

Mediation for Divorce: A Sensible Alternative to Litigation

Debbie Schneider

Alternative dispute resolution (ADR) is gaining in popularity both in the general community, as well as the legal community. Many states and local governments are now requiring matters to be subject to ADR before the dispute even enters the formal litigation pipeline. There are four main categories. The first is negotiation. Negotiation most typically does not involve any third parties, but the basic principles of negotiation are used by the parties themselves. There may be coaches in the background offering the parties advice, but their role is strictly informal. This model requires highly motivated parties to succeed.

The second type of ADR is arbitration. Many different types of disputes are handled by arbitration; typically union, labor and insurance matters. The parties have a contractual obligation to enter into the formal arbitration program and a decision is imposed on the parties. The arbitrators are typically third parties acting in quasi-judicial capacities.

The third type of ADR is collaborative law, most often utilized in divorce cases. The matter is resolved, using contractual guidelines, and sometimes the attorneys involved have been trained in collaborative law principles. There may or may not be third parties and sometimes experts, assisting the parties and their respective attorneys. Most often the contract also specifies that the parties will not resort to traditional litigation to resolve the matter. No one imposes a resolution on the parties.

The fourth subset of ADR is mediation.

Parties in mediation utilize a third party professional to assist them in resolving the matter. The mediator is always committed to neutrality and will never take sides in a dispute. There is no resolution imposed on the parties, but many mediators will propose what they believe is a fair and reasonable compromise.

The subject of this discussion is mediation for family law issues, primarily divorce.

With the help of third party professionals, couples are able to arrive at a healthy compromise and move forward with their lives. They are able to retain much of their marital estate rather than dissipating their assets in litigation; not waste time in the limbo and angst of endless litigation and most importantly maintain the good will that they have for each other. Good will is vital to couples with children; the parties may be contemplating no longer being married, but those two people and their children are still a family.

In addition to attorney-mediators, other professionals, including family/child therapists and CPA-Accountants, are part of a basic mediation program. The first step is for the clients to participate in a disclosure process in which they submit relevant documentation to support their assets and liabilities. They supply the most recent three years of personal income tax returns, and if there is a business at issue, the business/corporate returns are requested as well.

Every couple's divorce is unique, so although the facts are different, the approach taken by the mediators is similar for every couple. Address the facts, find out each party's position, making sure each party's position is clearly understood by the other party, and work at a compromise until each party is satisfied with the result. Ideally, the parties will be amicable, but it is not necessary. The parties have to agree that mediation is their preferred forum for resolution,

and they have to agree to participate in good faith. If they can make those two decisions, many couples will be successful in mediation.

Parenting Plans and Custody

For couples with minor children, often the most important issue is custody of the children. Any couple in Pennsylvania with children under the age of 18 and who have not graduated high school are subject to the custody laws. I truly believe that for many couples the only real issue is their children. They know that their divorce will be an adjustment, (often an enormous adjustment) but as "grown-ups" they are prepared to face it. What they have a much harder time reconciling is the impact that they know the decision to divorce will have on their children. For these couples, they are seeking expert guidance on transitioning their children from one household to two households, and all of the philosophical underpinnings that support that transition. Additionally, many of our couples have not told their children of their plan to divorce; they are seeking counsel from a professional on how best to tell their children that everyone's life is about to change.

The custody laws provide for modification, so provisions to review and modify are always built into parenting agreements.

The Heart of the Process – Financial Mediation

Mediation should address all of the financial issues of the parties, and should be conducted by a family law attorney-mediator.

The marital residence and its ultimate disposition should be discussed, as well as any other real estate.

The retirement assets are discussed as well, and if outside valuations or input is required, plans are made to obtain those expert opinions as well. The investment community, financial planners, and the

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parties own CPA's are often consulted here and asked to provide necessary advice and counsel. Dividing retirement assets in divorce often require the use of Qualified Domestic Relations Orders (QDRO), created and governed by the ERISA statutes. Third party providers can draft and process the QDRO for the parties, if need be. Although the appellate courts in Pennsylvania would prefer that each party retain their own retirement assets, it is often necessary to split the accounts, and QDRO's are valuable tools in a divorce, providing a means to save taxes and penalties.

Child support, spousal support and alimony are discussed and an agreement is reached with regard to these issues as well. Every issue should be discussed, and a basic agreement is reached.

Tax Issues

The divorce laws in Pennsylvania and the tax laws intersect very dramatically. Some time and effort should be devoted to addressing the tax issues. This is something that litigation attorneys won't pay any attention to because they feel that the tax consequences are for another place and time.

If the parties have ownership interests in any business, or they are self-employed, an accountant may play a larger role. They may be doing a business valuation consistent with the guidelines established by the IRS, at IRS Manual, Chapter 48, 4.48.4 Business Valuation Guidelines, or they may do an income analysis to determine appropriate income amounts for child and spousal support calculations.

The Agreement

Once all of the mediations are completed and the parties have reached a satisfactory compromise, the attorney-mediator creates the first draft of their

Marital Settlement Agreement. The parties meet and review the Agreement together, making revisions as necessary. The attorney-mediator then provides a second draft. The parties are advised to have the draft Agreement reviewed by an attorney of their choosing.

Many couples forego the second opinion only because they are already at peace with the agreement that has been reached, but they always have the option of a second opinion. The Agreement goes through as many drafts as necessary, and it is executed by the parties.

Estate Issues

Couples are advised that their divorce will create changes for their estate, and that they need the advice of competent counsel to revise their Wills/Trusts. For some couples the divorce is the very first time that they have ever thought about their testamentary plans; many already have children.

Fortunately, many couples are motivated to create an estate plan, looking forward to their impending status as a single person.

Financial Planning

If possible, it is a good idea to meet with a financial advisor.

The Divorce

The divorce laws were revised in 1980 in Pennsylvania; at that time the no-fault divorce statutes were created. With that action, the legal requirements and ramifications became less onerous. Either party could be the plaintiff because there is no legal significance to being either the plaintiff or the defendant.

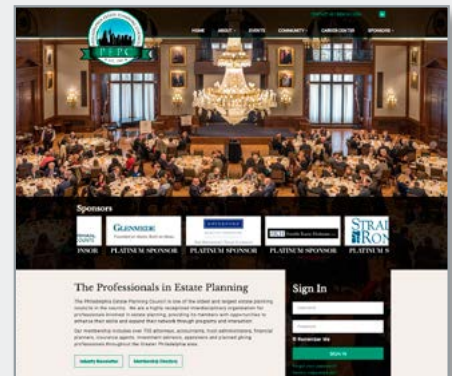
The parties do not have to set foot in a Courtroom, and most couples are extraordinarily pleased when told how simple it is, to be completed through first class mail.

Other Family Law Issues

Mediation is an extremely useful forum for resolution of any family law issue, adoption, custody, and of course prenuptial and post-nuptial agreement. It is an idea whose time has come.

Debbie Schneider is an attorney mediator at the Alpha Center for Divorce Mediation, joining the organization in 2005. A graduate of the Villanova University School of Law, Ms. Schneider's previous experience includes all facets of matrimonial and family law, both in private practice and as a clerk presiding over family court matters.

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