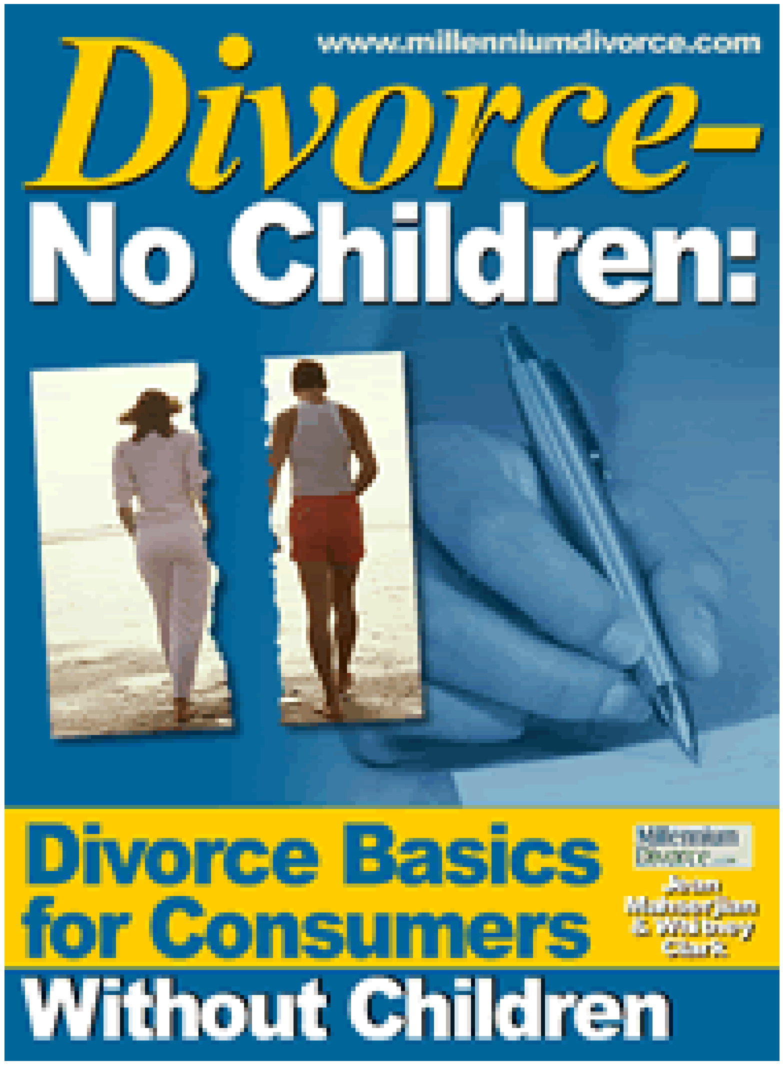
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Divorce - No Children

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Table of Contents

This is the Table of Contents for our Complete Divorce - No Children E-Book.

Chapter II: Mediation, Arbitration, Collaborative Divorce, Negotiation and Litigation is included in this Demo

CHAPTER II: Mediation, Arbitration, Collaborative Divorce, Negotiation And Litigation

There is more than one way to obtain a separation or divorce. You can mediate, arbitrate, engage in collaborative divorce, negotiate or litigate any or all of the issues that you need to resolve. Before you retain an attorney and commit to a plan of action, consider your various alternatives and decide which method of proceeding would be best for you. Some attorneys have a bias against mediation. Others favor that process to obtain a divorce. We advise, as with all issues in your divorce or separation, that you select the options that are right for you, and then hire an attorney who will work with you and with your stated objectives.

Mediation

Mediation is an alternative to litigation that can be less expensive. Mediation can also be a welcome alternative to our contentious litigation system. Some states require that spouses mediate or arbitrate their divorce or separation issues. Other states do not require mediation, but allow the mediation process to supplement or bypass the litigation system.

Most people involved in a divorce do not trust their spouse, or they are consumed with overwhelming emotional issues that motivate them to hire an attorney to protect their interests. Attorneys usually engage in negotiation or litigation. That is their role in the process. Many attorneys will not readily recommend mediation or arbitration. You need to understand early on that your attorney makes a living because you are involved in a battle. Many attorneys will not ask you to take your business elsewhere and find a good mediator or arbitrator to do what the attorney was going to do. However, some attorneys work very well with mediation. Also, not every case should be sent to a mediator. You need to assess your situation first and, if you want to mediate, question your attorney about his or her attitude towards mediation.

If you are involved in an abusive situation, you need the protections of the Court system. If you and your spouse are incapable of speaking civilly to each other and discussing your divorce or separation issues, mediation might be unsuccessful. If you or your spouse intend to contest grounds for divorce for economic or other reasons, mediation and arbitration are not an option. If you or your

spouse are unwilling to compromise on one or more of your issues, mediation will not work for you either.

Mediation works when two people want to resolve their marital issues without the tremendous expense of litigation and they believe that they can work together with one mediator instead of with two attorneys. Under those circumstances, the overall cost of the process will often be substantially reduced and the parties will be the authors of their own settlement. That fact alone usually results in settlements that are lasting and effective.

What is mediation? It is a process where by the parties work with one person who facilitates or helps them reach an agreement. A mediator does not make decisions for the parties and a mediator does not tell the parties what the end result should be. Rather, a mediator outlines the issues for the parties and helps them to arrive at their own decisions on those issues. The mediator does that by asking questions and focusing the parties on solutions instead of arguments. The parties might disagree on some of those issues. However, they have usually agreed on mediation because they are willing to compromise and because they want to enter into an agreement instead of battling their issues out with attorneys and Judges. Often, the parties understand the devastating effect that litigation and arguments can have on them and their spouse and that motivation alone compels them into a compromised or mediated agreement.

The mediation process can take anywhere from a couple of weeks to a year. The length of the process will depend upon the difficulty of the issues presented and the ability of the parties to reach agreements. It will also depend on how well informed each of the parties is about their legal rights and the options available to them. When the parties have completed the mediation process, they will receive a document from their mediator that is usually called a *Memorandum of Agreement*. That Agreement is not binding. If must still be reduced to a written legal Agreement to be enforceable in most states. A *Memorandum of Agreement* might be ten or fewer pages . A binding legal *Agreement* can be twenty pages or longer. The reason for the difference is that the binding legal Agreement will contain all of the legal language necessary to turn the *Memorandum of Agreement* into a valid and enforceable legal separation Agreement.

It is rare for the parties not to have their *Memorandum of Agreement* translated into a binding legal Agreement. Very few people engage in the process of mediation only to throw all of their work away after they have finished. But, since the Memorandum of Agreement is not binding, that can happen. If you de-

cide to choose mediation it is important that you realize that without the final legal Agreement, your mediation is not legally binding. Later in this Chapter we discuss hiring attorneys who are familiar with and who work with the mediation process. That issue is critical when it comes time to reduce the Memorandum of Agreement to a binding legal Agreement. If the process is going to fall apart, it will often occur at that time. If one of the parties hires an attorney who does not respect or adhere to the principles of mediation, that attorney might attempt to convince his or her client to disregard the mediated agreement and either begin negotiating again or worse yet litigating.

A mediator can be an attorney, but a mediator does not have to be an attorney. There is no requirement that you select one type of mediator over another. That is a totally personal decision. You should, however, select a mediator that is trained in mediation. When hiring a mediator it is a good idea to interview two or more mediators to see who you and your spouse will be comfortable speaking to. You should ask each mediator that you interview what their credentials and training are. Ask if they are certified as mediators. In some states, anyone can hang out a shingle and call themselves a mediator. Not every mediator takes courses on mediation and receives training and a certification. Hiring an untrained or uncertified mediator is no different than hiring an electrician to do your plumbing. It is your choice if you want to do so, but the end result will be effected.

The mediation process works best when the parties each also have an independent attorney that they have retained to work through the mediation process with them. Having each of the parties retain independent attorneys can increase their costs. However, it will also result in a mediated agreement that both parties have negotiated after being fully informed. If the parties rely on the mediator to advise them on their legal rights, each of the parties will get a watered down version of the law. The law is not black and white and there are many issues that could be decided more than one way by a Judge. If that is the case, how can a mediator advise both parties on the law?

In our experience the best mediators require that both parties have independent attorneys. Having an independent attorney can benefit the mediator and the mediation process. If a dispute occurs in mediation and the parties are in disagreement, the mediator can ask each of the parties to consult with their attorneys on that issue. After consulting with their attorneys, each party can then resume mediation with a better understanding of their position and their spouse's position. The mediator will a often require that the parties each obtain legal advice from their attorneys on specific issues, such as Spousal Support, before addressing that issue in mediation. This enables the mediator to focus on moving the parties to-

wards an agreement instead of worrying about whether the parties know all of their legal rights. That is very beneficial and necessary if the parties want to work out a creative agreement that does not follow the letter of the law.

Not all attorneys work well with mediators. If you are interested in mediation and you have an attorney, ask your attorney for a referral to a mediator. Your attorney's response to your request might be very enlightening. If your attorney is able to give you the names of one or two mediators and give you examples of successfully mediated divorces or separations, your attorney probably has experience in successfully working with mediators. If your attorney puts down the mediation process, your attorney may be more focused on earning money than exploring all of the possible options for resolving your case to ensure your interests are served. Undertake a thorough discussion with your attorney on this issue. It is possible that your case is not appropriate for mediation because there has been a history of abuse or violence, or if you and your spouse are not capable of communicating, or if the negotiating abilities that you and your spouse bring to the table is very unequal. Your attorney should be able to address those issues with you and help you to arrive at a decision about mediation. If your attorney claims that mediation does not work, your attorney is wrong. National statistics on successful mediation in divorce cases are promising. Mediation is an effective solution to marital dissolution without litigation.

You may enter into the mediation process without first hiring an attorney. If you do, you can and should also ask the mediators that you meet with for referrals for attorneys. There are attorneys in every geographic area who work regularly with mediators and who are capable of ensuring that the mediation process works. There are other attorneys in every area that will do everything that they can to convince their client that they should not adhere to the mediated agreement. Do not sabotage yourself; if you choose to mediate, hire an attorney who works well with mediation. If your attorney respects the mediation process, your attorney may object to how one or more issues have been resolved in your mediation. But, your attorney will work through the mediation process and with you to resolve any real problems on those issues. If you want those issues resolved a certain way, your attorney should respect your decision as well as the mediation process that brought you to that decision.

Collaborative Divorce

A variant upon mediation that has become very popular in the past few years is Collaborative divorce. Collaborative divorce is a process whereby the parties each retain an attorney who is trained in the process of Collaborative divorce. The purpose of Collaborative divorce is to bring the parties to settlement without the tremendous costs and antagonism involved in litigation. Collaborative divorce does not involve the use of mediators. It does require that the parties sign an Agreement to engage in Collaborative divorce.

The Collaborative divorce Agreement generally requires that each party and each attorney commit in writing to not litigating the case in court. The Agreement also requires that the parties agree to use mutual experts to value any property interests that must be valued and to engage in conferences to settle their case. If either party chooses to litigate, both parties Collaborative divorce Attorneys are disqualified from further representing the parties. This process requires an up front commitment to resolving disputes by negotiation, compromise and agreement. The attorneys are well invested in the process; if either moves the case towards litigation, they both cannot represent their clients any further. Thus, the risk that is sometimes present in mediation (that the attorneys will push the case into litigation) is not present in Collaborative divorce.

Collaborative divorce is a process that involves assembling a “team” of professionals to resolve all of the issues present in a divorce case. The team might include an appraiser to value the house, an accountant to value the business, or a vocational expert to assist in re-entry to the job market. Any expert required by the parties is retained by agreement and there is an agreement on how that expert is paid in advance. The experts are neutral - they do not represent one party or the other. There is no war of independent experts - i.e. experts hired by each side to provide an opinion that benefits just one party. The war of independent experts is incredibly expensive in divorce.

Just as mediation has its downside, so does Collaborative divorce. There is a financial disincentive to disagreeing in Collaborative divorce. If the parties are not capable of balanced negotiation or if one of the parties is dissatisfied with the process, there is an incredible penalty to starting over again. Each party has to find a new attorney and begin the process from scratch. That cost can be tremendous. The lesson to be taken is, however, simply one of caution. You must explore this alternative with the knowledge that committing to Collaborative divorce can result in tremendous savings of both money and stress, but with the risk of even greater expenditures of money and stress if the process is not right for you.

Arbitration

Arbitration is a process that is entirely different from mediation. It is actually more like litigation because the parties select an arbitrator who will decide their case, similar to a Judge. The parties will also go through the discovery process, i.e. the exchange of information that occurs during negotiation and litigation. Like litigation, while arbitration is ongoing, there can be a good deal of negotiating between the parties and their attorneys. Arbitration can be less time consuming and thus less expensive than litigation. It can also be more expensive than litigation, depending upon the case and the expense of the arbitrator. The parties usually pay an arbitrator.

If you are not happy with a decision reached after arbitration, you may not have the same appeal rights that you would have had with litigation, depending upon the state that you live in. That is an important consideration if your case involves unique or new issues in the law.

Negotiation and Litigation

Negotiation occurs in virtually every divorce or separation case, sometimes at the same time as litigation and sometimes without litigation. The parties themselves often discuss at least some of their issues prior to hiring attorneys or a mediator. Often the parties will reach an agreement on one or more issue and then consult with their attorneys to resolve the rest of their issues. If there is one or more issue presented in the case that the parties and their attorneys cannot resolve, one of the parties will usually commence an action for divorce.

There are many cases that begin with the parties stating that they simply want a separation that end up as divorce cases. This happens when the parties cannot agree and one or both or them heads to the Courthouse for a decision from the Judge. This is usually done by commencing an action for divorce.

Just because an action for divorce has been started does not mean that the negotiation has ended. In some cases, after the Judge has conducted a conference with the parties and attorneys, the Judge renders a decision on a difficult issue, such as temporary Support, and that decision has a significant effect on the settlement terms being discussed. Other times, an expert report is Ordered. The most common kind of report is what is an appraisal of the marital residence. Ex-

pert reports are often relied upon by attorneys to help them shape a settlement in your case.

Some cases remain in litigation until shortly before a scheduled trial date, and other cases actually do go to trial. The number of issues that you cannot resolve, the difficulty of those issues, and the desire of you and/or your spouse to compromise to avoid a trial will all effect whether your case goes to trial or is settled. The cost of a trial motivates many settlement negotiations. The simple fact that a negotiated settlement ends the case motivates many others. After three or six or nine months of battling or negotiating and battling, many couples simply want to move on and they do so by compromising on the positions that they initially held.

There are cases that will not be capable of mediation, negotiation, or settlement. Those cases may involve a very difficult issue pertaining to a specific aspect of the law, or an abusive relationship, or one spouse who simply will not compromise. There are also many cases where the amount of money at stake far exceeds the cost of litigation and trial. Under those circumstances, a reasoned decision to proceed to trial is certainly appropriate.

Whether your case is mediated, arbitrated, negotiated or litigated should be a decision that you make only after you have been completely informed of all of the possible ways in which your case might resolve. Your attorney should be frank in discussing the issues where your position might not be strong as well as in discussing your rights with you. Whether you want to pursue your legal rights or risk the potential loss and expense of litigation should be a decision that is left up to you *after* you are adequately and wisely counseled about all of your options.

F. ABOUT THE AUTHORS

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