



## **MEDIATING SEPARATION/DIVORCE**

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# Mediating a Separation or Divorce

Regardless of who initiates the conversation to separate or divorce, the process can be daunting to say the least. As you wrestle with the emotional and financial effects of a separation or divorce, sadness, fear, and anxiety, can be paralyzing or can often initiate a knee jerk reaction. It is rare for both spouses to come to a decision to separate or divorce at the same time; often one spouse is not ready to end the marriage. Regardless of where you are or what you are feeling, once one of you has made the decision or has come to the realization that a separation or divorce is going to happen, the business of how to move forward can be overwhelming.

***Legal separation? Divorce? What are my options? What do I do next? Can I afford this? How will I survive financially?***

Most people think they have two choices when it comes to negotiating a separation/divorce: (1) Hire an attorney so that they can 'win' in the divorce arena or (2) Not hire an attorney and go through the divorce process without legal counsel. Couples who have marital assets or debts or who have been married for a significant period, think that they must hire an attorney to figure out how to divide up their assets and/or debts and/or determine whether spousal support (aka. Maintenance or Alimony) should be paid or will be paid. That simply is not true.

**For some this may be the only way forward, but it is not the only way. You have other options.**

Mediation leaves the power and authority to make decisions strictly with you. The mediator does not decide what is "fair" or "right." Mediation gives each spouse the opportunity to express their needs and desires in a safe, neutral environment with a trained professional. Each party determines financial decisions that are right for you moving forward. No one is making those decisions for you.

Let's face it we all have heard divorce horror stories. Here are some of the differences in a contentious or litigated separation / divorce vs. that of a separation / divorce that is negotiated through mediation:

- **Costs** – It is estimated that a mediated Separation and Settlement Agreement is at least 25-40% of the cost of an adversarial or litigated separation or divorce.
- **Time** – You determine the pace of your mediation, depending on your circumstance decisions can be made in 3-4 sessions or less, 1-2 hours each.
- **Gentler, Less Contentious** – The focus in mediation is cooperation vs. conflict, presenting options vs. someone dictating what you must do! You and your spouse will be encouraged to work together toward an agreement that you both can accept. ***You determine what is equitable and fair.***
- **Confidential** – It is your story, you decide what to share in a safe, structured environment vs. that of an open court room.
- **Kinder** – Mediation strives to protect the self-esteem and dignity of all parties. Rather than looking back to assign blame, the decisions you make in mediation empowers you to look beyond today and to look to the future. You take control over the decisions that are going to affect you.

At the conclusion of the mediation process, you will have a comprehensive document, detailing all your decisions called a Memorandum of Understanding (MOU); as well as your financial Statements of Net Worth (SONW) which are required by the court when filing for a divorce. The MOU defines all the agreements that you have made, the SONW is the complete disclosure of your assets and liabilities. You are now ready to have these documents reviewed and filed with the court by an attorney.

# WHAT CAN I EXPECT IN MEDIATION

## General Process:

- Initial Consultation – Opportunity to hear about mediation and all options available to you and to determine if mediation is right for you. Approximately 1 hour, no obligation to proceed. (\$75)
- Separation/Divorce Mediation can usually be accomplished in 3-4 sessions, 1-2 hours each (can be more depending on your circumstances).

**Areas to Resolve:** Please Refer to the 'Decisions' Document in this Packet for More Specific Details

### A. Division of Marital Assets and Liabilities (Debts)

Complete independently a financial workbook to identify your monthly budget (your projected expenses when your finances are no longer co-mingled), the disclosure of your income from all sources, disclosure of all assets including all bank accounts – checking, savings, HSA, all real estate, time shares, value of owned vehicles, including boats, campers, trailers, etc., value of any business you own, retirement assets, stocks, etc. Disclosure of all debts, mortgages, home equity line of credit, credit cards, loans - personal, bank, or student, vehicle leases, federal and state taxes, retirement, or life insurance loans. Additionally, you will need to submit supporting statements and documentation for all assets and debts.

### B. Support Decisions

Spousal Support, aka Maintenance or Alimony – Domestic Relations Law, 2015 Maintenance Guideline Laws

## Documentation:

- Creation of Memorandum of Understanding, (MOU), billed 3-5 hours @ your billable rate.
- Creation of Statements of Net Worth, (SONW) usually billed 1-2 hours, @ your billable rate, can be more if you own a business or multiple real estate properties.
- Review of completed MOU and SONW billed 1-2 hours, may be less, @ your billable rate.
- MOU and SONW given to each party for attorney review, drafting of legal documentation and filing with court. MOU, SONW and all copies of financial documentation given to the mediator will be electronically sent to your attorney.

## Payment Requirements:

- Billable rate is based on a sliding scale using the parties combined incomes from all sources.
- Payment is required after each session.
- Payment methods: VENMO, Apple Pay, Credit Cards, Debit, Cash or Check

**Mediation is completely voluntary!** You will be asked to sign an Agreement to Mediate, this document does not bind you to the process. It defines my credentials, fees, my role as your mediator, what you can expect from me and what I can expect from you. If you agree that mediation is the right process for you – you will be expected to fully disclose all your assets and debts and that you will work towards an equitably fair agreement; you define what is equitable and fair.

# DECISIONS TO BE MADE IN MEDIATION

## EQUITABLE DISTRIBUTION DECISIONS

### FACTORS

- Determine Valuation Date (Date of Marriage to Current Date/Other)
- Identify all Marital Property and Separate Property
  - Retirement Accounts – Defined Benefit, Deferred Compensation Plans, Pensions, 401K, 403B, IRA's etc.

### REAL ESTATE – House, Vacation Prop., Land – Including Time Share(s)

- Jointly Owned?
- Buy-Out? Keep? Refinance?
- Sell?
  - Who Occupies Until Sale?
  - Who Pays Expenses Until Sale?
    - ~ Mortgage / HELOC ~ Taxes ~ Utilities ~ Insurance ~ Repairs

### MARITAL RESIDENCE – Must Determine

- Sale? When? – (if applicable)  
Remarriage? Co-habitation?
- Division of Proceeds / Equity
- Option to Buy Out the Other
- Expenses of Sale – Repairs
- Selling Price – How to Determine –  
Reduction in Price
- Tax Escrow & Tax Adjustments
- Net Equity Defined/Split

### DIVISION OF ALL OTHER ASSETS INCLUDING PERSONAL PROPERTY

- Retirement Assets - Pensions, IRAs, 401K, 403B, etc.
- Brokerage (Stock Accounts)
- Frequent Flyer Miles
- Cars –Titles/Registration/Insurance
- Boats / Campers
- Jewelry
- Collectibles
- Bank Accounts
- Bonds, Tax Shelters, etc.
- Household Items
- Family Photographs

## DEBTS /LIABILITIES

- Student Loans / Co-signs
- Credit Cards
- Car Loans / Lease – name on loan / Lease co-signed
- Bank / Personal Loans
- Notes Receivable
- Pension or Retirement Loans or Life Insurance Loans
- Federal and State Taxes

## SEPARATE PROPERTY

- Pre-marital Assets / Liabilities
- Gifts / Inheritances
- Other

## SUPPORT DECISIONS

### SPOUSE

- Who Provides Health Insurance?
- Legal Separation vs. Divorce (Affects Health Insurance)
- Who Pays Uncovered Expenses?
- Dental, Prescriptions, Glasses, Psychotherapy etc. expenses?
- "Cobra" Rights and Cooperation - Other Insurance Options

### LIFE INSURANCE

- Amount? (Enough to cover Spousal Support)
- Type – Term vs. Whole Life
- Beneficiary
- Duration

### MAINTENANCE/SPOUSAL SUPPORT /AKA: ALIMONY

- Amount – Guidelines (Domestic Relations Law)
- Maintenance (Child Support) paid for prior relationship?
- Timing of Payment
- Duration – Number of Years Paid
- Cost of Living Adjustment, Factors for Termination
  - Remarriage? Cohabitation?

## OTHER DECISIONS to BE MADE

### INCOME TAXES

- Joint or Separate Return / Division of Refunds / Taxes Owed / Stimulus Payments
- Audits of Previous Returns and Payment of Deficiency / Penalties

### FUTURE CONFLICT

- Mediation? Collaborative Law?  
Arbitration? Litigation?

### MISCELLANEOUS DECISIONS

- Legal Separation or Divorce
- Legal Fees
- Expert Advice / Financial Neutral Business or Pension Valuations
- Timing of Divorce
- Religious Divorce – Annulment? Get?
- Wills, Health Care Proxy, Power of Attorney
- Beneficiary Changes
- Pets – Residence – Finances – Catastrophic Decision Making

### USUAL DOCUMENTATION WHERE APPLICABLE

- Most Current Income Federal and State Income Tax Returns – Personal (1 year) and Business (3 years)
- W2s, 1099 or 1040 Statements
- (2) – Pay Statements (Most Current) for Both Parties and/or Unemployment Statement
- Any Other Sources of Income
- Bank Statements – All Accounts
- Completed Financial Workbook Including Budget Information
- Current Mortgage/HELOC Statements
- List of any Accounts Owned Prior to Marriage
- Pre-Nuptial or Post Nuptial Agreements
- Real Property – Appraisals or Realtor Assessment if applicable  
Time Shares, or Vacation Property
- Social Security Statements, if applicable
- All Investment Statements
- HSA / FSA Statements
- All Loan Information/Statements
- All Investment Accounts
- Retirement/Pension/Defined Benefit/Deferred Compensation Statements - SUMMARY PLAN DESCRIP .
- Health Insurance Information
- Life Insurance – Most Recent Statement(s)
- Current Credit Bureau Report Showing Open and Closed Accounts - NOT Credit Rating

## **INFORMATION RELATED TO DOMESTIC RELATIONS LAW**

*Connie Fraser Mediation, LLC **does not provide legal advice or counsel.** Each party is encouraged to be fully advised by their respective counsel regarding the legal, financial, and practical effect of any agreement entered into.*

### **Equitable Distribution Factors: (Parties consider the following factors in determining the distribution of their marital property)**

1. The income and property of each party at the time of the marriage, and at the time of the commencement of the action;
2. The duration of the marriage and the age and health of the parties;
3. The need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
4. The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
5. Any award of maintenance under subdivision six of this part;
6. The loss of health insurance benefits upon dissolution of the marriage;
7. Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a license, degree, celebrity goodwill, or career enhancement. However in arriving at an equitable division of marital property the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;
8. The liquid or non-liquid character of all marital property;
9. The probable future financial circumstances of each party;
10. The impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or other interest intact and free from any claim or interference by the other party;
11. The tax consequences to each party;
12. The wasteful dissipation of assets by either spouse;
13. Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
14. Whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts; (5/3/2020)
15. Any other factor which the parties shall expressly find to be just and proper.

### **TEMPORARY MAINTENANCE**

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**DRL § 236(B)(5-a)(h):** (1) The court shall order the guideline amount of temporary maintenance up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;
- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and
- (m) any other factor which the court shall expressly find to be just and proper.

Where the court finds that the guideline amount of temporary maintenance is unjust or inappropriate and the court adjusts the guideline amount of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the guideline amount of temporary maintenance, the factors it considered, and the reasons that the court adjusted the guideline amount of temporary maintenance. Such decision, whether in writing or on the record, shall not be waived by either party or counsel.

Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

## **POST DIVORCE MAINTENANCE**

### **Deviation from Formula**

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**DRL § 236(B)(6)(e):** (1) The court shall order the post-divorce maintenance guideline obligation up to the income cap in accordance with paragraph c of this subdivision, unless the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the post-divorce maintenance guideline obligation accordingly based upon such consideration:

- (a) the age and health of the parties;
- (b) the present or future earning capacity of the parties, including a history of limited participation in the workforce;
- (c) the need of one party to incur education or training expenses;
- (d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;



- (e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
- (f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (h) the availability and cost of medical insurance for the parties;
- (i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
- (j) the tax consequences to each party;
- (k) the standard of living of the parties established during the marriage;
- (l) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; and
- (m) any other factor which the court shall expressly find to be just and proper.

2. Where the court finds that the post-divorce maintenance guideline obligation is unjust or inappropriate and the court adjusts the post-divorce maintenance guideline obligation pursuant to this paragraph, the court shall set forth, in a written decision or on the record, the unadjusted post-divorce maintenance guideline obligation, the factors it considered, and the reasons that the court adjusted the post-divorce maintenance obligation. Such decision shall not be waived by either party or counsel.

**The following is the advisory schedule for post-divorce maintenance payments:**

Percent of the Length of the Marriage For Which Post-Divorce Maintenance Will Be Payable

**Length of the Marriage**

Zero to 15 Years	15% to 30%
More than 15 to 20 years	30% to 40%
More than 20 years	35% to 50%

**Hypothetical Durations of Post-Divorce Maintenance Per the Advisory Schedule**

<b>Length of Marriage</b>	<b>Range of Duration</b>
3 years	.45 years to .9 years
5 years	.75 years to 1.5 years
10 years	1.5 years to 3 years
13 years	1.9 years to 3.9 years
16 years	4.8 years to 6.4 years
20 years	6.0 years to 8.0 years
23 years	6.9 years to 9.2 years
25 years	7.5 years to 10 years
28 years	9.8 years to 14 years
30 years	10.5 years to 15 years
35 years	12.25% years to 17.5 years

The **formula** for the **calculation of spousal support** is 40% of the difference between the parties' net incomes without dependent children.

If the parties have dependent children, the **formula** is 30% of the higher earning spouse – 20% of the lower earning spouse.