Settling Dissolution Cases: Court Rules and Judges' Roles

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Lawyers come to court with their divorce clients and ask themselves, "Do we want the judge to get involved in settlement discussions?" Judges almost uniformly ask a different question: "How can I help these parties and their lawyers settle so we can avoid a trial?"

These interests are not necessarily conflicting, but they are clearly different. The client of one or even both of the lawyers may be adamantly opposed to any settlement that does not completely capture all the client's demands. The client (and often his or her lawyer) may be so suspicious of the other spouse's behavior (about money, property, children) or the spouse's lawyer (and/or his or her behavior) during the negotiations leading up to the first visit to the judge's chambers that a conference with the judge would be considered either a waste of time or a conspiracy to undermine the suspicious spouse's interests. Or the client's lawyer may fear that the opposing lawyer's "in chambers" verbal skills grossly overpower his or her own. More important and likely, most sophisticated divorce lawyers know judges' substantive policy dispositions[1]—and if the lawyer for one spouse is willing to make use of the judge's help in seeking a settlement, the lawyer for the other spouse, suspicious of possible disadvantage, may for that reason alone be hesitant or unwilling to do so.[2] In any

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1. Calculating a particular judge's substantive bent was difficult as the standard rotation in Hennepin County Family Court was a two-year rotation. The Hennepin County Bench recently voted a significant change (for the better) when it changed Family and Juvenile Court rotations to three-year terms. This will increase lawyers' ability to predict outcomes, and is one among many other positive aspects of this change.

2. As far as I can tell and to the extent I have been informed by practitioners, Minnesota divorce lawyers do not fear judicial "bias;" but that does not mean judges, like all of us, have

event, lawyers for both clients often worry about the impact on eventual fact-finding if judges gather incorrect impressions or draw faulty inferences from short presentations allowed to lawyers in chambers negotiations.[3] Yet individual judges and the organized judiciary, in Minnesota as well as other states, have confronted the tension and fostered procedural rules which seek to resolve it in the interests of efficiency as well as fairness to families.

The tension between a judicial officer's desire to resolve matters short of trial and a lawyer's hesitance to involve the fact-finder in settlement discussions is not an infrequent dilemma. Obviously the judicial officer has a personal as well as a systemic interest in resolving as many matters as possible and in as short a time as possible. Conversely, lawyers appropriately worry about "due process" and fairness for their client—especially when the fact-finder acts, in many respects as a mediator. Indeed, because settlement conference presentations, which might precede a trial, are not confidential as are mediation sessions, lawyers and their clients may be suspicious of the endeavor.

The basic evidentiary protection for parties can be found in Rule 408 of the Minnesota Rules of Evidence, which finds similar counterparts in all state courts in the United States. The Rule provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to provide liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as providing bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In other words, spouses and their lawyers can engage in negotiations with an opposing litigant, a process undertaken with or without the judge's help, which may avoid the cost and emotional travail of a trial, without concern that good faith disclosures (of assets, or individually sought property evaluations) will be deemed as admissions harmful to the

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been able to abolish the personal and family values which they bring to all their experiences and which inevitably play a role in the discretionary decisions that family law doctrine requires them to make.

3. I rarely met with lawyers in chambers, choosing instead to conduct discussions in the courtroom with the parties present. This was in response to my experience as a practitioner where too many clients were disaffected by in chambers discussions and the resulting decisions made outside of their presence.

party's case in the event of failure to settle.

Minnesota's appellate courts spend considerable time on the appropriate level of involvement of judges in criminal matters, particularly focusing of late on the role of judges in criminal plea bargains.[4] Minnesota's appellate courts have offered little guidance as to the appropriate role of judicial officers in settlement talks in dissolution cases. The terminology used in criminal matters, "plea bargain," can be viewed pejoratively; but the phrase "settlement discussions" in a family court matter is commonly seen as positive, even auspicious. In the end, most divorcing spouses and most lawyers know that the judge has an interest in resolving their dispute short of trial. This interest has grown as resources available to state courts have diminished.

Judicial involvement in Minnesota family law cases has increased dramatically in the last ten years as the family court's employment of early case management techniques to family court filings has increased.[5] This paradigm shift began in Hennepin County, the largest district court in Minnesota and home to one of the dedicated family courts in the state,[6] with the implementation of Initial Case Management Conferences (ICMC) at the outset of family court cases. These conferences are not formal contested hearings, but, instead, are informal conferences designed to identify issues early in the process,[7] design a plan for the exchange of early discovery, and determine appropriate referrals to programs such as Social Early Neutral Evaluation (SENE) and/or Financial Early Neutral

4. In Minnesota, the appellate courts have held that a defendant's guilty plea was invalid because the trial court improperly interjected itself into plea negotiations. State v. Anyanwu, 681 N.W.2d 411 (Minn. App. Ct. 2004). More than half the states instruct the judge not to participate in plea negotiations, the same position that is embodied in the Federal Rules of Criminal Procedure. Another group discourages judges from participating but does not prohibit it. *See* State v. Niblack, 596 A.2d 407 (Conn. 1991); State v. Ditter, 441 N.W.2d 622 (Neb. 1989). A small but growing number of states (now over a dozen) have rules or statutes that do not discourage judicial participation, and some even authorize judges to take part. *See* MONT. CODE ANN.§ 46-12-211 (2009); N.C. GEN. STAT. §15A-1021(a) (2009). Some of the laws authorizing judges to participate extend only to limited types of participation. For instance, some states allow judges to take part only when the parties extend an invitation. People v. Cobbs, 505 N.W.2d 208 (Mich. 1993). Others limit the judge to commenting on the acceptability of charges and sentences that the parties themselves propose. *See* ILL. SUP. CT. R. 402(d); State v. Warner, 762 So. 2d 507, 514 (Fla. 2000) (stating that once invited by parties, the court may actively discuss potential sentences and comment on proposed plea agreements). The author thanks Judge Kevin Burke and Judge Mark Wernick of the Hennepin County District Court for this explanation of criminal plea negotiations.

5. Authority for the use of Early Case Management is found in an Order dated April 23, 2004, and signed by the then Chief Justice of the Minnesota Supreme Court, the Honorable Kathleen Blatz.

6. Ramsey County, Minnesota also has a dedicated family court.

7. The best practice for holding an Initial Case Management Conference is to convene it within three weeks of filing an action.

Evaluation (FENE),[8] mediation, custody evaluation, or other services that may be appropriate under the unique circumstances presented in the case.

At the ICMC, judicial officers commonly conduct "hearings" without wearing robes, sometimes standing in front of the bench or sitting at the table with counsel and the parties. The discussions are informal and, under the best circumstances, focus on the parties. The ICMC allows a menu of options to be offered; it also establishes the judicial officer as part of a team of problem solvers that includes the parties, counsel, custody evaluators, mediators and other professionals. It is also the first in a series of frequent informal contacts with the judge designed to prevent disruptions in the case and reduce the need for formal, adversarial hearings.

Basic to Early Case Management in Minnesota is the notion that to meet the needs of the parties, judicial officers must act differently than judicial officers are traditionally taught to behave. A 2002 position paper stated:

> [T]he adversarial process of American jurisprudence may not produce the best results in some cases because it can accentuate differences and amplify the conflict. . . . .
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> In family cases the role of the judge—and therefore the court system—as Adjudicator is compatible with being a convener, mediator, facilitator, service provider, and case manager.[9]

In accepting this role, judicial officers take a significant step toward two of the primary goals of Early Case Management: (1) shortening the length of time to disposition for family cases; and (2) reducing the amount of formal litigation engaged in by families.[10]

As the court engages counsel and the parties in an informal manner, settlement discussions become part of the culture of the case and trust is built among the players. The discussions are part of a continuum of case management that in the vast majority of cases results in the submission of parts of the case—procedural or substantive or both—to the judge for informal decision-making. As cases progress, the truly disputed issues are

8. SENE and FENE are dispute resolution tools designed to help the parties resolve all custody and parenting time issues within sixty days of the Initial Case Management Conference or financial issues within seventy-five days of the Initial Case Management Conference. These processes have gained footholds throughout Minnesota and are an integral part of Early Case Management. Both programs boast settlement rates greater than seventy percent.

9. Conference of State Court Administrators, Position Paper on the Effective Management of Family Court Cases, COSCA, (August 2002).

10. Some have called the family court under these circumstances a "problem solving" court to compare it to what many (but by no means all) see as the modus operandi of drug and mental illness courts. I believe that Minnesota's approach is better described more simply as "dispute resolution" or "conflict resolution," largely because divorce presents personal, institutional and social problems very different from those in drug and mental health court proceedings.

narrowed, allowing the judges, counsel, and the parties to focus on significant areas of conflict. This informal triaging of cases is not an invitation to judicial officers to terminate or dilute litigants' due process rights; instead, it usually works to obtain the parties' consent to allow the judge to help negotiate a resolution. I have often had counsel and the parties confirm on-the-record their desire to involve me in settlement discussions. As part of that on the record discussion, I try to assure counsel and parties that if the matter does not settle I am unlikely to recall the details of the discussions in their case because my caseload of pre-decree matters included up to 125 cases at any given time. It is also important for the judge to listen carefully to the parties and counsel and to state plainly that his view as to any specific issue is based on the facts as presented, and that the outcome might be different after a more formal presentation.

While the Early Case Management model, on its face, is a natural fit for cases involving parties and lawyers who want to resolve their dispute short of trial, the model works equally well, if not better, for high conflict cases. Because judicial intervention happens early in the case, and in Hennepin County all family cases are blocked to a single judicial officer, the court sets the tone for the case early and in a setting where contested hearings are not permitted. By not permitting motions for temporary relief at the ICMC, cases featuring lawyers or parties on a path to high conflict and high stakes litigation receive case plans that afford the judge a better opportunity to maintain order. The traditional litigation model frequently involved a temporary relief motion as the opening gambit in the court process; it pitted parties against each other with affidavits replete with frequently inflammatory (and often irrelevant) allegations. Early Case Management has served to reduce very substantially the number of temporary hearings on the docket. In fact, in my experience, temporary hearings were almost nonexistent and, if conducted, frequently took place on the basis of pleadings submitted on an agreed upon briefing schedule (sometimes presented informally, depending on the issue) with no court appearance required.

The net effect of this change in practice is that parties are not suffering from the hurt and subsequent anger that permeated cases where adversarial pleadings were presented in affidavit form. By reducing the conflict associated with temporary hearings and finding alternate ways to resolve these issues, the parties have a much better chance of successfully resolving their disputes without a trial.

No claim is made that high conflict cases have disappeared or that all cases are right for (or will be settled by) a more informal process than that provided by the formal litigation path outlined in the Rules of Civil

Procedure. The case management method, however, provides a framework to ensure that even the most difficult cases stay on the path toward resolution.

One technique that has proved particularly successful at managing all types of cases is the use of telephone conferences for case management. A basic rule of case management is that each appearance, formal or informal, always results in another step involving the court. It is routine for judicial officers to set telephone conferences as a second appearance after an ICMC with the goal to simply determine if progress toward resolution is being made and what help, if any, the court can be. Many judicial officers do not use phone conferences when one or both parties are self-represented, but brief review hearings are often scheduled for cases involving pro se parties with the goal being the same: what needs to be done to bring the matter to resolution and how can the court help.

Discovery is another area where case management serves to streamline disputes both in terms of time spent and attorneys' fees incurred. In five years, I conducted less than a half-dozen motions to compel discovery, which I consider an astonishing statistic. However, I conducted countless telephone conferences where discovery disputes were either the only item on the agenda or among the items on the agenda. Almost all of these disputes were resolved without the necessity of formal pleadings. This is not to say that due process was denied to aggrieved parties, but in almost all matters, counsel agreed to allow me to decide a discovery dispute without the need for a formal presentation. By seeking the agreement of counsel to allow me to weigh in on an issue being presented on a telephone conference, complaints about a lack of due process were almost non-existent. When the facts required formal motions, or when counsel or a party felt that a formal motion was necessary to present the issue, the matter was set for hearing. But these types of motion were the exception, not the rule, and in so employing these techniques, cases continued toward resolution and attorneys' fees were spent on substantive matters in dispute.

It is the process of case management itself that prepares counsel and the parties for judicial officer involvement at various stages of the proceeding, including pre-trial and trial. By developing a relationship with the lawyers and the parties and an understanding of the procedural and substantive disputes in a case, it is a natural evolution for a judicial officer to ultimately be invited to participate in settlement discussions. By carefully listening to the parties and counsel and making suggestions and giving feedback based on these representations, cases are ripe for involvement by the fact-finder. But this evolution will only stand the test of time if parties are given an opportunity to be heard, albeit informally, and if their concerns

are addressed by the presiding judicial officer. Deals made in chambers with lawyers while the parties sit anxiously wondering what is happening to their lives will not work any better under a case management scenario than they would under the formal litigation model. Parties will not be satisfied with the outcome if they are kept from having their say and feeling heard. The significant advantage of case management is that opportunities exist throughout the life of a case for this type of interaction to happen. Cumulatively these opportunities serve to help resolve cases without trial.

So what happens when counsel simply state, as is their right, that they do not want the fact-finder involved in settlement? I suggest three techniques that have worked to help resolve cases:

1. The greatest impediments to settlement are: (a) unresolved fears of the parties; and (b) undeveloped facts necessary to resolve the case. After the judicial officer, counsel and the parties are satisfied that the facts are developed enough so that the case could settle and that the parties are aware of each other's needs and fears, the matter can be referred to traditional dispute resolution such as mediation. While many cases are referred to an early dispute resolution process, those that remain unresolved frequently resolve after further development of necessary facts.
2. A second technique, one that must be used sparingly because of the burgeoning caseloads faced by judicial officers throughout the country, is the use of a colleague—someone from the bench to serve as a settlement facilitator. I successfully served in this role about ten times in my five years on the bench. Each case represented issues that would require significant time in trial and in drafting an order or judgment and decree following trial so that involvement of another judicial officer made sense systematically. In each case, counsel and the parties were motivated to settle, but had not yet attained agreement and consented to my serving as a settlement facilitator. Each case featured either one or both lawyers not wanting to involve the assigned judicial officer in settlement. Each of these cases settled, some in as little as a few hours and the longest taking nearly three full days. My colleagues facilitated this by covering my cases or calendar. In the end, I consider resolving these difficult cases my greatest personal achievement on the bench.
3. An experiment in conjunction with the American Academy of Matrimonial Lawyers (AAML), Minnesota Chapter proved that sometimes old ideas are good ideas that should never have been mothballed. Minnesota's Alternative Dispute Resolution (ADR)

> Rule has long provided for the use of Moderated Settlement Conferences for civil cases. Various programs have featured these conferences over the years. In the case of Hennepin County, the bench targeted about three dozen difficult cases and each was assigned a volunteer, unpaid conference facilitator from the AAML. The cases were scheduled for the Family Justice Center and the assigned judicial officers were available to help if the facilitator determined that judicial involvement was prudent and the parties consented to the court being involved. At the end of this three-day blitz, upward of eighty-five percent of the cases were involved, some without any help from the assigned judicial officer, some with assistance. This experiment proved that the combination of a trained and qualified neutral and the agreed upon involvement of the court can result in a high percentage of settlements that otherwise likely would have been submitted at trial. The good news is that, in Hennepin County, there is a proposal to make this a permanent ADR option with the facilitators agreeing to serve on a sliding fee scale.

In the end, when and whether to involve the assigned judicial officer in settlement discussions is a strategic decision for lawyers, much like choosing an expert or ADR process. The experience of case management in Hennepin County suggests that early involvement by the court significantly reduces objections to judicial officer involvement in settlement. Moreover, even when objections are made to the court's involvement in settlement discussions, creative alternatives exist that can serve the interests of both the parties and the court.