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New court rules should increase use of mediation in Domestic Relations Division

COLLABORATIVE CONCEPTS

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After much hard work by many professionals led by Cook County Circuit Judge Grace G. Dickler, presiding judge of the Domestic Relations Division, it was announced on March 17 that Local Rule 13.4(e), relating to the mediation of certain issues in divorce matters, was amended to broaden its scope.

Prior to the amendment, only custody and parenting issues could be ordered to mediation.

This change was conceived and discussed at length by the Alternative Dispute Resolution Exploratory Committee and multiple subcommittees before being implemented. Members of the mediation subcommittee included judges, lawyers, mediators and members of academia.

The subcommittee's goal was to determine the best practices for mediation programs and to draft new mediation rules. After two years of drafting, meetings and obtaining input from numerous judges and lawyers, the new local mediation rule came to fruition.

"This rule was inspired by the judges and attorneys in the Domestic Relations Division who were all seeking better solutions to the many issues dealt with on a daily basis," Dickler said.

"While the custody-related matters were a good start, it was clear many other contested matters could be sent to mediation for possible resolution with the hope that the agreements reached better reflect what the parties' themselves hoped to achieve. This puts the power in the parties' hands rather than the court. This should lead to more amicable outcomes, which may lead to less post-decree litigation."

All court-ordered mediation is subject to the criteria that there must be no "impediment." By definition, an "impediment to mediation" means a circumstance that may render mediation inappropriate or would unreasonably interfere with the mediation process.

Examples include past or present family violence or abuse, mental or cognitive impairment, alcohol abuse, chemical dependency and family violence or abuse including harassment, intimidation and interference with personal liberty.

Once mediation is agreed upon or ordered by the court, there are a variety of ways a mediator may be appointed.

For custody-related mediation, the court will refer the parties to the Family Mediation Services. There is no change in this practice under the new rule. For discretionary mediation ordered by the court, the court may send the parties only to a mediator who is on the list of court-approved mediators.

Discretionary mediation, as determined by the court, can be ordered or agreed to by the parties when financial issues, discovery or issues other than custody are contested. Discretionary mediation may be ordered on written stipulation of the parties, on written motion of a party or on the court's own motion.

Typically, an agreement has more staying power when the outcome was arrived at together rather than imposed on them.

Court-approved mediators must possess minimum qualifications and serve at the discretion of the presiding judge. Custody-related disputes require an Illinois license as an attorney or mental health professional, while the discretionary mediation related to financial issues requires a licensed attorney-mediator.

All court-approved mediators must have three or more years' experience in the mediator's applicable profession, have completed a minimum 40-hour mediation training program and must have knowledge and competence in domestic relations law.

The application to apply to be a court-approved mediator is available at tinyurl.com/cdlbmediation.

Upon addition to the list of court-approved mediators, each mediator must list his or her hourly rate. Mediators can set their own rate unless the service is required by the court to be at no charge or a reduced rate. Court-approved mediators are required to provide services at no charge or at a reduced rate, not to exceed 20 hours per year.

Practicing family law attorneys should be aware of various issues regarding the new mediation rule. Attorneys are encouraged to attend financial and other discretionary mediations with their clients. With the attorneys present, the couple can hear each attorney's perspective on the law with the mediator present rather than each attorney advising the client separately. This can provide better outcomes for each party.

Attorneys also should ensure that their clients are aware a settlement agreement reached in mediation may be binding if the party signs a written agreement or memorandum of understanding. If attorneys are not attending the mediation, they should instruct their client not to sign any agreement until it has been reviewed.

Upon the entry of a mediation order, all existing orders remain in effect unless modified or terminated. Further, the court may bar motions from being filed during the mediation period, although postcard status calls remain and a failure to answer a status call will result in dismissal. The new rule also states that there shall be no hearing on contested issues without leave of the court, except in an emergency.

In custody-related mediation, no discovery is allowed while the mediation is in process unless otherwise agreed by the parties or ordered by the court. In discretionary mediation, discovery is allowed unless the court limits or stays it.

As a last important point, all communications made in mediation will be confidential and privileged, not subject to discovery nor admissible in evidence. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery simply because it was used in mediation.

To state the obvious, private financial mediation in family law matters has been going on for years. A couple who choose to take control over their financial future will be far better served than continuing in litigation.

As Dickler points out, the hope is that there will be less post-decree litigation as a result. Typically, an agreement has more staying power when the outcome was arrived at together rather than imposed on them.

With these points in mind (and, of course, a thorough review of the newly revised Rule 13.4), hopefully more attorneys, litigants and judges will be able to better utilize the mediation resources available in Cook County.