

Expanding Disagreement Resolution Skills for Attorneys: Helping Shape Future Co-parenting Relationships and Addressing Property, Debt, and Distribution of Future Income*

by

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Abstract: *Ken Waldron and Eileen McCarten designed and conducted a study to test the hypothesis that, in the vast majority of divorce cases, the causes of co-parenting conflict are skill deficiencies and not mental health issues. The skills regarding the inevitable tasks of resolving differences and disagreements post-divorce is critical. A functional co-parenting relationship requires much more than following a court-ordered custody schedule and the suppression of conflict. The healthy resolution of disagreements requires our Five Tasks to be performed in order for parents to facilitate and enjoy a functional and amicable co-parenting relationship.*

The Waldron-McCarten study reflected a high correlation between our Ten Disagreement Resolution Skills and the level of co-parenting conflict. Prior research on some of those skills confirmed that those skills can be taught. Therefore, assessing skill deficiencies at the time of a divorce and teaching those skills can lead to a much improved co-parenting relationship. In addition, attorneys can model and facilitate these steps at the time of a divorce, and thereby broaden services provided to their clients. This

* We intentionally use the term “disagreement,” rather than the more common term “dispute,” for accuracy. Parents have disagreements. When disagreements are unresolved, they become disputes. When disputes are unresolved, they morph into “conflict.” Marital partners and divorcing spouses begin with normative disagreements. Our hypothesis is that weaknesses in disagreement resolution skills are the key ingredient in the escalation to disputes and conflict.

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can potentially prevent (or at least reduce) co-parenting conflict and facilitate functional and healthy co-parenting relationships with better outcomes for their children.

Introduction

Much of what we currently think about co-parenting conflict might be wrong. Mental health problems, especially personality disorders, might not be the common cause of the majority of co-parenting conflict. Many current approaches to treatment for co-parenting conflict, at best, reduce overt conflict but do not result in healthy co-parenting relationships. This article posits an explanation for co-parenting conflict that includes a solution. Finally, we believe that family law attorneys can play key roles in shaping co-parenting relationships following divorce.

Psychologist Mary Whiteside, in an extensive review of the literature, found that about 20% of divorced parents conduct amicable, healthy co-parenting, about 20% conduct high conflict co-parenting, and about 60% have moderately high to relatively low overt conflict, some of which includes cold war co-parenting relationships.¹ The high conflict group likely represents mental health problems, especially personality and conduct disorders, since about 20% of the population exhibits these difficulties, independent of divorce.

The message of this literature search is that post-divorce co-parenting conflict is common but not inevitable. The history of marriage indicates that managing differences and resolving disagreements was pre-determined by socially dictated roles, which generally involved the suppression of women (wives) and the dominance of men (husbands). The history of divorce is the reverse, where mothers were dominant and fathers became largely irrelevant, except in the role of paying child support.

Only since the social revolution in the 1960's and 1970's has marriage become more egalitarian, at least in some parts of the world.² This created a new evolutionary paradigm shift: marital partners were required to manage differences and resolve disagreements when neither gender has the final say. Likewise, the increased role of divorced fathers in the lives of children has also

¹ Mary F. Whiteside, *The Parental Alliance Following Divorce: An Overview*, 24(1) J. MARITAL & FAM. THERAPY 3 (1998).

² See generally STEPHANIE COONTS, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (1990).

required that inevitable differences and disagreements be resolved without a designated final decision-maker. In both cases, spouses and parents need new disagreement resolution skills.

This article proposes to expand dispute resolution skills for family law attorneys and rename them “disagreement resolution skills,” to facilitate functional and amicable co-parenting relationships. Part I introduces our Skill Building Model and the link between lagging or lacking skills and co-parenting conflict. Part II introduces the Co-parenting Conflict Assessment Tool (CCAT) and offers additional information for the technically minded based on the research. Part III presents five research-based tasks facing separated parents, which is a roadmap for parents to facilitate a functional and amicable co-parenting relationship. Part IV describes Ten Disagreement Resolution Skills and provides suggestions to family lawyers for modeling and, to the extent possible, teaching the skills to clients. Family law attorneys are in a unique position to help clients make a healthy adjustment to divorce, particularly in the negotiation and settlement phases of a case. Part V applies these concepts to the distribution of property, debt, and future income.

Expanding legal services for divorcing clients can accomplish two important objectives:

First, the fears and insecurities of divorcing parents about the impact of divorce on family life and outcomes for their children can diminish dramatically as they learn the modest tasks facing them. They can also learn the skills that can diminish future conflict between them. Second, the same skills can be applied to the fluctuating financial futures of the clients, when adjustments to their financial situations might be necessary to reach financial goals for their children and for themselves.

I. Skill Building Model

Skills for resolving inevitable disagreements are required to have a healthy marriage, and when divorced, to have a functional co-parenting relationship and a healthy family. Taking inspiration from the *Lagging Skills Model* in education,³ Eileen McCarten

³ ROSS GREEN, *LOST AT SCHOOL: WHY OUR KIDS WITH BEHAVIOR CHALLENGES ARE FALLING THROUGH THE CRACKS AND HOW WE CAN HELP THEM* (2008). Dr. Greene originated the empirically supported and evidence-based model of care Collaborative and Proactive Solutions (CPS) based on the premise that challenging behavior occurs when the demands and expectations being placed on a

and Ken Waldron hypothesized that, at least for the 60% group of divorcing parents who have moderately high to relatively low overt conflict, the causes of marital conflict that end the marriage persist into the divorce, in the form of co-parenting conflict. The family law system exacerbates the problem, although inadvertently, by turning parenting into the zero sum games of legal custody and a parenting schedule. This creates the impossible illusion that successful parenting can be conducted in two homes with little communication and cooperation. The ingredients of a functional co-parenting relationship and the necessary skills for resolving disagreements could and should be addressed in the typical divorce, and this is where and when attorneys can help.

Research on marriage reveals that lagging (or lacking) disagreement resolution skills differentiate between successful marriages and failed marriages. John Gottman, Bill Banaka, Judy Wallerstein, and others have studied the role of skills in marriage. John Gottman and his colleagues studied marriages for almost twenty-five years and produced a breakthrough book.⁴ Bill Banaka identifies the phase in marriage that involves control as the make-or-break issue, depending on the control strategies of the spouses.⁵ Other books, such as Judith Wallerstein's *The Good Marriage*, deliver more information about skills that lead to a successful marriage.⁶

A reasonable hypothesis is that the majority of marriages that end in divorce do so because the spouses lag or lack skills to resolve the disagreements that inevitably arise from differences successfully. As Gottman points out, when differences and disagreements remain unresolved, marriages begin to go through predictable stages, culminating in apathy and often divorce.⁷ Based on a thorough literature search and the experience of the study's

child exceed the child's capacity to respond adaptively and that some children are lacking the *skills* to handle certain demands and expectations.

⁴ JOHN GOTTMAN, *WHY MARRIAGES SUCCEED OR FAIL: AND HOW TO MAKE YOURS LAST* (1995).

⁵ WILLIAM BANAKA, *RELATIONSHIPS: A DEVELOPMENTAL APPROACH* (1972). This book is unfortunately out of print. Dr. Banaka was one of Ken's graduate school professors, which is when Ken read his book.

⁶ JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* (1996).

⁷ Ellie Lisitsa, *The Four Horsemen: Criticism, Contempt, Defensiveness, and Stonewalling*, THE GOTTMAN INSTITUTE, <https://www.gottman.com/blog/the-four-horsemen-recognizing-criticism-contempt-defensiveness-and-stonewalling/> (last visited Jan. 24, 2024).

authors, Ken Waldron and Eileen McCarten identified a list of Ten Disagreement Resolution Skills.⁸

Ken and Eileen created an assessment tool to measure skill levels, and a rating system to measure the level of co-parenting conflict. A pilot study was conducted with 20 subjects to test the validity of the Co-parenting Conflict Assessment Tool (CCAT).⁹ The rating of the level of conflict was conducted by four experienced mental health professionals. The results showed a very high correlation between scores on the CCAT and four independent professional ratings of the level of co-parenting conflict. This suggested that the assessment tool is valid and that there is a correlation between the ten disagreement resolution skills and the level of co-parenting conflict. Ultimately, the study expanded to include 50 additional subjects drawn from legally required co-parenting education classes nationwide.¹⁰ The results of the expanded study also found a very high correlation between individual skills and total of skill levels and the level of co-parenting conflict. Because it is highly unlikely that the level of conflict causes skill weaknesses, and because it is very likely that skill levels cause the level of conflict, the study concluded that disagreement resolution skill levels predict and cause the level of co-parenting conflict. These findings therefore define the problem of co-parenting conflict as having a solution: teach disagreement resolution skills to vulnerable parties.

II. Co-Parenting Conflict Assessment Tool (CCAT) Research Method and Findings

Ken and Eileen developed a Co-parenting Conflict Assessment Tool (CCAT). Sixty items (six items for each skill), which are answered on a Likert scale (i.e., Strongly Disagree; Disagree; Neutral; Agree; Strongly Agree). Level of conflict was judged by four experts on a Likert scale (Low Conflict; Moderately Low Conflict; Moderate Conflict; Moderately High Conflict; High Conflict). Seventy enrollees in a required parent education classes in Illinois and on-line co-parenting classes elsewhere. Findings

⁸ See *infra* Part IV.

⁹ The 20 subjects were divorcing parties entering the required parent education program administered by Eileen McCarten in Rock County Illinois.

¹⁰ The 50 additional subjects were drawn primarily from the on-line co-parenting education participants at the High Conflict Institute of Bill Eddy.

strongly confirmed the validity of the CCAT, showing a very high correlation between subject scores and level of conflict. As an incentive to participate, subjects were offered a report on the findings of their answers on the CCAT. The responses came close to a normal curve distribution, suggesting that the study was valid.¹¹

Research Findings

Skill ¹²	1	2	3	4	5	6	7	8	9	10	Total	S-R	E-R
1	1.00												
2	.496	1.00											
3	.539	.695	1.00										
4	.616	.433	.567	1.00									
5	.564	.644	.732	.420	1.00								
6	.441	.631	.723	.304	.807	1.00							
7	.583	.619	.746	.440	.783	.813	1.00						
8	.620	.574	.616	.457	.674	.605	.568	1.00					
9	.639	.644	.721	.498	.739	.698	.672	.684	1.00				
10	.395	.611	.657	.285	.669	.758	.585	.495	.779	1.00			
Total	.729	.785	.856	.596	.874	.848	.837	.793	.871	.799	1.00		
Self-Rating	.487	.413	.460	.237	.500	.456	.677	.491	.488	.385	.567	1.00	
Expert Rating	.686	.710	.781	.520	.760	.750	.816	.762	.790	.649	.894	.426	1.00

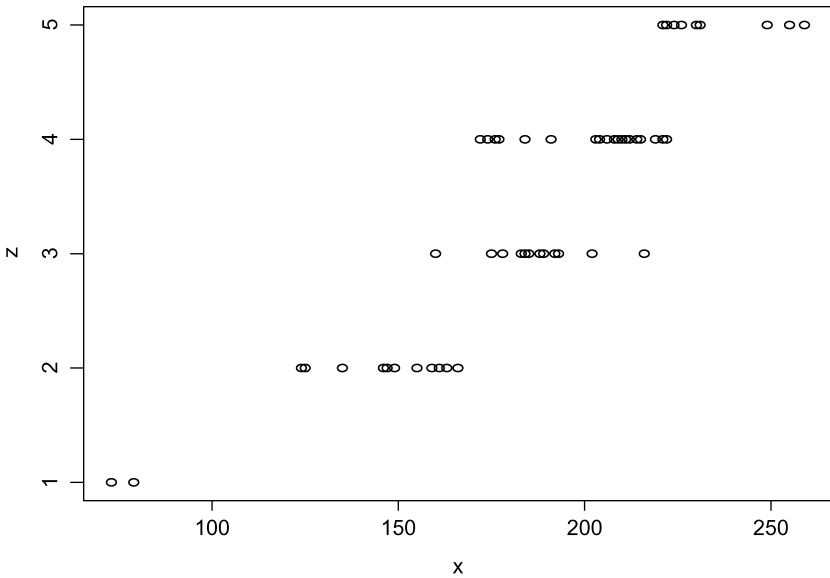
All ten disagreement resolution skills correlate highly with level of conflict, in both directions of low and high conflict, as measured by ratings, with some variance. Self-rating for level of conflict correlates well with Expert Rating (.426), but is noticeably lower than other correlations. In every case, expert ratings correlate better with each skill and with total skill scores than self-rating. It appears that a substantial minority of co-parents do not experience or perceive the same level of conflict that experts observe. A detailed examination of individual subjects suggested that the majority of co-parents are fairly objective, although a smaller, but substantial number of subjects have very subjective views regarding the level of conflict in their co-parenting relationship.

The following is the scatter graph of the results of the study. **Z** represents the level of conflict as judged by four experts (i.e., 1=low

¹¹ The distribution was slightly skewed in the direction of higher conflict.

¹² The numbered skills in the table correspond to the numbered skills in Part IV of this article.

conflict to 5=high conflict), and **X** represents the total scores of the subjects on the CCAT. The clear directions of scores (small ovals) shows the near linear relationship between conflict and skills.



Our Hypothesis and Conclusion

Our study strongly supports the hypothesis that the causes of co-parenting conflict for the bulk of divorcing parents are lagging disagreement resolution skills.¹³

III. Five Tasks to Facilitate Functional and Amicable Co-Parenting Relationships

Research on functional and amicable co-parenting relationships identifies five specific accomplished tasks¹⁴ in the following domains:

¹³ Dr. Waldron has written a *Co-Parenting Training Workbook* for parents to address these five tasks of a functional co-parenting relationship. Workbooks can be obtained at: www.unhookedmedia.com (the publisher).

¹⁴ CONNIE AHRONS, THE GOOD DIVORCE: WE'RE STILL A FAMILY (2004); Sanford Braver et al., *The Content of Divorce Education Programs: Results of a Survey*, 34 FAM. & CONCILIATION CTS. REV. 41 (1996); Sharlene A. Wolchik et al., *The Children of Divorce Parenting Intervention: Outcome Evaluation of an Empirically Based Program*, 21 AM. J. COMMUNITY PSYCHOL. 293 (1993).

Sharing information. In organizational terms, sharing information creates an *open information system*, in which the people involved in making decisions have the same body of information. In a co-parenting relationship, the implication is that both parents share all of the information they each have that the other parent might not have. This includes: general information about the children when at the home of each parent (e.g., school information; social information; behavior in each home; routines, rules and expectations in each home) similar to a business team meeting; emergency information (e.g., illness, changes in schedules, events that affect a child such as a problem at school); paperwork received (e.g., sports schedules; school notices); and transition information (e.g., information that accompanies a child going from one home to the other that allows the receiving parent to take appropriate action, when needed, such as, “*Lucy didn’t sleep well last night and has been cranky today. She might be coming down with something.*”).

Designing child-friendly transitions. Parents must design transitions to reduce logistic difficulties (e.g., getting sports equipment back and forth) and avoid problematic conflict (e.g., allowing a parent to come into the other home at the transition). These include allowing the child to separate from the parent being left and greeting the receiving parent in healthy ways.

Developing a flexible schedule. Parents must agree to rules and procedures for making temporary changes in the custody schedule to meet the needs and interests of the children, to take advantage of opportunities for the parents, to cooperate in emergencies, and so on.

Coordinating parenting in the two homes. Parents in amicable relationships make the rules, routines, chores, expectations, responsibilities, and discipline as similar as possible in both homes. This creates a unified effort to teach important life lessons.

Creating plans and rules regarding joint decision-making and problem-solving. Problems inevitably arise in the lives of children. Children will benefit most when both parents are involved in the solutions (e.g., a child struggling with academics). Parents often face new developments that will be best met with a coordinated effort by both parents (e.g., introducing children to a potential step-parent, a new opportunity at school, a new sport or extra-curricular interest, and so on).

Successful co-parents must set up rules and procedures for each of these tasks. Successfully addressing these tasks requires certain skills involved in resolving the inevitable differences and disagreements that arise. What follows are our Ten Skills that can strongly promote both parents’ participation in the above Five Tasks.

IV. Ten Skills for Effective Co-Parenting

Lawyers can be very helpful to divorcing parents by introducing them to the five tasks above and by addressing the importance of being able to resolve disagreements if and when they arise. Informing clients that resolving disagreements involves the following modest skills can make the goal of having an amicable co-parenting relationship seem achievable. Our skills are organized into three categories: 1. Right mindset; 2. Managing feelings and emotions; and 3. Problem-solving and decision-making.

1. Right Mindset

Skill #1. Overcoming Personal Bias

This skill sounds a little complicated, but it is not. Humans developed natural tendencies that were important to survival early in our species’ history, but which can also interfere in relationships in more modern times.¹⁵ These natural tendencies are: the Overconfidence Bias, the Us-Them Tribal Warfare Bias, and the Judgment Bias.

Overconfidence Bias is just what it sounds like. People tend to think of themselves as better than they objectively are. People have a very difficult time seeing themselves objectively. When people disagree with another person, they tend to think that they are “right” and that the other person, therefore, must be wrong. Because people are overconfident, if they have a problem in a relationship, they tend to think that it is the other person causing it, which leads to defensive emotions of anger and blame. In addition, because the other person is also likely overconfident, he or

¹⁵ SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993); ROBERT M. SOPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* (2017).

she does the same thing and ends up angrily blaming in return. Both people think that they are the one trying to cooperate and the problem is the other person. This leads to a cycle of blame and increasingly entrenched overconfidence.

Us-Them Tribal Warfare was key to surviving when resources were scarce. Early humans were not only competing with other species for those resources, they were competing with other groups of humans. Usually organized into families and tribes, one group would attempt to get the resources, sometimes warring with other tribes in the same area. Whole versions of our predecessors went extinct as a result of this thinking. For example, one hypothesis is that homo sapiens killed off Neanderthals, or at least crowded them out of areas with resources. In parts of the modern world where resources are not scarce, people channel Us-Them Tribal Warfare into less destructive activities, such as sports, lawsuits, and divorce. Most divorces start out with a competition for resources: property, future income, and time with children. A once loved spouse becomes “them,” along with those on “the other side,” such as his or her attorney and any friends or extended family members who took the ex’s side. The gravitational pull leads to litigation that feels like warfare, often lasting well beyond the divorce itself. As in tribal warfare, the “other side” becomes increasingly negatively characterized.¹⁶

Judgment Bias is subtler. People judge others by their actions, but judge themselves by their intentions.¹⁷ Because of this, a parent might judge his or her ex for an action negatively, but judge themselves positively for the same action because they had “good intentions.” For example, a mother thinks she is being “honest” with the children and that the father is “badmouthing” her, but they are both doing the same thing.

Overcoming personal bias is accomplished by seeing through these natural tendencies and being objective about oneself and the co-parent. Most people are ordinary and not superior to others. When people have problems in their relationships, they are

¹⁶ See, e.g., Marilynn B. Brewer, *The Psychology of Prejudice* “Ingroup Love and Outgroup Hate,” 55 J. Soc. ISSUES 429 (1999).

¹⁷ Emily Pronin, *How We See Ourselves and How We See Others*, 320 SCIENCE 1177 (May 30, 2008).

usually part of the cause.¹⁸ When they blame, even if they are at least partially right, it does not solve the problem. Respectful cooperation solves problems. Even though people are tempted to take an “Us-Them” perspective, they can step back and remember that they probably share similar long-term goals with their co-parent, goals that can only be reached through cooperation. Destructive actions are destructive, no matter what the intention is. People should judge themselves by their actions, not their intentions.

Overcoming personal bias is no easy task, but doing so simply means learning and practicing the necessary skills mentioned in the above paragraphs. Even when the co-parent fails to develop these skills, people can learn and use them to prevent or escape destructive conflict. If the co-parent angrily says that she or he is helping with homework and that the other parent had better do the same, a parent can respond that they both want their child to do well in school and should talk about how they can accomplish that. To be humble, avoid tribal warfare, and judge actions, not intentions, might seem challenging, but is healthy and effective in reducing co-parenting conflict.

An attorney can be a great help in addressing these biases with his or her client, although handling the perceptions of a client can be tricky. The client might be seeking support for the biases. An attorney friend of the authors once told a story of a woman who came to see him. When asked what she was hoping for, she replied that she wanted the attorney to “*bury the bastard*.” The attorney told her that he could do that with a number of legal maneuvers, but that would delay the divorce and cost a lot of money. Then he told her that, unfortunately, doing so would also likely bury her. Most experienced attorneys understand this. Effective negotiators understand that the optimal outcome for one’s client is usually also an optimal outcome for the other party.¹⁹

¹⁸ In a case in Richland County, Wisconsin, in which Ken Waldron was to testify, the father was on the stand badmouthing the mother. The judge, whose name he forgets, turned to the father and said, “*Be careful, in my experience, a 10 does not marry a 1.*”

¹⁹ The authors understand that in more extreme cases, this perspective might not be true. See also Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOTIATION L. REV. 143 (2002).

Skill #2. Coping with Different Realities

This skill involves bridging the gap between two different worlds and is closely related to Skill #3 (Getting Perspective). People live in their own world, which differs dramatically from the world where others live. This is because people all have experiences not shared by others, ways of interpreting their experiences that are different from others with the same experiences and even have unique differences in what they pay attention to and what they value. When people see that another person is living in a different world, they sometimes judge them by not understanding what is “*really going on*” or even lying. People have a hard time accepting that what is going on in the other person’s world can be true, even especially when it differs from what is going on in their world (which can also be true). Inevitably, they say things like, “*That is not what happened,*” instead of recognizing that it really did happen in the other person’s world.

People are able to bridge the gap between two different worlds with effective communication and rules. In effective relationships, there is usually a little of effective communication and applicable rules. Good communication involves listening and asking questions, so that two people can understand each other’s world and get a whole picture. However, sometimes it takes a rule.

For example, one spouse might have come from a family in which teasing includes swearing, but the other spouse might react very negatively and feel denigrated as a person. These parents might never understand each other’s world and might simply need to make a rule that there is no swearing when communicating with each other. Why are rules so effective? If everyone knows the rules, people can have high functioning relationships, even when they do not understand the other person. Think of a card game. If everyone knows the rules, they can play without understanding anything about or even knowing the other person.

Effective communication, even with rules, takes a good deal of patience and a genuine interest in listening and learning what is being said, both of which might be in short supply during or shortly after a divorce. However, when there are children involved, learning to listen, ask questions, and when necessary, making rules is a must.

For example, one parent might react very poorly to any disrespectful behavior (e.g., rolling the eyes), and the other parent

might not understand why the co-parenting partner gets so upset. Thinking the other parent is “wrong” for getting so upset is an example of personal bias (see Skill #1- Personal Bias). A rule to be respectful of one another, including not rolling eyes, solves the problem.

Attorneys again can be of great help with this skill. It might come down to simple modeling. For example, a client tells a story, and the attorney says, “*You are probably right, but I want to check into what your wife says about it. I will contact her attorney.*”

Skill #3. Getting Perspective – Looking at a Situation from Another Person’s Point of View

This sounds like Skill #2 (Different Realities), but takes it one step further. The challenge of this skill is the use of imagination. Even when they agree on reality, people have very different points of view because of their histories, personalities, values, differing information, and even what they pay attention to and what they don’t.

To be effective in relationships, people have to have the skill called perspective-taking, that is, looking at a situation from another person’s point of view. Research shows that this skill can be learned. For example, in 1990, Howard Zehr introduced *restorative justice* in the United States.²⁰ Beginning with delinquent criminals, the delinquent child meets with the victim of the crime, with a mediator, and often with others who were affected, such as family members. The mediator solicits the perspectives of both the victim and the delinquent, and others present who were affected by the crime, and they work out reparations (e.g., the delinquent might mow the victim’s lawn at no charge ten times). Actual outcomes have included the following:

1. The victims were able to see the perspective of the delinquent, and the delinquent was able to see the perspective of the victim.
2. Both the victim and the delinquent developed empathy for one another.
3. Victims reported that the process resolved the bad feelings.

²⁰ HOWARD ZEHR, CHANGING LENS: A NEW FOCUS FOR CRIME AND JUSTICE (1990). Restorative justice had been practiced in other cultures for a long time, such as among the Maori in New Zealand.

4. Delinquents were much less likely to re-offend in the future because they learned to see the perspective of victims.

This is a true win-win. These findings led to research on teaching perspective-taking simply by presenting situations (e.g., a photograph of a person in some situation) and asking subjects to report what they think people in the situations might be thinking and feeling.²¹ Clumsy at first, subjects became increasingly better at perspective-taking. Perspective taking can be learned, but it takes practice.

The Right Mindset (covered in the first three Skills) undergirds all of the remaining six skills. In fact, it also turns the tables on conflict. Assume one parent accuses the other parent of something. Rather than getting defensive, by asking a few questions, the accused parent can say something like, *"I can see from your point of view that what you are saying makes sense."* The accused person might add something like, *"But you are missing some information from my perspective."* This approach will, in most situations, deflate the anger and make problem-solving possible and, if they are humble, resist the temptation to engage in tribal warfare and judge themselves by actions, not intentions. Most people facing differences try to get their point of view across, but do not really listen to the other person. To get the other person's perspective means asking something like, *"I want to understand your point of view about X, but I need a little more information."* Then, really listening.

2. Managing Feelings and Emotions

Skill #4. Identifying and Processing Core Feelings, Including the Ability to Have Mixed Feelings and Ambivalence

It is so simple to blame another person for one's suffering, to be angry at them and even hate them. This is because anger, blame, and hate are defensive emotions. These are emotions people would rather feel when compared to the core feelings under the surface that should be addressed (meaning identified and processed).²² The dominant core feelings involved in a divorce are

²¹ Robert L. Selman (1975, 1980, 1990, 2003) developed the model of perspective taking and demonstrated that this cognitive task could be learned.

²² Leslie S. Greenberg, *Emotion-focused Therapy: A Clinical Synthesis*, 8 FOCUS 1 (Winter, 2010); Leslie S. Greenberg, *Emotion-Focused Therapy: A Synopsis*, 36(2) J. CONTEMPORARY PSYCHOTHERAPY 80 (Jan. 2006). Emotion-Focused

sadness, guilt, shame, fear, and insecurity, which are difficult emotions on which to focus. As a result, so many divorcing spouses jump to blaming and anger instead. Anger and blame can feel so real, but they are cover-ups for the core feelings.

When a meaningful relationship ends, it is sad. The longer people had that relationship, the sadder it is. A divorce might include at least the hope for, relief from pain, but a divorce means giving up each other and giving up the hopes and dreams people had of a life together. They lose the family experience that they wanted for their children. They lose some friends and often loved extended family members of their spouse. The sadness can be too overwhelming to handle initially, and spouses often turn to anger and blame to cope.²³

A divorce ignites people's fears. They are unsure how money will work out, how raising children as separated parents will work out, and whether their children will be "*scarred for life*." They wonder if they will want another relationship, and if they do, whether they will find one that works. Going on the "dating market" raises fears and insecurities. Although people might blame their spouse, most people know that they also played a part in what feels like a failure. Here, the core feeling is guilt. People are often ashamed of having a "failed marriage," which they also try to cover-up by blaming the ex-spouse, attempting to portray themselves as innocent victims.

When people fail to resolve these core emotions, they stay on guard and are quick to blame their ex-spouse. Unfortunately, core emotions become so distorted that a perfectly nice parent might take great comfort, or even joy, when the ex-spouse suffers or is even hated by a child. The core emotions must be identified and processed.

The key is to work on the sadness, guilt, shame, fears, and insecurities. This means going back to painful experiences and asking questions: "*What were our hopes when we decided to have children?*" "*What am I afraid of?*" "*What have I lost?*" "*What are my insecurities about my future?*" and so on. The goal is to resolve those core feelings and leave behind the anger and the blame.

- Sadness is resolved by going through grief.

Therapy is an evidence-based mode of treatment that focuses on core emotions and secondary (defensive) emotions.

²³ See Greenberg, *A Clinical Synthesis*, *supra* note 22; Greenberg, *A Synopsis*, *supra* note 22.

- Guilt is resolved by forgiving oneself and asking forgiveness from the ex-spouse.
- Shame is resolved by being open and taking some responsibility for the failure.
- Fear is resolved by developing a plan for going forward.
- Insecurities are resolved by being humble and open with people.

Most divorcing spouses have mixed feelings about each other. However, the good feelings are hard to handle when losing someone once loved. By being aware of the mixed feelings, good and bad, people can maintain a healthy balance. When a person can say they have mixed feelings about their co-parenting partner, got stuck in the marriage, and did the best they could do at the time, a person can let go of the shackles of a nasty divorce.

The best question to ask a parent complaining about the co-parent is not why the co-parent acted as he or she did, but rather why the parent reacted as he or she did to what the co-parent said or did.

Ken learned to start every mediation by focusing on sadness. A short *"We are here to mediate, but I want you to know that I understand how sad this is for you. I am sure it is not where you hoped you would be in your marriage."* The usual response was the clatter of weapons falling to the floor and often tears. Another good question to ask, before getting deeply into a case is, *"I want a good outcome for you? Can you tell me some of your fears about getting a divorce?"*

A lawyer can be most effective when he or she models this type of identification and processing of core emotions, avoiding the temptation to get caught up in the defensive emotions of anger and blame. The opening question might be: *"Tell me how you met. I want to understand how you got to where you are."* This can open the door for steering clients in the direction of managing core emotions. To an attorney, this might sound a little like therapy, but it is not. Expert negotiators strongly support the use of genuine empathic connection with both sides of a disagreement to facilitate meaningful solutions.²⁴

²⁴ E.g., Andrea Kupfer Schneider & Noam Ebner, *Social Intuition*, in I THE NEGOTIATOR'S DESK REFERENCE 127 (Chris Honeyman & Andrea Kupfer Schneider, eds. 2017); Paul Taylor & William Donahue, *Lessons from the Extreme: What Business Negotiators Can Learn from Hostage Negotiations*, in II

Skill #5. Developing the Ability to Be Vulnerable in Relationships

This skill is quite simple, and yet is probably the most emotionally difficult skill to practice and learn. To understand this skill, we must look at the issues of insecurity versus confidence. Insecurity in relationships comes when people fear losing control of a situation because they do not know what will happen. For example, imagine that you are at the end of a first date with someone you like and to whom you are attracted. Do you ask for a kiss? Do you ask for a second date? When you do ask, you are out of control and do not know what will happen. If you get a “yes,” you are happy and relieved, but what if you get a “no”?

Most people grow up with insecurities but develop ways to avoid experiencing the fear undergirding those insecurities. People develop ways of creating a social image that they think will get people to like them, take them seriously, or be attracted to them. People rehearse conversations with potential employers or memorize a speech. People might learn to make excuses for behavior or failures and give “spin” to stories to try to convince other people that they did not really make a mistake or do something wrong. If people age in a healthy way, they learn that being rigorously honest with others, being who they really are, saying what they are actually thinking, being open about mistakes, admitting to wrong-doing and apologizing and taking responsibility are the best practices. This reduces insecurities and develops confidence. As people slowly move into adulthood, they feel more confident and less insecure. When mistakes are pointed out, they can admit to them and laugh at themselves. They do not blame other people, make excuses, or lie for wrong-doing or failures.

However, not everyone learns that taking responsibility and being rigorously honest resolves insecurities. Many people maintain defense mechanisms to avoid being vulnerable in relationships. As they do, they continue to be insecure and afraid of losing control.

The solution to those insecurities is to practice being vulnerable in relationships. The practice involves being rigorously honest, in a respectful manner, taking responsibility for oneself, and being humble. Being humble simply means acknowledging that

one is a flawed person who makes mistakes, being selfish when one shouldn't be, saying and doing things one shouldn't, not looking perfect, and so on. The reason this resolves insecurity is two-fold: First, people find out that bad things do not happen often when they are forthright. In fact, people will generally find others refreshing and attractive. Second, people find out it is not so bad when bad things do happen. In other words, people become confident.

In cases of divorce conflict, both co-parents generally have difficulty being vulnerable with one another. During the marriage, both have experienced real pain with each other and fear more pain. Yet, the path out of this quagmire is by practicing being vulnerable. The lawyer can be helpful regarding this skill by modeling and practicing this exercise with his or her client in real time situations.

Skill #6. Hearing Criticism in a Healthy Way

Criticism comes in many flavors. Sometimes a criticism is very direct ("*You are such an a**hole*"), sometimes it is a bit subtler ("*If you loved the kids, you would be on time*"), and sometimes there are no words involved at all (just a sneer and rolling of the eyes). Some criticisms are implied, but not directly communicated, such as when a parent greets the other parent and the other parent ignores the gesture. In divorce conflict, these criticisms often provoke angry responses, like the defensive behavior of angry criticisms of the other person. The root of all these inappropriate responses is in taking criticisms personally. The skill is in not taking criticisms personally.

Generally, criticisms really are not personal. There is no rational connection between loving children and being on time. A sneer and a rolling of the eyes is an ineffective way of dealing with hurt or anger. Criticisms say something about the person making the criticism, not the person being criticized, and therefore, they are not personal. In addition, most criticisms are a poor way of identifying a problem because they do not suggest a solution.

It takes practice to get used to not taking criticisms personally, but when accomplished, people find that they escape the negative reactions to them. For example, in response to the "*You are such an a**hole*" comment, a person might respond: "*I am truly sorry that you think that.*"

However, some criticisms have some useful information, so it is worth listening, even though they should not be taken personally. Here is a twist. For example, *“If you loved the children, you wouldn’t be late. The children were really upset.”* Here, the co-parent is criticizing, but the other parent would not take the criticism personally. However, there is useful information about the children. The parent might respond, *“Thank you for telling me this. I will talk with the children about it.”* In another example, *“You are such an a**hole for telling your sister that I am a liar.”* If it is true, this is useful information. The response might be, *“You are right. Neither one of us should be saying bad things about each other to other people. I am sorry and will try to correct this with my sister.”* Here, the response is related to the useful information only, because the name-calling was not taken personally.

The task of managing feelings and emotions is a required skill for resolving inevitable differences and disagreements. In addition, a useful skill to avoid or escape divorce conflict is not to take criticisms personally, but to listen carefully and respectfully to the criticism in case it contains useful information. It can take time to get good at this skill, but is well worth it. An attorney can help a client learn this skill, through modeling and even encouraging the client to learn this skill. Telling a client that a criticism made by the co-parent not only tells something about the co-parent but also includes useful information. *“Let’s respond only to the useful information”* can be very helpful. Again, the lawyer can be helpful regarding this skill by practicing this exercise with his or her client in real time situations.

3. Problem-solving and Decision-making

Once a person has the right mindset (Skills 1-3) and learns to manage feelings and emotions well (Skills 4-6), there remains the task of problem-solving and decision-making. The following three skills discussed below are applying our Disagreement Resolution Skills.

Skill #7. Defining a Problem in a Way That Can Lead to a Solution

This skill is critical. When a problem comes up that a person would like to solve, it helps (in fact generally requires) the

parties to define the problem in a way that leads to solutions. Lawyers generally have this skill set, and it should be easy to apply it throughout the attorney-client relationship, modeling the skill to clients. However, it might help teach this skill by adding the following advice and counsel: e.g., *“We are likely to get more cooperation if we define the problem that you are bringing up in a way that can be solved. Telling your spouse to stop being a jerk is not likely to get very far, and it is not a solution. Making rules for behavior when you are together in front of the children might have a better chance of success.”* While this sounds simple, in human relationships, people often identify and define a problem in a way that leads to conflict, rather than solutions. Assuming that solutions are better than conflict, being skilled in defining problems makes a good deal of sense. For example, compare the following:

Initial Statement: *“You fought so hard to get your precious daily calls, but your telephone call last night really upset Sally. I told you it was a bad idea. That is the end to those calls.”*

Reframe: *“Sally was very upset by your call last night. She cried and kept saying that she missed you. We should try to come up with a way that she does not miss us so much when she is at the other house.”*

In the first example, the problem is identified, but not in a way that leads to a solution for the actual problem. Sally is not going to miss her mother less just because her mother does not call. The second example can lead to a solution because the problem is identified in a way that can be solved. The first example leads to more conflict, while the second example (reframe) promotes cooperation on a problem that both parents likely care about.

Another example is below.

Initial Statement: *“You kept the good jeans that I bought and sent him back in your crappy old clothes. I expect him to come back with the clothes that I send.”*

Reframe: *“I can see that the logistics of clothing going back and forth is complicated. We need a system for getting the right clothes at the right house at the right time. We will probably need a system like that for sporting equipment, school work, and who knows what else. Let’s come up with something.”*

In the first version, the person is demanding his or her solution, which is unlikely to work and puts the burden on the child to

wear the exact same clothes back and forth. Anger and blame are trumping common sense. In the second version (reframe), the person took time to identify the underlying problem and defined it in a way that can lead to a solution. They can find a way to deal with the logistical problems of the child spending time in two homes.

The skill is to step back from impulsive emotional reactions and really think about the underlying problem. Then, the problem needs to be defined in a way that leads to solutions. One more example may particularly illuminate the process of applying this skill.

Parent A is thirty minutes late and has a habit of being late. Parent B had plans and has been scrambling to change plans because the child is late. Parent B gets upset. Rather than saying anything when Parent A arrives, Parent B decides to think about the problem and come up with a plan.

A couple of days later, Parent B sends an email:

“When you are late bringing the children, any plans that I have are disrupted, as happened a couple of days ago. No one can be on time all of the time, and some people have more difficulty with that than others, but we need to come up with a way that plans are not disrupted by the other parent being late. Can you put some thought into what you could do to avoid disrupting plans, and I will put some thought into what I could do, and then maybe we could talk?”

This changes the definition of the problem from one parent being late to framing the transitions from one parent to the other so as not to disrupt plans. That definition leads to solutions.

The point is a simple one: rather than reacting based on emotions when a problem comes up, it is important to take time to come up with a definition of a problem that has solutions. Attorneys during a divorce are generally the first audience to a situation in which a client is having an emotional reaction and defining a problem in a way that cannot be solved. Therefore, the attorney is in the unique position of teaching the client to define the problem in a way that leads to solutions.

Skill #8. Resolving a Disagreement When Both People Are “Right”

This Skill is also challenging, but not for emotional reasons. The challenge here is about assumptions embedded in life. Most

people assume that there is only one “right.” Thus, if they disagree with someone, and believe that they are “right,” they try to prove the other person “wrong.” If the other person believes that he or she is “right,” that person (of course) does the same thing. This can be a healthy first step, because sometimes, one person is “right” and can prove the other person is “wrong.” If the other person is healthy, he or she can be vulnerable and admit being wrong.

However, often in relationships, after attempts to prove who is “right” fail, people are tempted to escalate the argument. This can lead to very destructive conflict. Instead of discussing a topic, people start personal attacks on each other (“*you are so damn controlling*”), develop increasing hostility, and create emotional distance. They might even run to their attorney and try to get a judge to agree with them.

The challenge is to resolve a disagreement when both people are “right.” This is not the traditional dismissive response, “*Let’s agree to disagree*,” where the person secretly still thinks that he or she is “right” and the other person is “wrong.” That is a stand-off, not a resolution. People must really accept that both people can be “right.” The difference is the result of different goals and values, what people focus on, differing histories, new but different information, and just plain old human nature.

To resolve these disagreements, the first step is for people to stop trying to prove that they are “right” and that the other person is “wrong.” The next step is to discuss the differences that led to their opinions, including the values that affect the topic, histories, what is considered important and unimportant, and the differences in the information that people have. They come to an understanding of the larger picture and the differences undergirding the disagreement. If they need to make a decision, and the disagreement is about what will be decided, people have to step back and consider options that accomplish as much as possible of what both people feel is important and what best fits both people’s values.

When resolving a disagreement when both people are “right,” what follows are some practicable Rules and Guidelines:

Rules and Guidelines for Resolving Disputes When Both People Are “Right”

1. **Focus on goals and list more options.** There are usually many possible options to consider when people get stuck on two

options about which they are arguing. They can step back from the argument and brainstorm other options that accomplish more of what is important to both of them. Real “winning” in an argument is when both people feel that what is important to them was included in the solution, or at least considered, even if they do not get everything they want.

2. **Assess different levels of matters’ importance.** Some arguments do not have a third option. When this occurs, it is helpful to measure and evaluate the differences between the two options. For example, Judy wants to abort a pregnancy, and Bob disagrees. They first argue about who is “right,” but after a while, they realize that both are “right,” given their different goals. They then discuss the values, points of focus, histories, and information that they each have. This is an intense discussion but does not resolve the question. They decide to measure the level of importance on a scale of 0 to 10. Judy says that she is an 8, because of the disruptions to her life having a child will bring. It is very important to her. Bob says he is a 10 and could not live with himself, which would likely mean ending his relationship with Judy. They do not abort the baby.²⁵

3. **Understand that pace is important.** If two people want to run together, they have to run at the pace of the slower runner. For example, Jim wants their two-year-old to start daycare, but Sally does not. She wants to stay home with the child for at least one more year before starting daycare and going back to work. They can stop arguing about who is right, sharing information, histories, values, etc. However, it just comes down to Sally not being ready leave the baby and return to work. Jim has to accept that if they are going to work together (and have a good co-parenting relationship and possibly to stay married), he has to operate at Sally’s pace. They hold off on daycare and remain amicable (and married).

4. **Practice the art of giving-in.** When at a true point of conflict, and when there is only one solution, to do it one parent’s way or the other parent’s way, one of the parents must give in. The successful art of giving-in is getting something of equal or better value. Parent A wants to have the children for their family of origin’s Thanksgiving Day celebration every year. Parent B wants at least one-half of future Thanksgiving Days. Both are “right” that

²⁵ *The Importance Of Integrity*, <https://www.gottman.com/blog/importance-of-integrity/> (last visited August 27, 2024). (The Gottman Institute)

their plan is good for the children, but both cannot get their way. Both attorneys ask their clients, “*What could you get in return that would make giving in possible?*” Parent B says, “*If I got the first half of the summer every year.*” Parent A agrees to that proposal.

The Skill here involves what to do next when both people continue to believe they are “right.” If people believe there is only one “right,” arguments escalate and become increasingly destructive. If they believe that there can be more than one “right,” the disagreement can change direction and move toward generation of a solution. If a decision must be made, they can find one that works for both people as well as possible.

The Skill here is one of mindset (that there can be two “rights”) and a little technique of asking the right questions: what is the other person trying to accomplish (and then coming up with ways to accomplish what both people think is important)? Again, the attorney applying this skill can reframe the issue into a win-win for both parties. The attorney can also model how to “give in” in a constructive way.

Skill #9. Making Decisions that Accomplish Both People’s Goals and Six Steps for Making Co-parenting Decisions

The focus of this skill is on making joint decisions. Cooperative and collaborative decision-making, that is, how decisions are made when more than one person is involved, has been heavily studied. Much of that research discovered flaws in the way that people made decisions. However, some of that research uncovered the secret to successful decision-making.²⁶

Separated parents must make many collaborative decisions, well beyond what is dictated by law. If separated parents have difficulty collaborating on decisions, they often put the burden on the shoulders of their children by each making unilateral decisions in their separate homes. For example, teaching good work habits involves establishing good routines with rules, so that the child just does tasks out of habit. What happens if the routines are different in the two homes? Instead of learning good work habits, the child tries to learn how to adapt to the two settings. This can get even crazier when one parent works hard to establish a routine and the other parent leaves it up to the child to get work done. This child

²⁶ See the field of Organizational Psychology. For example, “5 Decision-Making Models if You’re Stuck. Atlassian.com”

grows up knowing he or she should be getting some things done but cannot seem to force him or herself to do it.

Of course, the solution is that parents should coordinate their routines, but this involves making decisions together. Coordinating routines is just one set of hundreds of decisions that work best if collaborative. Deciding how much say-so to give the child in the selection of extracurricular activities and how much time each week can be spent in those activities are two more practical examples. The following section explores the Six Steps for making collaborative decisions in more detail:

Six Steps for Making Collaborative Decisions

1. Make an appointment to begin the process for making a decision.
2. At the appointment, share information and decide what additional information is needed and how to get it. Set up another appointment after all the information is received.
3. Meet again and share the information. List the options, as well as the pros and cons of each option.
4. Choose an option. If it is unclear which option is the best, just choose one and agree to evaluate the choice when there is more information.
5. If disagreement persists on the options, discuss each parent's goals and what they are trying to accomplish and come up with another option that accomplishes as much of what both parents want to accomplish.
6. Develop an action plan – how the option will be put into effect.

Rules Regarding the Six Steps for Making Collaborative Decisions

Some parents might read the above and say, “*I wish*” or “*If we could talk like that, we’d still be married.*” It might be true that if they had this skill, they might still be married. However, intimacy is much more complicated than a business-like co-parenting relationship. The solution is to agree on rules for this process and the meetings together. One rule might be to discuss only one decision at a time. Another might be to stay on topic and to have a way to get back on topic if the discussion goes off topic. Another might be to be courteous and respectful by listening to each other, not interrupting, not making denigrating comments, and so on. Parents

must always have the goal of accomplishing as much for both parents as possible, rather than trying to be “right” about something.

Attorneys can introduce and model this skill in the divorce negotiations. A selling point is that parents learning this skill can teach their child this skill by modeling it, so that their child can take the skill into adulthood. As previously stated, the attorney can apply skills already known and used in other settings to counsel his or her client appropriately.

4. Recovering from Destructive Conflict Quickly

Skill #10. Keeping It Short and Clean, Resolving the Disagreement, and Repairing the Relationship Damage

John Gottman’s research uncovered some surprises about relationship conflict.²⁷ One surprise is that people in successful relationships have as many gut-wrenching differences and disagreements as do people in unsuccessful relationships. However, people in successful relationships keep the discussions short, keep it fairly clean by not regressing to personal attacks and bullying, resolve the disagreement, and repair the relationship. While simple in theory, in practice, this skill involves all of the other nine skills—especially looking at the other person’s point of view and having healthy reactions to criticism and blame by the other.

The first point is to recognize that disagreements are unavoidable. All substantial relationships have disagreements, whether that is with a friend, business partner, an extended family member, an ex-spouse or even children. A cold war between co-parents creates a disturbing family for children. Instead of modeling how to handle disagreements well and get to solutions, it models avoidance. It is little wonder that children with separated parents who handle their co-parenting relationship poorly are twice as likely to divorce when they are adults, when compared to children whose parents had a functional co-parenting relationship.²⁸

The reason this is so important is very practical. If people in a relationship spend only about 10% of their time in conflict, this

²⁷ See *supra* text at note 4.

²⁸ Motti Haimi & Aaron Lerner, *The Impact of Separation and Divorce on the Health Status of Children and the Ways to Improve it*, 4 J. of Clinical and Medical Gen. 1 (2016).

frees them up to spend 90% of their time conflict free with one another. If they spend 90% of their time in conflict, there is far too little good time left to absorb the pain and frustration of conflict. It is when conflict absorbs more and more time in a marriage that people begin to think about divorce. For a co-parenting relationship, limiting conflict time by recovering quickly opens the door to enjoy raising children together, both being at activities and happy to see one another.

When co-parents have a disagreement, they have to cool down, look at the situation from the other person's point of view, be honest with themselves about their part in it, pledge to work on improving their part in the co-parenting relationship, and acknowledge this to each other, including with an apology, if warranted. Attorneys can provide this advice to their clients and model this skill in the divorce negotiations. Additionally, being vulnerable, coming to solutions for problems, and developing resolutions for disagreements all create a positive family atmosphere that children of divorce crave.

Expanding disagreement resolution skills is a win-win for everyone. Enhancing co-parenting relationships is a win for parents if they: learn the Five Tasks to facilitate amicable co-parenting relationships, develop the Ten Skills for effective co-parenting, and follow the Six Steps for making Collaborative Decisions.²⁹

Effective lawyers already have some of these skills and can model them for their clients.³⁰ However, enhancing co-parenting relationships is an additional win for lawyers. They can add extraordinary value and provide additional services by taking the extra step and describing the applicable skills to a client and how those skills can be effective. Attorneys can also point out the necessity for these skills in order to have an amicable and effective co-parenting relationship. The lawyer, by contrasting a conflict-filled co-parenting relationship with an amicable one, especially one that includes anger and blame, might create an attractive incentive for the parent. Most divorcing parents have similar goals for their children, which can only be reached by having a collaborative co-parenting relationship, especially when guided and counseled by an attorney.

²⁹ In Part V, we apply this model to negotiating property, debt, and future income.

³⁰ Schneider, *supra* note 19.

V. Addressing Property, Debt, and Distribution of Future Income

The focus in this article thus far has been on divorces with children. We posited that attorney modelling and teaching effective decision-making skills to divorcing parents might greatly improve the quality of clients' post-divorce co-parenting relationships. Those same skills can be demonstrated and taught by attorneys when addressing financial matters in the divorce.

However, there is a difference here. Financial matters are generally addressed within the framework of the law and expected rulings by a court.³¹ This Part of the article proposes addressing financial matters within a different framework: the framework of the long-term financial goals of the parties, through goal-based planning, and not necessarily through the lens of a legal framework. In this proposed context, disagreement resolution skills can be helpful, not only for reaching optimal agreements, but also in preparing parties for better future financial decisions they are likely to face if and when they have children.

A. Cooperative Non-Zero Sum Thinking

Most experienced attorneys know and understand that seeking optimal outcomes for one party to a divorce usually is best achieved by seeking optimal outcomes for both parties. On the opposite end of that spectrum was the client described in Part I who wanted to bury her soon-to-be-ex-spouse. Andrea Kupfer Schneider makes the same point.³²

Negotiations are often (perhaps more accurately are usually) constrained by the belief that the agreements to be made should lie within the range of what is prescribed by law and by expected rulings of a court. However, this limits choices, and as we have written elsewhere, traps people into making less than optimal agreements, and at times, even self-defeating agreements. Focusing on the distribution demands of the law can trap parties into making poor choices.³³

³¹ Credit to Robert H. Mnookin's famous article, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

³² Schneider, *supra* note 19.

³³ KENNETH WALDRON & ALLAN KORTIZINSKY, *WINNING STRATEGIES IN DIVORCE: THE ART AND SCIENCE OF USING GAME THERAPY PRINCIPLES AND SKILLS IN NEGOTIATIONS AND MEDIATIONS* (2017).

This approach creates a zero sum game of distribution out of a non-zero sum game of financial planning. Game theory research demonstrates that zero sum games promote selfish competitive strategies, whereas non-zero sum games promote communication and cooperation to reach optimal outcomes for both players.³⁴ This finding has been measured mathematically.

In competitive zero sum games, there is 100% of the pie to distribute. In cooperative non-zero sum games, the pie can grow to 146%. This sounds like magic, but is not. This is the concept that John Nash developed, which led to his receiving a Nobel Prize.³⁵ It is as simple as introducing the first phase of bargaining as a cooperative effort to grow the pie, that is, planning to maximize long-term outcomes for both parties. Only when the cooperative effort has reached its limit do parties then begin to compete and compromise.

The first phase of both competitive and cooperative negotiations is legal discovery and discovery of both party's goals; however there are differences:

1. In the competitive model, 100% of the pie is to be distributed. Most lawyers and parties cooperate to the extent of naming the pieces of the pie. The second step is to compete for the parts of the distribution (i.e., the pie) that are disputed. The law often dictates, or at least presumes, that the distribution should be at least equitable, if not equal.
2. In the cooperative model, discovery simply establishes the starting point of a plan – the current situation. The second step is to establish the long-term financial goals of the parties. This introduces a new variable into the bargaining: the subjective values of the parties, which, again in game theory research, will likely dominate the bargaining process.³⁶

An example will highlight the differences between the two bargaining models. Assume that the parties own a residence. Assume that the assessed value of the residence is \$400,000. However, both the husband and wife value the residence, and both want it in the bargaining. In traditional competitive bargaining, one or the

³⁴ *Id.*

³⁵ SYLVIA NASAR, *A BEAUTIFUL MIND: THE LIFE OF MATHEMATICAL GENIUS AND NOBEL LAUREATE JOHN NASH* (2011).

³⁶ WALDRON & KORTIZINSKY, *supra* note 32.

other might get the house at a value of \$400,000. In cooperative bargaining, the lawyers might establish an “auction price” for the house, only to learn that the subjective value to the wife makes the house worth \$450,000, while only \$420,000 to the husband. The pie grew because of the subjective values involved. The offset in value might also allow the husband to reach another of his goals, that is, to own a comparable residence.

This example, however, still focuses on short-term goals. However, if both parties are interested in having valuable real estate property available as a resource for their retirements, this might put the deal on the house in a different light. If the assessed value is \$400,000 and the area has about a 5% annual appreciation in real estate value, neither party might want the house at either of their subjective numbers, depending on how many years each has to retirement. To reach that retirement goal, selling the house might be the best strategy.

The take-away here is that there is not only a starting point in the bargaining, facilitated by good discovery practices, but also there are the end points for the long-term goals of the parties. In the cooperative model, the bargaining task is to plan the steps to get to the end goals from the starting point, including a consideration of obstacles that might arise. Probable court rulings (i.e., state divorce law) might be considered but are not binding or even determinative in this model. Agreements might well be out of the expected range of court rulings, but are most likely relevant to help the parties reach their long-term goals. Of course, all of this assumes that the lawyers advised their clients regarding the applicable law.

Example 1. Assume that the current total value of an estate plus the current income of the parties is insufficient to reach both of the parties’ long-term goals. In the cooperative model, they might focus on one additional step — i.e., discussing and likely acknowledging that the parties need to produce more income, so both of them can reach their goals. Sharing future income in the cooperative model is now seen in a very different light. How much total income is needed to reach both parties’ goals, rather than how much has to be paid by one party to the other party?

Example 2. Assume that a court is likely to award spousal support at a predictable amount for a predictable term of years. In the cooperative model, the spousal support might be less or more,

depending on what will help both parties meet long-term goals. Likewise, child support levels in the cooperative model might be based on the goals of the parents for their children, not a schedule based on overnights, where an overnight involves minimal additional cost incurred by the parent who has the additional overnight time.

Example 3. Assume the starting point (based on a real case) included a husband earning substantially more money than the wife. Both parties had the long-term goals of not wanting any financial connection to one another in the long term, but also protecting the children's lifestyles in both homes in a shared custody arrangement. During the bargaining, they discussed steps to reach these goals. It was clear that the wife would need more income to reach their goals. This led to a discussion of a possible career change, to include a period of training and then time to build her private business. They then agreed to an amount of support for an expected period of time to reach a sufficient income level. Suspecting the presence of an important obstacle, namely under-estimating the time needed for the wife to reach that sufficient income level, they made another agreement. They agreed to a presumed point when the support would stop, but if the wife had not reached the agreed-upon income goal, and the husband was convinced that she had continued to make a good-faith effort, the deadline for the support could be re-negotiated. In fact, the agreement was re-negotiated, and when she reached the income goal, the support was terminated.

B. *Unrealistic Expectations?*

Whether the bargaining model is competitive or cooperative, there will be disagreements. In Part I of this article, we presented our research-based Ten Skills for Effective Co-parenting (also called Ten Skills for Resolution of Disputes). There are skills that attorneys can model and teach, in order to pave the way for a functional co-parenting relationship. A caveat is that this approach might not be helpful and might even escalate conflict in a case if one or both of the parties have serious mental health problems, especially personality disorders. As a reminder, about 20% of people have personality disorders, which correlates to the number of high conflict divorces.³⁷

³⁷ Whiteside, *supra* note 1, at 2.

When the parties to the divorce have children, they will almost certainly have an ongoing financial relationship, at least with regard to their children. Both parents will also have a vested interest in the other party being able to provide a stable residence for the children. Issues such as educational needs or extra-curricular activities might also arise that require planning on behalf of the children. Parents might want to help adult children with education or even house ownership. Wedding planning might work best if the parents cooperate with one another on costs. Any of these situations might involve financial disagreements between the parties.

The skills outlined in Part IV can be modeled and taught during the bargaining process, whether the issues relate to the children or the financial aspects of the divorce. For example, a party might be having a great deal of difficulty focusing on some financial issue in a goal-based bargaining process. Very likely, that party is dealing with a core emotion that prevents him or her from going forward. His or her attorney can address this with the client, by simply asking, "*It seems like you are having difficulty with this issue. Are you having some strong feelings about it? Are you afraid? If you can tell me what is holding you up on this, we can probably find a way to get that resolved.*" Problem solving and decision making skills are particularly relevant to financial issues, but core emotions can be a major obstacle to applying those skills.

C. *The Intersection of Family Law and Psychology*

"*I am a psychologist, not a lawyer,*" says Ken Waldron, but spending forty years working in the family law arena required him to learn a great deal about family law. Ken also adds that the best family law attorneys accept that they are working in the world of humans struggling with the inevitable psychological dilemmas faced by divorcing spouses and parents. Almost all divorces are settled in bargaining. To reach optimal agreements requires a knowledge of law and of at least some psychology.

"*I am a lawyer, not a psychologist*" says Allan Koritzinsky, but after spending more than fifty years working in the family law arena, he confirms the necessity of understanding psychology and law. In fact, he often refers to Ken as "Dr. PsychoPal," which is why they worked together as a team while in private practice and continue as team members, co-authors, and great friends.

As Andrea Kupfer Schneider found,³⁸ the most effective negotiators were cooperative problem solvers, not “fighters.” Modeling and teaching disagreement resolution skills not only increases the chances of a better co-parenting relationship, but also increases the chances of better financial plans for the parties, and for better financial interactions in the future when those occur.

This Part V has focused on addressing property, debt, and the distribution of future income. Attorneys can, and perhaps should, explain the disagreement resolution skills during negotiations and how they effectively can be applied to specific disagreements in the negotiations. Doing so can help set the stage for a better post-divorce outcome for both parties.

When there are minor children, attorneys can (and should) point out the necessity of these skills to enhance the likelihood of enjoying an amicable and effective co-parenting relationship, especially because the parents are likely to interact financially in the future. Effective financial planning is critical.

Conclusion

Relationships can dramatically improve by applying our Ten Skills for Resolution of Disagreements (also called Ten Skills for Effective Co-parenting). Effective goal-based bargaining undergirds these skills and these skills are necessary to produce optimal parenting and financial plans for parties to reach long-term financial goals.

We hope this article will move the needle and improve the lives of those who divorce.

³⁸ Schneider, *supra* note 19.