

Divorce Conflict Information Booklet Series¹

Understanding the Problem

Booklet 4

What's Wrong with this Picture?

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The Current Family Law System is Broken. The Headwinds for Change Continue Blowing Strong. Are We Ready for Change?

**“My greatest challenge has been to change the mindset of people.
Mindsets play strange tricks on us.
We see things the way our minds have instructed our eyes to see.”
Muhammad Yunus³**

How our Game Theory Journey Began

Those of us who have been working in family law for a long time intuitively have known that there is something about the current family law system- i.e., that there is something wrong with this picture? It least, it is not a good fit for families. At worst, it actually does damage. In our first three Booklets, we discussed the inherent causes of divorce conflict **because** of the phase that the parties are in-i.e., divorce conflict. In this and the next two booklets, we look at the contributions of the current family law legal system (the System) to divorce conflict.

Some years back, Ken was introduced to Game Theory by Steve Seaman, a psychologist and friend, who did not work in the family law system, but his discussion and demonstration of a few Game Theory principles sparked Ken's interest. This prompted Ken to learn Game Theory

1 Our Divorce Conflict Information Series is organized into two Sections: Section One- Understanding the Problem and Section Two- Planning the Solution. Each of the Sections has six Booklets. This is the fourth Booklet in the Series.

² For more on the subject, you are encouraged to read the following two books written by your authors: **“Game Theory and the Transformation of Family Law: Change the Rules- Change the Game. A New Bargaining Model for Attorneys and Mediators to Optimize Outcomes for Divorcing Parties.”** Unhooked Media. Scottsdale, AZ 2015 and **“Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation.”** www.unhookedmedia.com.

³ Muhammad Yunus is a Bangladeshi social entrepreneur, banker, economist, and civil society leader, who was awarded the Nobel Peace Prize for founding the Grameen Bank and pioneering the concepts of microcredit and microfinance.

mathematics, to review Game Theory research and to analyze the traditional family law system from that perspective. Our analysis in this Booklet is based on Game Theory principles, but we have gone to great lengths to avoid mathematics, jargon and research, doing our very best to use plain language.

Ken later joined forces with Allan to use Game Theory principles to design a Negotiation Model. The result of all this, after years of work, is presented in two books- our first book leans in the direction of theory, and our second book is the more practical and pragmatic application of our Model. We then wrote a third book, where we present a rational strategy for parties to have a “sensible divorce”.⁴

After years of work, our analysis led us to interesting (frankly startling) conclusions:

- The most rational strategy for parties going through the family law system was to engage in the competitive behavior that leads to escalating conflict.
- Parties who have an amicable divorce avoid behaving rationally by resisting the gravitational pull to end up in intractable conflict.
- The professionals working in the system find high conflict parties to be the most time and resource consuming and the most distasteful of situations, while at the same time operating in a system that inadvertently promotes that same conflict. The paradox is striking.

“Mindset” as the Threshold Challenge for Change

The mindset of professionals in the current family law system has proven to be a challenge. Here are a few examples. (1) When a lone voice at a conference once asked, “*Why can’t one attorney represent both parties,*” the questioner was quickly “poo-pooed”. (2) When the rising rate of *pro se* divorces is discussed, the hypotheses put forth rarely hits the mark. Some will say that family law attorneys have priced themselves out of the market, but people often pay multiples of the cost of a divorce for a wedding. Parties who can afford to pay lawyers often elect to go *pro se*, or perhaps use mediation without attorneys. (3) Many well-known and highly experienced family law attorneys no longer accept a case or take a case to litigation. They provide mediation or settlement negotiations, but if those approaches fail, they withdraw from the case and refer the client to another lawyer for litigation.

What’s wrong with this picture?

Regarding this issue of lawyer mindset, Allan and Ken have written this Booklet and are making it available at no charge, hopefully prompting creative thinking about adopting a different

4 *Planning a Sensible Divorce: Avoid the Toxic Dance of a Messy Divorce.* Austin Macauley Publishers, Ltd.

approach.

Weaknesses in the Current Family Law System

There are three major weaknesses in the current family law system: Strategic Intention, Value Proposition and Standards. We start our analysis by discussing these three major general principles, which are major weaknesses in the current family law system (read below!). We then drill down to ten “traps” (read on!)⁵, which seduce parties, and often their attorneys, into engaging in aggressive competitive approaches to the legal tasks involved in a divorce. Those competitive approaches include dirty tricks (such as fictitious or at least exaggerated allegations), poor communication, dishonesty, and selfishness, which minimize healthy empathic compassion and concern for others in the family. After the final Judgment of Divorce, families are often left with a poor co-parenting relationship, which is the most important predictor of outcomes for children of divorce. Vulnerable parties often fall into the pit of intractable conflict in the process, and as one attorney friend put it, become “frequent fliers” in the judicial system.

In business planning, an owner or a committee in the business develops a Strategic Intention for the business, a value proposition and standards by which to measure the success of the business.

Strategic Intention is the goal of the business – what is the product or service that the business wants the customer to receive. The development of a Value Proposition is the focus on the experience of the customer going through the process of receiving the product or service. Standards are the axioms by which the outcome is judged.

For an example, let us first look at a restaurant business instead of the divorce “business”.

- A. **Strategic Intention.** The intention of the business is to provide a good dining experience, which of course includes a good meal, but the Strategic Intention is focused on the entire experience, not just the meal. Part of the Strategic Intent is what people in the restaurant business call the restaurant concept. Do they want the dining experience to feel like being in Italy, or in Texas? Do they want exotic food or comfort food?
- B. **Value Proposition.** The Value Proposition defines what the restaurant wants the customers to experience from the moment they make a reservation to the moment they leave the restaurant. This likely extends beyond the meal (e.g., even how easy it is to get to their car) in order to achieve the Strategic Intention. The Value Proposition determines

⁵ See elsewhere in this Booklet where we discuss the Ten Traps, which unfortunately continue to guide divorcing parties into self-defeating choices.

how staff is trained, staff clothing, the physical ambiance of the restaurant, what the menu looks like, what food is offered, timing of the food delivery, pricing, and so on.

- C. **Standard.** The Standard of success is that the dining experience was worth coming to the restaurant, which includes the logistics of getting there and the price. In other words, success or failure depends on the balance of price and experience. People will pay a lot of money if the experience is worth it. They will never come back, and will tell everyone they know not to go there, if the experience is not worth it. Restaurants thrive on repeat business and word of mouth advertising, and unless the dining experience was worth the effort and expense, the restaurant will not survive.

What happens if and when we apply the above three principles to the current family law legal system?

1. **Strategic Intention.** The Strategic Intention of the traditional family law legal system appears to have more to do with the goals of the professionals, namely the legal outcomes on the day of the Judgment of Divorce, than the customers (meaning the divorcing parties). A Strategic Intention should, have at its core, the outcome for the customer, not the needs and interests of the service providers. The current family law legal system inadvertently traps people, because it identifies legal outcomes as the Strategic Intention of the process. A customer-based Strategic Intention would be focused on lives, their experience and long-term goals after the Judgment.

What promotes this strategic intention is that the family law legal system has a captive audience. To return to our restaurant example, to have a captive audience is akin to a prison cafeteria. We doubt that much thought is put into the dining experience of the prisoners. The cafeteria is the only place to eat. Repeat business is guaranteed. The considerations of the prison people would be food cost, nutritional value and safety, issues of importance to the staff, not the prisoners.

For people getting a divorce, they must go through the family law legal system. It is the only place to get a divorce, and so the temptation is to organize the system around the interests of the professionals, not the parties going through the divorce. How many people who go through the family law legal system think that the experience was worth it? How well does the system prepare them for their post-judgment life with one another? Unfortunately, these questions are basically irrelevant to the lawyers, judges, psychologists, social workers and court-connected mediators, who have been paid for their work. After the Judgment of Divorce, the assumption is that they will not be back, and if they do come back, they get labeled “high conflict,” and the system just tries to

contain them. (Unfortunately, while this description might seem overly simplistic and a bit harsh, at its core it is very accurate.)

One drawback to this reality is that although the system is unconcerned (though not consciously) with repeat business, there is still word of mouth. Just as a restaurant can develop a reputation that affects future business, the legal system has also developed a reputation. As a colleague once said, "*Divorce lawyers have a reputation problem.*" As a result, many more people go through the system bad-mouthing attorneys or without attorneys. This phenomenon has not stopped and is growing.

Your authors think that is a very unfortunate. We believe that lawyers have much guidance, information and support to offer divorcing parties that can optimize the parties' post-divorce lives. However, to develop a reputation as being worth the cost of legal representation, the Strategic Intention must become focused on the parties going through the divorce, not the requirements of the system.

2. **Value Proposition.** A divorce customer-based Value Proposition would be that from the beginning to the end of the divorce process, the parties will experience helpful education, courteous and respectful treatment, consideration for their schedules, help managing the emotions involved, help preparing them for their divorced life and help planning so they reach their long-term goals. "Customers" should at the end feel that the process was helpful and that the product was good for both of them. The current family law system does not address these values, except perhaps in token ways with a parent education class and trite truisms.

People pay a lot of money to go through the current family law legal system to obtain a divorce. What is the product/service? What are they paying for? (a) Is it good legal advice or a good plan for their futures? (b) Does it increase losses, sadness and bitterness towards their once loved spouse or helps resolve those emotions? (c) Does it increase respect, empathic compassion and a mutually satisfying start to their divorced lives? (d) People walk out of restaurants judging if their experience and the food were worth the money? How many people finish the current family law divorce process thinking that their experience and their product were worth the money?

Again, part of the problem is that the legal system has a captive audience. Divorcing spouses are required to go through the legal step of obtaining a Judgment of Divorce.

This lulls the professionals into forgetting that they are providing a service- that there is a product to produce. By failing to focus on a customer-based Strategic Intention and Value Proposition, the current family law system can inadvertently channel people into making self-defeating choices.

In addition, by having no clear customer focused Strategic Intent and Value Proposition, the current family law system robs people of the guidance that they need, and could receive, for their futures.

Worse yet, as previously mentioned, a large and increasing majority of divorcing spouses do not hire attorneys. Potential customers decide in advance that hiring attorneys for the divorce process will not be worth the money. In one study in one jurisdiction, only 40% of divorces included at least one attorney, and in only 17% of divorces, were both parties represented by attorneys.

Unfortunately, divorce lawyers do have a reputation problem. This is comparable to a restaurant where customers leave, vowing never to go back. Worse yet, they warn their friends not to go. The reputation problem is the result of lawyers working in a system having no clear client-focused Strategic Intention and Value Proposition. Blaming the lawyers is like blaming the waiters at the restaurant where they had an expensive and bad experience.

More can be done if there was a change of mindset within the current legal system. (More on the “mindset” issue later.)

3. **Standards.** The current family law system has vague, ambiguous and often contradictory Standards by which decisions are measured. The standards of the current family law system are based on legal outcomes, not the outcomes of the parties’ post-divorce lives. Some of these standards are: an “*equitable*” division of property, an “*equitable*” division of income, the “*best interests*” of children and a “*fair*” amount of child support. What does “*equitable*” mean? What does “*fair*” mean? Might divorcing spouses have very different ideas of what is equitable or fair? Is it any wonder that many divorcing spouses argue about what is fair in the division of property and income? What does “*best interests of the child*” mean? Just about any legal position on the legal outcome of a physical placement schedule could be justified as “*in the best interests*” of the child. Any reasonably competent attorney could make legitimate and perhaps even compelling arguments for just about any position on any aspect of a physical placement schedule or income/property division proposal. Having these vague and ambiguous standards

inadvertently tricks people into behaving irrationally during a sad and even emotionally painful time of their lives. (Please read on to learn more what this means.)

The general functioning of the current family law system seduces divorcing parties into assuming that they have a legal dispute, triggering the natural human desire to prevail, focusing on legal outcomes.

This inadvertently prevents the parties from focusing on long-term financial and family goals, with vague, ambiguous and sometimes contradictory standards by which to measure outcomes.

THIS IS WHAT'S WRONG WITH THIS PICTURE!

Within this climate, the system (inadvertently) traps people into making irrational choices. Perhaps the most impactful of those choices is to see one another as rivals in a legal dispute, beginning a lengthy divorce and post-divorce relationship filled with frustration and wrath. Divorced parties will often engage in open conflict with one another or avoid each other like the plague. Ex-spouses, who might have been married for many years, and who have children together, might sit in the same room, or go to a child activity, acting like they do not even know each other. This is very sad, most unfortunate and absolutely unnecessary.

We recognize that people who are about to divorce enter the process with sometimes fierce conflicts with one another. They failed to achieve their hope and dream of a good marriage and an intact family. Worse yet, they often blame each other for that failure. They fear loss of money, property and time with their children. Unfortunately, it is easy to see the other parent as the cause of those losses. These thoughts and feelings are natural, but the foundations for them are not necessarily true.

One of the genius ideas in Game Theory, heavily supported by subsequent research, is that by cooperating with one another, people presumably in competition can greatly increase the value for both of them.

It turns out that the best form of selfishness occurs when it is balanced with altruism.

- Rather than seeing one another as rivals for the distribution of property and income, people are likely to increase the value of their divorce by seeing each

other as a team attempting to develop a Plan for both of them to reach important financial goals in the future.

- Rather than competing as enemies for time with their children, they can increase value for both of them, and their children, by seeing themselves as parents in a family who live in separate residences, where they need to manage the logistics involved.

Look at the difference in the two following conversations:

1. *"I was always the primary caretaker. He hardly did anything. He was gone at work all day while I worked from home, took care of the children after school, took them to all of their appointments, helped them with homework, fed them and most of the time put them to bed. I should continue to be the primary caregiver. He was around on weekends, so he can have every other weekend."*

"She knows I work every day, Monday through Friday and never had the flexibility in my work schedule that she did. Of course, she took the children to their appointments; that was when the doctors and dentists worked. I would have liked to go, but I couldn't. But, she is lying about when we were both home. I was just as involved after work as she was, and she often wanted me to take over so she could rest. I was very involved on weekends. I absolutely want 50/50."

vs.

2. *"I can work from home and have a lot of flexibility, so I have always been the daytime caregiver."*

"He would have liked to help more, but he did not have that kind of a job. I would encourage him to be more involved after work, tell him I was tired, because I wanted the children to have a close relationship with him too. He was often tired too, but we worked it out. He was great on weekends. We often did things together with the children, but sometimes he would give me a break and take over. I would like him to be as involved as possible, but I know I am going to be the school day parent."

"She is right that she did most of the parenting. I took that a little for granted sometimes. Now that we are divorcing, I want to be more involved. I am going to speak with my boss and see if I can at least get one afternoon off each work week. I

am happy to take some evenings after work, including making dinner, taking kids to activities and helping with homework. I have to leave early for work, and it doesn't make any sense to get the kids up really early because of that, so maybe I can bring them to her for bed."

If the second conversation sounds like people who would plan as if they were married, that is the point.

They are planning their involvement and responsibilities for the children, not competing over time, and even more ludicrous, overnights. Family circumstances change, and with those changes, parenting approaches change. However, long-term goals of raising competent, confident and independent children is always the deciding factor.

For example, when a child reaches 5 years old, often over the frantic protests of the child, we put them in school. In doing so, we share the raising of our child with teachers and give up over 6 hours a day to do that. When our child moves to middle and high school, how we organize the family changes again, depending on the activities and social life of the child. When a parent who had been home with the child goes to work, or when a working parent is able to be at home, we re-organize our parenting roles and involvement another time.

A divorce is no different.

The logistics involved demand that we reorganize parenting.

The question arises: *"Why do spouses come into the divorce legal system already set to fight over money, and if they have children, fight over the children, even if they have not had any contact with professionals yet?"* The answer is that they already know the rules of the game and come to play by the rules. They assume that divorce is a competitive game, because it is usually played like one. Certainly, lawyers and others in the legal system assume that it is a competitive game. Ask any attorney why one attorney cannot represent both spouses. You will hear that the interests of the parties are averse to one another, or some version of that. In other words, divorce is a competitive game.

Imagine that you are sitting down at a table to play poker. You know the rules, and you begin to behave like a poker player, even before the first hand is dealt. Once in the system, divorcing parties find their expectations of the system confirmed, rather than dispelled, because the professionals in the system are also playing by the same competitive rules. It is a hand-in-glove match, because most divorcing spouses are divorcing because they played marriage as a competitive game, rather than a cooperative game.

Summary

There are three general weaknesses in the current family law system:

1. **no clear customer-based Strategic Intention,**
2. **no clear customer-based Value Proposition** to achieve the strategic intent, and
3. **vague and ambiguous Standards.**

These weaknesses guide divorcing parties into self-defeating choices, often including bitter conflict, and in many cases, lives of intractable conflict. Unfortunately, we explain (i.e., rationalize) and pass that off as people with personality problems or just the ordinary conflict of divorce, but we should examine the degree to which the current family law system (inadvertently) promotes what none of us want or like.

What scientists and advertisers know is that people can be trapped into making irrational and self-defeating decisions. In his marvelous book, *Predictably Irrational*, Dan Ariely provides experimental evidence supporting this proposition. For example, in one study, at a sales table, the product was displayed and the salesman had a soda can on the table. The identical table was set up at a different time, with the same product, but the salesman had a drink set up in a crystal glass. You guessed it; sales went way up when it was a crystal glass compared to a soda can. Robert Sopolisky, in his book *Behave*, identifies how different parts of our brain fire up depending on context, thus igniting associations that can benefit us, or be self-defeating because we have been trapped.

We will now focus on ten traps in the family law system that inadvertently channel divorcing spouses into self-defeating patterns.

Ten Traps: Guiding Divorcing Parties into Self-Defeating Choices⁶

1. **Trap #1: The parties are directed to and often pressured to focus on legal outcomes, not life goals.** It is not a coincidence that this trap is #1 because of its importance. The absence of Goal Based Planning was a major prompt for your authors to ask: What is wrong with this picture? In addition, it may help explain why there are traps “guiding” spouses through the family law system.

⁶ Our Negotiation Model assumes that the lawyers will avoid all of the ten Traps.

Legal outcomes are not goals. They are tools for the parties to reach their goals. We need to remember this, especially at the beginning of the divorce. Ideally, there should be discussion of Goal Based Planning at the initial lawyer client meeting.

The time frame and context regarding Trap #1 is also very important. At the beginning of a case, agreements will be made. Some will be temporary agreements while others will be long-term agreement. One caveat: *What is temporary tends to become permanent.*

Regardless of the time frame, the focus should always be on what arrangements are consistent with the parties' life and financial goals. For most spouses (and lawyers), this will likely require a mindset change. This will mean that goal-based planning will be the guiding principles for all negotiations. For example, patterns in a family just prior to a separation, but before spouses are able to intelligently make agreements based on long-term goals, are often imposed as "temporary orders." It might make more sense in most divorces to have a high level of involvement between children and both parents, both to soften the losses and to help develop the long-term plan.

Regarding the temporary time frame:

- When making temporary agreements and arrangements on the temporary **use** of property and the temporary **use** (i.e., the allocation) of income and debt, practical considerations will likely be important and a top consideration.
- When making temporary agreements and arrangements regarding sharing time the minor children, the traps is the avoid the legal outcome of a rigid physical placement schedule. Why? Because we know that positive long-term outcomes for children need flexibility in the schedule. Even on a temporary basis, a bitter competitive win-lose approach to a physical placement schedule makes sense only if a favorable legal outcome is the focus. We know that the quality of the post-divorce parental relationship (starting when the parties separate) is far more important to outcomes for children than the actual physical placement schedule.

Regarding the final time frame: Again, If focused on life goals beginning at the outset of the case,

- When making final agreements on the **division/allocation of income, property and debt etc.**, the focus should be life goals and not legal outcomes
- When making final agreements regarding the **custody and physical placement of the minor children, etc.**, the focus should continue to be life goals and not legal

outcomes.

Legal outcomes and life goals. If focused on the legal outcome, it makes sense that a property distribution should be equal and/or equitable, except when there are special circumstances and perhaps prior agreements. Of course, it also makes sense that income should be shared in a manner that gives both parties a sufficient amount to live their lives, except under certain circumstances (e.g., premarital property, inherited property, special needs, etc.). Short-term thinking makes sense when focusing on legal outcomes.

If the focus is on the long-term financial outcomes for both of the spouses, the division of property and income should be one that increases the chances of a long-term positive outcome for both parties, whether or not that means an equitable or equal division at the time of the divorce. If the focus is on long-term goals for the child, the child/ren to have a positive experience of family life with separated parents, have good academic and social experiences, learn important life lessons, and so on. A competitive allocation of a child's time in percentages is not a plan for the family experience of a child/ren. When spouses divorce; parents only separate and can remain involved 100% of the time. A competitive allocation of assets and debts in percentages is also not a plan for the family experience of a child or the spouses.

**Tricking divorcing spouses into focusing on legal outcomes
distracts them from their long-term goals
and leads them to make self-defeating choices.**

2. **Trap #2: The current family law system turns Non-Zero-Sum Game⁷ (e.g., raising children and financial planning) into Zero-Sum Games (e.g., dividing the children's time and dividing property, debt and income).**⁸ What effect does this have on the parties? Zero-Sum Games promote competition, a win-lose mentality, often accompanied by bitter feelings. Zero-Sum Games also promote competition, dirty tricks and dishonesty as winning strategies, causing sometimes irreparable damage to the parenting relationship and all too often to their child. A Non Zero-Sum Game promotes planning and cooperation.

⁷ For those unfamiliar with Zero Sum Games, a Zero Sum Game is one in which the prize is a limited amount (e.g., 7 days in a week). A Non Zero Sum Game has no artificial limit (e.g., participation in a child's activities).

⁸ In modern negotiation literature, a Zero Sum Game is called "distributive negotiating," and a Non-zero Sum Game focusing on value-added strategies is called "Integrative Negotiating".

Let us give an illustration of this. In one situation, \$100 is placed on the table and the two subjects are told that their task is to split the money. They have a limited time to decide on the split, and if they have not decided in that time, \$10 will be removed, and they must decide how to split \$90. This is a Zero-Sum Game because any dollar one subject gets is a dollar that the other subject loses.

In another illustration, we have two subjects, and there is \$100 is placed on the table. This time they are told that the task is to decide on where both of them are to go for dinner together, with the \$100 to pay the bill. This is a Non Zero-Sum Game. This promotes open communication and planning, not competition. The goals of Zero-Sum Games and Non-Zero-Sum Games are completely different. When people are married, parenting and financial planning are not Zero-Sum Games, but the current family law system inadvertently transforms those family activities into Zero-Sum Games.

The \$100 situations above are real experiments, and post-experiment interviews with subjects reveal very different outcomes with their experience of their brief relationships with one another. It was the same amount of money, but the experiences and satisfaction rates were substantially different.⁹

**Trapping people into viewing parenting and financial planning
as Zero-Sum Games promotes competitive battles and dirty tricks
rather than cooperation and planning.**

3. **Trap #3: The current family law system assumes that disputes exist and that the interests of the parties are in conflict.** This unquestioned assumption pervades nearly every aspect of the family law legal system. Every question lawyers ask pounds this assumption into the minds of their clients. Even the paperwork reflects this assumption. In some jurisdictions, the name of the case labels the parties as in a dispute: the name of the case is so-and-so versus so-and-so. The language used reinforces this view: “the other side,” “opposing counsel,” “the litigants,” “dispute resolution,” “settlement negotiations,” and so on. What is the basis of this assumption?

The development of the legal system focused on the primary purpose of resolving disputes: innocent or guilty, where the property line is, who is responsible for an injury, etc. When the State took an interest in marriage, which previously had been a private and/or religious matter, it also took an interest in divorce and began to apply the same thinking – the assumption of a dispute. Why do people not have to hire attorneys to have

⁹ We point out that in divorce, there is a similar process, because if the parties do not agree early on regarding all of the pending legal tasks, their costs go up and the amount to split goes down.

a wedding?¹⁰ They are taking a legal step that is changing their legal status, much like a divorce, but in reverse. Following the marriage, a set of laws that did not apply to them prior to the wedding now apply to them.

This trap is fundamental to the family law legal system and to the training of lawyers. This is their mindset. In fact, it is more than a mindset; it is their definition of reality. Transactional attorneys have a very different mindset. While they still focus on legal protections, representing one party to the transaction, they do not assume there is a dispute. They believe they have a deal to close, and they implement a Plan to accomplish this agreed-upon goal, which at least in principle is for the long-term benefit of both parties. Why are family law attorneys not transactional attorneys and instead are litigation attorneys?¹¹ It is because of the fundamental assumption that the parties are in a dispute.

When spouses enter into the current family law system, quickly they are absorbed into the assumption that they are in a dispute. The difficulties in the marriage make spouses particularly susceptible to this temptation. They might even already see one another as enemies- as the reason that the marriage is moving to a divorce. Neither could prevail in their marital struggles, and now they can hire professional fighters (i.e., lawyer) to try to prevail over one another at divorce.

If we take the emotion out of the situation for a moment, do spouses really have a dispute? When we ask divorcing spouses what are their long-term goals for their child, there is rarely much difference. When we ask divorcing spouses if they would rather prevail on legal outcomes, even if that damaged the future of the other spouse, or if they would rather have legal outcomes that helped both spouses reach long-term financial goals, the answer is almost always the latter.

All this prompts an important question: what would the legal system look like if it did not assume a dispute? Are some of the disputes we encounter in the system the result more of a self-fulfilling prophesy endemic to the system than inevitable?

¹⁰ For the sake of simplicity, and to make our basic point, we are ignoring the fact that some parties hire lawyers at the time of the marriage to negotiate the terms of a Premarital Agreement.

¹¹ In 1994, when Allan joined a very large, national law firm, he was asked where he wanted to locate his Family Law Team- with the transactional lawyers or with the litigators? He chose the litigators. With the benefit of hindsight, after studying Game Theory, he would have chosen his “professional home” to be with the transactional lawyers.

**Trapping people with similar long-term goals
into believing that they have a dispute with one another
leads to escalating conflict and poor post-divorce relationships.**

4. **Trap #4: Children are treated as property in the current family law system.** Historically, children were treated as property because for many years, they were property. It was only in the late 19th and early 20th century that children began to be treated as a special class of citizens with legal protections. Rather than literally awarding children to a party, which for over one hundred years is what happened, our legal progress now awards time with the children to the parties. This is like telling divorcing spouses that one gets the car on one day each week and every other weekend and the other gets the car for the rest of the time.

What impact does this have on the parents? Evolution selected traits in parents for the protection and training of children. Distributing children like property triggers millions of years of evolution, wanting to do battle with the threat. The traditional family law system inadvertently identifies the other parent as the threat.

The trap of treating children like property, restricting the involvement and control of parents, flies in the face of fundamental instincts. These instincts might not even be part of the consciousness of the parties, but will drive the competition between them. If you doubt this, think about why we do not object to our children spending days in school, hours of soccer practice, music lessons, spring break with grandparents, sleepovers with friends and so on while married, but fight in court to try to get an extra day or two away from the other parent when getting a divorce.

**Trapping parents into viewing children as property to be distributed
triggers battles based on unconscious evolutionary based instincts.**

5. **Trap #5: Selfish strategies permeate the current family law system.** Petitions and Affidavits focus on what parties want for themselves, not on what will be good for everyone in the family, including the other party. Lawyers often see their task as getting their client what the clients say they want. Having already been trapped into focusing on legal outcomes, parties often say they want what appears to be a favorable legal outcome, even when those outcomes, and the process of getting them, are self-destructive. How would “winning” one more day with the children or paying a little less spousal or child support compare to a miserable co-parenting experience for the rest of their lives, especially when watching this damage their children?

Research demonstrates that a balance of narcissism (selfishness) and altruism (concern for the outcome for the other person) in the bargaining process improves the outcomes for both parties. In other words, the bargaining between parties should include each party, not only focusing on what is good for him and her but also on what is good for the other party. Many attorneys ask their own clients about their goals, but few, if any, ask their client about the goals of the other spouse or make deliberate efforts to elicit the long-term goals of the other party, also trying to help reach those goals too.

Integrative negotiating comes closest to the ideal of balancing narcissism with altruism by “adding value” in the negotiation process, but by making money and children zero sum games, the law slants negotiations to distributive negotiations. Lawyers and parties might start out with good intentions, but before long, more often than not, the process shifts to selfish distribution.

**Trapping people into being selfish reduces the value
of the outcomes for both spouses.**

6. **Trap #6: Winning on legal outcomes is most important.** Playing a game with someone is fun, win or lose, but it is more fun to win. Evolution selected humans who win and who have a natural desire to prevail, whether in enjoyable activities like tennis or serious activities like war. The legal system inadvertently promotes this desire to prevail in a family law case. Lawyers also get drawn into wanting to win desirable legal outcomes not only on behalf of their client but also on behalf of themselves. Not only can they pat themselves on the back if they get a “win,” but also their social status might improve. They might even end up with more clients and more income. The proof that this is a fantasy is that fewer and fewer people are willing to hire attorneys.

Research on winning and losing provides an interesting twist to this trap. People experience losing with much more emotional intensity than they experience winning. For example, gambling research finds that winning \$100 is much less emotionally intense than losing \$100. In fact, winning is not what causes gambling addiction; losing is. The desire to “get even” is strong. As one quote goes, a gambling addict that Ken new who played slot machines said, *“It is my money in there. I want it back.”* To draw a parallel, “losing” on legal outcomes might spur future battles, even future litigation, trying to even the stakes. People might become addicted to conflict with one another, like they do with gambling, because they feel like they keep losing.

**Trapping people into a win/lose mindset ignites the competitive
desire to prevail and not to lose, which promotes continuing conflict.**

7. **Trap #7: Escalating anger and blame, rather than resolving sadness, permeates the current family law system.** A divorce is the culmination of the failure of spouses to give each other their dreams. We all enter marriage with an idea of what we think will make us happy. In the “honeymoon” stage of a relationship, we often think that we have a good chance of that coming into being. Sadly, over time, however, our spouse usually ends up being a real human being, and not a bit player in our movie. We start trying to get our spouse to give us our dream so that we can have a happy marriage, and the control stage of the marriage begins. In a successful marriage, the spouses manage to resolve many of the control issues, but they never get the whole dream. We learn to tolerate those losses because the rest of the marriage is worth it.

However, when people fail to get enough of their dream to make the marriage worth it, they move to divorce. The losses involved are very sad. The loss of hope and the dream of a happy marriage and an intact family are perhaps the saddest.

However, most divorcing parties do not focus on the sadness; they focus on being angry at the other spouse for failing to give them their dream. Simply stated: they “*fall in hate*.”¹² The family law system often fans the flames of anger rather than redirects spouses to focus on the sadness. Attorneys, thinking that they are being supportive, might inadvertently fan the flames of anger and blame and even take action, like accusatory letters to “the other side,” which only increases the anger in the divorce relationship between spouses.

**Trapping people into anger and blame, instead of resolving sadness,
promotes a dysfunctional post-divorce relationship.**

8. **Trap #8: Deductive decision-making is encouraged from the beginning of a divorce in the current family law system.** Deductive decision-making means bargaining begins with the big picture issues and then drilling down into the details. For example, “every other weekend” is decided on, without looking in detail at the start and stop times, which comes later, or even considering if that is the best way for the particular family to handle weekends. Holiday schedules are lumped together in a template that the lawyers (or mediators) often give their clients: one gets the odd years and the other gets the even years, without a look at whether or not that will provide the family with good holiday experiences. The decision is made whether the schedule will be 50/50, 45/55, 9/5 or some other distribution, before looking at the best way to arrange days. This is called Deductive Bargaining.

¹² This is the opposite of “*falling in love*”.

**Inductive Bargaining produces a better plan.
Inductive Bargaining does not start with the big picture issues, but
builds a plan step by step, starting with a focus on the details.¹³**

Using Inductive Bargaining, the parties might start with each holiday, planning for example what will be the best way to arrange that holiday (e.g. Thanksgiving). This might include literally counting up how many Thanksgivings with children remain and planning each one. This might also include any time off of school and work associated with each holiday. They develop a Plan for each one to optimize the experience of themselves and their child. Then they focus on vacations, with the same goal of optimizing the experiences. Then they plan summers, that is, the best ways to organize the summers to provide themselves and their children the best summers possible. Then they plan weekends and other days off of school. By the time they get to school days, they have already planned, depending on the school district, about 200 days of the year.¹⁴ Days can even be broken down into parts. After-school time might be different from evenings in a good plan. This is the process of building a physical custody schedule inductively, focusing on long-term goals for each segment of the schedule instead of legal outcomes. When the attorneys write down and submit the schedule to the Court, they are submitting a Plan for the parties to reach long-term family goals.¹⁵

**Trapping people into bargaining deductively
ignores the long-term goals of the parties, financially for their security, and
as parents for their children.**

9. **Trap #9: The day of the final Judgment of Divorce is the end of the case for the parties, as well as for the attorneys, mediators, judges and other professionals involved.** Working toward the final Judgment of Divorce creates the illusion for parties that the day of the final Judgment will be the end of their relationship. The parties are often shocked, the day after the final Judgment, to discover that it is not true. In fact, rather than getting relief, they often find that the divorce process made the relationship worse than it was before. The trite prescription that attorneys and judges give to divorcing parents, usually including some version of “*Get along with each other,*” does not pervade the process in

¹³ In Game Theory terms, this is planning for simple and single games rather than for mixed and multiple games.

¹⁴ 200 days planned is already 55% of the total. Before long, the days planned will approach 90%.

¹⁵ Inductive Bargaining can appear to be a tedious task, but in the long run, this process serves everyone well, producing optimal outcomes and teaching parties a successful strategy.

ways that encourage parties to develop a sensible divorce relationship after the process ends. To the professionals, the case is likely over; to the ex-spouses, it has just begun. We remind the reader that the divorce is everything that happens after the day of the final Judgment of Divorce. This is much like a marriage, where everything that happens is after the day of the wedding.

Trapping people into focusing on the final Judgment of Divorce as the end leads to the realization that this is a fantasy and leaves them unprepared for what follows.

10. **Trap #10: The attribution of fault and blame has a long history in the current family law system.** Lawyers are sometimes referred to as “*professional blamers*”. This can fit like a hand in glove with divorcing spouses who, as we point out in Trap #7, are already blaming each other for the failure of the marriage to provide them with their dream. Fault and blame have little relevance to making a Plan for the parties’ futures. Focusing on sadness and focusing on planning for the future is critical. A good financial planner does not focus on blaming people for getting into financial trouble. The planner focuses on how to use current resources to have a better future. Parties could (perhaps should) do the same.

Trapping people into focusing on fault and blame distracts them from focusing on sadness and planning for the future.

**With a Mindset Shift,
the Current Family Law System Should be Ready for a Change**

Our goal in this Booklet is to reflect on the current family law legal system in which we professionals play a role. We started by asking this question: Does the current system help or hurt people? To answer this question, we analyzed the current system using the tools of Game Theory. It was an enlightening journey, leading to the following interesting conclusion:

**As professionals, we have been inadvertent active participants
in a system that might often do more harm than good.**

Some readers might have a mixed reaction to this conclusion, and think: “The system’s not all that bad...” Others might think that client demands are implicit in the family law legal system and are just “part of the job.” Ken has had attorneys, after disrespectful grilling in a deposition or in a trial, apologize and tell him they were “just doing their job.” What kind of a system promotes disrespectful behavior rather than respectful and cooperative planning?

**On the other hand,
hopefully many of you might find our analysis interesting,
perhaps even convincing.**

Upon further reflection, when you find yourself meeting with a client who does not want to pay spousal support, or with a parent who wants equal placement, or with a party who is accusing the other of abuse, you might have further (positive) thoughts about your initial reaction and conclusion.

**It is so easy to do the same old thing over and over,
and play our role in that system.
It is so human to keep building a road that goes nowhere,
even though we have such good intentions.**

The Bad News and the Good News Regarding Mindset Shift. One of the more disturbing aspects of our discovery was to realize how easy it was for us, for so many years, to ignore our instincts that something was wrong with this picture and rationalize the roles we played in it. That's the bad news. However, it does not take much to shift gears, even within current laws and the potential roles we can play. That's the good news.

The Mindset Shift. We can make a shift in our mindset, meaning our understanding of exactly what we are actually doing. We discussed earlier in this Booklet that this involves having a client-based Strategic Intention, Value Proposition and new Standards:

- where the parties' *Strategic Intention* is to have a plan for a post-divorce experience where the focus is on both parties' long-term financial and family goals and not on legal outcomes; and
- where the *Value Proposition* includes steps that treat the parties with respect, promotes high value outcomes through cooperation, manages emotions and helps resolve sadness, improves the relationship between separating parents and prepares them for the life-long task of raising successful children together and helps them develop legal outcomes that help them reach long-term financial and family goals; and
- where the *Standards* by which success is measured, is again focused on both parties' long-term financial and family goals and not on legal outcomes at the time of the final Judgment.¹⁶

**There is a Need to Recognize a "Dispute"
for What It's Not: A Dispute.**

When a "dispute" comes before us, here's what we can do:

¹⁶In our two books, we detail standards derived from Game Theory, which we call the "Five-E's," the settlement is: (1) **educated**, (2) **efficient**, (3) **equitable** (balancing objective and subjective values), (4) **equilibrant** and (5) **envy-free**.

- We can ask parents about their long term goals for themselves and for those of their soon to be ex spouse.
- We can promote a negotiation process that elicits and makes public, the long term goals of both parties and includes those goals, with a balance of selfishness and altruism, in developing solutions.
- We can ask when a party says he or she does not want to pay spousal support, what are your long term financial goals and what do you think are the goals of your spouse. This includes joint financial responsibility for the children.
- We can tell a party, “Wouldn’t you feel better if both of you reached your goals, even if that meant paying some spousal support in the short-term?”
- We can ask when a party makes allegations of abuse, what would make for a safe family experience for the children.
- We can tell a party who is participating in a custody study, that the focus should be on what the parents want as a long-term outcome; how they want their children to look back on their childhood experience after their parents separated and how they want their children to be functioning when they are adults.
- We can tell parties when they become selfish, that research tells us that the best outcomes for them are when both spouses have a plan to reach long term goals.
- We can tell the parties that it is better to start by growing the pie so that both spouses get bigger pieces rather than competing with one another from the outset.
- We can redirect the parties when they focus on who gets what overnights, to develop a Plan for the 100% involvement of both parents in the lives of the children, not where the children sleep.

**There is a need to recognize that
there IS something wrong with this picture.**

Although our Negotiation Model is more complex than we can briefly outline in this Booklet, a shift in mindset is essential and a good starting point for making a change.¹⁷ In a sense, we, as professionals, have also been tricked into a perspective of what happens when a marriage ends. We believe things that are not necessarily true. We play our roles in the system, knowing intuitively that something is wrong with this picture, but not knowing what we can and should do about it.

**There is also a need to recognize that
one’s view of reality might not be true.**

We are reminded of a physics example. Before Einstein, time seemed to be a constant

¹⁷ Using our Negotiation Model, briefly stated, attorneys can start by doing five things: 1) Changing their Mindset; 2) Supporting a new system that promotes a Strategic Intention, Value Proposition and new Standards; 3) Avoiding the Ten Tricks; (4) Assuming that the parties are not in dispute; and (5) Focusing on both parties’ long-term financial and family goals and not on legal outcomes.

throughout the universe. What was here “now” was what was “now” on a star 25 million light years away. The laws of classical mechanics seemed immutable. No one questioned this view of reality. Everyone, lay person and scientist alike, thought of time as a constant. And yet, this whole mindset turned out to be wrong. Time is different for different folks depending on the motion of those folks relative to one another. Most physicists did not accept Einstein’s work initially, because to accept it, meant a universally accepted mindset was wrong. However, when scientists tested Einstein’s assertion, he turned out to be right, and everyone in the world before him was wrong.

Another example from physics is the belief in the *ether*. When it was discovered that light traveled in waves, this posed a problem: wave action can only occur through a medium like water or atmosphere. A wave cannot travel through nothingness. So, the question was, how did light waves get to us from the stars and sun? The answer turned out to be the *ether*. The ether was an invisible substance that existed throughout space and was the medium through which light traveled. No one could see it, but everyone believed it because it had to be true. However, no one seemed able to come up with an experiment to prove the existence of the *ether*; at least not until two clever British physicists devised a clever device so sensitive that it was bound to measure the presence of the *ether*. When they measured, sure that they would prove the existence of the *ether*, they in fact proved that the *ether* did not exist. Again, their mindset was wrong.

We mention one social science example. It was a long-held belief that there were several distinct races of people. Recent genetic testing and other metabolic measurements trace all of homo sapiens to one common race; we are all just somewhere on the continuum from light to dark based on where our proximate ancestors lived on the planet. We all began in a small village in the Rift Valley on the east coast of Africa about 250,000 years ago. We are all of the same race.

Did We Challenge You? Help You? Provoke You? Our goal in this Booklet is not to offer definitive answers, although applying Game Theory principles in our two books, we do provide some answers. Our goal here has been to challenge assumptions and provoke creative thinking. With that goal in mind, we hope you find this Booklet both helpful and disturbing.

Our experience with family law professionals has been that nearly all of them want to do more good than harm. As a group, family law professionals are good people and sincere in their work. However, it is disturbing to conclude, when we step back and look at the current family law system in which we have worked, that the system might actually have been harmful to the very people we were trying to help. The rules and payoffs of the divorce game as currently played trap people into making self-defeating choices.

Are You Ready for Change? The reality is that we have no control over the past, but have a great deal of control over the future. We can change the way that we work. We can change the way that we think. We can offer a service and a product, where at the end of our

involvement, people will think it was worth the effort and expense, especially where they believe that their attorneys added substantial value during the course of their engagement. This is a lofty but a reasonable and attainable goal, if only we can change our mindset.