

ARTICLE

FAMILY LAW MEDIATION: A PRACTICAL ALTERNATIVE TO STAYING OUT OF COURT

When people are faced with sensitive family issues, whether it is divorce or custody, it is an all too common knee-jerk reaction to hire an attorney and head to court. And why shouldn't they, right? There are complex forms to fill out, they are not knowledgeable of the legal process or the law and there are sensitive issues that are of the utmost importance, such as children and finances. However, there is a better way...mediation.

In traditional litigation, both parties typically hire an attorney and then try to "win" their case in court. Communication is often stifled because communication is done through the attorneys, which is only one of many things that are billed to the clients. Stress between the parties increases to an all-time high with everything, from worrying about what will happen with their home and their children to the stress of appearing in a courtroom in front of a judge. An inordinate amount of stress comes from "the unknown." When one travels down the path of litigation, since the law is very grey, one is heading towards the unknown.

The old adage "a bird in the hand is better than two in the bush" is a great way to define one of the largest positive differences between mediation and litigation. Here is how that phrase relates to litigation and mediation: While there is a *chance* that one could obtain more of what they want in litigation, one or both parties can also walk away with much less. Litigation is akin to rolling the die at a craps table: the parties argue their case in court, only for the court to determine the outcome, applying the law to their particular facts. With mediation, both parties have the control over their own outcome, allowing them the opportunity to negotiate positively and creatively. I was informed of a very powerful statement made by a judge regarding a particular case that involved two parents fighting over their children, which went something like this: "I don't even know the color of your children's eyes, and you both want me to make a decision about your kids?!"

Oftentimes, people have a misconception that they can go to court and they'll get what they "deserve" under the law. Unfortunately, it is this flawed thinking that causes so much financial loss and emotional heartache in court derived from a false sense of security that the law will "take care" of them. The reason this type of thinking is damaging is because the law is far from black and white, subject to many different interpretations; additionally, the law often allows for wide discretion and flexibility as far as what the judge can ultimately decide

with a particular issue. The stark truth is that there is just no guarantee of an outcome in a litigated case.

In mediation, on the other hand, the parties retain control over their own outcome by coming to acceptable agreements on all issues, without someone else in black robe deciding their family's fate. The "grey" is removed in mediation, which gives the parties a sense of control and, thusly, comfort in the negotiations and the outcome. The parties work together with a mediator to positively and creatively resolve their issues with no court intervention, thereby relieving the stress of going to court and wondering what outcome the judge will provide them. In mediation, both parties are guaranteed at least the one bird in their hands, with a focus on being flexible, sensitive to the other person's concerns and a willingness to compromise to obtain an acceptable resolution.

Unlike litigation, private mediation is completely confidential. Other than various documents that may need to be filed with the court, the entire process is kept within the walls of the room used for the mediation. Although the mediator can be an attorney, there is no advocacy for any one party; rather, the mediator is completely neutral to the process and impartial to the outcome. The mediator is there to assist in the negotiations by providing a safe, confidential and balanced environment that allows the parties to brainstorm and come up with creative solutions to very sensitive topics.

With a family law attorney mediator, the parties can go through the mediation process with an understanding of the "shadow of the law." This means that the attorney mediator can provide feedback to the parties as to what the law states in a particular area of their case. Whether the mediation proceeds in the shadow of the law depends entirely upon the wishes of the parties.

Studies have shown that divorce litigation cost is typically almost three times the cost of a mediated divorce. This is no surprise since, in litigation, there are typically two attorneys that are being paid and the fight over who is going to "win" often lengthens this process. In mediation, parties are not required to hire an attorney, although it is their right to do so at any time. Additionally, if there is an area of the case requiring expert opinion, typically both sides hire experts to battle over the issue. Costs are lower due to the efficiency in the process. For example, in mediation, the issues are timely dealt with in a series of meetings, which often speeds the process along. Additionally, if an expert is required, the expert comes in as a joint *neutral* expert, avoiding the need for battling experts.

Litigation focuses on the past, as where mediation focuses on the future. In mediation, the parties problem-solve creatively to come up with long-term resolutions. As such, unlike litigation, which tends to focus on short-term gain, the focus in mediation is on a "win/win" resolution that works best for everyone, including any children that are involved.

Private mediation is a completely voluntary process. It is the parties that make their agreements, not a judge for them. Many family law issues are very sensitive, whether it is discussing an appropriate parenting plan for any children or finances. Sometimes emotions can run amuck and cloud one's logic. But it is always important to keep in mind the harsh alternative...litigation. Through respectful, positive, persistent and creative effort, mediation provides an environment conducive to overcoming any dilemma.

“Where there is a will, there is a way.”

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