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COLLABORATIVE DIVORCE WHAT IS IT AND HOW DOES IT WORK?

Divorce in our legal system involves each spouse engaging an attorney to litigate disputes in the course of a pending marriage dissolution proceeding. Those attorneys attempt to negotiate a settlement of the issues involved in the divorce such as custody (and a parenting plan or schedule), spousal support (alimony), child support, division of marital property and debt, insurance, and other related topics. Negotiating through attorneys can be protracted, time-consuming, and expensive. Each communication between the attorney and the client and then between the attorneys in the negotiation process may take days or even weeks. Also, the tone of communication between the attorneys often takes on the personality of the attorneys, not those of the clients and often involves “posturing.” Thus, typically the wording of letters and phone calls becomes that of the attorney instead of the spouse and can elicit a very different response from the other spouse than might have occurred had there been direct communication between the spouses. While an attorney-negotiated settlement certainly is much less costly than litigating (trying the case), there are other options.

Alternative dispute resolution is the name given to various means of resolving disputes other than litigation (going through the court process). This article will discuss two such alternatives, **mediation** and the **collaborative divorce** process.

Mediation involves the spouses retaining a neutral mediator as a facilitator of settlement negotiations. The spouses meet together with the mediator, often on a weekly or bi-weekly basis. In those mediation sessions the spouses negotiate directly with one another in the presence of the mediator who keeps them on track and makes sure they address all issues that must be covered in their settlement negotiations. If at the conclusion of the mediation process the parties have reached an agreement, the mediator drafts a memorandum of understanding or marital settlement agreement which memorializes the settlement terms on which the parties reached agreement during mediation. Ideally the spouses then will present to and discuss that memorandum or draft agreement with their respective attorneys. My experience has been that there are cases where, after mediation is complete, one or both attorneys will “urge” changes which can in some cases derail the entire mediation process, forcing the spouses into the very litigation they were attempting to avoid and resulting in the mediation process having

been a waste of time, energy and money. While this doesn't happen in the majority of mediated cases, it is a risk of mediation.

Although many mediators are attorneys with family law experience, the mediator does not represent either spouse and should not give legal advice to either or both of the spouses. Many mediators recommend that each spouse first consult with an independently chosen attorney to find out the parameters of a likely outcome under state divorce and custody laws were the dispute to go to trial. That way the spouses have an idea in their mediation sessions how far the proposed settlement terms being discussed are from the likely outcome if a judge were to make the decisions for them. In mediation, however, the spouses are not bound by the law and are free to fashion their own settlement terms without regard to what a judge would be compelled to do after a trial as limited by the law. Thus, mediation gives the spouses more latitude than they would have in court and, more importantly, control over their own destiny and what settlement terms their agreement will contain.

While mediation is fine for some couples, where there is an imbalance of negotiating power between the parties, where there is a psychological dynamic of subtle intimidation between the parties, and/or where one party is much more financially savvy or more knowledgeable about the family finances than the other, or due to myriad other reasons, the result can be a "lopsided" settlement. It is important to remember that it is not the mediator's job to help either spouse but rather to listen, keep the negotiations moving forward, to facilitate discussions, to make creative suggestions, and to make sure all bases are covered in the spouses' direct negotiations with one another in the presence of the mediator. It is not the mediator's job to force the parties to settle on terms which the mediator feels are fair as only what the parties determine is fair to them is what matters. If mediation is not a viable option, collaborative divorce is an option.

The **collaborative divorce** process has many of the attributes of mediation. It involves the parties negotiating directly with one another in private sessions toward the goal of achieving a settlement on terms that the parties themselves have fashioned and which they feel are fair. However, in the collaborative process a mediator is rarely utilized; rather, both attorneys attend all negotiating sessions (called four-way meetings) to counsel their respective clients and assure that the client is aware of the legal and practical effect of what is being discussed, and to try to prevent the client from sabotaging or undermining him- or herself or selling him- or herself short as people sometimes do in emotionally charged divorce negotiations. The presence of attorneys can help to prevent one spouse from overpowering or taking advantage of the other spouse. The attorneys also help assure that the necessary exchange of financial documentation (tax returns, W-2s, 1099s, pay stubs, bank account statements, investment account statements, credit card statements, real estate and business documents, etc.) takes place so that any settlement achieved is based on a sound financial foundation rather than merely based on the "trust-me" principle. (In a good mediation, ideally the mediator will urge the parties to engage in the same financial document exchanges but one spouse can prevail upon the other to "trust me" and waive the right to see documents to show that what the other spouse is saying is backed up by documentation.)

The attorneys in the collaborative divorce process also take on a different role than they would in litigation or in traditional negotiation. While each attorney still represents one client, each attorney is trained to **collaborate** in the process, to look for solutions that the spouses may not see, and to offer the spouses as many options as each attorney can come up with so that the clients have more options to consider for settlement. This collaborative aspect is one of the most unique concepts of the collaborative divorce process.

It is extremely important to understand that the attorneys in the collaborative divorce process are at all times focused on **settlement**, not litigation. In fact, in the collaborative divorce process the spouses and attorneys all sign a participation agreement which states, among other things, that, if the process is aborted by either party, neither attorney can represent his/her former client in the court process.

Litigation is yet merely another dispute resolution model in which each side fights for his or her client against the other toward the impossible goal of “winning.” While that model may work for criminal cases, car accident cases, malpractice cases, consumer fraud cases, and even contract disputes, it is inappropriate, in my opinion, for family disputes such as divorce where the parties will have an ongoing relationship in the future. Litigation is inefficient and wastes valuable financial resources. Although over 98% of all divorce cases filed in New Jersey ultimately settle, settling in litigation with the attorneys fighting each other and proceeding through the cumbersome and inefficient court process not only wastes money, it also produces a lesser-quality agreement that may not meet the parties’ and their children’s individual needs as the parties have direct less control over the content of the agreement.

In litigation, financial experts sometimes are brought into the case, especially where one or both spouses own or have an interest in a business or professional practice or where there may be cash income. Additionally, sometimes a child custody expert (such as a psychiatrist, psychologist, social worker, family therapist, or the like) is brought in. (It is not the norm to bring such experts into mediation.) By contrast, in collaborative divorce cases the parties can engage a neutral financial professional to help them develop together accurate budgets for their future support needs, to value interests in businesses or professional practices, and to clarify the true income (the total package of financial benefits flowing out of the business or practice) which such businesses or professional practices provide to the business owner or professional.

Another wonderful tool in the collaborative process is the use of a divorce coach, a mental health expert (psychologist, social worker, family or couples therapist, etc.) who meets with the parties (together and/or separately) without the attorneys and who also may attend the settlement negotiation sessions. A divorce coach can work wonders in the process. As anyone who has gone through a divorce knows quite well, separation and divorce, and the negotiations that ensue during the separation, are highly charged emotional events, touching raw nerves of both spouses. The divorce coach can work with the spouses to get them to overcome some of their emotional reactions to hot-button comments and issues which often can impede settlement or make it much more

protracted and expensive. The divorce coach also can help the spouses learn to communicate on a more rational and mutually beneficial level, especially for the benefit of the children. This can result in a better settlement. The spouses also may learn and carry with them into the future better communication skills so that they can discuss and resolve issues that come up from time to time without the need to return to attorneys to work out such disputes. The divorce coach also can help immensely with child-related discussions as child development is an integral part of every mental health professional's education and training. In this fashion, the divorce coach can offer valuable advice to the parents on options which they might not consider on their own as they develop a parenting plan or to resolve other parenting disputes or issues tailored to the age, the level of emotional development, and emotional issues of each child.

A question often asked is whether having a divorce coach and/or financial expert increases the cost. My experience is that the benefit of having such neutral experts at the table results in a better, fairer settlement which focuses on the children's best interests. In the end this process can actually save money as it is likely to move along more quickly than if the emotional roadblocks are not addressed by an expert who can help the spouses move around, over, or beyond them and on to a final settlement.

What do mediation and the collaborative divorce process have in common?

1. You and your spouse control the outcome.
2. You and your spouse speak directly to one another, not through attorneys,
3. You work on communication skills, making it more likely that you'll be able to work out future differences without having to return to attorneys and/or court.
4. The cost is less than litigation or even a negotiated settlement that comes out of the litigation process.
5. Resolution is quicker than in the court process.
6. You and your spouse establish the pace of the process and the dates of the meetings.
7. Meetings take place in attorney offices, not at the courthouse.
8. Both are confidential.

How do mediation and the collaborative divorce process differ?

1. In collaborative divorce, your attorney is by your side throughout the process.
2. You can utilize a divorce coach who is trained and experienced in dealing with emotional hurdles which often interfere with settlement.
3. You can have a custody expert in the form of the divorce coach or another mental health professional to help assure that your agreement is in your children's best interests, something that is rarely done in mediation.
4. The quality of the ultimate agreement is likely to be better as there are two attorneys collaborating in the process, not fighting each other, even though your attorney represents you and the other attorney represents your spouse.

In summary, the collaborative divorce process can be a wonderful means of resolving divorce disputes without giving up the right to have a lawyer involved in each step of the process (having your lawyer by your side as you negotiate with your spouse). It also affords you the opportunity of benefiting from the education, training and experience of financial and/or mental health experts as you negotiate a final settlement with your spouse.

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Mr. Borger is a 1976 graduate of the Temple University School of Law (now the Beasley School of Law at Temple University). After law school he clerked for the Honorable Paul A. Lowengrub, Judge of the Superior Court of New Jersey in Camden County in what was then the Matrimonial Division of the Superior Court of New Jersey.

For the past 35 years Mr. Borger has engaged in the private practice of law in Cherry Hill, New Jersey (presently as senior partner with Borger Jones Matez & Keeley-Cain, P.A.), concentrating in resolution of family law disputes through mediation, collaborative divorce, negotiation, and litigation where necessary. His practice involves divorce, custody, parenting time, out-of-state relocation, alimony, child support, domestic violence, civil unions, equitable distribution of marital property and debt, and all other aspects of the myriad of legal problems associated with separation and divorce and associated tort claims, and includes drafting and negotiation of cohabitation, premarital (antenuptial), and marital agreements.

Mr. Borger is a member of the Family Law Section of the American Bar Association, the Family Law Section of the New Jersey State Bar Association (for which he served on the Executive Committee); and the family law committees of the Camden, Burlington and Gloucester County (NJ) bar associations. Mr. Borger also is a volunteer Early Settlement Panelist in Camden and Gloucester Counties, assisting attorneys and their clients in reaching settlement short of trial. Mr. Borger has also lectured for the American Bar Association, Family Law Section; the NJ Institute for Continuing Legal Education; the Camden and Burlington County Bar Associations; and The Sharper Lawyer; and was a guest family law lecturer from 1987-2002 at the James Beasley School of Law at Temple University in Philadelphia, PA.

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