



DIVORCE MEDIATION: MEDIATING FINANCIAL DISPUTES

By: Carmina K. Tessitore



Carmina K. Tessitore practices at The Law Offices of Carmina K. Tessitore Esq LLC, based in Shelton and Westport, and serves clients statewide in

the areas of family and matrimonial law, business law and services, civil matters, foreclosure litigation and defense, and mediation/alternative dispute resolution. Attorney Tessitore is co-chair of the CBA Young Lawyers Section Solo Practice and Small Firm Committee's Executive Committee and is a member of the CBA Women in the Law Section Executive Committee. She is a featured author on financial affidavits in the MCLE New England 2014 Publication, *A Practical Guide to Divorce in Connecticut*.

Divorce mediation has become a widely recognized and utilized method for economically and effectively resolving financial disputes between parties in dissolution proceedings.

Critical to effectuating substantive and all-encompassing resolutions pertaining to financial information is the utilization of financial affidavits, and supporting financial documentation and information exchanged between the parties, for use during mediation sessions.

This article explores the methodology employed in mediating the financial piece of the divorcing couple's marriage so that separation agreements resulting from mediation are reflective of the parties' financial picture and address all aspects relevant thereto.

Mediator's Role in Mediating Financial Information

While an attorney and counselor's duty is to zealously advocate on behalf of his/her

client and to investigate the veracity of disclosed financial information to identify discrepancies and/or errors, when a practitioner is wearing his/her mediator "hat" that role changes.

Divorce mediation is a voluntary process, wherein the mediator serves as a neutral third party, bound by confidentiality, whose primary objective is to assist the divorcing couple in reaching points of resolution for each item and issue raised. The mediator does not advocate for either party, does not conduct outside investigation regarding disclosed documents or information, and does not advise or counsel either party.

The mediator does lay ground rules for participation in mediation (which in-

cludes the requirement of mediating in good faith and the disclosure of complete and accurate information), facilitates discussion and points of resolution, reality checks terms offered by each party, and can assist the parties in drafting the final terms of resolution memorialized in a separation agreement.

The mediator also explains to both parties that at any point during the mediation process, and/or during the pendency of the matter, either party may engage the services of an attorney for representation and/or to serve as review counsel, as well as engage the services of an accountant, financial planner, therapist, and/or any other professional they so choose.

Information exchanged in the presence

of the mediator while participating in mediation is not admissible as evidence in court proceedings, unless the parties otherwise agree, and/or unless the admission of evidence used in mediation is otherwise discoverable elsewhere.¹

Prior to the first mediation session, the divorce mediator typically requires parties to sign and abide by a code of conduct that mandates the parties mediate in good faith (among other requirements). This “good faith” requirement places the onus on each party to disclose and exchange all financial information relevant to income, expenses, assets, and liabilities, as well as any and all other financial information, whether classified by a party as separate property or marital property, so that both parties are fully informed of all relevant information necessary to reach resolution and effectively dissolve the marital estate.

One of the requirements includes the exchange of financial affidavits with supporting documentation.

The New Financial Affidavit Forms

As of January 2014, the Connecticut Judicial Branch adopted updated formats concerning the requisite filing of financial affidavits in family court proceedings. The new forms are JD-FM-6 LONG and JD-FM-6 SHORT.² The new short form and long form financial affidavits are much more substantive in nature as compared to the old forms. The old form affidavits were limited in space, and often necessitated additional schedules, charts, and footnotes to be added at the end and attached thereto in order to provide explanation and/or additional information with respect to certain data reflected in the affidavit, so that together the affidavit and attachments reflected a true and accurate picture of the parties’ financial circumstances.

The new forms have, to a large extent, limited the need to attach additional information to the affidavit, as the new form affidavits allow for inclusion of additional information to be added directly into the body of the relevant sections. Additionally, allowing for two versions of the affidavit assists parties and the court in distinguishing the information present—the short form affidavit is a

simplified version to be utilized by parties with minimal financial assets and debts; the long form affidavit is to be utilized by parties whose assets total \$75,000.00³ or more.

Financial affidavits must be filed by each party at various stages during the pendency of the divorce action, as well as during post-judgment matters concerning financial information.

Though parties utilizing divorce mediation predominantly file as self-represented litigants with the court, unless otherwise represented by counsel, each must nonetheless comply with the court’s rules and procedures in family matters, including the exchange of mandatory discovery material.⁴ Mandatory discovery material includes:

- Most recent three years’ personal tax returns, state and federal;
- Most recent three years’ business tax returns, state and federal, filed on behalf of any partnership or closely-held corporation of which a party is a partner or shareholder;
- IRS forms W-2, 1099, and K-1 for the most recent three years;
- Copies of all paystubs or other proof of income showing year to date figures, as well as the last year’s paystub or other proof of income showing year-to-date figures for the prior year;
- Statements for all accounts maintained with any financial institution, including banks, brokers, and financial managers, for the most recent 24 months;
- Most recent statement showing any interest in any Keogh, IRA, profit sharing plan, deferred compensation plan, pension plan, or retirement account;
- Most recent statement regarding life insurance of any party;
- Summary furnished by the employer of the party’s medical insurance policy, coverage, cost of coverage, spousal benefits, and COBRA costs following dissolution;
- Written appraisals concerning any asset owned by either party.

In addition to the exchange of mandatory discovery material, which remains an ongoing duty of each party during the pendency of the action, the parties must also produce for the divorce mediator master

lists of personal property, and any and all other items and information that need be addressed to dissolve the marriage and draft final terms for judgment.

In Connecticut, the court looks to all information concerning the marriage in determining the equitable distribution of the marital estate. The court is not limited by timing of acquisition, method, or source of funds used when considering allocation of property, and may assign to either spouse all or any part of the estate of the other.⁵ The court has broad discretion in determining what is fair and equitable under the circumstances, and each matter is adjudicated on a case-by-case basis.

Property acquired during the marriage is typically considered marital property, regardless of which spouse earned the income to acquire it or whose name is on it. Property acquired prior to the marriage is, at times, but not always, considered separate property, in addition to other items such as inheritances or gifts, and/or proceeds from a personal injury award. However, the court has broad discretion when considering the equitable distribution of property classified as marital property or as separate property, and each determination is fact-specific, taking other factors into consideration such as length of the marriage, among others.

All information exchanged between the parties is used as a roadmap for the divorce mediator to facilitate the parties’ discussion with respect to each financial piece, which typically includes: 1) personal property; 2) real property; 3) alimony; 4) child support—as well as daycare costs, educational expenses and post-majority educational expenses, extracurricular expenses, health insurance costs, and unreimbursed medical expenses for the minor children; 5) health insurance costs for the parties; 6) life insurance costs; 7) pensions, IRAs, 401(k)s, stock options, and other financial products; 8) division of assets; and 9) division of debts, in addition to other factors unique to the parties’ circumstances.

Mediating the Financial Piece

Together with the mediator, the parties must discuss every factor relevant to

each financial item presented in order to achieve mutually agreeable resolutions that will work in reality.

Considerations and talking points include:

- With respect to personal property, the parties must discuss whom will retain certain items such as furniture, electronics, decorative pieces, DVDs, clothing, artwork (which may also be categorized as an asset depending on worth), jewelry (which may also be categorized as an asset depending on worth), vehicles, motorcycles, boats, and any and all other “stuff.” If there is title or financing in one party’s name regarding any of the aforementioned, will title and debt obligations be turned over to the other party, and how and when will that be effectuated?
- When discussing real property, parties must determine how to address whether the marital home will be retained by one party, and if so how to effectuate that proposal—must a quitclaim deed be executed? Must the mortgage be refinanced to eliminate the other party’s debt obligation? Must a mortgage modification be undertaken so that the party retaining the property can afford to carry the mortgage going forward? If the parties wish to retain the property and create a “nesting” arrangement so that the minor children remain in the home and the parents alternate whom lives with the minor children in the home on certain days, while also maintaining a separate residence, how will that arrangement be met financially?
- If the marital home is to be liquidated, liquidation options must be discussed—logistics regarding: 1) obtaining an appraisal to determine the property’s fair market value, 2) signing with a real estate agent or broker, 3) determining when the property should be listed for sale (which month, which season), 4) determining length of time the property should be listed on the market before exploring other options or reducing the asking price, 5) deciding what the initial asking price should be, 6) deciding whom of the parties will have decision making with respect to the logistics of the sale, and 7) de-

terminating how the net proceeds of the sale will be divided, among other considerations. If the debt owed is greater than the value of the property, how will the short sale be processed, how will the deficiency balance be addressed, and what will be the tax exposure? If a foreclosure action has been initiated, how will the litigation be handled while the divorce is pending?

- If other real property is present, such as rental or investment properties, time shares, vacation homes, or others, what will be the course of action with respect to each?
- With respect to alimony, though the mediator is not acting as an attorney, he/she must nonetheless inform the parties that should alimony be waived during the divorce, neither party may address alimony in the future. Discussion regarding whether alimony is to be paid by one party or the other, and if so in what amount and for what duration, must be undertaken. The parties must also discuss factors that will determine a modification and termination of same post-judgment—whether income caps are to be established, whether Conn. Get. Stat. § 46B-86(b) commonly referred to as the “cohabitation” statute will apply, and/or whether the alimony award is to be non-modifiable as to amount and duration. Will there be an unallocated support award fashioned, combining alimony and child support, and will the parties be required to furnish the other with updated income information annually during the duration of the alimony or unallocated support award?
- With respect to child support, discussion must be had regarding which party will pay the other in accordance with the child support guidelines, and whether or not a deviation from the guidelines based on certain criteria will be utilized. Related to factors concerning the child support guidelines includes the parties’ obligations toward unreimbursed medical expenses for the minor children, daycare costs, **extracurricular activities**, and educational costs. If these and other costs related to the minor children are to be shared, must consent be obtained prior to accrual of those costs, and how will

- payment for those costs be arranged?
- When discussing post-majority educational costs for the minor children, factors must be considered such as will the parties share the costs of undergraduate and/or graduate level educational expenses? If the parties will share the costs of college and/or grad school, by what amount or percentage, and will a trust or college fund be established to effectuate accrual of those funds over time? Do the parties desire a cap to be placed on costs and/or will the minor children also be required to take out student loans? If the parties cannot agree on whom should pay what towards the minor children’s post-majority educational expenses, but do agree that each party should be obligated to post-majority educational expenses, will the parties request the court retain jurisdiction over that issue so that they can address that issue at a future date?⁶
- Other financial considerations related to the minor children include whether the parties will alternate claiming the minor children on their tax returns, whom will carry the minor children’s health insurance, and will life insurance policies be purchased naming the minor children as beneficiaries?
- With respect to spousal health insurance, is health insurance coverage available post dissolution for the non-policy holder, and if so how will continuing coverage be effectuated, and/or does it include Cobra costs?
- If life insurance is to be taken out to secure an alimony award, when will the life insurance be purchased, how much coverage should be purchased, and must proof of coverage be disclosed to the non-policy holder for a particular length of time?
- Will a qualified domestic relations order (QDRO) need to be effectuated to address retirement plans, or will the parties be retaining their own individual benefits? If there are stock options and other financial products present, will those be divided or retained individually? How will income in joint checking and savings accounts be divided, and how will credit card debts be apportioned?

Once all financial considerations have been addressed and resolved, the terms of resolution are drafted as the parties' separation agreement, and the executed document, along with other requisite filings for judgment, will be offered by the parties at their uncontested hearing date. Upon a finding by the court that the parties' separation agreement is fair and equitable, the agreement will be incorporated by reference and made a part thereof of the divorce decree.

The Mediator's Role in Ensuring Parties Mediate in Good Faith

One of the benefits of divorce mediation is that it allows the parties to tailor their separation agreement to their specific needs by undertaking fully informed discussions to reach points of resolution that make sense for their life. This places the power back in the parties' hands, and often leads to resolutions that remain effective in the long-term, because a positive take-away from mediation is that the parties have learned a healthy communication style so that when issues arise in the future, they can address disputes in a non-adversarial manner.

Vital to the effectiveness of mediation is the mandate that both parties mediate in good faith.

When a party is breaching his/her duty to mediate in good faith by withholding information, disclosing incomplete or inaccurate information, and/or attempting to employ manipulative tactics in an effort to achieve a desired goal, the mediator can address these issues without breaking neutrality or alienating either party.

The toolbox of skills acquired during mediation certification trainings and continuing educational seminars, time spent in apprenticeship and co-mediation, and experience, arms the mediator with the ability to maintain the purity of the mediation session while drawing out necessary information.

One way to do so is by "reality checking" the items being called into question and the offers on the table as they relate to the issues being discussed. Another way is to reframe hot-button issues to focus

the parties in on the data itself and quell heated debate or circular discussions that are not-productive. Yet another way is to address these concerns in caucus.

A caucus is a one-on-one session, whereby the non-caucusing party is asked to leave the room so that the mediator and the caucusing party may speak in private. In order to ensure the mediation is fair and balanced, the mediator must caucus with both parties when employing this tactic. Discussions had in caucus are confidential between the mediator and the caucusing party to the exclusion of the non-caucusing party.

Even while in caucus, the mediator must maintain his/her neutrality, must not take a position, and must not advise or counsel either party. In caucus, the mediator has an opportunity to remind the party of the ground rules established at the outset, the mandate to mediate in good faith, and the duty to disclose complete and accurate information. Doing so in this manner ensures the caucusing party does not feel as though the mediator has betrayed his/her duty of neutrality by reprimanding the party in the presence of the other.

Where appropriate, if parties are unable to sit in joint session to mediate effectively, a mediator can effectuate facilitation of disputed terms by having both parties in caucus in separate rooms throughout the mediation session, where the mediator goes back and forth between the two bringing terms and counteroffers to reach points of resolution on all outstanding issues.

These and other methods used by the experienced divorce mediator help to significantly reduce a party's attempts at trying to manipulate the process and/or the outcome.

Note: When mediating custody and parenting access time in addition to the financial piece of the divorcing couple's marriage, it is important for the mediator to keep discussion regarding these two issue areas as separate as possible. The parties' discussion with respect to custody and parenting access time should be focused solely on what is in the best interests of the minor children. While

many financial considerations concern and relate back to the minor children's best interests, the mediator must be careful not to allow a party to hold a financial ransom of sorts over the other party as a tactic to achieve a goal regarding custody and parenting access time, or the vice versa.

Mediator Requirements in Connecticut

Despite the unique skillset a mediator must acquire during his/her career to be effective in mediating the financial disputes of the divorcing couple, the arena of mediation is still left largely unregulated. The long-standing debate continues regarding whether mediation should be more closely monitored on a national or state level, and/or whether national or state bar associations should implement mandates regarding mediator qualifications, conduct, and ethics.

Like many states, Connecticut has yet to adopt a model code of conduct or require formal certification of mediators. Nevertheless, many mediators attend intensive certification training programs, some private organizations in Connecticut have internal regulations and requirements for member mediators, and various bar associations provide CLE and seminars to assist in equipping mediators with the skills necessary to effectively mediate financial information raised in the context of divorce mediation.

These and other efforts ensure that parties seeking mediation to resolve their marriage in an amicable manner are well-served by Connecticut mediators. **CL**

Notes

1. See Conn. Gen. Stat. § 46b-53a and Conn. Gen. Stat. § 52-235d.
2. See the Connecticut Judicial Branch "Individual Family Forms" section at <http://jud.ct.gov/webforms/>, and also JD-FM-6H LONG and JD-FM-6H SHORT for helpful Q&A.
3. Judicial Branch Form JD-FM-6-LONG NEW 1-14, PRACTICE BOOK §§ 25-30, 25a-15
4. Connecticut Practice Book § 25-30, § 25-31, § 25-32, § 25-32A, § 25-32B.
5. See Conn. Gen. Stat. § 46b-81.
6. Under Conn. Gen. Stat. § 46B-56C.