

## Chapter Two

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# **LITIGATION, NEGOTIATION, COLLABORATION AND MEDIATION - SHOULD I WORK IT OUT, OR FIGHT IT OUT?**

### **ALL ABOUT LITIGATION**

Two rational, intelligent, emotionally healthy people getting a divorce wouldn't want to let the court make all of the important decisions about their new, separated lives. Litigation is expensive. Attorney's fees can be around \$400.00 or more per hour, and billable in 15 minute increments. That means that for your attorney to read a one page correspondence from the other attorney, and to mail a copy to you, you are paying that attorney \$100.00, plus postage and copy paper. That is actual money no longer in your pocket. A contested, fully litigated divorce case can easily cost you \$50,000.00, or double that. Each. Why would you spend your children's college money, your retirement or your home equity, to fight with your spouse in court? Wouldn't you rather take a nice, long cruise, first class?

And in court, the judge will probably hear only one or two days of testimony, starting at 10:00 a.m. and ending at 5:00 p.m., with an hour break for lunch. After taking into account each attorney's opening and closing statements, each side only has two or three hours to present all of his or her evidence. Two or three hours for one party to testify, for all

of his or her witnesses to testify, and for any cross-examination of each witness. Based on this “snapshot” of the entire marriage, the judge will then make decisions which will profoundly affect each of you, and your children, for the rest of everyone’s lives. Then the judge and the lawyers all go home leaving you with the result they created.

Litigation is always a gamble. The only certainty is that your lawyers will hit the jackpot if your case is really expensive.

Litigation is an old-fashioned way to resolve disputes. Litigation is a show which you and your cast of witnesses put on for a judge, directed and produced by your attorney. Sometimes the attorney thinks that he or she is also the star.

Litigation is a battle. Litigation is combat. Litigation is a fight to be won or lost. In reality, though, only the lawyers are guaranteed a win, because even if you emerge victorious, the “victory” costs a bundle to achieve. You and your spouse both lose. And if you have children, a contentious, litigated divorce case will cause deep, painful and lasting damage to everyone, including to yourself.

If you are contemplating custody litigation, put this image in your mind: You and your spouse are engaged in a tug of war between your two new homes. The dividing line between your school districts, or perhaps even the state line, is on the ground between you. The middle of the rope is tied around your child, and you are each trying to pull him or her towards your respective homes. Now imagine that the rope is around your child’s neck as you each pull. Get the picture? That’s custody litigation.

**People usually choose to go to court for any one or more of the following reasons:**

**People litigate out of anger.** One or the other person never got out of the anger stage of the breakup of the marriage, and insists on

continuing the fight. The truth is, however, that eventually the person against whom all the anger is directed usually learns to cope with, and tune out, the angry person’s anger, and simply gets on with his or her life. But the angry person stays angry, and that anger eats away more and more at him or her, often turning into illness, disease and dysfunction in future relationships. The nonangry person “wins” by being happy despite all the games the angry person plays, and despite all the turmoil the angry person tries to create.

**People litigate out of fear.** Sometimes a person fears that he or she can’t get by on the offered financial arrangement. He or she thinks the court will come up with a better result. If you combine a fearful client with a lawyer motivated less by compassion, and more by the opportunity for personal financial gain, the attorney could play on those fears and drive up the cost of litigation. Yes, there are some attorneys out there who will do just that. The result is a case that won’t settle for any reasonable resolution.

**People litigate out of greed.** Sometimes greed is related to fear, and sometimes it’s just pure selfishness. “I want . . . I deserve . . . I’m not giving . . . I’m entitled to . . . I can’t afford . . . I earned it or worked for it, so I’m keeping it.”

If one side will not reasonably settle a case, and the battle would cost less than the likely and reasonable potential gain, from a strictly financial analysis, litigation may be necessary. But if you factor in the time spent or missed from work, the emotional cost and the length of time the case will take, the battle may actually not be worth the stress. Sometimes the smarter choice is to just walk away. Don’t kid yourself that “it’s a matter of principle.” “Principle” is just a matter of outlook, and your view may be distorted by emotion or by ego. Your outlook at the moment is just one of many valid ways in which the situation could be viewed. Your view may be wrong.

**People litigate to play the victim.** The human mind is powerful. We can convince ourselves of anything. We can use our minds to create a healthy, optimistic and caring view of the world if we choose, no matter the circumstances in which we find ourselves. Some people going through a divorce choose instead to delude themselves into a belief that they are a victim, and are therefore entitled to significant compensation from their spouse to punish that spouse, or to help ease the pain of their perceived wounds. And no matter what effort the other spouse puts forth to try to resolve the marital dissolution amicably, often the person holding onto a belief of victimhood will choose to not budge from that belief, instead of assuming some responsibility for the situation which has been created. It's easier to blame others, and to maybe rewrite history in the process.

**People litigate for control.** Some people simply have to call all the shots. They will not work anything out. They may have mental health or substance abuse issues. They think they are smarter and better than their spouse and everyone else on the planet. They may appear quite charming to the outside world, but they insist on always getting their way. They may be absolute liars and actually believe their stories. What they want may be totally unreasonable. Angry, controlling, demanding, greedy people with mental health issues, substance abuse issues or inflated ego issues, who have unreasonable expectations of what they could get in court, are not the best candidates to amicably resolve the dissolution of their marriages.

**People litigate for leverage.** Your spouse may need to learn that this time you are serious. If you are on the lower end of a situation where there is unequal out-of-court bargaining power, commencing litigation may serve to strengthen your negotiating position. Your case may even settle well before you and your spouse deplete the family fortune. Perhaps you will employ a neutral third party to evaluate your court case, and to help you and your spouse, each with your respective attorneys, settle the pending litigation. Some groups employing retired judges offer such services, as do the Neutral Case Evaluation and

Settlement Conference Programs of some courts. However, if your court case will not settle, completing the litigation may then be the only way to obtain your best possible result.

### **Here are some truths about litigation:**

#### **Lawyers can argue both sides of anything.**

You may have a “strong” case. That means your lawyer has some good arguments as to why the judge should “rule your way” based on the existing statutory and case law. Meanwhile, your spouse’s lawyer is saying the very same thing to your spouse, because that lawyer can also think up some really good arguments, and can also find some statutory or case law somewhere to support those arguments.

Law is not an exact science. When you go to court, there are several questions which can be asked, and the important questions can be asked in many different ways. You and your spouse will advocate different answers to those different questions. In the end, you may find that the judge’s ruling answers questions neither of you had even asked, with answers neither of you had suggested.

#### **Lawyers are friends, or at least have professional collegial relations.**

The “my lawyer can beat up your lawyer” mentality caters to a mistaken belief that your lawyer is some sort of weapon you can unleash for your personal use. Your very own gladiator. The reality is that most family law attorneys go to the same bar association functions, go to the same continuing legal education classes, have many cases with each other over the years and may even be friends. However, we will still fight the fight and try to win. We may even get ugly with each other, and file cross motions for sanctions, but it’s not our battle – it’s yours. It’s competition to us to see who prevails, but it’s your life. When it’s all over, we lawyers

will take the gloves off, go get some coffee together, congratulate the good work the other did, and refer future cases to each other. We do care about you, your life and your children, and truly do want to help you, but when your case is over, we lawyers go back to our offices and begin to prepare the next case. And your Invoice for Professional Services Rendered.

### **Judges do what they want.**

Sure, we lawyers tell you all about the family laws. You'll learn of the statutory factors, and of the relevant cases the court will consider. You'll hear all about separate property, marital property and hybrid property, or about community property. You'll learn about "imputed income." But you'll also hear that we may have no clear idea as to how the judge in your case will rule on certain aspects regarding the division of your property, and that we may have no clear idea as to how the judge will rule on spousal support, because not all judges rule the same way on the same facts. Ten experienced, conscientious judges, listening carefully to all of the facts of your case, could come up with ten different solutions to your family situation. In the end, the judge will call upon his or her personal beliefs, along with impressions of you, your spouse and of the evidence, and will then do whatever he or she feels is just, based upon the principles which he or she will apply.

You may not agree with the judge. Your lawyer may even tell you that the Court of Appeals wouldn't agree with the judge, but the truth is most divorce cases are not appealed. Appeals cost a lot of money, and of those cases that are appealed, the standard on review is usually an inquiry into whether or not the judge "abused his or her discretion." So even if the judge (in your opinion) ruled erroneously, you'd pretty much have to prove that the judge did so without considering the evidence. Most judges will be sure the record shows they "considered" all the relevant evidence, and that evidence will be considered by the Court of Appeals in the light most favorable to the party who prevailed in the trial

court. It's tough to win on appeal, especially if you are trying to reverse a well-respected judge, who has properly recited into the record detailed reasons for his or her conclusions.

### **No one wins it all.**

In a fully litigated divorce case, there may be ten or twenty or more things for the judge to rule on. The house. The value of the house. The pension or pensions. Separate premarital or post-separation portions of assets. Increases in equity attributable to those separate portions. Post-separation reduction in principle attributable to post-separation mortgage payments. IRAs. Alternate valuation dates. Alimony – permanent, rehabilitative or none. Imputed income. Custody - sole, joint legal, split or shared. Primary residence. Visitation – ninety days or less, ninety days or more; why is that important? Particulars of visitation. Child support. Health insurance. Medical expenses not covered or reimbursed by insurance. Tax exemptions. Tax refunds or further liability. Life Insurance. Debt. All of those items set forth in Appendix 4 of this *Guide*, entitled *General List of Topics to be Resolved*.

Picture a balloon. You squeeze one part here, and it comes out somewhere else over there. You may "win" on spousal support, and then get hit on attorney's fees. The judge may choose your spouse's value for the business interest, and not your value. You may get your separate premarital down payment on the former marital home back, but the judge decides not to also award you the increase in equity attributable to that separate interest, because the resulting division of equity would be grossly unfair.

If you think divorce is a contest to be won in a courtroom, understand that only the lawyers paid to fight the fight really win. Even if the judge grants you your main requests, after the time you have spent, the attorney's fees, the emotional costs and the effects on your family are

considered, you have lost a lot. You may have irreparably scorched the earth you and your children are standing on.

You won't get everything. You'll spend a fortune. You won't be entirely happy with the result, and neither will your spouse. It'll all be over faster than you'd have thought, and you're left with the result. Your lawyer will send you a big bill for all the legal work done, and will move on to his or her next big case. Was it worth it?

*Sometimes it is, usually it is not. What are the alternatives?*

### **ALL ABOUT NEGOTIATION**

Even though you may know what a court would likely award your spouse, you *do* have the right to make him or her work for it. You don't have to just hand it to him or her on a silver platter, with gravy and a decorative little garnish.

If you are going through a divorce, you will want to feel that you have a lawyer protecting your individual interests. Most lawyers will begin an adversarial process, will threaten or commence litigation, will make a variety of blustery arguments to the other side, and will eventually settle your case. Yes, most cases do eventually settle. The vast, overwhelming majority are resolved through compromise.

Settlement is an art. Lawyers practice this art all day long, every day. We don't mind conflict. For us family law attorneys, our professional lives deal with nothing but conflict. We're comfortable with all forms of conflict. We're good at it, although some are better than others. We don't get nervous if the police are called. We can be reasonable, unreasonable, tough, approachable, compassionate or all of those in any one day, or hour, depending upon the cases we're working on. We may settle early on in the case, or on the day of trial.

It is important to have a lawyer who has put your case in the best possible posture for litigation, in order to get the best possible settlement. There is a great variety of attorneys from which to choose, and your choice will greatly affect the strength of your case, and the point at which your case will settle. For more on this important topic, please see Chapter 3 of this *Guide*, entitled *How Do I Choose a Divorce Lawyer for Litigation or for Negotiation?*

However, the point at which a case settles depends largely upon you and your spouse. You are the ones who are trying to find that agreed upon custody arrangement, or happy dollar amount. Regarding financial issues, look at it this way: there is some number which is the most one of you will pay, and there is some number which is the least the other of you will accept. Good lawyers will find that number, and will help you to settle your case for that amount. Better lawyers will move the point of settlement more one way or the other. Even better lawyers will jointly push you together if your points don't quite touch, because the difference between your two numbers is probably less than the cost to go to court. There are a few "bad" lawyers out there who will keep you apart so you will not settle, and so they will get to charge you for a contested case.

Is negotiation with two lawyers the way to go? Let's see. You tell your attorney what you want. Your attorney writes something up for you to review, then confirms that it is exactly what you want. Then your attorney sends your proposal to the other attorney. The other attorney tells your spouse what you want. Your spouse tells his or her attorney what he or she thinks of your proposal, and that attorney and your spouse verify that your spouse's attorney understands your spouse's response. Your spouse's attorney then tells your attorney what your spouse thinks of what you want. Your attorney finally tells you what your spouse thinks about what you want. You do this thumbs up/ thumbs down over and over again, addressing item after item, perhaps one item at a time, slowly moving closer to a resolution.

For some the back and forth exchange described above may be the best way to safely resolve those matters which can be settled relatively easily, while advocating your interests in the tougher areas. However, you will almost certainly each be billed the time for every telephone call, letter, email and document preparation, plus for postage, photocopies and fax paper, as your attorney acts as your mouthpiece. Wouldn't it be less costly for all four of you to communicate within one room? Or maybe, better yet, for you and your spouse to actually communicate directly with each other?

Sometimes, however, you and your spouse can not communicate with each other. There's still a bit too much anger. If you are intimidated by your spouse, the playing field may not be level. Maybe you never did learn how to communicate, and that's why you're getting divorced in the first place. You may therefore have no choice but to litigate, or to negotiate.

Before entering into involved settlement discussions, and before running off to court, it is essential that you first become informed as to the law, as to the divorce process and as to what is reasonable to expect. You may find that creative solutions are generated through nonadversarial negotiation in attorney-to-attorney exchanges, or in four-way conferences. You may even possibly find that if you participate in the litigation process, the litigation might proceed smoothly, professionally and without animosity.

### **ALL ABOUT MEDIATION**

Not everyone getting a divorce feels that they have to hate each other. You don't have to become enemies just because you can't live with each other anymore. You may want to remain friends when it's all over.

If you and your spouse can communicate with each other, and if you both want to take part in creating your future, together you can decide how to settle everything. You can even be creative, and can make limited preliminary agreements to release money in part, or to just sell the house. You can make partial agreements. You can experiment with custody arrangements, through short term or temporary agreements, to find out what works best.

Litigation is a poor and rather outdated way to resolve family disputes. Litigation will usually hurt you in some way. Hiring attorneys to fight your fight in court is expensive, antagonistic and causes lasting animosity. You and your spouse lose all control over your lives, and the money you are fighting over goes to your attorneys instead of to you. The result will be dictated to you by a judge, who is a stranger to your family.

If you choose instead to work out your case through alternative dispute resolution, you can achieve results tailored to your special needs, you will probably both be happier, and you and your spouse will be much more likely to resolve future problems amicably. You may each even choose to be generous. You might still even like and respect each other when it's all over.

If you and your spouse can communicate with each other, and would rather your money go to your own family and not to your lawyers' families, you may want to consider mediation. If you can work it out, it will work for both of you.

You may each hire separate lawyers, just to provide individual legal advice and information to you. That advice and information will form a basis for the decision-making in mediation. You may then ask your separate attorneys to review, and to comment upon, a proposed draft Mediated Agreement prepared by the mediator, which Agreement you feel ready to sign, to ensure that the Agreement is in your best interests, and that it covers all of your interests.

If you mediate your divorce, you and your spouse will sit at a table with, or in the office of, an experienced, neutral third party. This mediator will help you to resolve your differences.

First, you will have an initial discussion to make sure you and your spouse understand the style of the mediator, and what he or she, or occasionally a pair of comediators, can do for you. Is the mediator's style purely facilitative, helping you to determine only what you voice as important to you, without mentioning those matters you haven't thought of, or of which you are not aware? Evaluative, letting you know what the mediator believes a judge would be likely to do? Directive, trying to influence or advise one or both of you, perhaps improperly? Transformative, trying to help you to see things in a new light? Faith-based, where Christian biblical or other religious principles may be considered and referred to in the resolution of your differences?

Or Informative, where the mediator will give you a lot of information about the law, about what topics you need to address, and about what options you have? Where you will both be provided, right in front of the other, with the legal information attorneys separately representing each of you would likely provide? Who will then write up a binding and enforceable settlement of your divorce?

At the commencement of the process, you and your spouse will each describe the situation to be mediated from your individual perspectives. You will then each identify your respective concerns, and will summarize and order those concerns. To gather some momentum, you may then identify common ground, or you may start right with the problematic areas, and the rest will fall into place.

You may need to obtain further information regarding the values and division of some of your assets, such as your house, the retirement plans or maybe a business. You and your spouse may decide to meet, either together or separately, with a trust and estate attorney, tax accountant,

financial planner, retirement benefits specialist, mortgage lender and/or family therapist, to discuss and generate options, or to obtain individual advice. Or you may choose instead to involve any of these specialists in the actual mediation sessions.

Understand that you must voluntarily share information, including statements pertaining to all of your assets and pertaining to all of your debt, since mediation requires full disclosure. If you do not fully disclose all relevant information during the process, the Agreement you sign off on in the end could be voided by law.

After all information is disclosed and analyzed, you will then each propose possible solutions in the areas where you are not in agreement, and will evaluate those options. Your interests will be discussed. The mediator may have some ideas as to possible solutions you hadn't even thought of. Maybe you will think about how realistic some of the proposals are should the case go to court.

You will decide upon solutions where possible, and the decisions will be embodied in a document. You may then each go to your separate lawyers to see if you all missed something, or to make sure the document protects you. If it does, you sign and you're done. All that is left is for one of you to then go to a lawyer who did not mediate for you, and to file the actual divorce case in the court. Your Mediated Agreement will become a part of the final divorce order.

Mediation should be a confidential process, so that you and your spouse can explore the widest possible range of settlement options. You should feel free to take conciliatory positions in mediation which you would not take in court. You should not be made to fear that if the mediation fails, either of you could go to court and tell the judge what the other would have agreed to in mediation. The Agreement to Mediate you will sign should state that the mediator, and the mediator's notes, can not be subpoenaed for court.

Chances are excellent that if you and your spouse are both committed to working it out, you will. You will fashion your own solution, instead of leaving it to the courts. You will both take control out of the judge's hands, and will put your life's new direction in your own hands. You will not be stuck with a binding court order, without first having worked out what is best for you.

There is a great variety of mediators from which to choose, and your choice will greatly affect how your mediation progresses. For more on this important topic, please see Chapter 5 of this *Guide*, entitled *How Do I Choose a Family Law Mediator?*

### **ALL ABOUT THE COLLABORATIVE PROCESS**

You may feel, however, that you need someone “on your side” protecting your individual interests, and that the mediator is too neutral for your liking. If you are in an abusive relationship, mediation may be inappropriate. You may want a lawyer to help you, but you “don't want it to get adversarial.” You may then want to explore the possibility of resolving your divorce collaboratively.

What is a collaborative divorce?

Collaboration is like mediation, in that you are working to privately settle your differences outside of court, except you each have your own lawyer protecting your individual rights and supporting you, and you won't even make threats about what you could do if you don't settle. All four of you are committed to working out your differences without fighting it out through litigation.

The collaborative process essentially involves a series of sit-downs with you and your spouse, along with each of your attorneys. You approach the dissolution of your marriage in a creative, problem-solving way, not in a combative way. No one is trying to grab all of the marbles; you are

simply working it all out. If you can't work it out, you have to go get new lawyers to do the combative lawyer thing, but if you do work it out, your lawyers can complete the divorce in court.

The attorneys must be trained in collaborative practice. However, there are no set rules governing how collaborative cases must be handled, other than a requirement that you, your spouse and your attorneys all sign a four-way Collaborative Contract, whereby you all agree to do a collaborative divorce. **That contract must say that if the collaboration fails, you will each have to go get new lawyers.** Any other requirements as to how the process is best handled relate to the preferences, expertise and recommendations of the collaborative attorney.

The disqualification of the attorneys if the case doesn't get worked out, and winds up in court, is what makes the case a collaborative case. If your Collaborative Contract does not contain a provision stating that the attorneys can not represent you anymore if the collaboration fails, your case may be a negotiated case which may settle without going to court, or a “cooperative” case, but not a collaborative case. You may choose to use a team model involving neutral financial and mental health professionals, or you may choose not to. Either approach is valid, and either approach may be the right approach for you.

The Collaborative Contract will usually also state that during the process, you won't make threats about what you could do if you decide later on to go to court instead of settling. During the collaboration, your attorneys may each advocate for you, and may separately advise you, but will not be adversarial or combative. You are all there strictly to work things out. However, if you just can't work it all out, you can always terminate the collaborative process, and can then go to court with new attorneys.

If you and your spouse each know from the outset that you want to do a collaborative divorce together, you will each sign a Representation Agreement with your respective attorneys, hiring your attorneys for collaborative representation.

If you want to do a collaborative divorce, but are not sure your spouse is willing, you or your attorney could give your spouse information about the collaborative process. You may also provide your spouse with a list of collaborative attorneys in the area. Your attorney may recommend a few specific local collaborative attorneys with whom he or she is comfortable collaborating, because those attorneys will approach the process in the same way as your attorney. Generally attorneys in the same geographic area will collaborate in similar ways, and will know each other pretty well.

Once your spouse is on board, and has hired an attorney for collaborative representation, there will be an overview by each attorney with his or her client describing how that attorney conducts his or her collaborative practice. The two attorneys may have also collaborated together previously on other cases, and will set the parameters with each other as to how they will work together.

In separate meetings, each of you, with your attorneys, will go over your respective concerns, and will review the applicable law. In the Collaborative Process, just as in litigation, in negotiation or in mediation, it is still very important to know the applicable divorce laws of your state, and how they would be applied by your local courts. You will then each prepare for your first four-way meeting, and will each review the Collaborative Contract with your attorneys prior to the meeting at which the Contract will be signed.

Prior to the first meeting, the lawyers will also touch base with each other as to what will be addressed at that meeting, but they will not strategize as to the outcome. Perhaps there are some pressing issues

which need to be addressed early on in the process to protect each of you, such as the filing of a support motion to preserve the retroactivity of support, or the submission of an agreed order restraining the dissipation of marital assets. Your rights should not be compromised in any way due to your participation in the collaborative process.

At the first meeting, the process and confidentiality issues will be discussed, and the Collaborative Contract will be signed. You will each present your concerns, emphasizing any immediate priorities such as custody or visitation, and will discuss and agree upon the participation of any third parties in the process. Information will then be gathered, and will be shared at subsequent meetings.

As with mediation, together you will generate, evaluate and agree upon workable options during the process. You and your spouse will each meet with your individual attorneys between meetings, and the lawyers will also touch base between meetings. They may even prepare Minutes of each meeting to clarify what was discussed, and may prepare Agendas after each meeting to clarify what will be addressed next. Eventually a Collaborative Settlement Agreement will be drafted by one of the attorneys, and will be signed by you and your spouse. The attorneys will then prepare the court papers to finalize the divorce, along with any necessary retirement court orders.

The collaborative attorneys handling your divorce may involve other professionals in the collaborative process, such as financial specialists and mental health specialists. Some collaborative attorneys will speak of “allied professionals,” or “consultants,” to describe the non-legal professionals or experts who may be a part of the process. You and your spouse may meet together with a financial specialist, or with a child specialist, outside of the four-way meetings, without your attorneys present. Or you may choose instead to involve the non-attorney professionals in the four-way meetings.

You may choose to each have a personal mental health coach available for you until the process is completed, to help you be strong, to help you participate effectively and to help you clearly convey your interests. You may choose to have one mental health professional work with both of you, to help create a deep and clear understanding of each of your thoughts. Coaches can assist you in moving forward constructively, so that you and your spouse will be better able to parent your children together in the future. Or you may choose to proceed without the participation of any mental health specialists at all.

Any neutral professionals you choose to involve in the process will each sign a Participation Agreement, which Agreement will address confidentiality issues, and will address the open sharing of information. Each Agreement will also state that the professional will be barred from testifying in court if the case does not settle. The ethical requirements binding the professional may also prohibit that professional from being able to help either of you in the future after you are divorced.

As with mediation, collaboration requires full disclosure. Some collaborative attorneys feel the process should be so transparent that the lawyers won't even advise their clients as to strategy, or as to the law, unless the other party and his or her attorney are also present. Other collaborative practitioners feel that an attorney can be an advocate for his or her client's interests without being adversarial, and will hold separate meetings with his or her client to strategize, and to address the client's concerns, throughout the process.

As with the use of the mediation process, if you and your spouse are serious about settling your case using the collaborative process, you will settle. Also, as with mediation, collaboration is respectful, private, more economical than litigation, more dignified than litigation, and will certainly preserve your family relationships while resolving your marital relationship. The process, however, is not inexpensive. The benefit is that you have the opportunity to gain deeper insight into some of the

emotional, psychological and financial issues surrounding the breakup of the marriage than you would have gained using traditional negotiation. You can then use that insight to determine how best to move forward.

There is a great variety of collaborative lawyers from which to choose, and your choice will greatly affect the speed, the cost and the approach taken in your collaborative process. For more on this important topic, please see Chapter 6 of this *Guide*, entitled *How Do I Choose a Collaborative Divorce Attorney?*

### **SO SHOULD I WORK IT OUT THE EASY WAY, OR FIGHT IT OUT THE HARD WAY?**

Your case may address the division of large business interests involving government contracts, protective orders and nondisclosure agreements. You may be dissolving a large asset marriage encompassing multiple properties, and numerous investments. Or you may have a "garden variety" divorce involving a house, some retirement, two or three cars, spousal support and some credit card debt. Perhaps you are mainly concerned with trying to find out what is best for your children.

In any of these cases, mediation or collaboration, possibly involving a mutually agreed upon financial analyst, retirement benefits specialist or child psychologist, can be the best way to go. The costs and animosity will be significantly lower than if you were to litigate. You will be fully informed.

Nonadversarial mediation or collaboration is more private than the spectacle of public litigation, and you and your spouse most definitely have a much better chance of getting along with each other when it is all over. You will have the opportunity to test ideas out during the process, which can help you to fine tune and tailor the solutions to your particular situation. You may even develop and learn better ways to communicate with each other, and to resolve future difficulties amicably.

However, you may have no choice but to fight. *You* may want to settle, but your spouse won't. Perhaps he or she is being aggressive, passive-aggressive or just downright unreasonable.

If you are dealing with an abusive or controlling spouse, if there are mental health or substance abuse problems, if your spouse is making grossly unfair or no offers of settlement, if your spouse's participation in mediation or in the collaborative process would only be in bad faith, or if you really want to "have your day in court" you may have to go down the tough path of adversarial litigation, or of aggressive negotiation.

Most important of all is that you shop around, talk to attorneys and to mediators, and choose the person with whom you feel most comfortable to guide you down whichever path you take. In a very real sense, you will be placing your future, and all that you hold dear, in that person's hands, as he or she helps you through what may be the most difficult time of your life. If you can not work with your attorney, your attorney can not work for you.

Live your life, and make decisions based on what is best for you and for your children, not necessarily based upon "how it will look in court." Granted, you do not want to jeopardize your case with damaging courses of action, but don't damage your life because you were worried about how a course of action might play out in court. Remember that if you wind up in court, lawyers can argue both sides of anything. We can also take the facts before us, find the good in a situation, and cast what we have in the best possible light.

No matter how tarnished you are, we'll manage to make you shine.



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