

TO MEDIATE OR TO LITIGATE? YOU DECIDE...

by Dr. Shuneet Thomson www.interpeople-inc.com

There is no denying it: divorce is one of the most stressful experiences people can go through. Even when the breakup is amicable, and especially when they have children, divorcing couples experience emotional upheaval and fear of an uncertain future.

Yet, under these trying circumstances, divorcing couples have to make critical decisions that will greatly affect their lives after divorce. How will they manage the parenting of their children, how will they divide their property and their debts? What about child support, health insurance and many other issues? In addition, at this vulnerable moment, divorcing couples know their decisions will be subject to scrutiny by judges and the IRS. The process is unfamiliar and intimidating.

There used to be one way to go about dealing with this tough situation: each side hired a lawyer and the lawyers did what lawyers are trained to do best - fight to get the most for their client. At the end, everyone comes out "roughed up." One side might win on one issue and the other side might win on other issues. Often both sides come out feeling bruised.

Now people have the option of divorce through mediation. In both ways the couple ends up legally divorced. The difference is mainly in the nature of the process, its cost and its duration.

DIVORCING THE "OLD" WAY. The adversarial approach of the legal system often undermines the couple's relationship even further. The couple surrenders to their respective attorneys the power of action, and to some extent the decision making. The attorneys negotiate with each other in their clients' names, speak for their clients in court, and sign documents for their clients. If the couple started out with communication problems - this tends to make things worse. The legalistic process is formal and alien to most people. It takes many months, sometimes years, and costs an arm and a leg. It is a process that feeds on the couple's animosity and distrust, and as their relationship worsens, the children suffer.

When the couple's relationship is very hostile and agreement cannot be hammered on important issues - a judge, a complete stranger, who mostly talks only with the lawyers, decides what will take place in the couple's lives and private affairs.

IN MEDIATION, the couple is guided through the unfamiliar process with the help of a professional in conflict resolution. A good mediator's expertise is bringing people with different points of view to agree on a course of action that meets their needs. The premise of mediation is that people know their own problems better than anyone else and are best qualified to identify solutions that will work for them. Another premise of mediation is that people prefer to be in control of their affairs, and that the process is most respectful of them when it permits them to determine their own future.

The mediator makes sure the couple is informed about the divorce process, and about the implications of various options they are considering. The mediator acts as an impartial third party, creating an environment in which both parties can safely address difficult issues and decisions. The mediator cares that the process is open, and well understood by both sides. The mediator cares very much that the process is free of coercion, but its outcomes are decided by the parties. They make the decisions; they own the decisions. Mediation is confidential (as is the client-attorney relationship, of course). Mediation is also voluntary. It cannot work if a party does not want to participate. When all issues have been addressed, the mediator writes up a Memorandum of Understanding, which contains all their decisions.

Mediating parties sometimes consult with a lawyer between sessions, or at the end of the process, to get advice on their mediated negotiation. Also, during mediation they often begin to acquire a new workable way of communicating with each other. This is especially important for the children. Children of divorce emerge more or less unscathed in the long term, if their parents relate to each other in a civil way, and are consistently loving and available to the children. Seeing their parents collaborate is very reassuring for the children.

Divorce mediation tends to move the process along relatively fast, it is much less costly than the legalistic way, and in most cases people come out of it satisfied.