Divorce Mediation in Oregon

Mediation Puts Your Children First

Julie Gentili Armbrust

2nd Edition
Updated and Revised

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I want to thank my wonderful husband, amazing children, and adorable puppies for accepting me, big curly hair and all. You remind me on a daily basis that life is about cuddles and kisses! I am blessed to call you my family.

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This, too, shall pass…

1.

INTRODUCTION & DISCLAIMER

For those who need a gladiator of peace to lead you through the fiery path of a divorce, this book is for you. This book is written for the vast majority of divorcing couples in Oregon. I assume that if you are reading this book, you were either married in Oregon or you have lived in Oregon for at least six months.

If you are either a member of the military or a debtor in an active bankruptcy, you need to seek additional legal advice.

For all readers of this book, I am not your attorney and this book is not intended to provide you with legal advice. If you need legal advice, please go see an attorney.

Of course, there will always be exceptions this book cannot anticipate. That said, most couples I encounter fall within the bullseye of this book. At times, the law described in this book has been simplified to best communicate the most likely scenario.

Many times in this book, but particularly in the sections related to children, I discuss psychological impacts to children. I am not a therapist. My suggestions are based upon the thousands of couples I have interacted with and innumerable studies by psychiatrists or psychologists. If the information wasn't practical, didn't pass the smell test, or didn't work for my clients, I didn't include it in this book. This book is based upon practical information that works for my clients.

I use the terms “husband” and “wife” because 95% of my clients are husbands and wives. I am sure that percentage will change now that same-sex couples can legally marry and legally divorce. The information in this book pertains to all married individuals, regardless of gender.

I believe in the power of information. If you are informed, you have the opportunity to make the right decision for you and your family.

This book is designed to allow you to chapter-flip to the sections you need to know. I suggest you read each chapter, but each chapter is designed to stand on its own.

Let’s get to it!

2.

WHAT IF I DON'T WANT TO GET A DIVORCE?

Divorce is difficult. It is infinitely more difficult when it is being forced upon you. In Oregon, it takes two "I do's" to agree to a marriage, but only one "I don't" to end a marriage. So, the harsh reality is that if one party wants a divorce, it is going to happen.

The divorce may not be your choice, but the terms of the divorce are your choice. This will be one of the most difficult times in your life. It will be difficult to concentrate on anything beyond surviving. Schedule time to learn how this divorce will impact your life. Two chapters per week for one month, and you will be informed enough to make decisions. You owe it to yourself to educate yourself and take back control of your life.

If you are in a situation where your spouse advises you s/he wants a divorce, then you have two choices:

- The terms of the divorce and your life are imposed upon you, or
- You choose the terms of the divorce and the path of your new life.

The Take-Away

The divorce may not be your choice, but the terms of the divorce are your choice. This will be one of the most difficult times in your life. It will be difficult to concentrate on anything beyond surviving. Schedule time to learn how this divorce will impact your life. Two chapters per week for one month, and you will be informed enough to make decisions. You owe it to yourself to educate yourself and take back control of your life.

3.

HOW TO GET A DIVORCE IN OREGON

There are four different ways to achieve a divorce in Oregon. Each option has advantages and disadvantages, and no single option is appropriate for everyone. My stress food of choice is a cupcake. For this chapter, I recommend peeling back the cupcake liner and taking one bite. This is a quick chapter.

Forms

The Oregon Judicial Department has many, many forms that allow you to obtain a divorce without attorneys. The advantage to using these forms is that they are free. The clear disadvantage to using these forms is that you aren't an attorney, and you could unknowingly create significant legal problems. Also, these forms are not regularly updated.

When I was a baby attorney, I made quite a bit of money fixing situations unintentionally and unknowingly created by these forms. If you understand the law and what particular clauses mean and do not mean, then the use of these forms is a legitimate choice for you. Attorneys earn a doctorate in the law to know how the law interacts with situations. If you have assets, liabilities, or children, and you do not know the law, using these forms could have a significant impact on you.

One Party Hires an Attorney

Another option is that one party could hire an attorney. When one party hires an attorney, that one party is represented by that attorney, which means that the attorney's ethical obligation is to look after *only that one party*. I cannot emphasize this enough: Only one party's best interests will be looked after when only one attorney is hired. The advantage of this option is that you have the legal advice of an attorney. The disadvantage to this option is that the unrepresented party is at the mercy of the other party and the attorney.

Both Parties Hire Attorneys

Both parties could hire attorneys. This is the safest option because attorneys represent both parties. Neither party needs to trust the other party. The legal nature of the divorce will be properly represented. Nice and safe. As my father says, "Super clean, jelly bean." However, it is also shockingly expensive. A teacher and a city employee could easily spend $20,000 just to negotiate the terms of their divorce…and that is if they settled prior to trial. If the parties go to trial, most parties will begin at $20,000 each. EACH!

Mediation

Mediation is a process where a mediator guides the parties through each decision necessary to obtain a divorce. Although I am a divorce mediator, and thus clearly partial to mediation, it isn't the right option for everyone. It is, however, the right option for most.

Mediation is a good solution for parents to discuss how to co-parent the children. Mediation Northwest always puts children first in the divorce mediation process. Children are our priority, even when parents accidentally lose sight of their best interests.

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Some mediators are also attorneys. If you are selecting a divorce mediator, I cannot emphasize enough to select a mediator who is also an attorney (or someone who has graduated from law school). An attorney-mediator has the ***skills and knowledge*** to get you to the goal line. A mediator who is not an attorney hasn't been trained in the law and can easily make mistakes that can cost you tens, or even hundreds, of thousands of dollars! Also, attorney-mediators can draft the documents necessary for your divorce. A non-attorney mediator can only draft a mediation settlement agreement but cannot draft all the documents necessary to achieve a divorce. Which means that if you use a non-attorney mediator, you'll be required either to go to court on your own and present to the judge or hire an attorney to do so. Yuck! It pays to choose an attorney-mediator!

Not to further complicate your decision, but not all attorney-mediators are equal. In Oregon, there is no licensing requirement to call oneself a mediator. Yes, my teenage son can call himself a mediator and not be in violation of the law. So, if an attorney calls himself a mediator, he is legally accurate. However, that doesn't mean he is *really* a mediator. A divorce mediator has taken a *minimum* of 80 hours of mediation training (a 40-hour basic mediation training and a 40-hour divorce mediation training).

Mediation is a learned skill-set. You wouldn't hire an attorney who rides a desk all day to litigate your case at trial. Similarly, you shouldn't hire an attorney-mediator who hasn't taken the necessary classes to learn

how to mediate. A great divorce mediator is a **trained neutral party** and knows how to get a case settled in a **fair manner for both parties**.

A mediator informs both parties of the areas necessary to discuss, plus the advantages and disadvantages to each possible decision. Then, the parties decide how to proceed. If a decision is not easily made, then a skilled mediator guides the parties through the decision-making process until the parties mutually agree.

There are many advantages to using mediation with an attorney-mediator. Mediation is very cost-effective for the legal skill involved. The average divorce mediation costs between $2,500 and $5,500, which means $1,250 and $2,750 per person and no attorneys racking up legal bills to $20,000 per person.

Most importantly, mediation assists the parties in talking through all matters related to the children. Generally, parents who are getting a divorce have different ideas of what is best for their children. Having an impartial party making sure both parties' voices are heard and reality-checking both parties is helpful to ensure a reasonable decision can be made in the best interests of the children. Mediation Northwest always puts children first in the divorce process. Children are our priority, even when parents accidentally lose sight of their best interests.

Mediation is awesome, but the process is not right for everyone. You must be able to eventually make decisions with your soon-to-be ex-spouse. If your soon-to-be ex-spouse is irrational, cannot make

decisions, or cannot be trusted to maintain decisions, then mediation is a giant waste of time.

Next Step

It is a safe bet to assume that if you are reading *Divorce Mediation in Oregon*, you are electing to use mediation to dissolve your marriage. The next step is to understand each and every aspect of your divorce: the children, the assets, the liabilities, the support, etc. Only once you understand the law that underpins divorce can you then understand how to best advocate for yourself in mediation.

Freebie

For a free "How to Choose a Divorce Mediator" check-list, email me at info@MediationNorthwest.com and I will email it to you.

The Take-Away

There are four ways to obtain a divorce in Oregon:

1. *Use forms*
2. *One party is represented by an attorney*
3. *Both parties are represented by attorneys*
4. *Both parties use a mediator (preferably an attorney-mediator or someone who went to law school)*

4.

WHAT ABOUT THE KIDS?

Do not skip this section if you have minor children.
If you do not have minor children, have a cupcake and
go on to Chapter 5.

First and foremost, let's understand two very important concepts about divorce with children: custody and parenting time. The contents of this chapter can dramatically impact your divorce. Fully understanding the actual vs. the perceived legal ramifications of custody and parenting time will be the hardest part of your divorce.

This is the time to forget the urban myths you've heard and not listen to your co-worker's nightmare divorce stories. Inevitably, these stories are full of misunderstandings and information that is only partially accurate but incomplete.

Information is power, and the only way to take charge of your destiny is to arm yourself with information. I suggest either taking a second bite of your cupcake or another sip of your wine/beer because this section will be difficult and it will test what you think you know.

Custody

The party who is awarded custody is the legal decision-maker for the children in four discrete areas: residence, health care, education, and religion. If the husband is awarded sole custody, then he, and he alone, will make the decisions for the children's residence, health care, education, and religion. If husband and wife agree to joint custody, then both wife and husband must mutually agree on the decisions in the four discrete areas.

Here is the first kicker: A judge cannot force a party into a joint custody agreement. So, if you or your soon-to-be ex-spouse cannot agree upon joint custody, it cannot happen. But joint custody doesn't mean you and your soon-to-be ex-spouse necessarily get along. It means you and your soon-to-be ex-spouse can make decisions together about residence, health care, education, and religion.

Here is the second kicker: Case law practically nullifies the decision-making ability of a sole custodian parent for residence. If a parent with sole custody wants to move to California, the other parent can simply petition the court and ask the court to intervene. Then, the court will need to make a determination of where the children will reside. So, the "residence" area of sole custody isn't nearly as scary or as important as it looks at first glance.

Another urban myth is "legal custody" vs. "physical custody." In Oregon, these terms do not exist. You either have sole custody or joint custody.

Here is the take-away: If you and your spouse can make joint decisions in the areas of health care, education, and religion, then joint custody can work for you.

Parenting Time

Parenting time is the physical time the children spend with each parent. If the children spend time with each parent in a one week rotating schedule, commonly described as "every other week," then the parenting time with the children is fifty percent to husband and fifty percent to wife.

What does this mean in real life? Let's use an example to best illustrate how the decision for custody and parenting time could affect, or could not affect, your new situation.

Scenario Number One

Ross has sole custody of the children. Even though Ross has sole custody, the children could spend 70 percent of their parenting time with Rachel. How could that happen? It can happen because the person who is best suited to make decisions for the children in the limited areas of residence, health care, education, and religion is not necessarily the person with whom the children should spend most of their time. For example, Ross and Rachel each freely admit they cannot make decisions

together. Ross has always been the decision-maker of the family, whereas Rachel, by her own admission, doesn't like to make decisions. However, Ross often travels for work and Rachel is a stay-at-home mom. It therefore makes sense for Ross to have sole custody of the children, but Rachel should be awarded most of the parenting time with the children.

Scenario Number Two

Rachel and Ross agree to joint custody. Ross has the children 40 percent of the time and Rachel has the children 60 percent of the time. The family has attended First Baptist since the children were born. Ross has decided he no longer believes in religion and doesn't want the children to attend, not just on his time, but on Rachel's time, too. What happens?

If Ross and Rachel cannot mutually agree upon religion, then one of three scenarios will occur. Either (1) Rachel continues to take the children to church during her parenting time and Ross remains annoyed, (2) Ross takes Rachel to court, a judge is then forced to grant Rachel or Ross sole custody (a judge isn't going to determine the children's religion — that is the parents' decision), and whoever is awarded sole custody will determine the children's religion or lack thereof, or (3) Ross and Rachel enter mediation to find a solution to the problem.

Scenario Number Three

Rachel has sole custody. The children spend parenting time with both parents in an every other week rotating schedule. Rachel hates it that Ross feeds the kids either fast food or pre-cooked, heat-n-serve dinners. Even though Rachel has sole custody, she doesn't get to control this decision because it is not one of the four discrete areas discussed above.

Suggestions for Custody and Parenting Time

Most parties make a HUGE mistake and fight for sole custody when they actually agree on the four discrete joint custody areas — they just don't agree on how to parent the children (e.g., bedtimes, food choices, activities, and so on). Sole custody is not going to fix that problem. If you are super lucky at court, a parent may be awarded a majority of the parenting time. However, more and more judges are awarding 50/50 parenting time unless a parent is a horrible parent. (When I say horrible parent, I mean a drug-dealing, prostituting, abusive, horrible parent. I don't mean a selfish, rude, and egomaniacal "horrible" person.)

Although judges routinely order 50/50 parenting time, I do not agree with 50/50 parenting time as a solution for all families. I see children the happiest when the parenting time schedule takes into account each parent's work schedules, the ages of the children, which parent the children are most bonded with, and the distance to the

children's school from the parents' homes. Please see the "Parenting Time Options" section for additional information.

Here is the take-away: As long as your soon-to-be ex-spouse isn't a current drug addict or an abuser, a better idea is to work things out in mediation by agreeing to joint custody to avoid the unnecessary fight, and fight about the parenting time (i.e., time spent with each parent) and the parenting time rules (bedtimes, meal choices, etc.) that are near and dear to your heart.

Here is the take-away: As long as your soon-to-be ex-spouse isn't a current drug addict or an abuser, a better idea is to work things out in mediation by agreeing to joint custody to avoid the unnecessary fight, and fight about the parenting time (i.e., time spent with each parent) and the parenting time rules (bedtimes, meal choices, etc.) that are near and dear to your heart.

I suggest re-reading this section. This is one area that, if misunderstood, can significantly impact your dissolution costs, time, and overall impact to your new life and your children's lives.

Parenting Time Options

Toddlers and teenagers are each in the same stage of growing up. They are pushing boundaries while, at the same time, they are in need of structure. That is why toddlers are described as being in the "terrible twos" and teenagers…well, usually it's uttered while shaking one's head and muttering, "Teenagers!"

The vast majority of children need frequent and consistent contact with both parents. Children, for the most part, don't care where they spend the night. The parents care…a lot! The kids care about seeing each parent and interacting with each parent on a frequent and regular schedule.

That said, children of all ages hate moving back and forth between homes. I haven't met a kid yet who says, "I love moving back and forth between Mom's house and Dad's house." However, most children of divorce understand that this is their "new normal" and accept it. They don't love it, but they tolerate it. Many, many psychological studies of children of divorce have clearly demonstrated that children are resilient, more resilient than we give them credit for.

Resiliency, however, doesn't mean that children can absorb all the conflict of divorce without consequences. What does all this mean? It means that children are resilient and can handle a divorce without damaging their future relationships *if* the parents plan properly, with the children's best interests in mind — not the parents' best interests, but the children's best interests.

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Finding the proper parenting plan is difficult. We want children to have frequent and consistent contact with both parents, not move around too often, and have a regular schedule. Teenagers want fewer transitions and more time (e.g., week on/week off). Toddlers desperately need structure in both homes (same bedtime, same routines, etc.), but unfortunately, transition more because they can't handle as much time away from each parent (i.e., a parenting plan that is dedicated to Mom on Monday and Tuesday, dedicated to Dad on Wednesday and Thursday, and alternates weekends — Friday nights through Monday mornings).

How to Tell the Kids

It is important to tell your children about your upcoming divorce **in a planned way**. Ideally, both parents will be present during the conversation, and the conversation will not occur until the parents have determined the parenting time details of the divorce.

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Why is it important to know the parenting time details before you tell your children? It is important to your children because after they get over the initial shock of the information, the first question they will ask is, “Where will I live?” They will naturally go into “how does this affect me” mode, and the more answers you have to their questions, the less conflict and turmoil they will endure. To be clear, the very fact that you are getting a divorce will create conflict and turmoil in their lives. However, the more you plan, the less emotional damage will occur.

The very fact that you are getting a divorce will create conflict and turmoil in their lives. However, the more you plan, the less emotional damage will occur.

Timing is everything. Be mindful that your children will go through weeks and months of being emotional and "in their heads." As such, don't tell your kids in May or June when they are in the throes of finishing projects at school, nor in December when Christmas is ever-present on their minds. Don't take them on vacation and announce the divorce. (Yes, I've had clients who thought that was a good idea.) Don't tell them the night before the big game or the overwhelming test. Be mindful of the timing of telling your children. It will turn their world upside down and they will need time to adjust.

My phone rings off the hook the first week of summer (phew, we made it through the school year), the first day of school (phew, we made it through summer), the first week of January (phew, we made it through Christmas), and the middle of April (thank goodness for our tax refund so that we can pay for this divorce). Why? Because parents are mindful that properly timing the divorce is important to the emotional health of their children.

What to say during the announcement is just as important as the timing. Don't blame either party. Don't even hint the divorce is occurring because of too much fighting. Why? Children fight with their siblings. So, when children hear "too much fighting," they internalize that information, and days, weeks, or even months later they'll begin to question their role in the fighting, which leads them to blame themselves for the divorce. If you must mention fighting, be mindful that you need to emphasize the fighting was between the adults and intentionally

mention that the fighting between the adults is 100 percent unrelated to the children…but, my best advice to you is to not mention fighting. I've seen too many kids internalize it and be negatively impacted by it.

Repeatedly inform them that you love them (again and again and again).

Tell them that sometimes it is best for a couple to divorce because it allows them to be better people. The kids will ask lots of questions about why this is happening. They will be crying out for answers. Don't take the bait. Why? Telling them more information is a short-term gain and a long-term loss. It may help them in the moment (for about five seconds), but it will inevitably either lead them to try to fix the situation, blame themselves, or permanently damage their relationship with one parent.

If one party wants the divorce and the other party does not want the divorce, it's selfish to tell the kids that fact.

If one party wants the divorce and the other party does not want the divorce, it's selfish to tell the kids that fact. If you can't tell them the information suggested in this section, I suggest at least being neutral or silent on the issue. Kids need to love, and be loved, by both parents. One party's determination that s/he doesn't want to be in the marriage is not a license to the other party to forever impact their children's lives by telling them it isn't their idea. Why? When one party openly and repeatedly says (or acts like) this divorce isn't his/her idea, the children begin to protect the perceived victimized parent and therefore blame the other parent. Whose interest does that serve? It serves one parent. It damages the children in ways that usually impact their ability to form trusting and lasting relationships. If you are the parent who doesn't want the divorce, give your children the best gift you can give them during this horrendously difficult time in their lives: Give them the gift of being able to love and be loved by the other parent. If your soon-to-be ex is a selfish narcissist or a deadbeat drunk, I assure you that your children will make that determination on their own, in their own time.

One party's determination that s/he doesn't want to be in the marriage is not a license to the other party to forever impact their children's lives by telling them it isn't their idea.

Many parents send their children to counseling the day after the announcement. I strongly discourage parents sending their children to a counselor just to check the box. Why? Children think there is something wrong with them when they are sent to a counselor. You, or your soon-to-be ex-spouse, or most likely both of you, have caused the breakdown in your marriage. Your children are not the cause of your divorce. There is nothing wrong with your children. They just need time to adjust. That said, there are situations where children should be receiving mental health services. Each child is unique, so address whether or not your child needs mental health services based upon your child's actions and words, and not to check the box.

If you are the parent who doesn't want the divorce, give your children the best gift you can give them during this horrendously difficult time in their lives: Give them the gift of being able to love and be loved by the other parent. If your soon-to-be ex is a selfish narcissist or a deadbeat drunk, I assure you that your children will make that determination on their own, in their own time.

Finally, be prepared that regardless of how much you have planned and how mindful you have been with sharing and not sharing information, your children could secretly blame themselves for the divorce. Be aware of questions repeated over months and years about why the divorce is happening. If this is the case, I suggest you then seek counseling for your child. A trained counselor can help a child see that s/he is not the reason for the divorce.

If it seems confusing about whether or not your children should be sent to a counselor, simply ask yourself if your child is showing signs **over time** that s/he blames her/himself for the divorce. If so, send you child to a qualified counselor. If not, wait and see.

Children with Special Needs

Children with special needs are near and dear to my heart. In addition to mediating divorce matters, I also mediate, facilitate, and train parents and districts in special education matters throughout the United States. As such, I know a lot about the unique needs of each special needs child.

Children with special needs require an understanding of their unique situations. Some need to sleep in their own bed every night due to their need for routine. Others need to maintain a very rigid parenting time calendar. Others still require a highly flexible parenting time calendar due to the child's emotional state.

Every parent of a child with special needs already knows that this book cannot address their child's special needs because, by their very nature, he or she is unique and requires unique solutions. Every parent of a child with special needs also knows that this will be one of the most difficult times in your lives because the divorce and the unique needs of the child generally do not mix well with each other.

All that said, it can happen and it does happen. It just requires more planning.

Ghosts at the Table

In every divorce, there is the potential of someone new. Whether that person is the reason for the divorce or if a newfound love is discovered post-divorce, that person is a ghost at the table.

A ghost at the table is a parent's new love who impacts the children. The new girlfriend/fiancée/wife who is the one picking up the kids, dropping off the kids, or putting the kids' pictures on Facebook. The new boyfriend/fiancé/husband who is coaching the kids' baseball team, wrestling with the kids, or taking the kids camping. These are people who impact your children's lives but have no personal connection to you and may harbor ill will toward you. These are the ghosts at the table.

What do you do about your ex-spouse's new paramour? You befriend them.

What do you do about your ex-spouse's new paramour? You befriend them. You tell them about your kids' hopes and fears. You don't talk about your ex-spouse. You enlist them to help you parent your kids when you are not there. Be honest and ask yourself what is best for your children. Your children are in the best situation if they have more adults who love them, not fewer. Your children are in the best situation if they see their parents properly communicate with each other and the ghost at the table. This may be the hardest thing to do, but suck it up and be nice for your kids.

If you can't make friends, then live by *The Godfather*'s motto, "Keep your friends close and your enemies closer."

Asking the Kids Questions About Your Ex-Spouse

During and after the divorce, you may ask your children questions about your ex-spouse. These questions may be innocent, or they may be calculated. Either way, however, your children will view these questions at best with skepticism, and at worst with irritation.

Some parents wrongly try to prove to their children that they can talk about the other parent to the children without any drama. This goal is rarely achievable because the parent forgets that the child is a party to the dialogue and has his/her own assumptions and beliefs about the questions.

Don’t ask if your ex-spouse is happy, has a new job, or even the innocuous, “How’s your mother/father doing?”

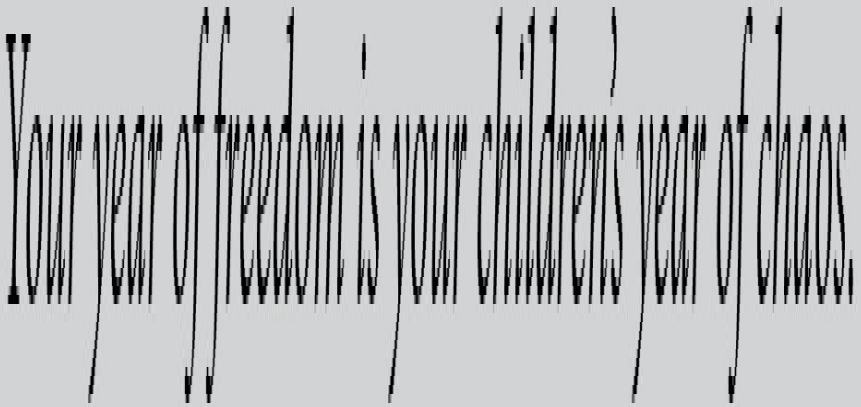
Rather, listen to your children and ask your children questions about their lives. Children of divorce, even happy divorces (yes, they do exist), compartmentalize each parent’s life. They may talk about the other parent, but the second they are asked a question about their other parent, alarm bells go off in their heads.

So listen, but don’t ask.

The Gift of One Year

The first year of your divorce will feel…different. Some parties will want to date. Some parties will feel pressured from their friends and family to date. If you have children, you need to put your children’s needs first. And don’t tell yourself the urban myth that as long as you are happy, they are happy. Wrong. Children are selfish by nature. They don’t care if you are romantically happy.

Do not make the mistake of introducing new romantic partners to your children during the first year of the divorce. Your year of freedom is your children’s year of chaos. So, if you know that your children are experiencing a year of chaos, why would you knowingly introduce a new dynamic into their lives?


Your year of freedom is your child's year of chaos.

And let's dispel the myth that the kids don't know you are romantically involved with an adult known to them. I hear this all the time, "Janice/Richard has always been in their lives. We are really careful. The kids don't know." The kids know that a parent has been removed and now Janice/Richard is paying more attention to Mom/Dad. They know that this person is now taking on a more parent-like role, making eye contact with Mom/Dad, that Mom/Dad seems to rely upon Janice/Richard for emotional support, and that Janice/Richard is "around a lot more." Regardless of how careful you are with Janice/Richard, the kids almost always know or suspect your relationship.

I will never forget when I had the opportunity to interview a child of divorce nine months after his parents' divorce, a divorce I mediated. He was fortunate to have two loving and intelligent parents. He told me, "It is like I am in a plane that is crashing, but the plane hasn't yet crashed." That is the best explanation I have ever heard of a child's experience of the first year of a divorce.

I am not saying do not date. Have sex like bunnies for all I care, but do not bring your children into the mix. If you have found "the one," then "the one" will wait until your children have had time to adjust. If s/he can't wait, s/he isn't "the one!" Please do not sacrifice your children's fragile psychological state, a psychological state that you (at least partially) created, for your romantic life. Their little brains and their beautiful hearts need time to heal. Give them the gift of one year.

Freebie

For a free "Parenting Time Schedule Comparison Chart," email me at info@MediationNorthwest.com and I will email it to you.

The Take-Away

1. *Children are resilient, but they are not bulletproof.*

2. *Young children need frequent and consistent time with both parents.*

3. *Older children need frequent and consistent contact with both parents.*

4. *Your year of renewed freedom is your children's year of chaos.*

5. *Give your children the gift of one year free from new romantic partners.*

5.

HOW TO DIVIDE IT UP

Common Law vs. Community Property

Oregon is a *common law property* state, which means you are entitled to property with your name on it. Washington and California are *community property* states, which means that the property you create during a marriage is equally both spouses' property.

Although Oregon is a common law property state, Oregon pretends to be a community property state for the limited purpose of divorce. What does that mean? It means that during a divorce, the court has the right to award any property created during a marriage, regardless of title, to either spouse and will distribute the property in an equitable manner.

Assets

You know (or think you know) the assets of your marriage. This section contains a brief description of standard assets of a marriage and common ways to handle the distribution. This list does not contain every possible asset, but rather, provides a highlight of commonly held assets.

This section contains a lot of important information, and it can be difficult to digest. I fully support eating an entire cupcake or drinking half a glass of wine/beer when reading this section. Eat or drink

slowly…this is a long section, and it is the most important section in the entire book. Somehow eating cupcakes makes it easier for my brain to digest difficult information.

How to Value an Asset

Asset - Attached Liability = Equity Value

Family Home's Real Market Value:	*$400,000.00*
Family Home's Mortgage:	*- $250,000.00*
Equity Value (this is the value in a divorce):	*$150,000.00*

Pre-Marital and Marital Assets

In mediation, we need to know every single asset in your name. However, every asset may not qualify as a marital asset. Let's dig a bit deeper.

An asset acquired prior to the marriage is called a pre-marital asset. Although a pre-marital asset is **presumed** not to be a marital asset, the court has the right to declare it as part of the marital pot. This is highly unlikely, but it is possible. For simplification purposes, I will presume that pre-marital assets are not a part of the marital pot.

If an asset is both pre-marital and marital, then the marital value is determined as follows: current value – pre-marital value = marital value. For example, if you and your spouse lived in a home that you purchased prior to the marriage and you each have contributed to the home, most couples agree that home has a marital value. So, if your home is currently worth $150,000 and it was worth $50,000 before the marriage, then the current value of the house is reduced by pre-marital value and the marital value is $100,000. The formula looks like this: $150,000 – $50,000 = $100,000.

If an asset is both pre-marital and marital, then the marital value is determined as follows: current value - pre-marital value = marital value.

There is a hot debate as to whether pre-marital passive growth income is marital or not marital. What does that mean? Let's take a bite of that cupcake and then breathe. We've got this.

We already know that "pre-marital" means it happened before the marriage. "Passive growth" means the asset grew in value by market forces and not by your hand (i.e., interest on a savings account). "Income" means the amount the asset grew. So, it's the value of the pre-marital asset that occurred during the marriage, not by anyone's hand. Yes, it's complicated. Let's look at a real-life example.

If (1) Ross's retirement account was valued at $50,000 prior to his marriage, (2) Ross added another $50,000 to his retirement account during the marriage, and (3) the account earned $25,000 in gains and interest during the marriage, then Ross's account balance is $125,000 ($50,000 + $50,000 + $25,000 = $125,000). It is normal for Ross to assign the original $50,000 as pre-marital and therefore not part of the marital estate. It is debatable whether or not Ross can also declare that the passive growth pre-marital interest earned on the original $50,000 is non-marital. How is the passive growth interest determined on **only** the pre-marital portion? When this issue arises in my office, we hire a financial professional.

Real Estate

If you own a house, condo, apartment, duplex, commercial property, or bare land, you own real estate. Even if your real estate has a mortgage, you still own real estate.

There are several ways to determine the value of the property. The platinum standard is to order an appraisal, which is prepared by a certified or licensed appraiser. Generally, an appraisal costs between $450 and $800. The gold standard is to order a comparative market analysis, commonly referred to as a "CMA," which is a value estimate prepared by a real estate agent. Generally, this is a free service. I fully support my clients using a comparative market analysis. It's the best value when looking at quality of information vs. price. The silver standard is when parties mutually agree upon the value, either by looking at recent selling prices of area homes or using internet valuing services such as Zillow. Zillow is either dead-on accurate or wildly speculative, sometimes in the same neighborhood. I strongly encourage you not to use the tax-assessed value of your property. Tax-assessed values are rarely accurate because the value is determined using an algorithm and not market forces.

Parties can avoid valuing the property if they agree to sell the property and equally split the net proceeds from the property.

The value of the home is the real market value less the mortgages and loans attached to the property.

If one party will be awarded the property and the mortgage is in both parties' names, then it is standard to require one party to refinance the

loan into that party's sole name. Some parties will discount the value of the home by the cost to refinance the loan.

Rental properties and commercial properties contain additional hurdles. First, if you sell a rental or commercial property, then (1) the gain (i.e., the profit) will be taxed as a capital gain, and (2) if this property was depreciated on your taxes, then you will likely need to recoup depreciation, too. What does all this mean? It means your rental/commercial property's value is significantly reduced due to taxes. So, if you are taking a rental/commercial property and your spouse is taking the primary residence, then you need to request a discount to the rental/commercial property's value for capital gains and potential recoupment of depreciation.

If awarding the property to one party, in mediation we need to know the real property's legal description, the mortgage lender's name, the account number of the mortgage lender, the balance of the mortgage, and the value of the property.

Automobiles and Big Boy/Girl Toys

Cars, trucks, snowmobiles, jet skis, quads, boats, etc. — these vehicles and toys need to be awarded to a party, and they need to be valued.

In mediation, we need to know the full name of the vehicle/toy (e.g., 2014 Ford Mustang), the VIN number (if available), the value, and any

loan attached to the vehicle/toy (including the loan's name, account number, and loan value).

Businesses

Many couples own a small business — the auto repair shop, the corner franchise, etc. Small businesses have value. Valuing the business, however, is difficult and requires a professional. A business valuation is not cheap ($4,000–$10,000), but it is worth its weight in gold! Why? Because the value of most small businesses exceeds by far (generally by tens of thousands of dollars) the cost of the valuation. At its simplest form, the value of the business includes the assets of the business, the liabilities of the business, the goodwill (i.e., reputation) of the business, and future stream of income of the business.

I routinely see clients fail to recognize the value of a business. The business-owner spouse talks the non-business-owner spouse into believing that the business does not have a value. Some businesses truly do not have value, such as a hairdresser, a moderate real estate agent, a solo mechanic, etc. So, how do you know? You hire professionals to advise you.

In mediation, we need to know the name of the business, the business's legal entity structure (e.g., corporation, sole proprietorship), the owners of the business, the value of the business, and the liabilities of the business.

Retirement Accounts

The entire retirement subsection is one of the most important sections in the "Assets" section. Read it in one sitting when you are awake and can process information. I suggest you get a cupcake…or two. It took me 15 years to truly understand this information. I suggest reading it twice.

Retirement accounts come in many shapes and sizes. Do not listen to your co-worker explain how to divide a retirement account, because the type of account determines how it is valued and how it is split up (if at all).

In the world of divorce, the two most common types of plans are *defined benefit* plans and *defined contribution* plans.

Defined Benefit Plans

A *defined benefit* plan is a plan that most often pays the participant every month from the date of retirement until (generally) the date of death. A common name for this type of plan is a pension, but not all pensions are *defined benefit* plans. Yes, it is confusing.

Oregon's PERS Tier One, Tier Two, and OPSRP operate similar to a *defined benefit* plans. The federal government's military, FERS and CSRS plans also operate similar to a *defined benefit* plan. Many union plans are also *defined benefit* plans. The military and the post office offer *defined benefit* plans, too.

The value of a *defined benefit* plan is not readily available without hiring an actuary. An actuarial valuation generally costs between $450 and $800, depending upon the plan, whether or not a marital share is being determined, and whether or not passive growth is included or excluded. (Please review the "Pre-Marital and Marital Assets" section above). If it sounds complicated, that is because it is complicated!

Defined benefit plans also have the possibility of survivor benefits. Many attorneys and parties forget to negotiate survivor benefits. Unless a survivor benefit is elected almost all of these plans will cut off the former spouse's retirement award upon the death of the retired spouse. Can you imagine? You were divorced twenty years ago, you are now retired with a completely different life, your former spouse dies and your retirement benefits are gone because someone failed to properly negotiate this area! This is an area that needs to be mindfully negotiated — another reason to hire an attorney-mediator who knows this stuff.

Defined Benefit Plans

- *Almost always pay you a fixed amount from the day you retire until the day you pass into cupcake heaven*
- *Usually do not contain a balance (because no one knows when you will die)*
- *Can be valued by an actuary for $400–$800 dollars*
- *Can contain both pre-marital and marital value*
- *Typical approach is to split the marital share 50/50 through a QDRO/DRO/COAP*
- *There is no tax or penalty to split the account pursuant to a divorce.*
- *Spouses usually do not receive their share until the employee spouse turns 55*
- *Each withdrawal is taxable (and a 10% penalty may apply if you withdraw before reaching 59 1/2).*

Defined Contribution Plans

A *defined contribution* plan is a plan that contains a certain sum of money. Once you have pulled out that sum, there is no more retirement account. For simplicity's sake, I have included all *defined contribution* plans into this section. A 401(k), Profit Sharing, 401(a), 403(b), 457, IRA, ROTH IRA, Simple IRA, IAP, and TSP are *defined contribution* plans.

For *defined contribution* plans, the value is the balance of the account. Easy-peasy lemon squeezy! Finally, something easy about retirement accounts.

Defined Contribution Plans

- *Contains an account balance and doesn't need to be valued. What you see is what you get.*
- *Each withdrawal is taxable (and a 10% penalty may apply if you withdraw before reaching 59 1/2).*

Combination Defined Benefit and Defined Contribution Plans

Some companies offer a combination of retirement benefits that include both a *defined benefit* plan and a *defined contribution* plan. The state of Oregon provides (most of) its employees both a *defined benefit* plan (PERS Tier One/Two or OPSRP) and a *defined contribution* plan (IAP). Most federal agencies also offer their employees both a *defined benefit* plan (FERS or CSRS) and a *defined contribution* plan (TSP). Some unions also offer their members a combination of a *defined benefit* plan (pension) and *defined contribution* plan (401(k)).

Retirement: How the Funds Get from One Account to Another

For both a *defined benefit* plan and a *defined contribution* plan, generally a *supplemental judgement* is required to award retirement accounts (of course, exceptions exist — see the discussion of IRAs below). The three most popular types of supplemental judgments used to divide retirement accounts are called: (1) Qualified Domestic Relations Order (QDRO — pronounced "quadro"), (2) Domestic Relations Order (DRO — pronounced "d-r-o"), or (3) Court Order Acceptable for Processing (COAP — pronounced "co app"). A QDRO/DRO/COAP is

drafted by a professional who specializes in drafting these types of supplemental judgments and generally costs between $750 and $1,200 each.

Most IRAs do not require a *supplemental judgment* so long as the *general judgment of dissolution* includes carefully crafted language. If at all possible, I try to equalize the retirement accounts through an IRA. If it is not possible to equalize through an IRA, I try to move retirement funds from one party to another with one transaction so that my parties only pay one QDRO/DRO/COAP fee.

Retirement: How Much to Divide

There are different ways to determine how much retirement should be divided. Do not believe the urban myth that you are either entitled to half of your spouse's retirement account or that you must give half of your retirement account to your spouse. There is no law that requires such a division. How much gets divided, however, depends upon the overall assets and liabilities of the marriage.

For both *defined benefit* plans and *defined contribution* accounts, parties should consider the marital value of each plan. (Please see the "Pre-Marital and Marital Assets" section above.) For instance, If Rachel's defined contribution plan is worth $150,000 today, but it was worth $50,000 when she married Ross, then Rachel will want to begin discussing the account's value at $100,000. (The formula is: current

value – pre-marital value = marital value or $150,000 – $50,000 = $100,000.) Additionally, the parties will want to discuss whether or not the account's passive growth income (i.e., the interest earned on the pre-marital portion during the marriage) is marital or pre-marital. (Please see the "Pre-Marital and Marital Assets" section above.) If the parties elect to include passive growth income, then an expert must be hired to determine passive growth.

For *defined benefit* plan benefits, some parties chose to split the marital share of **each defined benefit plan** 50/50. This 50/50 split provides two advantages. First, it eliminates the need to have the account valued, which saves money. Second, both parties get half of the marital account's actual value, not an expert's opinion of the value, which is speculative at best. I fully support this option to my clients. If more than one defined benefit plan exists, it gets complicated. Some parties split each defined benefit plan's marital share 50/50 to ensure the equality of the distribution. Other parties hire a valuation expert to value the marital share of all of the defined benefits plan benefits and then equalize the marital share in one step (if possible). I know, my eyes are glazing over, too. You are normal. Reason number 204 why you hire professionals!

For *defined contribution* accounts, most parties equally divide the marital share of the **total balance of the parties' defined contribution accounts**. For instance, if Rachel has three *defined contribution* accounts with a total marital value of $200,000 and Ross has two retirement accounts with a total marital value of $150,000, it is best to move

$25,000 from one of Rachel's accounts to one of Ross's accounts. After this transaction, Rachel will have $175,000 and Ross will have $175,000. Making a single transaction from one account makes less work, is mathematically sound, and can cost less if a supplemental judgment (aka QDRO/DRO/COAP) is necessary to divide the accounts.

Some parties use a retirement plan's value to offset other marital assets' values. For instance, if the total marital value of Rachel's retirement is $200,000 and the total marital value of Ross's retirement is $150,000, then they may want to move $25,000 from Rachel to Ross to equalize the distribution, leaving each party with $175,000. However, if the equity in the home is worth $25,000 and the home is awarded to Ross, then many parties consider the division to be equal. But…

Using a retirement account to offset the equity in the home, dollar-for-dollar, is not mathematically sound. To explain, taxable retirement accounts are taxed upon withdrawal (i.e., if you take $250,000 out of your retirement account, you are taxed on that money). On the other hand, when a person sells a primary residential home, a single party can receive up to $250,000 TAX-FREE! In other words, if there is $250,000 in taxable retirement and $250,000 in equity in a home, then the person with the equity in the home will realize $250,000, but the person with the taxable retirement account will never realize $250,000 due to federal and state taxes.

Usually, the best way to handle retirement is to: (1) determine the marital share of each party's retirement, (2) equalize the marital share of

the non-taxable retirement accounts (i.e., ROTH IRA) in one transaction, (3) equalize the marital share of each *defined benefit* plan, and (4) equalize the marital share of the *defined contribution* accounts in one transaction.

Usually, the best way to handle retirement is to: (1) determine the marital share of each party's retirement, (2) equalize the marital share of the non-taxable retirement accounts (i.e., ROTH IRA) in one transaction, (3) equalize the marital share of each defined benefit plan, and (4) equalize the marital share of the defined contribution accounts in one transaction.

If this is not possible, then parties may want to discount the marital portion of the taxable retirement plan for potential future taxes. The formula looks like this: current value of the marital share of retirement less potential future state and federal taxes = value used in divorce. (i.e., $250,000 – 38% = $155,000). This option is speculative at best. Most parties hire an accountant to suggest the tax reduction percentage. This is a last resort option.

Retirement: When to Divide

Although the QDRO/DRO/COAP should be drafted and entered by the court as soon after the divorce as possible, when the defined benefit plan is actually divided is negotiable and may significantly impact the parties.

In this scenario, Ross has a large defined benefit plan and Rachel is being awarded a portion of Ross's retirement. If the QDRO/DRO/COAP orders the plan to immediately divide the benefit (this is called an *up-front-division*), it generally (not always) favors the individual who is enrolled in the retirement plan (i.e., Ross). If the QDRO/DRO/COAP orders the plan to divide the benefit at retirement (this is called a *deferred-division*), the division generally (not always) is more neutral to both parties. However, the deferred division has some risk to the individual not enrolled in the retirement plan, too. Yes, this is

complicated, which is why you want to hire an attorney-mediator who can explain your options to you.

Military Retirement

Military retirement is complicated. Many rules apply, but this rule tends to separate the milk from the curd: If your spouse qualifies for retirement from the military, you were married for ten years or more, and your spouse was in the military for ten of your married years, then you (the non-military spouse) may qualify to receive a share of the military pension. I always hire a military retirement specialist when this issue arises in my office.

PERS Helpful Hint

A quick note about PERS: Do not be fooled by the PERS member account balance shown on the Annual Member Account Statement. This value does not indicate that account's actual value. Some of the factors that determine the value of the benefit include when the member retires, how many years the member worked in the PERS system, the member's highest compensation during the PERS employment, and how long the member lives. Indeed, it's fair to say that many PERS Tier One and Tier Two accounts have "missing" money that is not reflected by the Annual Member Account Statement. One client's Tier Two statement indicated

her account balance was only $11,000. She had worked within the PERS system for 22 years, so I suspected something was wrong. I hired an actuary to value the account and he valued the account at over $200,000!

Retirement: Important Parting Thoughts

Although most retirement plan participants cannot withdraw from retirement without taxes and penalties, a trick exists for *defined contribution* plans. A QDRO (not a DRO or a COAP) can be used to **withdraw** money from a *defined contribution* plan before age 59 ½ so long as it is paid directly to the spouse who is not enrolled in the retirement plan (i.e., Ross's plan, but awarded to Rachel). The money will still be **taxed** as income, to Rachel but the QDRO will avoid the 10 percent penalty. Some parties use this option to pay off jointly held liabilities or to obtain funds to purchase a new home.

To be clear, choosing this option is financial suicide because of the tax, but it is an option that may be necessary to pay off joint liabilities. Losing 24–38% of your retirement account is always a last resort option.

Here is your final take-away: Before you throw your head onto the table in exasperation, remember, this is why professionals are hired to handle this stuff.

Life Insurance Plans

Life insurance can be an asset of the marriage, but only if it has a value without requiring the death of the party. To explain, whole life policies, annuity policies, and universal life policies have a value that a party can withdraw prior to death and thus are an asset of the marriage. Term life insurance plans do not have a value for the marriage and only have a value upon the death of the policy holder.

If a party owns a whole life, annuity, or universal life insurance policy, in mediation we need to know the name of the policy, the holder of the policy, the account number of the policy, and the value that can be withdrawn from the policy.

Life insurance is also addressed in the "How to Pay for Your Life After the Divorce" section of this book.

Gifts and Inheritance

Gifts (including inheritance) received during the marriage but separately held by the receiving party in the receiving party's name are presumed to be the property of the receiver and not subject to marital division. This presumption, however, can be rebutted, and a court can take it into account if the court so desires.

Debts (aka Liabilities)

It is rare in American culture for a person not to have a liability. Liabilities, however, come in many different forms. Don't worry, this is any easy discussion. You won't even need an alcoholic beverage to understand it. I think another cupcake is a dandy idea, though.

Unsecured Loans (aka Credit Cards)

Most parties have credit cards and other "unsecured" loans. An *unsecured loan* is a loan that isn't attached to an asset. (Stay with me; it really isn't difficult to understand.) In other words, an unsecured loan is any loan that, if not repaid, will not impact an asset. If you don't pay for your car loan, your car is repossessed. If you don't pay your mortgage, your home is foreclosed. All of these loans are secured by an asset. Therefore, an unsecured loan is any credit card and any other loan that does not attach to an asset.

Here is the most important part to understand when it comes to unsecured debt in a divorce. Unsecured debt can be held *jointly* (i.e., in both husband and wife's name) or *individually* (i.e., in wife's name only). In a divorce, it is always best to award the individually held loan to the loan holder (e.g., Rachel's Capital One card should be awarded to Rachel). Why? Because if we assigned Rachel's Capital One card to Ross and Ross fails to pay it, guess who Capital One is coming after with a court order to garnish Rachel's checking account? Rachel!

Why? The court cannot legally change the original contractual obligation between a person and the credit card company. The court can impact Ross and Rachel, but not third parties, such as Capital One. Technically, there is fancy legal language called “Indemnification and Hold Harmless” that, in theory, requires Ross to hire attorneys to protect Rachel from Capital One if he doesn’t pay the bill. Practically, however, if Ross can’t afford to pay Capital One, he can’t afford to pay for attorneys to protect Rachel from Capital One.

I strongly advise clients to handle jointly held unsecured loans by either (1) assigning fifty percent of the account to each party and paying off each party's assigned amount with another credit card (i.e., a balance transfer), or (2) assigning the account to one party and requiring that party to refinance the account into his/her sole name.

What should parties do with those pesky jointly held unsecured loans? I strongly advise clients to handle jointly held unsecured loans by either (1) assigning fifty percent of the account to each party and paying off each party's assigned amount with another credit card (i.e., a balance transfer), or (2) assigning the account to one party and requiring that party to refinance the account into his/her sole name. In other words, if the jointly held Capital One card is assigned to Rachel, then Rachel needs to be required to refinance the loan into her sole name; or, if the jointly held Capital One account is assigned fifty percent to each party, then each party pays off the assigned fifty percent through a balance transfer from another credit card.

For divorce purposes, the value of a liability is today's pay-off amount unless the parties agree to add the future interest to the liability, which is rare.

Liabilities Attached to Assets

Many assets have a liability attached to them. For example, a car with a car loan is an asset with an attached liability. Same for most family homes. It is important to address the loan attached to the asset within the asset's value. For instance, if the sale price of the family home is reduced by the amount of the mortgage, the mortgage (i.e., the liability) is properly reducing the value of the home (i.e., the asset).

So, if we have a column of assets' values (like the $150,000 in the example above) and we have a column of liabilities' values (such as the Capital One credit card), we can't place the mortgage in both the asset and the liability columns because that is applying one loan twice. This inappropriate practice is commonly called *double dipping*.

Refinance Costs

For either unsecured liabilities (i.e., credit cards) or liabilities attached to assets (i.e., the house or the car), the cost of refinancing these liabilities into one party's sole name can be negotiated in mediation. Assuming a refinance happens, the parties should decide if the cost to refinance should be included in the cost of the divorce. For example, when a party refinances the family home, it generally costs between $4,000 and $7,000. If Ross refinanced the family home and incurred $5,000 of refinance costs, he may ask that the $5,000 reduce the value of the family home. The same is true, but to a lesser extent, for refinancing other liabilities.

Educational Loans

Educational loans are a mixed bag. If the educational loan was obtained pre-marriage, it is pre-marital and (1) should be assigned to the

party who originally took out the loan, and (2) should not be taken into account in the marital distribution.

Educational loans that were taken out during the marriage are messy. This is an unsettled area of the law. If a party is receiving spousal support based upon the additional education the loans provided (e.g., Ross makes more money because he took out loans to obtain his doctorate in paleontology), then some courts include, and some parties negotiate for, the loans to be included as marital loans (although still assigned to the originating party). Some courts and some parties do not include these loans as marital.

The messiest moment is when parties have refinanced their educational loans into one loan (i.e., Rachel's loans and Ross's loans are now one loan). When this happens, both parties need to decide if (1) the loans are marital, and (2) who is assigned the loan. Usually, when this situation arises, I suggest each party refinance his/her share of the loan into his/her sole name.

Family Loans

Family loans are a mixed bag, too. When I speak of family loans, I mean unsecured family loans (that is, Mom and Dad loaned you money but didn't take a lien out on your property). Some families absolutely expect to be paid back their loan. Other families have an unspoken agreement that the loan won't be paid back — hence the problem. The

spouse who was loaned the money inevitably insists that the loan be counted because it will be paid back, while the other spouse fumes because s/he knows perfectly well that the loan is never going to be paid back. At this point, it is a determination of the finder of fact (i.e., the court or by agreement of the parties).

Bankruptcy and Judgments

A judgment for the payment of money is an important legal tool to require Party A to pay Party B a certain amount of money into the future. Spousal support, child support, and payments of money into the future are generally called *money judgment awards*.

A *lien* is a legal tool that allows for a sum of money to be secured by property. For example, Rachel owes Ross $50,000, to be paid in two years. Ross places a lien on Rachel's home so that if Rachel fails to pay the $50,000, Ross can foreclose Rachel's home and get paid.

A bankruptcy proceeding can prevent a divorce from occurring until after the bankruptcy has completed.

Bankruptcy after a divorce is a potential nightmare for the non-bankrupt party. Except for spousal support and child support, other liabilities (judgments, liens, and/or obligations) can be discharged in a bankruptcy.

What does that mean? Well, for example, if Rachel is ordered to pay for that jointly held Capital One card and Rachel claims bankruptcy,

the bankruptcy court could discharge Rachel's obligation to pay for the liability, which means that Capital One is going to knock on Ross's door and demand payment. It is for this reason that I strongly advise clients to refinance all joint liabilities into their sole names.

Let's look at a more complicated scenario. Ross amassed the parties' retirement during the marriage but threw a fit during the divorce process that the retirement should not be split. Rachel agreed to be awarded $100,000 to be paid within four years of the dissolution in lieu of the retirement. Rachel was smart and had a $100,000 lien placed on the family home until the $100,000 was paid. Ross declares bankruptcy. Additionally, Ross lets the family home go into foreclosure. The bankruptcy court can, and most likely will, discharge Ross's obligation to pay the $100,000, and since the house is in foreclosure, Rachel will be lucky if she sees a few thousand dollars of her $100,000.

Here's the take-away: A judgment or a lien will protect you until a bankruptcy court says otherwise. Be smart about your negotiations and get everything you are owed as soon as possible.

The Math

The math of a divorce is not complicated. I have a doctorate, but I haven't taken math since my sophomore year in high school. When people talk math, all I hear is, "blah, blah, blah, blah." My eyes roll into my head and my brain goes completely blank. I know they are talking

and using words, but I have no idea what they are talking about. So, if I can do it, you can do it.

The only math skills you need are basic addition, basic subtraction, and basic division…and a cupcake. There are five basic steps to divorce math:

- **Step One.** Create a column for each party.
- **Step Two.** Assign each asset of the marriage to either party and include each asset's value. Add up the itemized assets' values for each column.
- **Step Three.** Assign each liability of the marriage to either party and include each liability's value. Add up the itemized liabilities for each column.
- **Step Four.** Subtract each column's liabilities from each column's assets. This results in a total for each party.
- **Step Five.** Subtract the higher award from the lower award. Divide the result by two. If the parties want to equalize the division of assets and liabilities (i.e., 50/50), this is the amount that needs to be moved from the party with more overall value to the party with less overall value.

	Rachel	**Ross**	**The Math**
Total Assets	$300,000	$240,000	

Total Liabilities	$10,000	$20,000	
Equity Total	$290,000	$220,000	Rachel: $300,000 – $10,000 = $290,000 Ross: $240,000 – $20,000 = $220,000
Difference of Equity Totals	$70, 000		$290,000 – $220,000 = $70,000
Half the Difference of Equity Totals	$35,000	$35,000	$70,000 / 2 = $35,000
TOTAL	$255,000	$255,000	Rachel: $290,000 – $35,000 = $255,000 Ross: $220,000 + $35,000 = $255,000

Freebie

For a free "Divorce Mediation Document Checklist," email me at info@MediationNorthwest.com and I will email it to you.

The Take-Away

1. *Parties to a divorce need to*
    - *Identify each and every asset and liability*
    - *Assign the assets and liabilities into marital and pre-marital categories*
    - *Assign the marital assets and liabilities into columns for each party*
    - *Do the math to determine the fair distribution*
2. *No (good) divorce mediator or attorney can advise parties if a distribution is fair until all of the asset and liability information is known. You are intimately involved (or should be) with your assets and liabilities. It takes time for a professional to become familiar with your situation. Be patient, do the work, and then you will know for certain if your potential ex-spouse's offer is fair or if you are getting the short end of the stick.*

6.

HOW TO PAY FOR YOUR LIFE AFTER THE DIVORCE

Child Support

The Oregon Child Support Division offers a calculator to determine child support. Some parties find this calculator easy to use; others find the multitude of options difficult. Oregon law requires all divorcing parties with children 20 years and younger to calculate child support and advise the court of the calculated amount of child support, which is called the *presumed amount of child support*.

I suggest taking one or two bites of your cupcake or a sip or two of your beverage. This is what you need to know.

Income

Each party's gross income, not net income, needs to be used. Gross income is the amount of your paycheck before any deductions for taxes, health insurance, and/or retirement. If a party receives benefits from an employer that cross over into that party's personal life, the cost of those benefits is added to the party's gross income. The typical benefits are cell phone, car allowance, and housing allowance.

If a party is self-employed, then the party's gross income is reduced by the ordinary and necessary business expenses. However, the self-employed party is only allowed to deduct one half of the self-employment tax, and if the self-employed party is receiving benefits that cross over into that party's personal life (as indicated in the above paragraph), those benefits are then added into that party's gross income. For individuals who are receiving disability benefits, Social Security benefits, or unemployment benefits, the actual amount of those benefits is considered gross income.

Additionally, full-time minimum wage is presumed for a party's gross income unless that party works in a profession that historically does not offer 40 hours per week to the individual or whose employer does not offer 40 hours of work per week. Finally, if a party is receiving Temporary Assistance for Needy Families (TANF) or Women, Children and Families (WIC) (i.e., food stamps), that party's income is presumed to be minimum wage.

Additional Information Required for the Calculation

The calculator requires that you insert the following information: (1) spousal support paid, (2) spousal support received, (3) work-related child care expenses, (4) union dues, (5) disability, veteran's, or Social Security benefits received by the child, (6) the number of the parties'

minor children, (7) the number of the parties' children attending school (see below for additional information about a child attending school), (8) the parenting time overnights for the children, (9) any children of either parent not belonging to the other parent, (10) the health insurance premium for each parent, and (11) the health insurance premium for the children. Each area to input is relatively simple…until it is not. The Child Support Division has added hyperlinks and pop-ups to each area to best describe the information they are seeking.

Deviations (i.e., Agreed-Upon Child Support)

Once the presumed amount of child support is calculated, parties can then deviate from the presumed amount to their agreed-upon child support amount. How does one do this?

Once the presumed amount of child support is calculated, parties can then deviate from the presumed amount to their agreed-upon child support amount.

The Oregon Administrative Rules allow for deviations for many different reasons, including, but not limited to the financial obligations of the parties, evidence of other financial resources, desirability of one party to remain in the family home, special needs child, hardship of one parent, and agreement. To apply the deviation, select the rebuttal type, apply it to the appropriate party, apply the rebuttal factor, and — poof! — the agreed-upon amount is now your child support amount!

Health Insurance

So long as one party has health insurance available for the children, that information should have been entered into the initial calculation. However, if neither party has health insurance, then an award of cash medical support is necessary. What is cash medical support? Cash medical support is an award from the party paying child support to the other party for each month where health insurance is not provided to the child.

Additional Considerations

Oregon child support is the presumed minimum of costs to raise a child. Honestly, for most middle-to-upper-income parties, additional child-related expenses are part of these parties' lives — the extracurricular sports, higher-end clothing, cell phone plans, extensive

summer programs, possibly private school tuition, etc. For most parties who incur these expenses, the parties will agree to share these expenses equally, share these expenses on a pro-rata share of their salaries, or assign them solely to one party.

Electronic Payment vs. Garnishment

Child support is presumed to go through the Oregon Division of Child Support by garnishing the payor's employment check, and then the Division of Child Support remits a check to the payee. There are significant advantages and disadvantages to using the Oregon Division of Child Support.

If the children are on the Oregon Health Plan or a parent is receiving TANF or WIC, then child support is required to go through the Division of Child Support.

The advantages are that the Division maintains an accurate record of child support payments, the parties do not have to discuss payments with each other, and the Division will modify the child support award at any time for a substantial change in circumstances or as required by law.

The disadvantages are twofold. First, having worked for the Division when I was a pimply-faced law student, I saw *many* payor's checks garnished without the payments being remitted to the payee in a timely fashion. Sometimes, months would go by with continual garnishment but without payment. Although this is a small minority of

the payments garnished and paid, it does happen. Second, and more importantly, middle-to-upper-income individuals tend to feel icky having their checks garnished. On more than one occasion, clients have told me garnishment makes them feel like common criminals.

So what do parties who do not want to use the Division of Child Support do? They set up an electronic deposit from the payor's bank to the payee's bank on a specific day of each month. That way, the deposit happens without one party asking for money, there is a clear record of the transaction, and it happens on the same day each month.

Modifications

Child support can be modified any time that a substantial change in circumstances has occurred. What is a substantial change in circumstances? A substantial change in circumstances is when either party makes more or less income, one party is receiving more or less parenting time overnights, a child is no longer eligible for child support, or a parent has a child with another party.

Non-Modifiable Child Support

As of 2013, child support can now be awarded so that neither party can modify the award. I think of it as the "forever-and-ever-amen" award. How can this happen? In order for a child support award to be

classified as non-modifiable, the parties must (1) allow for the court to retain jurisdiction, (2) cite the appropriate case law and statute, and (3) waive both parties' rights to request the court to modify child support in this matter.

As a side note, it is a horrible idea to create a non-modifiable child support award unless both parties are clearly, and without any doubt, benefitting from the arrangement.

Child Attending School (i.e., College Students)

In Oregon, a child between the ages of 18 and 21 who is attending school is called a "Child Attending School" and has the right to receive child support. A Child Attending School directly receives support from one or both parents, depending upon the calculation. This requirement to pay an adult child's schooling is an anomaly, and only a handful of states require this type of support. However, as my mother said, "It is what it is."

Most middle-to-upper-income individuals are already paying, or are in agreement to pay, for all or some of their child's education. If this is the case, then parties can deviate from the presumed amount of child support and pay the actual agreed-upon cost directly to the school. All this is done through those wonderful rebuttals discussed above. Reason number 205 why you hire a professional.

Regardless, it is best for the parties to discuss each party's intention to pay, or not pay, for the child's college expenses. If parties feel too overwhelmed during the divorce process to make this decision, which they often are, then the next best solution is to require mediation in the student's sophomore or junior year of high school. This way, no one is surprised, everyone has real numbers to work with, and everyone knows what to expect from the other party.

Child Credits

IRS regulations allow the parent who spends the majority of the time caring for the children to claim the child credits for the children. However, the IRS also has a nifty form that allows the parent with the right to claim the ability to waive that right. The right to waive child credits is generally negotiated between divorcing couples.

The divorcing couple can decide to either: (1) assign the children to one party every year, (2) assign the children to both parties in alternating years (i.e., Rachel gets odd-numbered years and Ross gets even-numbered years), (3) assign one child to Rachel every year and one child to Ross every year, or (4) my ever-dreaded option of determining each and every year whoever benefits more, and that party then gets to claim the children by buying the tax difference from the other parent. Option #4 is clearly a recipe for continual conflict. I don't recommend it.

Spousal Support

Oregon law provides that an award of spousal support may be awarded for a period of time as may be just and equitable. *ORS 107.105(1)(d)*. Here is my translation: Spousal support is available when party A earns substantially more income than party B if party B doesn't earn enough to live the life s/he has grown accustomed to living. However, unlike child support, which is calculated by a nifty calculator, spousal support is not calculated but negotiated. Huh?

For spousal support, parties negotiate the spousal support award based upon many factors.

It's time to eat a full cupcake or drink half a glass of wine/beer while reading this section. Spousal support is the number two reason why cases go to trial. (The number one reason cases go to trial is child custody). It is in your best interest to read the chapter while fully alert and in one sitting.

Three factors affect an award of spousal support:

1. How much spousal support per month should be awarded
2. How long spousal support should be awarded
3. How to label the spousal support

How Much. The amount of the spousal support award depends upon many factors, including each party's income, either party's

opportunity for advancement in his/her profession, the age of the parties, the budgetary needs of each party, and the length of the parties' marriage.

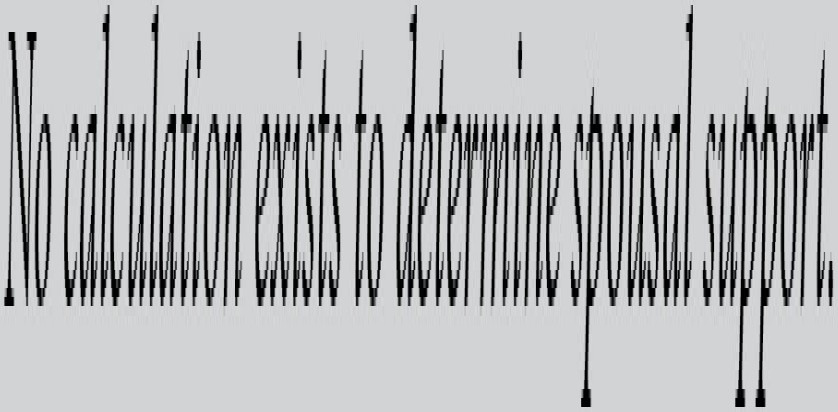
How Long. The length of the spousal support award is also dependent upon length of the marriage, either party's opportunity to advance in his/her profession, the budgetary needs of each party, and the age of the parties.

Label. There are three labels for spousal support: transitional, compensatory, or maintenance. *Transitional* spousal support is appropriate for a party who is trying to transition into the workforce and for those currently enrolled in, or about to enroll in, school. *Compensatory* spousal support is appropriate when spouse A made a significant contribution to the education or career of spouse B and spouse B is now making a very healthy income due to spouse A's contribution. The typical example is the doctor's stay-at-home spouse. *Maintenance* spousal support is appropriate for a marriage where one party's employment is not likely to change and the support award enables the party to maintain the style of living of the marriage.

Don't let your eyes glaze over just yet. Hope is found in the next section.

Spousal Support Awards

No calculation exists to determine spousal support. So, when parties negotiate thousands of dollars each month from one party to the other party, without the benefit of a calculation, inevitably the word “fair” is discussed. But, how do you determine what is fair?


No calculation exists to determine spousal support.

Most people want information to help them determine what is fair.

Since January 2013, I have tracked every reliable spousal support award in Lane County. I continue to track Lane County awards to this day. Additionally, throughout January 2014 through March 2019, I also tracked every reliable spousal support award throughout Oregon. Why? I wanted to compare the spousal support awards trends of Oregon to Lane County's awards. Yes, I am that much of a nerd.

I dump the spousal support awards into a fancy database, which allows me to sort and filter the cases in a myriad of ways. For example, I can sort for only cases that went to trial, only cases that include child support, and/or only cases from the Oregon Court of Appeals. Then, it applies a fancy algorithm to the cases and tells me exactly how much and how long your spousal support award is likely to be, based upon those cases and your unique circumstances. Pretty cool, huh?!

Information takes the guesswork out of determining what is fair. You don't purchase a vehicle without researching the data to determine a fair price, so why would you not demand data when negotiating your spousal support award?! No guesswork. Just beautiful, easily understood, groundbreaking, leveling-the-playing-field, pure data.

The only way to get this data is through my office. My clients receive access to this spousal support data without any additional charge. Woo-Hoo!

Additional Provisions

Once parties determine a monthly support amount, plus the length of the support and the type of support, some parties choose to add a few more chocolate chips into the cupcake mix.

Some parties create a non-modifiable support award, meaning that, regardless if someone earns more money or less money, if someone is promoted or fired, or if someone is married or cohabitating, the award cannot be changed.

Other parties require a cohabitation or remarriage clause that terminates or reduces the support award (i.e., if the person receiving the support cohabitates or remarries, the support is either reduced or terminated), depending upon the negotiation.

Non-Taxable

Spousal support was a taxable event prior to January 1, 2019. On January 1, 2019, the IRS changed how they treat spousal support. It is no longer a tax deduction to the payor and it is no longer taxed as income to the payee. What does this mean? It means if you pay or receive support, it isn't taxed or deducted.

Life Insurance

Many parties require a life insurance policy on the life of the person who is paying support be maintained until both spousal support

and child support are paid in full. Three options exist for maintaining or purchasing life insurance to back up a support obligation.

The first option is for the parties to specifically identify the life insurance policy in the general judgment of dissolution by requiring the person paying the spousal support (i.e., the payor) to: (1) maintain the award amount (i.e., $500,000 policy), (2) indicate that the person receiving the support (i.e., the payee) is the beneficiary, and (3) pay the policy's premiums. Furthermore, this option requires the life insurance company to notify the payee if the payor either changes beneficiaries or fails to make a payment. Sounds great, huh?

What if the payor wants to change from Farmers' life insurance to New York Life? This doesn't impact the payee, so what is the problem? The problem is that the payor must obtain the court's approval to change the life insurance. So? Most likely, you do not know how to complete this "simple" request of the court and thus you need to hire an attorney to complete it for you. Yes, it is simple, but attorneys are not cheap, even for simple tasks. Assume any change to the life insurance provision will cost between $500 and $750.

Additionally, what happens to the payee if the life insurance company fails to follow the order to notify the payee when the payor fails to pay the premium, etc.? We use fancy language called a constructive trust to protect the payee, but there are cases where that fancy language has failed to protect the payee. I do not encourage my clients to use this option.

The second option is for the payor to assign an existing life insurance policy to the payee. The payee becomes the owner of the policy and therefore controls the policy, the beneficiaries, the payments, and the award amount. Generally, parties negotiate for the payor to reimburse the payee for the cost of the plan each year. If the payor does not have an existing policy, then the payee may purchase life insurance on the payor's life with the payor reimbursing the payee for the premiums each year.

The benefit to this option is that neither party incurs additional fees or needs the court's approval, and the payee is not at the mercy of the life insurance company following, or not following, the general judgment of dissolution. This is the safest option and the option I recommend to my clients.

The third option is to maintain an existing life insurance policy and trust that the payor will pay for it and not change the beneficiaries. Although I counsel my clients against this option, this is the option they regularly choose due to its simplicity and cost effectiveness.

Finally, don't forget that if the payor dies while a child support obligation exists, the child will qualify to receive Social Security benefits. Some families rely on this obligation to back up the child support and elect not to use life insurance. This is not available to spousal support awards.

Freebie

My divorce mediation clients receive a free spousal support analysis during mediation.

The Take-Away

1. *Child support is a simple calculation based upon several factors. Child support is a non-taxable event.*

2. *Spousal support is not a calculation but a negotiation. Past spousal support awards are extremely helpful in assisting parties in determining a fair spousal support award. Spousal support is a non-taxable event.*

3. *Life insurance is generally used to back up child support and spousal support obligations.*

7.

THINGS YOU MAY NOT HAVE CONSIDERED

There are many incidentals that can happen to couples getting a divorce in Oregon. Most are case-specific. However, a few tend to happen on a regular basis, and most people (and some attorneys) forget to consider these potential road hazards.

Payments of Money

Many times in a divorce, one party is required to pay a sum of money to the other party. A few options exist to document and require this payment.

A *money judgment* is an award for the payment of money which has the following qualities. First, the payment must occur according to a timeline. Second, it creates a lien on the payor's real property in the county where the money judgment is filed until the payment is paid in full. Third, it is contained in a judgment, usually a *general judgment of dissolution* (many moons ago, a general judgment of dissolution was called a *divorce decree*).

The clear advantage of using a money judgment is that it protects the person receiving the payment (the payee) by securing the payment to

the real property of the person who is paying (the payor). If the payor fails to pay the payment, the payee can foreclose the payor's real property and get paid.

The disadvantages to a money judgment are many. First, the money judgment will impact the payor's credit score. Credit reporting companies say this doesn't happen, but I have many clients who watch their credit scores like hawks; it reduced their credit scores by an average of twenty to fifty points for 12 to 18 months. Even though they make every payment, it still drops the score. The mere existence of the obligation lowers one's credit score because the credit reporting companies view the payment obligation as another liability.

Second, many times the payor does not file a *satisfaction* at court indicating that the payment was completed. (A *satisfaction* is a document that tells the court that the payment has been paid.)

Third, many times the payee refuses to sign a *satisfaction* indicating that the payment has been completed.

If a *satisfaction* is not filed with the court, the payor will have a very difficult time refinancing or selling the affected real property because the title company will insist that the payment be made (sometimes a second time) to provide a clean title to the real property.

So, if the payment is required to be paid between 30 and 90 days after the divorce, and the payment is not too large, the potential impacts upon the payor far outweigh the benefits of using a money judgment.

What other options exist? Parties can make paying the money simultaneous to the signing of the divorce documents, which is my favorite method of requiring payment. The advantage is that the divorce cannot happen until both parties simultaneously act. It also has the added benefit of not requiring a *money judgment* against one party. Another option is to contractually agree to the payment but intentionally not require a *money judgment*. Fancy legal language can be used to allow the payee to create a *money judgment* if a payor fails to pay.

Another way to secure an obligation is to file a *lien*. A *lien* is a legal tool to attach a payment of money to a specific real property. The difference between a *lien* and a *money judgment* is that a *lien* is specific to the real property described by the *lien* and is filed against that specific real property. A *money judgment* is less formal, and although technically it is supposed to impact any real property owned by the debtor in the county of record, because it is not filed against a specific real property, it can be accidentally overlooked. Please see the "Bankruptcy and Judgements" section for further information.

You may want to eat a quarter of a cupcake about now. It isn't too complicated, but it is boring.

Money judgments and *liens* are not rock-solid. The sneaky disadvantage of relying upon a *money judgment* or a *lien* is that either can be discharged in bankruptcy and both can also be extinguished in a foreclosure, depending upon individual circumstances. What in the heck does that mean? It means that if the payor declares bankruptcy, the

bankruptcy trustee can eliminate the *money judgment* or *lien* if the payor lacks the funds to pay the debt and does not have enough equity in real property to recoup the money owed. It also means that if the payor simply stops paying the mortgage, and the mortgage lender forecloses on the house, if there is not enough equity in the real property, the *money judgment* or *lien* will disappear with the foreclosure.

In short, a *lien* is better than a *money judgment*, but either can be avoided by a person who both claims bankruptcy and is a party to a foreclosure.

Here is the take-away: After weighing the advantages and disadvantages to both parties, it makes most sense to me to require a payment of money to occur simultaneous to the signing of the divorce documents and not require a *money judgment* or a *lien*. If that means that the parties must wait 90 days for their divorce, that option is still better than the horrors described above. However, if the payment needs to occur in more than 90 days (e.g., waiting to pay the money until the house sells, but it won't be on the market until next summer), then a *money judgment* or *lien* makes sense. The best option is to award the assets and the liabilities so that neither party owes the other party money, if possible.

After weighing the advantages and disadvantages to both parties, it makes most sense to me to require a payment of money to occur simultaneous to the signing of the divorce documents and not require a ***money judgment*** *or a* ***lien****.*

Taxes

Upon the finalization of the divorce, parties are no longer allowed to file joint married taxes. So, unless negotiated otherwise, Ross's tax liability or refund is his and Rachel's tax liability or refund is hers. For parties who divorce mid-year or late into the year, some negotiate to separately file taxes at the end of the year and then add up each other's tax liability and/or refund. The party who is better off pays the other party one-half the difference.

Health Insurance

A divorce terminates a spouse's ability to qualify for the other spouse's employer-provided health insurance policy. There is no fancy language to change this reality. Three options exist.

The first option is for the non-employee spouse to access the employee spouse's employer plan through COBRA for up to eighteen months from the date of the dissolution. This is an expensive option because the non-employee spouse is required to pay the employee share, the employer share, and a nominal administrative fee for the cost of the health insurance. It also terminates after eighteen months, so it really is an expensive and a short-term option.

The second option is for the non-employee spouse to access his/her employer's health insurance plan, regardless of the enrollment deadline. A divorce is considered a life circumstance that waives the enrollment deadline.

The third option is to enroll in private insurance, regardless of the enrollment deadline. A divorce is considered a life circumstance that waives the enrollment deadline.

Too many parties forget to take the new health insurance payments into account when determining the post-divorce budget and also when negotiating for support.

Maiden Name

A woman's maiden name can be restored to her during a dissolution. This is a decision for the wife alone.

Splitting of Friends & Family

Most divorcing couples do not realize that their divorce will impact their friends and families in ways that cannot be expected. Some friends were only your friends because the dynamic of one couple to another couple worked well. However, the dynamic of one couple to solely the husband or wife is not the same. Other friends will judge one party's behavior in the divorce. Some families believe that once a divorce

happens, family must “side” with family, which means they cannot interact with the former spouse.

Here is the take-away: Your friends and families will have expected and unexpected reactions to your divorce. The best advice is not to have expectations of anyone. You will need to approach each relationship differently because you are not the only one impacted by your divorce; your friends and family are affected, too, albeit less so than you. Not to sound too woo-woo here, but be open to the changing relationships and allow everyone time to process this event in his or her own way.

Your friends and families will have expected and unexpected reactions to your divorce. The best advice is not to have expectations of anyone.

One Year

You will be on a roller-coaster ride for one year from the date of your divorce. Client after client sees me around town and tells me what a crazy year they have experienced.

One client told me, "I had bouts of depression, moments of reinvigoration, times better left unspoken and unrepeated, and more changes than I could have anticipated. Julie, you warned me I would be on a roller coaster for one year, and I didn't believe you…but you were right. I was on a roller coaster, but I didn't know it at the time. I am so happy you advised me not to make major decisions during this first year."

So, here is the take-away: Do not make any life-altering decisions during the first year of your divorce. Find out who you are without your former spouse. Do not get remarried during the first year. Give yourself time. After all, you've earned it.

Do not make any life-altering decisions during the first year of your divorce. Find out who you are without your former spouse. Do not get remarried during the first year. Give yourself time. After all, you've earned it.

The Take-Away

- *If a payment of money from one spouse to the other must occur, either (1) require that it happen simultaneously with the signing of the documents, or (2) create a money judgment award or lien.*
- *Your divorce will impact relationships in ways you cannot anticipate. You will be on a roller coaster, good and bad, for one year. Give yourself the gift of one year before making life-long decisions.*

8.

MEDIATION DO'S AND DON'TS

The Mediation Process

The mediation process is different for every mediator and every set of parties. Some mediators use a *co-mediation model* where two mediators mediate the matter. Others, like myself, conduct mediations solo.

There are many different styles of mediators. In the *transformative* style of mediation, the mediator uses techniques designed to change how the parties interact when they are in conflict with each other. This type of mediation is very personal, in-depth, and generally takes much longer than other types of mediation. In the *interest-based* style of mediation, the mediator asks many questions to determine the underlying reasons for the conflict. This type of mediation takes time but doesn't require parties to change how they interact in the future. It is very solution-oriented. In the *evaluative* style of mediation, the mediator advises each party how to solve the conflict. Think of this style of mediation as "Miss Bossy Pants" mediation. Finally, in the *facilitative* style of mediation, the mediator utilizes any style that works for the parties. I practice in a facilitative mediation style. I like to blend interest-based and evaluative in a facilitative manner that works for the parties. Think of it as finding

the solutions while reality-checking parties when necessary, but without holding hands and singing.

Mediation can be held either in a joint session, private sessions (other mediators call private sessions *caucuses*), or both. I try to keep my mediation parties in a joint session as long as possible and only utilize private sessions when necessary.

How to Prepare for Mediation

The best way to prepare for mediation is to get all your information and documents in order. Make sure you know your assets, the values of your assets, the account numbers, and who is on each asset's title. Print your credit reports so that you know every liability, the value, the account number, and who is on the liability. Know your gross monthly income and your health insurance costs. Consider the costs of living your post-divorce life. Make a post-divorce budget, if necessary. If you have children, think about what is the best parenting plan for them.

Come to mediation knowing what you want to happen. The mediator will show you the "how" to make it happen.

Even with all this preparation, though, keep this in mind: It took many years to create this marriage and it will take many hours of mediation to determine the division of this marriage.

Come to mediation knowing what you want to happen. The mediator will show you the "how" to make it happen.

The night before mediation, eat well, sleep well, and abstain from alcohol or other intoxicants. Hydrate yourself. You need to be alert and able to think during mediation. Mediation is stressful. You will need your sleep, water, and sustenance!

Come to mediation ready to actively participate and discuss the details of the divorce. Be prepared to listen more, talk less. And most importantly, be prepared that not everything will go as you expected.

The Mediation Agenda

In my office, I tend to follow a fairly structured mediation plan: (1) gather information, (2) negotiate all aspects of the divorce, and (3) make final decisions.

First, I mediate issues that relate to the children: custody, parenting time, holidays, child support, and health insurance. Next, I negotiate spousal support (if appropriate). I find that parties need to discuss child support and spousal support during the same session. Then, I discuss the assets of the marriage. Finally, I discuss the liabilities of the marriage. A colleague of mine describes divorce mediation as similar to three games of chess happening at the same time where a move on one chess board can influence the other chess boards. So, a decision regarding the house could have an impact on spousal support or the parenting time decisions. Thus, even with a structured agenda, a great mediator ebbs and flows the agenda to the parties' unique needs.

Other mediators have their own processes. Be sure to ask your mediator for the agenda for mediation so that you can be prepared.

Mistakes

There are a few mistakes I see in mediation, namely:

- **Only listening to the best-case scenario from your advising attorney.** Courts are notorious for giving a win to the wife on point A, but then awarding a win to the husband on point B. So, if you are only listening to the best-case scenario from your advising attorney on each and every issue, you are setting yourself up for failure — either in mediation or at trial. Unless your spouse is a convicted drug-dealing loser, you won't win every point at trial or mediation. So, be fair, cut a reasonable deal with your spouse in mediation, and pocket both attorneys' fees. No one gets all the wins.
- **Tripping over a dollar to save a penny.** When you fail to spend $450 for a pension valuation, yes, you are saving $450, but you are losing tens of thousands of dollars in the valuation.
- **Interrupting your spouse in mediation.** The mediator can only hear one party at a time.

- **Expecting the mediation will be completed in thirty minutes.** I have only conducted a few mediations in 20 years where we were completed in 30 minutes. It took years to create your marriage; it will take several hours to dissolve it.
- **Being mean to your mediator.** Your mediator is either your ally or your enemy. Choose wisely. Your mediator is not required to take you as a client or keep you as a client. If you are a condescending jerk to your mediator, don't be surprised if your mediator fires you as a client.
- **Expecting a divorce to make everything better.** A divorce will not make everything better. It may be emotionally freeing, but it will be financially taxing. Everything in life is a trade-off. No one gets all the wins.
- **Failing to consider your post-divorce expenses.** Make a budget. You need solid information regarding your expenses in order to properly negotiate for support (received or paid). Too many parties agree to pay too much support or agree to accept too little support based upon a lack of information. You cannot negotiate until you know the information.
- **Blaming your mediator for your divorce.** Your mediator did not cause your divorce. Blaming your mediator for your divorce is a quick way to get fired by your mediator.

- **Overplaying your hand.** It is transparent and disingenuous to suggest that you are doing something for the benefit of the other party, when in reality it works in your favor. A good mediator will call you on this behavior. Come to mediation ready to make fair decisions for both parties.
- **Coming to mediation with your own spreadsheet.** Yes, your spreadsheet will be helpful, but a mediator cannot rely on your spreadsheet and trust that it has properly attributed financials. Nor is it likely your spreadsheet contains ALL the information the mediator needs for your assets and liabilities. More often than not, when a client brings a spreadsheet to mediation and insists I work from it, they spend FAR more money in mediation because (1) the client's spreadsheet doesn't contain all the information, (2) it is improperly awarding assets or liabilities (i.e., it is double-dipping an asset or a liability), (3) it contains inaccurate values, and/or (4) it works in one party's favor.
- **Not having the information necessary to inform your mediator of your situation.** Your mediator cannot access your retirement account or run a "search" for your assets. Do the work.
- **Expecting not to share the assets and liabilities of the**

marriage with your spouse. However, this does not mean that every single asset and liability needs to be split in half. Rather, the best way to structure a divorce settlement is to assign assets and liabilities to each party and only split or sell the least amount of assets and/or liabilities necessary to make a fair distribution.

- **Failing to share important information with your mediator.** Tell your mediator everything. Your mediator needs to know all your information in order to best advise you of the law and the ways to settle your divorce. Your mediator needs to know if either you or your spouse has a long-term illness, has just inherited money, is romantically involved with a sitting judge, has purchased property with a sibling, has parents who consistently remit money to either of you each year, has an offshore bank account, etc. Why? Each scenario impacts the divorce. And yes, each scenario has happened in my office and the parties failed to advise me of the facts until the end, which changed everything! Err on the side of telling your mediator too much information…and do it early in the process!
- **Insisting on equal parenting time.** Or, conversely, insisting on having the children 99% of the time. Be open-minded about your children's needs and less concerned about your co-workers' suggestions.

- **Expecting too much, or too little, spousal support.** The payor's attorney always thinks the payor is paying too much in spousal support and the payee's attorney always thinks the payee is not receiving enough in spousal support. That tells me the amount is fair. Heed your attorney's advice, but be aware of each side's Achille's heal.
- Failing to review the divorce documents.
- **Failing to tell your mediator that you have sought the advice of an attorney.** If you want the fact that you have hired an attorney to remain confidential, then simply request this of your mediator. However, you mediator needs to know the professionals on the file. Frankly, a good mediator can tell you when you have hired a dud of an attorney or an exceptional attorney. Why not avail yourself of this information?
- **Listening to your co-workers and family.** In short, your co-workers and family don't know your situation. They don't know how much money you make and how much your spouse makes. They don't know how much money you owe and the value of your assets. Their divorce or their hairdresser's divorce isn't your divorce. Frankly, I spend quite a bit of time talking parties off the ledge from

their perceived expectations…based upon the hairdresser's divorce.

- **Hiring an unqualified mediator.** If you hire a non-attorney mediator or hire an attorney who claims to be a mediator but hasn't taken the necessary training, you could be throwing away your hard-earned money. You want to hire an attorney- mediator who understands all the nuances of divorce law and who can act in a neutral manner.

Suggestions

Many parties come to mediation with an open heart. However, a few parties come to mediation with ulterior motives. Some come hoping that if they give their spouse everything, the spouse will see their generosity, miraculously change their mind, and no longer want the divorce. Some parties attempt to use mediation as a document preparation service, with one party clearly determining each and every decision. Others come in body, but not in mind, and "give" the other spouse everything out of guilt.

My best advice to you is to come to mediation with an open heart and an alert mind, be prepared, and have realistic expectations.

The Take-Away

- *Hire a qualified mediator.*
- *Come to mediation prepared but with an open mind.*

ABOUT THE AUTHOR

Julie Gentili Armbrust is President of Mediation Northwest. She is an attorney-mediator whose practice is limited to divorce mediation, adoption/guardianship mediation.

She keeps her office well stocked with chocolate, tea, and facial tissues because divorce mediation is stressful and tends to make your eyes leak. Julie is always prepared to support (and sometimes drag) her clients through their conflict and into the light. She is a gladiator of peace!

Julie is the proud mother of two handsome boys, two miniature dachshund girls, and is happily married to her handsome husband. Julie loves, loves, loves, food…although she still hasn't come around to eating sushi, much to her husband's chagrin. On many weekends in the spring and summer, she can be found chasing a waterfall.