



Keys to a Successful Divorce Mediation

By Jake S. Duessa

What is Divorce Mediation?

Mediation is an out-of-court dispute resolution method. It's normally used by divorcing couples to clarify and resolve issues such as asset allocation, child and spousal support, child custody, co-parenting plans, and so on.

Mediation is led by a professional and certified mediator, who can also be a divorce lawyer. The mediator works with you and your soon-to-be-ex spouse and negotiates issues in an impartial manner. All meetings are confidential (provided that a child's safety is not threatened, or criminal behavior is not identified).

During mediation meetings, the mediator offers suggestions, advice, ideas and options, with the goal of enabling both spouses to arrive at detailed agreements. Agreements are typically reviewed and subject to endorsement or modification by each spouse's divorce lawyer.

Mediation Rules Differ in Various Jurisdictions

It's essential to "do your homework" and determine how the practice of mediation applies to your jurisdiction. In some jurisdictions, mediation is voluntary; in others, it's mandatory. Furthermore, different jurisdictions follow different rules. For example, in some

jurisdictions, both spouses are brought into the same room to discuss matters (though there can also be one-on-one sessions with the mediator). In others, spouses are placed in separate rooms and the mediator goes back and forth trying to narrow issues and settle matters. Additionally, in some jurisdictions, a mediation agreement is irrevocable and binding; in others, it's not.

Benefits of Mediation

The most valuable benefit of mediation is also the most obvious: it's not court! That is, it's a way to potentially help spouses resolve their divorce issues without litigation. As such, when it works, mediation can be a relatively swift, low-stress and affordable route. It can also help you and your spouse preserve your dignity, your relationships, and avoid the lingering and destructive bitterness and animosity of litigation – which is vital to any co-parenting duties you may share in the future. And even when mediation cannot resolve all issues, it can potentially take care of some of them, which lowers the number of issues for litigation if that becomes necessary at a later date.

Another benefit of mediation is that you can enter into unique agreements that a Court cannot, or will not, do. For example, in some jurisdictions, spousal

maintenance is limited to a specific duration (e.g. three years), and to either a percentage of the obligor's gross income, or a fixed amount (whichever is less). However, mediation allows spouses to shift a greater percentage of the assets to the obligor in exchange for more spousal maintenance.

Time is another big advantage of mediation. When you're in Court, you must operate on the Judge's schedule. And that means if the Judge asks you a question, you must make a relatively quick decision, because you don't have the time to explore all of the options available to you. In mediation, you have as much time as you want to get the information you need to make an informed and comfortable decision, and advance towards the resolution of your case.

Overcoming the Barriers to Successful Mediation

As described above, mediation seems like an ideal option; but it's not without potential barriers, any of which can undermine and render the process ineffective, and send both spouses marching angrily into court. Below, we look at the common barriers to successful divorce mediation, and how to overcome them before they turn a potentially ideal option into a costly and regrettable nightmare.

Barrier # 1: Inability to look past the hurt and anger

Mediation requires separating subjective opinion from objective issues — which is something that some couples cannot manage in the first few weeks, or even months, after their divorce is filed. However, you do yourself and any children involved a tremendous service if you can put aside your hurt and anger, and focus on resolving issues. Therapy and counselling can play a beneficial role here, as can a break from mediation sessions, so that both of you can step back, cool down, and re-focus on what matters the most: resolving issues as fairly, quickly and affordably as possible, given the realities of your unique case.

Barrier # 2: Spouses not at the same emotional phase

It's common for spouses to be at different emotional phases or stages during mediation. The spouse who first filed for divorce is typically further emotionally along than the other. And a spouse who now has to enter/re-enter the workforce on a full-time basis likely won't be as secure as the other. Then there's the complex problem that arises when one spouse doesn't want the divorce, and feels that things can still be worked out. In order for these factors not to undermine the mediation process, the mediator will need to use a variety of techniques, such as reality-testing, to help both spouses get on the same "emotional page," and focus on resolving issues instead of opening and re-opening new wounds. You and your spouse must commit to being realistic and accepting that divorce is a process you must go through, one way or another.

Barrier # 3: Not disclosing required information

One of the key causes of marital breakdown is a lack of trust. However, mediation requires that both spouses fully disclose their financial information, and anything else that the courts deem relevant. Unfortunately, due to the lack of trust noted above, plus the stress and trauma of divorce, honest spouses can do dishonest things during divorce, and fail to make full disclosure. It's easy to see how this can severely undermine

mediation and add more fuel to the fire. A skilled mediator, however, will educate you and your spouse on your legal obligation to make full disclosure (if they are dealing with legal related issues), and help you understand the consequences of dishonesty — both in terms of how it will render the mediation session useless, and how it will be handled by the (very unimpressed) Judge.

Barrier # 4: Thinking of litigation as a smart back-up option

Some spouses believe that litigation is a kind of "trump card," which they can pull out if the mediation sessions don't go their way. This is a myth! According to family lawyers, Judges and especially divorced people who have gone through the expense, stress and uncertainty of court, litigation should be viewed as the last resort. A skilled mediator will try to help you and your spouse understand the realities involved; especially with regards to litigation. You should seek out quality information from credible sources, and reject well meaning "advice" from friends and others, which could put you on the wrong road — which is towards court.

Barrier # 5: Not knowing one's priorities

Mediation requires that you and your spouse discuss your priorities and, indeed, make concessions in order to achieve consensus on as many issues as possible. Unfortunately, many spouses don't know what their priorities are when it comes to allocating assets and other divorce-related decisions. They either dig deep on issues that are simply not as important as others in the bigger picture (such as fiercely demanding certain assets for sentimental value), or they want everything — and won't budge. When this happens, the mediator's task is to try and help you and your spouse to articulate your individual priorities. Various tools and tactics can be used here to achieve this goal. Spouses can also avoid this pitfall by making a list of priorities and by understanding that, regardless of their feelings, they must learn to talk things over and "give and take" with each other — if for no other reason than it's in their self-interest to do so.

Barrier # 6: Not being prepared

It's up to you and your spouse to be prepared, and to understand how your decisions today will impact your lives tomorrow. Unfortunately, preparation is easier said than done during divorce for two reasons. Firstly, the severe emotional stress of divorce makes "being organized" a challenge, compared to a less stressful time. Secondly, because you may simply not have the facts (e.g. financial documents, etc.) you need on-hand, you may need time and help to gather, organize and understand them. While both of these factors are understandable and for many people unavoidable, it remains a fact that not being prepared can undermine what could otherwise be successful divorce mediation; even if both spouses genuinely want to make it work.

Mediation: It's worth a Look

The most compelling argument for making your mediation process work is to consider the alternative: a fractious, confrontational litigation process is going to cost thousands (or more likely, tens of thousands) of dollars, and cause stress and emotional wounds that may not heal for years. And since court by its very nature is an adversarial process, the damage you inflict upon your spouse, and receive in return, can make co-parenting or any other future co-operation painful; or maybe even impossible.

The bottom line? Alongside other alternative divorce resolution options, mediation can be a beneficial choice for you and your spouse if you have the ability to work with your mediator and, to a meaningful extent, work together.

If you and your spouse can avoid the pitfalls described above, you could be on a path to your new, post-divorce lives as quickly, painlessly and affordably as possible. ■

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