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CIVILIZED UNCOUPLING: A NON-ADVERSARIAL APPROACH TO DIVORCE

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Abstract

The word divorce can conjure images and expectations of ugly battles and emotional brutality involving parasitic attorneys profiting from the whole process. For many people the only hope for peace is to just walk away without a fight. There is another way for divorcing people. It is possible to get through a divorce and avoid the ugliness. This requires the willingness of the litigant and problem-solving skills of the attorney, as well as judges who demand compliance with court rules and accountability from both lawyers and litigants. Most of all, keeping divorce peaceful requires the viewpoint that it is possible to do so. This article advocates for this perspective.

Keywords: collaboration, divorce, adversarial divorce, partnership and divorce, peaceful divorce, family law

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INTRODUCTION

As a young lawyer beginning a career in family law, I thought that because divorce cases involve litigants who wanted the same outcome (i.e., to end their marriage), these cases would be less combative and less adversarial than other litigation. One of my law school professors had said in a lecture, "No emotions on any battlefield, in any war, at any time in the history of man rival the intense emotions of a couple in the throes of divorce."

I didn't ignore my professor's words, but thought that I could do a better job. I knew I brought a certain skill set to my work: the ability to promote a commitment to resolving rather than fighting. I believed that I could convince my clients that fighting and

winning were not useful goals. Thirty years later, I now say that I was both right and wrong.

Clients are generally open to, even if skeptical about, the possibility of getting a divorce without battling to the end. The system, on the other hand, encourages litigants to prove that the other party is at fault, which promotes fighting in an attempt to gain what they want or need. I remain clear about my responsibility to promote resolution for my clients, even within the system and often in the face of combative opposition. I am in the business of civilized uncoupling. That is the theory anyway: that uncoupling can be civilized. In actuality, a divorce, like the marriage from which it arises, involves a dynamic that impacts all aspects of the case. This paper discusses both the advancement toward and resistance to a partnership approach to divorce actions.

FINDING FAULT

In Michigan (the state in which I practice), divorce is deemed no-fault, which simply means that a person does not have to prove fault in order to get a divorce. However, as in most states, divorce remains an adversarial process like any other civil litigation. A litigant initiates the process by filing a divorce complaint and serving it upon his or her spouse - literally suing the spouse for divorce. This is true for all divorces, regardless of the issues present in any particular case. The only distinction is whether minor children are involved.

Determining fault in causing the breakdown remains relevant for property division and child and/or spousal support, and to a great extent it is these issues that foster fighting in and out of the courtroom. Thus, although the perspectives of judges have evolved, reflecting societal changes especially with regard to women, the process of divorce has not changed substantially. Newer judges bring with them the views and experiences of a younger generation. In the county where I practice, the judges handling family law cases currently are all women - working women, who are less likely to grant spousal support to a woman who does not work. Their male predecessors'

own wives may never have worked outside the home. This is the kind of natural evolution that has taken place in the legal system relative to divorce actions. Very little has changed in response to the glaring problems in the system.

What does get identified as a problem often has to do with who has the problem. Litigants have limited power to effect change in a system designed for attorneys. But once attorneys started specializing in family law as divorce cases became more prevalent, judges' lack of response to the needs of litigants in divorce cases was identified as a problem. Although this had always been a problem for litigants, it only became an identified problem when it became a problem for attorneys. One response to this issue has been the establishment of separate benches to address family law matters.

A SYSTEM DESIGNED FOR ADVERSARIES

The most obvious problem in the area of family law is that the procedural rules within which divorce lawyers and litigants must work are designed for adversaries, while the rhetoric from the bench and bar is that divorcing spouses need to grow up and get along. This paradox is unique to family law; no one tells the litigants in a criminal case or general civil litigation to be nice. Divorcing litigants, however, face the dilemma of how nasty to get with the person they once loved. This conflict generally resolves naturally when both litigants are behaving like adults, or even when both litigants are warriors playing the same game. The worst injustices in the arena of family law take place when one litigant and his or her attorney are proceeding in an adversarial fashion while the other litigant and attorney attempt to take the high road, whether for peace, to spare the children, to decrease expenses, or from personal conviction. This imbalance almost always recreates the bullying that characterized the marriage and that continues as each litigant finds the lawyer to suit his or her cause.

These cases, in which one side wants to fight and prove the other to be at fault, while the opposing side is simply attempting to resolve issues, are destructive to the family but very difficult to explain or justify to the judge. Attorneys can't complain about

the aggressive or adversarial behavior of their opponents. Indeed, the legal culture includes the expectation that a good attorney is capable of being a great warrior. The routine response of the legal system to problems is to create committees. Some family law courts require early intervention conferences in all divorce cases involving children. In my experience, these conferences accomplish very little and no problems are resolved, but the attorneys can bill the clients for attending. The idea behind the early intervention conference was an attempt to minimize the contention of divorces and the strain on the families. It is a good idea in theory, but in practice, it is like telling a new golfer simply to get the ball in the cup, without revealing how to do it. This information is not provided in the legal system, which operates in the opposite direction, as an inherently polarizing process.

How do we infuse and prioritize principles of compassion and fairness in a system that remains adversarial? Advising clients to remain fair and democratic often seems like weak advice. In volatile, even abusive situations, such advice can seem particularly inappropriate. And how do we convince judges to acknowledge the litigant who has not allowed herself or himself to fight?

I do find that clients are able to understand that fighting itself is the problem - they usually know this all too well, and have decided to end the marriage in order to escape fighting. This is how I explain to my clients the outcome I will advocate for: a divorce will be granted, an equitable division of property will be awarded to each litigant, and the best interests of the children will be determined. Reaching that outcome with minimal fighting is the key to a successful divorce and, in my opinion, being able to do so is the most important skill a divorce attorney can possess.

FIGHT OR GIVE IN? FINDING ANOTHER WAY

If all the parties agree that fighting is bad and peace is good, and divorce is the mutual goal, then why is it that my law professor was right? I think the simple answer is that people, particularly those who have a divorce attorney, by and large still believe in maintaining their positions of power in their relationships as an important thing

worth fighting for. Fighting or giving in become two sides of the same coin. Giving in, or as I call it, "feeding the beast", is the tool used by the non-dominating spouse to get the peace he or she wants. Threats are the tool used by the dominator to maintain power. Getting the passive spouse to stop giving in is crucial to resolution because there has been a long history of the dominating spouse holding out until the other caves in. The process of convincing a bullying spouse that intimidation will no longer work can be a long ordeal.

I once heard the word miracle described as a change in perspective. At the risk of sounding like I'm simply advocating getting the ball in the cup, the primary step I take with clients to create the best opportunity for a peaceful divorce is to convince them that fighting does not resolve issues. Fighting breeds fighting and creates attorney fees, period. Attorneys can take advantage of divorcing people's natural tendency toward hurting the other spouse, or they can douse the flames and counsel a client to see the value in remaining focused on the issues. If resolution does not happen, then a trial will be scheduled to accomplish resolution and completion. Any attempts to get the other side to cave in or agree through a campaign of bullying or relentless nagging is always pointless; short-term victories are just that - short-term. With a constant stream of advice, convincing clients not to fight can happen. It does not happen if attorneys advise otherwise, or if judges believe unproven allegations that put a litigant on the defensive. Either of these steps easily escalate a tenuous household in the wrong direction.

If divorce is viewed as a problem to be solved, then problem-solving skills are required of attorneys hired to obtain a divorce for their clients. For those people who view fighting as a viable means toward resolution, then they need to be shown otherwise. Fighting at best leads to winning and losing. Winning in family law means there is a loser, and that includes the children of parents in this type of battle. Advice is what attorneys are selling. Advising a client how to accomplish a favorable outcome without resorting to fighting with his or her spouse should be demanded by litigants.

Judges should be expected to see through attorneys who raise issues that do not deserve the attention of the court.

I have represented many clients who have been advised by their previous attorneys that they should compromise or give in, in order to keep peace or to reach a resolution. Although it may seem counterintuitive, giving in to the other spouse is a bad strategy that, over time, has the opposite effect on resolution. I never advise a client to give up something in exchange for peace - It merely perpetuates the dynamic that wrecked the marriage in the first place. It is challenging to deal with judges who generally do not understand this dynamic or, if they do, seem unable to perceive which spouse is being abusive.

My first step in a difficult divorce case is to explain to my client that disagreements over issues are not what is creating the conflict. Fighting, in and out of court, is about maintaining positions of power in both the relationship and the proceeding. The fact that fault is still relevant allows attorneys to make allegations of wrongdoing. Exposing bad behavior is generally the threat used by a spouse who abuses her or his power. Indeed, most spouses who have been abused do not speak up, for fear of reprisal, while the abusive spouse is permitted to berate him or her in open court. Getting to the truth is impossible with this dynamic in place.

Many of my clients are surprised when I let them know that I do not fight - I will not engage in verbal combat with the other attorney. The only battle that may be unavoidable is at trial, and even then, I do not fight with the other side. Attorneys who think it their duty to fight for their clients usually fail, by overlooking what needs to be presented at trial on their clients' behalf. Clients who are trying to get out of a marriage that has used fighting, threats, and intimidation as a means of getting needs met, maintaining power, and solving problems, can find it hard to accept that fighting is optional. When they do accept it, they generally welcome the possibility of getting a divorce without having to fight their way to the end.

I believe most litigants can understand that fighting is not worth it in a divorce case. Attorneys have a responsibility to explain this to their clients. And, while judges do not need to be convinced of the value of peaceful resolution, they are part of the problem when they do not require accountability from litigants. Litigants need to fully understand that they are sworn in court to tell the truth for a reason, and that lying in a courtroom will result in being held in contempt of court. Judges also need to convey to litigants that the legal system and the divorce process are not a vehicle for exacting revenge. Some judges take the position that there is little they can do in cases involving extreme volatility, but the real reason these cases get out of hand is because of lack of accountability. Lawyers know that they can make unproven allegations with impunity, to please the client or to intimidate the other litigant. Lawyers who do not make allegations they cannot prove or that are not relevant can appear weak to their clients, and even to a court that might expect a litigant on the receiving end of accusations to defend him- or herself against the allegations.

JUDGES AND THE BURDEN OF PROOF

The expectation that a litigant would not make a horrible allegation unless it were true is unique to divorce cases. In general civil litigation, courts expect litigants to make false accusations, and therefore require strict compliance with procedural rules to give the truth the best chance to come out. The burden of proof is an important consideration. However, in divorce cases, the burden of proof may shift to the accused spouse, who falls into the trap of defending himself or herself either because of the dynamic between the parties or because of general human nature. And judges may begin to require the accused person to disprove the accusations, rather than remembering that the burden of proof is on the accuser. In this way, the dynamic of the marriage remains intact in the divorce process.

I am not suggesting that the legal system can right the injustices inherent in a dysfunctional marriage. Divorce itself is the only solution the legal system offers for these situations. But to the extent that judges do not hold individuals, including attorneys, accountable for the truth of statements made in divorce cases, judges contrib-

ute to the degradation of the families who are in their hands. Because of the destruction caused when two people raising children are at war, the litigant who makes allegations against his or her spouse must be required to prove them or remain silent. As long as families are required to participate in an adversarial system in order to get divorced, the same rules of procedure as in any other civil case must be applied. An aggressive, bullying, abusive litigant or lawyer should not be permitted to make unproven allegations, using the welfare of the children as a rationale at the point when accountability is required. Judges must remind litigants and attorneys that accountability is expected, and that if they chose to fight rather than find a peaceful resolution, they need to be prepared for the consequences if they cannot justify the battle they have created. For those litigants on the receiving end of such aggression, they and their lawyers have to demand such accountability.

Everyone knows that peace, mutual respect, and fairness are the ideal means and ends in a divorce case, as in life. Litigants who had none of these even during the best times of their marriage are unlikely to receive them during a divorce. As long as fighting is tolerated, there will be little change to the system. As long as attorneys benefit financially from protracted litigation, change will not be forthcoming. And, to the extent that judges believe that problems can only be solved by giving in or by fighting, the system will not change.

Lawyers, including judges, are frequently drawn to their profession for the very power that a domination model offers. Attorneys benefit financially when cases are more volatile; judges can exert their power when litigants openly fight. Over time it seems that some attorneys have become more cowboys than problem solvers, especially in the domestic law arena, and this suits litigants who have a desire for power. The legal system is not immune to the impact of the values of those people coming into or inhabiting the system. This fact may be the greatest impediment to installing and adhering to partnership principles in the legal process.

On a positive note, it should be acknowledged that participants in divorce cases today at least talk about a peaceful, respectful, collaborative process as the superior path to legal uncoupling. No one has to prove that he or she is entitled to a divorce because of unacceptable behavior by the spouse. No-fault divorce was clearly a good idea. However, the remnants of a fault-based system, in conjunction with the general need to blame the other side in order to prevail in litigation, have contributed to keeping divorce actions adversarial.

I truly believe that we have a good legal system for resolving legitimate disputes. However, there is rarely a legitimate dispute in a divorce case. Fighting, like war, is about power and domination. Until divorce can be litigated with a different process than general civil litigation, it is vital that litigants in divorce cases are held to the same standard as in other civil litigation with respect to proving allegations.

The legal system tends to follow rather than lead the citizens it serves. When families and communities begin to value the power of resolving disputes instead of giving power away to judges and lawyers, the system will begin to evolve naturally into one that rewards resolution and penalizes fighting. In the meantime, I believe it is more likely that the system will continue to change in a positive direction in response to the increasing prevalence of divorce, rather than to any organized effort to improve the system for litigants. Blame seems to be a natural human reaction to a sense of failure. As divorce begins to feel less like a colossal failure, the need to blame the other side will wane and diminish in its relevance in divorce actions.

Gaylen Curtis, Attorney at Law, is a solo law practitioner in Sylvan Lake, Michigan, with a focus on family law. She planned to be a lawyer since she was in high school, considering the profession a good vehicle for combining service with her interest in relationships. She earned a bachelor's degree in sociology from the University of Michigan, and graduated from Wayne State University Law School. She has been an attorney for 32 years. Her personal experience in an abusive marriage gave her an intimate view of the lengths to which abusers will go to dominate their spouses, and what was her generalized regard for the occurrence of abuse of power in the legal world became a focused concern. Her interest in truth and justice and her belief that truth matters in the legal system, as in life, remain intact des-

pite the challenges of her work. Believing in truth requires a great deal of faith. Belief in oneself allows anyone to believe in change; it is this belief that gives her hope for a better legal system for everyone.

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