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3-23-2022

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Cardozo Journal of Equal Rights and Social Justice

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Recommended Citation

Wiesenberg Blonder, Elka, "From Lovers to Litigants: Is There No Better Way to Divorce?" (2022). *Cardozo Journal of Equal Rights & Social Justice Blog*. 25.

<https://larc.cardozo.yu.edu/ersj-blog/25>

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From Lovers to Litigants: Is There No Better Way to Divorce?

One crisp September afternoon, two young souls collide in the pasta aisle of the Whole Foods on 97th and Columbus, as both make a grab for the last box of gluten-free macaroni. Can I make it any more obvious?[1] They fall in love, fast and hard, bonding over their mutual loathing of Jake Gyllenhaal and not-so-secret obsession with *Euphoria*. Six months later, they're on a trip to Vegas, and an Elvis impersonator is asking for their vows. For a few months, things are great... and then summer hits. They discuss travel: Jamie realizes that Evie prefers backpacking to five-star resorts. Evie learns to hate Jamie's nail-biting. Neither of them can compromise on the thermostat temperature. Or the existence of a deity. Or how best to solve global poverty. The two begin to understand that they've made a dreadful mistake. Happily ever after is over, and it's time for a divorce. Oh, and—Evie's pregnant.

In meetings with the lawyers, the stress levels are through the roof. Neither Evie nor Jamie had realized how much this process would cost: they are told it will cost them more than a year's salary, with a possibility of going into six-figure costs.[2] This is *not* the life bohemia.[3]

They're also told that it will be at least a year before even getting to trial.[4] However, statistics show that they're 95% likely to settle before seeing a judge, anyways— which means they're paying a litigator's fee, on the court's timeline, limited to a legal style of decision making, all just to come to reluctant conclusions in an adversarial stance, to avoid having a judge make these decisions— when they could have made their own decisions from the start, without wasted time and money, in a collaborative problem-solving way instead of as a fight.[5]

At first, Jamie and Evie decide they want to have fairly equal parenting time, share any major costs of raising the baby, and make decisions about parenting together. After all, they don't have animosity towards each other; they just don't want to live together anymore.

Their lawyers, however, don't play like that. Evie's lawyer points out that as an independent artist who works from her own studio, Evie could take care of their baby herself on her flexible schedule—and besides, she was planning to breastfeed. They file for sole custody.

Jamie tries to talk to Evie, to understand what changed, but she will only speak through her lawyer now. She can't have Jamie talking her out of custody of her baby, or so her lawyer tells her.

Jamie doesn't want Evie to be the only parent to their child, so Jamie's lawyer says they need to fight for sole custody, too. Also, if Evie gets custody, Jamie will have to pay a lot in child support: Jamie would have to pay for *her* to raise *their* child. Obviously, this wasn't an option.

After a long, costly, tense three years, a judge orders that the couple is getting their divorce. Custody does go to Evie, with visitation to Jamie two evenings after work every week and one night over the weekend. Their now-toddler daughter Carrie will be tossed off between the two homes like a backpack. Jamie gets custody of their dog

Jerry though, and Evie can only see the pooch when she drops Carrie off. Jamie will be paying 17% of his gross income^[6] in child support to the custodial parent, Evie, while also paying spousal support of 40% of their combined income minus 100% of Evie's income.^[7] Evie got to keep the apartment because the judge felt it would be better for Carrie to stay in the same primary home she'd lived in all two years of her life.

Neither party is happy. Jamie misses Carrie, who is back-and-forth on a schedule not conducive to her needs, with no proper bedtime on nights she goes to Jamie for three hours. Evie loves having Carrie, but it's harder than she anticipated to be up at four in the morning with the toddler six days a week. After so much time and money spent on litigation, a judge had made decisions for the lives of two people who were strangers to her. Unsurprisingly, that wasn't working out so well.

Instead of being rivals, eat-or-be-eaten, Jamie and Evie could have chosen a process that enabled themselves, the two people who knew their own needs and the needs of their child, to determine how their own lives would continue. Divorce mediation allows for couples to sit down as partners—even partners who may not be getting along—to find a mutual solution towards the common goal of a separation agreement and a divorce.^[8]

In divorce mediation, there are just three people at the table: two spouses and a mediator. The goal is for the two spouses, the ones affected by the results, to decide what would be best for themselves and their family. There are very few limitations on what can be decided; there is a minimum to be determined, involving property, support, and parenting, but a couple can decide on their own what numbers and schedules will work for them.^[9] Instead of letting lawyers fight it out and a judge make the final call, the couple is in control of the entire decision-making process.^[10]

On top of that, divorce mediation is a much quicker and more cost-effective alternative to litigation. Mediation takes about 4-12 weeks from start to finish.^[11] The highest-paid mediators charge \$600/hour, with a maximum total cost of about \$5,000 from start to finish.^[12] While not insignificant, this is much less expensive than litigation. Also, in mediation, this is one fee for both parties combined, whereas in litigation, each spouse needs to pay a different lawyer to represent them.

At the end of the day, no one is going to say that divorce is easy, fast, cheap, or that they get everything they want out of the process. Arguing with a person one was once in love with and now co-parents with, only to then have someone else determine their future, doesn't seem to make much sense. Divorce mediation allows couples the opportunity to find a way to move on from the marriage without losing autonomy in decision and work together to create their own futures.

In some states, divorce mediation is a mandatory first step in the divorce process,^[13] so a lobbyist angle would look to these examples as a basis for further legislation. However, I do not agree that divorce mediation is for everyone: in a power-imbalance situation, such as domestic violence or even more subtle control dynamics, a litigator may be a necessary advocate for a divorcing party.^[14] Divorce mediation should, though, be more heavily promoted as an alternative to litigation for couples who are perfectly capable of making their own decisions, instead of the legal system convincing them that only a judge can determine their lives for

[1] AVRIL LAVIGNE, SK8ER BOI (Arista 2002).

[2] ROBERT KIRKMAN COLLINS, *DIVORCE MEDIATION: COMMON SENSE AND THE CRISIS OF DIVORCE* 57 (2018).

[3] ANDREW GARFIELD, *BOHO DAYS* (5000 Broadway Productions, Imagine Entertainment 2020).

[4] *Id.* at 38.

[5] Jason Crowley, *How to Prepare for a Divorce Trial*, SurviveDivorce, <https://www.survivedivorce.com/prepare-divorce-trial>.

[6] N.Y. FAM CT. § 413

[7] NYCOURTS.GOV, *Temporary Spousal Maintenance Guidelines Calculator* (2021), <https://www.nycourts.gov/LegacyPDFS/divorce/Calculator.pdf>.

[8] COLLINS, *supra* note 2, at 11.

[9] *Id.* at 57.

[10] *Id.* at 10.

[11] *Id.* at 37.

[12] *Id.*

[13] *Mandatory Mediation in Illinois Family Court*, STANGE LAW FIRM (March 25, 2021), [https://www.stangelawfirm.com/blog/2021/03/is-mediation-required-in-](https://www.stangelawfirm.com/blog/2021/03/is-mediation-required-in-illinois/#:~:text=In%20most%20Illinois%20divorce%20cases,the%20initial%20divorce%20petition%20filing)

[illinois/#:~:text=In%20most%20Illinois%20divorce%20cases,the%20initial%20divorce%20petition%20filing](https://www.stangelawfirm.com/blog/2021/03/is-mediation-required-in-illinois/#:~:text=In%20most%20Illinois%20divorce%20cases,the%20initial%20divorce%20petition%20filing).

[14] *See generally* Jessica Pearson, *Divorce Mediation & Domestic Violence*, CENTER FOR POLICY RESEARCH (1997).