

# Divorce Without Destruction

BY CHAIM STEINBERGER

**D**ie-hard litigators who have only one tool in their toolbox often believe that the way to achieve the best results for their clients is to be as aggressive and confrontational as possible. Clients buy into this narrative because by the time they involve lawyers they have already concluded that the other party is unreasonable. Clients mistakenly believe that in order to win the other party must lose. Moreover, the fear, anger and pain of the dispute restrict parties' creativity and result in psychological tunnel vision, leaving them unable to visualize or create other acceptable options. As a result, too many pursue (intentionally or inadvertently) a scorched-earth strategy that destroys what might be their most precious things—their children, businesses and family relations.

### Game Theory

Aside from the benefits of avoiding permanent injury to children, using game theory and advanced negotiation techniques can often achieve better financial and emotional results for the clients. Lawyers can be part of the healing rather than the destroying, doing well as they do good.

Game theory teaches that adversaries achieve better results by developing trust and working collaboratively, than they ever could by remaining distrustful, oppositional adversaries. As adversaries each party must protect themselves against the possible double-cross

by the other. As a result, the parties can only agree to what is a "pareto optimal" solution—a solution in which any unilateral deviation by a party will hurt the deviating party more than it advantages them. These solutions are akin to the "lowest common denominator," often not the very best solution for either of the parties but only the best solution that leaves them both protected. If the parties can, however, create some measure of trust and collaboration they can often find solutions that leave them *both* better off. The techniques outlined below foster just such results.

### "Win-Win" Techniques

In their seminal book *Getting to Yes: Negotiating Agreement Without Giving In*, Professors Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project develop techniques for achieving the seemingly impossible "win-win" resolutions in which both competing sides win at the same time. They recommend that negotiators be "hard on the problem, but soft on the people." That is, negotiators should thoroughly and critically analyze the positions of both of the parties, but do so without personally attacking either of them which could destroy any hope of a future working relationship between them.

Instead of using "positional bargaining" where each side conclusively states their demands, the professors recommend "principled" negotiation in which the parties negotiate around core values. So for example, parties may agree that they both want to be fair. They may agree that they both want to do right. They will likely both agree that they

want to protect their children. Just expressing such common core values reminds the parties of the interests that unite them.

The parties can then discuss aspects of fairness, of what is right, or of how to protect the children. Because the discussion is centered around fairness rather than demands, neither party feels attacked or becomes defensive. Parties can now hear and acknowledge the validity of the points made by the other, without feeling vulnerable or giving up their own deeply-held positions. This allows each party to feel heard and validated, a major step in fostering the trust that is necessary for a collaborative result. Unlike in the typical brute-force negotiations—negotiations in which the parties negotiate based on who has the better legal argument, the more aggressive or intransigent lawyer, or who is willing to spend more on legal fees—from which the parties walk away feeling worse about one another, these techniques create trust and understanding between the parties, making them more willing to work collaboratively in the future and perhaps even giving them the tools with which to resolve their own future disputes. Often a magical moment occurs in which what was a "me-against-you" problem becomes a "we have a problem; how can we find a solution that works for the both of us." Using creativity and empathy the lawyers and parties can then put their heads together to find win-win resolutions that would be impossible when the parties distrust one another.

Another powerful technique is to focus on the parties' interests instead of their positions. Instead of accepting the parties' posi-

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tions as absolutes, the negotiator delves into the reasons why each position is important to the party. Though asking basic questions when the answer seems obvious might make one feel a bit daft, it is surprising how often the seemingly obvious motivation is not the party's actual motivation. The other difficulty of this technique is that after asking for the reasons behind the party's position, the person asking must be quiet, not talk, and actually listen to the answer—a skill difficult for many, lawyers included.

The classic example of this principle involves two people fighting over an orange. Unable to agree and having grown impatient, one pulls out a knife, slices the orange in half and walks off with half. Having walked away, the party peels the half-orange and throws away the peel to eat the fruit. The second peels the remaining half, throws away the fruit and uses the peel to bake a cake. How frustrating for those with a bird's eye view to know that each could have had the whole orange—one the whole fruit and the other the whole peel. Because it hadn't occurred to either of them to ask why the other wanted the orange, their "positions" were diametrically opposed, though their "interests" in actuality were not. Because of the way the dispute was positioned, it seemed that one could "win" only if the other "lost." At the least, each had to "settle" for one-half of what they wanted in order to reach the only "fair" result they imagined. In actuality, however, neither had to give up anything; they each could have received 100 percent of what they wanted and they both could have "won" without ever making the other one "lose."

Like with the orange, so often uncovering the reasons behind parties' stated positions allows creative, empathetic lawyers to find win-win resolutions in which both sides win. A parent might demand the family home but really only want to remain in the school district with the special-needs program for the parties' child. Or it may not be the specific home a parent wants but only proximity to certain special friends or family members. Each of these motivations opens myriad choices that can fulfill the party's interest, one of which might satisfy the other party's interest as well and making a win-win resolution possible. A father's stated position may arise from his

fear that his relationship with the children will be impaired. Acknowledging his legitimate concerns and providing assurances and guarantees may go a long way in reestablishing the shattered trust between them, which might then make it possible for the parties to craft an out-of-the-box resolution that is right for them and that can benefit them and their families for years to come.

#### Be Calm, Cool and Collected

Like litigation itself, these techniques require solid, thorough preparation, lots of patience and a cool and collected demeanor. The lawyer must know the client's case and

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all of its relevant, even picayune but emotionally persuasive, details. The litigator's theory of the case demonstrating why justice demands a ruling in the client's favor, is used here to demonstrate the fairness of a particular position. The facts, the law (and the fairness it represents), the closing argument and the advocacy are all put in play, but in a safe, respectful collegial environment, one that makes the parties feel heard and understood so that they can be amenable to fashioning a resolution that works best for themselves and their family. As Sun-tzu advocates, a true pacifist must be the most accomplished warrior.

By listening carefully and respectfully, being genuine and forthright, agreeing with valid concerns and accommodating them when they can reasonably and fairly be accommodated, a good negotiator can avoid further traumatizing the parties' relationship and obtain better results for the client. By creating an atmosphere of rapport and even trust, the parties can discover or create resolutions that benefit both of them in ways that no adversarial win could. Achieving such a



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better resolution allows the parties to heal and move on, without the emotional negativity, recriminations and ill will that often linger long after the final appeal is decided and the adversarial battle is supposed to be over. Moreover, in addition to the better settlement terms, the parties will be better positioned to work together in good faith on joint issues like those involving their children. They will give their children the greatest gift divorcing parents can give children—permission to love the other parent and a willingness to work together to raise their children in a loving, cooperative manner.

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