BEYOND "DIVORCE AMERICAN STYLE"
The Search for a More Responsive Process

By Lawrence D. Gaughan

Marriage is a high risk undertaking. Consider the statistics. In recent years the number of marriages each year is just over twice the number of divorces in the same year. So when two adults in their late 20's – let's call them Justin and Lisa - decide to get married and have an expensive wedding with all the trimmings, there is a good chance that they will also get divorced. And when they do, it wouldn't be unusual for their divorce to cost as much as (or more than) their wedding and honeymoon. Those "trimmings" consist mostly of the legal costs of a contested divorce.

Maybe the odds of divorcing are nearly 50%, maybe not. We don't know for sure, because the two sets of figures point in different directions. Only the future will tell us how many of the couples who are still married or who get married this year will eventually get divorced. A good guess from the statistics we have so far is that the percentage of this year's marriages that end in divorce will be over 40% but less than 50%. Even if these figures turn out to be a bit high, those aren't wonderful odds for such an important life event.

Now suppose that Justin and Lisa decide to end their marriage after three years. Let's postulate that they have no children and that both of them are self-supporting. Their bank and credit card accounts and their vehicles are already in their separate names. The townhouse they shared is a rental unit, and dividing the furniture is easy. In short, Lisa and Justin are set up to have an inexpensive, quick, and relatively stress-free divorce.

Or maybe not. Suppose that they both want to keep their Irish setter dog "Taffy". Or maybe neither of them wants to be responsible for the rent on their townhouse, but the lease still has nine months to go. Perhaps one of them wants an accounting for the difference in value between the Hyundai and the BMW. There are always things to settle out, even in the most straightforward divorces. Divorce can be a major cause of stress and disagreement even in a relatively short and uncomplicated marriage. There are always two aspects to every divorce, namely ending the marriage and sorting out all of the details.

Most divorces aren't even close to being as simple as Lisa's and Justin's. It's hard to leave a marriage without feeling hurt or unfairly treated. When you add on disagreements over how the children will be raised and supported, or what happens to the family home, or whether one spouse should support the other post-divorce, the stakes can easily become much higher. Then add a few

other issues, such as an affair, or a search for hidden or dissipated assets, or a big dose of pent-up anger, and the stage can be set for a real battle.

These are the cases then can become the "train wreck" divorces that go on and on as they are fought out between attorneys and in the divorce court system. These "bad" divorces often result in major stress, long delays, attempts to re-litigate, and tens and even hundreds of thousands of dollars of legal fees on each side. It's not unusual in these cases for both parties to wind up bitter, angry, fearful of the future, and much poorer. The minor children in such a contested process often experience problems that they will carry long into adulthood. Welcome to "divorce American style"!

Divorce courts are a dysfunctional system

The adversarial court system for divorce settlements forces divorcing spouses uses a system that is expressly designed to promote conflict. But that's only one of many problems with the using judicial system for divorce disputes. Courts have never been noted for their expertise in handling relationships, family or otherwise. The traditional role of courts is to adjudicate the past, not to plan for the future. The law looks backwards, not forwards. The focus is on who did or failed to do things in the past, and what the present legal consequences are for such actions or inactions. The divorce courts in virtually every state generally use a cumbersome and inefficient process. Like most other bureaucracies, courts give priority to their own convenience. Even the most well-intentioned attorneys for the parties may stoke rather than mollify the family conflicts.

The most serious problem with adversarial divorces is when the courts are asked to decide conflicts over what the laws in most states still call "custody" and "visitation". These terms are outmoded, misleading, insulting, and emotionally charged. They are a major reason that too many of these cases can't be settled by forward-looking agreements. Such terms misplace the emphasis on the "rights" of the parents rather than the needs of the children. It's more than semantics.

The standard that supposedly guides the courts in making these decisions is "the best interests of the child". The mental health professionals who work with children of divorce uniformly emphasize that the best interests of kids often depends upon the ongoing cooperation between their parents. So when the litigation process erodes such cooperation, as it usually does, it shows us how the court process in such cases is itself inherently contrary to the best interests of children. Wow! This is like the famous quote from an American officer in the Vietnam War, "We had to destroy the village in order to save it!"

What divorce lawyers don't know about divorce

Except for the obvious "fire stokers" and some other phonies, many divorce lawyers appear to be members of an elite club. The most successful divorce lawyers are usually highly rated by their peers, are quite articulate and well-dressed, and appear to have good people skills. This should be no surprise. Divorce law is a well-paid profession. The documentary "Divorce Corp" estimates that divorce is a $50 billion a year industry in America. Even if that turns out to be a somewhat high figure, clearly divorce law is big business.

Even the best divorce lawyers do most of their thinking "inside the box". American lawyers are trained to think inductively from appellate decisions and detailed statutes, rather than deductively from statutory principles and criteria. So when a divorce lawyer advises a client, that advice is often based upon one or more of the following: (1) ways to manipulate the procedural system; (2) other strategies to bring pressure upon negotiations with the other side; and (3) trying to figure out how a judge might decide the case. This is the "legal box" of divorce cases. Thinking "outside the box" would be to advise the client about the best means to get a fair and workable settlement, taking into account the needs and goals of each party and all of the associated costs and variables. It doesn't have to be tied to what a judge might do, and that's not always easy to guess in any event.

Divorce lawyers are usually skilled at managing their own interactions with difficult clients. They conventionally spend less, if any, time in helping those clients in how to cope with the many stresses of the divorce process. And while they may understand routine family budgets and short-term financial planning, most divorce lawyers have little expertise in helping clients consider longer-range and retirement financial planning.

A divorce lawyer who is asked for advice about "custody" usually starts out with an adversarial focus and using the outmoded terms. Most divorce lawyers, however, haven't read much (if any) of the extensive research about the impact of parental divorce on children at different developmental stages. The mental health professionals who work with the children of separated parents are often horrified by how little divorce lawyers know about the ways to promote effective co-parenting, or how badly the legal system often handles this objective.

Divorce lawyers use vocational experts to try an impute income to a parent who has left a career to raise the children. But not many divorce lawyers consider it important to help such a stay-at-home parent obtain the advice and assistance needed to get a meaningful career started (or re-started). A divorce attorney who is faced with the task of tracing commingled separate property into the marital property or of uncovering hidden or dissipated assets usually hires a forensic accountant to do the job.

In fairness, some divorce lawyers are quite adept at negotiating settlements and are able to keep most of their cases out of court. In fact, a majority of the cases that divorce attorneys handle are settled before trial. At times these agreements may involve creative tradeoffs, such as between a pension plan or retirement account and the equity in the family home. However, it's also true that these out-of-court settlements themselves often wind up being quite expensive. And remember that there are lots of divorce lawyers who are not very good at settling cases out of court.

All divorce lawyers should be required to draft settlement agreements in 21st century English prose. It is distressing to see a draft agreement coming from a highly rated divorce law firm that starts out with "Witnesseth" and contains words such as "hereintobefore". A lawyer who would not even think of citing an outdated decision or statute should be ashamed to use an office form file that has not been fully revised in the last 40 years.

The social culture of divorce must change

A major shortcoming of some critiques of the legal process of divorce is a failure to examine how much the social culture of divorce (the spouses' anger and frustration) plays into fueling the divorce industry. One hears "then I'll see you court" far more often from clients than from their attorneys. In fact, many separated husbands and wives don't need even the least encouragement from their lawyers to carry on the fight. Their will to fight, fight, fight often arises from their unhappy experiences in the marriage and a perceived need for vindication. It also comes from their broader social system. This includes "well-meaning" members of their extended families, social friends and acquaintances, neighbors, fellow members of social networks, associates at work, and so forth. These family and friends can often be a serious impediment in getting a case settled out of court.

Anger is an obvious problem in many divorces. Far too many divorcing spouses don't consider just how expensive anger can be in terms of stress and wasted time, and especially with regard to the monetary costs. Residual anger over the marriage and the divorce is often an even greater problem when the anger is justified, because then it's harder to get past. A subtler problem is when a dispute with one's spouse is deemed to involve matters of "principle" rather than just a disagreement. The current political situation in Washington provides ample evidence of the problems that "principles" can cause. And when the expressed principles of one or both parties make an out-of-court agreement impossible, the resulting outcome in court may have very little to do with the principles in contention.

At the start of the divorce process most people think that their divorce case will be much simpler than it often turns out to be. Part of that problem is that most divorce attorneys are reluctant to give a straight answer to a client's request for an estimate as to how expensive and time-consuming the case will be. Very few divorcing clients have a sufficient sense in advance of the full extent of what they will be going through in terms of time, money and emotional energy.

Also, many divorce lawyers are more than willing to encourage their clients to take adversarial steps that can add substantially to the costs of the case. For example, if one side serves the other with oppressive and mostly unnecessary requests for information and documents, counsel for the party who is served commonly lobs a similar excessive request back over the net. Usually neither counsel stops to consider whether it's possible in the alternative to negotiate a common sense exchange of the materials that are really needed.

Making divorce mediation more professional

The first nationwide movement to find a common sense alternative to the adversarial system of divorce came in the late 1970's with the mediation movement. There was an earnest hope back then that most divorce settlements could be worked out much less expensively and to the greater satisfaction of the parties through mediated agreements. The media became interested in this new system, and it was a heady time of much favorable publicity.

The first major organization for divorce mediation, the Academy of Family Mediators, was founded in Arlington, Virginia in 1981. Mediation training courses quickly sprang up around the country and tens of thousands of persons from various professional backgrounds (especially from law, mental health, and accounting) took 40-hour introductory courses. It didn't take long for the market to become oversaturated with eager mediators, and also much amateur mediation was carried on. One ethic of the time was that a divorce mediator didn't need much knowledge of how the legal system worked, since there were process approaches that would somehow make the settlements come out right. Many of the new mediators were not divorce lawyers or even attorneys.

By the early to mid-1990's, things had somewhat sorted themselves out. A great majority of the mediators who took the training courses were unable to get enough clients to carry on a viable practice. Others moved on to mediating cases in fields that are usually less technical than divorce settlements. Conversely, this was a time when many lawyers started to take the mediation courses and to do divorce mediation as an adjunct to their legal practices. Consortiums of retired judges were being formed to do what they also call "mediation", although to an

outsider that process may appear as nothing more than an adjunct to the adversarial system. In other words, the legal profession was able to reassert itself against a challenge from other professionals and to integrate alternative settlement modes into more conventional law practices.

In 2001 the Academy of Family Mediators, which by that time was focusing most of its attention on the process of conflict resolution at the expense of the substance of divorce settlements, merged with two other conflict resolution organizations. The new organization was called the Association for Conflict Resolution, and of course its only real common denominator had to be process. However, except for many of the simplest settlements, the main growth areas in divorce mediation continued to be with those attorneys who added mediation to their regular practices and through the consortiums of retired judges. Most conventional divorce law firms have become larger and more prosperous than ever in the 21st century.

Divorce mediators of various professional backgrounds who have been in practice for 15 to 30 years or more generally agree that mediating divorce settlements of any complexity requires a broad range of knowledge and skills. They would consider the issue of substance vs. process to be a false dichotomy, in the sense that a professional mediator needs to master both. There are some excellent reasons for considering divorce mediation to be a separate profession.

With this in mind, some of the most experienced divorce mediators in the United States came together in 2012 to form the Academy of Professional Family Mediators. APFM is currently working to define the background and experience, as well as the knowledge and skills, needed for certification as a "professional family mediator". A number of states presently have no certification procedures for mediators, and there is quite a variety of requirements among those states that do have statewide or local certification. The APFM certification will become the first competency-based certification for professional divorce mediators on a national basis when it starts as anticipated in the next few years.

Divorce mediation has now become a major settlement method, but many of the successful mediations are being done in relatively straightforward cases. There are not enough mediators from any professional background who are fully equipped to handle a range of the most difficult cases. Hopefully this will change as APFM standards and certification establish credible models for the field. There are some excellent existing practice models. For example, Bill Eddy, a lawyer/social worker from California, has specialized in creating successful models for mediating divorce settlements in high conflict situations.

Collaborative practice as a process option

Collaborative practice ("CP"), sometimes called "collaborative law", started as a movement in the mid-1980's and became institutionalized by the end of the 1990's. Although there are some differences in detail among the various states, CP is now authorized in every state. The International Academy of Collaborative Professionals is the umbrella organization that promotes CP both nationally and internationally.

The core of CP is the representation of each party by an attorney, but there are some important differences between CP and conventional representation. CP attorneys are bound by contract to withdraw from representation if the case goes to court, and there are strict guidelines as to the conduct of representation while the case is collaborative. For example, neither lawyer may threaten court action or otherwise discuss litigation scenarios. The standards of attorney civility and cooperation are higher than for conventional lawyer-negotiated settlements.

The three main groups of CP professionals are lawyers, mental health professionals, and financial professionals. If there are reasons to address the emotional impediments to a settlement or just to give the parties additional professional support, a mental health professional may be designed as a "coach" for each party. Other professionals, and especially the financial professionals, may be brought into the settlement discussions as needed.

All of the professionals in CP are required to take an introductory training course and also a basic mediation course. Many states and localities also have CP groups, and these are excellent forums for exchanges between the professionals who have expertise in various aspects of divorce. For the present, collaborative practice is not nearly as widely used in divorce settlements as is mediation. However, the CP groups are moving some divorce lawyers into a broader appreciation of the scope of issues in divorce settlements.

One major problem with CP has been that at times the settlements involve an unnecessary layering on of other professionals. Some prospective CP users are appropriately concerned about the possible costs of such a process when additional professionals take an active part. In its present form, CP is also a somewhat bureaucratic and often time-consuming process. It is also a process that is designed to keep the legal profession fully involved in divorce settlements.

Broadening the options for divorce settlements

Both the involved professionals and public need a better understanding of the options available for people going through the divorce process. For decades we have been aware of the range of problems with having divorce courts as the

primary model for settlement options. One of the worst problems with the existing system is that it gives lawyers and judges too much influence at an often crucial juncture in people's lives. The goal is to turn the divorce settlement process around 180° to focus upon the future needs and goals of both parties. This also suggests that we give less attention to what the conventional backward-looking analysis of judges might be, while broadening the relevant considerations for a forward-looking settlement.

Divorce lawyers who do mediation, and especially members of consortiums of retired judges, need more interaction with other divorce-related professionals and with those attorneys who have a broader focus. Most of the lawyers who do mediation and almost all the retired judges working in consortiums do not actively participate in any of the interdisciplinary organizations that promote such useful interactions and exchanges. This needs to change.

By the same token, mediators who are not lawyers need to understand the extent to which their state law may still be relevant. After all, if the mediation does not result in an agreement that keeps the case out of court, it has not met its most basic goal. There are often sound social policy considerations in the existing family law statutes. Much of American divorce law is not found in the form of rules, but rather in these more discretionary statutory criteria. If these lists of criteria miss some important points, they can of course still be raised by the mediator or the parties. Even many divorce lawyers seem to be unaware of how many provisions in state family law statutes actually leave open the kinds of discretion that leads to more options for a fair and workable settlement.

No single profession embodies the full range of skills and knowledge appropriate to dealing with all of the issues in divorce settlements and the divorce process. Lawyers, psychologists, social workers, financial planners, accountants, and conflict resolution specialists are among those professionals who have important areas of relevant expertise. Very few professionals have it all. Again, an important goal in involving professionals from disciplines other than law is to turn settlements more squarely toward the future needs and goals of the parties. This is what is meant by a more responsive system.

Fixing the dysfunctional system

The first step in fixing what has become the often dysfunctional system of "divorce American style" is to encourage legislative reform. Although every state now has at least one "no-fault" ground of divorce, many states have also kept the old fault grounds – adultery, cruelty, and desertion – on the books. Every state should eliminate those old fault grounds of divorce, the style of setting up divorce cases in an adversarial format, and the use of the terms "custody" and

"visitation". If some specific aspect of marital fault is still to be considered in the divorce settlement, it can be given a more appropriate and better focused context.

For decades states such as Iowa have styled divorces as "In re the marriage of ...." and not Plaintiff vs. Defendant, and have abolished all of the fault grounds of divorce. About a third of American states have already either abolished or severely limited the use of the terms "custody" and "visitation". For example, West Virginia has a statutory system that focuses on framing workable parenting plans. This is a more responsive and contemporary system and is over a decade ahead of some adjoining states such as Virginia.

We need a new written set of standards for the exchange of information and documents relating to divorce settlements. It's a sad fact that the existing court discovery rules often add immensely to the hassle and expense of divorce cases, while the parties in those same cases often still don't get the information they really need. Any common sense rules on disclosures in divorce settlement cases should apply to both court and non-judicial settlements, although they can be framed with more flexibility for negotiated, mediated and CP settlements.

Lawyers and retired judges who mediate should have more extensive training in conflict resolution techniques, the divorce process, a variety of counseling skills, dealing with high conflict clients, and understanding family systems. They should also be familiar with the research on children of separated parents, the stages of child development, and the issues in promoting cooperative parenting. Other subjects that need to be covered are vocational planning, financial planning, and relevant accounting matters.

Too much so-called "mediation" is done by consortiums of retired judges. In practice these meetings usually seem to be quite grounded in the adversarial process. Attorneys are required on each side and often the retired judge goes back and forth between separate rooms. These settlement meetings can be quite time-consuming and coercive in nature, and are not even necessarily less expensive than the actual court hearing would been. Although some of the most respected judges join these consortiums after retirement, their framework is legally focused and designed only to settle the actual court case. The term "mediation" should not be authorized for use by these consortiums when the process used is coercive or otherwise conducted in a manner similar to a court hearing. This process may serve the interest of divorce lawyers and provide post-retirement income for judges, but it keeps settlements in the adversarial system and is far from providing a more responsive approach to divorce settlements.

Mediators who are not family law attorneys need more training in the structure of the legal system, the difference between rules and discretion, the

workings of the child support guidelines, the distinctions between separate property and community/marital property, the contrasts between pension plans and tax-deferred retirement accounts, the basic tax laws relating to divorce, and how to educate themselves on other legal/practical issues of divorce. And of course they also need to have the knowledge and skills that are covered in the previous paragraphs. All mediators should be required to draft memoranda of agreements and marital settlement contracts in clear readable English prose.

The desire of some divorcing spouses to be represented by a lawyer in most or all of the formal stages of the divorce settlement process has been around as long as there have been divorces, and will certainly continue for the indefinite future. There will always be cases where a four-way settlement conference (two lawyers and two clients) is the best modality to work out an agreement. This process works best when both lawyers conduct themselves with civility and information is exchanged in a reliable and businesslike manner. If someone feels a need to be accompanied by a lawyer, however, remember that this is also done in collaborative practice and is always available in mediations.

Because the conventional adversarial system often badly serves the needs of divorcing families, the court system must place more emphasis on non-judicial settlements. There should be a requirement that except in a genuine emergency, no case may be handled by a court without a showing as to why it cannot be settled by negotiation, mediation or collaborative practice. Recourse to the courts should be the absolutely last resort, not the first.

The formal process of getting the actual divorce through the courts has also become much more bureaucratic in the past 30 years. It needs to be streamlined so as to make recourse to lawyers less necessary and to make the "do-it-yourself" divorce process more user friendly. And at least in cases where there are no minor children and the parties have reached a settlement agreement, why should a court even have to approve the actual divorce?

Many of these changes will not be easy, and they will require efforts from all of the relevant professionals and affected members of the public. Some of these changes are technical and are addressed mainly to lawyers. Others require changes in public and professional attitudes, which also takes time. For a more responsive approach to the entire field of divorce settlements, we need to develop a new social ethic.

The time has come for a consumer revolution to accelerate the reform of what has become a dysfunctional bureaucratic system for divorce settlements. There are millions of Americans who have had unfortunate experiences with the divorce system. An entrepreneur named Joe Sorge, who is also a medical doctor,

has taken the leadership in crystallizing their discontent into what may become a genuine reform movement. In early 2014 he directed a documentary called "Divorce Corp" which graphically demonstrated some of the problems with the adversarial system of divorce settlement. And in November of 2014 he sponsored a Family Law Reform Conference which brought together a number of influential reform-minded professionals from various parts of the country. To learn about and join this growing movement, go to www.divorcecorp.com.

The adversarial system has badly served the needs of divorcing couples and has misdirected their efforts to achieve fair and workable settlements. It's clear what needs to be done to fix this dysfunctional system. Let's get started!

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