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# The Changing Landscape of Divorce

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There are noticeable new trends in divorce that affect both the legal process and the financial strategies required to help clients move past it. These trends include: 1) an increased reliance on alternative dispute resolution (ADR) methods, including development of a new modality called collaborative divorce, which are gradually moving divorce out of the courtroom; 2) the continued evolution of the best interests of the child standard; 3) the alignment of antiquated statutes or cumbersome and complex case law with other states' laws; and 4) a greater realization that the divorce process is most effective when it utilizes an interdisciplinary team approach. These and other trends will radically affect how the divorce process will evolve in the future.

## DIVORCE MEDIATION AND COLLABORATIVE LAW

The last several years have experienced an increasing application of ADR to the divorce process. The reasons for this are manifold, and include greater control of the process and its ultimate outcome, increased privacy, lower financial costs, more creative problem-solving opportunities, faster resolution of issues and reduced collateral damage to the family.

Divorce mediation, the most widely applied method, is currently used by over a quarter of a million people annually. In divorce mediation, a neutral third party helps facilitate discussion between the divorcing parties, enabling them to negotiate and resolve the issues themselves. Divorce mediators come from a variety of backgrounds, and with these come different vantage points. Most commonly, divorce mediators are also lawyers and therefore most knowledgeable about the law, therapists, who are best able to facilitate negotiations; or financial planners, who have the greatest and broadest financial expertise.

Another method that has been growing in popularity is collaborative law. In this situation, both parties retain separate lawyers who advise them throughout the process and assist them in negotiations. Collaborative lawyers are required to commit in advance to helping the parties reach an agreement and avoid judicial intervention. If the collaboration fails, the parties can take the case to court, but must do so with a different set of lawyers. A striking example of the increasing utilization and success of this approach is evidenced in Medicine Hat, Alberta, Canada, one of the first Canadian cities to apply the collaborative law process to divorce. Collaborative law has become so popular in Medicine Hat that today the number of family law cases on the docket has been reduced by almost 85%, freeing up large amounts of court time.

Another trend that may be moving divorce out of the courtroom, at least in part, is the increased utilization of pre- and post-nuptial agreements.

## THE MILLER COMMISSION

In 2004, Chief Justice Judith Kaye created what has come to be known as the Miller Commission (after retired Supreme Court Justice Sondra J. Miller, who headed the commission). The commission was charged with reviewing the divorce process in New York State and making recommendations for reform. In 2006, the Miller Commission published its report, which included a recommendation that the state begin to incorporate ADR into the divorce process. In February 2007, Justice Kaye, in her annual address to the judiciary, also announced plans to create a new family law center in New York City, a center intended to make divorce faster and cheaper for couples who want amicable settlements. When it opens, the Collaborative Family Law Center will serve as a pilot project on alternative approaches to divorce and will make New York the first and only state to establish such a venue. Judge Kaye stated, "We anticipate that spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved, which is surely a step in the right direction."

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## **COLLABORATIVE DIVORCE: A NEW INTERDISCIPLINARY COLLABORATIVE LAW MODEL**

While divorce practitioners have routinely retained experts to provide insight into specialized issues, there has also been growing usage of interdisciplinary divorce teams, particularly those involving mental health professionals and financial planners. In these situations, teams of professionals from different areas of expertise closely interact with one another and their respective clients during the entire divorce process.

Starting in the early 1990s, an interdisciplinary approach that applies the principles of collaborative law to divorce has begun to emerge. Referred to in this article as “collaborative divorce/interdisciplinary model,” this modality employs, at a minimum, a neutral divorce coach and a neutral financial planner, in addition to the collaborative lawyers representing their respective clients. Aside from its success in settling issues in divorce, collaborative divorce/interdisciplinary model is significant in that it embraces — in fact requires — a team (or interdisciplinary) approach.

While still in its infancy — only about 100,000 individuals have used the collaborative divorce/interdisciplinary model to date — it is making strong gains among both practitioners and the general public.

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In 1999, there were fewer than 100 collaborative practitioners. It is estimated that today over 20,000 people have been trained in collaborative divorce/interdisciplinary model. Interdisciplinary approaches to both divorce litigation and divorce mediation are also being vigorously pursued. As interdisciplinary approaches continue to evolve, high practice and ethical standards governing the various professional participants and the manner in which they interact must and should also evolve. Work in this direction for at least the collaborative law and divorce financial planning components is already actively underway.

### **FINANCIAL PLANNERS**

As financial planners, the authors have seen firsthand the benefits of incorporating a qualified divorce financial planner into the divorce team. The financial planner is a generalist with training and experience in all areas of personal finance and money management, including tax planning, retirement planning, present- and future-value calculations, employee compensation and benefits, economic forecasting, estate planning and risk management. This broad perspective gives the planner a unique ability to analyze assets and liabilities and income and expenses as they integrate and interact with one another in both short- and long-term divorce contexts. Because of this, cases involving divorce financial planners are often settled or resolved more quickly, with better results and at less cost, than those using more traditional methods alone.

Divorce financial planning, as defined by the Association of Divorce Financial Planners, a not-for-profit professional association of divorce financial planners and allied divorce professionals, is a fee-only process that adheres to the financial planning practice and ethical standards established and monitored by the Certified Financial Planner Board of Standards. In divorce financial planning, the principles and methods of traditional financial planning are applied to divorce. These include collecting, clarifying and analyzing data; studying this data in a long-term economic context; evaluating the

financial viability of alternative settlement scenarios; conducting periodic monitoring and recommending modifications when post-divorce circumstances or changes in financial goals so dictate.

When applied to divorce, financial planning can help individuals stay focused, work more productively with their attorney or mediator, develop a better understanding of short- and long-term needs and paying abilities, make smarter financial decisions, avoid costly and often irreversible mistakes, avoid emotionally driven outcomes, analyze alternative outcomes and arrive at agreements that are fair and workable and avoid letting potentially workable outcomes go bad.

Some of the other benefits of divorce financial planning to matrimonial attorneys and their clients are: 1) more thorough treatment of the financial issues; 2) better settlements with fewer mistakes; 3) increased likelihood outcomes will be workable; 4) reduction in emotional distractions and fears; 5) reduced liability or concerns about liability; 6) reduced stress; 7) increased efficiency and productivity; 8) increased client satisfaction; and 9) increased ability to focus on the negotiation process and avoid getting bogged down with peripheral issues.

The legal aspects of divorce theoretically end when the divorce is granted and the processes delineated in the decree executed, but the divorce process continues well beyond the actual divorce event, and the divorcing parties will likely be affected by the outcome for years to come. For some this can be financially and emotionally devastating, sometimes because the outcome is unworkable from the beginning and the workability not thoroughly analyzed and sometimes because the financial solution was just not properly managed.

### **NO-FAULT DIVORCE**

New York remains the only state requiring establishment of fault in divorce, but the Miller Commission

last year called for legislation to permit no-fault divorce in New York State. Despite the commission's recommendation and the actual passage of a bill by the New York State Assembly to establish irreconcilable differences as a ground for divorce, legislation enacting this ground has once again become stalled in the legislature.

In the recent case of *Molinari v. Molinari*, 2007 N.Y. Slip Op. 50781 (Sup. Ct., Nassau Co., 4/16/07) (Ross, J), Supreme Court Justice Robert Ross, head of Nassau County's Matrimonial Part, initially challenged the legislature to pass no-fault legislation by staying rendering judgment in the parties' fault trial until the legislature ruled on the pending legislation. The husband had sought the divorce based on the ground of constructive abandonment. He was unable to prove this ground, and his wife contested the divorce, presumably to gain concessions from him on the economic issues. This is a common ploy in New York in situations in which fault is difficult or too costly to prove (having to prove fault can raise the cost of obtaining a divorce in New York significantly and even put it out of reach of people with insufficient means). This is one of the major reasons no-fault laws have been repeatedly proposed. When it became clear that the legislation had once again stalled in the legislature, Judge Ross ruled against the husband and denied the divorce, thereby making any hearing of the economic issues moot.

In a separate action, also in the direction of no-fault divorce, the Assembly voted to reduce the waiting period for legal separations from one year to three months. The waiting period was subsequently amended by the Senate to six months. Again, however, the legislation became stalled in the legislature.

Although past attempts to pass no-fault legislation have failed, it is likely such legislation will continue to be considered in the future and will eventually pass.

## ENHANCED EARNING CAPACITY

New York was the first state to value enhanced earning capacity (EEC), in *O'Brien v. O'Brien*, 66 N.Y.2d 576

(1985). Although it has been over 20 years since the original Court of Appeals decision in *O'Brien*, New York is still the only state to value EEC. To summarize an enormous amount of ensuing case law, *O'Brien* "opened a can of worms," and the complexity of the valuation issues that have arisen as a result of this decision has continued to increase.

Recent case law involving "double counting" (duplicative award) issues that evolved from the original decision suggests that the courts have become increasingly reluctant to further complicate this concept. As with no-fault legislation, we believe New York will eventually fall in line with other states and reject it, eventually treating it in a much less complex fashion. In *Holterman v. Holterman*, 3 NY3d 1 (2004), for example, the court refused to extend the double counting issue to child support. More recently, in *Keane v. Keane*, 3 NY3d 115 (2006), the court refused to extend the double counting concept to the distribution of tangible, income-producing assets. Furthermore, it appears the system has also declined to follow *Hougie v. Hougie*, 261 AD2d 161 (1999), which would have expanded the definition of EEC well beyond licenses and degrees.

## 'BEST INTERESTS OF THE CHILD' STANDARD

Although a "best interests of the child" standard is contained in our statutes and is based on a totality of circumstances, it is a subjective standard. As a result, the relative importance of the various factors that relate to this standard is continuing to evolve, and there has been a significant shift in the court's attitude and philosophy toward children. For example, while "primary caregiver" was, for a period of time, the most important factor in custody determinations, the willingness of a parent to foster a relationship between the child and the other parent appears to be becoming more and more important. Furthermore, there is now a negative bias toward parental alienation, interference with visitation and the filing of false accusations.

A growing shift in child custody cases within the last several years also reflects a stronger bias toward joint legal custody. In many ways, as both parents increasingly share the day-to-day responsibilities of child rearing and income contribution to the family, the court system is reflecting this trend and striking a more balanced tone on the issue. Even in situations in which sole custody is awarded, there appears to be less of a bias toward awarding custody to the mother. Finally, softer terms such as "parenting plan," "parenting time" and "access time" are gradually replacing the more archaic terms "custody" and "visitation."

## GRANDPARENT RIGHTS

The best-interest-of-the-child standard is also being applied more liberally to grandparent custody and visitation cases. In a recent Court of Appeals decision, *E.S. v. P.D.*, 8 NY3d 150 (2007), the court held that § 72(1) of the Domestic Relations Law in New York, granting grandparents visitation rights when deemed in the best interest of the child, is constitutional and does not conflict with the United States Supreme Court's decision in *Troxel v. Granville*, 530 US 57 (2000). In this case, the maternal grandmother had been asked by the husband to move into the marital home to care for her terminally ill daughter and grandson. After her daughter's death, the child's father asked the grandmother to stay on and continue to help with the child's care as well as other household duties. After about three and one-half years, the relationship between the father and the grandmother began to sour with respect to caring for the child. The father demanded that the grandmother move out and forbade her from having further contact with the child. The Court of Appeals ruled against the father and found that visitation by the grandmother was in the child's best interest.

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In a recent Appellate Division decision *Steinhauser v. Hass*, 40 A.D.3d 863 (2d Dept. 2007), also subsequent to the death of the children's mother, the court ruled that the mother's death provided the maternal grandmother with automatic standing to seek visitation. Evidence further established that the grandmother enjoyed a meaningful relationship with the children. The court also concluded that evidence of animosity between the father and the grandmother was not the proper basis for the denial of visitation.

There have been many cases in which contrary rulings have been made, but the above cases and the affirmation of DRL §72 suggest this may be a trend worth noting.



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