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How Mediating Child Custody Agreements And Parenting Time Protects Families

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Divorce Mediator Nicole K. Levy reviews how parents can use a mediator to resolve child custody and parenting time while protecting their family from the conflict of litigation.



Putting together a custody agreement and a parenting schedule is honestly one of the most difficult parts of getting divorced. Dividing parenting time takes an emotional toll on both parents, who each will inevitably be losing time with the children, and a good parenting plan often requires creative solutions to accommodate both the parents and children.

Numerous [studies](#) have shown that children whose divorced parents engage in high conflict behavior have increased social and behavior problems later in life. Children do much better when their divorced parents can communicate and cooperate, and mediation can be an important first step in developing a co-parenting relationship that will last for years. For many parents, mediation is not just a means for determining parenting time. Indeed, a positive mediation experience often sets the tone for the parents' relationship moving forward.

Resolving the Unknown: How Mediation Helps You know the Future in Custody Cases

A big problem with litigating a custody arrangement are the unknown consequences of asking a judge to determine what's best for your child. A judge can consider an almost endless variety of child-related factors when determining custody and parenting time. The "best interest of the child" standard is incredibly broad and vague. In a recent [2017 Appeals Court case](#), the probate and family court judge's ruling giving primary physical custody to a parent who had only recently had supervised visitation was sent back for a new trial. The Appeals Court ruled that the judge's findings were unclear, and further noted that even without a definitive "list" of criteria for judges to consider in custody cases, relevant factors a judge to review include:

[C]onsideration of which parent has been the primary caretaker of, and formed the strongest bonds with, the child, the need for stability and continuity in the child's life, the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child.

This particular case also involved recommendations from a psychologist who recommended the continuation of supervised visits with the parent who was granted custody. Although the Appeals Court clearly disagreed with the judge, the decision did not resolve the

matter. Instead, the case was sent back down to the Probate and Family Court judge for further trial.

Waiting for Justice: Litigating Custody Issues in Probate and Family Court May Take Years

The case referenced above, [Belanger v. Betanno \(2017\)](#), illustrates how long it can take for a probate and family court to resolve custody. A quick peek at [masscourts.org](#) reveals that this Essex Probate and Family Court case kicked off in August of 2014 when a Complaint for Divorce was filed and the first motions heard. After about a year of litigation, the first day of trial was held in July of 2015, followed by trial days in October 2015, May of 2016, and August of 2016. For the entire two-year period while the case awaited trial, one parent was limited to supervised visitation with the child. After concluding trial in August of 2016 (i.e. two years after the divorce was filed), [the Appeals Court docket](#) tells us that the parties waited about a month for the judge to reach his decision. (Most judges take at least six months to enter a decision after trial, so this was quite fast). On September 16, 2016, the Judgment of Divorce entered. Thus, a decision was reached almost two years after the divorce was filed, and in the decision, the parent who received only supervised parenting time throughout the entire pending case was awarded primary custody of the child. The parent who lost custody of the child quickly filed an appeal in October of 2016, and the laborious appeals process began. After one year of additional court filings, brief submissions and an argument before a three-judge panel, the Appeals Court announced its decision on August 24, 2017, almost three years to the day of the parties' first court appearance in the divorce case. What did the parents get from the three years of litigation? Here's what the Appeals Court ruled:

While typically we would remand the matter for additional findings, here, because the judge has since retired, we vacate the judgment and remand for a new trial before a different judge. Because almost a year has elapsed since the judgment was entered, the judge may, in his or

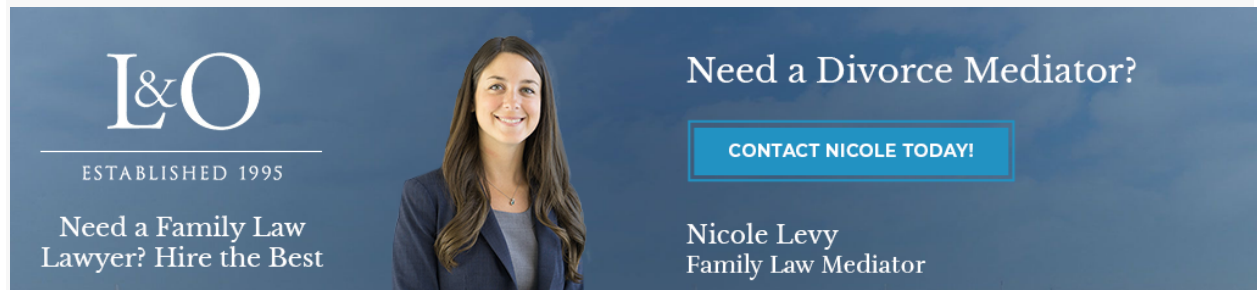
her discretion, hear evidence about the children's current circumstances.

That's right, a new trial. Three years and counting of litigation, and still no "winner" in sight. The *Belanger* case presents a somewhat extreme example, at least inasmuch as most cases do not involve such dramatic shifts in custody, with one parent going from supervised visits to primary custody back to supervised visits again. However, many litigated custody stretch on for years in a less dramatic fashion, as parents and children grind away in the slow churn of litigation. Would a case like *Belanger* be appropriate for mediation? Perhaps not, given the severity of allegations made by each parent. Nevertheless, every divorcing parent should be mindful of how a case like *Belanger* can remain unresolved in the court system for four or even five years.

Mediating Custody and Parenting Time Provides Custom Solutions for Your Family

Litigated custody cases are complicated, chaotic, muddled, and end up with a lot of "mud-slinging" that is often used to distract the judge from the real issues. When emotions are running high, parents often litigate for a schedule that is in their own best interest and not that of the children. Moreover, there is no "perfect" parenting schedule. Some families need flexibility with their parenting schedule and some need a schedule that is predictable. Factors like the distance the parents live from each other, their respective work schedules, the children's educational needs, medical needs, extracurricular activities, ages, etc. all come into play when creating a parenting schedule, which makes it impossible to have a "standard" parenting schedule that can be superimposed on every family. Mediation accommodates the needs of each parent far better than litigation. Mediating parents are encouraged to look at the whole picture, and not just one factor, when creating the parenting schedule. Instead of encouraging parents to identify their opponents' weaknesses and points of leverage, mediation focuses on identifying common goals. Flexibility by one parent is

rewarded by flexibility from other. In tensely litigated cases, such shows of flexibility are often simply impossible.



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Ask a Mediator: What Parenting Plan Works for Your Family?

Maybe repeating the same schedule each week works best for your family. Maybe a schedule that alternates parenting time each week is superior. Maybe there needs to be a four-week rotating schedule with flexibility on Wednesday during “Week 2” and Saturday in “Week 4”. Judges in custody matters do not have the time or resources to sit with the parents and review every potential option. Indeed, litigation centers on each party pressing for what works for him or her, not both parents. Mediation is 100% confidential. Every conversation in mediation sessions, document exchanged and mediated work product created over the course of a mediation is protected from disclosure in any court proceeding by statute in Massachusetts. Mediating parents are free to mediate and explore creative solutions without the worry of being punished for showing flexibility. Mediation creates a safe space for parents to discuss custody and the parenting schedule as a whole, with the goals of everyone taken in consideration. Not every litigated custody case turns into an endless nightmare of courtrooms and attorneys. But custody litigation lasting two or three years and costing tens of thousands of dollars in legal fees is quite common indeed. Give mediation a try. What do you have to lose?

Nicole is a divorce mediator and mediation coach for South Shore Divorce Mediation, with offices in Hingham, Massachusetts and

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