

Family Law

Why do family law cases settle when they do?

By Lorne Wolfson



Lorne Wolfson

(July 10, 2017, 9:31 AM EDT) -- More than 99 per cent of family law cases settle without a trial. The majority settle prior to the commencement of any litigation. Even when litigation has been commenced, a settlement may occur after questioning, an interim motion or a settlement conference. Since most family law clients enter the process seeking an early settlement of the case, it is worth considering why more cases do not settle without the need for intervention of a third party in the form of a mediator or a court.

What are the obstacles to early settlement?

Not emotionally ready

Family law clients must pass through a series of emotional stages before they are ready to settle. In many cases, one spouse has accepted the reality of the separation, while the other spouse has not. In such a case, the spouse who is ready to settle needs to understand that efforts to move the case forward will likely be unsuccessful and only result in frustration until the other spouse has caught up emotionally.

Seeking financial disclosure

There can be no useful discussion of resolution of the financial issues (property, support, etc.) until each party has made full financial disclosure. Delay in making such disclosure is one of the major obstacles to early settlement and a leading cause of the commencement of litigation. Where a party deliberately or inadvertently fails to make full disclosure on a timely basis, any serious settlement efforts must be put on hold until the disclosure is made.

In such cases, a party desirous of settlement may be forced to commence litigation for the sole purpose of compelling disclosure so that an informed negotiation can proceed. Where a party does not trust the other spouse to be honest and forthright, litigation is often initiated to get the disclosure that the former seeks. Equally problematic is where one party is never satisfied with the other party's disclosure or insists on a level of disclosure that is disproportionate to the amounts in dispute.

Exhaustion

Cynical as it may sound, a significant number of family law cases only settle when one or both parties have become financially, emotionally or physically exhausted from the fight. Perhaps the original negotiation style or dispute resolution option chosen has proven to be unsuccessful. Perhaps the client has lost faith in his or her counsel or in the legal system. Perhaps either or both parties have simply concluded that the time has come for a negotiated peace that allows both parties to put the case behind them and get on with their lives.

Lack of effective legal advice

Most family law cases are complex. Whether the contentious issues are legal, factual or emotional, most family law parties are unable to settle their case without effective legal advice. The need for such advice can be problematic for a number of reasons:

- Either party is unable for financial, cultural, geographic, or other reasons to find appropriate counsel;
- Either party is unable to understand or to appreciate the advice he or she has been given;
- The legal advice received is ineffective because it is based on inaccurate facts, incomplete disclosure or wishful thinking by counsel;
- Either party chooses to be unrepresented in the belief that it provides him or her with a financial or tactical advantage;
- A party is not prepared to accept the legal advice he or she has received and looks to find another source of legal advice (other counsel, friends, or frequently the Internet) that will say what he or she wants to hear;
- The parties have tried to negotiate a settlement between themselves (with a view to saving time or money), but they learned that the settlement cannot be formalized without proper independent legal advice.

Unrealistic expectations

A major impediment to settlement is often the parties' unrealistic expectations. Most clients have little understanding of the pertinent legal principles and what facts are or are not relevant to a determination of the outstanding issues. Most clients are unable to separate their emotions from the practical issues to be determined. Most clients do not understand the legal process and the role of lawyers and neutrals in the process. Many of those clients who insist that they only want a "fair" result, are unable to see the other party's perspective as to what is "fair."

While diminishing their clients' unrealistic expectations is one of family law counsel's basic responsibilities, many counsel do a poor job as a result of limited time or resources or a reluctance to be the bearer of bad news.

Dispute resolution styles

A major factor in determining when and how a family law case will settle is the dispute resolution style of the parties and their respective counsel. The manner in which the parties resolve disputes during the marriage (co-operatively, one spouse makes all of the decisions, the weaker spouse yielding to the other's will, no resolution, etc.) is often a good predictor of how their family law case will be resolved.

On the other hand, a spouse who felt that he or she was unable to participate in decisions during the marriage may feel that the family law case provides an opportunity to assert his or her views for the first time. The husband who has experience in dealing with lawyers and negotiating financial matters may have a dispute resolution style that is totally at odds with that of his homemaker wife who has never been in a similar situation.

Likewise, the dispute resolution style of each counsel plays a large role in determining when and how the case will resolve. Some lawyers see litigation as the preferred route in every case.

Lawyers with training in mediation or collaborative law will likely encourage clients to utilize these dispute resolution alternatives. Other lawyers may simply present to the client the array of dispute resolution alternatives and leave the choice to the client or wait to see what the opposing party chooses.

Lorne Wolfson is a Toronto mediator and arbitrator with Torkin Manes.