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Changing the default for resolving family disputes in America

By Mark Baer

Like it or not, if there are children of the relationship (regardless of their age), the family still exists after the relationship ends. The manner in which you end a relationship determines whether your family will be functional or dysfunctional from that day forward.

On Nov. 25, 2011, David B. Saxe, an associate justice of the New York Supreme Court, wrote, "[i]f matrimonial lawyers focus on the larger picture, they might recognize they stand to gain more in the long run from the good will and recommendations of satisfied clients following successful mediation, than from the backlash of dissatisfaction in the wake of a typical unpleasant divorce."

Stress is a pain and a pressure that seeks relief, and sometimes, tragically, that release is expressed in violence. The American Bar Association acknowledges that in child custody battles, reports of domestic violence are common, and by some estimates, as many as 50 percent of child custody disputes involve domestic violence. In one month alone, this past October, three tragic incidents made headlines:

* In Dallas, after a court awarded a father sole custody of his 7-year-old boy, the mother shot her son and herself, even as her estranged husband waited outside with police.*

* In New York, a successful attorney, who was reportedly distraught at the prospect of losing custody of his children in an up-coming trial, killed his wife and his children before turning his gun on himself.*

* In Seal Beach, California, Scott Dekraai, a despondent husband who had just faced a court imposed delay in his bid to obtain full custody of his son, blasted into the work place of his estranged wife, killing her and seven others.

While it is facile to argue that such instances can be attributed to the essentially unbalanced state of the individuals, this argument avoids dealing with the fact that the legal system aggravates the possibility that fragile people under enormous stress will lose control. For example, in the Seal Beach situation, Dekraai had just come from a hearing that would have forced him to wait an additional two months for a ruling. Continuances and other delays are typically considered "benign" — but are they, really? Forcing suffering people to endure frustrated expectations and prolonged ambiguity, as the family law system routinely does, is unquestionably — if passively — *malignant*, and can be a real trigger for violent behavior.

In British Columbia, this reality was a factor taken into account in enacting the New Family Law Act.

On Nov. 23, 2011, British Columbia passed the New Family Law Act. Overall, the act structures the law so that court is not the implied starting point to resolve family disputes. Parents will be encouraged to work together to resolve their differences and use family mediation or other assistance where appropriate, taking into account their circumstances and whether there is family violence. In other words, it changes the default process. It seeks to ensure that parents have tried, through mediation, to rectify their differences. The government acknowledged that a marriage break down is often a very emotional time and sometimes an adversarial process that can even lead to domestic violence.

One divorce mediator stated, "I do not think anyone can argue or dispute the massive amount of destruction to assets and children that has occurred in our adversarial system. The courts have been needlessly backlogged with mindless arguments and position bargaining about issues that simply do not belong in front of our Judges. Couples using our expensive courtroom resources to fight their personal battles must come to an end. If we can save one child from the tragic outcome created because of our system and if we can start to empower children of divorce to move through their parents' divorce without emotional harm — then we can start to change the way divorce happens."

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The parties to a family law dispute must comply with the requirements set out in the regulations respecting mandatory family dispute resolution and prescribed procedures.

In her book titled "The Good Karma Divorce," Judge Michele Lowrance, a domestic relations judge in the Circuit Court of Illinois, wrote, "[t]he court system was not built to house these emotions, and attorneys are not trained to reduce this kind of suffering. Divorcing people expect relief far beyond what the legal realm can provide from their attorneys and the courts, and they often end up feeling like members of a powerless, unprotected class."

Unless and until the default process for handling divorce and other family law matters is changed from litigation to some form of consensual dispute resolution, it only takes one person to sink the ship and thus destroy the family. Parents who end up in court are forced into an adversary system that knows little about child development and less about the best interests of children or the family unit. In sum, the adversary system destroys families. No one can expect a couple to effectively parent after being exposed to the court process.

Outcomes are often determined by the way in which the "game" is designed. For example, there are some countries in which close to 100 percent of the citizens are organ donors, other countries that are the reverse, and there is a large void between these two extremes. Most people believe that this is the result of cultural and value differences. Wrong!

In those countries in which most of the citizens are organ donors, the default is that all citizens are organ donors. They are then sent an "opt out" letter. If they bother to read the letter, check the box stating otherwise and return it, they will not be organ donors. In those countries where almost none of the citizens are organ donors, the default is that none of the citizens are organ donors unless they bother to read the letter, check the box stating otherwise and return it.

In the U.S., the default in the legal system is litigation and court. In order to avoid the default mechanism, both spouses must agree to handle their matter outside the legal system through mediation, collaborative divorce, or some other form of consensual dispute resolution. They must also agree on the particular process and the professionals involved. Moreover, they must both actually remain in some sort of consensual dispute resolution process until their issues have been resolved. Otherwise, they revert to the default mechanism, which is litigation and court.

Please note that while litigation is more costly and destructive than handling matters through some form of consensual dispute resolution process, it is much easier. All the parties need to do is throw their money at the lawyers and the "gun for hire experts" they employ and ultimately allow a judge to decide their fate and that of their family. It is much more difficult for individuals in conflict or high conflict to jointly resolve their issues, even with the help of professionals.

As they say, "when the going gets tough the tough get going." What I mean is that unless the default is changed, as it has been in Australia, England, Wales, British Columbia and elsewhere, someone may likely abandon the consensual dispute resolution process as soon as it becomes too difficult for them. This decision to take the easy way out creates a massive amount of destruction to assets and children, and destroys families. We must therefore do what other countries have already done and change the default. One member of the family should not have this much power and ability to cause so much destruction to their spouse and the other members of their family. If the default were mediation (except in those cases in which there are certain levels of domestic violence or child safety issues), I would bet that most people would successfully resolve their matter through mediation or collaborative divorce.

The definition of insanity is doing the same thing over and over again and expecting different results. Doesn't that apply to litigating divorces? Divorce and having children outside of marriage were slowly losing their stigma in the 1960s. The results, from the way in which divorce and family law has been handled since that time, are available and quite clear. If people continue litigating divorces, they will continue creating dysfunctional families. To think differently is insane.

Winston Churchill once said, "Americans will always do the right thing, after they've exhausted all the alternatives." I, for one, believe that we have exhausted all the alternatives and that the time has come for us to do the right thing and change the way in which we handle family law matters in the U.S.

Mark B. Baer *is a Los Angeles family law attorney based in Pasadena. He was trained in mediation by Forrest "Woody" Mosten, and now practices as a mediator, collaborative law practitioner and litigator.*