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Divorce Mediation: Frequently Asked Questions

By Joan C. Thomas, Esq.

1. What is divorce mediation?

Divorce mediation is a non-adversarial, voluntary process chosen by couples who have decided to obtain a divorce. It is not therapy or counseling, but rather a conflict resolution system. A couple who has decided to mediate is choosing to work as a team to resolve all of their divorce issues which may include -- without limitation -- division of property, division of debt, child and spousal support, and child-sharing issues.

2. How is mediation different from simply hiring an attorney to handle your divorce?

In choosing mediation, a couple is choosing to retain a divorce mediator and attend a series of meetings to work out reasonable solutions. If the spouses decide instead to have attorneys handle their divorce, they each have legal representation and pay a professional for that representation. They choose to participate in the litigation process, which may include court hearings, depositions, subpoenas, and demands for production of information. The process can be long, expensive, and very stressful. It can also be a demoralizing process with each party attempting to continually attack the other to enhance his or her position. The result is usually that any disagreements between the parties are exacerbated.

3. My spouse and I do not get along at all. Do you think we can participate in divorce mediation?

Couples do not have to "get along" to successfully mediate. Divorcing spouses usually do not get along, but they can mediate if they are willing to talk with one another and have, as their common goal, obtaining a divorce without going to court. They have to be willing to commit to the process until it is complete. The quality and effectiveness of the communication varies widely from couple to couple, but one of the mediator's jobs is to help couples with their communication skills to the extent necessary to complete the mediation. The mediator will also help the couple focus on the issues necessary to complete the process and not be sidetracked by discussing irrelevant past events and hurts that may stall or end constructive progress.

4. What is the difference between retaining a mediator who is an attorney and one who is not?

Individuals who practice mediation have generally received specialized training as a mediator. They learn techniques and skills to help individuals reach agreements, while at the same time remaining neutral themselves. Mediators come from a variety of professional backgrounds. Those who deal with family law and divorce are usually either attorneys or therapists. Occasionally, they have training in both of those fields.

If a mediator handling a divorce or other family law matter is a therapist but not an attorney, he or she would typically go through the same process as an attorney/mediator in order to reach agreements, but once the agreements are reached, the couple would be referred to an attorney to draft and file all of the necessary legal paperwork, according to the instructions of the mediating couple.

If the mediator is an attorney, he or she could handle both the mediation and the drafting of the paperwork on behalf of the couple. The attorney would then encourage each party to have that paperwork reviewed by consulting attorneys who are retained by each of them prior to signing and submitting it to the mediator to handle the filing. An attorney/mediator can also, during the course of the mediation, discuss the law as it relates to the issues of the divorce and give the couple a framework within which to discuss these issues.

5. What is the sequence of events in mediation?

The first step is for the mediator to meet with the couple and have an introductory session in which the couple signs a mediation agreement and a fee agreement and has all of their questions about mediation answered. If the mediator is an attorney, the couple would then instruct him or her to draft and file the paperwork necessary to open a divorce case on behalf of the couple. This typically happens near the beginning of the process so that the court's jurisdictional time requirements begin to run.

Subsequent meetings are held depending on the schedule of the couple and the mediator. They are typically 1 1/2 to 2 1/2 hours in length but may be longer if one party is from out of town or has a difficult schedule. The frequency of the meetings varies, depending upon the couple's situation. The meetings may be farther apart if it is necessary for the couple to gather information and have appraisals done between sessions. The number of meetings usually depends upon the complexity of the couple's estate and the difficulty of reaching agreements. If the couple has children, for example, they need more time with a mediator than a couple without children needs. If the couple owns rental properties or businesses, more time would be needed to discuss these.

Once all matters are discussed and agreements are reached on everything, the final agreement and accompanying paperwork is drafted by the mediator and forwarded to the couple for review and consultation with their attorneys. The final step is for this paperwork to be filed with the court.

6. How long will it take to finish the mediation?

It takes every couple a different period of time to complete divorce mediation. It depends in part on the number of issues the couple has to discuss and on the complexity of their estate. But it also depends upon a number of other factors. These could include difficulty in dealing with the emotional aspects of divorce, trial periods for child-sharing schedules, and the desire to wait until a large asset is sold prior to making a final decision on division of other assets. The length of a divorce mediation process could range from six weeks to 2 to 3 years. The average length of the process in my experience is six months.

7. What happens if my spouse does not follow our agreement?

Once an agreement is reached by a mediating couple and filed with the court, it has the same force and effect as an order made by the court. The court approves the agreement when it is filed and therefore if a problem arises in the future with following the agreement, either party can go to the court and ask for its help in enforcing the agreement. An alternative option would be to return to mediation. Sometimes, an amendment to the agreement, acceptable to both parties, solves the problem.

Joan Thomas is a licenced attorney and advanced practitioner member of the Association for Conflict Resolution (formerly the Academy of Family Mediators).