Traditional Family Law Mediation

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By

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I. The Early Days of Family Law Mediation

Although mediation has been around for thousands of years, it did not formally arrive in Texas until 1987, and in the practice of Texas family law until 1995.

In the 1990s, the early days of Texas family law mediations, the mediator almost always initiated the mediation with a general session with all parties and lawyers and experts present. The mediator went over the rules of mediation, followed by a preamble designed to motivate the parties to work toward a resolution. After the mediator's opening, the mediator would invite the petitioner's attorney to make a general statement about the case, the contested issues, and their proposed solutions. Next, the mediator would invite the respondent's attorney to make a responsive statement. After both attorneys' statements, the mediator allowed the petitioner and respondent to add anything else they wished to say.

Finally, the mediator might invite any experts present to add any general statements concerning their area of expertise relevant to achieving a consensus. At the conclusion of the general session, the mediator placed both sides in separate caucus rooms and then shuttled between them, meeting in private session with each side. If a resolution was achieved, the agreement was reduced to writing in a Mediated Settlement Agreement. If no resolution was reached, the mediator declared an impasse.

II. Family Law Mediation Today

The model described above is probably an excellent method for resolving lawsuits involving car wrecks or contract disputes. However, family law mediators discovered, through painful experience, that it was often counterproductive or even destructive to the resolution of family law disputes.

Unlike other areas of litigation, family law disputes involve just about every known emotion, including:

pain	**loss**	**fear**	**greed**	**guilt**
anger	**revenge**	**justification**	**pride**	**envy**

[1] Tex. Civ. Prac. & Rem. Code Ann. § 154.071 (West 2011).

[2] Tex. Fam. Code Ann. §§ 6.602 (Vernon 2006), 153.0071 (Vernon 2014).

These emotions may be more overblown than at any other time in that person's life. With so much emotion assembled in one room in that general session, those opening statements often disintegrated to the point that the mediator spent the next hour or two trying to get the sides calmed down and back to the starting gate.

Today, opening general sessions are rarely, if ever, used in family law mediation. It is much more efficient to cover the rules of mediation and any other preamble in each room, than to repair the damage from an off-the-rails general session.

III. Hallmarks of Family Law Mediation

Although the historical model for family law mediation appears similar to any other mediation, the potential range and magnitude of emotions described above makes the actual process a little bit different from other mediations.

> Possibly the biggest difference between family law cases and other types of mediation is the parties' need to vent and tell their story.

Many people going through a divorce (or custody litigation) are very wounded and need to tell someone their story. They need sympathy. They need reassurance. They need justification. They need confirmation.

A mediator with the patience to listen nonjudgmentally can go a very long way toward getting the party to a place where he or she can negotiate, problem-solve, and compromise rationally. A mediator with life experiences (their own, or a former client's) can share and empathize, and put the party at ease enough to have a meaningful conversation about problem solving and resolutions.

Another hallmark of family law mediation is that the parties truly do not know what to expect. They do not understand the law or the process. Worse yet are those who have gotten legal advice from friends and have a totally unrealistic expectation of the outcome (e.g., "Mother always gets custody unless you prove her unfit.").

Clearly, education of the participants is one of the most significant parts of the process. But how? The answer to this question may determine one of the biggest divides between an OK mediator and a great mediator.

IV. Education Process During a Family Law Mediation

Even though most parties are willing to extend a good deal of authority and a good deal of credibility to the mediator, telling a party the answer is seldom successful. However, if the mediator can ask rhetorical questions of the lawyer or client, often the answer can be arrived at in such a way that it is the client's solution rather than the mediator's (*e.g.,* "Mr. Lawyer, in your experience, what does Judge X normally do with this issue?")

Another part of the educational process during mediation is to define the playing field. Quite often, parties come into mediation with wildly inaccurate concepts about what is at stake. They see it as a win-all or lose-all proposition.

Possibly the best example of this is in custody litigation. The Texas Family Code contains a visitation schedule that awards the non-possessory parent with the children approximately 43% of the time.[3] In other words, even without a court fight, the "loser" in custody litigation is still going to have the kids 43% of the time. The parties are not fighting about all or nothing. Instead, they are fighting about 25 or 26 days out of a year.

Another facet of the parties' education concerns jury issues and non-jury issues. If things have not gone well for litigants in temporary orders or other preliminary proceedings, the litigants might be inclined to take away the judge's power by making a jury demand. However, they need to understand that will not totally resolve their problem.

In a fight over the division of an estate, the jury can answer if an asset is community property or separate property, and a jury can say the value of an asset. However, only the judge can divide assets and debts between the parties (and is not required to divide the estate 50–50).

Likewise, in custody litigation, the jury can say which parent should establish the domicile of the child (primary custody), but only the judge can dictate the other parent's access schedule (and is not absolutely obligated to follow the schedule in the Family Code).

[3] Fam. § 153.317 (West 2014).

V. The Cost-Benefit Analysis of Family Law Mediation Compared to Litigation

A different, but equally important, part of the mediation-education process has to do with a cost–benefit analysis. Without the help of a good lawyer or mediator, it is not unusual for a party to choose to fight over a $300 item when that choice will result in an additional $900 in attorney fees. When educated on the relative cost of this transaction, most parties decline to make the fight.

This example can be broadened by asking, "How much is truly in dispute today?" and "How much is it going to cost to get through a complete trial?" (How much longer will I have to remain in this current hell to get through a complete trial?). In fact, a significant part of the mediation-education process has to do with how expensive, how unpleasant, and how uncertain litigation is.

Any mediator worth his or her salt should be able to share a personal vignette about losing an unlosable case. The party must understand that there are no guarantees in the courtroom. (Just like Russian roulette, the odds may be highly in their favor, but the small chance of losing would be absolutely devastating.)

Another cost of litigation, which parents seldom appreciate or understand, is how destructive the process is to the children. Usually, children love both of their parents, and anyone who hurts their parent also hurts them. Very few litigants truly understand how severely each parent will hurt the other in a contested court proceeding.

Likewise, contested-custody litigation is so intense that most parents become very short-sighted. Winning or losing the court fight becomes their whole universe. In the quiet of a mediation caucus room, a good mediator can help parents understand that this litigation only concerns the short term, but they are going to continue to be parents (and to continue to want a good relationship with that child) for many, many decades. They need to know that the damage done in the short-term litigation can adversely affect their long-term relationship with their child.

Custody litigants also need help to understand that, even though they are getting a divorce, they will continue to have to deal with each other because of their continuing roles as parents. They need to visualize going to a Little League game, high school graduation, a child's wedding, and the birth of

grandchildren. Then they need to understand that the more havoc that is created in the current litigation, the more unpleasant each of those future events is going to be—for them and also for their child.

Finally, when the mediator is praising the parents for what a wonderful parent they are, he or she can help them understand that the greatest gift they can give to their child, right now, is to resolve this case and keep it out of court. All in all, traditional family law mediations are just like any other mediation, only just a little different.