Using ADR Ideas to Negotiate Divorce Agreements
By Lawrence D. Gaughan[1]

In negotiating a divorce agreement, it's important to understand how the spouses negotiated with each other during their marriage. If their usual marital negotiations were mostly effective, it's likely that they will find a divorce process that will lead to a fair and workable agreement. When their negotiations during the marriage were primarily dysfunctional and ineffective, it's probable that those marital dynamics will be also mirrored in the divorce process. The result is that they are more likely to experience a destructive divorce – one that is excessively expensive, unduly time-consuming, and emotionally draining.

Spousal negotiations are dysfunctional to the extent that the spouses are ***positional***, ***competitive***, and ***inflexible***. All of these attitudes not only result from, but also add to, the emotional level of the conflict. If one party has typically avoided conflict during the marriage by acceding to the other's control, that party is likely to take his or her resentment into the settlement negotiations. A party in a dysfunctional marriage who selects an attorney will probably seek a lawyer who may appear to support his or her point of view. If so, that attorney might also be positional, competitive, and inflexible. The adversarial system still encourages such negotiating.

Many divorce negotiations are now carried out in a less adversarial process known as ADR (alternative dispute resolution). The two main ADR modes are mediation and collaborative practice. ADR substitutes ***problem-solving*** as the primary means of negotiating. The classic book that reflects this approach is the 1981 bestseller by Harvard professors Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*[2]. The authors base negotiations on the *concerns* or *interests* of the parties rather than their *positions*. They then recommend a problem-solving focus that seeks out objective options to resolve the dispute. This book is an essential basis for most, if not all, ADR negotiating.

Getting to Yes came out near the beginning of the divorce mediation movement, and has been influential in the development of both mediation and collaborative practice. The Harvard Negotiation Project has trained a number of prominent attorneys across America and has published a number of excellent books.[3] A rich trove of other works on ADR negotiation has also appeared since 1981. Before we consider some of these useful books, however, let's take a look at a realistic domestic relation situation that illustrates the difference between dysfunctional adversarial negotiations and ADR problem-solving.

John and Mary have been married for 15 years and have three children ages 13, 11 and 7. John has a degree in accounting and had started a career in that field prior to the marriage. Mary has a degree in computer science and has worked in software development and sales. When their oldest child was born, the parties agreed that John would be the stay-at-home parent since Mary's income

was close to three times that of John's. As each child passed toddler age, Mary urged John to resume his career. John had not liked his work in accounting and felt that the children needed his regular presence at home even after they were all in school. The parties increasingly grew apart as Mary's life became even more centered around her career and John continued to focus his life on the tasks of raising their children. Mary responded to the marital tension by moving out.

Mary consulted an attorney, who advised her to seek shared custody and to employ a vocational expert for the purpose of imputing income to John. Mary was also advised to offer spousal support for a limited duration since John had the education and skills to be self-supporting. The attorney drafted a proposed agreement setting forth these positions.

When John received the draft agreement, he also conferred with a lawyer and received quite different advice. John's was told that he should have primary custody of the children and receive spousal support for an extended period without any present obligation to resume a career. His attorney responded to the letter from Mary's lawyer with a letter stating that the draft agreement didn't furnish a basis for reasonable negotiations. Soon afterward, John's lawyer filed a court case on his behalf alleging desertion, and set an interim spousal and child support hearing.

The arguments between John and Mary over their future roles had existed for years prior to their separation and had become increasingly frustrating and tense. The post-separation exchanges between their lawyers put the case on a course that could easily lead to full-scale litigation. The four grandparents also took sides in the case. John's mother had also been a stay-at-home parent, but both of Mary's parents were successful professionals. Each lawyer focused on the positions that had been worked out with his or her respective client.

Let's suppose instead that both attorneys decided to try negotiating from a problem-solving perspective. What is the problem to be solved? John's attorney might describe it as how to provide stability and proper parental care for the children during a crucial stage in their lives. Mary's lawyer could define it as how to encourage John to take appropriate steps to become self-supporting and to share in contributing financially to the support of the children. Neither side would consider the other's definition of the problem, and certainly not the other's positions, to be a primary basis for negotiations.

From an ADR standpoint, both of the above problems would be addressed in the settlement discussions, as well as many related considerations. John may indeed need to consider a plan to become self-supporting, but it might include obtaining another degree or credential that could lead to a career more in line with his interests. Mary may need to develop a practical plan to become more involved in the regular tasks of parenting, including involvement in school and extracurricular activities. A vocational counselor could be asked to assist John in

his career plans, rather than to serve as an expert witness in support of imputing income to John based a career plan he left years ago and never wished to resume.

Semantics can be important in setting a more neutral tone. "Custody" is an adversarial and competitive term that denotes possession and encourages positions, while "parenting plan" fosters problem-solving. "Interests" can often be reciprocal. It is in John's interest as well as Mary's for him to develop a practical plan for a new career. There are ways in which it is in John's interest to have Mary more involved with the children, and that is also likely to serve the best interests of the children if properly carried out. It may be in the interest of both parties and the children for John and Mary to agree on a plan for divorce and parenting counseling to deal with the transitions in their lives. They may find new ways of relating to each other as their roles change and stabilize. Focusing the discussions on these transitions doesn't automatically settle the case, but it keeps the negotiations on practical details that can be worked out.

In the real world of divorce practice, even those cases that start with the types of dysfunctional negotiating that mirror how the parties communicated during their marriage often wind up settling. This may simply be a grudging acknowledgment of what a court supposedly might do, or a compromise that leaves both parties unsatisfied. If the lawyers are familiar with ADR principles and can use them creatively, the resulting agreement may very well provide a more lasting and satisfactory framework.

This might seem like a good place to end this article, but there is more to cover. It would be a mistake to ignore the richness of the conflict resolution literature that has emanated from ADR experience over the past 35-40 years.

Books and articles about dispute resolution can be mainly *structural* or mostly *illustrative*. *Getting to Yes* is a structural book in that its central focus is a different way of thinking about negotiating, namely as *problem-solving*. If we understand that basic structure, we can comprehend its application in the variety of situations we encounter in practice. If a book is illustrative, it consists mostly of a diversity of examples. Although *Getting to Yes* sets up a structure that is easy to remember and apply, it is also illustrative in that it is packed with examples.

An excellent recent book that illustrates the practical application of a variety of conflict resolution principles is *Changing the Conversation: The 17 Principles of Conflict Resolution*[4] by Dana Caspersen. For example, principle number 10 is to "Develop curiosity in difficult situations." Each such principle has a counter-principle, which for number 10 is "Adopt a rigid stance. Don't try to understand other viewpoints." The book then provides examples of each in an organizational and typographical format that is readily understood. Caspersen's book can easily be used as a handy desktop reference. Although the principles in the book are mostly not original with the author, it's an excellent compendium of ADR ideas. The curiosity to consider options that can serve the interests of both

sides opens up more paths to successful negotiations, as the ADR approach to John and Mary's case demonstrates.

No discussion of ADR is complete without reference to the works of Bill Eddy. Bill is the founder of the High Conflict Institute in San Diego[5]. As both a practicing attorney and social worker, as well as one of the most experienced mediators in the United States, Bill Eddy has made a point of studying high conflict persons and suggesting practical ways to deal with them. High conflict persons are almost by definition positional, competitive, and inflexible. In addition, they become invested in the conflict itself.

A good brief introduction to Bill Eddy's works is *BIFF: Quick Responses to High Conflict People*[6]. "BIFF" stands for his four guidelines for the best ways to interact with high conflict persons: *brief*, *informative*, *friendly*, and *firm*. Since high conflict people are by nature emotionally reactive, it is difficult not to be reactive to them in response. Bill submits that his somewhat contra-intuitive guidelines are likely to be more effective than the emotionally-driven reactions that are commonly provoked by high-conflict persons. He has also written two excellent articles from a family systems perspective as how the legal system's reaction to high conflict people actually encourages them to keep the conflict going.[7] Although John and Mary have competing positions, they are probably not so fully invested in the conflict as to be totally inflexible, especially when they are encouraged to consider some alternative options.

Some other ADR diagnostic models have long since been tested in practice and proved useful. Since the early days of ADR, the Thomas-Kilmann test has been a useful tool for diagnosing the main styles of conflict based upon the interaction between *assertiveness* (self) and *cooperation* (other). If these work together, the result is *collaboration* (win-win) or *compromise* (split the difference). If they do not, *competing* is defined as being assertive without being cooperative, and *accommodating* as being cooperative without being assertive. *Avoiding* is the worst mode, since it neither assertive nor cooperative, and it can easily produce a stalemate that leads to litigation. (The Thomas-Kilmann test can be purchased from their website to administer to oneself, or in proper circumstances, to clients.[8]) Although John and Mary's positions are competitive, they appear more related to their separate interests rather than to a fixed desire to compete with each other. So even a collaborative outcome may still be possible if appropriate options are presented.

Another useful diagnostic model was developed by David H. Olson, Professor Emeritus of the excellent Department of Family Social Science of the University of Minnesota. While Thomas-Kilmann deals with conflict in general, Dr. Olson's model is a family systems structure dealing with negotiation in marriages. It evaluates the levels of two variables in a given family system - *flexibility* and *emotional involvement*. The flexibility continuum runs from *inflexible* to *chaotic*, and the emotional continuum traces the spectrum of

emotional reactivity from *excessively involved* to *rigidly distant*. Effective negotiation takes place in the center of the model, where the couple can negotiate from a state of balanced flexibility and non-reactive emotional responses. Inflexibility is a common and often serious problem in marital negotiating, and this is especially so when it is accompanied by emotional reactivity on either side of that spectrum. (An article explaining Dr. Olson's model is available online.[9]) Although John and Mary's lives have taken them in separate directions, it does not appear that their differences are based mainly on emotional reactivity to each other. Their personal goals in life have become quite different, but they still have the common goal of properly raising their three children. If each of their legitimate interests can be addressed, there is no fixed reason for them to be inflexible.

An online case study compares two difficult actual divorce cases using both the Thomas-Kilmann and Olson models, with each model set forth in color. It is titled *The Sagas of Mr. & Ms. Nasty and Mr. & Mrs. Nice*[10].

Many excellent ADR ideas are relatively simple to remember and carry out. For example, *EAR* (*empathy, attention, respect*)[11] is simply an encouragement to negotiate with courtesy, since even highly conflicted parties react more positively to civility. *Aikido* is a Japanese martial art that relies on using the opponent's strength against him defensively. In a negotiation, it starts with finding an area of agreement with the other side, and then seeks to integrate that into a more balanced and mutual option. A similar tactic suggested by the 17th century French mathematician, Blaise Pascal, acknowledges valid points made by the other person and then considers how they may fit into one's own broader plan. If John and Mary can each be aware of the other's definition of the problem, then they can talk about future transitions that deal with their shared interests. In this way creative options can be found. Such an approach works even better when done with EAR civility.

Basic legal theory provides another approach. Divorce courts tend to look backwards within the scope of their somewhat limited jurisdiction. Courts are not well-equipped to problem-solve. Often they lack the full power to order useful and needed future solutions. When the agreement solely attempts to replicate what a judge might do, the parties essentially function as a two-person court. Unlike courts, legislatures are charged with making rules for the future. Thus when the parties decide instead to act as a two-person legislature, they can put their future planning into a written agreement, even though a court might lack the power to achieve the same result. These future-oriented discussions may address such matters as financial planning, parental cooperation, vocational and educational planning, and tradeoffs among different categories of property. The agreements that result generally supersede state law. Courts lack the expertise and jurisdiction to respond fully to the coming transitions in John and Mary's case, since their optimum agreement needs to include creative future planning.

It is not easy to summarize the best ADR negotiating styles and techniques. They reflect an *attitude* toward negotiating that is only acquired by studying many examples of how they work in practice. Remembering a few simple tag lines is not enough, since many of these books contain a range of concrete examples. Two of the best such books are *Nonviolent Communication: A Language of Life* by Marshall B. Rosenberg[12] and *Difficult Conversations: How to Discuss What Matters Most* by Douglas Stone, Bruce Patton & Sheila Heen of the Harvard Negotiation Project.[13] There are many, many others. Amazon.com is always eager to recommend similar books when one clicks on any of the books mentioned in this article.

Books like these and *Changing the Conversation* are written to be useful in daily interpersonal relationships rather than just for divorce negotiations. Courts are not well equipped to manage human relationships. Even where there are no children of a given marriage, and especially when there are children, effective negotiations require working relationships. It is a good idea for all of the participants in a process that seeks a fair and workable agreement to be aware of a fuller range of tested negotiating styles and models. Many communication problems in marriages are actually negotiation problems. When we consider that ineffective adversarial divorce negotiations are often a result of dysfunctional marital communications, it may help us understand how this relates to the recurring problems of the adversarial system. That in turn gives us tools to make changes in the existing system, and to negotiate agreements in a more effective process.

There will always be cases that have to be litigated. Negotiation, however, is not just the wave of the future, it is the tide of the present. Over 90% of all divorce cases are settled by agreement, either by spouse-to-spouse negotiations, family mediation, collaborative practice, or (most frequently) by attorney managed negotiations. Litigation is the "outlier."

Some of the best divorce lawyers are intuitively skilled in the use of ADR ideas and may have even taken some related courses, although they probably didn't think of them as ADR. It's time for all of the various professionals involved in negotiating divorce agreements to acknowledge their shared interests, even as these diverge professionally. Change takes time, and when it's a paradigm change, it comes from how people interact rather than from new laws telling them what to do. Such a process change requires adjustments in attitude on the part of both divorce professionals and their clients. It doesn't require a legislative mandate.

Finally, this article is not intended to ask experienced divorce attorneys to abandon negotiation tactics that may have achieved positive results in settling their cases. Rather it is about being aware of (1) other useful ways to diagnose these cases and (2) other options for negotiating agreements. There is no supervening reason why the negotiating ideas and skills that have been used

successfully in mediation and collaborative practice could not also be used effectively in proper cases for conventional divorce negotiations. In fact, some respected family law attorneys have been successfully using ADR ideas in their practices for many years. Since most attorneys in divorce law practice settle a high percentage of their cases by agreement, they may thus take this article as a welcome to the shared world of ADR.

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[1] This article has benefited substantially in both substance and style from the edits of four professionals I respect: attorneys Doug Sanderson and Jennifer Bradley, therapist Natalie Goldberg, and my wife Joyce Holly, who is a retired therapist and mental health administrator. Several books were suggested by attorney Charlie Rowan. Any deficiencies in this article remain my responsibility.

[2] The latest edition as revised by Bruce Patton was published by Penguin Books in 2011.

[3] These include William Ury's *Getting Past No: Negotiating With Difficult People* (1993).

[4] This book came out in 2014 and is also published by Penguin Books.

[5] Bill Eddy's books are available on his website, http://ww.HighConflictInstitute.com.

[6] Published in 2011 by Unhooked Books, LLC.

[7] The site for these articles is http://www.highconflictinstitute.com/78-hci-articles/published-articles/196-misunderstandingfamilysystems; http://www.highconflictinstitute.com/78-hci-articles/published-articles/200-misunderstanding-family-systems-in-today-s-divorces-part-2.

[8] The test is available at http://ww.KilmannDiagnostics.com.

[9] Go to http://www.buildingrelationships.com/facesiv_studies/circumplex_article.pdf.

[10] Read this article at http://www.creativedivorce.net/wp-content/uploads/2016/09/2-1-2017-The-Sagas-of-Mr.-Ms.-Nasty-and-Mr.-Mrs.-Nice.pdf.

[11] This idea also comes from Bill Eddy. *It's All Your Fault! 12 Tips for Managing People Who Blame Others for Everything*, 2009.

[12] Published by Puddle Dancer Press in 2015.

[13] Published by Penguin Books, 10th anniversary edition, 2010.