

NEW MEXICO BAR ASSOCIATION

INTERVIEW – JUDGE ANNE KASS (RETIRED)

MAY 12, 2009

INTERVIEWER: ANITA MILLER

AM – Anita Miller
JAK – Judge Anne Kass

Judge Anne Kass Interview – May 12, 2009

AM: Good afternoon. I'm Anita Miller and I am interviewing former judge Anne Kass for the Oral Histories Project of the Senior Lawyers Division of the New Mexico State Bar, and I will review Anne's life and career so that it will be preserved in the archives of the New Mexico State Bar. So let's get started. Okay Anne, I would like you to tell us a little bit about your early life, particularly beginning with your childhood. Where were you born?.

JAK: I was born in South Dakota, born and raised on a farm in South Dakota, northern South Dakota.

AM: And what year were you born?

JAK: 1945.

AM: How about your parents? What were their occupations?

JAK: My parents were farmers. It was basically a subsistence farming.

AM: What did they farm? What did they grow?

JAK: Everything. I mean it was a subsistence farm, so we produced grain and animals – and for our own use mostly.

AM: Are they living?

JAK: No. My father died in 1999. My mother is alive and here in Albuquerque now.

AM: Do you have any siblings?

JAK: I have an older brother and two younger sisters, both of whom live here in Albuquerque and both of whom work at Friedman, Boyd and Hollander.

AM: Are they attorneys?

JAK: No. One sister is a secretary there, and the other is the receptionist there.

AM: And what are their names?

AM – Anita Miller
JAK – Judge Anne Kass

JAK: Jane Seeger [?] is the receptionist and Kay Smoleski [?] is John Boyd's secretary.

AM: What are their ages?.

JAK: Let's see. Jane is five years younger than I am, so she must be 60. No, she's 59, and Kay is 17 years younger than I am so she's in her fifties somewhere.

AM: And other ones who are living somewhere else?

JAK: Siblings?

AM: Yes.

JAK: No, that's it. There's just four of us.

AM: Where did you go to elementary school?

JAK: I went to elementary school in a one-room farm school in rural South Dakota..

AM: How about middle school?

JAK: The one-room farm school was grades 1 through 8, all in the same room.

AM: And how about high school?

JAK: High school I went to a small school in a small town near the farm that I was raised on. There were 100 students in the school.

AM: What's the name of the town?

JAK: Leola [?].

AM: And what year did you graduate?

JAK: In 1962.

AM – Anita Miller
JAK – Judge Anne Kass

AM: Where did you go to undergraduate school?

JAK: UNM, University of New Mexico.

AM: How did you end up in New Mexico?.

JAK: Well, I married Bill Kass in 1963. He went to graduate school in...he's a physical chemist at ASU and then did a post-doc at the University of Illinois, and we decided that we had become westerners and so he took a job at Sandia Laboratories in 1968 and we moved to New Mexico in 1968, and it was then that...I hadn't gone to college until then. So we kinda did a...I put him through school and then he put me through school. That was kind of the way we worked it.

AM: What year did you graduate from UNM?

JAK: I graduated from UNM in 1974 and graduated from UNM Law School in 1977.

AM: What inspired you to go to law school?

JAK: Well, when I first came to New Mexico we needed to live here for a year to qualify for in-state tuition, so I took a job at a small law firm as a secretary. The lawyer I worked for – Vance Monnie [?] was his name – was an insurance defense lawyer, and I had no contact with the law up until then. After a year of working for Vance Monnie and watching our small law firm bill and be paid by insurance companies twice, three times, four times the amount of money in legal fees as it would have cost them to settle the case and pay injured people what they were asking, my thought was that lawyers and insurance companies were not particularly useful on the planet. I was planning to go to undergraduate school in any case. I went to undergrad to be a journalist. Between the summer of my first year after I started UNM, I took a legal secretary position for a summer for a lawyer whose secretary was having a baby, and that lawyer was Steve Durkovich and Steve Durkovich had just graduated from law school, just become a lawyer. Steve was one of the Freedom Riders. He was a 1960s, early '70s law graduate who thought that people went to law school and that the function of lawyers was to level the playing field, which I think is the late '60s, early '70s law graduates what they were doing at the time, and watching him try to level the playing field for people who were being taken advantage of and exploited in various and different ways made me realize that you didn't have to be an insurance defense lawyer. There were other things that lawyers could do, so that's what inspired me to go to law school.

AM: Very interesting. Now we know where you went to law school. Where did you go to law school?

JAK: UNM.

AM: And you graduated in?

JAK: 1977.

AM: What were your favorite courses in law school?

JAK: My favorite courses were all of the courses that came out of Ralph Nader's work – the consumer protection, truth in lending, truth in advertising, OSHA and occupational safety, product safety – all of those things that were basically what Ralph Nader managed to accomplish. I thought they were fascinating, and they were doing what I thought lawyers were supposed to be doing, which was to try to level the playing field.

AM: Who was your favorite professor?

JAK: Favorite professor was Fred Ragsdale actually, because Fred Ragsdale thought that hiding the ball was not a particularly useful way to teach and he didn't do that, so I thought it was refreshing.

AM: How many women were in your class?

JAK: I think that about a third of the class. I think that there were about 100 people in our class. You were in my class, right?

AM: Yeah.

JAK: So I think there were about a third of us. About 30, I think.

AM: Weren't there a lot of returning students too? Older students who had been out in the world who then came back to law school?

JAK: Oh, I always thought that our class was an unusual class, and I think a number of the professors. I remember Bob Desiderio and Pam Minzner both commenting about our class being different, because among the things that happened in our class was we wouldn't compete with each other, you know. I remember people being ill and not being able to attend class, and instead of one-upping 'em, which is what I understood subsequent classes and probably classes before hand. Just basically this was, you know, it was this dog-eat-dog attitude. What we did was got together with whoever had been sick and helped them bone up for the exams, and I think that the professors realized that we were not interested in that kind of a competitive format, and interestingly, when I look

AM – Anita Miller
JAK – Judge Anne Kass

through the photographs of the people in our class, a whole lot of us ended up practicing law in a different way or not practicing law at all, which I thought was interesting. I thought we were an interesting group, but yeah, I think we were older.

AM: Were there any women faculty people besides Pam?

JAK: Ann Bingaman was there the first year and that was it. Ruth came later, didn't she? I think the first year we were there it was Ann Bingaman and Pam Minzner and then Ann Bingaman left and Ruth Kovnott [?] came. I'm not sure that we picked up. I think we stayed even..

AM: Anything really significant happen in law school in terms of events that mobilized the class to do anything special in the law during your period in law school?

JAK: Not that I recall. I mean, we were a pretty tight class intent on helping each other through and not willing to...

AM: Now you are married. Could you tell us to whom you're married and what your spouse does at the present time?

JAK: I am married to Bill Kass. Bill Kass is a retired scientist, retired from Sandia Laboratories shortly before I retired from the judiciary, and so what he does now is he is a community organizer. He basically is trying to organize the Democratic Party into a cohesive unit that stands for something, but he also plays bridge and plays golf.

AM: Do you have any children?

JAK: No. I do have four cats.

AM: Okay, well that's interesting. What are your interests outside of the law?

JAK: My interests now are, and have been for the last few years, deconstructing things. Deconstructing what I consider to be myths that have been told to me to be truths. I think one of the first places I realized that what I had been taught didn't seem quite accurate was after becoming a judge realizing that our legal system isn't designed to provide equal access. It isn't designed to provide due process to everyone. It isn't designed to honor the promises that are made, and I think very often it loses sight of the promises altogether and stops even striving to achieve those promises. So one of the first things I started to deconstruct was the myth that the American legal system was the best legal system that there is, and I find myself now when I think about people who, people like Joe Caldwell, who went off to some place in Latin America to help some Latin American country

develop a legal system that looks like the US legal system and thinking to myself, oh dear [laughs] or people who go to Russia to try to help Russia establish a justice system that looks like the US justice system, 'cause I don't think it's a very good justice system. I don't think it's about the truth; I don't think it's about justice. I think it's about winning and losing, and it's been turned into a business and people make money doing it, and so I really started to deconstruct what I thought were the myths that I had been taught in law school, and then as I was a judge and started to work with people, divorcing people, and I realized that one of the primary reasons people didn't obey court orders, for example, court orders to pay child support or court orders to pay debts that had been assigned to them, was because they didn't have any money, and the reason they didn't have any money was because they weren't paid a living wage, and so then I started to take a look at the best economic system in the world, the capitalist system that is the United States system, and to deconstruct that and realize how unjust and unfair that economic system is and how it doesn't work for people. Then I started to attend to the political system and realized that there were a whole lot of people who were not well qualified at all for the political offices that they sought and won and began to realize that what we call a democratic political system isn't a democratic political system and so I've been deconstructing that, and then last year in July I was diagnosed with breast cancer, so for the last nine months I've been deconstructing the health care system, because just in trying to figure out how to manage my own treatment I've come to the view that this health care system is a real mess.

AM: Where are you in your treatment at this point?

JAK: Well I've had a bilateral mastectomy and I am dealing with a naturopathic oncologist in Scottsdale, Arizona. So I'm pursuing alternative methods.

AM: So you didn't have chemotherapy.

JAK: No.

AM: Were you able to work during the course of your treatment? Well you were retired so you didn't have to worry about that.

JAK: No, I didn't have to, yeah.

AM: How about community service? I know you've been very involved in community stuff in the process of your deconstructing. So what are some of the things that you're doing?.

JAK: Well basically in the process of trying to deconstruct things, if people will sit still and listen to me I go out and rant [laughs]. I mean, I've talked to various classes at what used to be TVI, and I talk to...the Commission on the Status of Women has a group that they

help divorcing women, and so I talk to their new class every time they have a new class and basically will talk to people who are looking at a particular subject whether it's the political system, or is it the economic system, or the legal system or the healthcare system now.

AM: Do you ever speak at the law school?

JAK: No, not very often.

AM: Have they invited you to speak considering your views on the law?

JAK: They don't, and I think it's interesting that, you know, that when I think about the law school, I have to tell you I don't think that law school is an education process. It's sort of a combination indoctrination and vocational/technical, and it indoctrinates people to maintain the status quo, and then of course it's aimed at the vocational/technical because people going to law school a lot of them do it because they think they can get jobs and make a lot of money or make a decent living, and so making a living is what a lot of people are really interested in doing, but the indoctrination, let me just give you an example. Pam Minzner taught Property 1. I thought it was interesting at Pam's memorial service that somebody said that she didn't like Property, the class, when she was in law school. She had a strong negative feeling about that class, and that was ironic that she ended up teaching Property Law, but when I think about Property Law, one of the first cases that we talked about was the fox. You know, the fox that ran from Landowner A's property under the fence to Landowner B's property, and they had this big lawsuit about did the fox belong to Landowner A or Landowner B, was it a lost, stolen, mislaid, you know, that whole...all of that stuff, and where I sit now is why were we not talking about how did Landowner A get to own the land that he thinks he owned and Landowner B, because all that land used to be in the Commons, and they probably acquired it by some king just declaring that it was theirs, and I thought it was...we didn't go back and examine the whole notion of how people came to believe in private property in the first place. We started out with the idea that private property was a given, that there was a way of titling property so that you could prove ownership and that's where we started from, and so we never examined all of the other ideas, the other ways of using property, and so that's what I mean by indoctrination. It's not designed to get people to think about other ways of doing things, and of course one of the things that they'd say is that we've only got three years, it's a three-year course, and at the end of that you have to pass the Bar exam, and you want to pass the Bar exam so you can get a job. I mean, so it's vocational and it's bent and it's an indoctrination and it maintains the status quo.

AM: In your practice did you ever confront cases where property rights became the major issue? You might, you know, well in property settlements, but can you expand on that in the context of family law?

JAK: Well but that's what family law is all about. When people divorce they struggle over the things that they owned together, or thought they owned together, and so each of 'em wants to continue the lifestyle to which they had become accustomed, and the language of the law invites them to believe that all of that might be possible. I mean, when I was a lawyer I had this absurd notion. Somebody would come to me and tell me that they'd had a comfortable lifestyle, and since they'd separated...the typical case would be wife coming to me saying we used to have a comfortable lifestyle and he left and took all the money 'cause he had control over all of the finances and now I'm destitute, and so he has too much money and I don't have enough, so go get me some, and that was kind of the frame that I operated under, and I'm embarrassed to say that I operated under that frame for most of the seven years that I practiced law. I mean, near the end of my law practice I had sort of gotten to an understanding that there just wasn't enough to go around, but it wasn't until I became a judge that I started to sit down with both sides, and I'd hear this person doesn't have enough money, and lo and behold, this person doesn't have enough money, you know, because we put into place that bit about we're going to take your money, we're going to put it together, we're going to pay the bills that you've always been paying, we're going to try to maintain the status quo as best we can, and then the money that's left after we've paid for your regular bills and housing for the person that moved out each of you gets half. Well guess what? You'd get down and you'd pay the housing, you'd pay rent, you'd pay utilities and you'd get down and everybody got \$2.98, and with that they got to buy their food and gasoline and there wasn't enough money, and I remember we put that in place and I ran that for...probably took me a couple, three months before I suddenly realized that the reason they were having such a terrible time of it is because Americans have lived so close to the bone that adding the second housing expense in there just destroyed all, it consumed all of their, what had been, discretionary income, and so that was really the eye opener with respect to the economic system to make me realize that what we'd done to people was we'd made both spouses get jobs, that it took both incomes to maintain a status quo in their home, and that they were living really close to the bone and that when they divorced, which was regularly caused because they were under a lot of stress because they had too much debt – credit card debt usually – things got worse, and then I started to try to get lawyers to understand that divorce isn't a legal problem, it's a cash-flow problem and that the longer you have to pay two professional lawyers to fight over this very limited set of resources, the worse their problems are going to get, and so if being a lawyer means that you're trying to help people, I just don't think we do that very much, and it seemed to me that that is obviously true, but it runs up against the vocational-technical aspect of why people went to law school in the first place. They went to law school so that they could make a living, and so lawyers do the kinds of things that they do because they're making a living doing it, and even though they're not benefiting their clients and their clients aren't benefiting from what they're doing and they're pretty unhappy about what they're doing, because at some level everybody understands that this thing is just getting worse and worse, it didn't seem to me that we were able to change the court system at all. I mean, the court system is still set up as an adversarial process and finding the truth is not the goal. The goal is to win, even though in family law as you engage in this adversarial competition the lives of the clients just deteriorate. So I ended up trying to get people to move out of the adversarial model. It seemed to me if you could just get everybody in the same room at

the same time so that they could begin to hear what the whole story, what the whole picture looked like, that maybe you could make some progress, some sense of it, and in some cases that happened. I mean, there are some lawyers. You mentioned Gretchen Walther and the collaborative law people, although when I've talked with them one of the big impediments in collaborative law is can they trust each other? Can they trust each other? I've talked a lot about the whole trust issue and what practicing law does to people, what it does to the lawyers. One of the most profound things Bill ever said to me was...I used to come home at night sort of pumped up, revved up, and I'd talk about how I had outsmarted some other lawyer that day. I did this manipulative thing and used that technique and this and that and outfoxed Betty Reed, and we were sitting at dinner one night and I was telling a story like that, and Bill interrupted me and he said, "Do you know how I feel when you talk like that?" And I thought and I said, "Well, you must be very proud of this clever lawyer you're married to." He said, "No. I just want to know when can I trust you? When is anything you say the truth?" And it just rocked me back on my heels, and it was the beginning of my understanding that what I was doing was affecting who I was and how trustworthy I was as a human being. I used to when I'd have lawyer divorces and I'd be sitting around the table and lawyer spouse was saying I'm not hiding anything. There isn't anything. If you persist with this expensive discovery you're going to bankrupt us. I mean, you know, these lawyer fees and all this stuff is so expensive. I'm telling you there isn't anything else, and I'd go back and I'd say, "Did you used to go home at dinner and talk about how smart you had been and how clever you had been and how you outfoxed so and so and how you did all that?" And the lawyer would usually say yeah, and the spouse was usually sitting there saying yeah, and I said, "And now you want her to trust you?" So I think that those are the kinds of things that need to be talked about, and lawyers need to know the price that they pay for operating in this competitive, adversarial system, because they pay a personal price as well as a professional price as well as providing something we call a service that seems to make the lives of the people we're serving worse than better.

AM: Okay, well I think that's a very interesting discussion of our legal system. Do you have any hobbies or athletic interests at the present time?

JAK: Well my hobbies are gardening. When I retired we decided to completely redo our front and back yards, and Barbara Shapiro, who had retired and become a master gardener, came over and designed a plan for us to follow, and so we took Barbara's landscaping plan and landscaped, and so now on a regular basis – spring, fall, summer – I keep up with the yard, and as I said, I have four cats and they provide a tremendous amount of joy.

AM: Any other health challenges beside the breast cancer, which I think is challenging enough.

JAK: No. I actually feel better now than I have in years. I mean, I've always exercised, but one of the things that the alternative treatment protocol is very adamant about is that you

must have 20 minutes of aerobic exercise every day, so that's one of the things that I've added, plus I'm eating a vegetarian diet and I truly do feel better than I have in a long, long time.

AM: That's good news. Where did you begin your law practice?

JAK: I went into practice with Steve Durkovich and Peter Mallory – the three of us. I mean, I was going to be a PI lawyer and then that didn't work out very well, so six months after we formed that arrangement we decided that we could be friends or we could be partners but we weren't going to be both, and so we thought the friendship was more important and we all broke apart, and so then I went out on my own, and again, I thought I was going to be a PI lawyer because those were my models – Steve Durkovich and Bill Carpenter and Bill Kitts and those kinds of people – but I found that the cases that held my attention were the family cases; they were real, and so it didn't take all that long before I drifted into a family law practice.

AM: So you were at a family law practice when you were appointed to the judiciary.

JAK: I wasn't appointed; I ran. I mean, people have forgotten that, that the way you got to a judgeship was you... well a lot of people got appointed because vacancies were filled through appointments, but what happened was, in creating the family court the... I'm trying to think. I think there were 13 sitting judges in the Second Judicial District, and they all hated the family law cases, and so they would periodically talk about creating a special Family Law Division. They had already created the Children's Court Division, and every time they would talk about creating a Family Court Division, the family law lawyers – myself and then Betty Reed and a number of others – we'd all gather together to go to the meeting and say no, no, no; don't do that, and the reason we resisted it was because they wouldn't tell us how many judges they were going to put into the division and they wouldn't tell us who, and so we sort of figured that Larry, Curly and Moe would get put in there and we were going to be worse off than we already were, and so finally in 1984 the legislature created three new judgeships, and the deal was that the governor would appoint one and two would be elected. The legislators want elected judges, and so they said, so here's the deal. You can have three judgeships in Family Court, and who the judges will be is up to you, because there are two new elected positions and one will be appointed six months later, and so there you have it. So you figure out who it's going to be. And so we had meetings as, you know, the family law lawyers, this sort of informal group, and we got together and nobody wanted to be a judge – myself included. It was like, no thank you, and then what happened was that the people who announced for the two positions were not family law lawyers. In fact, Steve Reviele [?], who was running from the Republican side, said that if he was elected he would refuse to serve in the Family Court. I mean, so then we met again and said this is going to be a true disaster. Somebody is simply going to have to run, and you know, from my perspective I drew the short straw, and so Bob Thompson and I ran. Actually Susan Conway and I started out together running, and then Bob Thompson came into the race, and then the

AM – Anita Miller
JAK – Judge Anne Kass

political system operated in such a way that they didn't want three Democrats running for two positions, and so they convinced Susan to drop out on the promise that they would support her for the appointment six months down the road. So that's how political careers are made, and so then Bob and I ran and were elected.

AM: Were you opposed in that first [*unintelligible*]?

JAK: Oh yeah, oh yeah. In fact, my opponent was Steve Reviele who said that he...I mean, he made it rather easy, you know, basically saying, you know, you can decide. Do you want a family court or not? Because I think we ought to have a specialized family court. My opponent says he won't serve in one. So that's how we got the Family Division in 1984.

AM: So that your entire career then was on the Family Court bench.

JAK: Yes.

AM: You never did general jurisdiction.

JAK: Absolutely, yeah.

AM: I think we might have asked this before, but who were some of your early mentors in the practice of law? I think we said in law school, but now who were some of your mentors in the practice of law?

JAK: Well my mentor's Bill Kitts. Bill Kitts was certainly a mentor, but in terms of family law...I mean, as I look back on that my memory is kind of contaminated with my view that because the family law lawyers have stayed in an adversarial process, notwithstanding that it's so harmful to their clients and harmful to themselves, I don't know that I had any family law lawyer mentors.

AM: Are you providing mentorship to any other young lawyers today who are doing family law?

JAK: If they call I sit and talk to them. I, every now and then, will have people come and say they're talking...in fact, on Thursday I'm having lunch with a young lawyer who thinks she wants to practice family law and wants to know, you know, what words of wisdom I have. Well one of the things is, first of all, try to unlearn most of what they taught you in law school but...

AM: Are there any cases that you had, either as an attorney or on the bench, that you're particularly proud of?

JAK: Let me talk about two. One was when I was practicing law and I represented a man who was being divorced and wanted custody of his two sons, and he had been the primary parent of the boys. He was the nurturing parent in the group, so this was in the early 80s, and we went to trial. The judge was Judge George Perez and he awarded custody to the mother, and in his written findings wrote that because the boys were of such tender years – one was four and one was six – the boys were of such tender years that the custody had to be awarded to their mother, and part of my argument on appeal – and at that point family cases went straight to the Supreme Court – was, for crying out loud, Alabama declared the Tender Years Doctrine unconstitutional. I mean, it was basically a sexist doctrine. I mean, surely the Tender Years Doctrine is unconstitutional in New Mexico, and it just never occurred to me that the Supreme Court wouldn't reverse that decision.

When we got to the Supreme Court, one of the judges, as I was arguing about constitutional issues and equal protection and all that legal stuff, one of the justices said, "Isn't it true your client had an affair with the mother's best friend?" And I said, "Yes, but I don't think that's relevant. I mean, it's not in the legal findings that were up here that are the legal foundation of this appeal." And he went and he turned his chair and he looked out the window for the rest of what I had to say, and then I continued, pretty much taken aback but I continued, and then another one of the justices said to me, just this way, Anne; not counsel, not Ms., "Anne, these boys are really young, you know. In another four or five years when it's time to take them hunting and fishing, then they can live with their dad, but for now they're really young and they need to live with their mother." And my client was in the audience listening to this, and he said it was all he could do not to jump up and say I don't believe in hunting and fishing, you know. If somebody were going to take these kids out to kill animals it would be their mother, not me. It was that sort of thing. But it was so bizarre, and so the constitutional argument, the legal argument, it was all there, it was clear it needed to be addressed. It didn't matter. They affirmed without an opinion, and I almost quit practicing law as a result of that. I mean, that convinced me that the stuff I'd been taught in law school about constitutional rule of law, equal protection, all that stuff was just nonsense and that what mattered with respect to judges were their personal beliefs that were unexamined, unchallenged. There was no way to get to those, and that's what they were going to base their decisions on, especially in family law.

AM: And how about as a judge, what was the most significant case that you had?

JAK: The most significant case that I had as a judge was a case in which I was actually asked, and did serve, as a mediator, and it's the case of *Booker v. Roth*. That was Stan Frost's, in my opinion, gift to New Mexico, gift to family law and gift to New Mexico, and it should've been a gift to the entire country, because it was written at a time...the underlying case was a child had been born to a couple who had moved to Arizona. Mom was Hispanic, dad was African-American. They moved to Arizona when he was less than a year old. They were poverty stricken; the dad couldn't find work in Arizona. The

mother came back to New Mexico for some assistance from her family. The child was not being fed adequately. She really didn't have any money, and he really didn't have any money to send her, and she ended up – they were not married – she ended up placing the child for adoption, and the child was adopted, and the father as soon as he heard started to resist and protest about this adoption, but he didn't have the wherewithal to get back here to do anything about it, and it took a long time, you know, like a couple of years for him to get back here and to get a lawyer to get involved in it, and so he challenged the adoption.

Meanwhile, this child has been living with this adopted family, and it was right at the time in the...there were just a rash of cases across the United States. They were called the Baby Richard case, the Baby Jessica case – were the two that I remember, but there were more than the two. There were a number of cases where children had been put in adoptive homes and then courts had gone in and said that the adoption didn't follow the legal rules and they set the adoptions aside, and we saw on our television screens these children who were three, four years old, being ripped out of the families that they had grown up in and being given to a stranger because the stranger had won, and in New Mexico, meanwhile in New Mexico, this case went to John Brennan, and John Brennan recognized that the adoption was flawed legally but that the child had developed a bond with the adoptive parents and that they were the psychological parents of the child, and so he terminated the parental rights of the father and left the child with the parents. It went to the Court of Appeals in New Mexico who did the legal analysis and came down with it's flawed, the adoption was flawed. You have to set the adoption aside. Natural parental rights overrules and this child needs to go to his natural parent.

AM: Forget the best interest of the child.

JAK: I'm sorry. Unlike the Supreme Court that I'd argued my case to [*unintelligible*] didn't he have an affair [*unintelligible*] hunting and fishing and young children. These are the legal rules and this is the way it has to be. The case then was appealed to the New Mexico Supreme Court, and Stan Frost...if you've never read this decision you really need to read it, because it is beautiful, and it is uncharacteristic of Stan, because Stan used to chide Seth Montgomery. Seth Montgomery would write these wonderful, wonderful philosophical opinions. I just loved Seth Montgomery's opinions, and Stan would every now and then dissent saying we don't need all this stuff in here. I mean, this is a simple case and this is, you know [*unintelligible*]. So all of a sudden Stan gets this decision and Stan writes this long, philosophical opinion that is just beautifully written and beautifully reasoned, and basically what he said was yes, this is a flawed adoption, yes the adoption has to be set aside, yes this father has natural parental rights, but parental rights and remedies are two different things, and so just because he has natural parental rights to have a parent/child relationship with his son doesn't mean that the only remedy that we have is to take this child from the home that he's known and put him with the father, and so figure something out that's in the best interest of the child that recognizes the father's rights as well.

Now I had been mediating this whole thing for the whole time that it was at the Court of Appeals and in the Supreme Court, and I had been trying to get these people to say...I mean basically get them to understand you are all in this child's heart, memory, imagination. You're not either one of you going to win it all. I mean, even if the court does let one of you win it all as a matter of law, as a matter of reality the other side is always going to be a part of this child's memory and imagination, so you need to do what's best for this child, and what's best for him is for him to have access to all of you and for you to be supportive of that, and of course that was falling on deaf ears, because their lawyers were telling them that they were going to win it all, okay, and both sides were totally convinced that in the end they were going to win the big prize. They were going to be in total control of this, and when Stan wrote the decision he wrote and it came back down, I called back in within, I swear, hours, to say, see, you're not, any of you, going to win it all. You are stuck with each other forever, and you need to figure out how you're going to make this work for yourself and this child. And it was just a fascinating case because the first day I brought them back after that decision came down and I said, you know, I'm going to start this out with - you guys are angry with each other. This has been a terrible ordeal, it's been going on for years, but I want you all to spend a few minutes to think. The question I have for you is what could be good about this? What could be good about this whole ordeal that you've experienced? I gave them all a few minutes to think about it, and it was fascinating because every single one of them came up with how they had grown, and the father in particular had...I mean, his story was just heartbreaking. His father had abandoned him when he was a kid. He grew up in poverty. He had married a woman. He had fathered two children; they had divorced. He had abandoned those kids, he had not supported them, he didn't even know who they were, and then he had the series of relationships, and then he got into this relationship and then he fathered this child, and then this child was taken away from him, but what could be good about this was he said, "I didn't know I had this much strength. I didn't know how strong I was, and the other thing is, I have established a relationship with those two kids that I fathered that are now adults because I've realized that being a parent matters to me." And, you know, everybody grew, and it had to do with Stan Frost writing that opinion, and what's interesting to me is how few lawyers and judges in New Mexico pay any attention to *Booker v. Roth*, to this very day.

AM: And yet it's the most significant family law case we've had in terms of child custody, isn't it?

JAK: From my perspective the rest of the United States was running around ripping kids out of homes, giving them to strangers and the national media were covering these stories because they were traumatic and awful and ain't it awful kind of things. I was so furious that when Stan's opinion came down it got no coverage at all. In fact, it practically got no coverage in New Mexico.

AM: It didn't get into a family law journal or anything like that?

AM – Anita Miller
JAK – Judge Anne Kass

JAK: No, no, no. What fun is it? I mean, we don't have screaming children being torn out of a home that they love and being given to a stranger. We've got New Mexico doing something sensible and who wants to talk about that?

AM: Yeah, because there's a case now involving the father whose wife went off with the child to Argentina and he's trying to get the child back, you know. There's no mention of some kind of collaborative situation or anything. It's gotta get the child back, you know.

JAK: Yeah. Are you talking about the one that was just on the front page? The story where the father was being deployed to Iraq and the mother took the two children and went back to Iceland, to her home?

AM: I didn't see that one.

JAK: That's a brand new one. I mean and so, here we go. The front page of the story is all about this terrible ordeal and struggle and no mention of how in New Mexico – wait a minute...

AM: Yeah, there was an opinion written once...

JAK: Where we talked about what matters here is best interest of the child and let's try to fit it, and best interest means access to families on both sides.

AM: You ought to write a law review article on that and get it published either in the, you know, Bar Bulletin or in the Law Review, because that really is significant.

JAK: It was a brilliant decision..

AM: Have you made any significant contributions to your area of the law or legal practice? I think you have. Do you want to talk about some of the contributions that you take pride in as having made to the practice of family law?

JAK: Well I take pride in the interim division of income rule that said we're going to take your money, put it together, pay your bills and give each of you half of what's left over, not because it worked, but because it should demonstrate to everybody straight away that what's going to happen here with this divorce and running two households is that you guys are going to have...your economic situation is going to get much, much worse, and what I had hoped was as soon as people would figure that out they'd say, oh, wait a minute. We can't be paying two lawyers, and two psychologists, and two accountants and all these other expensive people. I don't think it's worked that way but I mean, it should, or could.

AM: Have you been involved in any national associations of family lawyers? Were you involved in the Family Law Section of the ABA or any of those organizations in your practice?

JAK: No. The only time I ever had anything to do with the Family Law Section of the ABA was when that Family Law Section did a co-continuing education program with the American Psychology Association, and so the two groups got together on family law somewhere in California and I did a talk and wrote a paper that got published someplace – I forget where – but basically trying to say, wait a minute. We can't continue in this adversarial, competitive format.

AM: Do you feel that people are listening to that argument more today, or do you think it's business as usual in the practice of family law?

JAK: I think that some number of people are listening to it, in that they're not hiring lawyers at all. I think that one of the things, one of the increases in *pro se* representation has to do with a) they can't afford lawyers, but b) they have enough information that somehow or another lawyers are going to hurt 'em, and so I think that the increase in *pro se* litigation in family law is part of that, but it's not changing lawyers. I mean, as far as I can tell lawyers continue to do what they do. I mean, the last couple of mediation cases that I had one of them was...the lawyers were...they hadn't resolved most of the issues, but they were fighting over alimony, and the fight about alimony had to do with health insurance, and the couple, the facts as I remember them is that they were self-employed and they lived in rural New Mexico. They were self-employed. They'd never had health insurance their whole married lives because they couldn't afford health insurance their whole married lives, and now all of a sudden when it's time to divorce the wife's lawyer is insisting that somehow or another medical insurance has to be something that is part of the alimony arrangement, that it has to be provided. Well there wasn't any access to medical insurance, and from my perspective it was obvious that that was an unrealistic demand. It was, you know, like saying I want the sun to come up in the north. It's not possible. So now I think that lawyers continue to meet with their clients alone in their own offices, and in doing that they develop this perspective of what their client is telling them, and that perspective gets locked in, and then when they finally do come together they come together in a competitive, adversarial format and they're not going to listen to, they're going to discount what the other side says or minimize what the other side is saying, and so it doesn't feel to me like it's changed.

AM: What do you consider to be your most significant contribution to the practice of law or the judiciary in New Mexico?

JAK: Well, I mean, from my point of view, the most valuable thing that I have to say is the criticism of the system, and it feels to me as though I'm not just able to sit on the outside

and offer criticism. I'm able to explain why this isn't working, and I also think that I have offered up another way of doing it, but the other way of doing it is just simply not as lucrative.

AM: Is anybody listening?

JAK: No [laughs]. No. I think non-lawyer citizens are listening. You know, I wrote that column for The Tribune for years and years and years, and there are still people who have those columns which were aimed at...they were not aimed at lawyers. They were aimed at clients to try to get them to have some sense of what was possible and what isn't possible, and tonight I'm going to go talk to the Commission on the Status of Women. It'll be a group of women, anywhere between six and 20 who are going through divorce, and when I'm all done tonight, hopefully they'll have a much more realistic picture of what they can expect and...

AM: These women are women on the commission or women who they've invited to a program?

JAK: No, no, no. These are women who are in the middle of divorce, and the Commission on the Status of Women four times a year starts a class of divorcing women and brings them in and they offer 'em...I come in as a judge, they bring in an economic advisor, they bring in a psychologist, they bring in an accountant, you know, so that these women have access to information.

AM: Okay, we've got to stop so he can change tapes around.

JAK: Okay.

AM: Is there anything going on in legal education which is trying to set up the new model, particularly of family law so that we have a different way of looking at things; one that's much more productive.

JAK: Let me just say that if there is I am completely unfamiliar with it. One of the things that did happen for a short period of time when Michelle Herman, who had had an epiphany about the adversarial process having to do with an employee of hers about whom she cared deeply who was injured in a fire at her home, and Michelle having to go to battle with her own homeowner's insurance to get health care for this person that she cared about, which really was an epiphany for Michelle about the adversarial, competitive model, and so Michelle at that point then became a mediator, and she traveled all over the country to learn mediation skills and techniques and all that stuff and brought it back to New Mexico, and she had an impact on the law school clinic, and there was a time when the law school clinic was teaching people when they were handling family law cases

collaborative processes, mediation process, work together kinds of process, and Michelle was working on the inside of the law school and I was working on the outside of the law school, and I think for some time that philosophy was at least part of the experience of some of the law school people, but then Michelle retired, and to the best of my knowledge that whole program kind of fell by the wayside, and I don't know what the law school clinic is doing now. I mean, the last few years that I was on the bench I really didn't have much contact with the law school and the clinic.

AM: Yeah, Antoinette leads the clinic now, but this is not her field of law either I don't think so...

JAK: I mean, I've had philosophical discussions with Antoinette, and I think Antoinette understands the philosophy of it all, but it is so outside of the mainstream that it takes a lot of energy when you're coming at something from outside of the mainstream, from outside of the main way of looking at things, and I think Antoinette has her energy directed in other directions.

AM: We're referring to Antoinette Sedillo-Lopez who is the professor in charge of the clinic. Okay, what words of wisdom can you give to young lawyers today?

JAK: Well, I mean, you know, remember that book Everything I Needed to Know I Learned in Kindergarten? I used to do a takeoff on that to say Everything I Needed to Know I Did Not Learn in Law School, and it feels to me as though one of the things that I spent a lot of energy on was unlearning what I learned in law school, and you know, the law school has stopped calling me for contributions to their building funds and all that stuff, because I have consistently told them that I have two requirements. One is that they make six hours of poverty law mandatory, and I'm not talking about weekend hours. I'm talking about six hours, six real hours and that they make six real hours of alternative dispute resolution mandatory. So 12 hours of law school education mandatory for people to understand poverty law and understand how uneven the playing field is out there and so that they have some idea of how bad it is and they have some idea about things that you can do to make it better and so that they have some idea about collaborative and cooperative ways of working, and I've told them repeatedly that until and unless they do that, as far as I'm concerned they're producing a toxic product and I'm not going to contribute to it. I see your reaction to this. I mean, I've thought about this interview going to the State Bar Association of New Mexico, which I can't imagine is going to be particularly pleased with what I have to say about the legal profession and law school, and you know, I'm not even willing to call the law school education, because I don't think it is an education.

AM: Have you done anything with equal access to justice?

JAK: Well equal access to justice is equal access to the courts. I don't think the courts are where justice happens, and so I...no.

AM: What do you think is your legacy to the legal profession in New Mexico?

JAK: [*Laughs*]. I think that by and large I'm going to be seen as some kind of a crank, as kind of a scold, as, you know, a radical – something like that – and I think it's a marginalized point of view and so that's what I think.

AM: Do you have any access to young women law students who you think might adopt your point of view in their practice of the law?

JAK: Actually, not law students. You know, the ones who are interested are the ones who've been out practicing law for a few years and learning that they are just miserable doing it, and when they get to be miserable practicing the competitive, adversarial model, that is a point in time when they're at a place where they're in enough discomfort so that they can begin to hear and entertain that there might be another way to do it. The people who are in law school are there because they want to be lawyers, you know. They're seduced by the whole expectation of what being a lawyer is all about, you know. It's about money, it's about power, it's about status. It's about all those kinds of things, and so I don't think that that's a very fertile ground to plant these seeds. It's watching lawyers and realizing when you sit down with a group of lawyers just how many of them are so unhappy in what they do, and it's at that point that you can begin to say, well I think one of the reasons you're so unhappy is because there's a part of you that wants to provide a service to your clients, and there's a part of you that knows that you're not doing that. There's a part of you that intuitively recognizes that you are in conflict with your client because you are trying to make a living, and the way you make a living is to get your clients to give you their money by providing whatever service it is that you're going to provide to them, and in the end they're not happy, you're not happy. It doesn't feel as though people are really a whole lot better off. Those people are willing to listen. What they, I think end up doing by and large, is leaving the practice of law.

AM: Is there anything you'd like to leave our audience with in addition to what you've already said?

JAK: No. You know, somebody asked me once if I was sorry I went to law school, and I said absolutely not. I would never have acquired the perspective that I have if I hadn't gone to law school and hadn't done when I did. I mean, if I hadn't gone to law school and done when I did, I'd be one of these Americans who still thinks that the American legal system has something to do with truth and justice, and you know, I'd still be living in a fog, and so I feel as though I've stepped down into the sunlight, and I feel really good about that.

AM – Anita Miller
JAK – Judge Anne Kass

AM: On that note I think we'll terminate this interview, okay?

JAK: Thank you.

AM: Whoa, that's quite an interview. I wonder what the good old boys are going to say when they see this.