

The Mediation Alternative

Mediation is emerging as a viable alternative to standard divorce litigation. Here's what you need to know.

By Brad Marcoux

While death and taxes may be the only guarantees in life, acrimony and financial woe almost always accompany an adversarial divorce. It isn't surprising, really: after all, the legal system by its very nature pits people against each other, seeming to offer the possibility of only one "winner" and little opportunity for compromise. The search for a way to make the process of divorce less painful has led many to mediation -- also known as "assisted negotiation" or "alternative dispute resolution."

Unlike traditional divorce proceedings, mediation takes the approach that individuals who were once able to organize their lives together can also arrange to live them apart. It's a different way of viewing divorce, and one with many advantages. But there are a few concerns that need to be addressed before you can be sure that mediation is for you.

WHAT IS IT?

Sam Margulies, a practitioner member of the Academy of Family Mediators (AFM), an accredited member of the New Jersey Association of Professional Mediators, director of the New Jersey-based Institute for Dispute Resolution, and the author of *Getting Divorced Without Ruining Your Life* (Simon & Schuster, \$12 US), defines mediation as "a facilitated agreement between ex-spouses on the important issues of children, money, and property." The key word here is "agreement" -- you and your future ex create an agreement that both of you can live with. The mediator is simply there to keep you on track, assure negotiations are fair, and make suggestions when roadblocks are encountered.

"The focus is on both parties maintaining control," Margulies maintains, "not on giving control to surrogate representation." Dr. Barbara Landau -- a psychologist, lawyer, mediator, president of the Toronto-area mediation organization Cooperative Solutions, and co-author of *The Family Mediation Handbook* (Butterworth, \$75 CDN) -- agrees. "Mediation is different from litigation in almost every respect. In litigation, lawyers speak on behalf of the parties involved. In mediation, lawyers act as advisors, but the parties speak on their own behalf so that the agreement reflects their personal needs and perspectives."

THE STAGES

While mediators handle each case differently depending upon their personal style and their training (an attorney-mediator might handle things very differently than a therapist-mediator) there are generally a few common stages. An initial meeting with you and your spouse is arranged to assess the dynamic between both of you, explain what you can expect, and discuss costs. Some mediators may also have you fill out a questionnaire or come in individually, based on what kind of relationship you currently have with your spouse and the mediator's personal preferences. "The

boundaries of the process are also explained," says Kathryn Somers, a lawyer and mediator in private practice in Chicago. "It's made very clear that, while we can make referrals for any type of help people may need, this is about getting on with their lives -- it's not therapy or a consultation with a lawyer."

Once this initial stage is complete, you'll set meeting times (usually weekly, but you can arrange any schedule that suits you), ground rules (no degrading or insulting language), and goals (usually regarding support, asset division, and visitation). "At this stage, as in the rest of the process, the decision-making is left in the hands of the two people who have the most at stake," says Jerald Kessler, a Highland Park, IL mediator and president of the Mediation Council of Illinois. "The parties control the pace themselves, moving ahead as they feel comfortable."

Next, information-gathering begins: your mediator will need documentation for property, assets, and debts, as well as tax returns, bank and pension statements, and any other paperwork relating to your marriage and finances. Based on the initial assessments and this documentation, a decision is made as to whether financial, legal, or emotional experts need to be consulted, and the actual process begins.

While individual cases vary, most cases can be resolved in a couple of months. "An experienced mediator will know in the first one or two sessions if mediation is going to be possible," says Dr. Carol A. Butler, a Manhattan-based mediator, psychotherapist, and co-author of the soon-to-be-released *Divorce Mediation Answer Book* (Kodansha America, approx. \$14 US). "In most cases, the issues are resolved in four or five sessions. I can't imagine seriously protracted divorce mediation except in very unusual circumstances." Alan Frankel, a psychotherapist and divorce mediator who does team mediation with mediator Jill Sanders-DeMott, J.D., in Mt. Kisco, NY, estimates that "between 85% and 90% of our cases are successful, and we've usually finished up in between three and eight sessions. It's much faster than litigation for everyone involved."

THE BIG PLUS

This short duration highlights one of the most appealing aspects of the process: although mediators generally charge between \$100 and \$450 per hour -- about the same as a lawyer -- the speed can make it tens of thousands of dollars cheaper than fighting it out in court. "While I estimate that somewhere between two and five percent of all divorce cases opt for mediation right from the beginning, most of those that go the legal route end up settling before trial," says Margulies. "They end up negotiating anyway -- mediation is simply a supercharger for getting a settlement."

There are other advantages as well: since you're the one who is crafting your own agreement, you can arrange for all of your concerns to be addressed to your satisfaction before the process ends. Because of this, you're more likely to be happy with the final result, and be more willing to follow through with your commitments than if your settlement had been decreed by a court. No one likes being told what to do, after all. And you can arrange visitation and support that's beneficial to your kids -- a massive plus, considering how harmful a disputed divorce can be for children. And there aren't any worries about your agreement not being legally binding, as the final agreement is drafted by the mediator into a "memorandum of understanding" that is then hammered into legalese by your lawyers.

THE PERFECT PROCESS?

Saving time, money, and perhaps your dignity are all wonderful; these potential advantages may make mediation seem like the perfect way to end your imperfect relationship. But, as with anything else, there are complexities that you should be aware of before you dive in headlong.

One of the biggest bricks to be hurled at mediation is that of power imbalances. It's felt by some that if one person in the relationship has dominated the other in the past, the weaker party is put at an impossible disadvantage when trying to represent themselves. It's a valid worry, especially if you feel that you're the weaker party -- and even more so if there is or has been abuse in the past. But it's also a problem that a good mediator should be able to correct, according to Desmond Ellis, a professor and coordinator of the Dispute Resolution Program at York University in Toronto who has researched power distribution in mediation. "Power imbalances are a big issue politically, theoretically, and with respect to practice," he says. "The difficulty is that people often confound the possession of resources with power. It's generally accepted in society that men have more money and resources, and can debate more effectively, so they therefore have more power. But the fact is that the possession of resources only equals potential power. It's how they are used that determines where power lies. You also can't generalize from an individual's position in a gender group to their position of power." Ellis' research has shown that power imbalances -- from resource possession to intimidation or even outright physical abuse -- does not have to rule out mediation as an option. Training for mediators in recognizing and dealing with power imbalances is the key, he says. "There are various specific interventions mediators can use to influence the balance of power. With proper training, they can ensure that each party feels confident in presenting the merits of their case."

QUESTIONS TO ASK

In your initial interview with the mediator, they will be looking for specific signs that your case is appropriate for dispute resolution. You should take advantage of this initial consultation to assure yourself that the mediator has all of the qualities necessary to bring your marriage to a fair and balanced end. Here are some of the essential questions you should ask:

- What is your training and experience? Most organizations require mediators to complete at least 30 hours of training (and, in some cases, extra hours of schooling in domestic violence awareness), several hours of negotiation, and several cases. You should be looking for someone who has done at least ten divorce dispute resolutions. Ask if they have experience with cases like yours (especially if you have some unique circumstances to negotiate) and what training they've had.
- What organizations are you affiliated with? You can follow up with phone calls to find out some information about those organizations (see "How to find a mediator" at the end of this article).
- What is your approach? You should get as much information about the process as the mediator gets from you about your case. Some mediators hold individual meetings, while others use questionnaires or other methods of screening. Ask questions, and be sure you're clear and comfortable with everything you're told.

- Do you have any biases? It's a blunt question, but a valid one: everyone has viewpoints that skew their perspective. Ask them how they feel about the role of mothers or fathers, or about the care of children.
- Should our children be involved in the mediation process? If so, how?
- Should new partners be involved in the process? If so, how?
- What is the cost?
- How much time do you
- feel the process will take? n Should other experts be involved?
- What role will my lawyer play in the process.

When used by a skilled and sensitive mediator, techniques such as shuttle mediation (where the parties are separated and the mediator "shuttles" messages between them) and precautions such as separate arrival and departure times can often effectively deal with the fear of psychological or physical violence. More general fears of a gender advantage can usually be balanced out by a trained individual mediator. There's also the option of a team approach such as Alan Frankel and Jill Sanders-DeMott use. "We decided to work as a team," says Frankel, "because we didn't want anyone feeling outnumbered. Our method creates a gender balance that couples seem to really appreciate." Deborah A. Vaupen, an attorney, mediator, and partner in the Santa Monica-based Alternatives: Divorce Mediation, works as a team with therapist and mediator Dr. Edward A. Dreyfus for essentially the same reasons. "There are so many legal and emotional dynamics at play, and we feel that the female/male model offers a balance for our clients. It avoids anyone feeling like it's two against one."

SUBTLE POWER

Jerald Kessler points out that the mediator has a vested interest not in taking sides but in "seeing that the process is balanced and fair. We gain nothing by being unfair." Because a mediator's business can rely heavily on word-of-mouth, crafting an unbalanced settlement would likely cost them both business and reputation. And there's also an incorrect assumption made here: that the mediation process will be less empowering to an individual than a legal battle. Dr. Michael Benjamin, a comprehensive family mediator and mediation specialist with the Toronto-area mediation organization FAME (Family Assessment, Mediation, and Parent Enrichment), sees the issue differently. "Mediation can be very empowering in some cases," he says. "It can give a spouse a voice that won't be heard in court. There are of course situations where mediation is inappropriate, but if I want a couple to continue working together beyond mediation, I can't allow any power imbalances to stand."

Those who voice concerns about power imbalances, however, tend to worry less about cases where the problem has been identified than a scenario where a mediator is oblivious to it. "There is real concern if one person is feeling intimidated -- especially if there's been domestic violence," says Frankel, "but we're trained to screen for and spot these imbalances so that we can try to restore that balance -- or screen out cases that are inappropriate for mediation." This screening begins with the very first phone call to the mediator's office and continues until the process is complete. "With the very first phone call, I make sure to ask specific questions about violence, drug or alcohol abuse, or fear of reprisals or for the safety of the children," says Barbara Landau. "I listen to direct answers, but I also listen for silences or hesitations that can tell me a lot about whether there are abuse issues." While each

mediator's methods of searching for both subtle and overt power imbalances may be different, a good mediator will take the time to inquire about potential imbalances and formulate a plan to compensate for them.

There are cases in which mediation is inappropriate, of course. "I disqualify people from the process if I see a gross and irreparable imbalance," says Sam Margulies, "or if there's a cognitive or emotional deficit too broad to traverse. But a good mediator can balance most power imbalances." Most mediators agree that if there is active and continuing violence, or a fear of violence, mediation is inappropriate -- but all stress that each case must be individually assessed, and broad generalizations cannot be applied. "The AFM and Ontario Association for Family Mediation's policies are that there is a 'rebuttable presumption against mediation,' in cases of abuse," says Landau. "This means that you must show in each case that the parties are capable of mediating without duress." Most people think that mediators start with the assumption that mediation is appropriate for all cases, but the opposite is actually true in cases of domestic violence, according to Landau.

LEGAL FEARS

Even though the final agreement is subject to lawyers' approval, there is still a danger of your ex-partner not making a full disclosure of assets. "The legal system does have a chance to engage in discovery that is not available in mediation," admits Benjamin. But such concerns are rare, and, since mediation can be abandoned in favor of a trial at any time, any apparent dishonesty can be dealt with in the old-fashioned manner. Besides, as with domestic violence cases, if you don't trust your ex in the first place, you're unlikely to seek a negotiated settlement. "Mediation does have an advantage," says Vaupen, "in that it tends to be self-filtering."

FINAL THOUGHTS

Mediation offers many significant advantages to the traditional divorce process. It can save time and money, and allow two people who have decided they no longer wish to share all of their lives to negotiate how they will cooperate, and how they will work out the details of living apart. Although there are some concerns -- the lack of government regulation and the possibility of an unrecognized power imbalance leading to an unfair agreement -- generally speaking, mediation can let you and your soon-to-be-ex make arrangements that can live with today and in the future. If nothing else, alternative dispute resolution is an alternative worth investigating.