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## Why Should You Use Divorce Mediation?

There are three main problems connected with divorce today: the cost of working out the settlement, the failure of settlements to last, and the emotional trauma suffered along the way. The average divorcing couple has a little under **\$20,000** in net assets. Very few of these people want to spend a hefty chunk of their savings in an expensive legal battle to divide these assets. Men and women in the United States spend upwards of **\$2** billion per year obtaining their divorces. The constantly rising fees of divorce lawyers, expert witnesses, and other professionals have contributed to today's high costs. It's a problem people face for a long time after the divorce is final.

The cost of divorce holds every promise of continuing to climb. Ask any divorced person you know to give you a general idea of the cost of divorce. You will hear numbers that greatly surpass what you imagined a simple divorce could cost.

Mediation makes a significant difference in this area by reducing the expense of working out the settlement. Paying for two lawyers versus paying for one mediator is the first

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and most obvious savings. During an adversarial divorce, each party is paying their own lawyer to gather the information. Mediation uses only one professional, resulting in one-half the professional cost.

The second area of savings is in discovery motions. The legal system encourages lawyers to spend thousands of dollars requesting payroll deductions, payroll income, bank accounts, pension contributions, and a host of medical and disability plans. During mediation, each person simply brings in a copy of their wage stub, payroll deductions, and medical plans, thereby eliminating the expensive process of discovery motions.

The biggest savings, however, is achieved in the cooperative working out of the settlement. Rather than paying for two lawyers to work out the multitude of details in a divorce agreement, which then have to be checked with their respective clients, mediation allows the spouses to directly communicate with each other. This direct communication reduces the bulk of the money that most Americans spend on their divorce.

The savings obtained by using mediation increase in those cases where the divorce would otherwise be contested. It is not unusual for a contested divorce to cost \$60,000 or \$70,000. (Chapter 7 has more information about the specific costs of divorce.)

Kenneth Kressel, a famous divorce researcher, reports, "There is approximately a fifty-percent chance of a court contest in the postdivorce period." The reality of divorce is that, after spending thousands of dollars and hundreds of hours on reaching an adversarial settlement, these settlements are often broken. Nationwide, over one-half of divorced people are back in court within one year after their marriage has legally ended. There are many areas of

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disagreement that drive people back into divorce court, but the ones that are raised most frequently are the following:

- First and foremost are disagreements over parental visitation rights for the noncustodial parent (the parent who doesn't have physical custody).
- Nonpayment of child support is another reason many people return to court. National statistics show us that **54** percent of noncustodial parents do not pay court-ordered child support during the first year after their divorce. The percentage increases over the next five years to roughly 75 percent of parents not paying their child support.
- Fourteen percent of divorced people (mostly women) are awarded alimony or spousal support. Within two years of their divorce, over one-half of these women do not receive their support payments or get drastically reduced payments. Women who do not receive their payments must file a motion to go back to court to get their payments enforced. Enforcing payments is not as easy as one might expect.
- Forty-six percent of divorcing people own a house at the time of their divorce. Many of them end up with joint ownership after their divorce, and arguments over who will pay for repairs or improvements are common. Most divorce agreements do not describe who is responsible for house repairs and improvements, and too often these arguments wind up in court.
- A person bitter over the property division in their divorce will often file a suit simply to bring the ex-spouse back into court. (While speaking at a seminar this past year, I met a woman who had gone to trial over her divorce settlement. The judge had awarded her 40 per-

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cent of the house equity [market value of the house minus debts on the house], while her husband received **60** percent of the house equity. She told me that even her husband's lawyer was surprised by the split. Still angry after all these years, she recently filed her newest complaint against her ex-husband over a minor matter. She readily admitted she's not really concerned with this minor issue, which was who should pay for their daughter's school trip, but that she is so bitter over what she sees as her unfair share of the house equity that she'll take him back to court on any matter.)

Mediation solves the problem of short-lived agreements by forging settlements that are followed. It accomplishes this in a host of ways, most importantly by involving both people in the decision making, and by considering and resolving potential problems before they arise.

The third main problem facing divorcing people today is the resulting emotional trauma of their getting caught up in the adversarial struggle. As one recently divorced individual put it, "The worst part of it was that we ended up really hating each other.-- Our divorce court system creates or increases the anger and distrustful feelings between divorcing spouses by encouraging a winner-take-all mentality. This is most destructive when clients are encouraged to fight a custody battle over their children. Parents who want to "win" the children from the other parent and force their spouse to "lose" their children face one of the most stressful and traumatic times of their lives. And so do their children.

The adversarial atmosphere leads to bitterness, which spills over into the negotiations and into future interactions between the ex-spouses. Pitting one spouse against the

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other in court is like pouring salt on wounds—it often finishes off any chance of the ex-spouses dealing reasonably with each other.

Many people want a civilized relationship with their ex-spouses. This is not true for everyone; some people assume that once the divorce is final, it's all right to be enemies. But people married ten, twenty, or thirty years frequently have a different outlook. After parenting children and spending a large part of their lives with each other, these men and women want to be able to attend a function together if they choose. They don't want to have to decide "Who gets to go to our son's wedding?" There are strong connections between ex-spouses. They aren't necessarily positive, but they are strong. They don't have to be turned into hatred toward each other.

Mediation makes a dramatic difference in helping you to maintain a civilized relationship. It's doubtful you'll end up with a Hollywood version of the perfect divorced couple, where you are each other's best friend. This is simply unrealistic for most people. But mediation can help to prevent the animosity we see and hear about from so many divorced people.

This past year I mediated the settlement of a couple who had one significant wish. Their daughter, who was living in a small town in Ohio, was expecting their first grandchild. My clients each wanted to be with her for the birth. Their daughter also wanted both of them to come. However, they assumed that as divorced people they would be too hostile toward each other to do this. They began mediation already angry, assuming that only one of them could fly out to Ohio to be with their daughter. Mediation helped them do what they wanted to do; they were both at the hospital when the baby was born. It was a boy.

## **WILL MEDIATION TAKE AWAY YOUR ANGER?**

A lot of people have a hard time dealing with the anger they feel during their divorce. Their spouse's anger is even harder to accept. Many people express the hope that mediation will "take the anger away." It won't necessarily stop your angry feelings, but it will help keep them from adversely affecting your major financial and parenting decisions.

People's concern with the damage that anger can do is legitimate. Too often the divorce process fans the fires of their anger or their spouse's anger, creating additional problems. All too often I hear this sort of story from a divorced person: "I'll never forget the day a sheriff pulled up to my house in a police car, actually came up to the house and served me with these damn papers. I was never so humiliated in my life. Imagine, a police car at my house!" After this kind of experience, the angered person is all too likely to seek revenge.

Anger expressed as a threat toward a spouse usually invites a vengeful response. One such scenario has the husband telling his wife, "If you make me angry, I'll never pay you a cent in child support." The threat is used as a way to control his wife. Sooner or later such a threat creates vengeful feelings in his ex-wife and she retaliates in some way.

Anger that spills over into the divorce negotiations is often the biggest problem facing lawyers, mediators, accountants, and judges. Divorce professionals privately tell the infamous Candlestick Story, about a couple who have finally finished their complicated divorce settlement when one spouse suddenly remembers they have not decided which one of them gets the candlestick they bought years

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ago during a trip to Mexico. A bitter disagreement begins. Their lawyers are helpless in the face of the argument. All the work that went into their settlement goes down the drain as each spouse adamantly refuses to accept a settlement that doesn't include the candlestick.

If a person's anger turns into bitterness, this feeling soon poisons all future contact between the two spouses. Take for example the case of a woman so bitter she wants to cut off all contact between her ex-spouse and their children; her bitterness takes priority over her children's needs for their father.

Mediation can help with the anger during this period in several specific ways. The process of mediation creates an open line of communication between the divorcing couple—and keeps the anger from closing what little communication exists between two people. The mediator may defuse the anger expressed between the couple by reframing a spouse's angry comments to the other and by clarifying what the spouse has actually said (and not what the person assumes he or she said). Statements can also be neutralized by the mediator taking the bitter thrust out of the verbal attack. Mediation takes the energy of anger and redirects it to problem solving. The mediator can separate the emotional anger from the financial areas of the settlement, so that the Candlestick Story need not occur.

Mental health professionals agree that angry feelings can actually be helpful during your divorce if they do not spill over into the settlement negotiations. Anger can have its positive side in helping one deal with the pain of divorce.

It's not easy to end a relationship. The attachment to a spouse may be so strong that you cannot leave unless you get angry. You may have to call up your anger toward your spouse to enable you to separate.

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Or you may find anger easier to experience than sadness. Anger can be a protection against feeling the loss of your spouse. Many people have an easier time experiencing anger than sorrow. The sorrow may be put off for another day.

Anger can also help to dispel the depression that's often a part of the divorce process. This depression is a difficult stage to move out of, and anger may provide you with the energy to go ahead with your life.

Anger isn't always a terrible thing. Therapists agree it is emotionally healthier to experience your feelings than to deny them. Indeed, anger is one of the natural emotional stages of divorce and, in the long run, will help you move through the process of separating from your spouse. Mediation can help you to keep these often necessary but potentially dangerous feelings from spilling over into your divorce negotiations.

## **WHAT IF WE CAN'T COMMUNICATE?**

Occasionally during professional gatherings I have had people say to me, "I was going to refer these clients to you, but they weren't the perfect couple for mediation." When I ask why, the response I get is something like "Oh, they don't communicate well enough with each other." It amazes me that professionals believe this is a prerequisite for mediation, since the clients are ending a relationship, not beginning one.

Mediation began as a way to resolve a conflict between two people; it evolved from a program that helped runaway adolescents and their parents talk to one another. These families were definitely not communicating; they could



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barely be in the same room together. Indeed, the purpose of mediation was to reduce conflict and allow them to talk to one another effectively.

People in the midst of divorce can rarely communicate effectively with their spouse. Since communication is important in reaching a settlement, the question is how to help people communicate. A good mediator helps divorcing people to do this in one of two ways, either by teaching them to talk directly to each other or by having them communicate through the mediator.

The first method, the direct approach, teaches people to talk directly to each other. This approach is the better one to use when mediating between individuals who will have considerable contact with each other in the future, as it provides people with the tools they need to talk to each other without the mediator. This is important unless you want to spend the rest of your days sitting in a mediator's office. Divorcing people with children will find this especially helpful in their future interactions as parents, since they will most likely have more contact with each other than they anticipated, or will ever want!

In the second method, the indirect approach, the mediator acts as an interpreter between the spouses. A mediator may choose this method for several reasons. I use the indirect approach if the spouses are just too angry with each other to be productive during a session, or if only one person is showing severe emotional stress. By using this approach, I take the sting out of someone's words and in a sense neutralize them for the other spouse to hear.

Clients may eventually learn the direct approach after several sessions using the interpreter approach. Most mediators integrate both methods into their practice. And on some days one approach works better than on others-

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whether because of someone's mood, or a fight, or simply because of the topic of discussion.

Some people mistakenly think of mediation as a kind of couples' therapy that will bring them back together. Mediation offers therapeutic benefits, such as reducing trauma and stress and increasing communication, but it is not therapy. The spouse who believes that mediation may lead to reconciliation as well as the spouse who is fearful that mediation is a ploy on the other's part to bring them together, are both misunderstanding the goals of mediation. The role of communication in mediation is to expedite the resolution of specific issues and to facilitate the ending of the marriage. Mediation allows for reconciliation because it does not escalate the anger and destroy any chance of resuming the marriage. Mediation *allows* for reconciliation—it does not cause it.

Today's popular stereotype of the perfect couple is the couple who can communicate with each other. This is a rare model of behavior, even for happily married couples. Mediation allows for communication between people who seemed unable to do so, and it increases communication between those couples who have some ability or willingness to talk with each other. Communication, in this case, is not a path to reconciliation, though this can happen; it is instead a tool enabling the couple to make decisions that serve the interests of both.

## **WHAT ARE THE OTHER BENEFITS?**

Over two million men and women are divorced each year. The couples who choose mediation do so for a variety of reasons. Many have problems and concerns that mediation

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addresses in a way that the adversarial arena cannot. Mediation offers several advantages in addition to the three main benefits we've already discussed.

- Mediation is fair to both people. This may come as a surprise, but many divorcing people want their settlement to be a fair one. Rarely does a day go by that a client doesn't say to me, "I want a divorce, but I want to be fair to her (or him)." An important benefit of fairness is the increased probability that the settlement will be complied with.
- The process creates a cooperative attitude rather than one of conflict. This problem-solving approach goes a long way toward explaining the success of mediation. Take the case of the two separating people who work together on their financial arrangements to minimize the amount of taxes they must pay to Uncle Sam. Now that's cooperation!
- Mediation allows men and women to make their own best decisions. They do not simply obey their lawyer's advice, regardless of the financial and emotional costs, no questions asked. Many competent and self-reliant adults live to regret the decisions that were made for them. It reminds me of the way things were twenty years ago, when people simply followed whatever the doctor ordered. During the past twenty years there has been a dramatic change in people's attitude toward medical care. Now patients routinely seek second opinions and often question their doctor before meekly submitting to the surgeon's knife. People need to bring this same self-reliance to the decisions they make in pursuing a divorce. Mediation is the place each person can make informed decisions.

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- Mediation is a place to learn about the various technical aspects of divorce and to get the information you require. Clients who have been in mediation do not echo the all-too-familiar refrain of divorced veterans of the court system, “If only I had known that before my divorce.

People who are pursuing divorce settlements can never have too much information. During my years with the federal Internal Revenue Service I met many people who suffered from not being given enough information regarding areas of their divorce settlement. In too many cases, a divorced woman would receive an IRS notice of taxes due on her alimony payments. She didn’t know the payments were considered taxable income to her and required her filing quarterly tax returns. Now she had penalties and interest to pay on top of her additional income tax. It was information she would have been better off having at the time of her divorce—it would have saved her a lot of money.

- Another benefit is discovering and examining the available options for your settlement. People walk into my office assuming there are only one—at most two—settlement choices. In fact, there are usually several options. Helping to brainstorm alternative choices is one of the strengths of a mediator and one reason why settlements can meet many of the goals of both persons.

Pension plans are a good example. Many people, both men and women, assume that whoever earned the pension should receive 100 percent of the retirement benefit. They don’t know that in most states, pensions are considered a marital asset. This means that the pension is owned by both people, not simply by the person whose name the pension is in. There are many choices

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in the area of pension division, and mediation allows each person to examine the different ways of achieving an equitable division of a pension earned while married.

- Mediation allows you to hear both sides of the issue. This is quite different from a courtroom trial, where typically neither person knows what the other side will present in court. Often the first time they hear the other side of the courtroom drama, they don't even recognize it as what really happened and are shocked by the judge's ruling against them. Mediation, in contrast, helps you to hear the other side of an issue in a way that promotes a fair resolution.
- Mediated sessions open up the lines of communication between two people. Since a lack of communication is the major reason cited for divorce in the 1980s, most couples need a third party to help them communicate. In order to work out a good settlement, you need to be able to clearly express your real concerns and to hear your spouse's concerns.
- A major advantage of mediation is that it promotes the best interests of your children. This is a priority clearly not shared by the adversary system. A courtroom judge essentially chooses the interests of one parent over the interests of the other parent. Though both parents may be represented by a lawyer, children in a custody dispute rarely have their own lawyer. Yet many parents want to do what is best for their children. These individuals find that mediation offers a place to reach sound agreements concerning their children. (This issue is explored in more detail in chapter 10.)
- The average mediated settlement takes approximately two months. The average adversarial divorce (using lawyers to negotiate but not including a trial) takes almost

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one year. There is a tremendous pressure on you during the period of time the divorce takes. The longer the negotiations drag on, the longer you experience this stress and, of course, the more money you spend. Mediation is geared to the time frame of the divorcing couple and moves along according to their schedule, which tends to be a shorter time than the delay-prone adversarial process.

- The separation of emotions from financial decision making is a significant part of mediation. Everyone has feelings, but in mediation these feelings do not form the basis for making financial decisions. Allowing feelings to affect settlements can be dangerous. Take, for example, the spouse who desperately wants out of the marriage. That person will often agree to anything to get the divorce, but soon changes his or her mind and the ex-spouses end up in court. Similarly problematic is a spouse with uncontrolled anger. If the anger is allowed to spill over into the negotiations, it can cause enormous expense and trauma for the entire family, as well as lead to repeated courtroom trials. Divorce decisions are often important long-term financial decisions that shouldn't be based solely on an overwhelming emotional base.
- Mediation avoids the public display of private issues. Unless you have firsthand knowledge of the mudslinging that can take place during a messy divorce trial, you may not recognize how important a benefit this can be. Indeed, clients do get angry and call each other names in my office, but my office is a far cry from a public courtroom witness stand. Maintaining your dignity is important during divorce, when your self-esteem may already be low.

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- Mediation empowers each person. The mediation process allows each person to take charge of their own life. This taking charge is the basic formula for being able to successfully get on with your life.

## **WHAT ARE THE RISKS?**

Many of the things that we want in life involve an element of risk. Even if we try to play it safe, we are apt to find ourselves in the very place where most accidents occur—our home bathtub!

Divorce itself has an element of risk. Studies have shown that among the forty-two most stressful life events, divorce rates as the number two stressor. (Heading the list is the death of a loved one, though some would argue that divorce is more stressful than death.) Indeed, accident and illness rates are much higher for men and women who are in the process of divorce or recently divorced than for the rest of the population.

Though mediation reduces the dangers of an adversarial divorce, it is not without possible risks. Be cautious of these:

- Hiring an unskilled mediator is a risky proposition. Unfortunately every profession has its share of practitioners who are not skilled at what they do. Since mediation is not an old practice, the small number of current mediators are highly skilled individuals establishing a new profession. But as this field increases, it will most likely have the same problems as other professions in guaranteeing the quality of its practitioners. Your mediator is not well skilled if he or she:

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1. Acts solely as a referee for the divorcing couple.
  2. Makes decisions for you.
  3. Always takes the side of one person against the other.
  4. Is not knowledgeable about state divorce laws, federal taxes, pension rules, etc. The mediator does not need to know everything concerning these areas (no one professional is an expert in every area), but the mediator should know when such information is necessary and how to get it.
  5. Has a bias that affects every decision.
  6. Makes a financial contingency fee arrangement with you. Contingency means that the price for the mediation depends on the settlement itself, such as 25 percent of any support paid. Mediation fees should be based on an hourly rate.
- A mediator who is not sensitive to power imbalances in the relationship of the divorcing couple will be ineffective at best and most likely destructive to the goal of a fair settlement. Some mediators don't understand the dynamics of power relationships and may simply act as bystanders, allowing the stronger spouse to get more than what is fair. For example, take a situation where the husband has a well-paying job, extensive financial knowledge, and makes all the family's financial decisions. The wife, in this case, has never worked outside the home, has no access to the checkbook, and must ask her husband for money. The mediator has to be concerned with balancing their financial expertise by providing the wife with the information she needs to make informed decisions.
  - A definite risk exists if your spouse is dishonest about money with you. Some people think a spouse who is honest about having an affair will also be honest about



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money. That's not necessarily true. You are probably the best judge of your spouse's financial honesty. If you have any doubts in this area, don't use mediation.

There is a related question that I am frequently asked. "What if my spouse has money hidden in an unnumbered Swiss bank account? Will it come out in mediation?" If a hidden asset is a concern of yours, such an asset will not be revealed during the sessions unless you or your spouse mentions it. However, it will not be routinely discovered during the adversary process either. Lawyers do not routinely track down unnumbered Swiss bank accounts. If you are worried that your spouse has any hidden assets, you are not a good candidate for mediation.

- If your spouse is actually involved in criminal financial dealings, be wary of using mediation. Any involvement with fraud, embezzlement, or other criminal activity requires legal help. Get yourself to a good lawyer specializing in criminal law. Your divorce settlement will not be easy.
- If you or your spouse is mentally incompetent, mediation should be undertaken only with special arrangements. One option is to have a close, responsible person take an active part in the mediation. This person can be a parent, sibling, or friend who must be present during every session. You may want to add the services of a lawyer and a therapist in this difficult situation. Mediation is flexible enough to allow for special situations, but this really depends on the willingness and skills of the mediator.
- If there is current physical abuse, I don't believe that mediation is appropriate. There is a range of opinions concerning mediating domestic violence cases. Many private mediators do not think mediation can work when physical abuse is involved. However, many court per-

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sonnel routinely use it in this type of situation. Since most domestic violence cases end up within the court system rather than with private mediators, this is probably a public policy issue rather than an issue for private mediators to determine.

- If the mediator has a prior relationship with either spouse, it is best to refer to another mediator, as many professionals think that any kind of prior relationship has a potential for creating a problem. If the mediator does have a prior relationship with one spouse, be sure to discuss the possible consequences. You need to consider what effect this will have and what other options are available.

If you know the risks of mediation, you can work to avoid or minimize them.