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Divorces are costly: The case for private trials

Private divorce proceedings—particularly trials before privately compensated judges—can significantly reduce the monetary, logistical, and emotional costs of complex family law disputes compared to traditional public court trials.

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This is the third 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. The second installment looked at how to use privately retained mediators in conjunction with privately compensated temporary judges (PCTJs) to streamline the process for dissolutions involving high-net-worth issues, complex or illiquid assets, complex custody issues, or time-sensitive matters. This article will focus on the process and costs of a public court trial compared with those of a private trial before a PCTJ.

Monetary and nonmonetary costs

Whether a case is heard by a PCTJ or in a public court, trial costs will be dictated by the number of issues and their complexity. The more issues or the more complex those issues, the more discovery and expert forensic work will be needed. Parties must be prepared to respond to whatever comes up.

Both monetary and nonmonetary costs begin accruing long before trial commences. Monetary costs include professional fees for attorneys and their office staff, the PCTJ and the experts. They also include the costs of depositions, subpoenas and other document discovery, court reporter and court filing fees.



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Nonmonetary costs include extended time away from the parties' daily responsibilities, as well as the psychological toll of the proceedings on the parties and their families. Additional "costs" may show up in the long-term mental and physical health of the parties and their families, which may result from the loss of personal privacy as they share intimate financial details and marital dynamics with professionals and the PCTJ.

Public trial costs

Depending on the number of contested issues, a publicly tried divorce case can often take four to five days. The parties will usually be called as witnesses, and additional witnesses will be called depending on the issues at trial. With a limit of six hours of evidentiary trial time in a public courthouse and the various pre-trial tasks, interruptions, and breaks that occur during each day, only three or four witnesses will testify in a single

day. A typical court day includes two scheduled 15-minute breaks and a 90-minute lunch period. Public court hours generally begin no earlier than 8:30 a.m. and end by 4:30 p.m., sometimes earlier to give counsel time to gather their things before doors are locked.

Public trials may also be delayed if the bench officer has to review ex parte applications or is sent a case with statutory priority for trial, such as a domestic violence restraining

order or contempt proceeding. A case scheduled for four to five days might actually be heard over the course of several weeks or months, in stark contrast to the private trial scenario.

A public trial on financial issues will likely also include testimony from two forensic experts. If real estate values are in dispute, two real estate appraisers may also testify. There could be testimony from a vocational evaluator and perhaps a rebuttal expert. Other experts might be called on to testify about business valuation, reasonable compensation, or rate of return, resulting in as many as 11 possible witnesses, although it is more common to have between four and six.

A complex financial trial with six to eight witnesses will require at least three days of trial. From about four months before the trial date, a party can expect to pay approximately \$40,000 per day of trial for the lead counsel, an associate, and a paralegal, not including direct invoices from experts, court reporters, and other third-party vendors.

In a trial on custody issues, the parenting plan evaluator and likely one or two rebuttal experts will be testifying, and there may also be testimony from mental health professionals such as a family therapist, a parenting coordinator, and a visitation supervisor. In total, a custody trial could include as many as eight witnesses, although it is more common to have between four and six.

A custody trial with six witnesses will require three days of trial. From about four months before the trial date, a party can expect to pay approximately \$50,000 per day of trial for the lead counsel, an associate, and a paralegal, as well as direct invoices from experts, court reporters, and other third-party vendors.

If the issues in both the financial and custody trials are handled together in a single trial, there will be the added logistics of witness timing and pre-trial matters, time needed for pre-trial motions and as many as 14 witnesses, opening and closing arguments, and other procedural requirements. The parties should expect to spend a minimum

of six days in trial. With an average cost of \$40,000-\$50,000 per day of trial, the total cost will be about \$270,000 per party, not including the costs of experts and third-party vendors who are paid directly—about an additional \$200,000 per party—and not including money lost from taking time off from work and other losses.

Finally, any preliminary issues, such as a dispute over the validity of a premarital agreement or the date of valuation of a business, may need to be set as a separate trial before the main trial, which would add approximately one to two days of trial for each issue and increase the cost estimates accordingly.

Private trial costs

For purposes of comparison, let's look at the monetary and nonmonetary costs of a trial before a PCTJ. Instead of a lengthy wait between court dates that can drag a trial out weeks or months, a private trial starts and concludes each day based on agreement between the parties and the judge. Breaks are taken as agreed, for as long or short as agreed, and without interruption from other cases. A four- or five-day trial can easily conclude in four or five days.

Instead of a judge randomly assigned to the case, the parties select their PCTJ based on his or her experience and expertise. This saves considerable preparation and presentation time: A bench officer new to family law must be brought up to speed on the issues, while a PCTJ needs no educating on matters he or she has encountered over years of practice.

A four- to five-day trial will probably be heard on consecutive days in the same week, making trial logistics efficient and streamlining costs. Expert witnesses can be called in the order most convenient, depending on their availability and travel schedules.

Other costs of public trials

A four- to five-day public trial might in fact be held one day at a time, weeks or even months apart. Expert witnesses from out of town will need to travel back and forth multiple

times, increasing costs. The unpredictable stops and starts require parties, their counsel and other professionals to refamiliarize themselves with the case each time trial is set to restart. Double and triple preparation means that information must be updated each time, creating more costs for the parties.

More concerning about truncated trials is that the court, which hears many different cases, must re-engage in the case after weeks or months, necessitating a recap or review of prior testimony each time. To avoid losing track of the evidence that came before, the parties must in effect relitigate the previous parts to ensure that it is fresh in the judge's mind. This lengthens the trial and adds to the costs.

Other benefits of private trials

With a PCTJ, the parties avoid most duplicative costs, especially those caused by the delays and redundancies of an overcrowded and underfunded public court system. Every complex, multi-day case that goes into the private system frees a judicial officer on the public bench to hear several less complex but deserving families' cases, helping those families move on with their lives.

In stark contrast to the public trial, a private trial gives parties their "day in court" sooner and allows them to move on with their lives. They are spared the psychological and physical toll of a long, drawn-out proceeding over the course of

months or years and the excruciating sense that their case will never end. The back and forth of a public court trial results in disjointed evidence that the judge must try to piece together from memory or by reviewing mounds of transcripts and notes. Once a public trial is finally over, the parties may wait many more months for the judge to issue the decision, so their trauma is ongoing.

Conclusion

The shared cost of a qualified PCTJ may be a small price to pay to reduce trauma for the parties, but it could substantially reduce the actual costs of the proceeding in both dollars and time. The parties select a PCTJ because of his or her expertise, and they benefit from the PCTJ's knowledge of the law and focused attention on their case.

A trial before a PCTJ takes place in a relatively short timespan. The evidence flows in a timely fashion, efficiently and logically. The PCTJ understands the issues and can make a timely decision without the need to be re-educated about the case at every stage. Preparations and facts do not become stale or out of date. Attorneys, experts, and parties prepare only once for trial without the need to update at each stage for new developments. The outcome is swifter than a public trial; attorneys and parties can timely implement orders and move forward with their lives.

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