

DIVORCE MEDIATION - A PRIMER

Few topics have created more apprehension and misunderstanding among my colleagues than divorce mediation. The purpose of the present article is to briefly describe the philosophy and procedures involved with divorce mediation in an attempt to allay the legitimate concerns of fellow matrimonial practitioners.

PHILOSOPHY

All attorneys find themselves immersed in a process adopted from Old English common law, known as the traditional adversarial system. The fundamental belief is that diligent advocacy will result in a just and truthful result. The adversarial system is probably well suited for criminal cases, car accidents and contract disputes. However, it is often ill-suited for resolving disputes among family members. Fortunately, the offended party in a criminal or civil action does not have to see the criminal, tort feisor or breaching party each week. There is no need to have a continuing relationship. In family law, when children are involved, quite the opposite is true. Civil contact must occur on an ongoing basis. The adversarial process absolutely, and without apology, aggressively retards the development of an effective post divorce relationship. In many cases, the adversarial process tragically and irretrievably destroys the ability of either parent to maintain a civil relationship.

Divorce is both a psychological and legal process. Mediation, as an alternative vehicle to dispute resolution, readily acknowledges this and maintains as its highest value the integrity and preservation of a quality post-divorce relationship between the parties, whether for the benefit of children or for the dignity of the litigants involved.

There are at least two different models of mediation, one described as academic/passive, and a second described as pragmatic/aggressive. I subscribe to the second and believe it is the most effective way to handle matrimonial matters. I advocate the second position based upon having mediated both civil and matrimonial disputes since 1989.

PROCEDURE

The first mediation session involves conferencing the case with the two litigants and putting them through orientation. First, information is gathered from the litigants the same way an attorney does when meeting with a client for the first time. Thereafter, litigants are provided with a general description of the Court process and the various issues involved in the resolution of any marital estate. Litigants are also provided with various documents, including a blank Case Information Statement, a blank Custody and Visitation Plan, the presumptive holiday schedule, a specific list of issues to be discussed at mediation, a booklet describing the role of the consulting attorneys, and other important materials. They are also provided with the names of consulting attorneys and informed that they must both confer with the consulting attorneys during the process and must have the final Memorandum reviewed by said attorneys before the matter can be reduced to a Property Settlement Agreement.

The second session is not scheduled until the litigants complete Case Information Statements and any other critical discovery is completed, such as valuations or other relevant information-gatherings.

The mediation sessions last no more than one-and-a-half to two hours. The sessions usually total two or three. In all the years I have handled mediation cases, I have never had a case exceed five sessions.

It is also my experience that those parties committed to mediation can complete the process in approximately two to six weeks, total, depending upon the schedules of the mediator, the litigants and the consulting attorneys.

Most mediators do not request retainers. The litigants pay the mediators on a session-by-session basis. A typical two or three session mediation, including time to prepare the Memorandum of Understanding, costs the litigants \$2,500.00 or less.

The sessions are confidential and devoted exclusively to problem-solving. They do not provide an opportunity for either party to vent their emotional agenda or engage in recriminations. The reality is that New Jersey has been a no-fault divorce jurisdiction for almost thirty years. The mediation sessions are strictly business.

At the end of the process, a document is prepared called a Memorandum of Understanding. It is simply a written manifestation of the parties' tentative agreements. The introductory pages of the Memorandum list all dates and times of sessions, all documents reviewed, as statement of the purpose of mediation, including confidentiality and thereafter recites the tentative agreements of the parties. Attached to the Memorandum area the Case Information Statements and any other documents made available by the parties through the mediation process.

The parties are then directed to meet with their consulting attorneys. They are instructed to provide their consulting attorneys with the Memorandum and all attachments before conducting a review consultation. Thereafter, the attorneys convert the Memorandum of Understanding to a more formal Property Settlement Agreement, occasionally with nominal revisions. The matter then proceeds through the Court system in an uncontested fashion.

In terms of selecting mediators, I sincerely believe that experienced divorce attorneys are best suited of the case involves complex financial issues or alimony concerns. However, if the case primarily involves parenting matters, a psychologist or M.S.W. is probably better suited to handle the dispute. It is also possible to use more than one mediator and bifurcate the issues. In any event, I would always suggest that a mediator be approved by the New Jersey Association of Professional Mediators and/or the Administrative Office of the Courts. Lists of accredited mediators are available through the N.J.A.P.M. and the A.O.C.

Burlington County is presently operating a pilot program for economic mediation. Certain cases are being assigned mediation, while others may participate in mediation by

consent. It is anticipated that economic mediation, as well as mediation of other issues, will become a commonplace referral as part of all Case Management Orders.

It is true that not all cases are immediately suited for mediation. If the case is not suited for mediation, it is likely that serious psychological issues exist. In other words, one or both of the litigants are not emotionally prepared to sit down and rationally discuss the issues. I strongly believe that any case can be successfully mediated. However, as acknowledged at the commencement of this article, divorce is both a psychological and legal process. We cannot engage the legal/problem-solving/business decision approach if either party remains seriously impaired from an emotional or psychological perspective.

I respectfully submit that dogmatic adherence to the traditional adversarial practice in all family law matters is inconsistent with our fiduciary obligation to litigants. We must explore reasonable alternatives to litigation. It is time the members of the matrimonial Bar acknowledge this fact and move into the twenty-first century, embracing mediation and other forms of A.D.R.