

Negotiating Divorce Agreements in the 21st Century

The ways in which divorce agreements get negotiated keep changing, and this has especially been so since we crossed into the present millennium. The purpose of this brief article is to offer a checklist of some of the main developments.

The starting point for much of what is happening to negotiating in the 21st century takes us back nearly 40 years to the advent of alternative dispute resolution ("ADR") through the Harvard Negotiation Project. Their initial major work was the publication in 1981 of the groundbreaking bestseller by Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*.

Fisher & Ury laid out three structural principles for negotiating. These are: (1) focus on concerns or interests rather than positions; (2) make it an exercise in problem-solving; and (3) find objective options to resolve the dispute. Although these strategies were not specifically intended for divorce agreements, they have been used widely and successfully in this field. The third edition was published by the Penguin Group in 2011 and continues in active sale.

Here are some of the other concepts that are revitalizing the negotiations of divorce agreements and can easily be incorporated into the practices of every family lawyer, family mediator, and collaborative attorney:

- Familiarity with the range of other alternative dispute resolution ("ADR") techniques that have been developed since the early 1980's.
- The ability to consider future-directed options that may do more than just resolve the case at hand, including financial and/or vocational planning and the means to promote future parental cooperation.
- The involvement of other divorce professionals, including impartial child specialists, vocational counselors, business evaluators, financial planners and mental health coaches.
- A practical plan for the exchange of financial disclosures tailored to the actual information needs of the parties for negotiation purposes.
- Awareness of the variety of useful ideas developed by Bill Eddy for managing negotiations with high conflict individuals.
- Ideas from the best new book on conflict resolution, Dana Casperson's *Changing the Conversation: The 17 Principles of Conflict Resolution*.
- The structural and process ideas in recent books by Forrest "Woody" Mosten and his collaborators. These cover the three areas of family mediation, collaborative family cases, and unbundling.
- Identifying the levels of difficulty among cases by observing how well or how poorly the parties negotiate with each other.
- Knowing how to take advantage of the effective styles of client negotiating and how to move the ineffective ones in more positive directions.

- Techniques to discourage exercises in dredging up fault and blame, since these often only have the effect of focusing discussions in the wrong direction.
- The art of reframing terminology in more positive ways, such as avoiding “custody” and instead using a less adversarial terms such as “parenting plan.”
- Setting a tone of civility by means of empathy, attention and respect.
- Being aware of the stages of the divorce process and how these affect the ability of each party during that process (a) to maintain stability and (b) to negotiate effectively.
- Recognizing how the statutory framework of divorce law often embodies criteria for discretion and flexibility, as well as acknowledging the frequent situations where courts just don’t have the jurisdiction to completely resolve many relevant issues.
- Appreciating the possibility of creative win-win tradeoffs that rearrange the possible settlement terms to better meet the goals of each party.
- Educating clients where appropriate by means of legal, financial and any other practical impartial information, as well as being aware of the limitations and restrictions on this device if the professional is an impartial mediator.
- Keeping pace with ongoing changes affecting divorce agreements, such as (1) relevant research, such as parenting studies; (2) legal changes, such as in the tax laws; and (3) technological developments, such as video conferences.
- Being able to draft agreements or memorandums of agreement in modern readable language that accurately reflects the parties’ agreement and may also be used during the negotiation process to fine-tune those provisions.

The details of over 90% of all divorces in the United States are resolved by agreements. These include those negotiated between adversarial attorneys, with the assistance of mediators, or through collaborative practice. A study of the concepts, strategies and skills of negotiating divorce agreements should be a primary focus (and not just a sideline) of law school courses and continuing legal education programs.

State divorce law clearly remains relevant in these negotiations, and some cases will continue to be resolved primarily by estimates of what a judge might do if the case were decided by a court. If negotiations are based upon only that single focus, however, it could also undermine the possibility of a more creative and lasting agreement that also draws upon some of these other techniques.

This article is not intended to discourage attorneys from using strategies that they have found to be successful a number of cases. It is instead to encourage them to also consider in appropriate cases some newer approaches and options that increasingly are becoming part of the “toolkit” of divorce professionals.

In short, nobody is asking anyone to throw away trusted old tools, but only to consider as well the utility of a full range of newer ones.