INSIDE THE MINDS

Strategies for Family Law in California

Leading Lawyers on Understanding Developments in California Family Law

2013 EDITION

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A Comparison of Dispute Resolution Methods Available in Family Law Matters

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Introduction

Conflicts of any type can be resolved through either force or diplomacy. In legal disputes, parties try to exert force on each other through the courts. "We call it an adversary system, but a better term would be a coercion system. The parties bash each other in order to persuade the judge to coerce the other person to do something they do not want to do," says family court Judge Bruce Peterson of Hennepin County, Minneapolis.[1] The threat of having a judge coerce "a person to do something they do not want to do" unless they agree to certain terms, is itself coercive.

Diplomacy, on the other hand, works through mediation and other forms of consensual dispute resolution (CDR). As the name implies, the parties to such processes resolve their conflicts through mutual consent, without obtaining such consent through coercion.

Litigation: No Real Resolution in Family Law

Litigation is the most traditional form of dispute resolution and involves the use of the courts. It is initiated by filing a lawsuit in a court. By definition, litigation is an adversarial process. How often does litigation improve interpersonal relations? Unfortunately, the answer to that question is never.

Somehow, many family law attorneys have convinced themselves that they are not litigating unless a judge makes a ruling. In fact, some attorneys actually believe that a matter is not litigated unless it goes to trial. However, pretrial litigation consists of litigation planning, fact investigation, legal research, discovery, pretrial motions, and settlement strategy. In an effort to make it appear as though family law litigation is not a lawsuit, the parties are referred to as petitioner and respondent, rather than plaintiff and defendant. Nevertheless, the summons itself states, "You are being sued."

A defendant has no choice to participate in litigation. Moreover, litigation involves formal and structured rules of evidence and procedure. The family law summons states, "You have **30 calendar days** after this *Summons* and

[1] Bruce Peterson, *Time, Perhaps, to Get Courts out of Divorce*, STARTRIBUNE, July 12, 2012, http://www.startribune.com/opinion/commentaries/162286176.html?refer=y.

Petition are served on you to file a *Response* (Form FL-120 or FL-123) at the court and have a copy served on the petitioner. A letter or phone call will not protect you. If you do not file your *Response* on time, the court may make orders affecting your marriage or domestic partnership, your property, and custody of your children. You may be ordered to pay support and attorney fees and costs…. **NOTICE**: The restraining orders on page 2 are effective against both spouses or domestic partners until the Petition is dismissed, a judgment is entered, or the court makes further orders…."

Litigation in family law matters commences upon the filing of the petition. Pretrial litigation is still litigation and is therefore adversarial in nature. Have we really convinced ourselves otherwise? At a recent bar association meeting, a colleague was describing the most contentious and costly divorce he had handled in his career. It just so happened that the respondent was served with the petition on Christmas Day. Is anyone really surprised by the result?

Typically, a divorce occurs due to marital discord, and litigation exacerbates conflict. When the matter is finally "resolved," is it any surprise that the parties find themselves unable to co-parent and violating coerced "agreements" or court orders? The reason the word "resolved" has quotation marks around it is that a case is not over when it is over.

It has long been said that the tongue is sharper than any sword. In fact, the Bible says, "Reckless words pierce like a sword, but the tongue of the wise brings healing."[2] Of course, in litigation, we place such words into correspondence, declarations, and pleadings in an effort to coerce a "settlement" or otherwise persuade a judge. This may be why litigation is often compared to war. Since lawyers are retained to "win" the war, they operate on a "take no prisoners" philosophy. Clients frequently manufacture or otherwise embellish facts. The attorney does anything in their power to assist their client in prevailing, including efforts to legally exclude evidence that would otherwise weaken or destroy their client's case. After all, who cares whether the result makes sense based upon *all* the facts, as long as our client prevails? Yet we expect those same parties to effectively co-parent throughout the litigation and thereafter.

Litigation is only one of many options available for resolving conflicts and

[2] *Proverbs* 12:18 (NIV).

disputes. It is an unfortunate reality that all non-traditional litigation methods fall within the category of "alternative dispute resolution" (ADR). In fact, as the Oklahoma Bar Association states in its public brochure on "Methods for Resolving Conflicts and Disputes," ADR processes "are often the more appropriate methods of dispute resolution and can result in a fair, just, reasonable answer."[3] By referring to these methods as "alternative," however, we make them seem less appropriate. Furthermore, ADR includes "alternative" forms of litigation as well as processes of CDR. This distinction is significant because consensus building and litigation could not be more different. Litigation increases hostility, makes emotional wounds worse, and drives families apart. Consensus building, on the other hand, seeks to transform an adversarial situation into a cooperative effort to obtain information and seek out solutions that meet all parties' interests and needs.

Mediation

A significant problem with mediation is the fact that the term itself is vague. Mediation could be evaluative, facilitative, or transformative. Which of those approaches does one mean when they refer to mediation? There are differences between pre-filing and post-filing mediations. At what stage are the parties entering into the mediation? Is the mediation voluntary or mandatory, as it is when parties file a request for order Regarding child custody and/or visitation? Will the mediation involve caucusing?[4] Is it a problem-focused or solution-focused mediation? Is it a short-term or long-term mediation? Will attorneys be attending the mediation? How directive, if at all, is the mediator? These are only some of the many factors that cause confusion with the use of the term "mediation." The only certainty is that the process involves at least one neutral professional.[5]

There are no guarantees that matters handled through mediation will result in full or even partial settlements. However, the statistics from those

[3] Oklahoma Bar Association, *Methods for Resolving Conflicts and Disputes* (Oct. 2012), http://www.okbar.org/public/brochures/confbroc.htm.

[4] Caucusing either occurs when the parties are kept in separate rooms and the mediator moves back and forth between rooms or when the mediator has private conversations with each of the parties, who are otherwise in the same room.

[5] Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CT. REV. 373, 375 (1996).

jurisdictions that have made mediation in family law cases mandatory are very promising. The statistics reflect that approximately 67 percent of the cases reach full settlements and 12 to 14 percent of the cases reach partial settlements, for a combined success rate of 80 percent.[6]

It should be noted that mediation is inappropriate in those cases in which there are certain levels of domestic violence or child safety issues.

Evaluative Mediation

Evaluative mediation is virtually identical to settlement conferences presided over by judges. The mediator helps the parties resolve their disputes by "judging" the legal strengths and weaknesses of each party's case. Thus, the mediator focuses on each of the parties' rights under the law. The mediator assists the parties in evaluating the case and analyzing the costs and benefits of reaching a mediated agreement at that time versus a judicial ruling at a later date. This model of mediation clearly requires the mediator to be involved in the outcome. For the mediator to be effective in this type of mediation, both parties (and their respective counsel, if represented) must perceive the mediator as having a great deal of knowledge and understanding of the law involved in their particular case.

Some advantages of evaluative mediation are as follows:

- Disputes tend to be resolved much faster through evaluative mediation than through litigation.
- Evaluative mediation has been found to be far less costly than litigation.
- It is a confidential process, unlike court cases, which are matters of public record.
- Evaluative mediations are generally held in conference rooms and are informal proceedings.
- The parties and their attorneys select the mediator.

[6] These statistics are from Utah, where the legislature enacted a mandatory divorce mediation statute effective May 1, 2005.

The following are some disadvantages of evaluative mediation:

- It requires voluntary participation by both parties.
- A mediator is neutral and therefore cannot advise either party.
- There is no way to compel a party to produce documents or information in mediation.[7]
- It is an adversarial process, like traditional litigation.
- The mediator is not concerned about the particular needs and interests of the parties.
- It does not promote communication and cooperation.
- It does not reduce the conflict between the parties.
- It creates a winner and loser and other consequences similar to those involving traditional litigation.
- The mediator's evaluation and predictions are just that: predictions.[8]
- Evaluative mediation does not always result in full or even partial settlements.
- Case law cannot be created when matters are resolved through evaluative mediation.[9]

I am not specifically addressing early neutral evaluation (ENE) because it is a form of evaluative mediation.[10]

Facilitative Mediation

Facilitative mediation is the original form of mediation. It was once the only style of mediation used. In this model, the mediator sets up and maintains a safe and comfortable environment within which to assist the clients in resolving their own dispute. The mediator maintains an atmosphere of mutual respect and assists the parties in communicating with each other. The mediator helps the parties uncover the reasons underlying their

[7] In cases in which a party is not forthcoming, mediation might be reconsidered after discovery is complete.

[8] The mediator's credibility "findings," factual "findings" and exercise of discretion may be very different than those of the judge who would ultimately hear that case if it were to go to court.

[9] If a judge never makes an order, there is nothing to appeal, thereby creating case law.

[10] ENE is a way in which to evaluate the legal and factual issues, as well as the strengths and weaknesses of each side's arguments. It may be used as a way of efficiently eliminating unnecessary discovery and motions and facilitating settlement discussions.

respective positions, in order to flush out their actual needs and interests. Once this information comes to light, the mediator encourages creative problem solving in an effort to resolve the conflict while still satisfying the needs and interests of each party. The parties may jointly retain experts to provide information they deem helpful or otherwise necessary to reach an agreement. The mediator may assist the parties in evaluating the feasibility of various potential solutions. Reaching a mutually satisfying settlement is the goal of facilitative mediation.

Some advantages of facilitative mediation are as follows:

- Facilitative mediations are generally held in conference rooms and are informal proceedings.
- Disputes tend to be resolved much faster through facilitative mediation than through litigation.
- It promotes communication and cooperation.
- It considers the underlying causes of problems and helps find solutions that best suit the parties' unique needs and interests.
- It reduces the conflict between the parties, which benefits them and their children.
- It is less stressful for the parties and their attorneys.
- The parties themselves make decisions affecting their future and are therefore far more likely to reach agreements that will suit all parties.
- The satisfaction level of the parties is typically higher than for litigation.
- People tend to comply with obligations reached on their own through facilitative mediation more than with those imposed by court order or through "coercive" means.
- Facilitative mediation has been found to be far less costly than litigation.
- Agreements reached through facilitative mediation may involve aspects of importance to the clients, which are not within the jurisdiction of the court to order.
- It is a confidential process, unlike court cases, which are matters of public record.

As with anything, facilitative mediation also has its disadvantages, some of which are as follows:

- It requires voluntary participation by both parties.
- Facilitative mediation does not always result in full or even partial settlements.
- Sophistication and power imbalances may lead to inequitable results, unless mediation-friendly attorneys are involved to level the playing field.[11]
- Case law cannot be created when matters are resolved through facilitative mediation.
- A mediator is neutral and therefore cannot advise either party.
- There is no way to compel a party to produce documents or information in mediation.

Transformative Mediation

Through "empowerment" of each of the parties and "recognition" by each party of the other's needs, interests, values, goals, and viewpoint, transformative mediation helps to transform the parties and/or their relationship. By improving each party's skills to make better decisions for themselves and their ability to empathize with others, the parties gain the capacity to reach balanced and lasting agreements with regard to both current and future problems on their own. Transformative mediation is therefore not focused on solving any immediate problems. This process views conflict as an opportunity for transformation and growth, rather than as a problem to solve. The mediator explains the concept of mediation to the parties, but allows the parties to establish the process, ground rules, and goals.

Some advantages of transformative mediation are as follows:

- Transformative mediations are generally held in conference rooms and are informal proceedings.
- It improves the parties' problem-solving skill set to make balanced and lasting agreements.

[11] Mediation-friendly attorneys are those who have been trained in and respect interest-based negotiation.

- Disputes tend to be resolved much faster through transformative mediation than through litigation.
- It improves relationships.
- It promotes communication and cooperation.
- It reduces the conflict between the parties, which benefits them and their children.
- It is less stressful for the parties and their attorneys.
- The satisfaction level of the parties is typically higher than for litigation.
- People tend to comply with obligations reached on their own through transformative mediation more than with those imposed by court order.
- Transformative mediation has been found to be far less costly than litigation.
- Agreements reached through transformative mediation may involve aspects of importance to the clients that are not within the jurisdiction of the court to order.
- It is a confidential process, unlike court cases, which are matters of public record.

Transformative mediation also has its disadvantages, some of which are as follows:

- It requires voluntary participation by both parties.
- Transformative mediation does not always result in full or even partial settlements.
- Case law cannot be created when matters are resolved through mediation.
- A mediator is neutral and therefore cannot advise either party.
- There is no way to compel a party to produce documents or information in mediation.

Pre-Filing Mediation

As mentioned above, automatic temporary restraining orders take effect upon service of the summons and petition. Although a party does not gain

a legal advantage by virtue of being the filing party, it may be an emotional issue for one of the parties. An agreement between the parties as to who files the petition may set the tone for future cooperation and agreements. In fact, the other party may be much more inclined to accept service of the petition without being personally served. Even if a person knows that their spouse has filed for divorce, being personally served can be very stressful and embarrassing. The way in which the party reacts to being served may set the tone for their future behavior.

In pre-litigation mediation, the parties work toward resolving their disputes before things have been said and done that increase their level of conflict. This does not mean that the parties should make uninformed decisions. The exchange of preliminary declarations of disclosure is required before a court will even enter a stipulated judgment. Therefore, it is prudent that the parties exchange these documents before entering into financial agreements or even discussing such things. If a party needs additional information to assist them in reaching an agreement, nothing is preventing them from requesting that information from the other party. Obviously, if some financial issues need to be addressed before the parties exchange their preliminary declarations of disclosure, they can make formal or informal interim agreements.

Post-Filing Mediation

If mediation commences after one of the parties has filed for divorce, it is considered post-filing mediation. Typically, this type of mediation occurs after the case has been litigated to some degree.

For example, if a party files a request for order that involves custody and/or visitation, the parties are required to attend pre-hearing custody mediation. While the parties are often able to reach full or partial parenting plans because of such mediation, their ability to effectively co-parent may well have been impacted by the information contained in the pleadings filed with the court.

The presumption that litigation does not affect parents' ability to co-parent if the litigation merely involves financial issues is false. Conflict is conflict!

Therefore, the sooner the parties enter into mediation post-filing, the less damage is caused by the litigation.

Collaborative Divorce

Collaborative divorce is an interdisciplinary team approach to family law. It is based upon specialization of labor, not duplication. In addition to the parties themselves, the team consists of attorneys, mental health, and financial professionals. The attorneys use logic, reasoning, knowledge of the law, and identification of their client's interests to assist clients in reaching a negotiated settlement. The coaches (licensed mental health professionals) use their training for any and all of the following purposes:

1. To help reduce clients' stress levels;
2. To improve their coping mechanisms;
3. To improve the way in which they communicate with each other;
4. To restore or at least improve their cognitive understanding and reasoning capabilities;
5. To assist in creating an effective parenting plan; and
6. To assist in restructuring the family.

The child specialist (a licensed mental health professional) is the advocate for the interests of the children. The financial neutral (either a CPA or a CFP (certified financial planner)) assists the clients in dividing their assets to best meet their needs and those of their family in general and planning for the financing of two households. All professional team members are co-equals and work together with the clients in a collaborative fashion to assist them in reaching a mutually satisfying settlement that best suits their particular family. It should be noted that there is only one team. It is not husband's team against wife's team.

Collaborative teams are no different from any other team in that they are only as strong as their weakest member. Collaboration only works when the professionals involved are like-minded individuals who actually trust one

another.[12] The professionals involved in a team must respect each other's boundaries.[13] If conflict develops between fellow professional team members, it needs to be addressed and resolved immediately because such conflict will otherwise derail the entire process.[14] "It is the ability of the team to process these moments of tension and reach a shared understanding that sets a well-functioning team apart from those that struggle and flounder."[15] Also, the professionals involved in such work must be actual peacemakers. Many people claim to be peacemakers merely because they use the right "terminology" and speak (orally and/or in writing) in a "peaceful" manner. Terminology and tone alone do not make something or someone collaborative or a "peacemaker." Training provides tools, but it does not change a person's character. Self-awareness is essential, regardless of a particular person's skill set.[16]

Collaborative divorce is interest- and needs-based, like facilitative mediation. A collaborative divorce commences upon the signing of a stipulation and order re collaborative law case by the parties and all professional team members. Among other things, the stipulated order provides that the parties are not to litigate and that the attorneys may not

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[12] Adriana Galimberti-Rennie, Chartered Psychologist (AFBPsS), *More Training or More Marketing – what is more important for increasing collaborative cases?*, INT'L ACAD. OF COLLABORATIVE PROF'LS (IACP) LINKEDIN GRP. DISCUSSION (Comment) (Feb. 12, 2013), http://www.linkedin.com/groupItem?view=&gid=2936590&item=ANET%3AS%3A210908830&trk=NUS_RITM-title.

[13] Adriana Galimberti-Rennie, Chartered Psychologist (AFBPsS), *More Training or More Marketing – what is more important for increasing collaborative cases?*, INT'L ACAD. OF COLLABORATIVE PROF'LS (IACP) LINKEDIN GRP. DISCUSSION (Comment) (Feb. 12, 2013), http://www.linkedin.com/groupItem?view=&gid=2936590&item=ANET%3AS%3A210908830&trk=NUS_RITM-title.

[14] Christopher Mills, MA, DipHIP, UKCP, *More Training or More Marketing – what is more important for increasing collaborative cases?*, INT'L ACAD. OF COLLABORATIVE PROF'LS (IACP) LINKEDIN GRP. DISCUSSION (Comment) (Feb. 12, 2013), http://www.linkedin.com/groupItem?view=&gid=2936590&item=ANET%3AS%3A210908830&trk=NUS_RITM-title.

[15] KATE SCHARFF MWS & LISA HERRICK PH.D., NAVIGATING EMOTIONAL CURRENTS IN COLLABORATIVE DIVORCE: A GUIDE TO ENLIGHTENED TEAM PRACTICE 112 (American Bar Association, 2010).

[16] Adriana Galimberti-Rennie, Chartered Psychologist (AFBPsS), *More Training or More Marketing – what is more important for increasing collaborative cases?*, INT'L ACAD. OF COLLABORATIVE PROF'LS (IACP) LINKEDIN GRP. DISCUSSION (Comment) (Feb. 12, 2013), http://www.linkedin.com/groupItem?view=&gid=2936590&item=ANET%3AS%3A210908830&trk=NUS_RITM-title.

continue representing the clients if the case falls out of the collaborative process. It may also include a retroactive support provision, pending agreement of the amount, if any. Furthermore, it may provide that if a party is not forthcoming with requested information and/or materials within a specified period of time, the other party may subpoena those records.

In his article titled, "Grab the Life Raft: When Emotions Swell and Threaten Capsize,"[17] Richard F. Lazur, Psy.D. does an amazing job describing the types of clients for whom the collaborative divorce process is inappropriate.[18] His description is as follows:

> If a client is entrenched in an immutable position, closed off from considering possible alternatives, or calcified in a belief system, no matter how competent the mental health provider, that person is unwilling to move. These people are recognized by the rigor, brutality, and callousness of their emotional stance. Elements of cruelty, enmity, and/or sadism as present either in their relations or in representations of their interactions. They are a closed channel. Nothing gets in and change is not possible. While litigation is likely to be drawn out, vicious, and expensive, these people are not good candidates for Collab Law. They only want their way, with no room for negotiation. These individuals experience a significant insult at the very core of their personality. Offended by the failure of the promise of marriage, their dreams have been smashed. Unable to reconstitute their resources, nothing can ameliorate their dissatisfaction. They want to be right and no matter what the 'offending' spouse offers, it is never enough. These are the people who want the judge to side with them and vindicate their experience of loss. They want to win.
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> For the majority of clients, however, who temporarily are thrown off their game by the tsunami of feelings intrinsic

[17] Richard F. Lazur, Psy.D., "Grab the Life Raft: When Emotions Swell and Threaten Capsize," American Bar Association's Section of Family Law 2013 Spring CLE Conference Program: Navigating the Emotional Currents of Collaborative Law (Course Materials) (2013).

[18] For those same reasons, such clients are not suitable for any alternative dispute resolution process, except for private judging.

> in a divorce, the mental health professional is able to lend a hand in their navigation of the emotional currents.

If both clients are suitable for the collaborative divorce process and each of the professional team members is well-skilled and works well with their fellow team members, collaborative divorce can produce amazing results. Collaborative divorce truly does incorporate all of the skills needed to increase the likelihood of a successful outcome for the clients and their family through its interdisciplinary team approach to divorce. It is a family systems and service based approach, meaning that there are value-added inputs being offered to the families that only an interdisciplinary approach can provide. Moreover, it is well suited to any type of family law dispute because most of what occurs is emotionally driven and this process effectively addresses that issue.

I would be lying if I claimed that all of my collaborative divorce cases have been successful. However, the successes have far outweighed the failures. On the rare occasion in which I have had a case fall out of the collaborative process, my former clients subsequently told me that they were glad that they attempted to initially resolve their case in such a manner, with only one exception. Furthermore, on each such occasion, the subsequent litigation was very nasty and protracted because at least one of the clients was unsuitable for the reasons described above. Moreover, my experience has been that the party that left the collaborative process generally ended up with the same or a worse result than that from which they walked away. In addition, that result does not even take into consideration the enormous financial cost of such protracted litigation and the destruction that ensued.

The one exception I mentioned involved both clients who were unsuitable for the process, as well as a dysfunctional professional team. For whatever reason, the communication needed for effective collaboration was lacking. Rather than working together, the attorneys became adversaries. Instead of allowing a professional to trust their instincts, the professionals insisted on "negotiation by committee." Furthermore, the professional team members failed to respect each other's boundaries. Moreover, when conflicts developed between professional team members, they were ignored by the other professionals.

A recent post on the Harvard Business Review Blog Network is titled "Collaboration Is the New Competition."[19] The article states in pertinent part as follows: "While collaboration is certainly not a foreign concept, what we're seeing around the country is the coming together of non-traditional partners, and a willingness to embrace new ways of working together. And, this movement is yielding promising results."

In an article titled "Are You Cooperating Or Collaborating? The Answer Will Increasingly Influence Your Success,"[20] Daniel Burrus wrote in pertinent part:

> The key to successfully co-creating is a strong focus on collaboration…. Cooperating is a much lower level activity than collaborating. Knowing the difference can make all the difference in the results you get with your business partners. You cooperate because you have to; you collaborate because you want to. Cooperation is based on a scarcity mindset; it's about protecting and defending your piece of the pie. Collaboration is based on an abundance mindset, working together to create a bigger pie for all…. When you and I cooperate, we work separately and make accommodations for each other. When we collaborate, we are not simply making room for each other's creations; we are *co-creating* the future together. Collaboration is a function of genuine communication…. Communication fuels collaboration, which fuels more communication, which fuels more collaboration…. There has been a lot of cooperation between competing players in the industry, but not true collaboration. It's still protect and defend, fiefdoms and egos, legacy thinking—all the things that keep abundance from happening.

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[19] Ben Hecht, *Collaboration is the New Competition*, HARVARD BUSINESS REVIEW BLOG NETWORK (Jan. 10, 2013, 9:00 AM), http://blogs.hbr.org/cs/2013/01/collaboration_is_the_new_compe.html.

[20] Daniel Burrus, *Are You Cooperating Or Collaborating? The Answer Will Increasingly Influence Your Success*, DANIEL BURRUS' STRATEGIC INSIGHTS BLOG (Nov. 1, 2012), http://www.burrus.com/2012/10/are-you-cooperating-or-collaborating-the-answer-will-increasingly-influence-your-success.

Some of the advantages of collaborative divorce are as follows:

- Court is not an option. No spouse is allowed to go to court under collaborative law. Therefore, it is a process free from threats of litigation.
- Collaborative divorce incorporates all of the skills needed to increase the likelihood of a successful outcome for the clients through its interdisciplinary team approach to divorce.
- In the collaborative process, each party has an attorney to ensure that any power imbalance is taken out of the process.
- The attorneys for each party are treated as vital parts of the settlement team, not adversaries.
- Parenting decisions put the interests of children first.
- Experts are jointly engaged and serve as neutrals.
- Disputes tend to be resolved much faster through collaborative divorce than through litigation.
- It promotes communication and cooperation.
- It considers the underlying causes of problems and helps find solutions that best suit the parties' unique needs and interests.
- It reduces the conflict between the parties, which benefits them and their children.
- Collaborative divorce meetings are generally held in conference rooms and the proceedings are less formal than court proceedings.
- It is less stressful for the parties and their attorneys.
- The parties themselves make decisions affecting their future and are therefore far more likely to reach agreements that will suit all parties.
- The satisfaction level of the parties is typically higher than for litigation.
- People tend to comply with obligations reached on their own through collaborative divorce more than with those imposed by court order or through "coercive" means.
- Collaborative divorce has been found to be less costly than litigation.
- Agreements reached through collaborative divorce may involve aspects of importance to the clients and which are not within the jurisdiction of the court to order.
- It is a confidential process, unlike court cases, which are matters of public record.

Collaborative divorce also has its disadvantages, some of which are as follows:

- It requires voluntary participation by both parties.
- Case law cannot be created when matters are resolved through collaborative divorce.
- Collaborative divorce requires transparency.
- If the effort to settle without any litigation fails, and few or no issues settle, then both must start with new attorneys and incur fees on top of those generated by the collaborative team.
- There is no way to compel a party to produce documents or information in collaborative divorce.[21]
- A team is only as strong as its weakest member.
- Team dynamics are inherently unpredictable.[22]

Collaborative divorce is inappropriate in those cases in which there are certain levels of domestic violence or child safety issues.

Arbitration

In arbitration, parties present their case to a private, neutral arbitrator, who makes a decision, much like a judge. The parties may hire an arbitrator either to resolve all pending disputes or merely to resolve a single issue that is impeding the resolution or negotiation of other matters. Some such issues are the validity of an agreement and characterization of an asset.

Prior to the arbitration, the parties decide whether the arbitrator's decision will be binding or non-binding. If the parties submit to binding arbitration, the arbitrator's decision will be final. If the arbitration is non-binding, the parties do not have to follow the arbitrator's decision.

While arbitration falls within the parameters of ADR, it is by no means CDR. It is merely an "alternative" form of litigation. Like traditional

[21] However, the Collaborative Stipulation may contain provisions allowing for the use of subpoenas under certain circumstances.

[22] Christopher Mills, MA, DipHIP, UKCP, *More Training or More Marketing – what is more important for increasing collaborative cases?*, INT'L ACAD. OF COLLABORATIVE PROF'LS (IACP) LINKEDIN GRP. DISCUSSION (Comment) (Feb. 6, 2013), http://www.linkedin.com/groupItem?view=&gid=2936590&item=ANET%3AS%3A210908830&trk=NUS_RITM-title.

litigation, it is an adversarial process and therefore a "coercion system." It creates winners and losers, just like traditional litigation.

In any event, the types of issues in a family law matter that may be submitted to arbitration are rather limited. Rule 3.811(b) of the California Rules of Court provides in pertinent part that except as provided in Family Code section 2554, Family Law Act proceedings are exempt from arbitration. California Family Code section 2554 provides as follows:

> (a) Notwithstanding any other provision in this division, in any case in which the parties do not agree in writing to a voluntary division of the community estate of the parties, the issue of the character, the value, and the division of the community estate may be submitted by the court to arbitration for resolution pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, if the total value of the community and quasi-community property in controversy in the opinion of the court does not exceed fifty thousand dollars ($50,000). The decision of the court regarding the value of the community and quasi-community property for purposes of this section is not appealable.
> (b) The court may submit the matter to arbitration at any time it believes the parties are unable to agree upon a division of the property.

Some of the advantages of arbitration are as follows:

- It is usually much quicker and less expensive than litigation.
- It is private, in that there is no public court record.
- Arbitrations are generally held in a conference room and the proceedings are less formal than court proceedings.
- Parties may submit a dispute to an arbitrator without court approval.

Some of the disadvantages of arbitration are as follows:

- Unless ordered by the court in accordance with the Family Law Code, it is a voluntary process.

- It is rare for there to be a court reporter.
- The arbitrator makes the final decision.[23]
- It is an adversarial process, like litigation.
- It creates a winner and loser and other consequences similar to those involving litigation.
- It is not concerned about the particular needs and interests of the parties.
- It does not promote communication and cooperation.
- It does not reduce the conflict between the parties.
- There are few grounds for appealing an arbitration decision.
- Arbitration is generally less flexible and more costly than mediation.
- Many significant issues may not be heard by arbitrators, such as divorce and custody disputes.
- Case law cannot be created when matters are resolved through arbitration.

Private Judging

Private judging is basically the same as traditional litigation, except that the parties pay for and select the judge they feel is most appropriate for the particular case.

The parties, their counsel, and a private judge of their selection may stipulate to the appointment of a private judge. Once filed with the court, the private judge is vested with all of the authority of judges appointed in traditional courts of law. The orders made have the same force and effect as those made by Superior Court judges.

Even though the parties pay for the private judge, they are not paying their attorneys to sit and wait for their case to be called and possibly continued. Furthermore, not all Superior Court judges review the pleadings before a hearing. Since the private judges are being paid by the hour and have lighter caseloads, they do review such documents in preparation for hearings. In

[23] Binding arbitration is more final than a judge's decision because there are few grounds for appealing a decision. Moreover, unless one makes a timely demand for a trial de novo, decisions made in non-binding arbitration may become binding.

addition, hearings may take place almost immediately. During the prolonged ambiguity that occurs before matters can be heard in Superior Court, the parties are experiencing stress, grief, and fear. We must keep in mind that continuances and other delays are not "benign."

Some advantages of private judging are as follows:

- It is usually much quicker and less expensive than having matters heard in court.
- The parties and their attorneys select the judge they want to hear their case.
- It allows for privacy by keeping matters out of the court's public file.
- It provides increased accessibility to the judge and their staff.
- Hearings are generally held in a conference room and the proceedings are less formal than traditional court proceedings.
- The parties have the opportunity to modify the rules of procedure and evidence to suit their needs and desires.
- Judgments are directly appealable.

Some disadvantages of private judging are as follows:

- There is no statutory requirement that a court reporter participate in such proceedings.[24]
- It can be difficult to get private judges to follow the rules.
- Private judges operate without public supervision or safeguards because they cannot be disciplined by California's Commission on Judicial Performance.
- It requires voluntary participation and by both parties.
- It is not concerned about the particular needs and interests of the parties.
- It does not promote communication and cooperation.
- It does not reduce the conflict between the parties.
- It is an adversarial process.
- It creates a winner and loser.

[24] As a result of budget cuts, this is now true in many Superior Courts as well.

Conclusion

Family is forever. While some families are functional and others are dysfunctional, they are still families. We cannot control the actions of others, but we can do or not do things within our control that affect the dynamics of our own family and the families of those who retain us to represent them in their family law matters. When people resolve their disputes through CDR, they work together in an effort to ensure that they satisfy their respective needs, interests, values, and goals, and those of their family as much as possible. Litigation is an adversarial process. Need I say more?

Key Takeaways

- Do not depend on litigation to resolve issues in family law matters—it only exacerbates conflict because so-called resolutions are coerced.
- Always remember that all decisions and actions taken during the divorce proceedings have consequences on the dynamics of the family itself, simply because the existence of children keeps the parties connected. Do not ignore this reality, even if the court does not have jurisdiction over the parties' children.
- Keep in mind that there is a big difference between brokering deals and resolving conflict. The skills and training involved in peacemaking are very different from those involved in lawyering.
- There is a significant difference between a family systems and service based approach, wherein value-added inputs are being offered to the families and the mere brokering of deals.
- The best results occur when we help our clients in resolving their conflicts from the outset.

Mark B. Baer, attorney at Mark B. Baer Inc. APLC, is a family law attorney, mediator, collaborative law practitioner, author, lecturer, and keynote speaker. He has been writing a column on psychology and family law for the San Gabriel Valley Psychological Association's bimonthly newsletter since September 2008. He has also published articles on family law in a variety of well-respected publications. Columnists from the Pasadena Star-News*, the* Los Angeles Times*,* The Wall Street

Journal*, and other publications use Mr. Baer as a resource for their columns. He has been interviewed on KTLA news by Manny Medrano, profiled by the Beverly Hills Bar Association in an article titled "Family Law Par Excellence" and by the* Pasadena Star-News *in an article titled "Finding the Solution."*

Mr. Baer was recognized as a Southern California Super Lawyer in the family law category in 2012 and 2013. On March 23, 2012, he was a keynote speaker at The Divorce Expo, which was a program offering resources and information to the Detroit Metro community regarding positive and future oriented options for divorce. He presented at the 2012 California Psychological Association (CPA) Convention on "What about family values? Facilitating rational problem-solving into an otherwise destructive divorce process." He also presented at the 2013 CPA Convention on "The Cutting Edge of Psychological Practice: Mental Health Professionals and Dispute Resolution." In addition, Mr. Baer was a panelist at the American Bar Association's Section of Family Law 2013 Spring CLE Conference in Anchorage, Alaska. The presentation was titled, "Navigating the Emotional Currents of Collaborative Law."

Dedication: *To Suzanne Lake, PsyD, without whose encouragement and guidance I would never have written anything for publication.*

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