

“DIVORCE IS EMERGENCY SURGERY: TUMOR REMOVAL” THE FIRST CALL TO MAKE

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Picture this: You have just been told in a phone call from your doctor’s assistant that the pain you are experiencing is a growing, but benign, tumor that if not treated could threaten your life. The only effective treatment is surgical removal. You have decisions to make right away. What will you do? Where and when will you have the surgery and what will be necessary for a successful recovery?

Most of us who face such critical situations, want the best care-with no shortcuts-that provides a great outcome in the most efficient manner. Do we exclude sedation/anesthesia? Do we exclude post-surgical treatment? Do we make those decisions so we can get out cheaply on the hope we don’t really “need” those things? Do we do the surgery ourselves? We don’t.

Analogizing health care with other emergent situations may be a stretch to some, but it is valid. Couples on the bumpy glide to divorce are almost always in pain; they are facing one of the most dramatic life changes they will ever experience (some social scientists liken divorce to the death of a family member); the finances of the crisis are always a concern; and life after divorce will be disrupted for an indefinite time. Far too many fear the cost of getting assistance because they ignore the value of the peace process as an alternative to the litigation process.

Just as one would not risk the surgical removal of a painful tumor, appendix, etc., one should not risk the process of a divorce without a guide and peacemaker. A person finding him/herself in this situation should make their first call to a family law dispute resolution professional, i.e., a Mediator.

COST COMPARISON

Assuming one realizes that the court process is overwhelmingly complicated for most laypeople and seeks assistance, there are two basic approaches to take (We will not address the advice and assistance of non-professionals such as independent paralegals because they complicate the process). The one that traditionally comes to mind first is that lawyers must be hired (please note: I used to make my living as a lawyer so I have no animosity toward the profession). Too often when making this decision the people either ignore or are unaware of several factors. The first factor being the cost. Mostly when one party engages a lawyer so does the other. Understandably, laypersons fear being disadvantaged in the process if they are not equally armed with professional assistance. In Southern California, it is not unusual for family law attorneys to charge clients between \$350 and \$450 an hour, *each*. One can also expect to pay a fee deposit (sometimes called a “retainer”) of \$5,000 or more when the attorney is engaged. Assuming that both parties will engage counsel, the immediate outlay of attorney’s fees will be \$10,000. That money is forever lost to the marital estate

(i.e., the money will affect the benefit of any community property distribution). The initial deposit seldom carries the parties past the first hearing (court appearance) in their cases. At least one analysis of divorce in California reveals that in the “average” divorce, 250 conflict issues exist to be resolved. It is common for cases pursued in court to take two or more years to get to trial and if so, they will cost from \$20,000 - \$50,000 even if both attorneys proceed with caution. If the matter is highly conflicted (which can be controlled or exaggerated by counsel), it can cost far more. Finally, as a factor to consider, the worst feature of pursuing a divorce in the traditional manner is that no matter what the parties may think when it all begins, they will have little say in the ultimate outcome. Litigation (court trials) seldom allows the parties much discretion in how their cases resolve.

Rapidly growing in popularity are processes that will not only allow the parties to remain in complete control of the process, but the outcome. The two most popular are “collaborative divorce” and the other is a mediated divorce (Note: the modern term for divorce is “marital dissolution”). Collaborative Divorce for those who are well heeled and involved in high conflict dissolutions is productive. This process involves collaborative lawyers, a mediator, and often other professionals as a part of the team such as financial specialists, family therapists (for some child issues), coaches, real estate specialists, and etc.) Before you suffer “sticker shock” over that process, remember that in a traditional divorce, instead of having professionals chosen as part of the team, the parties will each engage such professionals to dispute the claims of the opposition. In the collaborative process the collateral professionals are working for the benefit of the entire community property estate (and the welfare of children) and are not tools in a dispute. This process may seem relatively expensive, but in high conflict divorces, it is still far less expensive than traditional divorce through the courts.

The other process which is similar to collaborative, but less complicated, is family law mediation. In that process, the parties agree upon and engage the services of one mediator to facilitate negotiation between the parties toward an agreed upon resolution (referred to as a “stipulated” settlement or judgment). The mediator’s fee is typically split between the parties or otherwise agreed upon. Similar to the collaborative process, the mediator may recommend the engagement of other professionals on a case-by-case basis for real estate evaluation, business valuations and etc., and occasionally engaging a family therapist who specializes in parenting plans to assist with child issues.

Most family law mediators are well experienced in family law cases. They come from all backgrounds, but the mediators of California Arbitration & Mediation Services (“C.A.M.S.”) are practicing or retired lawyers who still represent or have represented clients in family law matters. Even if the parties have already engaged attorneys, mediation is an outstanding approach because the parties will have the advice of counsel (a mediator does not provide legal advice) if they wish, but the process is far faster than the court process and less expensive. Also, the parties can to resolve/settle their case on terms that a judge has no ability to order, i.e., a self-determined process. Most (though not all) mediations conducted by C.A.M.S. mediators are complete with all

papers filed, within a few weeks entailing a few meetings of 2 – 4 hours, each. Professional mediators charge for their services, the fees charged are lower than even one lawyer but even if the mediator charges the same or a little more than a lawyer, only one mediator is involved. Most family law mediators are sensitive to the cost of the process and work hard to be efficient while not giving the case short-shrift.

The cost of mediation, just like traditional divorce, depends upon several factors. The difference, however, is that in the mediation process *the parties* are in control of their case instead of the lawyers and the court system. The parties schedule the meetings; and the parties control how long each session lasts. The mediation process for almost any case will cost less, most times far less, than the same case with representation in a traditionally pursued case in court.

FURTHER COMPARISON

Though the cost of litigation is always important, for many the value of the privacy of mediation is even more important. With some exceptions, divorces in the traditional court process are conducted in open court in the presence of complete strangers. Every paper the parties file and every word they say in court becomes public record. A significant feature of the divorce process is the perception by some, including attorneys, that in order to “win” one party must say terrible things about the other. Obviously, that process creates a tit-for-tat sequence of events that quickly spirals downward. Words spoken in the public eye can be hurtful and even harder to take back than when said privately. Even when parties believe that “all is fair in love and war” when recording angry thoughts miss that, just like social media, anyone can review the file for any purpose. Future life-mates, future employers, credit agencies and others who may have any interest in those things can look at those records from time to time. Children who have grown into curious and sometimes angry adults occasionally visit the office of the Court Clerk to see what happened during their parents’ divorce.

Mediation affords the participants virtually complete privacy. Since all of the negotiations over the dispute are conducted in private mediation sessions, even the angriest of their words will not be public. Offers and counter offers, demands and counter demands, remain within the confines of the mediated negotiations. The only thing that becomes a public record will be the final agreement. Also, unlike what happens when a Court decides, the parties can agree that certain provisions remain private unless an enforcement action becomes necessary keeping prying eyes out of their personal business.

Familiarity with the important issues vs. decisions being made for the parties by a total stranger is another huge advantage of mediation. Asking a judge, even one well-meaning, who knows nothing about the parties, their wants, dreams, aspirations—the good and the bad, to make the most important decisions of one’s life often leads to outcomes that can devastate to the parties. A judge must follow the law as it applies to the evidence—even the most poorly presented evidence. Some call it the “meat cleaver” approach to dispute resolution. Since litigation is always backward focused,

cases are predictably decided upon anger and hurt rather than the best interests of the parties.

Mediation allows the parties, with the assistance of the mediator, to make their own decisions and to craft their own judgment on terms that avoid disaster. While the past of the parties is not ignored in mediation, the mediation process focuses on tomorrow and the hope that the parties can move on to a better life on the terms they choose. Also unlike the outcome of a court litigated divorce case, neither party "loses" in mediation since they decide the outcome for themselves.

Privacy, efficiency, speed and the preservation of the community property estate for the benefit of the parties are all great advantages to mediation. Mediation will cost the parties money, but it will be far less than a litigated dispute, much faster and almost completely private. The mediators at C.A.M.S. urge all to consider the value of those factors when considering the cost of a divorce.