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SOME WORDS OF CAUTION ABOUT DIVORCE MEDIATION

*Phyllis Gangel-Jacob**

I chose to present these words of caution about divorce mediation because the topic is receiving a great deal of public attention and a mediation program is being considered for use in our courts. By divorce mediation, I mean that process by which the parties to a divorce meet with a mediator, sometimes referred to as a neutral, in an attempt to settle the economic, custody, and other incidents of divorce. The mediator may or may not be a lawyer. At the meetings, the parties are not represented by counsel.

I have been on the bench for ten years in a variety of assignments both civil and criminal but for the past five years, eighty percent of my calendar has been devoted to matrimonial matters and I spend a great deal of my time assisting in the negotiated settlement.¹

* Justice, Supreme Court of the State of New York, New York County. Editor's note: This Article was originally a speech delivered as the Max Schmertz Distinguished Professorship Lecture at the Hofstra University School of Law on April 5, 1995.

1. This Article is in large part the product of my experiences and recollections; my statistics are not checked out with the data from the Office of Court Administration, because they are impressionistic numbers that have a meaning for me and will have, I hope, a meaning for my audience. On the other hand, I must also make a deep and grateful bow in the direction of a number of lawyers and academics whose writings and insights have become part of the fabric of my life. I am going to list some of them in this Article because their influence in most cases is too pervasive to distribute throughout this paper. Perhaps, I should invoke Rudyard Kipling, as Dean Prosser did, many years ago, when he was preparing PROSSER ON TORTS for the press:

*When 'Omer smote 'is bloomin' lyre,
He'd 'eard men sing by land an' sea;
An' what 'e thought 'e might require
'E went an' took—the same as me!*

Here then is a list of authors and works, and may all on that list smile back at my Kipling by way of Prosser, catch my wink of "Thanks," and wink back. See Carol S. Bruch, *AND HOW ARE THE CHILDREN? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 30 *FAM. & CONCILIATION COURTS REV.* 122 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for*

My husband, Professor Bernard Jacob,² frequently says that I do more divorce mediation than all the members of the Associated Coalition of World Wide Divorce Mediators combined. He is not *often* wrong but about this he is wrong. First of all, there is no such organization; and second, the difference between divorce mediation and negotiated advocacy, with a little assist over the net by a judge, is vast. I submit that the former has, as its paramount goal, settlement between two unrepresented parties to a dispute, and the latter has as its paramount goal, a settlement arrived at with knowledge of the consequences and attention to the legal issues.

Matrimonial matters are generally viewed as a burden on lawyers, judges, and courts. How often I have heard lawyers say they wouldn't "touch" a matrimonial matter—I believe this to be a thirty year old carry-over from the days when a divorce could only be had on grounds of adultery and perjured testimony was rampant.³

Even today, judges turn their backs on these cases; they wince and grimace and convey their distaste to administrators. It is true that a judge in a matrimonial part has a different row to hoe in an often legally complicated and emotionally charged setting. Conferences are serious business. This is not a mere offer and demand, select or settle, five minute session with the judge or the judge's court attorney. Matrimonial cases do not lend themselves readily to a "quick settle-

Women, 100 YALE L.J. 1545 (1991); *Joint Custody Was a Bad Idea*, THE RECORDER (California), Jan. 26, 1989; PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, *Adopted Resolution Opposing Mandatory Mediation in Family Law and Domestic Violence Cases*; Carol S. Bruch, Professor of Law, University of California Davis, Testimony before the N.Y. Assembly Standing Committee on Judiciary, Interim Hearings on Mediation of Child Custody and Child Support Disputes, Nov. 7, 1985; Kevin M. Mazza, *Divorce Mediation: Perhaps Not the Remedy It Once Was Considered*, 14 FAM. ADVOCATE, Spring 1992, at 40; Marcia Rachofsky, *Settling for Less, Experience Shows Divorce Mediation is Hostile to Women*, GUILD NOTES, Winter 1985; Joanne Schulman & Laurie Woods, *Legal Advocacy vs. Mediation in Family Law*, THE WOMEN'S ADVOCATE, Vol. IV, No. 3; Harriet N. Cohen, *Mediation in Divorce: Boon or Bane?*, THE WOMEN'S ADVOCATE, Vol. V, No. 2; Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994); JOHN DEWITT GREGORY, *UNDERSTANDING FAMILY LAW* (1993).

2. Bernard E. Jacob is Professor of Law at the Hofstra University School of Law.

3. See *Abelson v. Abelson*, 298 N.Y.S.2d 381, 384 (Sup. Ct. 1969) (reporting on "three new 'fault' grounds" added to adultery, and "two 'non-fault' grounds" that were added by the New York State Legislature in 1966); *Rosenstiel v. Rosenstiel*, 262 N.Y.S.2d 86, 96 (1965) (noting that "[f]or 160 years New York as a State has recognized one cause only for divorce"), *cert. denied*, 384 U.S. 971 (1966); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

ment on the record” or “striking while the iron is hot.” Resolution means the careful drafting of a lengthy agreement, a final draft of which is unlikely to occur without further conference with the court. Come to think of it, this may be the best and highest form of alternate dispute resolution—but it is a system of “advocated negotiation,” not “mediation.”

What about the rare case that goes to trial? I find the trial not to be any more lengthy than a tort or commercial case and a great deal more interesting than a “trip and fall” or “account stated.” Why, then, is the matrimonial case an anathema to the bench? Probably because the issues are complicated, the considerations great, the decisions long-lasting, the possibility of recurring motions for modification and enforcement haunting, and finally, since there is no jury to share in the process and render a quick decision, the judge must actually listen carefully, take copious notes, and ultimately write lengthy decisions which set forth findings of fact, conclusions, and judgment.⁴

Matrimonial actions are not small matters. When a partner to a marriage needs the court’s aid in obtaining a fair partnership share, he or she should not be encouraged to accept a forum which does not provide the checks and balances of the judicial system. The rights of divorcing parties should be protected by vigorous advocacy.

Consider these factors:

Most matrimonial cases, perhaps eighty-five percent or more, are resolved without any court intervention. There is court contact only for the uncontested divorce and even that may be accomplished by submitting papers. No one will ever see the courthouse or the judge. Of the remaining fifteen percent, only two percent or three percent are actually tried.

There appears to be greater concern about the “emotional” aspects of divorce than the “economics.” I have found that the emotionalism is *most* readily diffused by a fair economic resolution. But the parties are entitled to their emotional frailties. They often require a recovery period—a time for the wounds to heal. I have before me at this very moment a case where a forty-three year marriage is coming to an end because the husband, a performer of worldwide reputation, has at age seventy-eight found another life; this obsession is not so uncommon as one might imagine and is frequently referred to by

4. See generally Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119, 1133 (discussing the complexity of issues in matrimonial cases).

matrimonial lawyers as “life before death syndrome.” I have also before me a case of a traditional homemaker (or at least that which a decade ago was considered traditional) who, at age fifty, suddenly discovered that she has been “oppressed” for thirty years, deprived of her true potential, and determined to strike out on her own. Her weeping and understandably distraught husband believes that this is a temporary aberration and that she should be kept from this self-destruction. He may be correct. And there is the case of the young mother, still nursing her third child, who has been told that her husband has found a new and true love in his religious studies class—a yearning for his roots which includes a demand for joint custody of the children. None of these three people can fathom what has happened to them—they need time to heal and they need powerful allies in the form of skilled, professional, competent counsel to put the brakes on the tsunami wave that is about to sweep them away. There are times when the delays in the court system serve a necessary and humanitarian purpose.

There is a lack of appreciation for the complexities of a matrimonial case; able counsel, familiar with the most recent decisions in a quickly developing field, with expertise not only in matrimonial law but in landlord-tenant law, real estate law, tax law, and consumer rights law, should be on hand from the beginning and through every stage of the advocated negotiation and, if necessary, the trial.⁵

An able matrimonial lawyer not only knows *the difference* between separate property and marital property,⁶ but also knows that appreciation of separate property and income from separate property may very well *be* marital property;⁷ knows the difference between

5. See, e.g., Leonard G. Florescue, *New Matrimonial Rules; Pensions*, N.Y. L.J., Dec. 13, 1993, at 3 (generally highlighting the need for matrimonial attorneys to stay abreast of new developments in the law).

6. Seven states, including Illinois, Minnesota, New York, North Carolina, Tennessee, Virginia, and West Virginia, and the District of Columbia draw distinctions between “marital” and “separate” property. JOHN DEWITT GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* ¶ 2.03[1][b] (1989). “[L]awyers must carefully examine the applicable statute.” *Id.* In New York, “marital property” is defined as generally including “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held” N.Y. DOM. REL. LAW § 236 pt. B(1)(c) (McKinney 1993). “Separate property” generally includes “property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; . . . compensation for personal injuries” and appreciation of such separate property. *Id.* pt. B(1)(d).

7. Separate property includes appreciation on separate property, “except to the extent that such appreciation is due in part to the contributions or efforts of the other

passive income and appreciation and active income and appreciation;⁸ knows the reasonable date for valuation of the property, which may be anywhere from the date the summons is served to the date of trial;⁹ knows the tax consequences of sale or transfer of property; knows the impact which dissipation of marital property may have on the distribution and, in fact, what constitutes dissipation;¹⁰ and knows the likely outcome of a case based on recent decisions and the evolution in attitudes about marriage and property considerations.¹¹ When I recently asked a reputable mediator—indeed a lawyer mediator—who was a panel member along with Professor John [DeWitt] Gregory¹² at a seminar at Cardozo Law School, what it is she tells a couple about the tax impact of a proposed arrangement, she replied that she *never* tells the mediating partners anything. She is a neutral. She simply assists in their dialogue—a kind of Freudian mediation. Perhaps each of them has an attorney with whom they consult during the process, but if each *does*, this seems like a very prolonged, costly, duplicative process which could well be accomplished in four-way conferences involving the parties and their lawyers. It has not been my experience that parties hesitate to speak nor is dialogue unavailable when the parties are represented.

Does the mediator—lawyer or non-lawyer—know or tell the parties that the agreed-upon promise to transfer a valuable leasehold interest from one to the other party may be a fair concept but a total illusion because the landlord has rights which may defeat the plan?

Does the mediator know or tell the parties that spousal support is deductible by the payor and taxable to the payee but that New York State may not permit the payor to take the deduction if he or she works in New York but lives in another state and has to file a non-resident return?¹³

Does the mediator know or tell the parties that capital gains on a second home cannot, under most circumstances, be rolled over or

spouse" N.Y. DOM. REL. LAW § 236 pt. B(1)(d)(3) (McKinney 1993).

8. See generally GREGORY, *supra* note 6, ¶ 2.11[3] (describing the implications of investment appreciation).

9. Whereas Colorado and North Carolina have established a valuation date by statute, lawyers in New York and other jurisdictions must be aware of the applicable case law. See GREGORY, *supra* note 6, ¶ 4.02.

10. *Id.* ¶ 9.01.

11. See generally *supra* note 5.

12. Professor Gregory is the Siben & Siben Distinguished Professor of Family Law at the Hofstra University School of Law.

13. See N.Y. TAX L. § 631(b)(6) (McKinney 1993).

avoided by the exemption for persons over fifty-five.¹⁴ For that matter, does the mediator know or tell the parties that such roll-overs and exemptions may be available on the primary residence only if it is the primary residence—a scenario often not the case when couples have been living separately? Add to these tax dilemmas the problems of deductions, exemptions, responsibility for past filed joint returns not yet reviewed by the IRS, present and future recapture of tax deductions taken in connection with tax shelters on past returns, and tax consequences of transfers from one party to the other. *This is not social work; it is law—complicated law.* You not only need a lawyer but your lawyer may need to consult with other counsel, accountants, and experts in a variety of fields.

Proponents of mediation may argue that many cases do not require such sophisticated lawyering. The parties really have nothing. They merely need a divorce. There are only two children. The husband, as an example, is the superintendent of a few tenements in Hell's Kitchen. He does not earn very much. He carries out the garbage and sweeps the steps. All that is needed is child support based on the guidelines. Mediators certainly can handle this, can't they? Well, what about the free apartment? Does the mediator know or tell the parties the difference between a tenancy and a license?¹⁵ What is the value of the free apartment? What about all the invisible income from handyman jobs, gifts from suppliers, gratuities, and Christmas gifts? And what about the debt to Household Finance and Visa and Master Card? Does the mediator know or tell the parties that these debts can be consolidated; that the lender may be entitled to nine percent rather than the contractual interest rate which may be twenty-two percent? Does the mediator know that once an account is in default, New York State limits lenders to nine percent because it wishes to discourage lenders from prolonging the high interest rate period before judgment? Does the mediator even know that the debt exists? For that matter, do both parties know—and if only one party

14. See I.R.C. § 121(d)(5) (1988) (outlining the requirements of taking the one-time deduction in this context).

15. Typically, occupancy of an apartment incidental to a job is considered to be pursuant to a "license" and not a "lease;" such an arrangement lacks many of the protections accorded to tenants in New York and terminates when the employment terminates. It is excluded from the protections of either rent control or rent stabilization. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9 § 2520.11(m) (1985) (promulgated under the authority of 1985 N.Y. LAWS 888 §§ 1-2 (continuing the authority of the real estate industry stabilization association and the stabilization code to an extent not inconsistent with law)).

knows is it not just possible that it is the other who will unwittingly assume responsibility for at least one-half of the debt? One-half always seems fair.

Full and fair financial disclosure and discovery is the watchword of fair settlement. This can barely be accomplished in a court setting with available legal sanctions. It will all but be forgotten in the mediation mode. We have finally come to admit that failure to disclose finances has reached epidemic proportions in matrimonial matters and our Chief Judge Judith Kaye has made the most remarkable progress with promulgation of new rules which make full disclosure more likely.¹⁶ Those new rules place a great burden on lawyers to see to it that the goal is achieved. The rules require the lawyer to certify that he or she believes the net worth statement to be complete and accurate and has no knowledge which might lead to a contrary belief.

You may ask: What about the mediation of custody and visitation, Judge? We do not have to worry about all this law. This is a "people thing." Can't the parents, at the very least, work out their relationships with their children? Where will the children live? Where will they go to school? What about religious training, medical care, etc? We will not talk about equitable distribution or spousal maintenance and child support or child care costs or medical costs or college. You have convinced us, Judge, that all of these money issues are complicated and should be negotiated with the assistance of skilled counsel. But what about the children? Why can't that be mediated?

My answer is: sometimes it can be—but why hire a mediator? You have a lawyer on board. Custody and visitation should be, and generally is, the least contentious element in an agreement and is easily dealt with by the parties and their attorneys. When it is complicated and contentious, a red flag should go up and that red flag means representation.

The literature tells us that proponents of mediation are generally proponents of joint custody, either split physical custody or joint decision making or both.¹⁷ I submit that joint custody has not been defined and its ramifications have not been carefully addressed. There

16. See 22 N.Y.C.R.R. § 202.16 (McKinney 1995).

17. See, e.g., JOINT CUSTODY AND SHARED PARENTING at v-vi (Jay Folberg ed. 1984) (indicating support of joint custody arrangements); Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 448-49 (1985) (indicating support of mediation).

are many reasons to believe that it may not be good for the child or fair to the parent who has been the primary caretaker. But I will save that for another lecture which may be entitled "Some words of Caution about Joint Custody."¹⁸

King Solomon did not gain his reputation for being wise and good because he proposed cutting the child in half.¹⁹ The story has been told for centuries because King Solomon knew that the child *should not* be cut in half and *would not* be cut in half. In that story the true mother relinquished claim. A very sad result for both mother and child. But King Solomon was not a neutral. He was a judge. He observed and listened and watched and made inquiry and then granted custody to the true mother. If King Solomon were a neutral and this was mediation the child would have remained with the imposter.

Women are typically the primary caretakers of children both before and after divorce.²⁰ A few states have mandated mediation for all cases in which custody has been raised as an issue.²¹ We are not speaking of the more than eighty-five percent of cases which are resolved without court intervention. In most of these cases, the summons and complaint is drafted after the agreement is signed. It is only one or two percent in which custody is truly at issue. Nevertheless, almost without exception, in the remaining fifteen percent a demand for custody is found in the pleadings. Judges recognize that it is used as a bargaining chip. Women who have raised the children with the consent, acquiescence, or insistence of good fathers who obviously knew what was best for their children, fear losing custody and therefore compromise on the economic issues. The father has nothing to lose. It is the King Solomon story.

It has been my experience that the more serious the economic risks, the more contentious the demands for custody—more contentious, more threatening, more litigious, more unyielding—but *nevertheless not serious!* Not serious because the custody issue is merely a smoke-screen for the money issue. Mandatory mediation of these so

18. Justice Richard Neely, Chief Justice of the West Virginia Supreme Court of Appeals, has made a start on this subject in *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

19. 1 Kings 3:16 to 3:28 (King James).

20. See Hayley Gorenberg & Amanda White, *Off the Pedestal and Into the Arena: Toward Including Women in Experimental Protocols*, 19 N.Y.U. REV. L. & SOC. CHANGE 205 (1992).

21. Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331 (1986).

called custody cases will only contribute to this form of financial and emotional battering. An experienced judge can dispose of these cases in a half-hour conference where the parties are present along with their counsel. Once again, advocated negotiation, and not mediation, will lead to a quicker, fairer result. And for the rare case which is a *serious custody case, a real custody case*, mediation is certainly not the answer.

Those cases require all of the constitutional and due process and other protections which have heretofore been particularly and carefully developed in this most important area of law.

There is no provision for the assignment of free legal counsel in any aspect of a matrimonial case but two; they are custody and contempt. The two "C" words, "custody" and "contempt," result in entitlement to the third "C" word, "counsel." Judges are obliged in these cases to provide counsel to those in need because of the dire consequences—possible loss of parental rights in custody and possible loss of liberty in contempt.

In custody cases, the judge is permitted to interview the child *in camera*.²² Indeed it may be reversible error to fail to interview the child. The interview is transcribed by a court reporter and is available on appeal for direct delivery to the appellate court, but is otherwise sealed and protected from all eyes. It is the better view that children should be able to speak freely without facing recriminations from either parent. How is this accomplished in the mediation process?

In serious cases, a judge can appoint an expert to evaluate the fitness of parents and the impact on the child with the use of psychological testing, alcohol testing, and drug testing. How is this accomplished in the mediation process?

In serious cases, the judge can condition *contact on conduct*, providing protection for children who need protection, training in parenting skills for parents who need training, and counselling for parents or children who may benefit from counselling, including drug and alcohol rehabilitation. How is this accomplished in the mediation process?

In custody cases, arbitration—even a written agreement to arbitrate—is not binding. This is because our civilized and child-caring society has recognized its responsibility for the care of our children.

22. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1118 (1993).

An agreement to arbitrate future questions concerning a child's care and well being is not binding, nor is the outcome of an arbitration to which the parties have voluntarily submitted. Decisions after arbitration are subject to a *de novo* review in court if the best interests of the child are at issue.²³ Peculiarly, an agreement, on the record or in writing, arrived at through mediation or an advocated negotiation, is harder to modify despite the best interest test.

Are we really suggesting that this important area of law and the family be reduced to a make-do, disorganized, unregulated, improvised mediation without lawyers, without judges, without examinations or licensing, without standards, without protection, without codes of ethics, without disciplinary forums, without responsibility, without confidentiality, all in the name of settlement?

Let me take a minute to discuss the battered and abused spouse or the battered and abused child only to say that they are *not* easily identified, particularly among the vast American working middle class. More or less, all of the proponents of mediation have, after much prodding and admonition, carved out an exception for the battered family.²⁴ There is a general acknowledgment that these folks are not candidates for mediation.²⁵ But that acknowledgement is generally in the form of one line in a statement or brochure. It is simply not serious. I have read not a single word about a serious identification or screening process developed to assure that victims of abuse are not subjected to further abuse in the mediation process. There is all manner of abuse—physical, verbal, economic, even the abuse of silence and alienation. In our society, abusers are not applauded, but neither are victims of abuse. Victims are reluctant to stand up and identify themselves. How do the proponents of mediation propose to identify and protect them?

And what about the party who was never abused as we have come to accept that term, because they acquiesced in complete subjugation for ten or twenty or thirty years? Are they candidates for mediation?

There is a great deal of shame and depression that comes with an abusive relationship. It is not enough to say "and by the way, if

23. Carbonneau, *supra* note 4, at 1157-59.

24. "General agreement exists, even among mediation enthusiasts, that *no matter*, regardless of the specific issues involved, should be mediated when domestic abuse of a serious nature has occurred between disputants." Mary P. Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 721 (1993).

25. *Id.*

you have been abused or battered, mediation may not be for you.” There may in fact be no way to adequately identify the lion’s share of candidates to a custody mediation who may be abused or depressed or shy or frightened.

I have little doubt that court-annexed divorce mediation is in New York State’s future, but I also know that our dedicated Chief Judge will not treat this casually nor will she, I predict, permit it to happen until every “T” is crossed and every “I” is dotted. She will not expose the parties and their children to the whims and dangers of crash course mediators who are ill-equipped to handle the complexities of matrimonial law; who might permit settlement without financial disclosure; who do not understand or care that the sanction of law is necessary to prevent deception and withholding.

I predict that, if and when we have mediation, it will be a program which is carefully crafted to do the most good, which should be after, and only after, a case is trial-ready; after all discovery and disclosure is complete, all forensics reports delivered, and then only with lawyers present to participate and assist their clients in the process and the drafting of the final agreement.

The legislature, media, public, academics, and many professionals seek reasonable modes to resolve difficult problems. They are to be commended for their efforts. But they frequently are influenced by artful language—words which I have come to call the buzz words of civilized society. An example is the word “civilized” itself (e.g., a “civilized” divorce). A civilized divorce may be an oxymoron, but it is less likely to be when there is economic justice. Other buzz words that connote fairness are “joint custody,” “shared decision making power,” “no fault divorce,” and “mediation.” What could be more civilized than a nice, mediated settlement which results in joint custody, few economic burdens on the monied spouse, and a quick divorce? I propose that far more civilized is a fair economic package that takes into consideration the children’s economic and emotional needs and makes adequate provision for the non-monied spouse.

To that end, I appeal to those among you who are legislators, those who influence legislators, those who are academics whose influence is so felt through the hundreds of lawyers you graduate each year and through your academic papers and other writing, those who are judges and administrators who search so hard for a solution to the problems in our courts, those who are lawyers practicing in these areas, and those who are law students and the future of our profession, not to cast matrimonial attorneys as the “villains” and mediators

as the “saviors”—do not be taken in by the buzz words.