

VOLUNTARY MEDIATION IN DIVORCE AND CUSTODY ACTIONS

WHAT IS "MEDIATION?"

The Domestic Code, 23 Pa.C.S. § 3901, authorizes a court to establish a mediation program for both divorce and custody cases. At the present time, these rules apply only to court-connected mediation of custody cases because most, if not all, court-connected mediation programs that have been established for domestic relations, are limited to mediation of custody disputes. If, in the future, these programs expand to include mediation of divorce issues, these rules will be revised accordingly.

These rules do not apply to private mediation, which may be agreed to by the parties and conducted independent of the custody proceeding. They do apply, however, whenever the court refers a custody case for mediation, regardless of whether the referral is made to a formal program established and operated by the court or to a less formal arrangement between courts and mediators such as a court-approved list of mediators or, in the absence of such a list, to individual mediators appointed by the court to mediate particular cases.

"Mediation" is the confidential process by which a neutral mediator assists the parties in attempting to reach a mutually acceptable agreement on issues arising in a custody action. The role of the mediator is to assist the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties must be based on the voluntary decisions of the parties and not the decision of the mediator. The agreement may resolve all or only some of the disputed issues. Parties are required to mediate in good faith, but are not compelled to reach an agreement. While mediation is an alternative means of conflict resolution, it is not a substitute for the benefit of legal advice.

"Memorandum of Understanding" is the written document prepared by a mediator which contains and summarizes the resolution reached by the parties during mediation. A Memorandum of Understanding is primarily for the benefit of the parties and is not legally binding on either party.

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Comment: The definition "mediation" follows the legislative distinction between the initial **orientation session**, which the court may order the parties to attend, and actual mediation of the issues in dispute by the parties, which, statutorily, may be ordered only upon the parties' agreement.

"Orientation Session" is the initial process of educating the parties on the mediation process so that they can make an informed choice about continued participation in mediation. This process may be mandated by the court and may be structured to include either group or individual sessions. An orientation session may also include an educational program for parents and children on the process of divorce and separation and the benefits of mediation in resolving custody disputes.

WHY CHOSE MEDIATION OVER LITIGATION?

The tendency of the parties to a divorce or custody matter to become firmly and adversely entrenched in their respective positions is directly related

to their perceptions of a hostile motive on behalf of the other party. In most cases, the filing of a complaint and the hostile posturing of most attorneys will have a deleterious effect on the relationship of the parties. Mediation is a less hostile, more amicable way of dealing with a very difficult situation. It brings the parties together in a non-confrontational manner to discuss their issues with a court-appointed or individually selected attorney, learned in the law, to help them reach a resolution. Attorneys for either party are involved, but not as directly when dealing with litigation. It gets the case resolved faster and with less angst as long as the parties are willing to work together and toward a common end.