

## Resolving Family Matters in an Economic Crisis

By Karen G. Shields

Reality bites. Everyone is feeling the pinch — wages are down, unemployment is up, the economy is failing. Intact families are struggling together to make ends meet while the hard economic times are pouring fuel on the fire of family disputes. While divorce lawyers cannot increase the income and assets of the party they represent, they can help clients by suggesting alternative dispute resolution (ADR) as a tool to save time and money, thus leading to satisfied outcomes for the clients.

### A TIME OF STRESS

The harsh realities of the nation's economics are adding extra burdens to family disputes. Families undergo extra stress when people lose their jobs or their wages are cut, resulting in their being unable to pay their bills, including their mortgages. To make matters worse, their homes are often worth less than what is owed — and cannot be sold even at a loss — and their investments and retirement accounts no longer have the value they once did. Amidst all these

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**Hon. Karen G. Shields (Ret.)** is a Chicago-based mediator and arbitrator with JAMS, a private provider of mediation and arbitration services. She has extensive litigation, judicial, and settlement experience in all aspects of family law, including custody and parenting time, property, marital vs. non-marital, distribution of assets and debts and family support and maintenance. She can be reached at [kshields@jamsadr.com](mailto:kshields@jamsadr.com).

tensions, many parties are delaying divorce as they attempt to find a way to survive economically. New filings for divorce are down as couples struggle to make ends meet, while living together but apart at the same time, *i.e.*, continue living in the same home — but assume separate lives — purely as a means to save money.

Alternatively, some couples are seeking to finalize their divorce as quickly as possible while their combined assets are worth less. That way, they are not losing as much as they would have if their assets possessed higher value. With increasing frequency, those that are moving forward with dissolution of their marriages are fighting over every asset and every penny of income.

Increasing numbers of former spouses who receive alimony and/or child support are requesting more money, and payors of alimony and child support are requesting downward modification. Known as post-decree, these petitions for modifications to the prior orders are clogging the courts. (See the article on page one.) The American Academy of Matrimonial Lawyers' recent surveys of some of the nation's top divorce lawyers reported that new divorce filings go down in economic downturns. They also reported a 39% increase in requests for reduction in child support payments and a 42% increase in requests for changes to alimony payments.

### MEDIATION

Attorneys representing family law clients know that one of the ways to make clients happy is to get them what

they want. The best way to allow clients to make their own decisions and to control outcomes is through the use of mediation. Mediation is uniquely suited for family law cases, including divorce or dissolution of marriage, separation of same-sex relationships, splitting of marital assets, child support and maintenance or alimony, and custody and parenting time issues (married or never married). Mediation involves the parties, with or without their lawyers, meeting with a trained mediator who facilitates their discussions and helps the parties reach a solution on all or part of their issues.

Many states require mediation for family cases involving children. In those jurisdictions, the court will only hear custody and visitation issues if the parties failed to reach an agreement or in dire circumstances. A few states additionally require mediation of all the financial issues before the court will hear them. This illustrates an increasing recognition by legislators and courts that family law matters are best decided by the parties, and the courts should be used as a last resort.

Family matters are deeply personal. In no area of the law is it more important that the people who are at odds with one another participate in the decision. A judge's job is to resolve the dispute presented. Most states only require that the judge apply statutes that contain provisions for the court to consider in making its decisions. With the judge comes his or her personal belief system and upbringing. On review, the standard is "abuse of discretion." In other words,

the judge's decision stands unless she has abused her discretion in making the decision. In this light, it is easy to see why family issues are better decided by the parties going to mediation. Usually, in a family matter, there is no right or wrong answer, but an outsider (the judge) will make the decision if the parties do not.

Many parties coming into family court do, in fact, decide their issues without significant court intervention. For others, however, their lives are open to the public in courtrooms and court files. They spend months and sometimes years in court fighting about all relevant issues (and sometimes irrelevant ones, too), sacrificing their own privacy along the way. Over time, clients often become frustrated with the court and attorneys as the expenses increase, along with their feeling that they have no voice in the final outcome. This, in turn, increases the conflict between the parties. Conversely, through mediation, the parties can discuss their goals and what is most important to each of them. In the end, neither side can have everything, but the parties will make the best decisions together for their family.

Parties and attorneys who have used mediation as a tool to resolve family matters will vouch that it is well worth the cost, and that it should not be viewed as an "extra" expense. Indeed, mediation is less expensive than having a divorce attorney wait in a courtroom for the monthly status hearing. In mediation, the attorney is able to be in his office working directly on the file instead of sitting around waiting for the case to be called. Mediating, with all its other positive attributes, is usually less expensive than going through a lengthy trial. All the benefits to the parties culminate in a major benefit to the attorney. A happy client who is pleased with the process and resolution is more likely to refer other people to his attorney.

### ARBITRATION

Arbitration is another useful form of alternative dispute resolution in divorce matters. If the parties cannot reach an agreement in another forum, they can decide to take their case to an arbitrator who hears the evidence and renders a decision much like a judge. Although the parties will not be coming to their own agreement and another person will make the final decision, arbitration still provides many benefits:

Arbitration is like a trial where the parties are heard, testimony is taken, and evidence is presented. Instead of open court, it takes place in a more private setting.

- The parties can decide how much discovery needs to be done and how the evidence will be presented.
- The parties can have their case heard more quickly, and in sequential days, a luxury that courts usually cannot provide due to the large caseloads.
- The attorneys and the parties are able to select their arbitrator, another luxury for the parties that is not attainable in court.
- State laws support arbitration agreements and courts enforce the agreements. Most states require, either by statute or by case law, that the courts review arbitrated parenting decisions to determine if they are in the best interest of the child. This is no different from mediated agreements.

### EARLY NEUTRAL EVALUATION

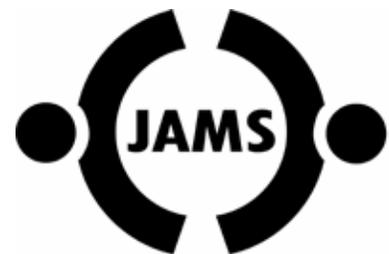
Another form of ADR that can be helpful in resolving family conflicts is early neutral evaluation (ENE.) This involves hiring a neutral party to review a matter, whether in part or in whole. Sometimes one side hires an ENE, and sometimes the parties may agree to present issues together. The attorneys, parties and neutral decide how it will

be presented whether by stipulation, reports, written or verbal testimony. To conclude the process, the early neutral evaluator will render an opinion as to the outcome and provide some analysis of the issues. The goal is still to help move the parties toward an agreement.

### CONCLUSION

Resolving one's case through settlement is almost always a better way to go for litigants, especially when a family matter is at stake. The resolution options are numerous: The parties may choose mediation, arbitration, or early neutral evaluation, or some hybrid form. Regardless of their position or argument, they can gain control over the outcome in their case, lessen internal family strife, and protect children from conflict. Most importantly, in this time of recession, they can avoid protracted litigation and conserve the family's money and assets. Family conflicts bring attorneys unhappy clients; good resolutions leave happy clients who make referrals. Attorneys know they have done the very best they can for their clients. Everyone wins. No doubt it is good to have something positive and cost-effective to turn to in hard economic times.

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