

Cooperative Divorce

BY JAMES R. SKIRBUNT

Once the decision has been made to end the marriage, the most important question to be answered is “how” the parties will go about it. Increasingly, divorcing couples seek options to traditional divorce litigation in order to be able to customize the outcome to the needs of their family, and, to avoid the economic and non-economic costs associated with such litigation. Responding to the demand for alternatives to litigation, Cooperative Divorce is the latest development in the divorce alternative dispute resolution arena.

Co-created by Cleveland lawyers James R. Skirbunt and James S. Cahn, Cooperative Divorce provides clients with the flexibility to choose from among all of their options in creating a process that suits them. They select, both, the Negotiating Model and the Dispute Resolution Mechanism with which they are most comfortable. The choices for the Negotiating Model include: four-way meetings with the parties and their counsel (either required, or as requested by either party); mediation; facilitation; or, early neutral evaluation. The Dispute Resolution mechanisms include: arbitration; use of a private judge; cooperative litigation; and parenting coordination. Clients are free to “stack” their choices. For example, the negotiating model can specify four-way meetings as requested, followed by mediation, before proceeding to the dispute resolution phase of the process.

The linkage between the Negotiating Model and the Dispute Resolution Mechanism is the distinctive characteristic of Cooperative Divorce. It takes into consideration the fact that,

despite the best efforts of the parties and their counsel, a global settlement may not be the result of the negotiation. Indeed, in some instances, a party may enter into a divorce process alternative to litigation with the hope that a “sweet-heart deal” can be obtained, with the underlying intent being to litigate if the other party does not agree to a one-sided settlement. By identifying the Dispute Resolution Mechanism in advance, the potential of threatening litigation as a bullying tactic is effectively removed. For Cooperative Divorce, the conclusion of the negotiation phase of the process without agreement is not viewed as a “failure,” but, rather, merely a shift to the next phase of the Cooperative Divorce process, namely, dispute resolution.

This is not to suggest that there is anything wrong with the selection of litigation as the method by which a dispute is resolved. In cases involving concealment of assets, difficult valuation issues, or, domestic violence, litigation may well be the process of choice. Within Cooperative Divorce, however, if litigation is chosen as the Dispute Resolution Mechanism, the choice is qualified as being Cooperative Litigation. Simply put, this means that there will be no “gotcha” tactics, or personal attacks, in the course of the litigation. The parties and their counsel will use their best efforts to present their issues to the court as efficiently as possible, including the use of stipulations wherever possible.

Among Dispute Resolution Mechanisms, arbitration is an attractive choice as the method by which a dispute, other than parenting issues, can be resolved. Arbitration is discreet in that no public record is made as occurs with the filing of pretrial statements and other pleadings in litigation. Arbitration can also be informal.

The Rules of Evidence may be suspended, and parties provided the opportunity to speak in the narrative rather than only in response to questions posed by counsel. Arbitration can be conclusive, and not subject to appeal, if “binding arbitration” is selected. Arbitration can also be an expedited process when compared to the timeline of a litigated matter.

Just as arbitration can be effectively used to resolve disputes, private judging provides unique advantages for the parties, as well. Parenting coordination is also an alternative to litigation in providing a solution to parenting issues that cannot be resolved by negotiation.

Because Cooperative Divorce does not view a negotiation that ends in impasse as a failure, there is no disqualification of counsel if the process moves to the dispute resolution phase. The lack of the potential for disqualification is not a license for lawyers representing parties in Cooperative Divorce to engage in positional bargaining. At its core, Cooperative Divorce remains an “interest based” process.

All of the Negotiation Models in Cooperative Divorce are “interest based” dialogues. Interest based negotiating has its roots in the book, *Getting To Yes*, by authors Roger Fisher, William Ury and Bruce Patton. Interests are what lie behind positions. The most powerful interests are found in the most basic of human needs, including security, recognition, and control over one’s life. When a client says, “I want custody of my children,” the client is expressing a position. The interests that lie behind that position may include: “I want my children to be safe;” “I want my children to be loved;” “I want my children to be healthy;” “I want my children to experience consistency and continuity.” Understanding the interests of the parties is the key to unlocking creativity in a negotiation. In order to be effective in the negotiation, the interests of both parties need to be made known and understood.

Interest based negotiating leads to outcomes that are suited to the goals of each particular family. It uses “probable outcome at court” as a barometer of fairness — but not the *only* measure of fairness. After all, probable outcome at court has limitations.

The most objective part of a divorce negotiation based solely upon “probable outcome” is the determination of the amount of child support. This is an objective calculation based upon the Child Support Guidelines. However, the child support guidelines reflect what the “normative family” spends on children, not what the family of the clients actually spends. Although

the child support calculation is objective and predictable, it really has nothing to do with the realities of the case at hand. "Probable outcome" also will not address the college education of the children because the court has no jurisdiction to do so. Yet, educating the children remains an almost constant interest of parents going through a divorce. Likewise, concepts such as liquidity discounts, risk tolerance, and sustainability are nowhere to be found in domestic relations case law or statutes. These concepts are essential for equity to be achieved in an economic environment in which "lost value" is a significant factor in every divorce. The "lost value" may be in a house, a business, or a 401(k) account. Addressing if, and how, the "lost value" can be recovered is an interest shared almost universally by divorcing couples today.

The Negotiating Models in Cooperative Divorce are based upon the interests of the parties. Whether participating in a four-way meeting; a meeting with opposing counsel; coaching a client in preparation for a mediation session; or, working with a Facilitator, the role of the attorney in Cooperative Divorce negotiations is that of a problem solver. In such an environment, settlement structures frequently emerge that are different from "probable outcome at court." The fact that an outcome is "different" than what might happen at court, does not, in and of itself, make it better, or worse, than "probable outcome" at court. It is just different. The difference, however, in most cases, reflects the unique interests and goals of the parties.

There is no single process that will work for every family facing the termination of their marriage. Litigation, Collaborative Divorce, Mediation, and Cooperative Divorce all provide distinctive options for clients faced with how to terminate their marriage. The flexibility afforded by Cooperative Divorce makes it an appealing addition to the choices available.

The Center for Principled Family Advocacy has been a pioneer in promoting, and training, lawyers and related professionals in alternative dispute resolution models in divorce. The Center has formed a Cooperative Divorce Practice Group. Participation in the Practice Group is restricted to members of the Center. The formal training for the Cooperative Divorce Practice Group will be held on October 5, 2012.



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