

Eric Higgins and Brian Loughmiller Podcast

Two family lawyers from the McKinney law firm of Loughmiller Higgins offer advice for anyone contemplating divorce or currently going through a divorce in Texas.

I'm Dan Couvrette, the CEO of Divorce Magazine and Family Lawyer Magazine, and I'm very pleased to have Eric Higgins and Brian Loughmiller, two of the top family lawyers in Texas, on this Divorce Magazine podcast with me today.

Our goal at Divorce Magazine is to help divorcing people make better, more informed choices as they go through the divorce process. We find that the best way to accomplish these goals is to have professionals like Eric Higgins and Brian Loughmiller share valuable information and advice based on years of having worked in the field of family law.

Eric and Brian are partners in the McKinney Texas firm of Loughmiller Higgins. The firm serves the needs of people throughout the Dallas-Fort Worth Metroplex and North Texas who have legal concerns or problems involving family law and divorce issues.

Brian and Eric have 47 years of combined trial experience, which is very helpful whether your case goes to trial or not, because it provides a base of experience to help guide and advise their divorcing clients through what can be a very challenging process. With the help of people like Brian and Eric, this process is less challenging.

Brian has been recognized as a Super Lawyer ever since its inception in 2005; he is a member of the American Academy of Matrimonial Lawyers; and he is rated by Martindale-Hubbell with an AV Preeminent rating.

Eric is also a top family lawyer who's been recognized by *Super Lawyers Magazines* in the area of family law and he has served on the board of organizations, which is recognized for assisting children who find themselves thrust into the legal process.

To learn more about Eric and Brian and their Loughmiller Higgins firm, I recommend you visit their website. It's www.loughmillerhiggins.com.

Today, I've asked Brian and Eric to give us their best divorce tips and advice for people who are contemplating divorce or going through a divorce. Brian and Eric, thank you very much for joining me today.

Higgins: Thank you, we're glad to be here.

Let's start with divorce preparation, because that's where it starts for many people. Eric, what are the best ways to prepare yourself for divorce prior to telling your spouse that you want a divorce?

Higgins: One of the things that I talk to my clients about is having an exit strategy when leaving the relationship. It's one thing to decide that you're going to get a divorce and end the relationship, but it's another to have a plan for where you're going to live, having a budget, looking at the housing issues if there are children, looking at what your expectations are in terms of possession schedules for the children, and where they're going to go to school.

One of the things you can do to help yourself and help your attorney is to have a plan of where you want to go. Early on in cases, we need clients to gather documents to help us. Clients can help by coming up with a budget to help us advise them, by identifying assets that are in the community estate that are subject to being divided, and putting documents together to prove any separate property that our clients might be alleging is not subject to being divided.

More often these days, cases start with quite a volume of email and texts back and forth between the parties. A party can start to gather and copy all of those documents—whether it be bank statements, broker statements, deeds on houses, or communication between the parties—so we can help devise a plan of what would be best for our clients and what assets we want to try to get them in the divorce. We can then come up with a realistic budget so that they have the best opportunities to succeed at the end of the divorce process.

Brian, do you have advice for business owners going through the divorce process to ensure their divorce has the least possible affect on their business?

Loughmiller: It's important to realize that even though going through a divorce is a very emotional point in a person's life, they need to take a step back and let the attorneys navigate the process for them.

A mistake that a lot of people make is getting in the middle of the process on every issue. They start ignoring their business and pay more attention to the emotional issues in their divorce. That's why you hire an attorney to be with, to deal with those issues instead of you constantly communicating with your spouse and trying to figure out a way to get through it.

Many people that own businesses spend a lot of time trying to limit the exposure of that business, yet by not co-operating in producing documents and not co-operating in determining value, even when it's to their benefit, they inhibit the business aspect of it.

My message is simply let your attorneys do the work that they need to do, limit your communication directly with your spouse to the extent that it impacts how the divorce is happening, and just go about your work while you let the attorneys work on the divorce issues.

Eric just mentioned the importance of working with your attorneys. Brian, what is the best way to know if a particular lawyer is right for you and your divorce case?

Loughmiller: First of all, the relationship between a family law attorney and his client is a little bit different than the relationship between attorneys and clients in commercial litigation cases or other types of civil litigation, in that it truly is both a business relationship and a personal relationship.

The client has to feel comfortable, not only with the legal advice they are getting, but also in that there is good communication so they trust that the attorney is giving them accurate information and looking out for their best interest. That also requires the attorney to give the client what they might perceive to be bad news. For instance, a client may believe that they want custody of their child, but after listening to the facts you may have to tell them, "I understand that you want custody of your child, but the

facts of your case may not warrant you getting custody, because you travel a lot in your job and you can't devote the time and energy that it takes to be the custodial parent in the judge's eyes." You have to be willing to communicate to the client so that you're not creating false expectations. Building a personal relationship of trust between the attorney and client is very important.

That's the number one thing—you have to walk out of the initial consultation feeling like here's an attorney who's going to advocate for me in my case; here's an attorney who's not going to give me false expectations in an effort to generate a fee; here's somebody I can trust to help me through this process so that when I walk out of it, even though I'm no longer married to my spouse, I can move on with my life, have a good relationship with my children, and continue to operate effectively as a person.

Brian, you've always seemed to be a very straight shooter and I believe that you would tell the divorcing person what they could expect. Has being straight with your potential clients ever cost you a divorce case?

Loughmiller: Absolutely. I'm not going to tell clients something just to get a client. That's a mistake that some attorneys make, because if you create unrealistic expectations and then go to court, have a trial, and effectively "lose" that trial, what's the end result? The end result is an unhappy client who thinks you're a terrible lawyer. I would rather give accurate expectations and have the client decide to go somewhere else because that's not what they wanted to hear, than go through that process.

Most of us that have been practicing law for a very long time understand what the parameters of the result will be of a case. You're not going to know exactly, but you'll know within percentage points how a court will divide an estate and you know what they're looking for in custody issues, so it's not that hard to give an accurate assessment of a case. You shouldn't forgo that just to get a retainer; that's a big issue that lawyers need to deal with.

Eric, when somebody is starting their divorce, what are their options? I understand that you can possibly litigate, mediate, or use the collaborative divorce process. What is the best process for most people?

Higgins: That is dependent on the parties themselves, their personalities, and the issues involved in the case. To go into the collaborative model takes two parties that, despite the fact that they're getting a divorce, do trust each other on a certain level and two lawyers involved in the case that trust each other.

Once you have signed the collaborative agreement, you are essentially locked into that process and to opt out everybody has to get new attorneys, pay new retainers, and essentially start over. To be successful in the collaborative model, you've got to be willing to trust that your spouse is going to be transparent in terms of the assets. All the lawyers have to trust each other so that if expert witnesses are going to be obtained to value businesses, trade separate property issues, or give opinions on child-related issues, you trust that everybody's going to use the same expert and that the experts are not going to be biased towards one of the attorneys.

It takes a lot of trust to lock yourself into the collaborative model, but if you have trust, then it's a good arena to handle the divorce case. There is not an imminent threat of

going to court all the time. Unfortunately, in most of our divorce cases, you don't have that trust between the parties if they are about to start the divorce process.

In the litigation model, one pattern we see is a husband who has been the breadwinner in the family and controlled the finances and a wife who alleges he is very controlling and he wants everything done his way. Sometimes the litigation model might be a better option, because you can get a person like that in front a judge early on in a case and they can see that their spouse is not in control; the judge is in control. It helps to control their expectations.

In the litigation model, if you can't get a case resolved on its own and it looks like it's going to be tried, most judges in Texas are going to ask you to go to mediation, but there are few exceptions. Mediation is a great process to get cases resolved, but one of the things you've got to consider is the cost of mediation. To go mediation with a good mediator and two attorneys can easily cost the parties \$8,000 to \$10,000 in a daylong mediation. You really need to identify the issues that need to be tried in a case, find out if there is a realistic chance that you can settle the case in mediation, and make sure that you've got a good mediator who's going to get in there and really try to resolve the issues before having to go to a trial.

By the way, I did a full half hour teleseminar on the subject of collaborative divorce and mediation with Eric and Brian. I recommend that you visit www.divorcemagazine.com and listen to that teleseminar if you're interested in this topic.

Eric, if you do go the litigation route, what are the best ways to get a family law judge to see your point of view in the courtroom?

Higgins: You mentioned earlier that Brian and I combined have 47 years of experience. I think the most important thing to have when you walk into a courtroom is credibility. The lawyer has to have credibility; the client has to have credibility.

The lawyer builds credibility over time with the judges, and Brian and I have done that. The judges know that if we go into the courtroom and ask for something, it's because we believe it's justified in that case. If we make a representation to the court about what the facts are going to be, they know we're going to have the witness to back that up or the documents to back that up. It goes back to preparation and putting your documents together.

If we try a case and in our opening statement we tell the judge that we're going to show that one of the parties has been siphoning off hundreds of thousands of dollars, I promise you we're going to have the bank statements to show the judge that. We don't make those accusations without being able to back them up.

Once you build that credibility with the court, it's more likely that the judge is going to enter rulings at the end of a trial that are more consistent with what you want, because you've built that credibility in a courtroom.

Let's move on to deal with your spouse or soon-to-be ex-spouse. Brian, what are the best ways to deal with an un-cooperative spouse during your divorce?

Loughmiller: The best way to deal with that is, getting back to what Eric just talked about, you have to show a party or spouse that you're willing to litigate if it's necessary to achieve a fair result.

In a lot of cases, you have clients that continually negotiate with their spouse thinking that it's going to speed up the case or save money or reach a conclusion that they want to reach. With an uncooperative spouse, all that will do is give them a feeling of entitlement or give them what they feel like might have leverage in the case and they will constantly come back and ask for more.

I tell my clients, first of all, that it's my intention to try to settle every case that comes in the door in an effort to preserve a post divorce relationship, especially if they have children. However, if somebody is uncooperative or is not being reasonable, then you have to let your attorney do their job and go to court. Once you go to court, my job as the attorney is to win that case for my client and to come out with a result that I think is fair and reasonable.

In a lot of cases where you get that co-operation is when the person on the other side realizes, "If I don't start co-operating and if I don't start being reasonable, they will take me to the courtroom, they will ask for results, they will put it in the hands of the judge and let the judge ultimately make that determination." A big part of it is that nobody really wants to go to trial, but you have to at least give the impression that you're willing to go to trial if it's necessary.

Brian, you also deal with people who want a prenuptial agreement. We're going to the other end of the spectrum here: people who are thinking about getting married. What's the best way to tell a soon-to-be spouse you would like to have a prenuptial agreement?

Loughmiller: The earlier the better. When your relationship goes from a dating relationship to potentially an engagement or marriage relationship, you need to hit that issue head on, be very direct about it, and talk about it.

When you talk to your attorney about the details of a premarital agreement, the attorney will want to know what discussions you've had with your fiancée. Do they understand what they're giving up or what they're getting as a result of signing one? The negotiation process can become fairly lengthy, especially in cases where you have somebody who has significant assets. There are provisions for disclosure of assets, nondisclosure, and waiver of disclosure and you want to make sure that they've had detailed discussions about that.

By way of example, I did one recently where the parties were talking about the premarital agreement probably for well over a year before the marriage actually happened. Yet, we really didn't get anything drafted or executed until a couple of weeks before the wedding. The attorney that represented the fiancé of my client came into it with the false impression that this had been done quickly, that there had not been much discussion, and that there had not been a lot of exchange of information, which created some difficulty to finalizing it.

The impact of that, as an attorney, I had to tell my client, "Here's the issue, are you willing to delay your wedding? Are you willing to not get married if we can't get it

done?” That’s when it becomes very uncomfortable for the parties. Obviously they want to get married, they were in love and they didn’t want a contractual relationship to impede that.

Start talking about premarital agreements as soon as you start talking about the relationship going beyond a dating relationship and discuss what the expectation is if it gets more serious, including if you are willing to execute a premarital agreement. Then decide at that point, before you get further into the relationship, if this relationship is worth running the risk of not having one as opposed to waiting until you’re already planning a wedding and then suddenly saying, “I’m not going to marry you unless I have a premarital agreement.” That’s a disastrous way to handle it.

Right. Let’s move on to money. Eric, can you give us the best ways to save money during your divorce?

Higgins: Maybe there’s a theme in some of my answers. Many of our divorces these days are very document intensive, whether it be financial documents, whether it be tracing separate property assets from 20 or 30 years ago, or whether it be child-related issues, and they have boxes full of emails and text messages.

One of the things the client can do is put all those documents together and organize them for us so that they are organized when they get to our office and we don’t have to spend time organizing them. We have clients who will, if there’s a proper discovery request or if we ask them to get us some documents, bring us boxes of documents that are completely unorganized. They are just thrown into a box and then we have to go through and find out what they have. It can be very labour intensive for the client. One way they can save money is to help us in organizing those documents.

Another thing they can do is be responsive when we ask them for something. We have clients that, whether they’re busy or they’re in denial about the whole divorce process, when we ask them for documents or to bring us items, they’re not always responsive. When they’re not responsive, we may be facing a motion to compel on a discovery request and spending time in court that isn’t necessary. If they’re responsive to us, that’s going to save them money.

We have to manage expectations for our clients. If our clients, like Brian referenced, let us do our job, listen to our advice, and be reasonable in terms of their expectations of how we get them through this divorce, then that’s going to save everybody some money in the process.

You’ve touched on this before, Eric. Going to court, I’m assuming, is an expensive process. Are there any recommendations you can make to help people avoid having to go to court?

Higgins: Dan, one of the things I touched on before is managing expectations. Once we’re able to identify what issues are contested in a case, look at the evidence on those particular issues, know which court we’re going to be in, and know which judge is going to be making these decisions, then we can sit down with our client and be realistic about the range of possibilities that could happen in the court and get the client to be reasonable.

Another thing that helps cases settle is preparation. For instance, if a client wants us to allege that they have \$100,000 separate property interest in a retirement account, I can send a letter saying we've got the separate property interest, but since I don't have the backup documentation, it's going to be harder to get that resolved.

If our client helps us organize the documents necessary to prove the claims that we need to prove, then the other side realizes that you have a realistic position, you're prepared to go to trial, and you have your evidence to back up your position. At some point, that case is going to settle. It may settle on the steps of the courthouse, but preparation helps get cases settled.

If you've already gone through a divorce and you're owed child support payments that your spouse isn't paying, what's the best way to collect those child support payments?

Loughmiller: One of the remedies that is available in a child support enforcement action is contempt. If you can hold a party in contempt for not paying child support, they are subject for being sentenced to jail. When you've got that big stick hanging over somebody's head, that remedy is probably the one that helps us collect more child support than anything.

There are other remedies available that can be effective at times. You can get a judgment against somebody, but you've got to collect that judgment just like any other judgment. When a child support arrear accrues, there's automatically a lien that attaches; you can send a notice of lien and put liens on bank accounts, retirement accounts, and real estate. As long as the property is not exempt, you have a lien by operation of law.

If a child support obligor is at least three months behind in their child support, we have the ability to attempt to suspend or revoke any licenses that have been issued by the state of Texas. That can be anything from a driver's licence, a medical license, or a law license. If you have somebody who has some sort of license with the state, then once they have a threat of having that license suspended or revoked as a result of the child support arrears, that can also be an effective tool.

Brian, what is the best way to create a co-parenting plan that works for all parties?

Loughmiller: The important thing about creating a co-parenting plan is to recognize that whatever your ways of raising a child were before divorce are no longer the way that you're going to do it.

An example is a situation where you have a stay-at-home mom and a working dad. In most cases, after the divorce, that stay-at-home mom is going to have to have a job where they're out of the home. Maybe for the first time their child has to go to daycare or an after school program and one of the parents is going to have the responsibility of picking them up.

The first thing you have to do is recognize that those changes occur and then look at your schedules—everyone operates off of a schedule these days because everyone's busy—and recognize that the children have schedules as well. If you take your calendar, your spouse's calendar, the activities of your children and look at who has the best

ability to meet those day-to-day needs, you wouldn't have child custody litigation because everybody would operate that way.

There's a reason why the two parents had a child. They both believed at the time they could both be good parents and you have to have a willingness, even in a divorce, to let the other party be a parent to that child. In lot of cases, one side feels like the other person cannot be a good parent and they want to manage everything from who throws the birthday party to who takes the child to soccer, yet they're working—so what are they going to do?

That's where you have to be creative in working out a schedule and realize that if you're not creative and if you don't work together, the judges in Texas are going to follow the Texas Family Code, which has a standard possession schedule that is presumed to be in the best interest of the child. However, that standard possession schedule doesn't work for every family. There are families that don't have weekends off. If you don't agree and you have a possession schedule that says you're going to get first, third, and fifth weekend, what are you going to do with your child when you're at work?

You want to really pay attention to the issues that you have relative to your professions and come up with something that works for both parties and for the child, so that everyone can come out of this, even if they don't like each other as spouses, able to effectively co-parent their child.

Eric, do you have any advice as to how you can help your children through the divorce?

Higgins: All too often, parties use their children as pawns in a divorce case. In the long run, it's only going to do damage. Unless you're just dealing with infants, kids are pretty intelligent; they're sponges and they hear things, they see things, and they pick up vibes from their parents.

You've got to do whatever you can to insulate the kids as much as possible from the issues going on in a divorce. When you're talking to your kids, you have to be honest with them in an age-appropriate manner. Obviously, you don't want to go into detail. We have standing orders and junctions that prohibit our clients from talking to the kids about litigation while it's ongoing, but on some level there's got to be a basic discussion about mom and dad getting divorced, about there being two houses, and about a schedule.

As much as the parties are sometimes focused on the battle, so to speak, they have to be aware of their children and how their children are responding to the divorce process. To the extent necessary, they need to make sure they have counsellors or other professionals available if the kids need to have a third party to talk to about the process.

Right. Brian, what is the best way to make changes to your divorce agreement after your divorce is final? Can you make changes to it and in what areas can you make changes?

Loughmiller: Dan, that's a good question. The first thing people need to realize is that there are things you cannot change in a divorce decree and those pertain primarily to property agreements.

Under the Texas law, the court cannot modify a property agreement, but the court can modify issues related to child custody. For instance, they can modify child support by increasing or decreasing it, they can modify possession and access schedules, they can modify the rights of parties in terms of who makes educational or medical decisions that affect the child. You want to know that so when you're negotiating with your spouse, you don't give up significant rights in an effort to achieve a result on the custody issues.

I've seen time and time again, predominantly moms who seem to be focused on the child custody issues, clients who say, "If I can get custody of my child, I'm willing to give up part of a 401(k)," or some other major asset that they would be entitled to. I have to advise them not to do that, because they could agree to that, get divorced, and a year later their ex-husband could come back and file a modification to decrease child support or modify custody or the possession schedule. In the new litigation, you can't go back and say that you gave up property, because the court's not going to care about that.

The important thing is to understand what you can modify. The process is similar to all other litigation, you basically file a petition, modify your decree, have that served on the other side, and then you start the negotiation process to see if you can reach agreements to modify the decree. If not, you're going to go to court and ask for that modification. If you end up in litigation, you have to prove two things: you have to prove that there has been a material change in circumstance that requires a modification and that the modification is in the best interest of the child.

Often, it depends on what that material change is and how you quantify it, and that is very hard to do. However, that's the process you go through. In every case at the divorce stage, I tell my clients to not only look at what they're trying to achieve in their divorce, but to look at this order and project yourself three years, five years, or eight years down the road, depending on how old your child is. Is this order going to be functional as your child grows or do you think, based on what you're agreeing to, we're going to be back in court in two or three years? You want to avoid having to go to court every two or three years just because something changes in the development of your child, which you can do if you have a really good divorce decree.

My guests today have been Eric Loughmiller and Brian Higgins of the Loughmiller Higgins firm. You can learn more about Eric and Brian by visiting their firm's website. It is www.loughmillerhiggins.com.

This is the fourth in a series of four Divorce Magazine podcasts with Eric and Brian. I highly recommend that you visit Divorce Magazine to listen to the other broadcasts if you're going through a divorce and you live in Texas.