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OUTSIDE COUNSEL

BY KENNETH B. WILENSKY

Alternative Dispute Resolution In Matrimonial Cases

DISCOURAGE LITIGATION. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often really a loser — in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity at being a good man. There will still be business enough. [Abraham Lincoln 1850.]

Apparently, Abraham Lincoln was able to read the future insofar as matrimonial cases go. It is clear that more often than not, matrimonial litigants who "go all the way" really do end up being losers. It is also clear that matrimonial litigation is unduly burdensome to our courts. Perhaps Alternative Dispute Resolution (ADR)¹ is a means to solve the problem.

What are the real problems that confront a divorcing couple? Begin with the definition of divorce. *Black's Law Dictionary* defines divorce as "the legal separation of man and wife." *The New Brittanica — Webster Dictionary* defines divorce as "a complete legal dissolution of a marriage." Interestingly, however, marriage has a much broader definition. *Brittanica — Webster* defines marriage as "the institution whereby a man and a woman are joined in a special social and legal relationship for the purpose of making a home and raising a family."

Thus, it is interesting to see that marriage is viewed as a legal and social union of two people; however, divorce is merely viewed as the legal termination of said marriage. These definitions in and of

themselves highlight one of the basic problems that occur when a couple chooses to divorce. Namely, although the legal system is equipped to deal with the legal problems that the couple faces when divorcing, it does not address nor is it equipped to deal with the social and emotional issues that confront the couple.

Once the emotional or social issues² are dealt with, it makes the resolution of the legal issues that much easier. Taking it a step further, what most people really are arguing about is not legal or financial issues, but rather arguments fueled by their desire to get some form of revenge for a perceived wrong by the other spouse.

Once each of the participants is helped and supported to resolve the emotional and social issues, however, they are in a much better position to deal effectively with the legal and financial issues.

Mediation

Where does mediation fit in the divorce process? *Webster* defines mediation as the "intercession of one power between other powers at their invitation or consent to arrange amicably differences between them." Thus, the two individuals contemplating divorce could seek jointly the help of one or more "mediators" to help the couple to arrange amicably for a settlement of all of the issues with which they find themselves confronted.

The couple involved in the divorce mediation may need more than one medi-



ator to help them arrive at a mutually acceptable agreement. Different people have different needs. One's emotional or social issues are best handled by mental health mediators such as psychiatrists, psychologists or social workers. Financial issues are best dealt with by specially trained mediators such as accountants, financial planners and possibly lawyers. Legal issues are best dealt with by attorney-mediators.

This "mediation team approach" effectively enables a couple to have what might be called a successful or positive divorce. Whatever particular problem or issue needs resolving by the couple can be worked on by the expert-mediator most particularly suited to that type of problem.

One may ask, however: "How can one attorney properly help two people with "conflicting interests?" The New York Court of Appeals in *Levine v. Levine*, 451 NYS2d (1982), firmly held that a couple has the absolute right to utilize the services of one attorney to work out the terms of their agreement. It is clear from that case and others that as long as each individual knows their rights, and knows the implications of their agreement, that

Kenneth B. Wilensky is a family law partner in Vessa & Wilensky P.C. in Mineola. He can be reached at 516-248-8010 and on the Web at www.vessawilensky.com.

they are each free to agree on whatever terms for their separation or divorce settlement agreement that they wish to.

Furthermore, when a couple decides to get divorced, it does not necessarily mean that they have "conflicting interests."¹³ They could have conflicting interests if that is what each wishes to pursue; namely, conflicting legal positions.

However, if the couple resolves the often unresolved emotional or social issues, then they may have a united interest; namely, that they terminate their marriage legally, fairly and in a way such that each of the participants and everyone else in the family and society wins.⁴

Win/Win agreements are possible especially where each of the participants is interested in arriving at a win/win solution as opposed to a "you or me" solution.

In the area of conflict resolution, it can be said that there are three levels of relationship in which people can operate: "you or me," "you and me," and "we."¹⁵

In the "you or me" domain, each of the participants is looking for what is best for them, without regard to what the other wants or needs; namely, a win/lose situation.

In the "you and me" way of relating, each of the people is interested in going their separate ways, but each is also interested in the other's winning as well.

In the "we" domain, the couple would be going in the same direction with a unified effort. Mediation can take place where the couple learns how to solve problems in a "you and me" or "we" frame of mind. This method of problem solving can be taught to the couple by the mediator.

Once a couple receives the proper guidance from a trained mediator, shifts in the way each participant relates to the other and to the divorce as a whole, occurs. With the appropriate mediator's help, the couple would be able to come up with various win/win alternatives so that an agreement can be arrived at which benefits everyone.⁶

Contrast this with the "you or me" approach in which each person would seek what is best for them and would seek to minimize what the other person gets. This is typical of the adversarial context where each party hires a separate attorney whose role is to get as much for his/her

client as possible —often at the expense of the other spouse.

For those who share the school of thought that an attorney is always necessary for each party, mediation can still be a beneficial process. Indeed, the couple can agree to mediate, with or without attorneys present at the mediation sessions, and the process can continue until an agreement is reached; this agreement can then be finalized by the separate attorneys.

At every stage of this mediation proceeding, each party can be advised by their respective attorneys of their rights and the ramifications of each decision. In this way, the adversarial nature of the litigation process can be avoided, and the client can be "represented" by separate attorneys at every step.

This model may be the best since it is the best of both worlds; the clients are moving forward in as amicable a way as possible, and their "conflicting interests" (if any) are being carefully monitored by their respective attorneys.

Arbitration

If mediation is not possible, binding arbitration is the next best thing. In an arbitration, the parties can set their own rules with regard to disclosure, presenting evidence, expert testimony, and the like.

The entire process can be expedited, "informalized" and streamlined so that what the people really want (a quick, fair and inexpensive resolution) can be obtained.

The parties and their attorneys are free to select an arbitrator (or arbitrators) of their choice, thus assuring each party and their attorneys that the best possible person to make the decision will be chosen.

There are many organizations that maintain lists of available arbitrators (as well as mediators) who are either retired judges or noted mediators and arbitrators.⁷ ADR is becoming a fact of life.⁸ Abraham Lincoln said "there will still be business enough." He was right. Matrimonial lawyers can participate not only as litigators as we now do, but also as advisors to our clients going through a divorce mediation or other ADR process.

Instead of waiting for the case to proceed through the litigation process, we can recommend our clients to mediators or arbitrators in an effort to have the case resolved as efficiently and with as little bad blood as possible. We also can act as mediators and arbitrators.⁹ We can still charge our hourly rates, and although probably much less of our time will be needed in connection with a mediated and/or arbitrated divorce than a litigated divorce, we probably will be paid our "full fare" much more often, and indeed have much happier clients.

We can and should seek to make a difference in the lives of our clients. We can best do this by urging them to seek fair, just and expedient resolutions of their problems.



(1) This article will discuss two ADR methods — mediation and arbitration. Chief Judge Judith S. Kaye has appointed a Blue Ribbon Panel to investigate ADR techniques as a means of resolving the overcrowding of our courts.

(2) Such issues being parenting abilities, hurt, resentment, anger, etc.

(3) When the couple or family had emotional problems during the marriage, they jointly went to counseling or therapy; when the couple had financial problems, they jointly went to accountants; when the couple had legal issues, they jointly went to one attorney. Why should it be any different when a couple is contemplating divorce?

(4) Marriage as an institution in this country has unfortunately resulted in a divorce rate of approximately 50 percent during our recent past.

(5) I am deeply indebted to my colleague, Dr. Arthur Phillips, for pointing out these distinctions.

(6) Indeed, in mediation, it is attempted to have a couple operate in a "we" frame of mind when it comes to their children. If the children's best interests are taken into account, then it is clear that the couple will seek the training and support necessary to raise the children in as positive and nurturing an environment as possible. Parents want their children to be happy. What will make the children happy is for their parents not to fight and argue (especially over them), but rather get along in a positive relationship. This is all possible in mediation.

(7) The following are a few examples: The Academy of Family Mediators, American Academy of Matrimonial Lawyers Arbitration/Mediation Panels, The American Arbitration Association, Divorce Mediation Professionals, Endispute, JAMS, Judicate, Mediation Resources Group, Nassau County Bar Association ADR Tribunal, The New York State Council on Divorce Mediation and Resolute Systems Inc.

(8) Mediation and other ADR techniques have been successful in such states as California, Texas and Florida for many years.

(9) The American Academy of Matrimonial Lawyers presently has training programs to certify mediators and arbitrators.

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