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Mediation Article

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No-Fight Divorce

By Brette McWhorter Sember, J. D.

Mediation is a flexible and creative process that encourages finding solutions that both you and your spouse can live with. Before you can decide if mediation is a viable option for your situation, it's important to get a clear picture of what mediation is all about.

Mediation is a type of alternative dispute resolution (a problem solving method) that was first used in divorce and family law in the 1970s when attorneys and other divorce professionals became dissatisfied with the process. (This was also around the time when more and more people were getting divorced; skyrocketing divorce rates created a great demand for services.) They were frustrated that divorce had to always be about conflict. There was no cooperative element, and spouses were pitted against each other as if they were in a war. It seemed incongruous that people who had once lived together and raised a family were suddenly encouraged not to speak to each other and act as if all they wanted to do was win. The founders of the divorce mediation movement believed that there were better, more therapeutic ways to end marriages than the traditional adversarial process.

The Basics of Mediation

Mediation is a process in which two spouses work together with a neutral third-party mediator to reach decisions about the issues involved in their divorce. Mediation is also often used in other family law cases - such as custody disputes, child support cases, or visitation problems - between couples who are already divorced or who were never married.

- **Mediation gives the control back to the couple.** Throughout your marriage you made decisions together about how you were going to live your lives, raise your children, and manage your money. Just because you're getting divorced does not mean you should simply hand over all of those decisions to someone else. Mediation allows you to make decisions together that will affect the rest of your lives. When you allow a judge to decide your case, he or she never truly gets to know you. The judge never talks to you alone and gets to know your feelings. In fact, the judge might never even hear you say a single word! Judges decide divorces according to set rules and standards, based only on the evidence that is presented in court. They don't have time to make each decision personal and tailored to the couple's needs. But when you use

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mediation, you can personalize your divorce agreement and incorporate everything that is important to you. You and your spouse make choices that are suited to your specific situation, which you both agree to.

- **Mediation is about compromise.** Many people think that divorce has to be an all-out war. The way we often talk about divorce is very confrontational: "take him to the cleaners," "win custody," and so on. Divorce doesn't have to be about conflict, winning, losing, or punishing the other person. Mediation approaches the divorce process with compromise in mind. You and your spouse each have outcomes you would like, and often these are very compatible with each other. When you don't agree, mediation helps you find a way to compromise enough so that you both walk away believing that you've reached a fair and livable decision.
- **Mediation is about problem solving.** There is an array of decisions to make when you get divorced, and many are not easy. The mediator helps you think in a logical and orderly way about the problems confronting you, helps you understand the decisions you need to make (many of which are not obvious to you at the beginning), and helps you discover and create solutions that are tailored to your specific issues. When an issue is resolved in mediation, it is not about one person getting what he or she wants and the other person losing. There are no losers in mediation.
- **Mediation emphasizes self-determination.** You and your spouse have the power to make decisions about your own situation. To make decisions you must become empowered with knowledge. The mediation process helps the parties become knowledgeable about the law, their situation, the other person's position, and all the options available. Mediation opens your eyes to possibilities you might not have considered and gives you the power to decide what you want to do.
- **Mediation is flexible.** Mediation is designed to allow you and your spouse to choose solutions that are carefully crafted to meet all of your family's needs. Cookie-cutter solutions, often found in traditional divorce court, are not imposed upon you.
- **Mediation has no time limits.** In most cases, unless you're in court-ordered mediation, you can take as long as you need to decide things. You have time to think and talk through the issues. When you go to court, there is often a rigid time frame in which your case must be decided. Mediation gives you the freedom to think things through and see how they develop. Sometimes you just can't know if a solution or an arrangement is going to work until you've actually tried it. In mediation you have time to do that.

How Mediation Works

When you decide to mediate, you and your spouse will meet with a mediator for approximately six to ten sessions, each session lasting between one and two hours. You can create a schedule that suits you and your spouse and meet for as many sessions as you need, although many mediators recommend meeting once a week if possible so that you can keep the ball rolling.

The mediator guides you through all the decisions you must make in your case and explains how your decisions will become part of your divorce agreement. Your mediator is your guide, not a decision maker, who suggests options and helps you analyze

When mediation may not work

Successful mediation requires two individuals who are able to put their emotions aside and find solutions that allow each of them to achieve a positive result. Here are examples of situations in which mediation may be impossible:

- If there's been family violence and one spouse is afraid.
- If there has been child abuse.
- If there's a significant power or financial imbalance in the marriage.
- If one spouse won't agree to mediation, won't continue mediation, or won't "play fair." Remember, it takes both of you, and you both have to want it to work. - Diana Shepherd

raising your children together.

Who Are Mediators?

Mediators are trained professionals who guide you through the decisions facing you. Mediators are often attorneys or therapists and should have specific training and experience in divorce mediation.

What Mediation Costs

Mediators normally require a retainer (or up-front) fee, which is applied against work done out of sessions and from which the fees for the first few sessions may also be deducted. Once the retainer fee is used up, you are billed hourly for the mediation sessions and only pay for the time you actually use. Mediation rates vary across the country, depending on the mediator's experience and qualifications.

Even though you will be retaining an attorney and a mediator, the cost of a mediated divorce ends up being much less than a traditional one. It simply takes many more hours to have an attorney litigate your case than to have a mediator mediate your case, and litigating attorneys usually charge a higher hourly rate than mediators. Even though most divorce cases do settle before they go to trial, attorneys must prepare for trial in case it does happen. In fact, most settlements come on the eve of a trial, when all the trial preparation has already been done (and charged to your account).

Important Aspects of Mediation

Mediation has three important components, which make it a process that is fair and user-friendly.

Neutrality

Your mediator will remain completely neutral throughout the entire process and will act as your guide and resource. He or she won't take either person's side or try to convince either one of you of anything. He or she will act and appear completely impartial and unbiased, without having any particular stake in any outcome. It is important that both parties believe the mediator is neutral, because if there are any lingering doubts, it will be difficult for both of you to trust the mediator and listen openly to his or her suggestions.

Some mediators refuse to meet separately with either party because it can make the other spouse feel suspicious. Other mediators have no problem doing this but set clear ground rules. You might agree that everything you discuss in private with the mediator remains private and is not shared with the other spouse, or you might agree that anything that is discussed is information that can be shared with the other spouse.

Confidentiality

Everything you discuss with your mediator is in confidence, and he or she can't discuss it with anyone. Your sessions are completely private. However, it's important to understand that your mediator is not acting as a therapist or an attorney, and he or she could be subpoenaed to testify in court about things discussed during mediation. This is a very rare occurrence, though. Outside of that, your mediator will keep your information completely private.

Financial Disclosure

One of the most important parts of mediation is complete financial disclosure. When your divorce is handled in court, you and your spouse are required to provide each other with complete information about your financial situations, including income, debts, investments, bank accounts, property, and so on. If you fail to provide complete disclosure, you can be held in contempt of court.

In mediation both parties must provide complete financial disclosure, just as in court. Mediation cannot work if one person withholds information. It is essential that all the facts are laid out on the table for both of you to see so that you can negotiate fairly and honestly and not have to worry that there is anything hidden.

Long-Term Effects

One of the biggest benefits of mediation is its long-term effects. Litigated divorce can leave a bad taste in your mouth, so to speak. You and your spouse end your marriage with conflict. You go on record, saying damaging and hurtful things about each other, and in fact, you are encouraged to think of as many bad things as you can about your spouse. You end up with a court decision that doesn't give either one of you what you want, and you part as enemies. When you mediate your divorce, you and your spouse work cooperatively to end your marriage, and you part on reasonable terms. You end up with an agreement that works for both of you and for your children, and there is not as much resentment and anger. Mediation teaches you how to solve future disputes that may come up so you don't need to return to court. Mediation also benefits children. Parents learn that even though they may no longer be partners, they can still be parents together. When there are children involved, mediation creates a parenting plan (also known as custody and visitation), which devises a family arrangement that maximizes each parent's time with the children. Parents are not fighting over ownership of their children. Instead, they think and talk about how they can best continue to parent together and what kind of arrangement they can create that will be best for the children. Children of parents who mediate experience less stress during the process than children of parents who litigate. These children whose parents mediate also learn that the best way to resolve a conflict is through compromise and reasonable discussion, instead of argument and underhanded tactics.

Understanding Limitations

Mediation is not the ultimate life solution. It is a very useful tool, but it can't solve all of your problems. Although mediation has some similarities with therapy and counseling (it focuses on talking through your problems, examining your needs, and finding solutions that work for your life), it is not designed to be used exclusively in that way. Mediation is a goal-oriented process, and its purpose is to move you through the decisions you need to make to end your marriage. If you expect it to do more than that, you may end up disappointed.

If you're considering mediation, you need to understand the type of thinking you'll use in mediation. Mediation requires you to think cooperatively. It's easy in a divorce to suit up in your war clothes and head out for blood. When you use mediation, you will be encouraged to stop and think about what you're doing and how it is going to impact the other person. You created this marriage together, and mediation allows you to end it the way both of you choose.

This article was edited and excerpted by permission from the book No-Fight Divorce by Brette McWhorter Sember, J.D. The author, a former family law attorney and mediator, demystifies the mediation approach and provides tips on what to expect from this process. No-Fight Divorce is available at better bookstores

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