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Settle, Settle, Settle

Why letting the judge decide should be your last resort

BY ARTHUR E. BALBIRER

There is only one real alternative to settling your divorce case: judicial intervention and decision. In other words, if you and your spouse cannot reach a settlement, a stranger will define and determine the most significant financial transaction of your life. Even more dramatic is that stranger's deciding issues with respect to your children. If at all possible, resolution of your divorce case through agreement with your spouse is far preferable. After more than 45 years of experience in these matters, I have come to the inescapable conclusion that judicial intervention should be your last resort. One could call such intervention, "judicial roulette."

No matter how well intentioned, experienced, or wise, a judge is, after all, a human being like the rest of us who can have a very bad day. As a mediator, I believe that fear of the only alternative to settlement—the judge—is and should be the main motivator in resolving these matters. Parties far more easily accept and abide by resolution through agreement than one imposed on them by a stranger.

Why settle for reasons other than fear? Settlement results in closure and finality. It's over. No more courtrooms. No more lawyers. No more litigation-related anxiety. No more large and unaffordable legal bills. Your attorney will commemorate the resolution in clearly defined and unambiguous language. Sometimes judges' decisions don't do that, thereby resulting in more litigation and attendant cost and anxiety.

A trial might be extended or prolonged. A three-day trial may start and stop for any number of rea-



sons: judicial interruptions or unavailability due to more urgent matters. The whole process could take months. The judge has an obligation to render a decision within a certain timeframe, depending on the rules in your area. Once a decision is rendered, parties can seek clarification, sometimes even seek to reargue. The judge, after assigning the motion for argument, which could take months, must make a further decision or pronouncement. All of this results in more delay and expense.

Once the dust settles, the party has the right of appeal. Depending on the jurisdiction, an appeal could take several more years. If the appellate court believes the trial judge committed error, it can reverse the judgment and send the case back for more proceedings or, if appropriate, a new trial. Then you start all over.

How to settle

To make the best possible decisions in your divorce case, you must be armed with good advice and be well educated. Your lawyer doesn't make decisions. You do. Listen to your lawyer. He or she can explain

the legal process and case strategy and help you set goals and acquire reasonable expectations for the resolution of your case.

Your attorney has two major responsibilities: (1) to be your advocate in court and in negotiations and (2) to counsel, educate, and create reasonable expectations as to goals and outcomes. Your lawyer's analysis will and must take into account the facts of your case, the law as it exists, and her or his experience before the judge who might or will hear the case. It is crucial that you assist your counsel by providing the facts as you know them.

Level with your attorney. Disclose the facts and any "skeletons" you may have. Don't whitewash your shortcomings. With full knowledge of your "problems," your lawyer is best equipped to help you deal with them. Arm your lawyer with the truth and a close look at your blemishes. Don't let your lawyer spend time and your money analyzing someone else's case. Every moment of your lawyer's focus must be on your case.

Listen attentively to your attorney. Well-meaning friends and loved ones are in no position to give you anything but emotional support. Their advice should never supplant that of your attorney. They are not armed with the facts or the law or what really happens in these matters. They might be familiar with how one matter was decided, but they have no real understanding of how that matter differed from yours. Their "baggage" and desire to say what you might want to hear may very well result in bad counsel.

Armed with your attorney's advice and counsel, you, and only you, have the right to accept or reject the legal advice and/or recommendations. Your lawyer must give you his or her best and worst-case scenarios. My procedure was to envision 10 mythical judges in 10 mythical courtrooms. All 10 would have excellent wisdom, experience, judgment, and be having a good day. Where would these judges rule with respect to the facts of your case, the law, and issues? "Wild cards" surface in every case. How will the judge react to your wild card? What's the best-case scenario? What's the worst case? What's the mid-range? What's black? White? Gray?

Such considerations are important in analyzing settlement proposals. The risk and reality is that your judge may not possess the attributes of perfection ascribed to "mythical judges." Remember, judges are human. They come into the courtroom with their own baggage. Your palpable fear that the judge could well decide your case from far out in left field is a good reason to settle.

What is a settlement?

By its very nature, settlement involves compromise. A settlement cannot be perfect. If it is perfect for you, by definition, it is totally imperfect for your spouse. Why would your spouse ever agree to a resolution that is totally imperfect for him or her? Settlement will consist of a package of things. In most cases, the primary components are amount and duration of alimony, child support and child-related expenses, parenting issues, and a division of assets and debts. There are other components—important, but more secondary or tertiary. In analyzing the total package, "does the good outweigh the not so good"?

To achieve your primary goals, you must consider giving up some secondary or tertiary goals. What are the chances of achieving your primary goal in a courtroom? If not so good or not so sure to happen, achieving it might require giving in on something that is important to your spouse. Remember, the settlement will not be perfect. It will involve compromise. Don't analyze or decide based on one component. Look at the whole package. Don't allow anger or guilt to hijack decision-making. Be guided by your counsel, but understand that it is your decision. You must live with the outcome.

Last but not least

Do not settle at all costs. In some cases, despite best efforts, the matter cannot be settled. Consider mediation in which an impartial and skilled person can attempt to get counsel and the parties to "yes"—or, at least, to "maybe." If that fails, there are alternatives to conventional courtroom litigation, namely binding arbitration.

Although still litigation, arbitration is an attractive and efficient way to litigate. It permits the parties and their counsel to dictate the procedure and to streamline the hearing. You will have a say in where, when, and how arbitration takes place, and a skilled and experienced person will hear and determine your case. Arbitration permits the privacy of a hearing, free of public scrutiny. Be forewarned, however, that nothing is more satisfying than being the captain of your own ship and in charge of your own destiny. Whenever possible, settle, settle, and settle. **FA**

Arthur E. Balbirer is a divorce mediator and arbitrator in Connecticut. He was a founding fellow of the International Academy of Matrimonial Lawyers and has written and spoken on family law topics across the country.

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