

The Wisdom to Know the Difference

By Judge Lynn Toler

In order to navigate the legal system successfully, you have to understand (and come to terms with) what it can and cannot do.

The judiciary is required to provide both fairness and resolution, a difficult thing to do in a divorce. What could be more complicated than untangling lives that have been intertwined on every level for years? How can the law address all of the nuances of everyday life and the entire range of human behavior?

The answer is, it can't. Unfortunately, in order to achieve resolution, sometimes the law must make generalizations with respect to what is fair. So your court's answer to "how do we end this" may seem somewhat arbitrary. Sometimes the law simply has to say: "This is the way we are going to do things."

What the divorce courts say

- Canada and many U.S. states have adopted child support guidelines, a mathematical formula in which you plug in the numbers (income and the like) and do the math, and out comes the support amount.
- In a community property state, the court looks to divide marital property 50/50, no matter who made what during the course of the marriage.
- In an "all property" state, the law may not distinguish between marital and separate property at all.
- Canada and most U.S. states (with the notable exception of New York, where fault is an issue in contested divorces) provide no-fault divorces. That means the court will not consider either spouse's misconduct during the marriage in determining support or property division.

The judge's discretion

These generalizations notwithstanding, it doesn't mean that a judge has no ability to make equitable determinations based on individual circumstances. Judges almost always have some judicial discretion. That's the leeway the law gives to judges in implementing those general rules. Sometimes, the law will give the judge the ability to consider not only the factors outlined by the statute but also any other factors that will promote a just and fair outcome. In some no-fault jurisdictions, a judge can consider a party's misconduct if that party's actions are sufficiently outrageous or depleted the marital assets. Even when the law requires judges to follow mathematical support guidelines, a judge may deviate from them in certain situations, although they are typically required to provide written support for their decision.

Learn the divorce law and your options

The thing to keep in mind, however, is that when, where and how a judge can exercise discretion is outlined by the law. Moreover, if a judge's use of discretion ignores or acts contrary to the law, it's subject to reversal.

So what does this mean to you?

First, you need to develop the right mindset. Understand your area's divorce law and learn just how much leeway a judge has and when he can exercise it. Your lawyer can explain what factors a judge must consider and the circumstances in which he has no discretion at all. Come to terms with it. Concentrating on how they are unfair will not help.



Understanding where you have room to move will.

Second, in the same way the law has two goals, so should you. You should seek not only a favorable legal outcome but resolution as well. In order to achieve the latter, you might have to redefine the former. Know the law and its limitations before you wed yourself to a position. It will allow you to establish realistic goals which will keep you from wasting emotional capital on things you cannot change and help you focus more productively on those you can. Freedom and peace of mind have a value all of their own. In order to snatch a good night's sleep, you might have to let go of the TV.

And third, remember that court is not your only option. There are alternatives to this process. As I have said in a previous Divorce Magazine article, "I May Not Be the Answer." ■

Judge Lynn Toler, a graduate of Harvard and The University of Pennsylvania Law School, served as a municipal court judge for eight years. She presides over the courtroom on the nationally syndicated television show Divorce Court and is the author of the book My Mother's Rules, a guide to greater emotional control.

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