

PERSPECTIVE

Defusing the Matrimonial Minefield

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WHEN A MARRIAGE breaks down, two decent and honest people can become deviant and rapacious. If children are involved, the divorcing man and woman may lose sight of the fact that they will have to continue to parent together after the divorce. Lawyers will lead the parties through the legal and financial minefields. But early collaboration of a mental health care professional with the attorney may help the parties avoid blinding, self-destructive volatility.

Families facing divorce take on the attributes of a dysfunctional family, a term now common in popular jargon. A dysfunctional family is one that is either incapable of working towards common reasonable goals, or one which is not meeting the needs of its members. In divorce, the disputes can reach monumental proportions regardless of the legal issues involved. The parties often seem fixed on short-term, one-sided gains and all-out victory without regard to the emotional or legal cost.¹ Families like this are commonplace in the courtrooms and the offices of matrimonial lawyers. The constraints imposed by the need to work toward common goals, even those constraints imposed by the presence of children, slip away, yielding to an every man or woman for himself or herself or frankly Machiavellian atmosphere.

As a matrimonial lawyer and psychiatrist, we have collaborated on a number of matters, which have included both pre-divorce and post-divorce disputes. We believe that such a collaboration can help temper the power of a divorce to stimulate regressive, paranoid and infantile behavior, even when such behavior was apparently not there before.

The destructive potential of a divorce can be enormous. Atypical, perhaps, but not unique is the case in which an intelligent well-educated husband and wife with four successful children embarked on a five-year litigation, which pitted child against parent, sibling against sibling and consumed one month of court time. The behavior of the spouses descended to the point at which the wife attempted to hire someone to kill the husband.²

Or take the case in which a world renowned musician, upon separating from his wife, was faced with a custody dispute of such resolute bitterness that it required a 30-day trial to establish unsupervised visitation. Here, a man who had access to his children before the marital strife began, faced a battle to attain something he had had, just months earlier.³

In a hostile marital dissolution, an early collaboration between the legal and psychiatric professions can help construct more strategic, compassionate and goal-oriented communication between spouses. We see this early phase of discussion as pivotal to the quality of the post-divorce relationship. Emotional wounds left untreated during a divorce can leave a residue of bitterness and rage and lead to retaliation that goes on after the divorce for years to come, often drawing in and further hurting the children and at the same time preventing the former spouses from establishing their new lives.

THE CASELOADS OF our matrimonial judges, especially in New York and its close suburbs are staggering. Litigants line up for what are often long trials, often not because of the legal issues, but because of the emotional and psychological dimension of what takes place in a divorce action. At these times, there is a need for psychological awareness and intervention, a need that is usually not met. When psychological issues are considered, they most often center on the interests of the child. But the focus should be on each member of a divorcing family. An early, collaborative intervention may help prevent the toxicity of the divorce from invading the ethics and judgment of family members and allow the parties, lawyers and courts better to focus on a constructive termination of the marriage.

Parties in a divorce often tend to see the situation as zero-sum game. The fight for victory between the spouses may or may not produce a winner and loser, between them. But it will inevitably produce compound losses to the children. Because children will always need to, and want to, love both their parents, they would, under these intensely hostile conditions, find themselves in what psychiatrists call a double-bind. They would appear to support (but privately resent) the winner, while experiencing intense debilitating guilt toward the loser.

Research by two psychologists, Judith Wallerstein and TK Kelly, supports the view that the greatest damage to children is caused by those forces promoting ongoing bitterness between divorcing parents. If a divorce dispute ends up in a sharp contrast between the apparent outcome for the mother and the father — where one seems socked with an unfair result — there runs a much greater risk of anger for years to come. A resolution in which both parties share in the financial and emotional loss can produce an outcome that the parents are better able to put behind them and a legacy that will not cause children to forever wince in pain. Under such circumstances, the prognosis for a healthy post-divorce relationship is good.

For matrimonial lawyers to help create an atmosphere in which sensible negotiations can take place — to help deinstitutionalize the adversarial nature of the proceeding — they might find it useful early on to collaborate with mental health professionals experienced in marital issues.

The experienced professional would be retained by, and work with, the family, not just one of the parties and his or her lawyer. That might aid in establishing positive, result-oriented mediation and negotiating strategies and ground rules that benefit all family members, not just the parties. It would lead to a consideration of goals which include the needs of all family members. And in a bitterly contested matrimonial dispute where legal fees run high, the services of the mental health professional could end up saving the parties money.

Before we began our collaboration, as an attorney, I found that many resolutions reached in the cases represented by my firm were the result of long, arduous litigations that left many painful memories for the litigants and their children. By contrast the cases in which collaborations were a reasonable alternative, we have achieved solutions that were more genuinely the result of thoughtful discussion and compromise. Litigation was avoided, and in one instance the divorce did not take place. And, perhaps most fortunately, the children were the beneficiaries of decisions reached by a better functioning family.

(1) In a recent two-part article authored by Justice David B. Saxe, one of the four matrimonial judges sitting in Supreme Court, New York County entitled "Reflection on Matrimonial Lawyers, Judges and Practices," Justice Saxe noted the magnitude of the cost of litigated matrimonial actions writing:

The final and perhaps most overwhelming problem for all cases is the enormous cost of a fully litigated equitable distribution case . . .

The attorney fee's honestly accrued in a litigated matrimonial action are far beyond what the ordinary middle class citizen can afford . . . Too often, the cost of expert witnesses — plus the combined attorneys' fees are more than enough to confine the entire marital estate.

"Reflections on Matrimonial Lawyers' Judges and Practice Part I" NYLJ, Jan. 8, 1993, p. 2 C 3-5.

(2) In *Gordon v. Gordon*, NYLJ, March 10, 1992, p. 22 col. 4-6, the court found the wife to have attempted to hire a "hit man" to kill her husband, a senior partner in a major New York City law firm and took such conduct into account in distributing the parties' assets.

(3) *Doe v. Doe*, 86 Misc2d 194, 338 NYS2d 194 (Family Ct. N.Y. City, 1975).

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