Psychology and Family Law

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Mediation is only one form of collaborative law used to resolve matters outside of court. By utilizing some form of collaborative law, the parties maintain control over the outcome. After all, a settlement can only be reached by *agreement* among the parties. If the parties are unable to reach an agreement on each and every issue at some point, they will then be forced to litigate the unresolved issues in court.

Mediation has been used by the Los Angeles Superior Court as a means of resolving child custody disputes since its inception in 1955. If the parties are involved in a custody dispute, mediation is *required.* In fact, a court will not make orders related to custody unless the parties have attempted to resolve their custody dispute through mediation. Court employees trained in resolving such disputes work with the parents in an effort to reach a custody agreement. This form of mediation is known as Conciliation Court. Attorneys are not permitted to participate in this process and the "mediators" advise the parties that they have the opportunity to reject any agreement entered into within 10 days or the morning before the Court hearing, whichever occurs first. What the "mediators" and many attorneys fail to explain to the parties is that if they timely reject the Conciliation Court Agreement, the judge will often inquire as to the reasons for the rejection of that agreement. Unless the rejection is based upon a significant incident that occurred since entering into the agreement, many judges will make a custody order that basically reinstates the terms of the original agreement, regardless of the rejection.

Many of the Los Angeles County courthouses utilize attorney mediators for the family law matters. Family law attorneys are asked to volunteer their time at a particular courthouse and are sent cases which the judge or commissioner believes are appropriate for mediation. As an example, I must point out that there are three family law courtrooms in the Van Nuys Courthouse, and that there are typically at least 20 matters set for hearing in each of those courtrooms on any given morning. However, it is rare for more than a three to five cases to be sent down to mediation at any given day. The reason that so few cases are sent to the mediator is that the judges and commissioners do not believe that every case is appropriate for mediation.

I have been volunteering as an attorney mediator on a rotating basis at the Van Nuys Courthouse since January of 2008. I have found that program to be a very effective means with which to resolve such legal disputes. Those matters have involved custody/visitation disputes, spousal and/or child support issues, and requests for contribution toward attorneys fees, I have found mediating family matters so personally rewarding that in or about May of 2008, I completed a 40 hour training in mediation skills.

I tend to agree with those judges and comissioners that hold that mediation is not appropriate for every case. The parties and/or their attorneys must have a good faith desire to resolve their disputes in such a manner. I use the term good faith because I have found that in a family law situation, one party generally tends to be more aggressive than the other. I have also noticed that the more aggressive party tends to be the one pushing the idea of mediation and that the parties participate in mediation without legal counsel. It is important to note that a mediator

cannot represent the interests of any particular party. In fact, the mediator's job is to assist in resolving the legal dispute. If the parties are not represented by separate counsel and one party is more aggressive in the mediation, he/she may be able to put into effect a mediation settlement that is unfair to the other party through intimidation or just by "steam rolling over" the weaker party. Unfortunately, once the agreement is signed, it is almost impossible to set aside. While such a case may be resolved through mediation, if the agreement is unfair to the weaker party, I am not sure that I would consider the mediation to have been a success.

Often times, the parties participate in mediation without legal counsel, but the mediator recommends that each party go over agreements reached with separate counsel before signing the agreements. While in theory this is a means of protecting the weaker party, the problem is that both parties are aware of the agreement that each was willing to make. If material changes are requested after consulting with attorneys, it is often difficult or impossible to make those changes because of the terms that were preliminarily agreed to by the parties, as mentioned above.

As a result, I believe that the "safest" form of mediation is where each party is represented by counsel throughout the process. Obviously, this is often not the case. I do not mean to convey that mediation cannot be effective unless each party is represented by counsel. However, the parties should exercise caution when mediating without separate counsel because of the risks involved.

If used effectively, a mediated resolution allows the parties to heal much sooner from their emotional wounds caused by the dissolution of their relationship. Mediation also enables the parties to delve into the underlying reasons they desire certain results and thereby allows for more creative resolutions that might accomplish those needs through means that are more palatable to the other party. However, it is a misconception that mediation is always a less costly form of dispute resolution. It certainly has its benefits, if used effectively. However, if the primary reason for utilizing mediation is cost savings, the parties may not be using it effectively.