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## WIN-WIN DIVORCE BY JORYN JENKINS

### THE SEVEN BIGGEST DIVORCE MISTAKES©

#### MISTAKE #1 ASSUMING YOU MUST LITIGATE OR FAILING TO CHOOSE YOUR PROCESS

There are various ways to dissolve your marriage that don't require contested litigation. While a judgment of divorce signed by a judge is required, there are diverse routes that lead to that final hearing. Not all paths to the courtroom lead *through* the courthouse. As we've already discussed, you can negotiate an agreement at your kitchen table. You can hire a mediator to help both of you work out the agreement. You can retain a cooperative lawyer to work it out with your spouse or with her cooperative lawyer. Or you can employ a collaborative team to help you both negotiate your divorce. If you are successful in one of these forms of alternative dispute resolution, you will be required to attend a brief final uncontested hearing so that the judge can enter your final judgment, but you will avoid scary hearings and intimidating depositions.

You may choose to handle your divorce yourself, without hiring attorneys. If you haven't been married long, do not have children, and have few assets and liabilities, negotiating an agreement with your spouse and filing it in court on your own is not terribly difficult. It will be the least expensive way to dissolve your marriage, and is the option people often choose.

Some people are able to reach an agreement without the help of any professionals, but it's too complicated to use a simple form. Others believe that they have reached an agreement, but one or both of them want an attorney's advice before signing anything. Whatever the reason, after the sit-down at the kitchen table, one of them may then retain a lawyer who drafts what his client understands to be their settlement agreement.

At times, one spouse hires an attorney, but the other does not, and the attorney and the other spouse negotiate. Or the lawyer retained by one spouse to review the agreement the couple thought they had reached recommends certain changes. Again, the attorney then negotiates an agreement with the unrepresented spouse.

Another alternative is cooperative divorce, which is a principles-based dispute resolution process in which both parties are represented by attorneys. It is settlement-based, but leaves open the possibility of litigation if, and only if, it is absolutely necessary.

Mediation is a dispute resolution process in which an impartial person facilitates settlement negotiations between the two spouses. In mediation, the couple, either together or separately, either with counsel or without, sits with the mediator to work out their agreement. If the relationship has become oppositional, then the mediator will often work



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with both spouses at the same time, albeit shuttling back and forth between them in their separate rooms.

Collaborative practice is a negotiation process that also occurs outside of court, but is specifically structured to ensure respectful and efficient meetings between the two spouses. The focus and objective of collaborative practice is to produce solutions that meet each person's needs, and those of their children, if any, within a safe and confidential setting. This enables a couple to end their marriage legally, financially, *and* emotionally, without sacrificing those relationships that they value most, as so often happens in court.

CP is premised on three primary principles: the spouses' pledge not to go to court (i.e. to war); their pledge to an open and transparent, but private and confidential exchange of information; and solutions customized by the participants to account for the highest priorities of the adults, their children, and any other interested persons. Each person retains a lawyer, as well as a team of other professionals who are neutral, usually a financial professional, at least one mental health professional, and sometimes a child specialist. This method consists of a series of non-confrontational meetings, between each spouse and each neutral professional, between each spouse and his or her attorney, sometimes between both spouses and each neutral professional, and almost always of the full team, that is to say all of the professionals (neutrals and lawyers) and both spouses.

Divorce discussions usually focus first on agreeing how those negotiations should occur. Understanding the different process options is an important first step in resolving your divorce as inexpensively, stresslessly, and quickly as possible.

### **MISTAKE #2 EMPTYING THE JOINT ACCOUNTS**

Some lawyers encourage their clients to clean out the bank accounts "before your spouse does it." This is a declaration of war, equivalent to pushing the red button.

In many jurisdictions, when one of you petitions for divorce, the judge enters a standing temporary order, instructing both of you not to dissipate marital assets, not to take all the money and run, etc. The one who unilaterally empties the joint bank accounts will lose credibility in the judge's eyes. If your matter ends up in trial, the judge will be the decision-maker, and you want him or her to view you favorably. Furthermore, your spouse will know that assets are missing and will inevitably embark on a search mission to find those assets. This will cost you both more in attorney's fees and costs of discovery (of information, documents, etc.), and it will delay the conclusion of your case.

Additionally, you and your spouse accumulated your marital assets together, even if you made a marital decision for one of you to stay at home. You are usually not entitled to



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more than 50% of the marital assets, so you will eventually be forced to return them. In the meantime, by hiding the assets, you will have completely destroyed your relationship with your ex, and perhaps with your children. In a divorce, it is important to see the bigger picture and to understand that there is life after divorce. You don't want to destroy your relationships because of the inappropriate way you acted while your marriage was dissolving.

If you are truly worried, dig up and copy your family's most recent financial information. Inventory and photograph your family's valuables. Move 50% of the liquid funds into an individual account, and don't forget to meet with a financial planner, afterwards.

### **MISTAKE #3 TALKING TRASH**

You may feel you must vent about your issues with the ex. If you do, beware the natural and logical consequences of your actions. The only truly confidential exchange you enjoy is with your lawyer. And that's protected only if there are no outsiders present when you have that discussion.

*Never* trash your ex to your kids. It will hurt you in court, if you insist on going there. And it will certainly bite you back with the children for years to come. Your kids will tell your spouse the bad things that you say about him or her. Or, based on the things that come out of your youngsters' mouths, your spouse will know that you are speaking about him or her disparagingly.

I had a horrible case in which the opposing party, the mother, falsely accused my client of sexually molesting their six-year-old daughter. Luna was clearly coaching little Angel to believe that she had been abused. One day, Angel told her grandmother over the phone that "someone is touching my private parts." Her grandmother could hear Luna tell Angel "Don't tell her that! You're not supposed to say that to her!" Additionally, Angel informed Alejandro, "Daddy, I can't go with you until I tell the judge what you did to me." And later, she told him, "you gotta stop touching my private parts, ok, Daddy? If you just admit what you did then I can see you."

Needless to say, we obtained 100% timesharing for this father, and their mother didn't see any of their three children for over a year!

I also had a client whose ex began a relationship with a woman, Marcy, who attempted to alienate my client from her young daughter. Among other horrid behavior, the opposing party and Marcy spoke badly about my client in front of little Susie. They would both tell the six-year-old everything that was going on in the court proceedings and that my client



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was trying to get a judge to try to take her away from her father. This greatly upset Susie, and when it came time for trial, the judge was not happy to hear it.

If you must, vent in the journal that your lawyer should have asked you to maintain.

### **MISTAKE #4 POSTING ON SOCIAL MEDIA**

It's hugely tempting to brag about your new life before you're even divorced, to ensure that your ex knows that you're *over* him or her. Don't post anything that might be used against you! Details about the keg you finished all by yourself, comments about the one-night stands you've enjoyed, pictures of you with your new girlfriend or beau, will not help your divorce case. Consider all of the famous folks who are now infamous idiots just because they *had* to hit "enter."

I had a case in which a domestic violence injunction was entered against my client early in the proceedings. Although he was a hothead, I don't believe he was truly physically violent with his wife. Nevertheless, the injunction was entered, and I advised my client to be on his best behavior. Thereafter, Dick began posting pictures on Facebook of him on lavish boats with different women. This infuriated his ex. But the icing on the cake occurred when Dick posted a quote by the Chinese philosopher and reformer, Confucius, "Before you embark on a journey of revenge, dig two graves." Although Dick meant that no good comes from revenge and you will hurt yourself as much as the person you are trying to hurt, his ex claimed that she felt threatened by the quote. She felt that Dick was warning her that he was digging her grave. The judge agreed with her interpretation and extended the domestic violence injunction for another year.

Then we represented a mother in another post-paternity action in which the father was seeking additional timesharing with his child. He had begun a relationship with a very young woman, and he wanted to play house. His girlfriend, Hayley, began posting pictures of the parties' kindergarten daughter, Sally, on the internet. The father did nothing to prevent it. Hayley placed captions below these pictures referring to Sally as her own daughter. She even endangered the young girl by creating a "Myspace" page for Sally. The page included pictures of Sally, and references to Sally's school and the city in which she lived when residing with her father. When it came time for trial, the judge did not appreciate these social media posts, and they were a big part of why the judge refused to allow the father more time with Sally.



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### **MISTAKE #5 FILING FALSE CHARGES**

Telling the cops that your spouse hit you is not the right way to announce that you want a divorce or to get him or her out of the house. It's a declaration of war, and your kids and bank accounts will suffer in the ensuing firestorm.

I had a client who was granted an injunction, despite that the judge stated in his ruling that "if I had to sit as a jury and find that a battery occurred beyond a reasonable doubt, I don't think I could." In that situation, the parties were fighting, and my client was using her husband's computer without his permission. Unfortunately for him, he put his hands on top of my client's hands and removed them from the keyboard. My client was granted temporary majority timesharing, and, as generally happens, when it came time for the final hearing, the judge did the easy thing and simply made the temporary timesharing final.

In another case, the opposing party, Lizzie, filed her request for a temporary injunction and then quickly dismissed it. She was having an affair and wanted a divorce but didn't say so. A few weeks later, the parties still living together, had friends over for dinner and drinks. After their friends left, a drunk Lizzie went to get ready for bed, slipped on the hardwood floor, and hit her head hard on the bed post. She was bleeding badly, and she came out to the kitchen to tell my client.

Gil was extremely concerned, but Lizzie wanted to go to bed. Gil tried to insist that she go to the hospital, but she refused. He restrained her by the wrists so that he could convince her that she needed medical attention. She needed stitches, and he was concerned that she might have suffered a concussion and should not go to sleep. The parties verbally fought about it. Gil called their neighbors, their close friends, for assistance in getting Lizzie to the hospital. They agreed she needed medical attention, and they finally convinced her to go to the hospital.

Lizzie returned to the house that night and spent the night with Gil. She stayed at the house the next day and night with Gil, and then filed her new request for an injunction against him on Monday morning. As often happens, Lizzie was granted temporary majority timesharing. The parties were eventually able to settle their divorce, but my client had to agree to much less permanent timesharing than he would have liked because of the injunction.

It may sound like this is the best option; after all, these spouses got what they wanted in the short term, didn't they? Come back ten years later. The two families are strikingly similar; in both cases, the kids (every single one of them), as they reached their middle teen years, have moved in with my clients.

Instead of filing a baseless or untruthful injunction, be brave; talk with your spouse



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about a divorce at the kitchen table. Or invite your spouse to coffee in a public place to have the discussion. You can ask family or a close friend to facilitate that talk. Or ask your attorney for his aid in enabling that conversation.

### **MISTAKE #6 NOT GETTING A SECOND OPINION**

A lawyer should explain the various options available for obtaining that final judgment. But lawyers are human. They have biases. They make mistakes. They want to make money. Always get a second opinion before choosing an attorney. But once you do retain counsel, take her advice!

Most attorneys prefer a certain process, like litigation, mediation, or collaboration. A trial attorney may not understand that she should explain all divorce process options to you so that you can choose the best alternative for you. And if she is not collaboratively-trained, she won't be able to effectively explain that process.

It is important to understand all of your options, so it is best to interview several attorneys. Lawyers have different personalities. Some are bulldogs, wanting to go to war over almost every issue. Some attorneys are natural negotiators and more comfortable trying to help you come to a reasonable settlement.

Moreover, you're going to spend a lot of time with your attorney, so if possible, it is crucial to hire one whom you actually like, and who shares your values. No matter what process you choose, your attorney will be your teammate, and your team will be more successful if you get along with one another.

### **MISTAKE #7 NOT HIRING A COLLABORATIVE LAWYER**

A collaborative divorce will save you time and money, prevent emotional trauma to you and the ones you love, ensure personalized results with which your family can live, and protect your relationships with the people about whom you care. While most divorce processes address only the legal and financial separation between the parties, CP addresses the emotional element of the dissolution of your marriage, as well.

Collaborative professionals work as a team to help you resolve your divorce. In many states, the team consists of an attorney for each spouse, a neutral communications facilitator, and a neutral financial professional. In others, the financial facilitator is supported by an attorney and a communications coach for each spouse, as well as a child specialist. All team members should be specially-trained in the collaborative paradigm,



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although a team may agree to the participants' choice of a professional not yet collaboratively trained, if they believe that they can work with the clients' nominee and that he will contribute to a successful collaboration.

Collaborative meetings are intended to be non-confrontational, and to focus on the shared primary goal of finding acceptable resolution between the spouses. Like the neutral team members, collaborative lawyers are trained to work with one another and the clients to manage communications, to ensure that each client is heard, and to explore each issue and possible solution fully. The process does not rely on court-imposed resolutions but instead permits the participants to negotiate in a safe and structured atmosphere of honesty, cooperation, integrity, and professionalism geared toward the future well-being of the restructured family.

The clients pledge to open and transparent communication as between themselves, but private and confidential exchange of information as to the public.

The critical element of the collaborative process that distinguishes it from any other is that the collaborative attorneys must withdraw and the spouses retain separate trial attorneys if any adversarial proceedings ensue. This assures that everyone involved is committed solely to the collaboration and its goals; no one splits his or her attention between collaborating and preparing for litigation in the event that the process terminates.

While participants may be more comfortable with the idea that they will not lose their attorneys if they cannot reach a settlement, the fact that the clients cannot easily opt for litigation means that reaching a settlement is more likely in the collaborative model.

Furthermore, while there are many ethical lawyers out there, many simply do not understand that we all have a conflict with our clients; we want to make money and our clients want to save money. The collaborative process eradicates most of this conflict by eliminating the lawyer's ability to "stir the pot," whether by design or by accident. The lawyer's sole job in the collaborative process is to help the clients satisfy their interests and settle their divorce. If he fails in that task and the collaboration terminates, then he loses his job, and the participants litigate.