

Decisions

The most important decision in divorce, parenting and other family cases is how to make the other decisions. Will you have a “no-court case” or a contested one? There are basically five ways to make decisions:

- A. By the divorcing spouses (or parents of the child, etc.).
- B. By the same people, with the help of a trained mediator.
- C. By the same people, with the help of their lawyers, either through
 1. Collaborative Practice; or
 2. Traditional negotiation.
- D. By the judicial officer (master or judge), after a contested hearing.

Many spouses/parents use a combination of these methods, using one method for some issues, another method for others. Making these decisions is a process over time, not a one-time event. Often, there is a stage of short-term agreements, including the practicalities of moving apart, followed by the final divorce agreement.

Timing - When to start the court case is another important decision. Because going to court is stressful and encourages hostile feelings and actions, many people wait until the agreement is done to file in court. This approach is called “agree first, then file.” Waiting to file is recommended unless the parties need the court’s decision on some short-term issue. Delays in the court process may mean that mediation or other settlement process would resolve the short-term issue substantially faster than court.

Decisions are often made in two steps: temporary and final. After the temporary agreement or hearing, there is usually a period of living under the temporary agreement/orders. This allows time to see if the temporary arrangements are appropriate to become permanent terms. This is especially important if the couple is still living together when the case starts. It is difficult to go from living together to a final parenting plan intended to last until the child is 18 years old while still living together.

Informal Negotiation (without help) - It's generally best if the family members make the decisions. Most spouses/parents are able to make at least some of the decisions. However, making decisions at this time is often difficult. Problems with communication are a common reason for a relationship breakdown. Additionally, the hurt and anger that are typical of divorce make discussion difficult.

There are certain guidelines to make “direct negotiation” with the other party productive: Be business-like. Establish an agenda in advance and meet at a public place. Talk only about the issues to be decided. (This is not the time to discuss the problems in the relationship.)

Mediation - Mediation is a way of disputing parties to resolve disputes with the help of a trained, neutral third party (mediator). Mediation may be either private or court-referred. The mediator does not make the decisions or give legal advice. Instead, a mediator helps people communicate and negotiate the disputed issues using “interest-based negotiation.” Once there is an agreement, the mediator writes it up for review by parties’ lawyers, and filing with the court.

Collaborative Practice - In many divorce cases, the people involved reach an agreement with the help of their lawyers using either Collaborative Practice or traditional negotiation. If either of these two methods are successful, the result is an agreement which both sides are willing to sign. Collaborative Practice means both parties and both lawyers commit in writing not to threaten or use litigation. They hold a series of meetings to work out the issues. Counselors and financial professionals may be included in either process to help with emotions, communication, parenting, and financial issues.

Negotiation Between Lawyers - An alternative to information negotiation, mediation, and Collaborative Practice is traditional negotiation through lawyers. One person gives her lawyer information about any agreement which the couple have worked out, and any other issues which need to be resolved. The lawyer then draws up a *proposed agreement*. The lawyer and client work together to revise and perfect the agreement. When they are both satisfied, it is sent over to the other side. The other person and his lawyer then review the agreement and propose changes. There may be several rounds of negotiations with different draft agreements.

Contested Cases - "Contested" means that one or more issues are not agreed on, and thus must be decided by the court. Many couples have a contested temporary hearing, but then agree on the final issues and settle the case.

Contested final hearings happen in about 10% of family law cases. They are the last choice of how to resolve family problems because the judicial officer cannot possibly care as much about the family and its needs as the family members do. However, if the other side is unwilling to reach a reasonable agreement, you may decide to have the court make the decisions.

Disadvantages of Contested Hearings - There are several disadvantages to having the court decide the family issues, specifically: higher costs, time, unpredictability of results, and most important, the impact on children. Legal expenses increase significantly with a contested hearing. Depending on the number of issues, the lawyer's hourly rate, and the levels of anger and bitterness between the couple, the actual costs may skyrocket.

Advantages of Settlement - A contested case is a poor preparation for co-parenting after divorce. Reaching an agreement and avoiding a contested hearing requires compromise, but at least the parties have a say in what the terms are. If the court decides, the result may be what one person request, or what the other person requests, somewhere in between, or even something quite different, which the judicial officer considers fairer. This means that a contested hearing is a gamble.

If there are children, an agreement has additional advantages. A contested hearing increases hostility between the parents, which adds to the child's stress. If the case ends with a contested hearing, that unpleasant memory will stay with all family members for years. An agreement, even if it takes months to mediate or negotiate, is a much sounder basis for their relationship as co-parents.

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