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## ASK THE EXPERTS

### **A Game Theory Perspective: Three major weaknesses in the traditional family law system and ten tricks that promote divorce conflict**

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Game Theory is a branch of mathematics and science that analyzes people's choices. A Game Theory analysis of traditional family law yields the surprising findings regarding flaws in the system:

- The most rational strategy for parties going through the family law system ("the system") is to engage in the competitive behavior that leads to escalating conflict.
- Parties who have an amicable divorce are behaving irrationally by resisting the gravitational pull to end up in intractable conflict.
- The people 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.

You might find some (perhaps all) of these findings surprising and even questionable. In this article, we use Game Theory principles to analyze how this happens. We learn that there are three major weaknesses and flaws in the system and ten specific tricks that promote divorce conflict. Although many attorneys and mediators profess a belief in integrative bargaining (value added, win-win), the divorce game is set up so that when the feet hit the ground in a specific case, most revert to distributive bargaining (competitive), establishing an "us-them/win-lose" conflict, damaging the relationship between parties going forward in their lives.

#### **Three Major Weaknesses and Flaws in the System: Strategic Intention, Value Proposition, and Standards**

**Strategic Intention** is the fundamental goal of any organization. In restaurants, for example, the strategic intention is to provide a dining experience worth the money spent. Notice that this is customer-based. In most businesses and service organizations, the Strategic Intent focuses on the outcome for the customer. Only by focusing on the customer can the business or organization hope to thrive, or at least survive.

The Strategic Intention of the system appears to have more to do with the goals of the professionals and the court, namely the identification of legal outcomes for the day of the final Judgment of Divorce. The system has a captive audience and therefore does not have to focus on a customer-based Strategic Intention, much like a prison cafeteria, which does not focus on the dining experience of the prisoners. The payoff structure of the divorce game is chiefly for the professionals and the court. The only payoff that the parties receive is the final judgment. For the professionals, the game is over, but for the parties, their lives as divorced spouses are just beginning, especially if they have children.

How many people finish their divorces and feel that the experience was worth the money? They have divided property, income, and children, but do they have a good plan for their lives? For example, one Strategic Intent that is customer-based could be that divorced parents will have a better co-parenting relationship per the Judgment of Divorce, compared to what they had when they entered the system.

**The Value Proposition** comprises all details of how the organization plans to achieve the strategic intention. Returning to our restaurant example, the value proposition will focus on the customer's experience from the time of a dinner reservation and parking, through seating, staff service, menu presentation, timing of courses, and so on. Lawyers might have thought through the value proposition for their services, but what is the value proposition of the system? Once a client has signed on with an attorney, how much time is spent on the experience of the client in the system, versus getting information about desired legal outcomes and planning strategy to reach the client's desired legal outcomes? The steps through the system are likely those required by law or strategic steps to obtain desired legal outcomes, not steps to reach long-term life goals. To returned to our example of an improvement in the co-parenting relationship, aside from court-mandated parent education classes (often a short-term, one-time class), no programs are readily available to train people in co-parenting skills and procedures. It is often only when people have already gotten mired down in divorce conflict that they are encouraged to go to co-parenting counseling. By then, the focus is often on managing the conflict, rather than more proactive skill building.

**Outcome Standards** in the system are vague and ambiguous. In our restaurant example, the standard is whether the dining experience was worth the money. Many restaurants have formula standards (chains) where research on this standard is done early. Non-formula restaurants usually open by inviting restaurant critics to measure the standard. In the system, the measures are based on the legal outcomes with the vague and ambiguous standards of "equitable" and "best interests of the child." In addition to being vague and ambiguous, the standards are meaningless in terms of long-term financial and family goals. A physical custody schedule at the time of a divorce has almost no long-term effect on real outcomes for children. Social science research tells us that the co-parenting relationship, the quality of parenting in each home, the socio-educational status, the presence or absence of mental health problems, and support systems for children and parents all have **more** impact on the short- and long-term outcomes for children than the schedule. An "equitable" division of property and income might or might not help the parties reach long-term financial goals. A better financial standard might be to have a plan that will help each party reach ten-year financial goals.

In the context of these three major weaknesses and flaws, in addition, the system "tricks" parties into making self-defeating choices.<sup>1</sup> In the following, your authors briefly describe the ten tricks embedded in the system.<sup>2</sup>

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<sup>1</sup> The System is in Game Theory a "game," in which law and practice establish the rules and payoffs of the game and influence the choices and strategies of the players (parties and their attorneys).

<sup>2</sup> These "Ten Tricks" are detailed in our publications, *Game Theory and the Transformation of Family Law: Change the Rules and Change the Game* and *Winning Strategies in Divorce: The Art and Science of Using Game Theory Principles and Skills in Negotiation and Mediation*. Both books are available at Unhooked Books, Scottsdale, AZ. ([www.unhookedmedia.com](http://www.unhookedmedia.com)). See [www.thedivorcedoctor.net](http://www.thedivorcedoctor.net), where The Tricks are also discussed.

## The Ten Tricks Causing Parties to Make Self-Defeating Choices

- 1. The parties are directed to, and often pressured to, focus on legal outcomes, not life goals.** Short-term thinking, such as equitable division of property and income and a schedule for children, makes sense if the goal is legal outcomes, but legal outcomes are not goals: they are **tools** for reaching long-term life goals. From that perspective, short-term thinking makes no sense. Tricking divorcing spouses into focusing on legal outcomes distracts them from their long-term goals and leads them to make self-defeating choices. For example, when a distribution of physical custody time is the focus, competitive behavior is the rational strategy. However, if parents want their children to have a low probability of delinquency, mental health problems, suicidal ideation, and a disastrous marriage, a physical custody schedule might only be marginally relevant.<sup>3</sup>
- 2. The system turns non-zero-sum games (financial planning and raising children) into zero-sum games (dividing property, income, and children's time).** Zero-sum games promote competition, dirty tricks, and dishonesty and an us-them/win-lose mentality, often causing irreparable damage to the co-parenting relationship. Non-zero-sum games promote communication and cooperation as winning strategies. Financial planning looks at the current situation, the goals, and how to go from now to then. Distribution of resources is part of a plan to reach goals, not a competition over dollars. Likewise, raising children looks at how to get children to a certain point by the time they are adults, not a competition over who gets which overnights.
- 3. The system assumes that disputes exist and that the interests of the parties are in conflict.** This unquestioned assumption pervades nearly every aspect of the system. The paperwork reflects this assumption (so and so vs. so and so); the language (opposing counsel, the other side, dispute resolution, settlement negotiations, and so on). Every question the attorneys ask their client reflects this assumption. Even the requirement for each party to be represented, by their own attorney or by themselves, rather than one attorney representing both parties, reflects this assumption. This trick is fundamental to the training and mindset of attorneys. Parties soon learn to make the same assumption, even though they might have very similar, if not the same, long-term goals. In other words, there might be no dispute about their goals, but parties may find themselves in major disputes over legal outcomes.
- 4. Children are treated as property in the system.** Only in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries were children treated as a class of citizens with legal protections. However, despite some progress in the system, children are still awarded like property. The difference is that instead of awarding the child, time with the child is awarded on a schedule. It is no accident that parents begin thinking of parenting in terms of "my time" and "your time." Parenting is no longer a joint effort, it is parallel efforts conducted on the basis of ownership of time. This inadvertently triggers conflict from millions of years of evolution: humans evolved to care for, protect, and control children's experience because children are not born independently able to survive. Dividing children's time as an ownership concept directly places parents out of control of blocks of time when the child is with the other parent, stimulating conflict resulting from base instincts. Divorce conflict is rife with complaints about the care of children in the "other home."
- 5. Selfish strategies permeate the system.** Petitions and affidavits focus on what parties want for themselves, not what might be good for everyone, including the other party. Lawyers see their task as getting their clients what they say that they want. Having already been tricked into focusing on legal outcomes and believing there is a dispute, "winning" is often self-defeating. Paradoxically, Game Theory

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<sup>3</sup> Schedules for infants and toddlers are relevant to these problematic outcomes, but not for children over 5 years old.

research repeatedly has found that cooperating with a balance of selfishness and altruism produces the best results. In other words, the best way to be selfish is to have a balance between selfishness and altruism. However, the system promotes selfishness only.

- 6. Winning on legal outcomes is most important.** Playing a game can be fun and interesting, but it is more fun to win than lose. Evolution selected humans who liked to prevail. Interestingly, research informs us that the feeling of losing is substantially more intense than the feeling of winning. Gambling research, for example, tells us that the experience of losing \$100 is about five times as intense as the experience of winning \$100. Thus, while divorcing parties might start out trying to prevail on a certain legal outcome, the competition can become very emotionally intense and perhaps more about not losing than winning. Unwanted compromises (losses) in settlement negotiations and trial outcomes might lead both parties to feel that they lost and lay the groundwork for future conflict and efforts at “getting even.”
- 7. Escalating anger and blame rather than resolving sadness permeates the system.** A divorce is mostly sad because it mostly involves loss, including loss of the happy dreams of a successful marriage and a family experience for children. As spouses move through the last stages of a failing marriage, they tend to blame one another for the failure, rather than focus on the impending loss. They carry this forward into their divorce, sometimes to defend against the shame and guilt they are experiencing. In a healthy situation, spouses get increasingly objective about the reasons for the divorce, resolve guilt and shame, and focus on the loss. However, the system tends to promote the anger and blame and avoid the sadness of the loss. Blame might even be seen as an effective strategy to achieve desired legal outcomes; paperwork and arguments are often filled with blame. This can often set the stage for continuing anger and blame between the divorced parties as a way to maintain a sense of wellness and avoid resolving the sadness.
- 8. Deductive decision-making is encouraged in the system.** The process of establishing positions is often based on big picture decisions and then drilling down to the details, often with little thought. For example, parties might begin with positions on physical custody, such as “primary parent” or “50/50.” Once resolved, or litigated, parties might then begin planning vacations and holidays, many times simply getting templates (e.g., every other holiday rotated every other year), with very little thought put into the goals the parties have for the many parts of a physical custody schedule. This is a foolhardy way to make a plan. A good plan is built inductively, thinking through each part of the plan and developing plans for each part. To return to our example, one might start with making a plan for Mother’s Day, based on the goals of the parties for those holidays, and then move on to Father’s Day all the way through Christmas and birthdays. They might then plan vacations, summer weekends, summer weekdays, or perhaps even parts of days. They might then move through school year weekends, school days, school breaks and days off, and so on. By building a schedule inductively, based on goals for each part of the schedule, parties can substantially increase the value of the plan. Legal outcomes are no longer goals; they are tools to reach goals.
- 9. The day of the final Judgment of the Divorce is the end of the case for the parties as well as for the attorneys and other professionals involved.** This creates an illusion that the suffering is over and when divorcing parties find that, in fact, their divorce has only just begun and will last the rest of their lives, they find themselves unprepared for what follows. Even parties who have no children and no continuing financial ties to one another are in danger of taking their bitterness and unresolved sadness into new relationships. A divorce is more like a marriage: the wedding is the day of the legal event, but the marriage is everything that follows the wedding; a divorce is everything that follows the judgment of divorce. Preparing for that should be the focus.

**10. The attribution of fault<sup>4</sup> and blame permeates the system.** In fairness, the attribution of fault and blame is a key element to most aspects of the legal systems that deal of injury, contracts, criminal, and so on, and was a key element in the family law system prior to no-fault divorce. There is historical momentum behind this aspect of the System. Attorneys are sometimes called professional blamers, and this can fit hand-in-glove with divorcing spouses who are blaming one another for the demise of their marriage. However, to become preoccupied with fault and blame interferes with good planning. Good planning has nothing to do with fault and blame. Planning is focused on the future whereas fault and blame are focused on the past. In a sense, everyone is facing the wrong direction. A financial planner does not focus on blaming people for getting into financial trouble; the planner focuses on how to reach goals.

## **The Exciting News!**

Correcting the three major weaknesses and flaws in the system and the antidotes for the Ten Tricks do not require any major changes in law. They only require a substantial change in the mindset of family law attorneys. The change in mindset involves developing a customer-based Strategic Intent, a Value Proposition to accomplish that intent, and Standards to measure the success of those efforts.

In our various publications, we discuss the change of mindset in detail. As for the antidotes to each of the tricks, they are, in fact, relatively obvious, but require controlling the process:

- When a client says, “I want primary custody,” for example, the attorney should redirect the client to his or her long-term goals for their child.
- This takes skill and patience, especially when the attorney should state: “... We need to find out your spouse’s long-term goals for the children, so we can develop a good plan...”
- The attorney continues: “...The schedule will be part of that plan, but not central to accomplishing your goals...”
- Skill is required to prevent the client running out to a “fighter” to reach his/her position, rather than moving slowly to making a plan that involves the goals of both parties.

This is the challenge for the family law attorney!

We hope we have prompted some thought about the uphill challenge of a divorce in the system—one that results in a good experience for the parties and a good plan for their futures.

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<sup>4</sup> While No Fault Divorce is the law in many/most jurisdictions, here we are talking about the relationship of the parties to the divorce, and how they communicate with each other. Unavoidably, the parties make fault relevant, wherever and whenever they can.

## About the Authors

**Kenneth H. Waldron, PhD**, is licensed psychologist and a member in the firm of Monona Mediation and Counseling LLC, Monona, Wisconsin. His practice has been devoted to providing services to divorced/separated parents for over 35 years. He has served as court appointed expert, performing custody studies and testifying to social science research in jurisdictions throughout the United States and in Canada. Ken has done research and has published broadly on topics related to children of divorce. His latest books, co-authored with Allan Koritzinsky, Esq., is *Game Theory and the Transformation of Family Law*, in which the authors analyze traditional family law using game theory principles to help understand and explain why traditional family law often promotes rather than relieves family conflict, and *Winning Strategies in Divorce*, which teaches the reader how to apply game theory principles in cases. Ken has trained professionals across the country in Structured Coparenting Counseling and Structured Coparenting Training Classes, a specialized program for reducing parenting conflict and increasing effective communication and cooperation between separated parents. Ken has also published numerous articles, chiefly in legal journals, on general divorce related topics but also special topics such as post-divorce relocation.

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