

The Custody Fight

By Daryle Salisbury

“I’m going to lie.”

“You’re going to what?” I ask.

“I’m going to lie to the judge,” Janet clarifies as she settles into one of the comfortably cushioned, white wicker couches occupying my office anteroom. “I have to,” she adds. “It’s the only way I can protect Jemma and Jason.”

On these lazy summer afternoons, this casual, sun-warmed room provides a relaxed setting for meeting with clients while watching sunlight dance across the gentle ripples on the bay. “Ah, yes,” I think, “it’s this peacefulness, this lifestyle downstaters refer to when they say, ‘a view of the bay is worth half the pay.’”

Shaking my head as I take a seat on the other matching couch, I state, “Janet, you can’t do that. Don’t even go there. It’s not right!”

“Right,” Janet shoots back. “Right!” Clearly agitated by my admonition, Janet spits out, “I’ll tell you what’s not right. Harming my kids is not right. Leaving them vulnerable to my crazy husband’s evil and controlling ways is not right!”

Catching her breath before continuing, Janet pleads, “Can you understand how devastating it will be to me if he gets the opportunity to do to them what he’s done to me? I can’t risk having them in his care. I shudder to think what will happen to them or to me if I let that occur.”

Still pleading with me, Janet continues, “Help me prevent that from occurring. You’re my lawyer. Help me.” Then, she angrily adds, “But don’t tell me what I can’t do.

Don't tell me it's wrong. You know very well Jim would be terrible at raising the kids—he would damage their little psyches for life.”

Subdued, Janet confides, “Jim used to be a good man. Part of me still believes that goodness is still in him, but lately his cruel, ‘I always have to win, I’m always right’ way of living is destroying us.”

“Janet’s right,” I think. I know from others who’ve had dealings with Jim that he doesn’t hesitate to lie or cheat if it will help him come out on top. That’s his nature. That’s his way of life.

“Janet,” I implore, “lying is wrong. Lying just because you want something is a terrible message for your children. Think about that. Just because Jim is evil does not give you license to lie. It doesn’t work that way.”

“Besides,” I continue, “there are 12 factors the court must consider when deciding custody matters.”

Janet quickly responds, “I know. You’ve told me about those 12 factors. Those factors are the very reason I’ve decided I must lie—that and what I noticed when you mentioned how the *Molloy* decision basically prevents the judge from questioning the children. When I heard about that restriction, it was like a light going on because I realized I’m free to make up a good story—a sob story that, with a little acting on my part, will have the judge bending over backwards to grant me custody.

“I’ve gone over those 12 factors a hundred times and it’s clear to me we should be considered basically equal. But my short-term psychiatric hospitalization isn’t going to help my cause. Never mind that Jim drove me to my depressed, suicidal condition. My hospitalization just looks bad, especially when coupled with Jim taking care of the kids while I’ve been living with friends and relatives over the past three weeks.”

Looking me in the eye, Janet says, “You know why I left, but convincing the judge I had a very good reason is nearly impossible. My ‘mental instability’ factor will cause me to lose unless I counteract that perception and make Jim look even worse.”

“Janet is right,” I think. How can we convincingly use Janet’s panicked call three weeks ago telling me between her sobs that Jim, enraged about interrogatories I’d sent him, had come home as she was stepping out of the shower, grabbed the baseball bat he kept in the bedroom “just for burglars,” threatened to hit Janet as she cowered down in the corner, covering her head to ward off the blow? Instead, Jim stripped her of the terrycloth bath towel and looping it around her neck used the bat to twist the towel tight. The tightening towel soon choked her into unconsciousness.

During that call, Janet said, “Just before I passed out I thought, ‘I’m going to die. He’s killing me.’”

When she finally awoke, it was almost time for the kids to be dropped off from school. Janet had asked me, “How could he do this? How could he just leave me naked and dead for Jemma and Jason to find? What kind of sicko does that to their kids?”

I assured Janet I’d get a restraining order, perhaps even get Jim removed from the house. “But,” Janet had responded, “with what evidence? There is none. The red mark on my neck is nearly gone. There’s nothing to see. It’s just better that I leave.”

Recalling that episode reminds me how headstrong Janet is. Dissuading her will be difficult, but maybe I can convince her she’ll get caught if she lies. Pursuing that premise, I ask, “What lie are you are thinking about telling?”

“Not ‘thinking about,’” Janet corrects me. “What I’m going to do!”

“Which is what?” I ask.

“When you ask me about Jim’s mental health, I’ll calmly explain in my ‘woe is me’ voice how I’ve kept this horrible family secret to protect the children and keep us all from getting hurt anymore, but how I can’t stay silent any longer since I’m afraid what will happen if I’m not there to protect our children.”

“Then, choking back tears, I’ll explain how Jim often comes home drunk, resenting being tied down by the children. I’ll explain Jim’s favorite sick way of torturing the children is to make them strip naked and stand on their tip toes in the corner.” Janet continues.

“Then, when they can’t stand on their toes any longer, he hits them with the dog’s leash, a magazine, a towel ... whatever is handy.”

Although I’m against her plan, I’m fascinated by Janet’s well thought-out scheme.

“Then,” Janet continues, “I’ll tell about the choking incident that occurred when I tried to stop Jim from abusing our children.”

“Is any of that true?” I ask.

“Only the part about me and the towel, but not the reason.”

“Janet, you can’t do this. It’s wrong.” I repeat.

Again looking me in the eye, Janet commands, “Listen. You are my lawyer. You’re supposed to help me. What I’m telling you is in strict confidence. I expect you to honor that confidence and not do anything to harm me, harm my case, and, most importantly, harm my children.” Then, softly, Janet adds, “Besides, you know I’m right. You also know Jim should not have custody.”

We sit silently, watching that dancing sunlight on the waves while I consider the dilemma Janet just presented. Finally, I repeat, “I can’t let you do this, Janet. It’s my duty to withdraw from representing you if you persist on this course. Or worse yet, I’ll have to inform the court if you do lie. Don’t do this!”

Janet, having no part of my protestations, barks out, “Listen, I’m paying you good money to represent me. My father is your best client. If you’re not going to help me, then I’ll get another attorney and proceed with my plan. I’ll also make certain my father switches attorneys. Do you really want to lose my father as your client? Think about that before you do something that harms me and my kids.”

Standing to leave, Janet gloomily continues, “I’ll see you at court tomorrow.” Then, almost as an afterthought, Janet states, “You can win this, I know.”

Rising from the couch, I plaintively request, “Janet, please reconsider what you’re planning to do. You say you are doing this for your children, but will you be able to look them in their sweet little eyes knowing you lied to keep them? What example are you setting? Believe me, they will know at some point. Not much gets by kids. Eventually, they’ll view you as the bad parent and they’ll want away from you.”

Continuing, but more earnestly, I add, “You mentioned your father. How will he feel about his darling daughter doing this? He raised you to be honest and kind—like him. Think about those things tonight and come to court tomorrow morning with a change of heart, okay?”

Janet doesn’t reply. She just opens the door and leaves.

Our hearing is not scheduled until 10 a.m., so I have time to call the State Bar Ethics Helpline, which confirms that, under these circumstances, my duty to the court is greater than my duty to my client.

Even though I arrive early at court, a somber Janet is already there. Janet’s white pantsuit covers her white camisole top. The only hint of color is the fresh lilac sprig pinned to her lapel that probably came from the bushes fronting the courthouse. Her thick, not quite shoulder length, dishwater blonde hair completes the picture of a cool, calm, attractive

woman. With all that's been happening, I'd forgotten how good-looking Janet is but, on the other hand, her outfit choice is terribly wrong for this hearing. The suit makes her appear aloof and unapproachable. What it certainly does not do is make her look motherly.

"Why are clients so often their own worst enemies?" I wonder. "On the other hand," I muse, "she does look like Tom Wolfe in drag." Smiling at my observation, I realize that in a perverse way, her choice of attire is very apropos—if she's going to tell a tale, she might as well dress the part of a master storyteller who is known for always wearing white.

Before I can say good morning, Janet offers, "I didn't sleep well last night. I'm very worried about today. I also thought a lot about what you said about my dad. You're right. My father would be very upset with me doing what I'm planning, but it's my kids' lives and my life that will be ruined if Jim is awarded custody. I'm confident my father will understand and forgive me, as will the children. I'm comfortable with my decision."

Sighing, I respond, "Janet, I just confirmed that if you persist in doing what you're planning, then I must inform the judge about your lie. Now, seriously consider this, if you lie and I tell the judge you lied, what do you think the judge will do?"

Before Janet can reply, I continue, "I'll tell you what will happen—the judge will be very angry with you and will definitely order custody to Jim. So, you will quickly go from having a fighting chance to no chance. Now, does that make any sense? Why not just shoot yourself in the foot? Your plan has the same effect."

Pausing to let what I'm explaining sink in, I then continue, "Your lie will assure Jim's victory as sure as I am standing here. Please, please do not place me in the position of reporting you."

Janet, not swayed by my speech, quickly responds, "You are representing me." Gesturing to herself, "Me. You are here to help me. Your duty is to me—your client.

Besides, you know I'm right about the kids. You know I'm right about how damaging my psychiatric hospitalization is. You know my planned testimony is my only chance. Do the honorable thing—represent me.”

The hearing is underway and Janet's testimony is going well, but I know Judge Hale uses a “check-off” list regarding the child custody factors; if I don't cover all 12, he'll ask Janet any question I leave off.

I keep avoiding the loaded question, hoping Janet uses the time to reconsider giving false testimony. But now my only remaining inquiry is to ask Janet about Jim's mental health. So, perhaps subconsciously, as I'm asking the question I pivot my back to the witness stand so I can avoid watching Janet lie. Latching upon that thought, I think “Maybe all I need to do is cover my ears. If I don't hear the lie, then I do not have to report it.” Instead, my question just hangs there with no response. Turning back, I see Janet staring down at the floor, not even attempting to answer.

I rephrase the question. “Has Jim ever exhibited strange behavior?”

Now Judge Hale, opposing counsel, and I are all eagerly awaiting Janet's answer. Then, faintly, without raising her head, comes her answer.

“No.”

That answer is quickly followed by a torrent of tears.

Judge Hale reacts to the tearful outburst by promptly ordering a short recess.

As the judge leaves the bench, Janet steps down from the stand and, still without lifting her head, slowly walks to the counsel table, collapses into her seat, cradles her face in her arms on the table, and quietly resumes her sobbing.

Returning to the bench, Judge Hale inquires if I have more questions for my client.

“No,” I respond.

The judge then asks opposing counsel if he would like to cross-examine the witness. Looking over at Janet, who is still sobbing, Richard responds, “No. Defendant passes, your Honor.”

I rest my case and Richard calls his client to the stand.

I’m hardly paying any attention to Jim’s testimony since I’m watching Janet sobbing while thinking to myself, “so lost . . . so sad.” When I do start listening, I realize Jim has gone right to Janet’s psychiatric hospitalization. He explains how Janet’s emotional and mental difficulties are so hard on their children, and how he had to be the children’s solid, steady rock, especially during Janet’s psychiatric hospitalization and again over the past three weeks after Janet had abandoned the kids.

Gesturing toward Janet, who is still holding her head in her arms, Jim continues, “You can see how difficult, how disturbing her emotional upheavals can be on our children, your Honor. It is so tough to explain to them why their mother is not well.”

“Talk about making hay when the sun shines,” I think. “My opposing counsel knows to go straight for the big points right out of the box. Janet is right. She doesn’t stand a chance—particularly now after her meltdown on the stand.”

Slowly returning my attention to Jim’s testimony, he is explaining, “She was always playing ‘let’s pretend’ with our children, your Honor. But it’s not a good ‘let’s pretend.’ Janet is obsessed with stars’ lives. She buys all those gossip magazines. She fantasizes about how her favorites spend their time. So, one sick game she did over and over was make the children pretend to be Brad Pitt and Angelina Jolie. She would make them hug and kiss while she pretended to be Jennifer Aniston and come in yelling and crying. It was awful—and sick!”

Jim was now choking up. “Sometimes she even told our kids—our kids, your Honor—that instead of Brad Pitt it was me and another woman. The kids hated it, but Janet made them do it over and over.”

Sighing, Jim adds, “Janet is a wonderful person in many ways, your Honor, but she needs serious psychological help. We’ve had many arguments about this, I’m afraid.”

Surprised and appalled by the content of Jim’s testimony, I nudge Janet and whisper, “Janet, is that true? Have you forced Jemma and Jason to pretend—pretend to be Brad Pitt and Angelina Jolie?”

“Wha ... what?” she stammers. Puzzled by my question, Janet inquires, “Why are you asking me that?”

Just then, Richard addresses the court. “Your Honor, it is my professional responsibility and duty pursuant to MCPR 3.3 to inform you that my client’s testimony was a lie. He told me he was going to make up a story about his wife that would place her in a terrible light—and now he has done so. I warned him against doing that, but he has ignored my advice.”

Judge Hale, reacting promptly, states, “I’ll see both counsel in chambers ... right now!”

EPILOGUE

Nearly a year later, I spot Janet in the Kroger milk aisle with Jemma and Jason by her side. Janet quickly steps away from the children and says, “I’m sorry we haven’t talked more, but thank you again for all your help—and your good legal advice. It’s surprising how everything worked out.”

Softly smiling, Janet sheepishly confides, “I’ve been seeing Jim fairly regularly. We’re taking it slow, but I think he’s a changed man. Apparently, being publicly caught in his ‘lying-to-win-at-all-costs’ game shamed him so much he’s no longer living his life like he used to. He’s even apologized to me for all the bad things he did during our marriage. I think losing the custody fight made Jim better, and his changes are making life better for us all.”

Returning Janet’s smile, I reply, “I’m happy for you and the kids. You look so much more peaceful—so much more relaxed and happy. But the lawyer in me says make certain Jim is making a true change in his life before you get too involved again.”

“I know. I will,” Janet promises as she turns and heads toward the kids.

Standing there, watching Janet walk away while thinking about what she has just confided to me, I can’t help contemplating the permutations of love and marriage and the vicissitudes of life. A smile creeps to mind as I grasp the irony of that day in court. Who knew that ethical behavior would beget ethical behavior?