

COURT CLOSURES AND CONSENSUAL DISPUTE RESOLUTION

By Franklin R. Garfield

The Supervising Judge of the Family Law Departments of the Los Angeles Superior Court has recently announced a back log of 32,000 cases that await a hearing. That back log is increasing at the rate of 100 cases per day. When the Court reopens, priority will be given to various categories of cases. This will prolong the waiting time for those family law cases that are not entitled to priority. In the current climate, estimates of when a case will be heard are unreliable; it could be many months, a year or even longer before the Court is able to catch up.

One option is to hire a private judge. As a practical matter, exercising this option is limited to couples who are both interested in a prompt resolution, agree that the issues must be resolved by a third party decision-maker and can afford to pay the related cost. In a substantial number of cases, one party may not agree that the issues must be resolved by either a public or a private bench officer and may accordingly be unwilling to address those issues sooner instead of later in the context of an adversarial hearing. Affordability is usually a shared concern for all but the most affluent couples.

While the potential threat of sanctions for litigation conduct that frustrates settlement is a factor to be considered, there is no assurance whatsoever that a judge would impose such sanctions on a party whose only “offense” was declining to hire a private judge.

The partial closure of the Court because of the coronavirus outbreak, the limitation on the Court’s ability to process the crush of cases when it reopens, and the inevitable delay in the administration of justice all militate in favor of the parties and their attorneys evaluating the suitability of every case for some form of consensual dispute resolution.

Historically, the growing prominence of consensual dispute resolution is attributable to many factors. Among them: The high cost of litigation, the collateral consequences of adopting an adversarial approach to the dissolution of a marriage, and the fact that way over 90% of all family law cases are settled prior to trial.

There are two fundamental principles that justify and support the adversarial model. First, the assumption that the parties have conflicting interests and, second, that because of those conflicting interests, the belief that the parties must have separate representation.

Based on these two principles, the mindset of a divorce litigator is to get as much as possible for the client he or she represents, and to give as little as possible in exchange. The adversarial model thus produces a wide range of possible results; in many instances, that range is too wide to compromise; and it is more likely that the parties will need a third party decision-maker.

It is of course possible to emphasize the parties’ conflicting interests and to adopt aggressive positions on their behalf. However, in most cases, the parties have many more interests in common. They want to be fair; they want to minimize the financial and emotional cost of their

divorce; they want to avoid adversely affecting their children.

Before the parties commit to having a trial – whether before a public or private judge – and even before the parties conduct the formal discovery necessary to prepare for that trial, their lawyers should encourage them to get into mediation.

There are many mediation models. A model that is firmly grounded in California law is most likely to be helpful to parties who are otherwise heading for trial. California law may be regarded as a framework that the parties can use to organize their discussion, or the default if the parties are unable to agree on a resolution of any given issue that they prefer. Either way, it enables the parties to resolve most issues if what they are being told about California law emanates from a neutral.

Unlike an attorney who is looking at things from the point of view of the party he or she represents and is motivated to adopt extreme positions based on a variety of professional considerations, a mediator is able to provide the parties with a more objective analysis of how the laws of the State of California apply to the facts of their case. The mediator's analysis may not yield a definitive result; however, it is virtually certain to narrow the range within which the parties' negotiations will take place.

A mediation model that emphasizes the parties' feelings and notions of fairness will be less helpful to parties who are attempting to avoid a trial; particularly if those parties are represented by counsel. The fundamental problem with that model is that the parties are led to believe by the mediator that their feelings and notions of fairness control the outcome of the case. This gives the parties permission to say: "We are in mediation. We do not have to follow the law." On the one hand, this is true. The parties have no obligation to follow California law if they agree otherwise. On the other hand, most experienced mediators will attest that the parties often end up following the law because they cannot agree otherwise.

It is a truism that both parties want to be fair; at least they say they want to be fair. However, they have different notions of fairness. The parties also have different feelings about the history of the marriage, who is to blame for the failure of the marriage and so forth. Each party is entitled to his or her feelings; however, a party is rarely willing to prioritize the other party's feelings over his or her own. Using California law to organize the parties' negotiations avoids the pitfalls of a mediation model that provides the parties with no objective standards for their decision-making process.

Enacted in 1970, the Family Law Act has been amended with some frequency, and the nuances of California's divorce laws have been refined in many hundreds of appellate decisions. These days, the number of issues that are legitimately subject to dispute are few and far between. In the vast majority of cases, an experienced family lawyer who serves the parties as a neutral can tell them how the issues in their case are likely to be resolved. While the result of going to Court and letting a judge decide could produce a result that is a little better or a little worse, the potential upside to either party is almost always dwarfed by the cost of litigating the issues through trial.

There are at least two reasons to involve a mediator whose focus is California law. First, it enables the parties to hear how a neutral sees the issues; the way the mediator sees the issues is likely to be closer to how a judge sees the issues than to how either party's attorney sees those issues. Second, it provides cover for attorneys who may have previously allowed the parties to believe that they are each likely to end up with a best case scenario.

Since each party's best case scenario is the other party's worst case scenario, it may be awkward for the parties' attorneys to back off from an analysis that was made at an earlier stage of the case. It is not uncommon for a mediator to explain a principle of California law that comes as a surprise to at least one of the parties; sometimes both.

There is no particular magic to what a knowledgeable and experienced family law mediator does. An experienced and knowledgeable divorce litigator could do the same if he or she were not disabled by the belief that an adversarial lawyer's job is to get as much as possible for the client he or she represents and to give as little as possible in exchange. This necessarily commits the lawyers aggressive positions that frustrate the policy of the law to promote settlement.

To be sure, there will always be cases that must be tried. When the facts are disputed, there are unresolved issues of law, or one of the parties is being wholly unreasonable, and the amounts involved justify the cost of litigation, going to trial may be the only option. The vast majority of cases can and should be settled early in the process instead of on the verge of trial. Promoting consensual dispute resolution will help to achieve that goal.

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