were returned. While only a few nations had ratified the Convention in the late eighties, today eighty nations, including New Zealand, have become signatories. Moreover, in 1993 Congress passed the International Parental Kidnapping Act Crime Act, which makes it a federal offense wrongfully to take a child outside of the United States. If the act had been in effect when Morgan’s parents took Ellen to New Zealand, they could have prosecuted upon their return whether or not New Zealand recognized the Hague Convention. In addition, the U.S. State Department has tightened passport controls; minors under 14 must apply for a passport in person, and issuance may be conditioned on both parents’ consent. The airlines have also become stricter about allowing children to travel without both parents’ consent. The single biggest change, however, may simply be that the world has become a smaller place. The Morgans would have a more difficult time today traveling under their own names without detection; they would have had to go underground and not just far away to avoid recognition.

Since the time of the Morgan v. Foretich litigation, legislatures and courts have taken a number of measures intended to defuse custody battles before they begin. The divorce literature is now more sensitive to children’s developmental needs and includes more sophisticated discussions of the wisdom of overnight visitation for very young children and the importance of not separating young children from their primary caregivers for long periods of time. After all, Morgan’s initial reservations about visitation after all stemmed from Hilary’s adverse reactions to extended and overnight visits with her father.

148 For a discussion of the importance of distinguishing between more sensitive and more resilient children, see Ann Masten & Norman Garmezy, Risk, Vulnerability, and Protective Factors in Developmental Psychopathy, in ADVANCES IN CLINICAL CHILD PSYCHOLOGY 1, 9–10 (Benjamin B. Lahey and Alan E. Kazdin, eds., 1985); Margaret O'Dougherty & Francis S. Wright, Children Born at Medical Risk: Factors Affecting Vulnerability and Resilience, in RISK AND PROTECTIVE FACTORS IN THE DEVELOPMENT OF PSYCHOPATHY 120, 120–137 (Jon Rolf et al. eds., 1990).
Complementing greater attention to the child’s needs is greater use of alternative dispute resolution for custody and visitation disputes. These techniques proceed from the premise that allowing parties to reach an accommodation on their own terms minimizes potential conflict and provides a stronger foundation for shared parenting.150 Morgan and Foretich fought less, for example, during the initial period when they agreed to visitation at the home of Hilary’s babysitter. The fact that both felt comfortable with the arrangement and that a third party oversaw the process reduced the potential for conflict.

None of these measures, however, deals with the intractable issue of unproven allegations of sexual abuse. Evaluation of the physical evidence is no more conclusive today than it was in Morgan’s era.151 Instead, the investigative techniques that have developed the most are the psychological evaluations that now underlie even routine custody disputes; today Foretich and Morgan would be the subject of much more extensive psychological examination and profiling.152

Nonetheless, given the personalities involved, perhaps nothing could have avoided the conflict in Morgan v. Foretich. At the end of the day, the continuing lesson of the case must be that when adult conflict becomes intractable, the children become the victims. Anthony Lewis wrote an open column to Eric Foretich at the height of the controversy, imploring him to drop his custody claims for his daughter’s benefit.153 And the New Zealand court recognized that whatever the truth of the allegations, Ellen’s interests lay with continuity and stability in her family life.

Litigation on other fronts

Even though Foretich’s efforts to gain visitation or custody ended with the New Zealand custody degree against him in 1990, he made good on his threat to sue Morgan for defamation, and he also sued publishers and broadcasters for defamation and other torts during the 1990s. All but one of the suits were unsuccessful, however.

Based on the 1988 Glamour magazine article, as well as editorial commentary on letters to the editor about the article, Foretich and his parents sued Glamour and its publishers for defamation and intentional infliction of emotional distress. The federal district court ruled that some of the claims were time-barred,155 and the court granted

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150 Parties who mediated their parenting plan have been found to be more satisfied and less likely to litigate or revisit the issues than those who experienced court-imposed orders or lawyer-negotiated settlements. See Robert E. Emery, Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation, 10 Va. J. Soc. Pol'y & L. 164, 172 (2002); Jessica Pearson & Nancy Thoennes, Divorce Mediation: Reflections On A Decade Of Research, in MEDIATION RESEARCH 9–30 (Kenneth Kressel et al. eds., 1989).

151 The exception would be cases involving the presence of semen or physical injuries such as a ruptured hymen, allegations not present in Morgan v. Foretich.


153 Lewis, Judgment of Solomon, supra note 92.

summary judgment to the publisher as to Foretich’s claims.\textsuperscript{156} About the same time, he also sued CBS, Morgan, and others for defamation and intentional infliction of emotional distress, based on an episode of \textit{People Magazine on TV} that aired in August 1989. The D.C. Court of Appeals affirmed the trial court’s grant of a motion for judgment on the pleadings because of Foretich’s refusal to litigate whether the statements upon which he sued were true.\textsuperscript{157}

In 1995 the federal district court in D.C. granted summary judgment against Foretich in a suit against Connie Chung, CBS and others for defamation arising from programs that aired in 1990 because Foretich failed to respond to the defendants’ arguments in support of the motion.\textsuperscript{158} And in 1997 the same court granted summary judgment against Foretich in his defamation suit against ABC for a docudrama about the case because, the court said, he was a public figure and had failed to prove that any inaccurate statements in the program were made with actual malice.\textsuperscript{159}

Finally, in 1991 Foretich brought suit on behalf of himself and Hilary/Ellen for invasion of privacy against a cable television company for broadcasts of a documentary about his alleged abuse of her. The defendant’s motion for summary judgment was denied, and the case was set for trial.\textsuperscript{160} A guardian ad litem appointed for the girl negotiated a settlement for her, to be paid when she turned 18.\textsuperscript{161} Ten years later she received $200,000 from the settlement.\textsuperscript{162}

\textbf{Personal resolutions}

When Morgan, Ellen and Morgan’s mother Antonia moved back to the U.S., Morgan opened her plastic surgery practice in Maryland, just outside D.C.\textsuperscript{163} She wrote a second book about the case entitled \textit{To Save My Child: The Elizabeth Morgan Story}, but it was not released because of the publisher’s fears about liability.\textsuperscript{164} Her marriage to Paul Michel did not survive. He became Chief Justice of the Federal Circuit in 2004 and

\textsuperscript{156} Foretich v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1106 (D.D.C. 1991). The court also granted summary judgment to the publisher for claims brought by Foretich’s father. His mother’s claims were allowed to proceed, but the court held that because she was a limited purpose public figure, she had to prove actual malice to prevail. Id. at 1108–10. However, three years later, in another defamation suit brought by Foretich’s parents, based on a docudrama about the case aired on ABC, the Fourth Circuit held that neither grandparent was a limited purpose public figure. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1564 (4th Cir. 1994).


\textsuperscript{161} Foretich Agrees to Drop Defamation Claim Against Network, \textit{Liability Week}, May 18, 1992. The cable company had counterclaimed against Foretich for contribution to any judgment that Hilary received, arguing that any harm to her was caused by his sexual abuse. Foretich and the company reached a settlement in which each dropped the suit against the other.


\textsuperscript{164} Carbone interview, \textit{supra} note 63.
remarried the same year.  

Ellen had more difficulties. She dropped out of school in ninth grade, used drugs, and engaged in other self-destructive behavior. She later said, “I was so angry with people, and I wanted to punish them. I didn’t know how to take it out on other people, so I took it out on myself.” In 2000, when she was 18, she told a TV interviewer that being taken away from her mother “was very---very, very difficult. It was awful, in fact. I think that for any child to have to lose the only functional parent in their life at such a young age is, like profoundly traumatizing. And you never really make up for those years.” A few months earlier she had told another interviewer, “I think one of the biggest misperceptions that people have is that when things sort of go off camera, thing all of---suddenly get better. And that’s not the way it happens.” About the same time, she described the first time that she saw her father in 13 years:

When I saw him, I saw the weak, pathetic little man that he is. I remembered him as a huge, menacing beast, but at the same time, I was what, two feet tall? . . . I look at him, and he's not that much taller than I am, and .... he is so sick and so weak. I mean, his weakness just sort of pours through his skin. He is so much more afraid of me than I am of him. Because honestly I am his worst nightmare.

Ellen graduated from American University, and in 2005 she moved to Los Angeles, where she is an actress. Her mother followed her. William Morgan died in March 1996 in Maryland while Elizabeth, Antonia, and Ellen were still in New Zealand. Antonia Morgan died April 3, 2006, of congestive heart failure at her home in Washington, D.C. She was 91.

In 2000 Eric Foretich was living with his wife and their two sons in northern Virginia, where he continues to practice oral surgery. The one patient review posted in 2006 is very favorable.

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167 Transcript of the NBC Today Show (Sept. 1, 2000).
168 Transcript of CBS The Early Show (May 12, 2000).
169 Bill Miller, Daughter in Custody Battle Calls Father a ‘Weak’ Man; Teenager Says She Lost Much in Notorious Case, The Washington Post, Aug. 24, 2000. See also Smolowe et al., supra note 165.
171 Thomas Jr., supra note 65.
172 Lamb, supra note 64.
173 Smolowe, et al., supra note 165.