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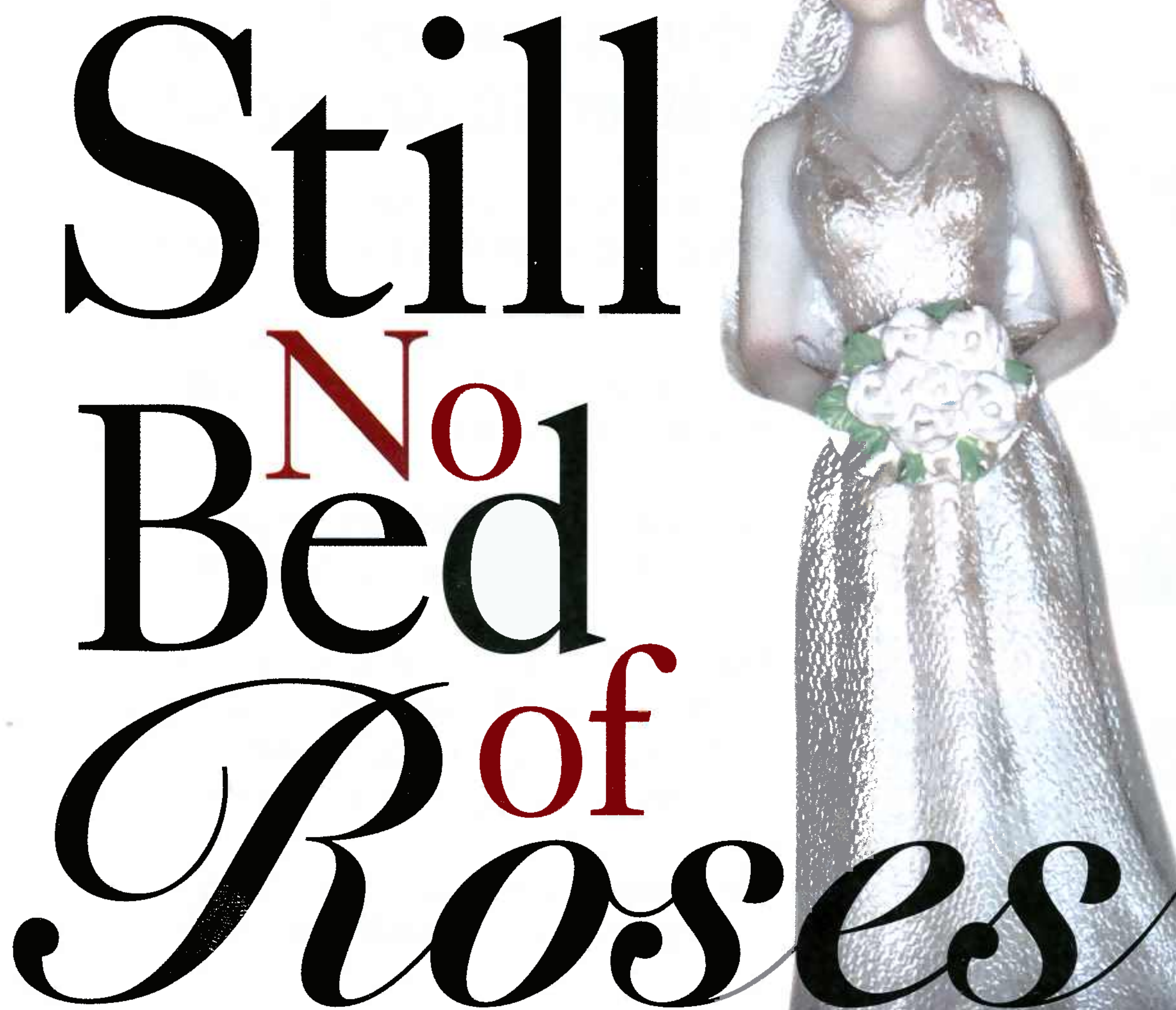
Still No Bed of Roses



Efforts to take the nastiness out of divorce proceedings haven't reached a happy ending ... yet

BY JILL SCHACHNER CHANEN

AS MARK A. CHINN built his family law practice in Jackson, Miss., he put a premium on being prepared and thorough in court. He learned the rules of procedure inside and out. He aspired to get along with opposing counsel. But he also wanted to be tough, and he wanted to win each case—at almost any cost.

"My attitude was that 'I want to do this nice, but if you punch me in the nose, I'll punch you twice,' " says Chinn.

Then, about a dozen years ago, Chinn started to change his thinking.

Chinn describes his transformation in the prologue to *The Constructive Divorce Guidebook*, in which he tells how lawyers can help clients going through divorces resolve their disputes in a constructive manner with better long-term results for everyone involved. The book was published in 2007 by the ABA's General Practice, Solo and Small Firm Division.

"I hate to admit it now," writes Chinn, "but in the earlier years of my practice, I wanted to be viewed as a tough litigator. ... I can remember telling associates and employees that I practiced law like Chicago Bear linebacker Dick Butkus played football—that is, dreaming of hitting people so hard that their heads would fall off."

But in the mid-1990s, Chinn writes, he began noticing that an aggressive approach was not serving him or his clients very well. He frequently found himself filled with anger. When Chinn tried to promote civility during his term as president of the Hinds County Bar Association, other lawyers derided his stance as hypocritical. Later on, Chinn was told in private by a judge he respected highly that he needed to ease up on opposing lawyers—and to even start helping them in court.

Then Chinn hired an associate, Patricia R. Williams, who brought an entirely different approach to the law firm's divorce practice. "She began to coach me," writes Chinn about his younger colleague. "Slowly, Patricia and I transformed our practice. We developed a philosophy and a value system for litigation that is designed to be civil, courteous and conciliatory at all levels, while maintaining a proper balance of obligation to advocate on behalf of our clients."

THE WISDOM OF SETTLING

CHINN ISN'T THE ONLY LAWYER WHO IS thinking in new terms about how to represent clients more productively in divorce and family law matters. More practitioners are adopting the view that when a marriage doesn't work out, the

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divorce shouldn't have to engulf the parties in acrimonious court proceedings and skyrocketing legal expense. Instead, they are adopting processes for working through divorce disputes that emphasize appeasement, courtesy and cooperation.

"Divorce has become far less litigious in that far more cases are settled than litigated," says Gregg Herman, who chairs the ABA Section of Family Law. Herman, a shareholder at Loeb & Herman in Milwaukee, cites such factors as the cost and fear of litigation, the growing availability of various forms of alternative dispute resolution, and the development of approaches like collaborative and cooperative practice.

The American Academy of Matrimonial Lawyers has identified the same trend. In a 2007 poll conducted by the academy, 58 percent of the members responding said more of their divorce cases in the past five years were being settled without trial. Only 12 percent of the respondents reported that they were resolving fewer cases before trial.

Academy president James A. Hennenhoefer, who practices in Vista, Calif., says the preference for less contentious divorces is taking hold especially among middle-income clients. These are, he says, "people who look at their estate and say, 'We've amassed $500,000 in assets over the last 10 years. Why are we going to give 20 percent of our wealth to lawyers?' "

Gregg Herman

The teeth found in the collaborative approach "can sometimes bite you."

NEW ISSUES, NEW FIGHTS

SOME LAWYERS, HOWEVER, TAKE A CAUTIOUS VIEW ABOUT whether the acrimony can ever be squeezed out of the divorce process. And in the public's view, divorce still can be all too reminiscent of *The War of the Roses*—a darkly satirical film from 1989, in which a couple in the throes of divorce wind up dead at the bottom of the stairs in the trophy house they've been battling over. Their cautionary tale is retold by the husband's attorney, who is so unnerved by the nastiness that he returns to chainsmoking as he details the disastrous feud to a wary new client.

Divorce cases still tend to be wrought with harsh emotions, says Andrew D. Eichner, a partner at Berger Schatz, a domestic relations law firm in Chicago. The levels of conflict and acrimony run high in people who are so hurt or angry that they are intent on punishing their former spouse without regard to the consequences.

"It is more a function of human nature than any statute, law or how divorce lawyers are," Eichner says.

And new ways to inflame the acrimony of divorce continue to appear. These days, alimony is still one of the most inflammatory issues in divorce law.

One of the problems concerning alimony is that standardized maintenance rules are practically nonexistent, says Susan M. Moss, a partner at Chemtob Moss Forman & Talbert, a family and matrimonial law firm in New York City. Instead, states generally give judges discretion to decide whether to award alimony, how much it should be and how long it should continue.

"Unfortunately, discretion equals fighting," Moss says. "The way spousal support works now is like the 'divorce lawyer full-employment act' because we spend so much time fighting over it, and the only people benefiting from it are the divorce lawyers."

A handful of jurisdictions have adopted guidelines for awarding alimony; and proposals in other states, including New York and Massachusetts, are gaining traction.

In Massachusetts, active consideration of legislation addressing maintenance issues started with Timothy Taylor, a sole practitioner in Lincoln who drafted a bill that eventually picked up sponsors in the legislature. Massachusetts law now allows awards of lifetime alimony. Taylor's bill would limit awards to the lesser of 12 years or half the life of the marriage.

"Alimony is harmful because it promotes dependence on the supporting party," Taylor says. Moreover, a continuing monetary relationship has the potential to increase bitterness between the former spouses that can spill into parent-child relationships, he says.

For its part, the American Academy of Matrimonial Lawyers has declined to call for standardized rules governing alimony, although one of its committees drafted alimony guidelines last year along with specific formulas for calculating what it should be.

While consensus hasn't developed among academy members for standardized alimony rules, one of the academy's past presidents says that, as a practitioner, he supports them as a way to reduce disparities between similar cases.

"The judge in one courtroom will make a different judgment on the same facts and circumstances than the judge in the next courtroom," says Gaetano Ferro,

PHOTOGRAPH BY COREY HENGEN

a partner at Marvin Ferro Barndollar & Roberts in New Canaan, Conn. "Awards are all over the place. Some of us think there should be standards or formulas, and that might help resolve divorces more easily because if you sit down and say, 'Here is what the statute says,' you'll be more likely to settle."

Another increasingly volatile divorce issue involves differences over religion and religious practices.

Ronald Nelson, a partner with Nelson & Booth in Shawnee Mission, Kan., whose practice primarily involves high-conflict child custody cases, sees religious issues being brought into divorce cases in more and more ways.

Nelson says he tries to avoid taking religious issues to court because "judges can't and should not deal with religious issues." Nevertheless, it's not unusual, he says, for divorcing parents to argue over whether their children should stay in a religious school. Still, he notes that earlier this year, the Oregon Supreme Court was asked to sort out a dispute between the parents of a 12-year-old boy over whether he could be circumcised. The court remanded the case so the boy could express his view. *Boldt v. Boldt,* No. S054714 (Jan. 25, 2008).

Nelson has seen religion used as a weapon to assault character in divorces and child custody disputes. He recently litigated a custody case in which one parent brought up the other one's experimentation with different religions as evidence of poor parenting skills. And there have been cases in which parents attack the parental fitness of their former spouses on grounds that they became more religious or less religious.

PERILS OF THE ELECTRONIC AGE

COMMUNICATIONS TECHNOLOGY IS YET ANOTHER NEW cause of acrimony in divorces, say lawyers in the field.

In a survey conducted earlier this year by the American Academy of Matrimonial Lawyers, 88 percent of the respondents said they have seen an increase over the past five years in the number of divorce cases using electronic data as evidence. E-mail is introduced most often, said survey respondents, but they also cited text/instant messages and records related to credit/debit cards, toll pass cards, cell phones and GPS systems.

Eichner says he warns clients to assume that any e-mail they send may end up being read by a judge. "E-mail between the parties is just another rich ground for getting information, statements, musings that will be harmful later on," he says. "It is proof you said it."

Moss says she uses e-mails and evidence gleaned from computer hard drives with increasing frequency to establish fault under New York law, which requires petitioners to show grounds for seeking divorce.

"So we can use it for fault issues as well as custody issues," says Moss. "I still can't believe how much porn is out there."

Even in no-fault states, electronic evidence can be raised in custody matters. "Nothing says 'I love you' like 80 hits to a porn website in an hour when Dad is supposed to be watching the kids," Moss says.

But lawyers need to be sure that the treasure troves of electronic information their clients want to give them were collected legally. In some cases, electronic data collection can run afoul of wiretapping laws or infringe on privacy rights of third parties, Eichner says.

Increasingly, businesses are being drawn into divorce cases because one party or the other is trying to introduce data stored on company computers. Eichner cites a seminal case in which New York's trial-level Supreme Court ruled that a laptop computer owned by one spouse's employer was marital property because the spouse regularly brought it home and allowed his child to use it for homework. *Byrne v. Byrne,* 650 N.Y.2d 499 (1996).

Many clients find themselves put off, however, by the cost of mining electronic data in search of evidence against their spouses. Ferro recalls a recent case in which one of the parents was trying to prove that the other was involved in child pornography. Eventually, the fee for just one of the experts brought into the case topped $300,000. "The clients were wealthy, but you can imagine how it added to the expense and the acrimony," says Ferro.

Eichner says he counsels clients to resist bringing in electronic data unless it is absolutely necessary—and appropriate. But when a client is determined to destroy his or her ex, he notes, temptation can be hard to resist at any price.

TOOLS FOR CONFLICT REDUCTION

WITHOUT QUESTION, THERE'S STILL PLENTY OF ACRIMONY in the divorce field to go around.

Nevertheless, the growing numbers of lawyers and clients who are making efforts to lower the conflict levels in divorce proceedings have a growing number of legal tools at their disposal to accomplish that goal.

Divorce lawyer Nancy Hunt, a partner at Harris & Hunt in Tampa, Fla., embodies this new paradigm. In her view, litigation signifies a failure of the process and should be used only as a last resort. Instead, she works with a wide range of experts, including psychologists and social workers, to help her clients address their emotional issues before they focus on the legal issues. That way, she says, they are less likely to try to use the legal system for emotional revenge.

"Lawyers, counselors and even financial advisers are speaking out on the cost of divorce—emotionally and financially," says Hunt. "I think the public is understanding that there are different ways to proceed with divorce other than in the traditional adversarial proceeding."

Wider use of alternative dispute resolution is a key reason why more divorce cases are being resolved with less acrimony, say Hunt and other matrimonial lawyers.

"We feel that it has increased client satisfaction," Chinn says. "We are resolving cases more quickly, for example, by moving immediately to a mediation date, practicing full disclosure, creating asset notebooks with the numbers and your position on them. It's just to make it easy for the other side."

Many jurisdictions now mandate mediation in divorce cases, especially where custody is at issue, Herman says. "In one of the counties that I practice in, there is an 80 percent success rate for [resolving] contested custody

cases with mediation," he says.

One variation on the ADR theme is private judging. Hennenhoefer says there is a wealth of retired jurists who can help parties resolve cases quickly and fairly without actually taking them to court.

"You don't have to spend an enormous amount of time educating the jurist about the law," Hennenhoefer says. "You can pick the best of the best." But he notes that the expense of private judging makes it appropriate primarily for high-asset divorces.

An even more significant development is the growing use of what practitioners term a collaborative approach to divorce cases.

Borrowing principles of mediation, the collaborative approach calls for the parties—and, significantly, their lawyers—to reach a settlement without taking their case to court. This process encourages parties and their attorneys to freely exchange information at so-called four-way meetings. The collaborative process calls for the lawyers to withdraw from the case if a freely negotiated settlement cannot be reached, which requires the clients to retain new counsel to represent them in court.

Susan Moss

"The way spousal support works now is like the 'divorce lawyer full-employment act.'"

A collaborative approach can be especially productive in divorces where children are involved and the parents are concerned about maintaining good relationships, Herman says.

He says a collaborative approach, like other forms of ADR, does not always suit the personalities, emotions and goals of clients. But "in the right case, it can be absolutely the right way to go," he says.

EVEN MORE OPTIONS

NOW THERE IS A VARIATION ON THE COLLABORATIVE approach. In cooperative practice the lawyers are not required to withdraw from the case if the parties can't reach a resolution and it goes to court.

The cooperative approach is still "a good-faith representation that you will try to work toward settlement," says Herman. He acknowledges that collaborative law purists do not like the cooperative approach because it lacks the teeth that the mandatory withdrawal provisions provide. "But those teeth can sometimes bite you," he notes.

As more divorcing couples try to settle their cases more amicably, specialized experts are playing increasingly important roles in mediations and other ADR proceedings. It is not uncommon for the parties to have teams of experts offering advice on various issues, including budgets, finances and child psychology.

Frederic J. Siegel, a partner at Fitzmaurice & Siegel in Stamford, Conn., often uses a financial analyst in divorce cases these days. They offer a perspective and expertise that differs from accountants, he says. While accountants often tend to focus on tax matters, financial planners can help on investment issues and other considerations relating to the future use of assets. Financial analysts can also prepare net worth statements.

Siegel says a financial analyst's input can sometimes be a factor in deciding whether a divorce settles quickly or ends up in protracted litigation. In one recent case, for instance, he represented a divorce client with a special-needs child. Siegel used Michelle Smith, a financial analyst at Smith Financial Strategies Group in New York City, as a consultant in the case. He says her explanation to opposing counsel of the child's future financial needs was a key to reaching a quick resolution of the case.

Smith agrees with Siegel that financial planners cannot provide comprehensive expert advice on all economic aspects of a divorce. Business valuations, for example, are best left to accountants, she says. But financial analysts—who generally are retained by an attorney rather than the client to preserve privilege and confidentiality protections—can evaluate the lifestyle and expenses of clients to help substantiate support requests. They also can prepare financial projections and later help clients live within their new post-divorce budgets. And in some cases, analysts can perform financial forensics work like tracing money, she notes.

"We are like a beautiful gap filler for attorneys," Smith says. "We are an alternate resource to do some of the tasks."

Herman says some jurisdictions have taken another important step by appointing lawyers to represent the children of divorcing couples.

"These court-appointed lawyers add a level of sanity into the process," says Herman, "because if you have a lawyer in court recommending what is in the best interest of the child, the odds of the judge following that recommendation are high. It leads to settlements because it's like a suicide mission to challenge it."

Another trend in divorce law is the increasing use of postnuptial agreements.

PHOTOGRAPH BY RYAN DONNELL

In January 2007, the American Academy of Matrimonial Lawyers reported that 49 percent of the members responding to one of its surveys said they had started drawing up more postnuptial agreements within the past five years. And 58 percent of the respondents said most of the requests of "postnups" were being made jointly by husbands and wives rather than just one of the parties.

Postnups differ from prenuptial agreements precisely because they are made by a couple while they still are married. While financial considerations are the reason for most postnuptial agreements, they can cover a variety of issues. Respondents to the academy's survey said some of the topics covered in postnups they drafted included limits on how many children a couple should have, the division of household chores and decisions about who gets which cemetery plots.

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In jurisdictions where they are valid, postnuptial agreements can resolve potential conflicts, whether in the context of a divorce or a continuing marriage.

"Having a written document with expectations and obligations clearly set forth reduces the areas of disagreement for spouses, and can remove a good amount of stress from everyday married life," Ferro said in a statement announcing the survey results when he was the academy's president.

But many matrimonial lawyers are cautious about postnuptial agreements because of lingering questions about enforceability.

In Connecticut, courts have taken the position that the mere act of staying in a marriage is not sufficient consideration to support a postnup agreement, Ferro says. "Part of the problem is that, unlike prenups, which are accepted widely, it is not clear if postnups are enforceable," he says. "There is no precedent for it in Connecticut. Courts have mostly taken the position that a contract needs consideration, and merely staying married is not consideration because you already were married. It's muddied."

But prenuptial agreements can pose their own problems, say Ferro and other matrimonial lawyers. Siegel says many lawyers aren't doing prenuptial agreements as much as they used to, largely due to malpractice concerns. "If they are done right, they will hold up," he says. But prenups can be voided due to fraud, inadequate disclosure of assets, lack of independent counsel and duress unless there is solid evidence that each party signed them willingly. For those reasons, Siegel has begun videotaping the signing of prenuptials involving substantial assets as a way of proving the state of mind of the parties.

"Pre- and postnup issues are complicated to draft," Hennenhoefer says. "I tell everyone that unless you create something that allows the other side to feel that they are getting something out of it, it is just drafting the first pleading in their divorce."

Ultimately, that kind of attitude might be the key to success for any efforts to make the divorce process less contentious, expensive and drawn out for the parties involved—and their attorneys. It might even have brought *The War of the Roses* to a happier end. ■

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