

The Court's Role in Settlement Negotiations

BY HUGH E. STARNES & SHELDON E. FINMAN

In no other area of law practice is the significance of judicial leadership and involvement in case management so profound as it is in family law. Moreover, appropriate case management will often lead the parties to an ultimate settlement.

A dissolution of marriage can, and often does, involve parties with an array of feelings and negative emotions that can deter the procedural progress of the case through the system. Often the parties' negative feelings can be addressed and thereby prevented from festering and remaining out of control. If these negative feelings are allowed to dominate the dissolution of marriage case, they will lead to a detrimental outcome for the family, not to mention a strain on court resources, which will last as long as the jurisdiction of the court continues.

Effective settlement negotiations require that all persons to the dispute communicate with each other in an effort to find common ground. How might this occur in a family law context involving the judge? As a family law attorney and former (retired) family law judge, we feel strongly that a judge's key role in family court is to foster productive settlement negotiations, if possible.

To accomplish this objective, the judge's role will likely shift from the traditional adjudicating model to one of leadership in facilitating communication and problem solving. As a neutral, but one with ultimate authority to adjudicate, the judge is in a unique position to facilitate creative problem-solving. However, the judge must be careful not to substitute his or her judgment as to a productive outcome for that of the parties themselves. After all, the best outcome is usually the one the parties feel they have achieved themselves. The trick is to lead them to the waterhole, and then let them decide whether they want to drink. Skillfully used, the judge's influence as an authority figure (but one with demonstrable empathy and compassion) can unlock the potential solutions the parties and attorneys can't envision.

In no other court than family court do the parties so often ignore established boundaries. The negative behavior and conduct of the parties can cause a procedural quagmire if not addressed quickly and as often as necessary. If the family law judge is unwilling to proactively address areas of conflict resulting from a lack of cooperation and a desire to prevail in litigation, then real problem-solving and truly lasting resolutions will likely be illusive. Family relations are personal. Laws pertaining to rights, duties, and obligations upon termination of the marriage do not lend themselves to rulings and orders that will be followed enthusiastically.

We are reminded of the old axiom: 10 percent of families take up 90 percent of the court's time and resources. (Conversely, 90 percent of families take up 10 percent of the court's time and resources.) Therefore, the real challenge is not the 90 percent of cases that settle, but the 10 percent that continue in conflict indefinitely.

Why don't the litigious 10 percenters uniformly follow the court's rulings? There is no "buy in"; they have no investment in the resolution imposed upon them. When issuing rulings, judges tend to use reason and logic and follow a path of practicality. This judicial approach does not provide a contentious, litigating party with an opportunity for the real buy in.

Following are some techniques a proactive judge can use to encourage clients to buy in.



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Judicial case management

Judicial case management is a process that encourages dialogue among all parties, attorneys, and the judge. The judge makes an effort (with the help of court staff) to find high-conflict cases as early in the process as possible and place them in a judicial case management track. The judge, on his or her own, schedules hearings, labeled judicial case management conferences, or the attorney may schedule them for either or both parties.

At these conferences, the judge steers the case in a constructive manner without necessarily ruling on any particular issue. By understanding each party's claims and goals, the judge can lead a constructive dialogue. If a claim or request is out of line, over the top, and/or clearly not within the parameters of legality, equity, or fairness, the judge can suggest options (which may be considered as consequences), allowing both sides to discuss what may work, what may not work, and why. The goal of the judge is to move the case along once both sides have had the chance to have a dialogue with the judge.

Serial case management hearings set by the judge in a proactive manner allow the judge to advise the parties of his or her propensity to rule (without ruling) and thereby afford them an opportunity to buy in. No participant in family law cases, other than the judge, has the power to make such a difference. If judges are unwilling to engage in such proactive processes, there is little hope of stemming the tide of these contentious 10 percenters.

Child-focused facilitation team

The child-focused facilitation team (CFFT) consists of a sitting or retired judge (not assigned to the case), experienced attorney, experienced mental-health professional, and a CPA or financial expert if financial issues are involved. This process grew out of a seminar presentation, and its goal is to move parents away from more selfish motivations toward what's best for their child.

The process has stimulated a "child focused" approach in a variety of settings in family law practice. A mental-health professional meets with and interviews the parents before the parents meet with the full team. Moreover, before the full session begins, the mental-health professional will report to the other CFFT members the salient facts and information about this family so that team members are all on the same page.

Parents are then brought into the meeting with the fully assembled team. No attorneys representing either party are allowed to participate in this process. The team fully empowers both parties as equals. All discussions focus on the children and how best to meet their needs and interests. The dialogue is open and respectful. Each team member may ask questions and listen as parents share their feelings and ideas about how best to meet their children's needs and thereby reduce family conflict.

These sessions typically last between 90 and 120 minutes. The parties are praised for their open and courageous participation and are further encouraged to continue to work in a positive fashion throughout this process. The parties are then excused. The team debriefs and discusses components of a potential recommendation to this family. If financial issues are involved, the CPA or financial expert may need additional time to consider what might be recommended to this family. In some cases, this may involve a "least detrimental" financial result.

The team will reconvene at a later date to discuss any different or updated status in relation to the children and announce final recommendations or suggest to the parties how best to implement the suggestions. The array of participating professionals allows each to observe the direction of the discussion and choose when

and how best to steer the discussion toward a productive resolution. (Four heads are better than one.) Parents, in turn, can observe professionals communicating as a team for the benefit of their family and learn better communication and problem-solving skills.

Child-focused, high-conflict case management

Child-focused, high-conflict case management is not the same protocol as serial case management, although both processes may involve working with parties who are inflexible and arbitrary. This process grew out of the child-focused facilitation team experience. In this particular process, only children's issues are discussed. The judge will utilize a child-focused format. This is achieved initially by not allowing either party to state what they want in a parenting plan. They may discuss only what their children need to grow into mature, successful adults.

The judge will steer all dialogue to focus only on the children. The judge will inquire as to the children's needs and interests in all facets of life: education, spiritual needs and preferences, health, extracurricular activities, personality, and emotional development. One method of bringing the children and their interests into the room is to have parents bring pictures of the children and share them with the judge. It is amazing how this changes the ambiance in the room. Parents literally compete to show their pictures and demonstrate their focus on what is best for their children.

Once this part of the discussion is complete, many parties subtly come to a consensus on the outline of the parenting plan. The child's presence literally fills the room. The parties and attorneys are thus encouraged to participate in a process by which the discussion focuses on how parents can help their children to thrive without conflict. Admittedly, this process may move forward in baby steps at first, but the parents' buy in can occur and most often does, as long as the parties remain children-focused. Once the parties get around to stating their own needs and desires, most of the groundwork will already have been laid for a more cooperative resolution.

In Lee County, Florida, Judge Starnes has utilized this model and, on occasion, has enhanced the process with additional assistance from an experienced family law attorney and family law mental-health professional. The interplay and dialogue, including between the attorney and the mental-health professional, responding to the judge's request for input, will provide more insight into the issues and how they can be addressed from both professionals' perspectives. At the end of the conference, the professional observers often debrief parents outside the courtroom and offer suggestions for follow-up discussions and resources.

Standing orders and letters from the judge

At the time of filing in every dissolution of marriage action, standing orders and letters from the judge can be an effective tool in educating and guiding the parties. Most parties who initiate a divorce are generally aware of the court system but have little or no knowledge of alternative dispute protocols, such as mediation, cooperative law, or no-court collaborative law. A letter from the court clerk or court administrator will not likely be as persuasive as one from the judge—the person with the power.

Imagine how compelling the presiding judge could be in suggesting that the parties consider alternatives to court in resolving their dispute. A further discussion of why alternatives to court will result in a better outcome is not only informative, but persuasive. At the beginning of the case, judges can have maximum impact in curbing the conflict by explaining to the parties that not only may alternative techniques result in a better resolution to their conflict, but that doing so also may reduce the cost of their divorce. The parties likewise should understand that if they insist on taking their case to court, a stranger will make these important decisions

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regarding their family. Conversely, they themselves can maintain control and power over their own lives by making mutually agreed upon decisions and coming up with an agreement in an open, forthright, and respectful manner.

The practice of family law is not exactly rocket science. Playing fair, with balanced results, is not a difficult concept to understand. Judges and lawyers can work cooperatively. However, the judge must be comfortable and willing to take on this leadership role in attempting to address all cases at the outset that are, or appear to be, ready to tax the limits of judicial parameters and the court system. In seeking a more constructive path for a family law case with significant issues and challenges, the judge may consider referral sources and resources that are designed to facilitate a different, less destructive, and less wasteful path.

Mental-health facilitator

One such referral can be to a mental-health professional in the role of a facilitator to help parents create a parenting plan or, in an extremely high-conflict case, a professional team consisting of an attorney and a mental-health professional as co-guardians ad litem. In cases involving high-conflict parents, a judge may wish to consider referral to a court tribunal or a child-focused facilitation team (as described above).

The court tribunal consists of a judge (not assigned to the case), an experienced family law attorney, and an experienced mental-health professional. The three professionals comprise a panel, with the judge on the bench presiding. The panel hears an abbreviated presentation (one half day without experts or one full day with experts) through direct examination only (no cross-examination). Each party presents a summary of all matters at issue through appropriate direct examination. Each side will be allowed to, in effect, state their case. At the conclusion, before ruling, each panel member may ask questions and state a summary of what they heard from the

OPEN HOUSE

Another effective tool is the open house. It works quite simply:

1. The judge grants lawyers in pending cases informal access by setting aside a specific block of time on a specific day each week when the judge will be available for informal discussions on potential resolutions in a case.

2. The lawyers simply show up together on a first-come, first-served basis. No notice or pre-arranged schedule is necessary. The lawyers lay out particular problems, whether procedural or substantive, that have bogged down the case and explain the basic factual context and issues. If requested, the judge may indicate how he or she might be inclined to rule in such a situation, based strictly on the facts presented. The judge may ask questions, seek to clarify issues, and make suggestions to resolve the issues. One ground rule is that both attorneys must agree to the conference and that none of the discussions subject the judge to a recusal. In our jurisdiction, this process was actually initiated by attorneys

who came to value its use. After a year or two, its use tapered off, because attorneys felt they knew enough about the judge's philosophy to anticipate how he or she might rule.

This model allows attorneys to participate in problem-solving, guided by the judge and based on the judge's view of a potential range of rulings. Such a model can lead the parties to a more sophisticated discussion about the sources of their conflict and provide techniques or resources for moving them toward a more constructive view of the need for a lasting solution to their problems. It is a chance for all professionals to work together informally to lead the family out of conflict.

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other side. The parties and attorneys are then excused.

The panel will openly discuss the facts and legal factors involved as they consider their ruling. In deliberations, each panel member will recommend a ruling and give specific reasons, including which parent is more likely to promote a conflict-free parenting atmosphere and promote a healthy relationship between the child and the other parent. The panel members also will focus on what appears to be the best long-term solution to benefit the children. The panel's goal is to keep this family from falling in among the "10 percenters" and keeping these children from being involved in their parents' odyssey of conflict. Each panel member will issue an oral ruling and provide reasons and explanations for it and, optionally, suggestions to the parties for a constructive outcome. This protocol is nonbinding. However, results have shown a significant rate of settlement and reduced conflict.

The biggest failure of any family court system is not addressing high-conflict cases with a vigorous resolve and commitment to engage the parties and attorneys in some form of the judicial case management process, including potentially referring the parties to other resources that might better redirect their adversarial mindset, actions, and conduct. Such protocols and strategies will likely lead to an ultimate settlement of part or all of the case.

A retired judge can be used as a resource in a collaborative family law case (no-court) when all other avenues have failed and the process is likely to be terminated without an agreement. Although the parties and lawyers will have avoided addressing court options in the collaborative process, a termination of the process will land them in court. Therefore, with the consent of the parties, it may be helpful for them to consult with an experienced, retired family law judge in an open, collaborative law session dialogue. Which matters are at a stalemate? Which matters seem unresolvable, and how might these be addressed in the litigation process? What would that process look like?

Perhaps further inquiry and discussion would involve what a judicial outcome might look like in terms of time, fees, expenses, and potential results. Moreover, it is the presence of the experienced judge, as an authority figure, who may command intransigent parties to listen, understand, and discuss how resolution and agreement would better serve them and their family. A retired judge may fully participate with the collaborative team of professionals. As with all of the suggested protocols, there is less risk of recusal or complaints of favoritism when a retired judge is involved.

As a family law attorney and judge, we promote cooperation, including having the family court judge proactively involved in case management. We believe this will not only lead to a reduction of the "10 percenters," but also will lead to a systemic focus on resolution. This, in turn, could result in a less adversarial family law practice.

A judge also can stimulate the formation of a local association of family law professionals. All professionals would be treated as equals, striving to create a nonadversarial, problem-solving style of practice, with enhanced skills in achieving a client-centered, child-focused practice culture. Such an association could include social events (short educational programs) and seminars to address skills building and dealing with thorny family law issues. This could be an excellent vehicle for building consensus on how best to reduce traditional adversarial practice. Developing consensus in this manner can lead to a team approach and foster problem-solving skills and innovative processes and protocols to help families through this most difficult period of their lives.

Growing familiarity among family law attorneys, judges, and others (mental health, financial, etc.) through work, organizational meetings, and social events may enhance nonverbal communication to such an extent that one day a judge's subtle facial gesture may communicate a thought or opinion as effectively as speech.

All of the dispute resolution processes detailed above have the added benefit of modeling enhanced communication skills between attorneys and clients and of helping clients to utilize creative problem-solving techniques. The ideas all focus on developing consensus, reducing adversarial practice, and promoting skills to help contentious parents learn problem-solving skills to reduce future conflicts in the separated family.

The judge plays a key part in developing and implementing this consensus, but the impact of these processes is broader still. We ask every family law professional to view as a moral imperative the guiding principle of physicians, "first, do no harm." We all know that ongoing parental conflict injures children. Shouldn't the attorney and all professionals in family court have a moral obligation to strive to reduce conflict between parents and to reduce adversarial litigation wherever possible? Failure to act on this commitment has the propensity to harm children and contributes to the destruction, if not devastation, of life-long relationships, and ultimately untold harm to society. This moral obligation transcends (but is complementary to) ethical and disciplinary rules. Our society needs and demands no less. **FA**

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