

Family

Marriage Story: Important lessons for divorcing spouses

By **David Frenkel**



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(January 27, 2020, 12:17 PM EST) -- Sometimes a motion picture is not only worth a thousand words but can also be a helpful and informational resource for divorcing spouses. The 2020 Oscar-nominated movie *Marriage Story* is one of those pictures.

It's a story of a mother and father (played by Scarlett Johansson and Adam Driver) who had so much potential in their marriage but ultimately go down the path of no return. During that story, the divorce lawyers, played by Laura Dern and Ray Liotta, made matters worse by flaming the fires of fear, uncertainty and revenge.

The couple originally wanted to settle their matrimonial affairs amicably, including custody of their young son. However, the mother's lawyer started playing hardball quickly which resulted in the father finding an even more aggressive lawyer.

Both could not afford the legal fees but felt compelled to continue on a path of a scorched earth approach.

This movie is a reminder that far too often couples in the real world face the question of how aggressive they should be in their own divorce proceedings. It is not an easy choice to make.

Faced with unreasonable and aggressive tactics by an ex-spouse, sometimes one has little choice but to respond heavy handedly.

In *Marriage Story*, Driver's character did just that. Otherwise, he stood to lose custody and an opportunity to be significantly involved in his child's life.

However, what is often not discussed is the alternative — the alternative to not respond in kind but with understanding and compassion.

Responding in kind would be simply finding as much dirt to throw back at your ex-spouse and to draw the battle lines forcefully — not very kind at all. Actions like this may unfortunately confirm the original spouse's fears that had she not acted aggressively; she would have been swallowed up alive by her former partner.

But what happens if a party uses real kindness as a litigation strategy? What happens if the father does not throw back a baseless and insinuating accusation that the mother is an alcoholic (like the father did in the movie)? What happens if instead the father agrees to pause litigation temporarily in order to enter a non-binding and non-aggressive mediation process that would allow the parties to focus on the issues most important to them?

This way, the original party acting aggressively at the encouragement of her lawyer can say that such a tactic was possibly a mistake. She may appreciate that her ex-spouse did not stoop to her level and she did not have to start litigation with guns blazing.

Who knows, maybe she could even fire her unreasonably aggressive lawyer having a "court or die"

approach and retain someone more settlement focused, thus saving both parties substantial amounts of money. At a minimum, perhaps she could have received a second opinion.

As Justice Freya Kristjanson indicated in *Goldstein v. Walsh* 2019 ONSC 3174, a scorched earth litigation calls out big guns in response. In that case, the father "pursued a scorched earth policy" and was found to act in bad faith along with unreasonable conduct. As a result, he was ordered to pay the wife \$420,000, with Justice Kristjanson reasoning in part that the father could not be permitted to litigate in the manner he did with impunity.

Similarly, even if a person does not have a lawyer representing them, they too cannot act in any way that they please. For example, in *Barran v. Schanck* 2019 ONCJ 218, the mother blamed her shortcomings, her poor judgments and inadequate conduct on the fact that she could not afford a lawyer. She also attempted to use these excuses to shield herself from a cost award.

However, the presiding judge was not having any of that. Instead, Justice Victoria A. Starr reasoned that any such consideration is outweighed by the need to ensure that the unrelated objective of sanctioning and discouraging inappropriate behaviour is met.

Unfortunately, a lot of people simply rely on their family law lawyer's advice too blindly without considering the alternatives. It is true that some lawyers are afraid that if a forceful approach is not taken from the beginning, then their clients may be prejudiced. However, many such lawyers may either be unable or unwilling to offer the alternatives due to incompetency or inexperience or both.

Rather, family law clients can approach the process with increased awareness and additional knowledge of their rights and alternatives. There is now too much information and resources available for an individual to simply say, "My divorce lawyer made me do it." There is nothing wrong with spending a little more money to obtain a thoughtful second opinion and save thousands of dollars more due to an ill-advised litigation strategy.

Unlike *Marriage Story*, people can choose their own path in a divorce process. It is an empowering lesson from an example of how a couple's separation can go wrong quickly. And the movie can now be a resource that couples can learn from so that they can avoid making the same mistakes in their own family law stories.

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