



## **Lynelle Gleason article: "Misconceptions and Benefits of Family Law Mediation."**

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Getting divorced, separating assets and liabilities, determining how much should be paid in child support and alimony, and devising a custody schedule that will be best for the parties' children is challenging for divorcing spouses/parents, to say the least. Mediation provides divorcing spouses and separating parents with the opportunity to take control of their future by investing their time and energy in resolving these issues without the necessity of litigation.

Spouses and parents who choose mediation over litigation do so for many reasons. Many cite cost as a reason for choosing mediation over litigation. Some think mediation will be faster and simpler than litigation. Others simply do not want a judge determining their child custody schedule, nor should they.

Conversely, there are many reasons people do not choose mediation. Those who choose not to participate in mediation often do so because they want to assure their legal interests are protected and believe this can only occur if they have legal representation for every aspect of the divorce/custody/support process. Others have no desire to work through the issues needing to be addressed with their soon to be ex-spouse.

### **Misconceptions**

The most common misconception about mediation is that the parties do not need to hire or consult with an attorney. Mediators generally do not explain, in detail, the divorce code, equitable distribution, child support guidelines, or how a court is going to determine child custody issues, because not all mediators are attorneys, and not all mediators who are attorneys practice family law. Although mediators may provide an overview of the divorce process, the existence of support guidelines and child custody law, he is not going to explain to each client what their individual legal rights are.

A mediator is going to recommend that the clients each consult with an attorney during the mediation process in order for the attorney to advise the client of his or her rights and ensure that he or she understands how certain decisions made in mediation will impact them legally. A mediator can also communicate with the attorneys involved. This communication may be a summary of the topics addressed during mediation, legal issues or questions raised during the mediation process, and it could include a list of documents each client is requested to produce. Communication between the mediator and the attorneys will ensure that the legal issues or questions raised during a mediation session are addressed properly and privately with the client and his or her attorney.

A second misconception about mediation is that the mediator will be able to prepare and file any legal documents such as a divorce complaint, agreement to pay support, custody agreement or marital settlement agreement. Mediators generally do not prepare pleadings: they prepare memorandums of understanding as to the amount to be paid in child support, alimony, and the distribution of the parties' assets and liabilities. A mediator will also prepare a memorandum of understanding or parenting plan addressing the parties' agreed-upon child custody schedule. This memorandum of understanding summarizes the agreement reached by the parties during mediation and is primarily for the benefit of the parties; however, it is not legally binding on either party. An attorney retained by one of the parties will need to file a complaint in divorce, implement the terms of the memorandum of understanding and convert the terms into a marital settlement agreement.

A third misconception regarding mediation is that someone in the process will be taken advantage of, or bullied, or otherwise coerced into reaching an agreement. Mediation involves participation and input from each party. Having legal representation also ensures that each party has received legal advice throughout the mediation process. A mediator helps the parties create a safe setting to discuss difficult and emotional issues. In establishing a safe setting to discuss these topics, a mediator is able to assist the parties in setting boundaries and improving their communication skills. Although a mediator is not there to take sides or provide counseling to the parties, he or she may be able to help a party find his or her voice for the first time in the relationship.

## **Benefits of Mediation Over Litigation**

So why would anyone participate in mediation if the parties still need to retain their own counsel? There are a number of reasons. The main reason for parties to participate in mediation is that the parties get to control the outcome of their divorce and their parenting plan. Controlling these outcomes through an agreement, which they have reached together, provides a sense of empowerment to the parties where litigation generally leave parties feeling as if they have either won or lost. Mediation, unlike litigation, provides each party the opportunity to express their concerns, fears, disappointment and issues in a neutral setting, which may be emotional but it is not litigious. Mediation provides the parties with the opportunity to identify the issues to be addressed and, once those issues are identified, the mediator is able to assist the parties in their negotiations. Litigation rarely provides litigants the opportunity to be heard. Mediation also provides a setting in which the parties control the narrative, not a judge.

A second benefit of mediation over litigation is that it is less expensive, even with each party retaining counsel and paying a mediator, and it is less time-consuming than litigation. Retaining private counsel during mediation is generally limited to seeking legal advice, making sure the parties have identified the legal issues to be addressed in any formal agreement ultimately filed with the court, and drafting the agreements for filing with the court. Retaining an attorney as part of mediation does not involve filing emergency pleadings, regular communications between counsel, or numerous court appearances. When parties opt to litigate issues, they often have to wait weeks or months for the matter to be addressed by a judge. Once the matter is before the court, the parties and their counsel will likely spend their time waiting to be heard and attempting a resolution of the issue on “the courthouse steps.” Conversely, mediation provides the parties with a non-adversarial setting. Mediation offers the parties the opportunity to discuss the legal ramifications of an issue with their own attorney, then revisit and negotiate the issue through mediation in a manner satisfactory to both of them.

A third benefit of mediation, particularly as it relates to parenting plans, is it allows for more creativity in developing solutions to issues which may be unique to a particular family. Parents who have a child with special needs or parents who have non-traditional work schedules, to name a few, present with very different issues that are unlikely to be addressed properly and fully in a courtroom. Mediation, unlike litigation, provides a setting in which the mediator and the parents actively listen to what the other person has to say. At times, this certainly may prove difficult for everyone involved, but a mediator should be able help the parties find common ground. Once the parties have found this common ground, the mediator is then able to help the parents clarify their issues and facilitate the negotiations. Parents or parties participating in mediation who have had the opportunity to “be heard” and have then negotiated and participated in creating their own agreement are more likely to abide by the terms they have set and agreed to. Mediation further provides divorced and separated parents a resource they can come back to in the future if they need assistance addressing new parenting issues.

Although mediation may not be appropriate in every divorce, support or custody dispute, mediation, unlike litigation, provides the parties with the opportunity to identify and discuss their issues, clarify their priorities, explore areas of compromise and reach a mutual agreement.

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