New Jersey Law Journal

VOL. CLXXXV– NO.7 – INDEX 616 AUGUST 14, 2006 ESTABLISHED 1878

FAMILY LAW

Mediate or Litigate

Which is best for your divorce client?

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As divorce lawyers, it is our job to advocate, negotiate and, if necessary, litigate. In certain cases, it is imperative to file motions, hire experts, take depositions and prepare for trial. Yet, we all know that divorce cases become even more contentious once the parties dig into their positions and back up those positions with documentation, expert reports, Early Settlement Program memos and witnesses.

Because of the time, expense and uncertainty of the outcome in litigating a divorce case, there is a growing trend toward divorce mediation. Not all cases can be successfully mediated, whether due to the personalities of the parties or the positions taken by those parties. Many cases can be mediated, however, if the soon to be ex-spouses come to the table early enough.

The courts have already implemented two types of mediation in divorce actions. The first has to do with custody and parenting time issues. In any case where custodial time is a genuine and substantial issue, the parties will be referred to mediation through the court system. These mediation sessions are closed to the public, and the parties generally go without their attorneys. It is an opportunity for them to discuss their views on custodial time with a trained professional in the very beginning of a divorce case and, hopefully, come to some resolution.

In several New Jersey counties (Atlantic, Bergen, Morris, Ocean, Somerset and Union) there is a pilot program for mediation of the economic aspects of family actions. Under this pilot program, if the parties have not settled their financial issues after having participated in the Matrimonial Early Settlement Program, then an order of mediation referral will be entered. The parties must meet with a mediator, on the court-approved list, to discuss their divergent views on whatever financial matters they have not been able to resolve. Under this program, counsel for the parties are encouraged to attend at least the first mediation session.

While this pilot program has been successful in the counties in which it has been implemented, one questions whether going to mediation after the Matrimonial Early Settlement Program, which is generally six to eight months into a case, is too late. The parties have already expended much time, effort and money in conducting discovery, filing motions, meeting with the Early Settlement Panel and hiring experts.

Since one of the benefits of mediation is saving time and money, mediation should take place fairly early in a case. In addition to saving time and money, there are several other benefits to mediation, as opposed to litigation. It is meant to be a nonadversarial process in which the parties have a forum to solve their problems and maintain their relationship, most often because of the children. It's a process where the focus is on interests rather than positions. Litigation tends to pit the parties, one against the other, with each digging in their heels and fighting to the death, whereas mediation strives to direct the parties to focus on what is in their best interests, as well as those of the children. Further, mediation is private. Outside intervention is basically limited to the mediator, although experts may be consulted if necessary. The mediation process will be less expensive than litigating the case and the process is faster because it is done on the parties' time line, not the courts'.

To give a better understanding about when and how mediation can be helpful in individual cases, consider the following scenarios.

Scenario One: You consult with

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your client, find out that he and his spouse wish to get through this difficult period by amicable resolution of the issues. They do not hate each other, they have just grown apart, and they each need to move on.

This scenario seems ripe for mediation, since the parties appear to want to be nonadversarial. Yet, they recognize they have issues they want to resolve and are ready to engage in a process which will deal with their issues. If the parties can come to the table and discuss their disputes face-to-face with the help of a facilitator, it would appear that the benefits of mediation — that it is nonadversarial, private, less expensive than litigation and faster — would truly benefit this couple.

Scenario Two: The case has just begun. The parties wish to try to resolve their issues to keep an amicable relationship for the sake of their children. You have no doubt that the financial issues can be worked out with a minimal amount of discovery and negotiation. But both parties want primary residential custody of the children, each for their own very valid reasons, and this issue is preventing the parties from reaching an agreement on the financial issues.

In this case there are two options. The first is to file a Complaint for Divorce. Since custody is an issue, the parties will be referred to custody mediation through the court system, and perhaps with the aid of said mediator, the parties will reach an agreement. The drawback may be the number of hours a state-employed mediator will be able to give to these parties. If they can't reach agreement in a limited amount of time, the case will be referred back to the court and a custody trial will be scheduled, compelling the parties to obtain custody evaluations and prepare for what generally turns into a bitter custody dispute. The other option is for the parties to choose a private mediator to wade through their custodial issues. Not only do the parties pick the mediator of their choice, they can also determine how much time they are willing to put into resolving this dispute. If a complaint has not yet been filed, time is on their side and no court calendar will be forcing them to settle or litigate within certain time limits. Once the custody issues have been resolved, it may be much easier to settle the financial issues.

Scenario Three: You are retained by your client, delve into all the issues, find that there is a potential tax problem in that the parties did not claim all of their income from a closely held business for several years. Alimony and child support are going to be very sticky problems because of this, including pendente lite support, which must be addressed immediately.

If the Court learns that the parties have not reported income to the federal or state government, it has a duty to report same to the IRS and the state taxing authority. Knowing that this could happen, you can't put your clients in that venue with such potential consequences. If the parties take their issues to mediation, it is a private matter, and this information will hopefully never come to the attention of the court. In this scenario, mediation will not only help the parties reach agreement on support issues, it will keep them from incurring fines and penalties and perhaps even criminal prosecution.

Scenario Four: You have negotiated all the main issues, including alimony, child support and equitable distribution. Now the parties are squabbling over the division of furniture and furnishings and a myriad of other smaller issues, such as the income tax refund, who drives the children to the other's residence for custodial time and who is responsible for the late fees on the home equity loan.

In the above scenario, you are just about tearing your hair out after negotiating and reaching an agreement on the major issues. If you have to continue writing letters or making phone calls over a four-page, single-spaced listing of furniture, you feel you should surely turn in your license to practice law. And every time you settle one small issue, five more pop up. Mediation screams to you in your sleep. And it is the perfect answer. The cost to the parties in legal fees will be halved, and one facilitator will work with the parties, face-to-face, to work through each and every issue until they are all resolved. This will help the parties bring the matter to closure and help their attorneys save their sanity.

It must be noted that mediation does not obviate the need for each party to be represented by counsel. During the mediation process, each party is encouraged to meet with an attorney to explain their rights and obligations under law, so that they may come to the table and mediate their interests with some knowledge of those rights and obligations. Once the parties reach an understanding at mediation, the mediator turns those agreements into a written memorandum of understanding, and each party's attorney must review the document with the client to make sure he or she understand the agreement in light of that party's obligations and rights under law.

Mediation is not right for everyone. It works best for those who recognize they have a dispute, agree on the need to resolve it and want to actively participate in a process designed to settle their dispute with a minimum of outside intervention. As attorneys, we can assess the situation between our client and the spouse, determine whether mediation would benefit that client and, if so, guide the client through the process. ■