

WHY DIVORCE LITIGATION IS SOMETIMES NECESSARY

A D V O C A T E

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In my practice as a Naperville divorce attorney, I often recommend that my clients consider mediation (or other non-adversarial options) for their divorce. There are many benefits to non-adversarial approaches such as mediation over traditional divorce litigation; however mediation is not for everyone. This article covers situations where you may have to consider litigation over a less adversarial divorce resolution process like mediation or collaborative divorce.

MEDIATION REQUIRES THAT THERE IS SOME LEVEL OF COOPERATION

Couples that are going through divorce always have issues that they are in disagreement with. Whether or not mediation is successful comes down to the magnitude of the disagreements, and more importantly, whether or not both parties can cooperate enough to reach a settlement. If cooperation is simply not there, then litigation may be the only path.

Additionally, with mediation both parties to some degree have to be ok with the idea that their soon to be ex-spouse can live a happy life going forward. This is important, because with mediation it is necessary that each party negotiates based on their common interests and needs, not out a sense of revenge or desire to “win”. When one or both of the parties are out for vengeance (or to seek an unfair settlement), then mediation becomes impossible. In this situation litigation may be the only option.

Be wary of attorneys that use a power-based negotiation style out of the blocks. Mediation is about interests-based negotiation. You want to avoid a situation where going into the divorce you and your spouse were suitable candidates for mediation, but because of actions of one or both of the attorneys you now are on your way to litigation.

WHEN ONE SIDE IS BEING UNREASONABLE

Experienced attorneys generally have a good idea of how different judges will rule within a set of outcomes on certain issues. This knowledge often allows the attorneys to encourage their clients to settle within this range. The challenge comes when one party insists on a settlement that is well outside the range of possible rulings. In these situations litigation and going to court may be the only option.

WHEN THERE ARE UNIQUE CIRCUMSTANCES OR COMPLETE DISAGREEMENT ON AN ISSUE

In some cases there are unique or complicated circumstances that relate to child support, parenting plans, spousal maintenance or division of property. In these situations, if both of the parties are in complete disagreement, then litigation may be the only option. Often times, when an issue is truly unique, it is necessary to have a hearing before a judge to determine the proper course of action.

WHEN ONE SIDE BELIEVES THEY ARE THE VICTIM

There are two sides to every story, and it is no different in a divorce. Often times one spouse will believe that the divorce is something that the other spouse is doing to them, rather than a process the marriage is going through. Problems arise when one spouse clings to the idea that their story is the only story that holds truth, and they view the other spouse as the “bad guy.” This often occurs when one party believes that the other party’s actions are completely unacceptable. Sometimes, a spouse will even try to take positions to ‘punish’ the other spouse. In this situation cooperation becomes almost impossible and litigation may need to be considered.

ONE PARTY IS UNABLE TO ADVOCATE FOR THEMSELVES

In some marriages there is a strong power imbalance where one party is unable to stand up for themselves. Often times, the other party is ready and willing to run over them in the negotiations. If one spouse is unable to stand up for their rights in a divorce, then this may be a situation where the Court could be better at deciding the outcome of the divorce.

VIOLENCE OR ABUSE

If there has been a history of violence or abuse in the relationship, then the case may not be right for mediation.