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I agree with Justice Markman's dissent. In family law particularly, there are many factual variations. It is often easy to factually distinguish the pending case from published authority. However, there are hundreds of unpublished family law opinions annually covering a much larger range of facts. Finding an unpublished decision that matches both the legal issues and the facts (or comes much closer than any published decision) is common. Legal rules in a vacuum are useless unless applied to the facts. With so many factual variations, whether a rule should or should not apply to a particular case is a difficult question. Examining how prior panels applied the law to a particular (or similar) set of facts can be useful, often essential, to achieving a just result.

For that reason, a majority of my appellate briefs cite at least one unpublished decision. In a perfect world, that would not be necessary. This is not a perfect world and there is a relative dearth of published authority in family law (relative to its proportion of cases in the court system). There are not enough published family law decisions to provide meaningful authority on the wide range of facts I see in my appeals. Where an unpublished decision exists that is legally on point and factually very similar to my case, I will use it,

If the assigned panel wants to ignore a cited unpublished opinion in their deliberation, that is its option. Just don't place unnecessary hurdles in my path as I advocate for my client by presenting decisions that are similar to my client's case, even if unpublished.

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