Case Study: Divorce Mediation vs. Divorce Litigation

Dr. Sanela Porca, University of South Carolina-Aiken, USA
Crystal Carlson-Myer, Indian River State College, USA

ABSTRACT

Mediation, or alternative dispute resolution, is becoming increasingly popular nationwide. It is viewed as an alternative to costly court disputes and can be used for disagreements of all sorts. For divorcing persons, mediation is economically more efficient than litigation because it reduces transaction costs, expands the set of possible solutions, reflects more complete information on the parties’ preferences, and fosters co-operation rather than conflict. Mediation almost surely promises net gains to court systems and attorneys as well.

INTRODUCTION

Mediation, or alternative dispute resolution, is becoming increasingly popular nationwide. Mediation differs from arbitration in that the parties to the disagreement do not surrender control of the final outcome. Rather, the mediator’s purpose is to create an environment that facilitates the negotiation process between the parties, who have been unable to reach agreement prior to mediation.

This is a conceptual study that examines the economics of mediation as an alternative to litigation. In this paper authors discuss the mediation as an alternative in the case of divorce and related issues, such as child custody. Focusing primarily on the welfare of divorcing parties, the authors analyze economically the mediation process and explain why a mediated outcome is likely to be preferred by both parties to a court-ordered resolution. The authors also note that mediation almost surely promises net gains to court systems and attorneys as well. This is the first study that conceptually analyzes mediation from an economic perspective. To illustrate the mediation concept, its strengths and benefits, the authors surveyed Cindy Jennings, an attorney in her first year of practice. Cindy is working at a small law firm in Augusta, Georgia that handles family law and bankruptcy cases. Cindy has been assigned to the family law department within the firm and is excited to begin her career. Cindy has taken many classes related to family law while she was in school but has never practiced in the area. Cindy has been reviewing the law related to divorce cases so that she is prepared to take on new cases. The firm has assigned her a mentor to help her learn the ropes and she has also been shadowing some of the firm’s key attorneys to gain some insight into the practice.

After about a month Cindy begins to notice a pattern in divorce cases. She has noticed that many of their clients begin the divorce process in mediation rather than going straight to litigation and Cindy is wondering how this is affecting the outcome of her clients’ cases. Cindy is beginning to learn that in most divorce cases, a mediated outcome is likely to be preferred by both parties to a court ordered resolution. She has decided to do some research on the topic to conceptually analyze mediation from an economic perspective to get a better understanding of the process that divorce cases have to go through in the Augusta Judicial Circuit.
The Augusta Judicial Circuit consists of three counties: Columbia, Richmond, and Burke. When speaking with a fellow attorney, Cindy has discovered that mediation is not required in divorce cases but most judges in the circuit will suggest mediation as a starting point. (K. Kitchens, personal communication, January 28, 2015). “Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of a settlement the parties lose none of their rights to a jury trial” (Mediation Rules for the Augusta Judicial Circuit, 2015).

MEDIATION REDUCES TRANSACTION COSTS

The mediation process, when it improves the negotiation environment, effectively reduces monetary and non-monetary costs associated with communication between the two parties. A major factor that precipitates divorce is the couple’s inability to communicate without conflict, so it follows that spouses who can agree on all the terms of a divorce are rare. If mediation alters the environment in which negotiation occurs, however, it can increase the probability of dispute resolution without external mandate. Cindy has evaluated the mediation process and concluded that when it improves the negotiation environment, it effectively reduces monetary and non-monetary costs associated with communication between the two parties.

Marriage and divorce usually involve substantial transaction costs. Disputing Elizabeth Peters’ conclusion (Peters, 1986) that transactions costs are not important in divorce, Douglas Allen (Allen, 1992, p.684) suggests that “Transactions costs arise from establishing and protecting one’s property rights…marriage is likely to have very large transactions costs.”

Cindy has realized that the same is true of marriage dissolution. Expenses for legal representation in divorce proceedings are the most obvious transaction cost. But joint tax obligations and the power of the court to decide ownership of valuable assets can also result in major transactions costs to divorcing parties. Since the terms of a divorce can seriously impact the welfare of minor children, the maintenance of a healthy environment for the children can become an important cost for one or both spouses. These and other transaction costs are likely to be lower with mediation than with the court deciding divorce issues. Cindy begins asking herself why?

Cindy does a little more digging into the issue and learns that mediation costs usually are shared equally between the two spouses. If the mediator’s fees are comparable in size to legal fees, a mediated settlement that requires the same number of hours of professional time will cost each party half as much. But that is not the only way in which transaction costs are impacted by mediation. Neither is it necessarily the most important. Family courts are usually burdened and time lags are substantial. Even when attorneys negotiate an agreement without court intervention, that process is usually slow. (Indeed, when attorneys are paid by the hour as is common in divorce cases, their self-interest demands slow negotiations unless they have an unending stream of clients willing to pay as much or more per hour for their time.)

Cindy has noticed that these delays rarely benefit the divorcing parties, however. Extended periods of uncertainty can be expensive both in terms of emotional stress and foregone economic opportunities. Studies show that arbitration reduces the time required for resolution in divorce cases by 33% below that required for litigation (National Arbitration Forum, 2003). Economic reasoning suggests that mediation
also will reduce the time lags, though probably not as consistently and as much as arbitration. (Cindy was unable to locate empirical studies comparing time lags in mediation to those in litigation.)

Finally, and probably of most importance, the divorcing parties lose all control over the final outcomes of the divorce when the court settles unresolved issues. The judge can inflict substantial transaction costs (both monetary and non-monetary) when mandating the division of marital properties or assigning child custody. If the two parties retain control over the outcomes as they do in mediation, they can craft settlements that avoid transaction costs the judge might not even recognize. Surely the couple’s superior knowledge of their own family circumstances puts them in a better decision-making position than even the most capable outsider. Cindy refers to a conversation that she has had with another attorney. This attorney stated: “As one judge likes to say, if we settle the case the parties can carve out the settlement with the precision of a scalpel. If they leave it up to him he will decide it with a meat cleaver” (J. Matson, personal communication, February 11, 2015).

MEDIATION EXPANDS THE SIZE OF THE SOLUTION SET FOR DIVORCE ISSUES

Attorneys sometimes act as if negotiations in divorce are zero-sum games, but they are not. Cindy noticed that some of her fellow attorneys sometimes act as if negotiations in divorce are zero-sum. As Jeffrey Senger, a Justice Department Appropriate Dispute Resolution (ADR) expert (Senger, 2003, p.1), points out “Litigation is typically confrontational and backward-looking. In most litigation, there is a winner and a loser…through ADR, parties can craft more creative solutions to problems, rather than settling complaints with money.”

While Senger addresses his comments to workplace disputes rather than divorces, they apply to divorce as well. The sample space of solutions for divorce issues can clearly expand with mediation. After all, case and statutory divorce law regarding property division, alimony, or child custody need not be considered in mediation; two parties can agree to anything they choose. A family court decision, however, must reflect statutory and case law or risk being overturned by a higher court. Thus, the family court’s options are constrained. Similarly, the property rights assigned by law will limit attorneys’ negotiations and recommendations.

Cindy is looking into a current case handled by her firm where a wife has committed adultery. She noticed that with mediation, the husband has agreed to support his wife after their divorce with monthly payments until she finishes her education. This is the economically efficient course of action for him. If she increases her earning power, she can contribute more to financial support for their children. Both would be worse off in the long run if he had to support the children alone because she lacked earning power. Nonetheless, if the case had been decided by a judge, that judge could not force him to make support payments if the state’s divorce laws say that adultery precludes the award of spousal support by the court. Their firm, in turn, would probably feel duty-bound to discourage the husband from volunteering to pay spousal support. The result without mediation would likely have been the inefficient one. This finding is supported by Larson (2014) who suggests that law alone is not the only tool by which the society sets its standards and resolves disputes. Wider social structures, communities, and different management of divorce practice can better address the size of the solution set for the parties involved in a divorce.
MEDIATED OUTCOMES REFLECT MORE COMPLETE INFORMATION

Another reason that mediation might actually increase the utility associated with the divorce settlement is that the court cannot afford the time to establish detailed and complex decisions. Cindy has realized this as the mediators have told her “war stories” of clients who plan in minute detail which days and hours of which holiday seasons the children will spend with which parent (and even which grandparent) for years to come. The court docket is too heavy for judges to attempt such detail in each decree. Just as international trade raises consumer utility levels by offering new and different products, mediation can increase utility levels for divorcing parties by allowing more complex options that are preferable to both spouses (and even to children and grandparents).

Another reason mediation can increase the efficiency of divorce outcomes is that the two parties themselves will always have more complete information about their own preferences than the attorneys representing them or the judges who would issue their divorce decrees. In fact, any information regarding the desires of the divorcing parties that attorneys and courts do collect and consider will be associated with significant hourly fees to be paid by the divorcing parties. Cindy has learned that most firms assess fees for a divorce based on the client’s assets. An attorney stated to her that if the clients have a large number of assets, the more likely the divorce is to be contested, and higher fees will result (K. Kitchens, personal communication, January 28, 2015).

In mediation, on the other hand, the two parties evaluate options and express preferences themselves; no one else needs to be educated about their preferences in order to comply with them. Further, mediation is likely to promote understanding between the two parties of each other’s perspectives and preferences. According to Babcock and Lowenstein (1997), self-serving bias (a non-deliberate, non-strategic tendency to confuse “what is fair with what benefits oneself”) sometimes is the reason that negotiation ends in impasse. Cindy points out that psychologists, though they do not agree on its cause, agree that such a bias exists. Better understanding of the other person’s perspective and a focus on the future rather than past injustices should help to reduce the size of this bias. Murphy (2015) points to this increasing trend of family courts “problem-solving” approach in which courts attempt to resolve legal and non-legal issues associated with a divorce.

MEDIATION FOSTERS COOPERATION INSTEAD OF CONFLICT

In addition to the strictly economic arguments that Cindy has found for mediation is the fact that its social and psychological costs are likely to be lower than with litigation. She looked at a recent study by behavioral neurologists at Emory University (Griffin, 2003, p. 44(1)), and found that cooperation in a Prisoner’s Dilemma situation stimulated the brain’s reward system. They concluded that “co-operation really is neurologically rewarding.” The goal of mediation is “to transform the couple’s relationship” so they can deal more effectively with future issues regarding children, etc. Cindy has learned that by doing so, mediation is fostering cooperation rather than conflict.

Cindy has analyzed Game theory and has concluded that it is relevant to divorce outcomes when lawyers do the negotiations because they see the negotiation process as a zero-sum game. Accordingly, each attorney develops a strategy based on what the other party’s lawyer is likely to ask for. The outcome of this game is not Pareto Optimal, by definition. Murphy (2015) discusses this “adversary” legal system in which a judge simply determines which party is at fault in a divorce. Because of the lack of optimality in this system, many family courts opt for mediation versus litigation.
A confidentiality agreement (that what is said during mediation cannot be used in court) is a standard prerequisite for mediation; this reduces the costs of honesty for the two parties. No longer is the negotiation a Prisoner’s Dilemma sort of game. Cindy has concluded that there is no need for an attorney to devise a strategy based on prediction of the other’s strategy and no need to try to score points with a judge. Control of the outcome lies entirely with the negotiating parties.

Cindy has concluded that the potential thus exists for both parties to win by compromising whenever the opportunity costs of giving way on two or more issues are not identical for the two parties. For example, in one of her current cases, the husband’s prime concern is gaining custody of the children. The wife wants primary custody only to avoid the financial obligations of child support. The wife could not afford to state such a position in court, lest the judge give him custody and assign her child support. But the confidentiality guarantee of mediation, combined with the flexibility of options and the prospect of trading to get what really matters, has increased satisfaction for all parties and yields a Pareto Optimal solution for both. In this case, the husband has agreed to give the wife more of the liquid marital assets, so she can better afford the child support obligation that she will have when he gets primary custody. In this sort of give and take, mediation is analogous to trade on the basis of comparative advantage: each party can benefit from giving way on one issue to get something that (s)he deems relatively more crucial in another issue, so long as the opportunity costs of giving way on every issue are not the same for both parties.

CONCLUSION

Throughout her research, Cindy has learned that mediation can resolve disputes between divorcing parties with greater efficiency than litigation because it can reduce transaction costs, expand the set of possible solutions, reflect more complete information on the parties’ preferences, and foster cooperation rather than conflict.

Cindy knows it would be worthwhile to analyze the economic impacts of mediation as an alternative to litigation for family courts and the legal profession, as well as divorcing parties. Crowded court dockets surely suggest the value of mediation as an alternative to litigation. For attorneys like her, the analysis above suggests that divorcing parties are likely to emerge from mediation better satisfied than they would be with a court order. The higher level of satisfaction would likely be reflected in a more favorable regard for the attorneys involved.

SURVEY INSTRUMENT

SURVEY for the Case Study: Divorce Mediation vs. Divorce Litigation

We are asking you to help us compile important information on the divorce climate in the CSRA. Please take a few moments to complete this survey. Your participation is voluntary and confidential. Your name and address will not appear in the case study unless you specify release of this information by signing the waiver below. All completed questionnaires will be securely stored. Your responses will be used only for the purposes of this study and will not be shared with other groups or individuals. Thank you for your help with this important study.

Researcher: Professor Crystal Carlson-Myer and Dr. Sanela Porca
I give permission to use my name and address in this case study.
_____________________________ (signature) (date)
I do not grant permission to use my name and address in this case study.

________________  (signature)       (date)

Questionnaire
1. What is the primary focus of your practice?
2. Approximately how much of your practice is devoted to divorce clients in a typical year?
   a. 0-25%
   b. 26-50%
   c. 51-75%
   d. 76-100%
3. Does Richmond County require mediation of divorce cases?
   a. In the event mediation is not required, do you think it would be beneficial to make it mandatory?
4. Does Columbia County require mediation of divorce cases?
   a. In the event mediation is not required, do you think it would be beneficial to make it mandatory?
5. Do you file cases in South Carolina? If so, is the divorce process substantially different from Georgia?
6. How many of your divorce cases are resolved in mediation?
   a. 0-25%
   b. 26-50%
   c. 51-75%
   d. 76-100%
7. With regard to those cases which were NOT resolved in mediation, do you think the mediation process was beneficial? Explain.
8. How long does a typical divorce mediation take?
9. Does mediation offer more privacy than a trial? Why or why not?
10. Approximately, how many of your divorce cases are appealed following a trial?
    a. 0-25%
    b. 26-50%
    c. 51-75%
    d. 76-100%
11. Does mediation provide more flexibility than litigation in obtaining the desired outcome/terms? Why or why not? Yes.
12. How much does a typical divorce case cost? Is the cost the same for mediated and litigated cases?
13. What are often the areas of greatest disagreement in divorce cases? (Example: children, finances, property, Alimony.)
14. Do you think a judge’s personal bias impacts his or her rulings on custody or alimony? Explain.
15. Does mediation produce better results than litigation? Why or why not?
16. What often is most important to your divorce clients (quick settlement, financial satisfaction, emotional satisfaction, other)?
17. Do you have a set of questions that you ask every divorce client? If so, would you be willing to attach those questions?
REFERENCES


