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## Family Law: An Alternative To Litigation

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With the California budget crisis, our family courts have experienced growing demands on their limited resources. About 75 percent of all family law matters involve self-represented litigants. Most self-represented litigants find it difficult to navigate through legal rules and procedures, which can be

complicated for even legal practitioners. The increasing complex family law rules and procedures compound the congestion and frustration that litigants face while churning in the ever fiscally strained California family law court system.

As parties are faced with this complex and expensive judicial process, there is an increasing demand for out-of-court resolutions to family law issues (especially in a down economy). Family law impacts the core of our lives: our children, our finances, our homes, our safety and even our pets. And, parties have begun to realize that they have more control to creatively structure a framework for settlement that is tailored to their unique family circumstances. There is a growing demand for settlement options outside litigation; however, most people lack the information and mastery of the complex rules to successfully reach a peaceful resolution without court assistance.

As the public frustration boils, many family law practitioners have addressed this growing need by completely excluding litigation from their practice and adopting a collaborative law practice. Collaborative family law is a growing alternative to the litigation practice wherein the parties (and counsel) agree not to litigate, jointly approach the case with full exchange of information and joint experts with the goal of working together to resolve the issues in the case. However, if the parties can't reach an agreement, they are then stuck having to start from scratch and hire new lawyers as they move on to litigation. Moreover, many times the confidential nature of the collaborative process requires the parties to engage new experts for purposes of litigation. While collaborative law is a wonderful approach if successful, most families do not have the trust, resources and patience for it to be a realistic method to reach a resolution.

In fact, current California public policy actually promotes a more collaborative approach to family law issues. Family Code Section 2100(b) states: "Sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery." Family Code Section 2100(c) further states: "In order to promote this public policy, a full and accurate disclosure of all assets and liabilities...must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties...together with a disclosure of all income and expenses of the parties..."

Given these disclosure requirements, a hybrid approach to settling and mediating family law cases that includes some of the fundamentals of collaborative law is actually possible (and encouraged by California public policy), without completely foregoing litigation. Overall, it is better for the family as a whole if they can reach a settlement themselves. Ultimately, the courts should only be utilized when the families are unable to resolve the issues on their own.

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## **resolution without court assistance.**

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To effectively approach a settlement of a case under this hybrid approach, the family law practitioner should consider the following tactics:

*Joint Disclosure and Exchange of Information:* Much litigation is fueled by the distrust of the other side. Early disclosure and full information of the finances can help calm down the paranoia and keep the case from clogging the court's docket. To avoid problems with production, parties can quickly and efficiently provide much of the information and documentation in the form of pdf files on a flash drive or sent via e-mail. Once both sides have sufficient information, they can then evaluate the case and the options available. Given the stringent requirements under Family Code Section 2100, playing "hide the ball" with discovery and information in a family law case will just promote litigation and possibly expose the client to sanctions.

*Consider Employing Joint Independent Evidence Code Section 730 Experts:* An agreement early in the case to employ joint independent experts can ultimately save the parties substantial expense. The following types of experts are common in family law cases. *Appraisers:* If the value of the real property is at issue, a joint appraiser can help narrow the discrepancy in estimated values. *Forensic accountants:* If either side has a business, then the parties' cash flow from the business and the value of business will be at issue. Moreover, many times forensic accountants are hired to evaluate the standard of living. *Psychologists:* In child custody cases, an independent child custody evaluation can give both sides an objective third party's opinion as to the best interests for their children. *Vocational Evaluation:* If there is an allegation that one party is underemployed, then a vocational evaluation can be employed to determine that party's ability and opportunities for employment. Moreover, many times such an evaluation can provide the supported spouse with information to help them find a lucrative career opportunity that they didn't consider.

In addition to Section 730 experts, several other experts can be employed jointly to assist the parties. Financial planners and certified public accountants can discuss creative options to support payments, property division and tax planning benefits. Many times, toxicologists in family law are employed to evaluate substance abuse issues. A hair follicle drug test can put to rest any suspicions of substance abuse; however, without an agreement, the hair follicle drug testing is not currently something the family law court can order.

*Identify Main Concerns of Both Parties:* Once both sides have the information relevant in the case, it is important to listen and seek to understand the concerns of both the client and the other side. A settlement proposal is more likely to be successful if the parties can consider creative solutions that will meet the main concerns of both parties.

*Encourage the Clients to Be Creative and Proactive in Settlement Discussions:* Counsel should inform and guide the client to be fluid in tailoring a settlement proposal. If the client is emotionally wired to view the case as a "win/lose" situation, settlement will be more difficult. Instead, the client should be advised to understand their spouse's concerns and to be proactive in an approach to their own goals. The adversarial tactics and arguments should be saved for litigation.

*Narrow the Issues and Disputes in Facts:* When approaching settlement, counsel too must be goal oriented. Focus on the end result; do not argue for the sake of argument. Instead, focus on the agreed facts and try to get a stipulation as to those facts. If not all issues can be resolved, then agree to disagree and reach a partial stipulated judgment and/or orders on the undisputed issues. If you can reach an agreement on some of the facts and issues, then you can spare the parties and the court's calendar from a longer unnecessary trial.

*Rebuttal Evidence on Disputed Issues/Facts:* The remaining disputed issues need to be reevaluated after you obtain the evidence and hear the other party's position. Counsel should consider obtaining further rebuttal evidence to help persuade the other side. If the joint experts have given opinions that harm your case, then a rebuttal expert to re-examine the issue should be considered. This will give you a second chance to negotiate the issue in your client's favor and obtain trial evidence to help your case. But, you should properly advise your client as to the expense for the rebuttal evidence and the value of what is actually at issue.

And, if the negotiations do not work out, there is still trial. With full evidence and

information properly exchanged, the parties will be better prepared for a court hearing that is narrowed to the truly disputed issues and facts. And, if the parties have stipulations as to uncontested issues, ultimately, they will spend less time waiting in a congested courtroom. The parties themselves clearly understand the circumstances of their family better than the bench. If we give them the opportunity and tools to resolve their own family law issues, the outcome is best for both sides and the family court system.

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