

OUT OF THE SHADOWS: INCORPORATING ADULT CHILDREN INTO THE COLLABORATIVE DIVORCE PROCESS

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CHAPTER 6

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I. INTRODUCTION

“If you don’t deal with your shadows, you are condemned to repeat the same mistake over and over, as a human being or as a society.” - film director Denis Villeneuve

In the past decade a new acronym entered the American lexicon: ACOD. “Adult Children of Divorce” suddenly became a thing. *The New York Times* wrote about them. *Time for Serenity*, an ACOD-focused blog (acodtimeforserenity.blogspot.com) was launched and quickly attracted 20,000 followers. The movie *A.C.O.D.* was released – starring Adam Scott, Amy Poehler, Catherine O’Hara and other A-listers.

While the acronym can describe an adult whose parents divorced when he was a child, it is increasingly used to refer to an adult whose parents divorced once he was already grown and flown. It is this cohort that is now becoming “a thing” in collaborative divorces.

Collaborative divorce lawyers are taught to beware of shadow figures. These well-meaning neighbors, parents, siblings, and friends can whisper in our clients’ ears and create unrealistic expectations and unnecessary conflict. Like lawyers, mental health and financial professionals also guard against amateur advice, encouraging divorcing husbands and wives to ignore the whispers from the shadows. But what if those whispers are coming from the clients’ own children? And what if those children are adults with children of their own? Is it possible that they could contribute to the collaborative process in a positive way, rather than causing problems from the sidelines?

Collaborative professionals must recognize the prevalence of adult children lurking at the edges of their divorce cases and should embrace the opportunity to bring them into the collaborative process in a meaningful, productive, and ethical manner.

II. DEFINING AND DISTINGUISHING ADULT CHILDREN

“I think that inside every adult is the heart of a child. We just gradually convince ourselves that we have to act more like adults.” - video game designer Shigeru Miyamoto

A. Who is an Adult Child?

The term “adult children” can encompass offspring from age 18 to 50+. Different age groups are affected differently by their parents’ divorces, but it is clear that these “adults” of all ages are definitely impacted. A couple’s divorce has psychological, social, and financial ramifications for the entire family. Dr. Carol Hughes, a divorce coach and member of Collaborative Divorce Solutions of Orange County, California, has stated: “In our work, we’re seeing the trauma to adult children whose parents are going through divorce. The parents say, ‘The children are adults now, they’ll be fine,’ but they aren’t fine.” (“Never Too Old to Hurt from Parents’ Divorce,” Jane Gordon Julien, *The New York Times*, April 21, 2016). By bringing adult children out of the shadow of the collaborative divorce process, we can help spur discussion and solve problems in all these areas.

B. College-Age Children

The collaborative divorce movement has already made great progress in identifying and meeting the needs of young adult children. Many collaborative teams now include a neutral Child Specialist who can help the children who are the subject of the suit as well as their older siblings. Sometimes a Child Specialist is even utilized with families in which all the kids have graduated high school before the divorce process began, in recognition that these legal adults still function very much as children in our society. Child Specialists are effectively providing these young adults with a voice in their parents’ divorces, as well as assisting with parent education around these young adults’ divorce-related issues. In fact, the topic of parent education will be addressed by Jennifer Leister, LPC, and Nicole Stover, LCSW later in this 13th Annual Collaborative Law Course; consequently, this paper will leave that topic to those experts!

C. The Older ACOD

“Children” ages 25 and older are the demographic with whom we concern ourselves in this paper. They are the same group that has been largely ignored in the collaborative divorce process. With this exclusion, we have been leaving behind a growing number of individuals who may need – and can offer – help during their parents’ divorce. Most of us are now well acquainted with the “gray divorce” phenomenon in the United States. Women have achieved more financial independence. Medical advances are allowing us to live longer, healthier lives. And, “OK, Boomer” –

the Baby Boom generation generally feels entitled to pursue personal happiness . . . even well beyond middle age. This surge in gray divorces has created a new class of salt-and-pepper children. The needs, fears, goals, and interests of 25 to 50+ year old ACODs are very different than those of their younger adult counterparts, and beyond the scope of what we have typically (yet incorrectly) assumed Child Specialists can address within the collaborative process.

So, what are the specific kinds of needs, fears, goals, and interests these older ACODs might have? Emotionally, their worldview may be rocked by news of their parent's divorce. Did they miss the signals that their parents' marriage was crumbling? Could they have prevented the divorce by noticing the signs and intervening before it was too late? Are all their happy family memories "phony"? And their concerns will often go far beyond the emotional.

Older ACODs might fear the ways in which this divorce will impact future holidays, birthday celebrations, and other family traditions. They might also have significant financial fears in connection with their parents' divorce. They might be worried about how/whether the divorce will affect payment of their graduate school tuition or student loan payments, not to mention the impact on their parents' estate planning and/or their own future inheritance. ACODs may have financial concerns for the non-working or lower-earning parent as well: how will Mom make ends meet after the divorce? Will I (and my siblings) have to help with her living expenses? How will she learn how to manage her own financial affairs? It can be very common that older adult children will feel upset about the impact on their own nuclear families: they might worry about whether either or both parents will continue contributing to the grandchildren's college funds, or wonder about who will attend the next family Thanksgiving, or feel nervous about potential disruption at an upcoming wedding, bar mitzvah, or christening. Finally, even a middle-aged ACOD might be put in the middle of her parents' divorce and not know how to handle that. It can be quite uncomfortable for an adult child to suddenly have to provide Dad a support system and shoulder to cry on, or – even more awkward – to be expected to share Mom's excitement about her new boyfriend.

III. ADDRESSING THE INTERESTS OF THE OLDER ACOD

"The eye is always caught by light, but shadows have more to say." - novelist **Gregory Maguire**

A. Out of the Shadows

One of the strengths of the collaborative process is that it meets a divorcing couple where they are, without regard to the artificial schedules and arbitrary priorities that can be imposed by the litigation process. This flexibility can provide room to assess and address the many different fears/goals/needs of ACODs expressed above, as well as other unique issues that can come up in individual families. For example, sometimes the ACOD's emotional reaction can be unexpected. Rather than feeling guilty about failing to notice the decline of her parents' marriage, one young adult daughter-of-divorce expressed frustration to an interviewer: "Why didn't they tell me they were having trouble? If I had known, I would have helped them find a marriage counselor. If they were unhappy then why didn't they do something about it? My dad spent more time fixing his car than he ever did his marriage." ("The Price They Pay: Older Children and Divorce," Barbara S. Cain, *The New York Times Magazine*, February 18, 1990). This ACOD could have benefited from airing her grievances with her parents in a safe space and with the help of experienced professionals.

The bottom line is that older ACODs are undoubtedly impacted by their parents' divorces, and they often would like to participate in the process somehow. But their needs aren't the only ones to consider. The divorcing clients themselves should still take center stage, and their best interests should not be capsized nor put at risk by the involvement of their adult children. Keeping these restrictions in mind, a creative collaborative team has at least two reasonable options for bringing adult children out of the shadows and including them as participants in their parents' collaborative divorce.

B. Option 1: Including a Child Specialist for the Adult "Children"

When we talk about including a Child Specialist on a collaborative team, it is usually because the divorcing couple shares young or school-age children. But Dr. Honey Sheff, who regularly serves as the Mental Health Professional or Child Specialist on Dallas County and Collin County collaborative teams, confirms: "While it may be thought to be beyond the scope of what Child Specialists typically address within the collaborative process, in some cases the Child Specialist can indeed be of value in providing the voice of the ACOD." Using a Child Specialist is an effective way to allow an adult child to participate in the collaborative divorce process without giving him or her full exposure to all the issues the parents are discussing with the team. The Child Specialist offers ACODs a safe place to express and process their emotions about the divorce, and also provides education and reassurance about the divorce process itself.

It is advisable to review the language of your Collaborative Participation Agreement (or separate agreement adding the Child Specialist) to make sure the language is appropriate for the ACOD situation. For example, I

participated in a recent case in which a Child Specialist was added after the original Participation Agreement was signed. The clients had three minor children and a college-age son (some facts have been slightly changed to protect confidentiality). The team used both an “Amendment to Collaborative Family Law Participation Agreement” to add the Child Specialist, as well as a Confidentiality Agreement between the “adult” son and the Child Specialist. This Confidentiality Agreement is attached to this paper as Appendix A, and is intended to be used or modified by practitioners in similar situations.

C. Option 2: Utilizing an Observer Agreement

While adding a Child Specialist might be the right way to involve an adult child in the collaborative divorce process, it is not the only acceptable approach. If a collaborative team decides that a Child Specialist is not appropriate for the particular needs of the clients and their family, an ACOD can be made a more direct participant in the collaborative divorce process. Via a specially tailored Observer Agreement, the adult child can be added as a neutral team member with limits clearly agreed upon and delineated in advance.

I first encountered this option in a case in which the adult child (let’s call her a 45-year old woman for confidentiality purposes) had helped her parents find a therapist to counsel them about divorcing without conflict. The counselor put together a collaborative divorce team of which I was privileged to be a part. Both clients were over age 70, and they had very compatible mutual goals involving their two adult children and their three grandchildren. Many of these goals were financial in nature. The 45-year old daughter was a CPA and very familiar with her parents’ finances. Daughter had concerns that Mother would not even know how to balance her checkbook after the divorce, and was also concerned that Father might lose some connectedness with the grandchildren. Both clients agreed that the daughter would be a helpful addition to the collaborative team. Both lawyers knew that some protection was needed in terms of confidentiality and neutrality. The solution, found in Appendix B to this paper, was to craft an Observer Agreement to formally include the adult daughter in the process. We took her out of the shadows and legitimized her involvement, while still protecting against possible risks. One of the most important protections was a clause allowing either client to terminate his/her consent to the daughter’s participation at any time during the process. Although this clause was never triggered, it gave the whole team some comfort that the ACOD could be ejected from the process if her involvement became more poisonous than productive.

Creative collaborative professionals may already be using additional methods to involve ACODs in their parents’ collaborative divorce cases, and more ideas will no doubt come to light in coming years. As mentioned above, as older people divorce in increasing numbers, the number of ACODs will increase as well. Our collaborative divorce processes will be required to adapt to the needs of this population of adult children, balanced – of course – with the needs of our clients.

IV. ETHICS

“One does not become enlightened by imagining figures of light, but by making the darkness conscious.”
- psychoanalyst Carl Jung

Collaborative divorce lawyers – like all lawyers – must be mindful to guard their own client’s best interests, even against the well-meaning involvement of adult children if necessary. Each lawyer has a duty to represent and protect his/her own client, and the collaborative team members have a joint responsibility to utilize the process for the good of the family. If it becomes apparent to any team member that an adult child is whispering from the shadows, a team call should be arranged to discuss options to bring that ACOD into the process in a positive way. Likewise, if an adult child has been incorporated into the collaborative process informally (be careful with that!) or by the use of a Child Specialist or an Observer Agreement, all team members will want to stay alert to any manipulation of the process or other potential problems.

The careful team will make sure that the needs and desires of adult children are recognized and that the proper documentation and communication plan are put into place to monitor the ACOD’s involvement in the process. Much harm can be done by ignoring the realities of adult children in a gray divorce – but harm can also be done by allowing the adult child to have too strong a voice or to push one or both parents too hard in a questionable direction. Wise drafting of documents and good team communication should allow beneficial involvement of ACODs and a resolution to the divorce that is best for the entire family.

V. CONCLUSION

“Only when we are brave enough to explore the darkness will we discover the infinite power of our light.”
– research professor and best-selling author Brene’ Brown

The collaborative community has long been on the forefront of positive change in the divorce process. Old ways of thinking about divorce (i.e., the litigation model) have been replaced with new, creative methods to protect clients’ confidentiality, to foster interest-based negotiations between clients, and to minimize the clients’ cost and conflict. The collaborative process can demystify divorce for clients, putting their lawyers in the same room and enlisting a whole team to help them establish and reach mutual goals. We know that these goals often include specific desires for the future peace, harmony, and financial security of their adult children. Child Specialists, customized Observer Agreements, and additional creative thinking are powerful tools that we can – and should – use to illuminate these worthy goals. Nothing beautiful grows in darkness; it is time to revamp our thinking about ACODs as scary shadow figures and bring them into the light.

APPENDIX A

Confidentiality Agreement Doe Family Matter

This Confidentiality Agreement (“Agreement”) is between John Doe, Jr. (“the Client”) and Dr. Smart, the neutral child specialist (the “Neutral Child Specialist”). “The Parties” are Jane and John Doe.

For good and valuable consideration, the Client agrees as follows:

1. The Neutral Child Specialist shall serve as a neutral mental health professional with respect to any presently pending litigation or any litigation or collaborative law matter that may later be initiated involving the Parties.
2. The Client desires to discuss various matters and issues with the Neutral Child Specialist regarding himself, his minor siblings, and his family, and in order to promote the forthright exchange of information, the Client has agreed that all written and verbal communications with the Neutral Child Specialist will remain confidential.
3. All information conveyed to the Neutral Child Specialist by the Client will NOT be subject to disclosure and shall NOT be released by the Neutral Child Specialist in response to any form of discovery procedure. The Neutral Child Specialist’s work will also be protected from admissibility by the terms of the participation agreement which has been signed by the Parties.
4. Neither of the Parties will directly or indirectly initiate any procedure seeking the Neutral Child Specialist’s testimony and/or notes or information provided to the Neutral Child Specialist. The Neutral Child Specialist shall not be compelled to divulge any notes, records, reports or other information received by the Neutral Child Specialist, nor shall the Neutral Child Specialist be compelled to testify in any adversary proceeding or judicial forum.
5. The Parties shall respect the confidentiality of the meetings between the Client, his siblings, and the Neutral Child Specialist and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding: a) views expressed or suggestions made by their children in those meetings with respect to a possible settlement of the dispute; b) admission made by their children in the course of those meetings; c) suggestions or views expressed by the Neutral Child Specialist; or d) the fact that either Party had or had not indicated a willingness to follow a suggestion made by the Neutral Child Specialist.

6. The discussions with the Neutral Child Specialist and all information conveyed to the Neutral Child Specialist are considered to be part of settlement negotiations and, therefore, are not admissible in any proceeding involving the Parties to this action.
7. If either Party violates this Agreement he or she shall pay all reasonable fees and expenses of the Neutral Child Specialist, including reasonable attorneys' fees, incurred in opposing efforts to compel testimony or production of records from the Neutral Child Specialist.
8. The Neutral Child Specialist is authorized to communicate about the Client directly with the Neutral MHP, the lawyers representing the Parties to this action, the Parties, and the Neutral MHP, the lawyers, the Parties, and /or Neutral FP with the Neutral Child Specialist, provided the Neutral Child Specialist communicates the same information simultaneously to the lawyers for Parties to this action and to the Client. The provisions of the participation agreement signed by the Parties pertaining to process communications shall govern all such communications. The communications are confidential and shall not be subject to disclosure, including in any legal proceedings between the Parties.
9. The terms of this Agreement shall be enforceable, as between the Parties, as a Rule 11 agreement to be filed in any pending proceedings as well as any proceedings that may later be initiated involving, and also as a contract between the Client, the Parties, and the Neutral Child Specialist.

AGREED on this _____ day of _____, 20____:

JOHN DOE, JR., Adult Child

DR. SMART, Child Specialist

JANE DOE, Mother

JOHN DOE, Father

APPENDIX B

Observer Agreement **Doe Family Matter**

The undersigned observer may observe all aspects of the collaborative process involving the above-referenced family matter by, including without limitation, listening to team calls, attending meetings, and initiating and being copied on emails.

Accordingly, the observer agrees to the following:

Observation is subject to the continuing consent of the participants. Any participant may terminate consent at any time.

It is the observer's duty to disclose conflicts of interest and/or associations with the attorneys or any of the other Collaborative Team members.

The observer is familiar with and agrees to be bound by the collaborative law statutes (Title 5, Chapter 1-A of the Texas Family Code).

The observer agrees to refrain from participating in or recording the meetings, unless requested to do so by the participants.

The observer agrees to keep confidential all aspects of the collaboration, other than in communications with the collaborative professionals.

The participants agree that the observer will be considered to be a neutral expert or neutral allied professional as described in the Collaborative Law Participation Agreement and all communications the observer initiates or is privy to (whether verbal, non-verbal, or in writing) shall therefore be confidential and privileged as delineated in the Collaborative Law Participation Agreement for other Collaborative Team members.

The participants waive any actual or implied conflicts of interest due to their familial relationship with the observer.

Date: _____

John Doe, Jr., Observer

Jane Doe, Participant

John Doe, Participant