**COLLABORATIVE DIVORCE OR MEDIATION: WHAT PROCESS SHOULD I CHOOSE?**

***By Ellen Barron Feldman, Attorney and Divorce Mediator***

As a full-time mediator who is collaboratively trained, I spend much of my time talking to prospective clients on the phone or in person about their options as they contemplate divorce. Litigation, collaborative, mediation, with or without attorneys, so many choices. Definitions do not tell the whole story about how a divorce with any process might play out or how much control the divorcing couple has about the way things will go.

**Mediation Process and Advantages**

Mediation provides the opportunity for resolution of all the required issues under the Illinois Marriage and Dissolution of Marriage Act in a neutral setting, with the assistance of an objective, impartial mediator. The mediator facilitates conversations about custody, parenting time and finances. More often than not, couples hire a mediator to help them with all issues in their divorce. Attorneys who have already been hired or consulted by one or both of the spouses refer their clients to mediate the custody and parenting piece.

As a mediator, I see countless advantages to the process. A divorcing couple may not talk at all. Just being in the same room with a neutral person listening and facilitating conversation allows them to talk to each other. Talk about anything: children’s schedules, how they are doing in school, trying out for the soccer team, whether to hire a tutor for math and the list continues. Communication has often broken down in the marriage and couples are stressed and fight when they are together. Even talking about logistics may be impossible. They do not have to stay married but every couple needs to communicate about their children. Communication in a new or different way can help the couple move forward to be the best parents they can be for their children.

With divorce mediation, spouses are more inclined to honor their obligations than if a judge had imposed a parenting plan, holiday schedule, division of assets and financial commitments. They own the process because they are coming to decisions themselves and not being ordered to do things. Especially with children, mediators help the couple focus on the best interests of the children. This provides a financial benefit because the money saved by participating in mediation can be used for children’s activities, schooling and to fund college accounts for the future.

The threshold question I ask potential clients is whether they can advocate for themselves. If they have the ability to tell their spouse what they want and state their position on an issue, in the presence of a neutral mediator, mediation is the most efficient and expeditious way to resolve the issues in a divorce.

**Collaborative Divorce Process**

Like mediation, collaborative divorce has as its most basic premise that the case will be settled. The couple signs a participation agreement that they may not go forward in court with their collaborative attorneys if they are not able to settle all the issues in their divorce. Collaborative process is a team approach to divorce. Each spouse has an attorney in the room. At a minimum, there are four people in every meeting. There may also be a child specialist to help with the parenting plan or holidays, a financial neutral to talk about assets, debts, child support and spousal support or a mortgage broker to talk about refinancing the house or selling the house. There is typically a coach in the meetings to reframe what someone has said so the client understands it better or help a party state his position in a less adversarial manner so the other party can hear what is being said. Coaches manage expectations and emotions and help pace the couple so that the process is not moving too quickly or slowly for either party.

While not necessarily less expensive than a litigated divorce, the biggest advantage of collaborative process is the safety aspect. Attorneys are in the meeting at every step of the way. Clients do not need to advocate for themselves. They are making informed decisions based on advice of the professionals in the collaborative meetings. Clients feel protected because they know their spouse has also agreed not to go to court to litigate their divorce. This allows them to make agreements more comfortably.

**How Collaborative Divorce is Different from Litigating a Divorce**

In a litigated divorce, though more than ninety percent of divorces cases end in settlement, the parties are in an adversarial situation. They each hire their own attorney who advocates for their client in a zealous way to get the best possible outcome. Clients want to have their day in court when the Judge will hear their side of the story and do the right thing. Truth be told, judges rarely hear the divorcing couple speak but talk to the attorneys who relay directions and decisions to the couple. Trials are not like they appear on television. Nobody feels heard and nobody really wants to do what the judge has ordered them to do. This goes back to owning the process, like mediation, when the couple is making their own decisions about what is best for their children, family and finances moving forward.

**How Collaborative Divorce is Different from Mediation**

Collaborative process uses a team approach to the divorce, bringing in professionals as necessary to inform the couple about the best way to handle any piece of the process. Attorneys are in every meeting to represent the couple and help them through the process. In mediation, each spouse needs to be able to advocate what is wanted in the meetings. Collaborative cases typically have one coach, a financial neutral, a child specialist to help the couple discuss sole or joint custody for the children, decide the best parenting schedule and outline holidays. A mortgage broker may be necessary if the couple wants to evaluate options about selling or keeping the house post-divorce. Mediators too may bring in a financial neutral or refer either spouse to a financial planner to understand the finances better or prepare a budget.

At the end of the mediation process, the mediator writes a Memorandum of Understanding outlining the agreements made by the couple during mediation. The attorney hired by either party during mediation or at the end of the process will draft a Joint Parenting Agreement, or JPA, outlining custody, parenting schedule and holidays, and a Marital Settlement Agreement, or MSA, detailing the financial agreements. At the end of the collaborative process, the attorneys write a agreement and help the parties enter it in court since no petition or pleadings are filed at any point during the collaborative process. Collaborative and mediation are the same in that both processes are committed to resolution of the divorce without litigation.

If the parties are not able to resolve things in the collaborative process, the attorneys are done and the parties need to hire new attorneys. Everyone has signed a collaborative agreement that the attorneys may not take the parties to court if the process fails. The child specialist may stay on to advise the couple as necessary but not the attorneys, financial neutral, coach or coaches. If the parties are not able to resolve their divorce through mediation, the mediator cannot be called to testify in court about the agreements made in mediation. Only the agreements themselves, if the parties agree, can be forwarded to the attorneys for inclusion in the JPA or MSA.

**Conclusion**

While both collaborative and mediation offer couples the option of resolving the issues in their divorce outside of the court system, there are differences to consider based on how comfortable each person is being able to advocate for himself in the process and professionals who may be needed to facilitate resolution of the issues.