



Fox Rothschild Podcast

Texas Family Law Podcast Series: Mediation and Collaborative Law

Featuring Laura S. Hayes, Jamie-Lee Denton and Erin M. Garza of Fox Rothschild LLP

Laura Hayes: Hi, welcome to the Fox Family Law podcast. I'm your host, Laura Hayes, a Partner in the Fox Dallas Office. We are here for series two of our podcast. We are talking today about mediation and collaborative law with my associates Jamie-Lee Denton and Erin Garza.

Erin Garza: Thank you, everyone, for joining us. Jamie-Lee and I are very excited to talk to you about mediation and collaborative law. It's our hope that, by the end of this podcast, you have a good understanding of what mediation is, what collaborative law is – maybe some advantages, or disadvantages, of each approach, and how one or the other might work better for your specific case.

Jamie-Lee Denton: This is Jamie-Lee. Thank you all for joining us. Erin, I guess we'll just jump in to the first topic you mentioned. What is mediation? Mediation is a confidential, formal settlement process that uses a neutral third party to help assist couples with reaching an agreement. An easy example of the mediation process is a parent mediating a disagreement between siblings. If you picture one sibling in one room, and the other sibling in another room, and the parent being a neutral third party, going back and forth between the rooms, not telling the other exactly what was said, but trying to reach a settlement – that's how you can picture mediation.

Erin Garza: I really like that example, because it puts it in context for those who might be listening to the podcast who don't have any familiarity with the legal process, and haven't been through mediation before. If that's you, you might be asking yourself "what do you do at mediation? What kind of disputes do you talk about?" It can essentially be anything, specifically in regards to a divorce, or issues with children. We mediate cases where the two parties are discussing how the assets of the marital estate are going to be distributed, who is going to pay for what when the divorce is finalized, health insurance, who is going to get the dog. There are a wide range of issues that you can talk about at mediation and come to an agreement.

Jamie-Lee Denton: I guess the main question people are going to have is "how do you get to mediation?" We talk about it and what goes on, but how do you even get a mediation scheduled? I guess the main thing we would say is, it would be wise to hire an attorney. While you could do it by yourself, hiring an attorney gives you a roadmap and a guideline, someone to walk through this process with you. An attorney can help you get temporary orders in place. Before the mediator is able to hear your case and help resolve this, you may have certain things, like wanting to see your kid on a certain day, or wanting to change agreements that are in place,

and the temporary orders can help out with that. Another thing that was talked about in the previous podcast, is making sure necessary documents are in order. A really important thing is your financial information, property information, bank statements, home appraisal documents. All of this stuff that you may take for granted and, you get so busy that on a day-to-day basis you don't think about, becomes really important and you don't want to be scrambling later on in mediation.

Erin Garza: I'm glad you mentioned that. Once you hire an attorney, if you choose to hire an attorney, they're really going to help lay out that roadmap that Jamie-Lee discussed, and help you get all your ducks in a row, if you want to put it that way.

Another thing that we really enjoy helping our clients with is setting goals for your mediation, helping them identify specifically what is important to them and what their desired outcome would be. Something that I've always carried with me since law school is the pebbles, rocks, boulders analogy. Pebbles, of course, being things you can shift around a little easier, they're important but if you had to give up a little on it you could. Rocks being those things that are a little bit more important, you don't want to be quite as flexible. Then boulders, of course, being the really heavy things that you just want them to stay as they are, you're not going to negotiate as much on those. We found that that analogy is great in life, but also in the context of divorce and family law issues if you're trying to decide who gets the house, who gets the car, what your co-parenting agreement needs to look like. Trying to identify what are your pebbles, what are your rocks, what are your boulders going into mediation. It ensures that the process will be productive and efficient once you get there.

Another important thing that, Jamie-Lee, you could help me provide more explanation on this, is choosing a mediator. We know that's really important and it varies from case-to-case. One mediator might fit one case really well, but they might not be a good fit for another couple going through divorce. So what are some things that you would tell clients to look for when choosing a mediator?

Jamie-Lee Denton: I would say, one, your family law attorney will have way more experience with what specific mediators specialize in. We see some mediators are really good with child custody cases, and cases involving different child arrangements. Then some are very good with the financial aspect, if you have a multi-million dollar estate and you're trying to divide the property and someone is just better with numbers, and better with different solutions for the stocks and the bonds and all of that. So I would say it's really case-specific and your attorney will look and see what you're fighting over and know the best person to take that fight in front of.

I would also say, one thing before mediation, is to be able to come to the table ready to negotiate. You're going to know that you're not going to get everything you want. As you were saying, the pebbles – you can't have every single pebble. That's not negotiating, that's called winning and in a divorce that's hard to do completely. I would say that's one of the main things,

and you need to be able to have an open mind and be able to allow yourself, your attorney and the mediator to think of creative solutions to the issues in your case. I always think about what one law professor told me: both people should leave the mediation equally uncomfortable. That really stuck with me because you're not going to leave equally comfortable, you're going to start thinking "well, we should have done this," or that. But if you're both equally uncomfortable, I think, it was a successful mediation.

Erin Garza: I would agree. It's good to know that even if you're going to come out of mediation a little bit uncomfortable, you're not alone in the process. You're going to have your attorneys guiding you through, and you're going to have the impartial third party, that being the mediator, really having your children's best interest at heart, having your goals at heart, and really working to find a way to come to a resolution for everyone.

We want to discuss some of the advantages of mediation. Certainly, that impartial third party view, having someone who is removed from the situation enough to see both sides of things. Sometimes that's all you need to be able to get an issue resolved is to have a neutral third party come and take a different perspective that maybe you weren't seeing, or maybe your soon-to-be ex-spouse was not seeing. We've also seen some advantages just being the timing and expense saved by going to mediation.

Jamie-Lee Denton: Yeah, definitely. If you're going to just fight it out and not mediate until way later in the case, then each time your attorney needs to file something, you're going to incur expenses. There's going to be court costs and there is just a lot of time involved in that, but if you do take your case to mediation, it does cut time and expenses. Another thing is that you retain more control over your outcome and your future living situation. If you put your whole case in front of a judge, or in front of a jury, at the end of the day there is going to be a decision and you're going to lose the say of it as soon as it goes up to the judge, or the jury. In the mediation, until the very end, until you sign, nothing is happening. So the control is really in your pen, or your hands.

Erin Garza: I think that's something that a lot of clients really enjoy, too, is having control. No one knows your family like you know them. No one knows yourself like you know you. Having the ability to take that through to the end is really important.

We've also seen that mediation is likely to be successful in certain cases, maybe where the issues are very direct or we have these pointed issues. So, when have you seen mediation be successful, Jamie-Lee?

Jamie-Lee Denton: Definitely, like you were saying, the pointed issues – both parties go in knowing they're negotiable issues vs. the ones that they're not going to budge on. I would also say if the parties are being risk adverse, when parties do want to retain that control and when

they have a little bit of healthy fear of what a judge, or a jury, might do. I guess the last one is they are ready for a solution. I feel like I've seen quite a few times is that they say, "I don't want to leave this table and not have anything resolved." Erin, I think we've seen that a lot with COVID because the courts are pushing back trials, especially in the beginning of COVID, and people don't know when they're going to get in front of a judge, or a jury. So the mediation, while we can do it virtually, just seemed like a great option.

Erin Garza: That's true, and even though we have the vaccines coming out now, we still don't know when everything is going to return completely to normal. There is still some fear of not being able to get in a court room, especially, depending on the county that you're in, how backlogged the cases are. So mediation is a great solution. I think we seem to think of divorce sometimes as, it always has to be a fight, everyone is wanting to get the other person's neck, but we've seen clients come in who have somewhat of a good relationship still with their soon-to-be ex. They just want to find a solution to some very defined issues – child custody, etc. and that kind of thing.

Jamie-Lee Denton: We've also seen cases where the parties come in hating each other and somehow, despite not being too hopeful that it would be settled that day or that time, it does. I don't think you can take it for granted the skilled mediator, the skilled attorneys, and parties ready to be done with each other aren't going to settle, because it does happen. I think, no matter which situation it is, there's a chance that your case is going to be resolved even if you don't want your spouse to get anything.

Erin Garza: I would agree. We've talked a lot about mediation and I think that, certainly, this is one of the tools that we see most often when people are trying to come to an agreement without having to go a full out, drag out trial. But there are other options available, such as collaborative law. This process is similar to mediation in the aspect of you're focusing more on the negotiation than on a trial. It starts by hiring an attorney, making sure that the other party, more often than not, is represented by an attorney, then essentially having a series of conferences together where everyone at the table is working to find resolutions to the parties' issues.

Jamie-Lee Denton: Yeah, I think a really good part of a collaborative divorce process is that it does keep the case out of the courtroom, and it keeps it private. So there are safeguards for family law cases, at the top of documents we can put "Notice: this information is confidential." But at the end of the day, it's still changing hands and there's still more confidentiality that can be in the collaborative law process rather than any case that's in court. So I think that's a big deal. It also lets the spouses formulate agreements about the most important goals and individual needs. They also are in more of a discussion and more of a process rather than arguing the whole time.

Erin Garza: Right. In a way, I like to think of it, too, as some clients are opposed to mediation because they come in with the mindset that they and their spouse are never going to come to a resolution on all the issues we need to discuss in half a day, or a day. In collaborative law, that gives you a series of conferences that you can have with your soon-to-be ex-spouse and their attorney to find solutions, without the fear that you only have four hours, or eight hours, to get this done. You have more time. So it can be a little bit of a stress relief in that respect.

Jamie-Lee Denton: I do think one of the main disadvantages of the collaborative law process is that if you don't settle and you don't resolve the case, and you want to go into litigation, that you'll have to hire a new attorney, which I think people really need to be aware of. We were talking the other day, it's hard to have change when you've put your trust and your faith in someone and they know your case and they know you. It's kind of like, I don't want to hire a new hairdresser because they know my hair better than anyone, or a new banker because they know my assets and they know everything. I think that's something people really need to consider. Yes, it could all work out, but if it doesn't, there is a main takeaway there.

Erin Garza: Of course, and we've seen this process be successful and workout in some types of cases more than others. Some things we find to be really good going into a collaborative law process is when the parties have trust between the two of them. They're very forthcoming with their financial information, information regarding their property. Having that transparency is really necessary if you're looking at collaborative divorce.

Jamie-Lee Denton: You pretty much are giving up front all of your, I would say, the golden tickets that could win your case in trial. It's like, here's this, we're going to lay it all on the line, we're being very open, and that's not typical in litigation, that's not typical in normal family law cases. This is a different type of case. Usually it's discovery and processes to try to track down what your spouse is hiding, and this is, like you said, you have to be trusting and feel that your soon-to-be ex-spouse is turning all of their information, too.

Erin Garza: Exactly. You need trust with your soon-to-be ex. You need to know that they're not having a secret vendetta. The two of you need to be somewhere on the same page when it comes to willingness to negotiate. We've seen the same thing with mediation. You can't come to the table for every settlement conference and not want to budge or have an "I'm going to take it all" approach because, more likely than not, you're going to find yourself in litigation and this process may not be the process for you. But if both parties come to the table willing to negotiate more cooperatively, we've seen collaborative law be a great way to resolve disputes.

Jamie-Lee Denton: I think one of the ways that we've seen collaborative law not be able to work out is when there is abuse in the relationship, Erin. When there is mental, emotional or physical abuse, and that I guess goes back to the trust factor. If someone is able to do that to you then what else can they do to harm you? So I'm not sure we would look at those for collaborative law process as much.

Erin Garza: Right, there are definitely situations where this approach probably isn't ideal. Situations involving abuse, domestic violence. Also, if there is any situation in which there is any inkling that your opposing party, or spouse, may not be fully transparent with you. If you have any fear that they're hiding assets, that they're not going to be forthcoming with their financials, that might be a situation where discovery is better suited and we might actually advise you to go forward with litigation.

We've talked a lot about the options that are available to you, if you're able to go the mediation route, or the collaborative law process, Jamie-Lee. Hopefully we've provided you with a good overview of what each of those are.

Jamie-Lee, tell me, just for fun, we're looking for comic relief here, what are some movies or TV shows that you think people should watch if their curious about Family Law?

Jamie-Lee Denton: I would say, "The Girlfriend's Guide to Divorce," is a pretty fun one. It's about this lady who ends up trying to get a divorce and live the single life in LA in her forties. It's comic relief for sure. It has quite a few seasons, I can't remember my favorite episode, I've watched it a lot, but you all should definitely check that out.

Thanks for tuning in today, we'll have some other podcasts coming up that will lead you on to some different family law topics

Laura Hayes: Thank you, Jamie-Lee and Erin. That was very helpful to learn about mediation and collaborative law today. We look forward to next up in our series, we'll be talking about pre-marital and post-marital agreements.