

Consider Mediating the Financial Disputes, Not Just the Parenting Plan

by Lindsay K. Lundholm

The 2007 revision of the Parenting Act fundamentally changed Nebraska family law practice with the mandate that from 2010 forward, parties must mediate parenting plan disputes.¹ For the past five years, Nebraska family law practitioners have been required to familiarize themselves with Parenting Act mediation, which has become standard operating procedure. The mediation of financial disputes in domestic relations matters can also offer significant benefits to divorcing parties and their children and should likewise be considered in many situations.

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her trial practice, Lindsay represents entities and individuals in complex commercial, contractual, and other high stakes litigation, including complex and high stakes domestic relations disputes. She has an extensive background in alternative dispute resolution, regularly enforcing agreements to arbitrate, frequently trying cases in arbitration proceedings, and advocating for clients in mediation. In 2015, Lindsay completed the Office of Dispute Resolution's sixty hours of required training for Parenting Act Mediators and expanded her practice to include work as a mediator.

Many goals of domestic relations clients—maximizing positive financial outcomes, shortening the length of the divorce process, and minimizing contact with the judicial system—are more likely to be achieved if financial disputes like the identification and division of the marital estate, spousal support, and child support are addressed in mediation rather than through litigation. This article will cover: 1) the available data related to mediation of financial disputes in domestic relations cases; 2) the legal authority related to Court-ordered mediation of in a domestic relations dispute in Nebraska; and 3) practical considerations for practitioners seeking to mediate a financial dispute in a domestic relations case.

1. Available Data Related to Mediation of Domestic Relations Matters in Nebraska Indicates that a Small Percentage of Disputes are Currently Mediated.

Domestic relations disputes continue to represent the majority of new cases filed in the district courts of the State of Nebraska:

- In Fiscal Year 2014, 22,216 domestic relations cases were filed in Nebraska District Courts, representing 56.71% of the 39,174 cases filed.²
- In Fiscal Year 2013, 22,654 domestic relations cases were filed in Nebraska District Courts, representing 57.12% of the 39,659 cases filed.³
- In Fiscal Year 2012, 23,232 domestic relations cases were filed in Nebraska District Courts, representing 57.80% of the 40,188 cases filed.⁴

The Nebraska Office of Dispute Resolution data for 2013-2014 indicates the mediation of only 2,480 Parenting Plan cases, with an overall 79% rate of resolution of all cases mediated (included non-Parenting Plan cases mediated through the

Nebraska Office of Dispute Resolution).⁵ The data suggests that only a small percentage—approximately 11%—of cases involving a Parenting Plan dispute are currently mediated through the Office of Dispute Resolution.

Other recent data also establishes a low utilization of mediation in the domestic relations arena generally. In December of 2013, the Office of Dispute Resolution/Special Court Programs published the results of the Custody Court File Research Study, which reported on decisions on JUSTICE between 2002 and 2012, in an effort to address questions about the allocation of custody and parenting time in court cases across Nebraska.^{6,7}

The study established that between 2002 and 2012, courts in Nebraska ordered parties to mediate in 7.5% of domestic relations disputes. Of the 7.5% of domestic relations cases in which mediation was ordered by the Court, 73% were instances in which mediation was ordered by the court's own motion, 21% were the result of a plaintiff's motion, 3% were the result of a defendant's motion, and 3% were the result of a joint motion. The study did not show any examples in which either party objected to mediation. Mediation appears to have been utilized in only 8.2% of domestic relations disputes between 2002 and 2012. Unsurprisingly, "[p]arties were statistically more likely to be ordered to mediate after the implementation

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of the 2007 Parenting Act.⁸

The study noted that “[o]ver the years, multiple studies have examined the effects and outcomes of mediation as an alternative to litigation, with overall findings suggesting that mediation is a successful alternative that leads to increased out-of-court agreements and satisfaction amongst service users.”⁹ The study called for additional alternative dispute resolution (ADR) data collection in Nebraska but noted that “the court file analysis shows trends that are consistent with the literature,” which establishes that mediation is a successful alternative to litigation and is highly satisfactory to would-be litigants.

2. Nebraska Law permits District Courts to order domestic relations disputes to mediate, even if one or both parties are unwilling, reluctant, or noncommittal. Either party can file a motion for mediation, or the Court can order parties to mediate on its own motion.

A. Nebraska Courts have the power to order parties to a domestic relations dispute to mediate.

District courts in Nebraska have the inherent power to order disputes to mediation pursuant to the Dispute Resolution Act at Neb. Rev. Stat. § 25-2943, which provides:

A court may refer a civil case, including a contested guardianship or contested conservatorship proceeding, to mediation or another form of alternative dispute resolution and, unless otherwise ordered following a hearing upon a motion to object to such referral, may state a date for the case to return to court. Such date shall be no longer than ninety days after the date the order was signed unless the court grants an extension upon request of the parties. Any agreement or resolution made in mediation or another form of alternative dispute resolution shall be voluntarily entered into by the parties.¹⁰

The Parenting Act also contains a grant of broad authority to refer disputes to mediation at Neb. Rev. Stat. § 43-2927:

In addition to those cases that are mandatorily referred to mediation or specialized alternative dispute resolution under subsection (3) of this section, a court may, at any time in the proceedings upon its own motion or upon the motion of either party, refer a case to mediation or specialized alternative dispute resolution in order to attempt resolution of any relevant matter. The court may state a date for the case to return to court, and the court shall not grant an extension of such date except for cause. If the court refers a case to mediation or specialized alternative dispute resolution, the court may, if appropriate, order temporary relief, including necessary support and provision for payment of mediation costs. Court referral shall be to a mediator agreed to by the parties and approved by the court, an approved mediation center, or a court conciliation program. The State Court Administrator's office shall

develop a process to approve mediators under the Parenting Act.¹¹

The broad phrase “any relevant matter” gives the district court authority to refer child support, assets, and other financial issues unrelated to a parenting plan to mediation. Nebraska case law also specifically acknowledges that District Courts have the general statutory authority to order parties to a domestic relations dispute to mediation.¹²

In addition, in many districts, parties can also avail themselves of local rules providing for the referral of any aspect of a domestic relations dispute to mediation:

• District 1 (Nemaha, Saline, and Gage Counties) Local Rule 1-4 (I)(1) provides, in pertinent part: “At any time in the proceeding, the Court may refer a case to an approved mediator in order to attempt resolution of any relevant matter.”¹³

• District 2 (Sarpy and Gage Counties) Local Rule 2-10(D) provides: “At any time in the proceedings, the court may refer a case to mediation or the specialized alternative dispute resolution process in order to attempt resolution of any relevant matter.”¹⁴

• District 4 (Douglas County) Local Rule 4-3(D)(2) provides: “At any time in the proceedings, the court may refer a case to mediation or the specialized alternative dispute resolution process in order to attempt resolution of any relevant matter. The court may state a date for the case to return to court, and the court shall not grant an extension of such date except for good cause shown.”¹⁵

• District 9 (Buffalo and Hall Counties) Local Rule 9-21(J) (9) provides: “A judge may refer a case or a portion of a case to mediation or to the specialized alternative dispute resolution process. If such referrals are made by the court, the court will indicate the particular issues that are the subject of the mediation and dispute resolution process.”¹⁶

• District 10 (Kearney and Adams Counties) Local Rule 10-17(J)(9) provides: “A judge may refer a case or a portion of a case to mediation or to the specialized alternative dispute resolution process. If such referrals are made by the court, the court will indicate the particular issues that are the subject of the mediation and dispute resolution process.”¹⁷

Importantly, the District Courts can exercise their power to order any relevant matter to mediation on their own motions. Nebraska District Courts looking to actively manage their civil caseload, which is dominated by domestic relations disputes, have the option available to issue orders *sua sponte* sending not just parenting plan issues, but the entire divorce dispute, to mediation.

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B. Current authority provides that only attorneys can mediate the financial disputes in a domestic relations action and only approved Parenting Act mediators can mediate Parenting Plans.

If the financial disputes of a dissolution action are mediated, a 2015 advisory opinion from the Commission on the Unauthorized Practice of Law of the Nebraska Supreme Court counsels that while non-attorney mediators can mediate Parenting Plans, it is the unauthorized practice of law for non-attorneys to mediate child support, spousal support, the division of assets, or any other financial issue which may arise in a dissolution action.¹⁸ The Commission reached this conclusion because the Parenting Act requires approved mediators to “demonstrate the ability to function in a neutral capacity in mediation” as implemented under the *Nebraska Standards of Practice and Ethics for Family Mediators*. The Commission concludes that “the extensive statutory provisions and policy guidelines pertaining to the neutrality of approved mediators under the Parenting Act provide persuasive evidence that approved non-lawyer mediators qualify for the exception under §3-1004(D)” and thus non-attorney mediators are not engaged in the unauthorized practice of law when mediating parenting plans.

However, the Commission further opines that it is the unauthorized practice of law for a non-lawyer to negotiate

and draft property settlement and financial support settlement agreements. The Commission reaches this conclusion based on the rationale that the negotiation and drafting of financial agreements requires the application of law to fact and thus constitutes the unauthorized practice of law. Accordingly, in light of the Commission’s recent opinion, Courts and practitioners may utilize non-lawyer mediators for Parenting Plan mediation, but must use lawyer mediators for the mediation of financial issues in domestic relations disputes.

Conversely, Nebraska Ethics Advisory Opinion for Lawyers No.13-02 provides that attorney mediators who have not completed the Office of Dispute Resolution’s training and certification requirements for acting as a Parenting Act Mediator may not ethically mediate Parenting Plan issues.¹⁹ Thus, Courts and practitioners seeking to mediate both Parenting Plan and financial issues in one mediation need to utilize attorney mediators who are also properly authorized to mediate under the Parenting Act.

3. Practical Tips for Mediating Financial Issues in Domestic Relations Disputes

A. Carefully evaluate whether mediation is in your domestic relations client’s best interests.

When considering whether to pursue mediation for your

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domestic relations client and discussing the possibility of mediation with your client, the following considerations will likely come into play:

- Will mediation be more cost-effective for your client?
- Will mediation help your client reach a final resolution of the case more quickly?
- Does your client value self-determination above judicial determination and is he/she interested in working out a solution rather than leaving it to the Court?
- Would mediation increase the likelihood that your client and his or her spouse/co-parent could have more positive future communications with one another and is that of value to your client?
- Does your client desire to avoid having to go to Court or having to testify in a deposition or have a strong interest in keeping his or her personal affairs private and confidential?
- Could your client achieve lower overall attorney fees and expert fees and increase the total marital assets to divide between the spouses by mediating instead of litigating?

Recommended best practices for the mediation of financial disputes in a marital dispute include:

- *Timing.* Evaluate the timing of the mediation carefully. Before you schedule a mediation of the financial issues, evaluate with your client whether you have gathered sufficient information through discovery or otherwise in order to negotiate effectively. For example, do any real estate assets or other assets need to be appraised in advance of mediation or does your client have sufficient valuation information to negotiate without first obtaining appraisals? With your client, weigh the need for gathering additional information against your client's interest in mediating at the earliest possible time to avoid wasting time and money in litigation.

- *Pre-Mediation Call with Mediator.* Set up a telephone call between you and the mediator in advance of your mediation. Plan to discuss the issues of your case, challenges you anticipate, and the process generally.

- *Mediation Statement.* Prepare a short mediation statement describing the factual background and law on the important issues for your client and the important issues for your adversary. Attach copies of key documents as appendices to your mediation statement, with the caveat that one should only give the mediator documents to review if the documents are critical to understanding the issues and facts. Submit the mediation statement to your mediator in sufficient time for him or her to review it carefully in advance of the mediation.

- *Child Support Calculations.* If you are mediating child support, attach a proposed child support calculation to your mediation statement and set forth your arguments supporting

any disputes regarding income or earning capacity. Prepare additional calculators for potential likely scenarios for your reference prior to the mediation or bring along a computer or other device that allows you to access your preferred online child support calculator tool.


- *Property Statement.* Consider attaching a proposed property statement, listing all assets and liabilities, and your proposed division of assets and liabilities to your mediation statement and bring it to mediation. Microsoft Excel can be a helpful tool for preparing property statements and proposed allocations, because you can build formulas into Excel which permit you to more easily calculate how negotiations on one sub-issue—such as one asset's value—will impact your client's overall financial position. Always bring a computer (or your preferred device for performing calculations) to mediation so you can more easily calculate the financial impact various proposals and scenarios will have on your client.

- *Qualified Domestic Relations Order (QDRO).* Gather the basic information you will need to put together any QDRO, including the plan administrator's pre-approved form for a QDRO, if it is available to you. Consider coordinating with opposing counsel so that one of you has prepared a basic draft QDRO in advance of mediation.

- *Premarital Assets.* If your dispute relates to whether any property is a premarital asset not subject to division, consider whether you should bring copies of any critical documents on the topic.

- *Prenuptial Agreements.* Attach prenuptial or antenuptial agreements to your mediation statement and bring them to mediation.

Conclusion

Clients are asking for faster, less expensive, private, out of court, and less adversarial methods to resolve the issues that arise in domestic relations actions. For many divorcing couples, mediation of financial disputes will be a helpful process that will allow them to attempt to work out the difficult issues surrounding the end of the marriage on their own terms, instead of the Court's. 

Endnotes

- ¹ Neb.Rev.St. § 43-2937 (2008 Reissue).
- ² Nebraska Judicial Branch Annual Caseload Report District Courts Fiscal Year 2014 July 1, 2013 to June 30, 2014, downloaded from <https://supremecourt.nebraska.gov/sites/supremecourt.nc.gov/files/reports/courts/FY-2014-District-Courts.pdf>
- ³ Nebraska Judicial Branch Annual Caseload Report District Courts Fiscal Year 2013 July 1, 2012 to June 30, 2013, downloaded from <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/reports/courts/dc-caseload-13.pdf>
- ⁴ Nebraska Judicial Branch Annual Caseload Report District Courts Fiscal Year 2012 July 1, 2011 to June 30, 2012, downloaded from <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/reports/courts/2012-district-court.pdf>

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- ⁵ Nebraska Office of Dispute Resolution Cumulative Mediation Case Data Report 712013-6/30/2014 https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/mediation/Publication_Reports/2013-2014%20ODR%20Cumulative%20Report.pdf
- ⁶ Nebraska Office of State Court Administrator, Office of Dispute Resolution/Special Court Programs Nebraska 2002-2013 Custody Court File Research Study dated December 31, 2013; Principal Consultant, Saini, Michael Ph.D., M.S.W., R.S.W., available at: <https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/reports/courts/2002-2012-custody-court-file-research-study.pdf>
- ⁷ Findings and recommendations of a related study on Nebraska's Parenting Act conducted by the National Center for State Courts were initially scheduled to be publically released on May 14, 2015, but the release of the study was delayed until sometime in the Summer of 2015 and not available at the time of submission of this article for publication.
- ⁸ *Id.* at 35.
- ⁹ *Id.* at 11 (emphasis added).
- ¹⁰ Neb. Rev. Stat. 25-2943 (2008 Reissue)
- ¹¹ Neb. Rev. Stat. § 43-2937 (2008 Reissue)
- ¹² *See e.g. Geiss v. Geiss*, 20 Neb. App. 861, 869, 835 N.W.2d 774, 781 (2013) (concluding the District Court is "permitted by the Nebraska Revised Statutes to order mediation").
- ¹³ Rules of the District Court of the First Judicial District of Nebraska, Rule 1-4 Dissolution Actions (I)(1) (2011 Revision)
- ¹⁴ Rules of the District Court of the Second Judicial District of Nebraska, Local Rule 2-10(D) (2010 Revision)
- ¹⁵ Rules of the District Court of the Fourth Judicial District of Nebraska, Local Rule 4-3(D)(2) (2010 Revision)
- ¹⁶ Rules of the District Court of the Ninth Judicial District of Nebraska, Local Rule 9-21(J)(9) (2010 Revision)
- ¹⁷ Rules of the District Court of the Tenth Judicial District of Nebraska, Local Rule 10-17(J)(9)
- ¹⁸ Advisory Opinion 01-2015 of the Commission on the Unauthorized Practice of Law of the Nebraska Supreme Court, "Mediator Role in Developing a Parenting Plan"
- ¹⁹ https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/mediation/Publication_Reports/Nebraska%20Ethics%20Advisory%20Opinion%20For%20Lawyers.pdf