

An Elmhurst family lawyer and certified mediator, Laura M. Urbik Kern discusses alternative dispute resolution, including mediation and collaborative divorce.

How does divorce mediation work?

Laura: It can happen in two different ways. Number one, the court could order you to mediation or the parties can go voluntarily to mediation. If they come, they will meet with an independent person – it could be a lawyer, it could be a therapist, or another person who is trained in mediation – and they guide the process so that both parties can reach their common goals of self-sufficiency and meeting the kids’ best interest. Once people come into the divorce mediation process, everything that happens in there is confidential. All information has to be disclosed. If someone wants to tell the mediator something that they think they should know while they're doing the mediation, they can do that separately. Hopefully by the end of the process, the parties are educated and have come to an agreement.

What are the advantages of using mediation to settle a divorce case?

Number one, cost. It is extremely expensive to litigate in these times. Our system is set up for lawyers – not for people. We have to spend a lot of time waiting that the client is paying for. In mediation, you are involved; you are active and you are trying to get your case settled in the most efficient manner with the least amount of pain. You need to be able to work on compromise, which will be a skill you'll need in the future if you have children.

How does collaborative law work?

In collaborative law, each client hires an attorney who is a collaborative lawyer. They meet in a series of four-way meetings, which could be more than four people. The other people that may be involved are financial planners, parent coaches, and therapists. There could be as many as six of those type of people along with the lawyers.

The best thing to do in a collaborative case is to try to get someone who is going to be your joint expert for financial stuff, who's going to do all the evaluation so that the parties are on the same page as far as that's concerned. Also, if you are really, really at each other's throats all the time, you might want a parenting coach who will help you to resolve your issues regarding the children.

What are the advantages to using collaborative law versus litigation or mediation?

In collaborative law, it's working with the parties – almost like mediation with lawyers except that you're putting everything on the table the same way. In court, you have to go through a lot more different steps – you have to do discovery, you have to do all the paperwork, and reviewing all the paperwork – whereas if you go into collaborative law, everything is right there in front of you and everyone voluntarily brings it in, so it takes less time than the litigation system.

Can you mediate a case where there are major power imbalances between the couple or where there's been domestic violence during the marriage?

I can. I've taken a lot of domestic violence and psychological training to try to get more understanding of where people come from. If people have great power imbalances, you may have to put them in two different rooms to be able to do that. That's called shuttle mediation. Or it may be that you cannot mediate it. It just depends again on the facts. If someone is very volatile and they're going to be screaming and yelling the whole time, and I as a mediator can't control that, I'm not going to do it because it's too stressful on everybody.

Would collaborative possibly be a good choice for this kind of couple with the power imbalances, given that they each have their own collaboratively-trained attorney and there also usually is a divorce coach who can help them through?

Yes. Again, you should have some experience or at least do some research in the area of the problem so that you know what you're dealing with. I would encourage all lawyers to take whatever psychological training they can take to understand different types of personalities, child rearing, bonding, and all those other things that go into kids.

How long does a typical mediation process take? How many sessions are generally required to reach an agreement?

It depends. If we're just doing children's issues and the parties are relatively co-operative with each other, you can get it done in a couple of hours. If you're doing the whole thing – all the financial and children's issues – that might take eight, 10, 12 meetings. It just depends. It also depends on how many assets they have.

In my mind, doing the children's stuff is the hardest part because the financial stuff is a business deal. This is what we have to split. It's not what I deserve, it's not what I need, it's kind of like, alright. The kids are the hardest part.

You mentioned that you can just mediate specific issues and not having to mediate the whole case. Why would you do this? What are the advantages to just doing a few cases, a few issues in mediation?

Well, most of the people who come with just a few issues are the court-appointed people who come for the kids. These days, there aren't a lot of financial mediations, but it's becoming more and more popular to do them. I think that it's not a matter of people not wanting them to; it's a matter of them not knowing they have that option.

What is the difference between mediation and arbitration?

In mediation, there's no judge, there's no panel, there's one mediator and two people. In arbitration, that is an actual court hearing done by lay people. In Illinois, we have three lawyers that sit on the arbitration panel. They then rule and it goes back to a judge. Then that person, at that point in arbitration, can appeal the arbitrator's decision. In mediation, people can accept or reject it. They can do a whole mediation and then walk out and say, "I'm not doing it." There's nothing anybody can do about it.

How does the success rate of mediation compare with other forms of alternative dispute resolution such as arbitration or collaborative divorce?

I don't know how it compares with arbitration or collaborative divorce, but I can tell you mediation in divorce cases where the parties come to an agreement on their children are much more likely to be settled quickly. I think our success rate of court-appointed mediation in our county is 85%.

When is mediation a better choice than going to court?

Always 100%. Because even if you go to mediation and you don't walk out with an agreement, you now know where the other person is coming from in their head and vice versa. That sometimes makes it easier to try to get the parties to be focusing on the goals that they're trying to reach, because they lose track of the goals. I really believe that mediation is the way to go with everything.

Is mediation more or less expensive than other forms of dispute resolution? How much does it typically cost?

Usually the lawyer would charge the regular hourly rate, which in our county is anywhere from \$250 an hour to \$450 an hour. If you're court-appointed, it is less expensive. The court sets the rate at \$225 an hour. It can be less expensive in the long run if you have one half of the process already completed before you go to the next one.

What can someone do to prepare for the divorce mediation process?

You have to know what your goals are. You have to be prepared to figure out in your own head what you want and what your goals are. Those are two different things. We want to have a stable life, but our goal is that we survive. Those are two separate things, right? That happens a lot across the board between goals and what people want or deserve.

Does the mediator typically draft the divorce agreement?

In our state, it is not allowed. The mediator is supposed to just send a letter stating the agreement to the other attorneys, and then the attorneys would draft it. On occasion, rare occasion, the attorneys will both agree and the parties will agree that the mediator should draw up the agreement. But, for the most part the lawyers do it.

Is it necessarily for a divorcing couple to each hire a lawyer to review the agreement before the couple signs it?

Not necessary, but they should just to be absolutely sure. The caveat to that is that if it's a financial mediation, what went on in mediation is not necessarily what the law would have given the people. However, the people are comfortable with the agreement that they worked out. The lawyer then gets involved, and it's possible the lawyer could blow up the deal. That's happened to me before. The only way to sort that out is if they go to trial. It's a shame that it happens because we got the parties to agree and it worked for everybody, and then it got blown up. It's frustrating sometimes.

Because you're a lawyer yourself, do you ever have couples come to you and say they want you to act as their mediator and they're not going to hire lawyers? What would you do in that case?

I would tell them that I would be happy to mediate their case and give them a letter stating what they agreed to, but they're going to have to have somebody draft it. Somebody should get a lawyer to draft it because I can't do that.

Is mediation suitable for a case with very complex issues?

Yes. Mediation is used across the United States by companies and by individuals to try to resolve their problems. Imagine a company that's worth a billion dollars and they have a problem. They mediate it. Why couldn't we mediate a divorce case? The key is that all the information is on the table.

You're saying that mediation can be used in very high-net-worth cases?

Yes, it can. But most lawyers would not send their high-net-worth lawyers to a mediator because they'd rather litigate it.

Would one advantage for that high-net-worth client be the privacy?

Exactly, that's one of the reasons. I'm doing a case right now, a mediation between two people where they do have a high net worth but they also realize that they want to keep as much money in their family as possible. What they're doing is kind of a blend – it's not a collaborative case and it's not a mediation case. But the lawyers are going to have a four-way with the people to try to work out a deal. In a way, it's like collaborative, except in collaborative if you don't reach a deal, you have to withdraw, and then another lawyer has to come in to be the litigator. From that standpoint, that's one bad aspect of collaborative law if it doesn't work.

Is there more than one style of mediation? I know you mentioned shuttle mediation earlier on, but what are the differences between the different styles?

Shuttle mediation is a physical type of removal. There are a number of ways to do mediation. One is direct where you direct the people where they're going to go. One is you sit back and let them talk to you. Another way is more gentle and more probing like a psychologist would do as opposed to a lawyer who's like "I'm direct, that's just the way I do mediation." You can have the people be in two different rooms, you can have the people be in the same room. I prefer to have people in the same room if at all possible because, going forward, they have to deal with each other until those kids are grown. They need to start learning how to do that.

What is co-mediation and when is it typically used?

That's when you have two mediators and typically you would use it if you have what we call stumbling blocks in mediation – where we get to a point where we can't get the parties to move in any direction. Having a co-mediator there for that session, they're sometimes able to approach it from a different way that gets the parties rolling again. A lot of times, co-mediation is used with new mediators with experienced mediators so

that they can learn. Or you would bring in two mediators when you think you're going to have a very, very difficult case.

What are the ethical guidelines of mediation? Does the mediator always remain objective or do they sometimes pick sides and advocate for one party?

Not allowed to do that. You have to be neutral across the board. If you're advocating for anybody, it's for the kids. You can't disclose anything that's heard within mediation nor can the parties for that matter, I suppose. But they can't call the mediator to testify. Ethically, you go in there and you try your best to get the parties to come to some agreement. That's what our job is.

What happens if you just really dislike one of the two parties?

Before you do mediation, you have to check yourself and make sure you're ready to do it. If you're already aggravated, tired, and everything else, you're not going to do a good job. Let's say one of the parties is really, really volatile or really, really obnoxious. I'll pull them into another room and I'll say to them, "Look, here are your choices. You can go to trial and spend \$50,000 or you sit in this room with the person that you married, at one point you loved, and had children with and try to figure out what's best for your kids. What do you want to do?" If the guy is still very difficult, or the woman, I'll say I'm done. You guys are wasting your time, your money, and now you're wasting my time.

Will the mediator keep information confidential or are you bound to share it with the other party?

Unless the person giving you the information gave you permission, you're not allowed to share that with the other party. However, what I would do in most cases is say to the person, "Look, this is a concern of yours. If it's a concern of yours, I can weave it into some of the questions that I'm going to be asking you guys so that it's brought up on the table without you bringing it up." That way, it doesn't look like you're pointing a finger about something. A lot of times, they'll allow me to do that, and we get it out on the table, it's fully discussed, and the issue goes away.

What about if the thing they tell you is going to blow up the mediation? Like I'm having an affair with somebody and I bought them a condo?

I would suggest to them that they talk to the lawyer about that stuff because that has to do with their rights under the law and they need to know what their rights are or are not. I would encourage them, before we went into mediation, to talk to a lawyer about that information and see how they wanted to handle it.

Divorce mediators are often also lawyers, financial experts, or mental health professionals. Can the mediator wear two hats during the process, such as a mediator and a lawyer or a mediator and a therapist? Or can you only wear the one hat?

You're not allowed to be anything but the mediator when you're in mediation. However, it's not like you can't leave out your life experience. Because you do have life

experience that helps, and whether that life experience came from being a mediator or being a lawyer or doing finances, you can still use that information within the process. However, you can't give legal, therapeutic, or financial advice because you are a mediator when you're in there.

Is collaborative law suitable for a case with very complex issues?

Yes. There's nothing that can't be done in collaborative law that can't be done in litigation except that in collaborative law, the parties are working to a resolution together. When you go to court, you're in an adversarial system. If you want to be adversarial, you go to court. If you want to try to work this out in the best interest of your kids and figure out how you can financially make it, then collaborative might be a better route or mediation might be a better route.

Have you ever seen clients attempt mediation or collaborative really not in good faith?

I have not had that problem. With most of the people who come in for their kids, they want to get it done. They want some closure on those issues. On the financial issues, most of the financial people don't come to mediation. If they do come to mediation, they don't have lawyers and they get the lawyers after the fact.

Do you have to handle mediation or collaborative law sessions differently when one of the parties has a diagnosed personality disorder – such as narcissism, borderline personality disorder, or any of the ones that we hear about commonly nowadays?

If you try to learn about those particular conditions, they also teach you how to approach those types of people and how to get them to come around. A narcissist, for example, is always right – they know everything, they're the best, they're the best parent, they're this, they're that. So you flatter them in your mediation: “Wow that's a great thing you did for your son.” Then you say, “Don't you agree?” And she may say no. Say, “Really? Come on, it's your kid.” That's the kind of stuff that you can do in mediation that you can't do in court. You can't have that conversation and say, “Come on, what are you thinking here?”

How do you keep the children first and foremost during mediation or collaborative sessions?

That's the lawyer's job. The lawyer has to keep going back to wait, we're talking about Joey here, we're not talking about Mary. What does Joey need? What did dad do? What had dad done? Is dad a good dad? He's maybe a rotten husband, but he could be a great dad. And vice versa, it might be a horrible wife but a great mom. It's difficult to get people to come to the table and admit that the other parent might actually have a good thing about them, but you can get them there. Once you've established that, it goes a lot faster.

I just like to emphasise how important it is that your kids come first in any dissolution proceeding. I don't know how to say that in any other way, it's just really important. It's

also important that the less money you spend in court, the more money you have to put your kid through college, period.

Are there any tricks that you use?

Sometimes I will ask them, “Do you have a picture of your child?” They'll say “no,” and I'll say, “What? Come on, in your phone?” Oh yeah, I got one in my phone. Let's put it on the table. Sometimes I'll do that, sometimes I won't. It just depends on the people and the feeling that I get from them. I meet with them individually before I go into the joint session to try to get a feel for what's going on in their lives. I think doing that makes a big difference.