

ALTERNATIVE DISPUTE RESOLUTION

Trend in the Future of Family Law

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The focus in family law over the last decade has been to find litigation alternatives that resolve conflict in a manner that allows the participants to minimize the financial and emotional cost of the family court experience, maximize the outcome for all involved and do so in a way that preserves the dignity of the family.

The use of litigation, for years the only means of resolving disputes, is no longer favored as the line of first defense in cases especially when children are involved, whether in a case of marriage dissolution or paternity.

The current dispute resolution services that are being most widely utilized to settle cases are mediation and early neutral evaluations. It is important to understand the differences between these processes. If you are involved in a family court matter there is a strong likelihood that you will participate in one or more of these processes.

Mediation.

Mediation is a process in which a neutral third person, called a Mediator, works with the parties to assist them in formulating an outcome to their issues based on their goals and wishes not based on the absolute requirements of the law.

There are two primary mediation styles, evaluative and facilitative mediation. In facilitative mediation the mediator facilitates a discussion that encourages the participants to resolve their disputed issues through the use of open-ended, probing questions and discussion points. The mediator does not offer opinions or suggestions to overcome impasses except through the use of follow-up questions designed to stimulate the development of ideas for problem-solving and the creation of outcomes.

In evaluative mediation the mediator may start with a facilitative process but if there is no resolution she offers the parties an evaluation of the possible range of outcomes should the case proceed to trial. If the parties are stuck and interested in other ideas and options that may move the case toward settlement the evaluative mediation process allows the mediator to explore other ideas and options with the parties and their attorneys including new options not yet identified or considered.

Mediation can take as little as one or two sessions. Generally it takes less than 4 sessions to complete. The parties generally pay one-half of the mediator's fee and sometimes use a marital investment or cash asset to fund the total fee.

Early Neutral Evaluation.

The Early Neutral Evaluation program (also referred to as ENE) is designed to allow the presentation of custody and/or financial issues to non-attorney experts and/or family law attorneys who have the skills and experience to be Early Neutral Evaluators. The ENE expert(s) listen to the presentation of each party regarding the issues and ask questions. The ENE expert or team ultimately presents the parties with an opinion of what a likely

outcome or range of outcomes might be if the matter is presented to the Court so that the parties can consider the possible outcome in deciding whether to engage in contested litigation.

Custody Issues.

In custody cases the ENE panel is typically a team of two individuals, one male and one female, both of whom are experienced in the issues of custody litigation. Early Neutral Evaluators can be attorneys, social workers with Master's degrees (MSW), psychologists and others who work with children and families in the litigation system. A balance is generally sought with teams having a male/female and attorney/psychologist component. The goal is to give the parents an opinion as to the most likely outcome for custody based on the facts presented. Facts not presented are not considered by the evaluators.

In a custodial early neutral evaluation the goal is to help the parties resolve custody without the need for a custody evaluation and trial.

Private, thorough custody evaluations with a qualified evaluator cost approximately \$15,000 – \$20,000 depending on whether testimony is required in a trial. A custody evaluation can take 4-6 months of time.

A custody trial can take 2-5 days, or more, of court time depending on the number of witnesses and custody issues involved. Trial expenses are generally 10 hours per day in billable legal time for pre-trial preparation of witnesses, experts and testimony, trial time and post-trial submissions including proposed pleadings and memorandums of law. This does not even touch the cost of an appeal or post-trial motions.

In an early neutral evaluation the fee is significantly less than the cost of a custody evaluation and trial. The ENE process is generally completed in less than 75 days from the date it is ordered. The cost is typically less than \$1,000 for each session with the evaluators. Each party generally pays a proportionate amount of the ENE fee. Usually an ENE for custody issues takes no more than 2 sessions. The cost of an early neutral evaluation is a fraction of the cost of a contested custody case.

Financial Issues.

Financial early neutral evaluations (called FENE's) differ from mediation in several ways. In an FENE there is an expectation that the parties and their attorneys will have completed the work needed to establish the identity and the value of assets prior to the evaluation commencing. The evaluator will generally seek to have the parties and/or their attorneys create a balance sheet that shows the assets of the marriage and any nonmarital assets prior to the first ENE.

In mediation the parties have the time to discuss what information gathering is needed to create an accurate statement of assets and debts. The mediator might start her work by setting information gathering goals to assist the parties and attorneys with the development of a full statement of the assets and debts, as well as the income sources for addressing child support and spousal maintenance.

The intended purpose of an FENE is a quick analysis and evaluation of the financial issues with a report as to what the evaluator believes might occur relative to the financial issues if the matter were to go to Court. It was not designed to be a form of “cheap mediation” by knowledgeable attorneys, although it is often treated as such.

In addition to assets the financial evaluators can address issues such as spousal maintenance and child support. Again, if the parties are unable to resolve the issues the evaluator will provide an opinion as to what may occur if the Court is asked to resolve the issues.

Financial Early Neutral Evaluators can be attorneys, accountants and other professionals all of whom have taken the course work needed to be certified by the court as an Early Neutral Evaluator.

Difference between Mediation and Early Neutral Evaluations

Early neutral evaluations are court directed and require a Court Order to be a true early neutral evaluation. The court sets time deadlines in which the ENE should be completed and sets the fees for the evaluators. The attorneys and non-attorney experts who agree to serve as Early Neutral Evaluators often serve the Court at significantly lower hourly rates than they normally charge for their private service. They do so to make family law matters more affordable and to assist the Court in managing growing caseloads without the needed resources to do so. ENE's are voluntary. You agree to participate or not.

Private Early Neutral Evaluations are available but the form is more in the nature of an evaluative mediation than a court-ordered Early Neutral Evaluation. The outcome of a private ENE is the same as an ENE. The benefit of a private ENE is that the parties can select the evaluators they wish to use whereas a court ordered ENE is generally limited to the selection of court approved evaluators.

In mediation the parties select the process that will govern the mediation, i.e. facilitative or evaluative. Early neutral evaluations are evaluative by design.

Mediation differs from an Early Neutral Evaluation in that mediation can occur over a much longer period of time than an ENE. Mediation can occur throughout the case and up to the time a final decree or order is entered by the court.

ENE's are expected to conclude within 60-75 days of the date of a court order, hence the term “early”. Early neutral evaluations were expected to occur early in the process to keep the cost of litigation to a minimum.

Mediation is less expensive than the cost of litigation but is typically a bit more expensive than the ENE process because the fee structure for evaluators and mediators is different and because mediation may extend longer than the ENE process.

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