

Divorce Conflict Information Booklet Series¹

Understanding the Problem

Booklet 6

Is the Traditional Family Law System Facing Extinction, and What Can Be Done Before It's Too Late?

By Kenneth R. Waldron, PhD and Allan R. Koritzinsky, JD²

Authors' Note: This Booklet continues our discussion regarding the future and direction of our critically important family law system!

INFLECTION POINTS 101

Inflection points should not be ignored. In mathematics, there is a concept called the *inflection point*, which describes the point at which a curve on a graph changes direction. Business has adopted this concept, sometimes known as the *strategic inflection point*, referring to when a change occurs that requires a business to change direction in order to survive. Changes occur in technology, in the customer base, in the business area (such as increased competition), in regulations and/or in all four. Companies that heed such changes and reinvent themselves have a chance of thriving. Companies that do not, often find themselves headed for extinction.

Change is in the air. Examples abound. If you think this is theoretical, think of Polaroid and Kodak. Kodak is particularly disturbing because they had invented a digital camera in 1975, but rather than pursue that technology, Kodak sold the intellectual property and hung on to the chemical film business. Bookstores are another example of pending extinction. Think of neighborhood bookstores that did not see the inflection point when the large bookstore chains blossomed. Think of the Borders bookstore chain that did not see the emergence of digital books as an inflection point that would dominate the market.³ Those *inflection points* were changes in

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 Booklet is the sixth 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 Books. Scottsdale, AZ 2015 and "***Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation.***" The latter is an online book only. See www.unhookedmedia.com.

³ Barnes and Nobel and Amazon both saw that inflection point and thrived.

technology. Other changes can be in the customer base and the way products are sold. How would you like to have owned a string of rental video stores 20 years ago? People still watch movies, but the way they watch them has changed dramatically. Or think of Equal Exchange, which built a for-profit Fairtrade worker-owned cooperative with great success, on the basis of paying its growers more and charging customers more. The change in the customer base was that customers were willing to pay that premium for the feel-good of being fair to the farmers who grew the coffee. Changes in regulations can be the inflection point. In the late 1970's, when airlines were deregulated, the shift in the customer base was from level of service to cost of the ticket. Southwest Airlines, a small regional airline at the time, saw the inflection point and thrived- at least until now. What happened to Pan Am and TWA?

In the early 1970's, there was a gas crisis caused by shortages in the supply. There were gas lines, and prices rose rapidly. The big three auto makers also relied on planned obsolescence for repeat sales. Cars were manufactured to provide between 60,000 and 100,000 miles to their owners. A motorcycle company, Honda, began selling small, gas efficient cars that lasted twice that mileage. Soon Datsun and Austin Healy were doing the same. Ford and General Motors saw the *inflection point*, but Chrysler missed it. Chrysler would have gone bankrupt and faced extinction had the United States government not stepped in and had Lee Iacocca not taken over, who fired 16 of the 17 vice-presidents and invented the mini-van.

Does the current family law legal system face inflection points? Family law is a business. Some have called it an industry, not only subsidized by taxpayers for the family law court system, but also by plenty of for-profit professionals and their staffs. To our knowledge, there are no good estimates of the average cost of a divorce, because the cost range regarding legal fees is vast, and because the budgets of jurisdictions for family law court costs are difficult to ferret out of the total budgets for the court system. However, it is an industry that consumes millions, perhaps billions, of dollars each year.

FAMILY LAW SYSTEM INFLECTION POINTS

What are the current family law legal system inflection points? There have been several *inflection points* in the area of family law, which could spell the end of the system as we know it today. What are they? Are they being ignored?

- The emergence of no-fault divorce
- The change of role-based marriage to the egalitarian nature of modern marriage, in which both spouses work and parent
- The dramatic changes in the cultural view of children since the 19th century, from being family property to being a class of citizens with their own independent legal interests
- The statutory presumption and/or case law regarding joint custody and/or equal physical placement

- The statutory guidelines for calculating child support, and possible future guidelines for calculating spousal support
- The statutory presumption and/or case law regarding the equitable division of marital property
- The statutory presumption and/or case law regarding equal income-sharing when determining spousal support, especially in long-term marriages
- The introduction of technology, where *pro se* divorces have become easier and more accessible
- The introduction of free legal services and forms sponsored by State Bar and local Bar Associations, again making it easier for parties to proceed without lawyers
- The cost of legal services, which continue to rise, and in high conflict cases, make lawyers unavailable because they are unaffordable or unwilling to take the case
- The continued marginalization of divorce lawyers, compounded by an undeserved reputation problem, that lawyers are not helpful players in the process and may make matters worse

INFLECTION POINTS IN THE BUSINESS MARKETPLACE

Kodak and Polaroid ignored the inflection points. What about the family law system?

Kodak ignored rapidly decreasing sales of film and cheap cameras, despite clear evidence that an *inflection point* threatened the very existence of a company that had a lock on photography for 100 years. They filed bankruptcy, and are trying desperately under new leadership to reinvent themselves. Polaroid ignored the *inflection point*, but unlike Kodak, did not own valuable patents and is gone.

Will the family law system ignore the inflection points? In the family law system, does the rapid growth of *pro se* divorces, and alternatives such as mediation and private judging, mirror Kodak's lost sales? Is the family law system traveling down the same path as Polaroid, Kodak or Borders Books?

Thomson Corporation did not ignore the inflection points. Neither did IBM or GM.

Thomson Corporation was a highly successful publishing company, publishing some 200 newspapers and trade publications in North America and the United Kingdom. In 1997, Richard Harrington, the President and CEO, saw the industry changing with on-line publications; he saw an *inflection point*. The company was doing well, but he nevertheless changed the whole direction of the company, shedding regional newspapers and buying hundreds of businesses that better fit his future vision. Although the company took a major short-term hit in costs and lost revenues, Thomson reinvented itself and rose to substantial success in the modern era. IBM and General Motors are two other companies that (finally) saw an *inflection point* and reinvented themselves into having a second rising.

Can the current family law legal system reinvent itself from the bottom up, without a leader? Can family law reinvent itself into a useful aid in the gut-wrenching transition from

marriage to divorce? What needs to be done cannot be done by one person; there is no visionary CEO in the family law system. There is no Lee Iacocca, Warren Buffett, Ted Turner, Steve Jobs, Mark Zuckerberg, Elon Musk or Richard Harrington poised to take the reins of the family law legal system.

There are few examples of businesses changing from the bottom up. Perhaps the National Football League will change from the bottom up as the customer base becomes increasingly concerned with the injuries inflicted. Some systems have changed in history as the result of revolutions, or in the case of South Africa, as the result of financial pressure reflecting a change in attitudes towards Apartheid.

CAN THE CURRENT FAMILY LAW SYSTEM REINVENT ITSELF (IN TIME)?

With each of your authors having worked in the family law system for over 45 years, we proffer the opinion that the current family law system may be heading for extinction, having failed to recognize important *inflection points* that changed our “customer base.” We have seen the legal system make changes to try to do better⁴, but many of these changes are only coming up with new slogans.

The changes made regarding the family law system to date are not substantial and not fundamental changes to the business model.

- We change the wording “custody plans” to “parenting plans” like a failing business redefines “best practices.”
- We change “custody” to “physical placement” or “parenting responsibilities,” but parents still dispute who get what time with the children as though parenting is a Zero Sum Game.
- We force parents to attend classes intended to help prevent conflict and then usher them into a system in which conflict is the method of choice for far too many cases.
- We invent Collaborative Divorce where settlement rates are the same as the traditional system and in which prevailing (i.e., winning) is simply attempted in a different forum.⁵
- We theorize that Integrative Negotiations (value added) are better than Distributive Negotiations, but laws still require the distribution of assets and time with children.
- We use various forms of Alternative Dispute Resolution, but all of the alternatives are methods of dispute resolution, and not a goal-based long term planning process.

⁴ Remember the famous saying: “Lipstick on a pig is still a pig!”

⁵ Under Collaborative Divorce, the parties not only “*bargain in the shadow of the law*,” but also “*bargain in the shadow of losing their lawyer*” if the case does not settle with the collaborative lawyers. This presents another challenge under this process.

The government will likely always regulate marriage and divorce, but what will that look like in the future if the divorce industry fails to reinvent itself? People will always read books and watch movies, but who could we have foreseen what those markets would look like today?

In the face of inflection points, what is needed to make serious change? Would Kodak have survived if it advertised chemical film as “*The artful way to take pictures*” or prettied up the edges of its photographs? Doubtful. Slogans, changing wording in the laws or tinkering around the edges of the family law system will not save it. Without serious change, we worry that fewer and fewer good lawyers will go into or remain family law practitioners. Courts will continue to streamline on-line do-it-yourself divorces. Spouses will continue to avail themselves of cheaper and less conflictual alternatives. However, as long as divorce is viewed as a competitive process by spouses and the law, the results will always be sub-optimal.

Without any law change, lawyers can change the rules and change the game, but will they? The sad part of this story is that divorcing spouses would do much better to have informed guides and planners to help them through this process. We call them **LAWYERS**. Rather than seeing divorce lawyers as professional fighters who end up with the children’s college education money, spouses could see lawyers as guides who help them plan for their futures and the futures of their children. Your authors posit that this alternative offers a much better chance of an optimal outcome when compared to the current alternatives in the market. (Like a financial advisor, only one lawyer might be needed per case. We mention this idea without addressing the issue further. Any discussion requires serious time and attention. However, it is only a hypothetical concern that there is a dispute that requires two lawyers.)

However, there are many serious obstacles to any possible law change, or any change in the rules which would change the game, if and when it happened:

- **Inertia**- where the driver is to do things the way they have always been done.
- **Group think**- where the self-reinforcing interaction of the people in the system perpetuates destructive memes.
- **Leadership vacuum**- where the absence of a person or group to take the lead in transforming the system provides no leadership
- **Tragedy of the Commons**- where individual lawyers focusing on self-interest do things the same old way, even when (in the end) it is to everyone’s detriment, including their own.⁶
- **Encrusted mindset**- where there is an inherent resistance to changing our view of reality. In order to change our view of reality, we have to unload unquestioned

⁶ Tragedy of the Commons originated in England when a local government set aside land for sheep to graze for free, called the commons. Because feed was free, it served the interests of the herders to have more sheep, which they did, but this led to over-grazing and all of the herders paid the price with starving sheep. Individuals can do things in their own interests but as a group, can harm everyone, including themselves. In this context, individual lawyers might continue to practice in the same manner in order to make a living, but as a group shrink the market so that all lawyers suffer.

assumptions and standard operating procedures. We perceive what we expect to perceive.

Can this change come from inside the current family law system? It can, but the real question is, “*Will it?*” Kodak suffered not from a lack of bright talented people. It suffered from inertia and a drive to keep doing things the way they always have been done.⁷ Will the current family law system take that Kodak path? We hope not. Or...

**Will the current family law system
take the Thomson path and reinvent itself
as a valuable system for its current customer base?
We hope so! Time will tell.⁸**

A REINVENTED FAMILY LAW SYSTEM TO CONSIDER

This Booklet concludes our “understanding the problem” of divorce conflict. In the first three Booklets, we examined what parties bring to the table of divorce conflict, including destructive patterns in the marriage, vulnerabilities, due mostly to skill weaknesses, to escalating and often persistent divorce conflict. The divorce conflict often plagues the rest of their lives, if they have children, with coparenting conflict. In the next three Booklets, in “planning the solution”, we analyze what parties face when they enter the family law system and learn that traditional family law promotes competitive and selfish strategies, even when those choices are self-defeating over time. We also address the reasons that the legal divorce system is slow to change and potentially faces extinction in its current form.

Negotiation theory has advanced dramatically, especially with the advent of Integrative Negotiations, which appear to be superior to distributive negotiations. However, integrative Negotiations face substantial obstacles in the real world of divorce negotiations. Front and center are the fundamental assumptions in both the legal system and in negotiations, including the simple fact that the law requires “distribution,” This causes most negotiations to revert to distributive (competitive) negotiations no matter what theory practitioners espouse.

Mediation offers a great deal of promise and grew rapidly from 1979 to the present. However, mediation could as easily fit negotiation theory as being of two types: Distributive Mediation and Integrative Mediation. In his comprehensive research, Robert Emery found that mediation had long-term positive outcomes for family relationships when the mediation included:

- the active promotion of cooperation,

⁷ Thinking about this notion reminds us about how Albert Einstein defined insanity: doing the same thing over and over again and expecting a different result.

⁸ Our book, *Game Theory and the Transformation of Family Law*, introduces a pathway for lawyers to “take back their legal system” (to coin a popular phrase) and become planners applying Game Theory principles and skills.

- dealt at least briefly with the emotions of a divorce,
- established a “business-like” relationship between separating parents and
- avoided “divisive” negotiations at a time when spouses are particularly vulnerable.⁹

Interestingly, Integrative Negotiations can have the same four ingredients that Emery reports created positive long-term outcomes.

However, those outcomes reflected Emory’s thinking at the time of his research (2005). i.e., that improved contact between fathers and children, with mothers still largely responsible for raising the children and improved relationships between parents, would have positive effects on the outcomes for children. This meant, in his focus, less “pain” associated with the parental separation and fewer mental health and behavior problems than those children whose parents go through traditional negotiation and litigation.

Emory’s findings were helpful, but do not get us where we want to be now. For example, his recognizing that both mothers and fathers be involved in parenting which will have more positive effects on outcomes for children, gets us only part way.

The goal should be to have a plan that involves both parents 100% in the lives of the children.

In the final Booklets in this Series, your authors begin to explore an alternative system of planning and disagreement resolution based on Game Theory principles.¹⁰ However, for the family law system to reinvent itself, fundamental assumptions must be changed.

Starting with the assumptions. Let us return to an earlier example. Kodak assumed that people would always be interested in recording their lives with pictures. However, they also mistakenly assumed that people would want to print their pictures and place them in albums, and in order to print pictures, they would need film. Similarly, the legal system assumes that people going through a divorce will have to divide property and debt, income at least to support children and possibly one another, and to raise children from two residences rather than one, which is correct.

The family law system further assumes that because such divisions of money and time with children are Zero Sum Games (not correct), that the interests of the parties differ (likely not correct) and that there are inherent disputes in the process (not correct).

⁹ Emery, R. (2005). Divorce Mediation: Research and Reflections, *Family Court Review*, 43(1), 22-37.

¹⁰ These Booklets are a cursory exploration of just several principles. For a more comprehensive description of the Game Theory based negotiation model, see our books: “**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 Books. Scottsdale, AZ 2015 and “**Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation.**” The latter is in digital form only. See www.unhookedmedia.com.

Divorce law and practice has infused the divorce process with these assumptions, which are not correct, and magnify the typical disputes that divorcing spouses have at the time of a divorce.

Furthermore, the family law system assumes that the purpose of the legal system is to establish legal outcomes, either through settlement negotiations, litigation or even mediation and other alternative dispute resolution processes. In Booklet Four, we explored this assumption in depth, both looking at three fundamental weaknesses in the current family law system and ten specific Traps in the system leading to escalating conflict between parties. Again, in contrast to the assumptions of Integrative Bargaining, it is assumed (incorrectly) that legal outcomes are Zero Sum Games of distribution of money and time with children.

Because bargaining is always in the *shadow of the law*, lawyers tend to assume that negotiated agreements will fall somewhere between the best alternative to a negotiated agreement (BATNA) and the worst alternative to a negotiated agreement (WATNA). Their task is to attempt to move the needle in the direction of the client's asserted positions, and, if well trained, to try to create added value for both parties along the way. This mindset greatly restricts creativity and thinking outside of the box to develop a Plan that meets long-term goals of both parties.

The best Plan on a particular issue might be well outside of the BATNA-WATNA range.

Because a divorce is a legal process, the family law system assumes that the legal rights of parties need protection. Thus, parties require advocacy. Historically, this has meant getting adversarial counsel, but more recently, with the rapid growth of *pro se* divorces, parties represent themselves. At a Final Hearing, the Judge must determine if the legal rights of the parties have been protected.¹¹ If it appears (to the Judge) that one or both of the parties' legal rights, or those of their minor children, have not been protected, the Court might not grant the divorce and refer the parties back to the bargaining table, or to attorneys.

For the family law system to reinvent itself, these fundamental, often unquestioned, assumptions must change. What follows are a two new assumptions to consider:

1. That there is no dispute and
2. That the interests of the parties are not averse to one another.

Here, we go beyond the distinction between distributive negotiations and integrative negotiations. The law defines the legal process of a divorce as identifying the division of property, debt, income and time and power with children – all of which are distributive tasks. Integrative negotiations try to create “win-win” agreements, chiefly by trying to identify the “interests” of clients undergirding their positions on the distributions required by law.

¹¹ Judges at Final Hearings vary greatly regarding their review of stipulated settlements.

For example, in a particular case, a parent might reject any schedule that has the children away for more than three days. An examination of the underlying “interests” involved might reveal that the parent simply cannot tolerate not seeing the children for three or more days in a row. Integrative negotiations might find a way for that parent to spend time with the children, independent of who has physical custody at the time, meeting that need but still allowing for a variety of schedules – a win-win?

The assumption is that parties do not have a dispute when the focus is on long term goals and not on short term interests or outcomes. For example, a long-term goal of both parents might be that the children have positive healthy relationships with both parents well into their adult lives. They might share the vision of their children, that at 25 years old, they view their parents as “always being there for us” independent of the fact that the parents were divorced. Flexibility in the physical custody schedule, both daily and as circumstances in the family change, and easy access off schedule now become a tool to reach these and other long-term goals.

Ask parents the following questions, and one is unlikely to find any disagreement:¹²

1. When your toddler grows up, do you want him or her to have a 95% chance of being suicidal in her teen years or 5%?
2. Do you want your children to have a 50% chance of having behavior problems in school or 5%?
3. When your children are adults, do you want them to have a 65% chance of divorce or a 30% chance it requires thoughtful planning.

People get married, lose jobs, buy houses, have children, inherit money, move to new locations and get divorces. These life events often include strong emotional reactions, but at the heart of it, they require reorienting the planning process to take new developments into consideration.

An emotional reaction to having a baby might be a strong desire to be a stay-at-home parent, but only through thoughtful planning can and should a decision be made.

We do not assume that people have disputes when they face these life events, even though they might sometimes disagree about which plan will best help them reach goals.

We might predict that some people will resolve disagreements best with professional help.

In the next six Booklets, we begin to introduce a few Game Theory principles that point to the Solutions to divorce conflict. In describing the “problem”, we have clearly indicated some aspects of those Solutions. Those include:

¹² These are real statistics.

1. Viewing divorce conflict as a normal human reaction to the sadness of the end of a relationship.
2. Seeing divorce conflict as people lagging skills for planning and the resolving disagreement; not as reflections of personality problems or other mental health pathology.
3. Recognizing that divorce conflict can be a process addiction for vulnerable people which can lead to intractable conflict and “falling in hate”.
4. Understanding that fundamental flaws in and tricks by the current family law system can exacerbate already existing divorce conflict, each of which can be corrected by family law attorneys in the planning process.
5. Acknowledging that the current family law system is a static culture, inhibiting cultural evolution by repressing new ideas (memes) or at least isolating those new ideas to background research where they lead to no real change. The “enlightenment” of the family law system will require the production of and testing of new ideas (memes).
6. Accepting that this static culture and failure to recognize inflection points may be leading to the extinction of the family law system as we know it. Whether or not family law will reinvent itself deliberately or simply become a failed system, is an unknown.
7. Reinventing the family law system requires more than simply finding new ways to do the same old thing or adding band-aids like court-connected mediation and parent education classes.
 - a. First and foremost, fundamental assumptions undergirding the system need to change.
 - b. Second, the mindset and approach to settlement negotiations need to shift to goal-based long-term planning.
 - c. Third, services need to be designed and provided for the lagging skills which undergird divorce conflict and for the prevention of and in some cases treatment of the addiction to divorce conflict.

With these ideas in mind, we now move to the “Solution” to divorce conflict. Your authors hope that the manner in which we describe the “problem” leads to some obvious solutions. However, in the next six Booklets, we introduce some techniques derived from Game Theory, which might not be so obvious.