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WEDNESDAY, JULY 2, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 130

Attorney-assisted family law mediation can provide a better way forward

Under the new Cook County Circuit Court Rule 13.4(e), a judge can order parties in a domestic relations dispute to mediate both financial and custody and visitation issues. Previously, a judge only had authority to order mediation for child custody and visitation disputes.

Under the new rule, child custody and visitation disputes are still subject to mandatory mediation and discovery, and financial issues (including property, maintenance and child support) are mediated at the judge's discretion.

Every domestic relations case involves financial issues, child custody and visitation issues, or both, and therefore a judge can now order any domestic relations case to mediation.

The Cook County Circuit Court is compiling a list of mediators who must meet set criteria to be appointed for domestic relations disputes. Many of these mediators will be family law practitioners with an unprecedented base of knowledge and experience to resolve cases. Appointed mediators may be compensated similarly to child representatives in that they are expected to accept pro bono cases to be eligible for fee-generating cases.

In the past, attorneys often sent clients to mandated custody mediation with no preparation and the expectation that mediation was a hoop to jump through before the "real" case could begin. The legislature has now imposed higher standards for mediation and mediators. If they were not before, family law attorneys must now follow a best practice model for mediated cases.

If attorneys and parties decide on attorney-assisted mediation, each side determines goals and develops a strategy to execute. As in a litigated case, an attorney must explain the process and set expectations from the beginning.

Prepare your client

Parties might confuse mediation with arbitration or litigation. At the outset, explain what mediation is — and what it is not.

Explain that mediation does not occur in a courtroom and that the clients resolve issues with the help of the attorneys and mediator. The mediator is not a judge or an arbitrator, and will not provide legal advice or make decisions. The mediator may make recommendations if agreed to by both parties, but advise your client that recommendations can polarize the parties and make resolution difficult.

If there is a power imbalance between the parties, the vulnerable party may believe that a judge's decision is less intimidating than giving any control to the opposing party. Attorney support and problem-solving is why attorney-assisted mediation can work, even when a power imbalance exists. Remind your client that attorney-assisted mediation gives him or her the benefit a lawyer without the financial and emotional drain of litigation. And if mediation fails, litigation is still an option.

If attorneys prepare for mediation like a litigated case, parties to family law disputes will have a viable and effective alternative to litigation.

Prepare yourself

Some lawyers believe that mediation does not require the preparation of a litigated dispute; under this theory, lawyers only facilitate the parties' resolution, and that resolution may not be what a judge can order at trial. The possibility of an atypical outcome should not dictate the preparation process.

MODERN FAMILY

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Many mediators require parties to provide a summary document stating facts and positions on each issue. Do not treat this document as a starting point for preparation — treat it as your opening statement and do the advance work to support the facts stated.

Remember your audience when preparing your summary, however. In a litigated case, a judge may have history before a trial, but a mediator does not know the back story, the parties or the issues.

If the court has not suspended or limited financial discovery during mediation under Cook County Circuit Court Rule 13.4(e)(viii)(b), issue formal financial discovery. Trace assets and prepare demonstrative exhibits to show the basis for a position.

If valuation reports or appraisals have previously been exchanged (or there is an agreement to exchange before mediation) review the reports, talk to the experts, and know the weaknesses in your opponent's report.

In financial disputes, a mediator may require parties to provide proof of income and a financial disclosure statement. Decide how to truthfully state income, cash flow and expenses in a way that is helpful to your client's position.

Under Cook County Circuit Court Rule 13.4(e)(viii)(a), parties cannot engage in discovery regarding custody and visitation while mediating these issues, but if a case involves a child in therapy or with special needs, consider asking the mediator to speak to treatment providers, therapists or teachers before mediation.

One obvious but important caveat — mediation may fail, so do not give documents to the opposing party containing a roadmap of your case or information that could later be used against your client in litigation.

Follow up

If the parties reach an agreement in mediation, it is generally better not to execute a final agreement immediately afterward. While anxious clients can fuel the temptation to strike while the iron is hot, key terms can be missed if an agreement is hastily drafted. Being well-prepared for mediation and a satisfactory resolution are meaningless if the agreement does not correctly state every term.

Mediated financial agreements signed by both parties will generally be upheld by a court if they are not found to be unconscionable, especially if attorneys are present. See Cook County Circuit Court Rule 13.4(e)(vi)(d).

Ask the mediator to prepare a memorandum of understanding of agreed upon terms within 24 hours to memorialize the agreement and avoid mistakes.

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