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Family Law

OUT OF COURT DIVORCE SETTLEMENTS USING THE MEDIATION PROCESS TO YOUR ADVANTAGE

By Nicole Whyte

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IT IS A WELL-KNOWN STATISTICAL FACT AMONG FAMILY LAW practitioners that 85% of all contested divorce cases settle prior to trial. It is an even better known fact that 99% of these cases settle at the courthouse steps. These agreements are usually achieved at settlement conferences, court hearings, or on the first day of trial. In view of these statistics, one may wonder why it is not possible for these cases to be resolved early in the process, prior to months, if not years, of litigation and extensive attorneys' fees being incurred.

For some parties, it is necessary for the spouses to quite literally "go through the motions" of litigation, exchange of discovery, financial documents and other information, before they can reach a point where settlement is attainable. However, for most parties, if provided the right representation early on, and if presented with appropriate options, early settlement achieved through early mediation is indeed an attainable goal.

Pursuant to Family Law Statutes, the parties are required to attend a Court Ordered Mediation whenever a hearing on child custody and visitation issues comes before the court. Usually, mediation is set prior to the hearing dealing with custody and visitation issues. If either of the parties fails to appear at mediation, the matter may be prevented from being heard by the court on the date of the custody and visitation hearing.

Where children are involved, mediation is usually an opportunity for both parties to meet with a professional mediator, usually a marriage and family counselor, to discuss the sharing of responsibility with respect to raising the children. The purpose is to assist the parents in coming to their own parenting plan, and to help determine a settlement that best serves the children's interests. Mediation also gives parents an opportunity to share responsibility and make decisions with respect to how their children will be cared for, before a court issues mandatory orders regarding these kinds of matters.

At Court Ordered Mediation hearings, the only issues addressed are child custody and visitation. Issues pertaining to support, property, attorney fees, and other concerns are mediated between the parties during a hearing called a "Mandatory Settlement Conference," which generally takes place later in the process. The parties also have the option of attending a voluntary mediation with a mediator of their choice. In this instance, the parties will generally agree to share the cost of a private mediator.

It is important for clients to be prepared and well assisted by their attorneys in advance of mediation. The parties who go

through mediation will likely be asked to present a proposed parenting plan, including how they intend to make decisions regarding their children, and how they will share time with their children. The parties should keep the following factors in mind:

1. The children's needs and best interests are the foremost priority. Significant concerns include the children's primary bonds with parents, siblings, and other influential persons in the child's life.
2. Geographical and practical considerations are also important. For example, issues such as who typically takes the children to and from school, to and from extracurricular activities, etc.
3. The children's desires may be considered by the court if the child is sufficiently mature to make such decisions. Children who express mature and well reasoned requests are generally taken seriously by the Court, and their desires will be given more weight than children who are less mature.
4. The State of California encourages frequent and continuing contact between parents and children. It is important that the parties demonstrate respect for one another and their parental rights, and that there is cooperation in working together toward this goal.

With respect to mediation of non-custody and visitation issues, it is important that the parties either formally or informally exchange all necessary documents and information prior to mediation, to allow each side to make informed decisions regarding their settlement options. It is also important that there be willingness to compromise on each side. However, with some strategic planning and an early exchange of information, the parties and their counsel can set the stage for effective settlement discussions, thereby creating a greater likelihood that the case will resolve during mediation and at the earliest possible juncture prior to trial. This has the inherent benefit of reducing the amount of attorneys' fees and costs spent on the case, thereby maximizing the financial benefits to the parties themselves. **GT**

Nicole Whyte is founding principal of the law firm of Bremer, Whyte, Brown & O'Meara LLP, located in Newport Beach, California. Admitted to the California State Bar in 1991 and the Nevada State Bar in 2000, Ms. Whyte has extensive experience in all aspects of litigation, including the specialty areas of construction defect litigation, premises liability, personal injury, general liability and intellectual property (trademark and copyright infringement), and family law.

