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## Divorces are costly: Mediators and private judges can reduce those costs

This second installment explains how combining private mediation with a privately compensated temporary judge can streamline complex, high-net-worth divorce cases by pairing flexible negotiation with enforceable decisions that keep the process efficient and out of public court.

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This is the second of a three-part series on ways to minimize the stresses and costs of complex family law cases. In the first installment, we looked at the benefits of using private mediation, before or in lieu of trial, to resolve many or most issues in dissolution proceedings. Today's column looks at how to use privately retained mediators in conjunction with privately compensated temporary judges (PCTJ) to streamline the process for dissolutions involving high-net-worth issues, complex or illiquid assets, complex custody issues, or time-sensitive issues. The last part of the series will discuss the process and costs of a litigated private trial with a PCTJ compared with those of a public court trial.

Imagine a couple, Wendy and Hugh, who have two teenage children. Wendy and Hugh have been separated for four months and have alternated staying in the family home, with the "out parent" staying with friends or relatives during the off weeks. They know this is an unsustainable long-term solution but want as little disruption as possible for their children, at least until the end of the school year.

Wendy is an MD who works part-time covering for doctors who are on leave or vacation. Hugh works



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in the buy-side of the financial services industry with alternative investments as a partner in a private equity firm. Wendy isn't clear on how Hugh is paid, in what companies he holds an equity interest, or how those might get valued. There is no agreement yet about the financial arrangements of their separation.

Wendy and Hugh have discussed mediating their divorce, but they are at an impasse about living arrangements, payment of expenses and disclosure of Hugh's income and finances.

### Private mediator in conjunction with PCTJ

By using a combination of private neutrals, Wendy and Hugh have an opportunity to accomplish efficient, yet structured resolution of their case. Both of them want efficient management of their dissolution outside the public courthouse, but they need more structure than the private confidential mediation system contemplates.

Both of them may benefit by bringing in a third party to manage

the case, helping them determine what issues should be addressed immediately, what issues might be explored for future settlement or trial and what information each of them need in order to get to that point.

Because of the nature and complexity of the financial interests arising from Hugh's ownership in the private equity firm, Wendy should consider conducting formal discovery so she has enough information to fully understand and make an informed agreement. Before provid-

ing information to Wendy, Hugh may need a protective order setting forth guidelines on what can be provided, what must be redacted and who can view the information so as to protect the privacy of his partners and third-party investors while still providing sufficient information to Wendy about what her interest might be in the private equity assets.

The couple also have a few urgent issues, such as a parenting arrangement. They may engage a private neutral party, such as a PCTJ, to address specific aspects of a temporary parenting arrangement in anticipation of establishing separate households. Subsequently, they can work with an independent private mediator to achieve comprehensive resolution of all matters in the case.

### **Different roles of the private mediator and PCTJ**

The mediator and the PCTJ play different roles in the resolution of family law cases. A mediator's job is to facilitate negotiation between the parties, either directly or through their attorneys. He or she does not issue orders but helps the parties find workable solutions to their issues. A PCTJ, in contrast, hears testimony, reviews admissible evidence, makes decisions and issues orders that are to be followed. A PCTJ might encourage parties to resolve issues prior to making a decision, but it is not his or her job to facilitate negotiation.

The same neutral could serve as a mediator in one case and a PCTJ in another, but unless the parties and their counsel have agreed beforehand to a process in which the same person will serve in both roles, such as a mediation-arbitration agreement, those two roles will remain separate. The mediator may learn information that cannot and should not be considered by the PCTJ, and any court orders, if they are required, will be made only by the PCTJ and only on the basis of admissible and admitted evidence.

### **The appropriate neutral when needed**

Once both neutrals are in place, they will be able to recommend certain issues to one another. For example, when a discovery dispute could disrupt further progress in mediation, the private mediator can refer the parties and their attorneys to the PCTJ to discuss and resolve the specific discovery issue. The PCTJ can then issue an order on more focused discovery, thereby assisting the parties with avoiding scattershot discovery without sacrificing their ability to do follow-up discovery if necessary.

Such orders can stop the parties from playing games, especially when the PCTJ has the authority to issue enforceable orders that break an impasse standing in the way of successful mediation. Once the discovery issues have been decided and the parties have complied with the PCTJ's orders, they can continue making progress with the private mediator in the separate mediation process.

A delay in the mediation process to address this kind of discovery issue could take as long as 60-90 days to resolve before the parties can get back on track in the mediation process. By way of comparison, if the parties were working within the public court system, the time required to resolve discovery issues could easily be six months or longer.

### **One private neutral in both roles?**

Can one neutral serve in both capacities—facilitating negotiations and acting as decisionmaker for the issues that do not resolve? Whether a neutral is willing to do double duty may depend on his or her general comfort with serving in two roles. Was the possibility of serving in both roles clear at the outset of their services? Was this type of decision-making expected?

It is not uncommon for a mediator to be asked to sign the final

version of a judgment based on the fruits of that negotiation. If language is disputed, the mediator—who was present throughout the negotiation—is in an ideal position to know what each party intended at the time. It is not uncommon, for example, for parties who have agreed to some post-judgment service, such as family counseling or preparation of a Qualified Domestic Relations Order, to have not agreed on who will provide those services. They may ask the neutral to receive briefing and/or arguments on the issue(s) and make the decision on which provider(s) will be retained. Before accepting that decisionmaking role, the neutral must still comply with the requirements for serving as a Judge Pro Tem, including disclosures, even though their decision is basically a continuation of their facilitative work.

By contrast, if neutrals are asked to determine the amount of spousal support or the value of a business interest, they will be expected to take on a role different from their facilitative function. Opinions expressed to them in mediation for the purpose of helping make the best offer of settlement might influence them; they have heard the offers and are now the decision-

makers. Some neutrals may feel comfortable that they can separate what they are told and their opinions in mediation from their decisions as judges in the same case. Others may be uncomfortable with taking on this new role, not confident that compartmentalization is possible. They may believe that they could be influenced by what they previously heard in their role as mediator, even subconsciously. Unless the neutral can assure everyone involved that they can competently handle the change in roles, using two separate neutrals should avoid this dilemma.

### **Conclusion**

While private mediation of family law disputes provides significant benefits in terms of costs, timing and flexibility, it may not be a complete solution for complex or high-stakes matters. In such cases, the parties will be better served with the addition of a PCTJ who can make important decisions that can overcome mediation roadblocks and move the matter forward. Whether those roles—private mediator and PCTJ—are performed by one person or two individuals will be dictated by the unique circumstances of each case.

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