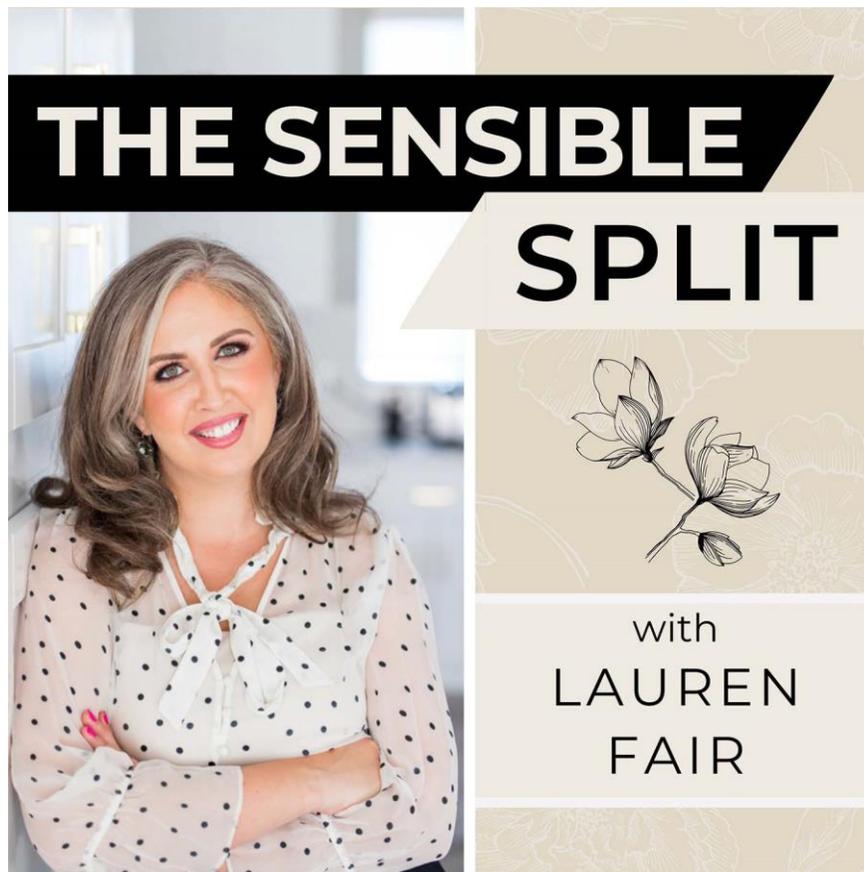


Ep #5: What Are My Options for the Divorce Legal Process?



Full Episode Transcript

With Your Host

Lauren Fair

[The Sensible Split](#) with Lauren Fair

Ep #5: What Are My Options for the Divorce Legal Process?

You're listening to *The Sensible Split* podcast, Episode 5. Today, we're talking about different process options you have to proceed with the legal aspect of your divorce.

The Sensible Split is a podcast for smart but overwhelmed women in search of a roadmap to a successful separation and divorce. If you are looking for guidance in navigating the practical, legal, and emotional aspects of divorce with confidence, this is the show for you. Here's your host, Master Certified Life and Divorce Coach, Divorce Attorney, and Mediator, Lauren Fair.

Hey, ladies, welcome back. I feel like there's been so much that's happened since I talked to you last, and I want to catch you up on a couple things. One, I lost my grandmother this week, at the age of 100. She was my last living grandparent, and her death feels like the end of an era for me.

It's really hard to believe when I think about it, but she had been living on this planet since 1923 up until this week. Wow, just the amount of things that you see living over a century is just really astounding. She didn't look or act 100, and if I live for that long, I really hope that I can do it as well as she did, for as long as she did.

In brighter news, our family adopted a puppy last week. She's a darling little Shi Chon, which is a teddy bear... I guess they call it a teddy bear breed or what have you... But she's a cross between a Shih Tzu and Bichon Frise. She's just the cutest little ball of fur. She's so sweet and fun and energetic, yet also very chill. Like, she'll just lay on my lap sometimes while I do some work, and she's really content to do that.

She's white and brown, with a tiny bit of black. We named her Annabelle. Well, that's what we call her on a day-to-day basis, but she has a longer name of Mademoiselle Annabelle Sparkles. We have this tradition in my family of giving our animals multiple names and then picking one for short.

So, I have Miss Annabelle with me today. I've been bringing her to the office, she's really too little to be left alone for a long period of time, so she's been my

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little shadow during the day. And I have to say, my staff at the office loves having her here because I've even seen her popping up on some of my paralegal's IG stories. So, I think she's a hit. But anyway, that's what's going on with me lately.

Now, I want to take a moment and thank all of you so much. All of you who have followed, rated, and reviewed the show, to those of you who shared it with others on social media, sent me DMs, and emails with words of encouragement. I heard from so many of you as I launched this podcast, and I just wanted to say you are so awesome. I so appreciate each and every one of you, your support of the show and sharing it with others.

You may recall that I was doing a podcast launch giveaway to celebrate the launch of it. And so, I have those winners that I'm going to share with you today. Our lucky three winners of a \$100 Amazon gift card each are, and I'm just going to share names and last initials because I do value confidentiality: Kathy K., Diana S., and Kalina C. You lucky ladies, we'll be getting your prizes shortly. And thank you, again, to all of you so much, for all of your support as I kind of share this creation that is the podcast with you all.

Alright, today I want to talk to you about the options that you have to handle the divorce legal process. Yes, you have options. If you thought there was only one option for the legal process, or you may be knew there were a couple of options, but you didn't know much about them, that is very normal.

Most potential clients that I talk to, as a lawyer or as a coach, don't know what their options are. It's important to know what your options are, and the details of each of them, before electing how to proceed with your divorce. So, you can, one, make the best decision possible for you in alignment with your goals. So, that might be goals for how the process goes, goals for the outcome that you'd like to achieve from the process, and/or your goals for the future for yourself in your life.

We've first got to figure out what are those goals, so that then you can choose the process option that best matches, or best sets you up for, attaining those

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goals. So, I want to give you an example of when this particular type of issue can go wrong.

Let's just say that you have a particular goal as to an outcome of the issues. Maybe that could be how you want to share time with your kids. And in fact, I had a client come into me recently and say, "This is the outcome I'd like to have, in terms of how I share time with my ex with my kids."

And when we really got to talking about it, it became clear to me that the outcome that she wanted is something that here, in the courts, she would be highly unlikely to get. So, in order to have the best chance of getting that resolution that she wanted, we were able to determine that mediation might have been the best option for her, so that she could have a chance at the resolution that she wanted.

What we were able to do there, was to avoid a situation where she went into the process in a way that didn't match up with her goals, and also would have had her potentially overconfident in what she'd be able to achieve through the litigation process.

The second reason that you want to know your options, and the details of each, before deciding how you move forward is, once you know what process option you would like to elect, you can then select the right attorney for that type of process that you anticipate. When we go and we hire an attorney, before we even know what kind of process option that we want, sometimes that can be a bit of the old cart before the horse.

What can go wrong here is, if you select an attorney who doesn't do the service that you want, then we're in a situation now where we've got to decide, do we find a new attorney? Do we go with the process option that the attorney I've already selected does?

So, it's really important to figure out in advance, "Okay, here's the process that I'd like to have, so that now I can look for an attorney who matches with that, in terms of what they're offering is."

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The third reason, it's important to know what your process options are before deciding how to move forward, is you can avoid the costs that come along with not making this decision consciously and intentionally from the outset. Because it can be really difficult and costly to change course after you have started, for example, litigating.

What can happen here is, if you take an extremely aggressive approach from the beginning, then that creates a response in your spouse, right? When we approach something in a really aggressive manner, usually it puts the person on the receiving end of that in a defensive position, and they have a natural reaction to protect themselves.

So, when you've started the process that way, sometimes that results in your spouse wanting nothing to do with settling, you both can potentially have been become really entrenched in what your positions are, on what the issues in the dispute entail. Maybe you've spent tens of thousands of dollars in legal fees, and it's hard at that point to be like, "Well, now I want to go to mediation because I don't like how this is going."

It's not to say that you can't change course, in terms of the process that you've already embarked on. It's possible, it's just hard to dial back a certain level of aggression that has already begun. And the thing is, most people starting the divorce process are not getting the education around what their process options are before they're already taking steps forward.

This is really something that you don't want to delegate to an attorney. What I mean by that is, you want to understand what your options are, and you want to get expert opinion where you want it, where you think it will be useful, and that could be from an attorney. But their input should be data, among others, for you to consider in making your own decisions.

So, we always want to be making our own decisions about how we want to proceed for reasons that we like, and not because someone else is telling us that that's the only option or that that's what they think, without you taking your

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own look at it and deciding whether you agree or not. And this is part of being empowered to take ownership over your role in this process.

If you're at the very beginning of this process, understanding what the process options are, is really prep work for making a smart exit from the marriage. If you're in the middle of your legal process and it isn't working, then there may be an opportunity to change course. And so, it can be helpful to understand what those other options might be.

Each of these dispute resolution options, that I'm going to detail for you in a moment, has pros and cons to consider. I am going to give you a few reasons why you might choose each option. But this is not an exhaustive list of reasons that you might choose or not choose an option, but rather some food for thought to kind of get you thinking about what might be the best choice for you.

All right, so let's dive into them. The first one is mediation. Mediation is a private process in which an impartial third person, that's the mediator, facilitates the resolution of family disputes by promoting the participant's voluntary agreement.

So, mediation is a voluntary process, and the mediator is there to help you reach an agreement on what the issues in dispute are. The mediator does not have the power to make a decision for you but can help you find a resolution that works for both parties. The only people who can actually resolve the issues in mediation are the parties themselves.

The mediator is there to assist with communication, to encourage understanding, and to focus you on your individual and common interests. So, the mediator is there to help you explore options, make decisions, and reach your own agreements. Okay?

What the mediator is not there to do is to give you legal advice, and that's a common misunderstanding. The mediator cannot tell you what is best for you in terms of a resolution, and then also tell your spouse what is best for them in terms of resolution, because that is a conflict of interest. And so, the mediator is there primarily to help you identify the issues in dispute, to help you determine

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what options there might be to resolve those issues, and help you come to an agreement.

Okay, mediation can take place with or without attorneys present. And if attorneys are not present in the mediation room, the parties can still have the option of having attorneys consult with them in the background. So, that's something that is important to understand. Because there is a tide turning in favor of mediation.

That is great, but it still is very important to understand what your legal rights are, and to help you understand what your bottom line should be in terms of negotiating the issues in mediation. And how you can have a better understanding of what your bottom line should be, potentially, is by having legal advice about what would happen if you don't reach an agreement in mediation.

Also, it is important, if you reach an agreement in mediation, to consider having it reviewed by an attorney before you sign it and finalize it. So, a consulting attorney can act in that role for you. To provide you with advice, and be able to answer questions about the process, about your rights, etc, in the background. And to review a potential settlement agreement before it's signed.

Alternatively, you can involve attorneys in the mediation process itself, where they would be present in the session, and that is always an option that's available to you as well. Mediation in today's world can look different depending on what your preferences are. It could be in person, or it could even be virtual.

Often, mediators want to start the mediation in a joint session. Some of them wants the entire mediation process to occur in a joint session. Others prefer to, at certain times, meet individually with the parties. There is no uniform standard across the country for exactly how the mediation process goes. There are best practices in that regard, but it can vary from mediator to mediator exactly what that process looks like. And also based on the requests of the parties.

This is something that's important to know, is you do have some input on how the mediation process goes. It can be very useful to spend the time in advance

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to look at what do you need in order to make the mediation process successful in terms of the process itself, the length of the sessions, or the form in which it's happening. Is it virtual? Is it in person? Who's there, in terms of support to you?

You have a lot of say over exactly what that process looks like. And so, it's important to come up with a personalized plan for yourself, in advance of starting the mediation, to set yourself up for the best chance of success in that.

I'm really passionate about helping people to successfully engage in the mediation process, so I'm going to talk a lot more about this in a future episode. But the mediation process, ideally, will end in a resolution of what the issues are.

So, in that event, either the mediator will help you prepare a settlement agreement for review and approval, that memorializes what the agreement is. Or some mediators choose not to get involved in the paperwork process, involved with filing with the court, in which case, usually they will refer you to the attorneys that could support you in completing the paperwork necessary for court.

Why would you choose mediation? There are a lot of reasons, but I'm going to give you the top three that come to mind. The first is having control over the resolution of the issues. This is a big one for me. I like control, I don't know about you. But whenever you delegate the decision making, over the resolution of these very important personal issues for your family, to a stranger in a black robe, who no doubt is doing their best, but we'll never know your family the way that you do, that feels very risky.

And after litigating in family court for a long time, I can tell you, it is risky. You don't know what the resolution is going to be. And oftentimes, it is a resolution that neither party is happy with. I actually had a judge say that once, "If I do this correctly, neither one of you is going to be happy." Seriously, this is what he said.

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The other thing is, as I mentioned earlier about my client who came to me asking about the parenting plan that she wanted and what the likelihood was of getting that in court, we are able to do more creative solutions in mediation. And sometimes you can achieve a better resolution in mediation than what you might get in court.

So, the control of the resolution, even if it's not exactly what you want it to be, oftentimes is better than rolling the dice with a stranger on the bench making these decisions for you.

Another reason to choose mediation is it just costs less, right? It's a reduced cost and a shortened timeline than if you were to go through the court.

And thirdly, it's important if you have children, to consider how you can minimize the impact of the divorce on them. I suspect you're already thinking about that. One of the best ways to minimize the impact of the divorce on your children is to minimize the conflict with their other parent. Participating in mediation and working through these really difficult issues, including how you're going to spend time with the kids, is critical to reducing the impact of the process on the kids.

Sometimes I hear from clients concerns that mediation won't work for them. And let me be clear, mediation is not appropriate in every single case. There are just cases that will not work in mediation. However, a lot can. Just because your spouse is a jerk, or there's some complexity to the issues in your case, does not mean that your case can't go to mediation. Okay?

I hear that a lot, "He's never going to agree to this. He's so unreasonable." And that very well may be, but that does not mean that mediation will not work for you. When there's a lot of complexity to issues in a case, it doesn't necessarily mean it can't be mediated. It just might mean that you need some additional information, possibly some expert opinion on some of the issues, to use in mediation and reaching an agreement.

So, I'll talk about this a lot more in the future. But just suffice it to say, that if you're interested in mediation but you have concerns about whether it would

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work or not, definitely have a chat with a professional about that, before deciding in advance that mediation won't work. Okay?

The second process option is attorney-led negotiated settlement. In an attorney-led negotiated settlement scenario the parties hire attorneys, or one does. Sometimes there's an attorney for each spouse, and sometimes it's just one attorney on one side and the other spouse chooses not to hire an attorney. Either way, the attorney, or attorneys involved, assist the parties in the process.

So, if there's one attorney that's involved in the process, usually they are representing one side. I want to be clear about that. You can't have one attorney represent both spouses in the divorce, because it is a conflict of interest, and the ethical rules prohibit attorneys from doing that. But if there's only one attorney involved in the process, then they can nonetheless help facilitate the process for both parties, while only representing one of them.

The parties and any lawyers involved begin the case with a common commitment of cooperatively settling all of the issues, and they go to court only if they can't reach a reasonable settlement. If the parties don't settle, then the lawyers can continue to represent them in court, so you can have the continuous representation of a lawyer regardless of whether you end up in court or you're resolving it outside of court.

The attorney-led negotiated settlement process is very flexible and can be as formal or informal as desired. Oftentimes, too, it's dependent on how much that's desired, in terms of formality or informality, by the other side as well. The process typically involves the exchange of written settlement correspondence, or in some situations, four-way meetings with the parties and the lawyers. Though, some negotiation may be directly between the lawyers or the parties when appropriate.

If the parties or the lawyers encountered difficulties in reaching an agreement, then they can hire a mediator at some point in the process to help resolve disagreements, if they choose to do that.

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For example, the attorneys may first start with exchanging some settlement correspondence to kind of take the temperature of where everyone is on their positions, on the resolution of the issues, and see whether some correspondence back and forth can move the parties forward toward a resolution or completely to a resolution.

If not, you can kind of see, “Where is everyone? And do we think that we're going to be able to get to a resolution without involving the court or some other neutral third party?” And so, if you get to a point where it looks like it's not going to resolve just through communication with the attorneys, then they can look out from there.

“What makes sense to introduce into this dynamic here, in order to keep us moving toward a resolution?” In that situation, sometimes what happens is the attorneys agree to engage a mediator to assist them in getting past whatever the impasse is at that particular point. The process can take place before a case is filed in court, or while a court case is pending. And in some jurisdictions, the court may support that process in some way.

Why choose an attorney-led negotiated settlement? Okay, top three reasons. One, you've got a spouse who does well with having something put in front of them to sign. This is something that I do with clients from time to time. I represent a lot of women who come to me and say, “I'm the one who has handled all of the finances during the marriage. I've handled all of the administrative matters for the family. And I think I'm going to be the one that has to figure out all this divorce stuff, too.”

In that situation, sometimes what we look at is, does it make sense to have them be the one that engages the attorney? Who puts together all the paperwork to facilitate the process? Then come up with a proposed settlement agreement, is it something that they then can deliver to the spouse, and we expect that the spouse is going to sign? Or it's going to be a relatively easy negotiation process to getting to done? It's a very efficient process when you've got the right dynamic for it.

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Another scenario in which it would make sense, potentially, to consider an attorney-led negotiated settlement, is when your spouse has already hired an attorney. So, if your spouse already has an attorney, it may be something you want to consider at that point. That you may want to also have counsel, so that you have someone who can correspond with the attorney on your behalf, advise you, and work with the other attorney toward a resolution.

And the third reason, is you want to have someone take the lead for you through the legal process.

The third process option is litigation. So, litigation is a process for handling disputes in the court system. This is just what you hear about in terms of a contested divorce. A contested divorce, typically, is a divorce that's unfolding in court through a litigation process.

In that situation, someone else, most often a judge, makes the final decisions for the parties, unless the parties settled before the hearing or the trial. Settlement can happen at any point during the process. And sometimes that even happens in the courthouse hallway right before a contested hearing.

During the litigation process, there can be a series of hearings and temporary orders. For example, temporary orders that are common, would be temporary orders for custody or child support or spousal support. And ultimately, there has to be a reaching of final orders, the final orders regarding the substantive issues and dispute in the case. Again, custody support, division of assets, etc, are usually entered only after there has been a trial with witnesses.

It can be possible, in some cases, to hire a privately compensated temporary judge who can step into the shoes of the regular Superior Court or whatever your local court is called; the typical judge that would handle your case if you file at the local court.

Sometimes people choose to hire a privately compensated temporary judge in order to have an expedited timeline, to maintain some degree of privacy because the proceedings then happen outside of the regular court, or they have

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particular expertise in an area that is relevant to this particular case and there is an agreement by the parties to opt for that temporary private judge. Oftentimes, a privately compensated temporary judge is a retired judge who has a lot of experience and is operating in a private practice.

Why choose litigation? A few reasons. One is that other alternative dispute resolution options have not worked. So, you may have tried mediation, you may have tried attorney-led negotiated settlement, and it's just not working. There are just some cases that just don't settle. It's not the majority of the cases, it's a very small percentage of cases in family court that actually ended up going to trial.

It makes sense to attempt a resolution outside of court, or through attorney-led negotiation, as part of the court process to resolve the issues before going to trial. But in some cases, they just don't work. In which case, that's what the courts, therefore.

Another reason to choose litigation, is there may be severe domestic violence that's happened during the marriage. I say severe... It's not to discount any level of domestic violence. But it's a common misconception that if there's domestic violence that has occurred, that mediation can't work. It can, in some situations. This is an area where it's going to be really important, if there has been domestic violence in your relationship, that you get qualified professional advice on what the best approach is, okay?

Because it's important that there be the right dynamic happening, if you are going to attempt alternative dispute resolution in a situation where there has been domestic violence. Or if there are significant substance abuse issues on the part of a party, to the point where they can't reasonably participate in a process to cooperatively resolve the issues. That would also be appropriate to consider litigation in that situation.

Another reason to choose litigation would be, you know your chances are better in court. So, maybe there's just nothing reasonable on the table in terms of a resolution and you think you could get something better in court, and you want to roll the dice. And lastly, you're just dealing with a completely unreasonable

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person who just won't agree to any kind of reasonable resolution. So again, there's just nothing reasonable on the table.

The thing to remember here though, is just because you perceive your spouse to be completely unreasonable in advance of commencing the divorce, doesn't necessarily mean that you have to resort to litigation. Because, usually, when you're getting divorced there's some part of you that thinks the other person is unreasonable because they're not doing the thing that we want them to do. Because if they did, maybe we wouldn't be getting divorced, right?

This is so common to think, that there are things in the way of resolving something in mediation. That's very normal, it doesn't necessarily mean that you have to end up in litigation. It just means there needs to be a fuller conversation around, "What do we think the barriers are to this working in mediation?" Or, again, through some other out-of-court resolution process.

In either the attorney-assisted settlement process or litigation context, one thing to bear in mind is you can hire a lawyer on a limited scope, or a consulting basis. To work on only part of the case, or to assist with preparing documents, or answering questions in the background, if you prefer not to have an attorney present on paper. If you don't want them to represent you on paper because you have concerns about, "What is going to be the impact of my spouse seeing that I have an attorney?"

It's possible to hire an attorney to do a certain scope of service that may not be their traditional full service. So, if you want legal assistance and, you have some concerns about the impact of it, or maybe what your budget is in relation to it, it's worth having a conversation around what the options might be. In that situation, you'd want to consult a lawyer in your jurisdiction to find out details on the options that would be available to you. All right.

And the fourth process option is Collaborative Practice. So, this is collaborative with a big C. It is a specifically titled practice option. We're not talking about collaborative like, "We just sort of work together," and such. This is an actual specific name of a process option. It is a voluntary dispute resolution process, in

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which the parties settle without resort to litigation, and they work collaboratively with an interdisciplinary team of professionals toward a cooperative resolution of all the issues.

So, in the collaborative process, the parties sign a Collaborative Participation Agreement. This is done upfront. Everybody's got to be on the same page that they want to opt for this process, and they sign a participation agreement upfront.

And in that agreement, both parties commit to respect both parties' shared goals and the needs of the whole family. They agree to freely and voluntarily disclose and exchange all information that's relevant material to the issues to be decided. They make a genuine commitment and pledge not to go to court, and instead use good faith efforts in their negotiations to reach a mutually acceptable settlement.

Each party must be represented by a Collaborative Practice Lawyer. So, this is a lawyer who's gone through the education necessary to become part of the collaborative practice groups. And they can represent that party, that they are contracted to represent, only in this collaborative process. Okay?

If you're interested in a collaborative practice option, you've got to find an attorney who does that specific service. Not all attorneys offer collaborative practice representation. And if the matter ends up in court, if you don't reach an agreement in the collaborative practice process, then you would need to hire a new attorney, or represent yourself if you went to court.

So, the attorney that you engage at the beginning of the collaborative process can be with you so long as that process works. In the event that it doesn't, it falls out of that process, and it ends up in court, you would need to start over with a new attorney. Also, the parties can engage mental health and financial professionals whose engagement would terminate, again, upon it going to court.

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There are mental health professionals and financial professionals that would be part of this process. Again, they're only a part of that process so long as that process continues to work.

And you can also jointly engage other experts as needed. So, what would that look like? That could be an appraiser, it could be a financial expert who could value stock options; these are just examples. But whatever other expert opinion you might need to resolve the issues in the collaborative process, you could jointly engage those people as part of that collaborative process. And you can also do that in other alternative dispute resolution processes, as well.

So why choose the Collaborative Process? One, you want a multidisciplinary team in an environment that fosters transparency. Two, you have some complexity to the issues in dispute and you're committed to an alternative dispute resolution process, even if it takes a while to resolve. There's kind of a lot more to coordinate when you're dealing with a collaborative process, because you've got a lot of people involved in it. Okay, so it's something that oftentimes takes a bit of time in order to coordinate and work through.

Thirdly, it's typically less expensive than litigation. It's not necessarily a completely inexpensive option. But it is less expensive, certainly, than litigating in court, in most situations.

So, those are the major legal process options that are available to you in most jurisdictions. I want you to think about what process sounds most like a match for you. And what questions do you have about that preferred process option or any of the other ones?

Whatever those questions are, you want to get them answered upfront and make a decision on what your preferred process option is. And then, once you've decided on what your preferred option is, to the extent that it's anything other than litigation, you want to prepare to have a productive conversation with your spouse in which you will deliver to them your proposal, in terms of how you will move forward with resolving the legal process that you've got to get through in order to dissolve your marriage.

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We, in this country, have involved the state in marriage, in forming the marriage, and therefore they are also involved in dissolving the marriage. So, regardless of the process option that you utilize, there is a legal aspect to it, and it's got to be handled.

This is what we want to do, figure out what is the best approach for you, and to prepare you to have that conversation with your spouse, so that you can try to set this process on a trajectory that aligns with your goals.

And I want you to think about, do you think your spouse will be on board with this option that you have? In doing that analysis, I want you to think about how would that process option also benefit them.

Because that's something you want to think about, in preparing for that conversation in which you are going to endeavor to get them on board with the option that you want to utilize. So, when you've done your homework upfront, and you've strategized on how you'd like to see this go, you have the best chance of influencing the trajectory of the case in that manner, through the influence that you carry with your spouse.

You might think you don't have influence in your relationship with them anymore, but you do to some degree. It might look different than it did before, but you have more influence than maybe you might think that you do.

If you're like a lot of my clients, you're going to want to know that you have done your best to set your divorce on a path to success. One where you have the best chance of getting the resolution that you want, the best chance of getting through the process as unscathed as possible, in a timely manner, with the least amount of money spent on getting from point A to point B. So, choosing the right path for the legal process can have huge consequences on the impact of the divorce, on your wellbeing, your wallet, your kids, and your future.

You might also be wondering, "Which one of these does coaching fit into?" And the answer is, into all of these. Coaching itself is recognized as an alternative

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dispute resolution process. But it is for you, and it is to support you and your engagement in any of these processes.

I hope this was helpful for you, and I'll see you next time.

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