

Texas Divorce Options

Now that you've decided to divorce, you have another important decision to make—how to accomplish your goal? You may be surprised to learn there's more than one way to get a divorce in Texas. One size doesn't fit all, and the path you choose can have a significant impact on your future and your family's future. In Texas, there are two main paths to divorce—the cooperative path and the adversarial path.

Collaborative law is a cooperative path in which the couple works together outside the courtroom and makes their own decisions with the guidance of their lawyers and often additional professionals. Litigation is an adversarial path, in which the parties are adverse (opposed) to each other, and a third party, such as a judge or jury, makes the decisions unless the parties reach agreement.

You may also have heard of mediation and arbitration, which are processes that are sometimes used in divorce. Mediation isn't a divorce process like collaborative law or litigation; it's a settlement process. Arbitration is similar to litigation, but with a private judge. This paper's purpose is to give you the information you need to make an informed choice about which divorce option is best for you.

Cooperative Divorce Process—Collaborative Law

Collaborative law is a complete divorce process that can begin peacefully even before a divorce petition is filed at the courthouse or later if the parties agree. It's a cooperative process in which the couple and their respective lawyers work together in private to resolve the issues in the divorce. Often, the lawyers assemble a collaborative team that includes a neutral financial professional and a neutral mental health professional to assist the couple. Together, the collaborative team works with the couple to devise a creative, customized settlement that meets both parties' needs to the greatest extent possible under the circumstances. The collaborative process is designed to be respectful and efficient.

If a husband and wife decide to follow the collaborative path to divorce, they must sign an agreement that they will share all relevant information about their property and children, and they won't take any issue to court. If they can't settle their differences using the collaborative process, litigation attorneys can still take the case to court, but the collaborative lawyers can't continue to represent them. There would be some duplication of the collaborative lawyers' work if litigation attorneys take the case, and new experts would need to be hired because the neutral collaborative professionals also aren't allowed to appear in court on that case.

Collaborative divorces are conducted in a series of joint meetings in which the parties and their lawyers, and possibly other professionals, sit down together in the same room. Under Texas law, everything that is said in these joint meetings is confidential and can never be brought up in court. Participation in the collaborative process is voluntary. Either party may choose to end the process at will, and both parties must agree to any resolution that is reached. If the parties are having difficulty in reaching settlement, their lawyers may recommend mediation with a

collaboratively trained mediator.

Like any divorce process, collaborative law has its benefits and risks. It may not be appropriate in situations where there is insufficient trust, a lack of cooperative spirit, family violence, or a need for court intervention. For example, if one party refuses to disclose relevant information or wants to drag his or her feet, the attorneys can't use the courts to compel compliance. If there's a history of family violence that can't be adequately managed within the collaborative process or if emergency relief is needed, the courts are not available for a remedy as part of the collaborative process. Also, for the angry spouse who wants payback and vindication, collaborative law will provide no satisfaction because it's designed for couples who want a constructive, positive, respectful end to their marriage.

Adversarial Divorce Processes—Litigation and Arbitration

Litigation is the familiar spouse vs. spouse divorce, which is often played out in the courtroom. It's a complete divorce process that includes fact gathering and a final decision. Unlike collaborative law, in litigation decisions are made for the parties by a judge or sometimes a jury. Also, the parties are discouraged from communicating directly with each other about the divorce. Instead, the attorneys handle communications. There are very strict rules about what information may be presented to the decision-maker. Litigation is appropriate for some cases and provides resolution for couples who can't settle their differences any other way. The court system is the only way to "force" a reluctant party to deal with family law issues.

However, litigation is a process that often focuses on the negative aspects of divorce and other family law matters. In comparison to collaborative law, litigation causes people to focus on how they are "right" and the other is "wrong," when they really may just have different ideas about how their lives should look after divorce. In addition, litigation can be expensive, destructive to relationships, and hard on children. Even though most cases settle before they go to trial, the process of preparing to go to trial can cause relationship damage that's difficult—if not impossible—to repair. The costs of litigation can use up funds that could be put to better use, like children's college or litigants' postdivorce financial independence.

Arbitration is similar to litigation, but with a private judge. Although seldom used, arbitration is another path to resolution that is available in a divorce if both parties agree to utilize the process. An agreement to arbitrate in a family law matter must be in writing. An arbitrator is a private judge who is hired to hear the evidence that would otherwise be presented in a courthouse trial. A trial to an arbitrator may be informal or may follow all the rules of evidence and discovery that are required in a trial to the court, depending on the signed agreements between the parties. An arbitrator can decide from one to all the issues in a divorce, and the decision can be binding or nonbinding, depending on the agreements of the parties. If everyone has agreed that the arbitrator's award is binding, the court must enter a judgment that reflects the arbitrator's decision. Unlike a trial to a court, the hearings before the arbitrator can be at times convenient to the parties and their attorneys. An arbitration can be heard before one arbitrator or three arbitrators, depending on what the parties decide. Either way, the arbitrator must be paid for his or her time, which could add up to the same cost as litigation.

“Kitchen Table” Settlements

The kitchen table settlement method isn't necessarily cooperative or adverse; it depends on the relationship between the parties. The husband and wife sit down at the “kitchen table” and work out an arrangement between themselves. The agreement can be taken to a lawyer to be put into legal form or used to complete do-it-yourself divorce forms. Unlike some other divorce options, this method of reaching agreements can produce inexpensive, quick, private agreements for couples who don't have children or substantial assets.

While this can sound attractive at first, there are big risks. Without the benefit of legal advice, you may not know if you're giving up valuable rights. It's also easy to make mistakes that someone with family law experience could help you avoid. People often find, on taking the agreement to a lawyer, that questions arise which may cause one or both spouses to change their agreement. If the husband and wife don't have equal information and equal power in the relationship, one person might not get his or her needs met. Coercion of one party by the other can be a problem and lead to an unfair settlement.

Mediation—A Settlement Process

Mediation isn't a divorce process like collaborative law or litigation, but instead is designed to help with settlement negotiations. A mediator is a neutral third party, not necessarily a lawyer, who meets with the couple and their two lawyers to assist them in reaching an agreement. Mediation proceedings are confidential. Instead of taking sides or forcing decisions, the mediator's sole purpose is to help people resolve the issues that a court wants addressed in a final divorce decree. If the parties reach an agreement and it's properly written and signed, it's binding. Even if the mediator is an attorney, he or she cannot give the parties legal advice.

Mediation is generally part of the litigation process. In many courts, the parties are required to attend mediation before they go to court for trial. The parties can also agree to mediate their divorce voluntarily. Because mediators are neutral, they can offer clients a different, unbiased perspective. Also, having both clients, both lawyers, and a mediator in the same place at the same time with everyone's attention focused on getting a settlement can often create a positive environment for making agreements. However, mediation often takes place just before a case is scheduled to go to trial, after the parties have already spent money, time, and emotional energy fighting. Mediation under these circumstances can sometimes feel coercive to clients, who may never have discussed the realities of their situation in depth with their attorneys.

Early intervention mediation is a special kind of mediation that happens at the beginning of a divorce rather than at the end. For some couples, working with a skilled mediator at the start can be a helpful and satisfying way to settle the issues in their divorce. Even if the mediator is an attorney, he or she cannot give the parties legal advice, so couples who choose this route to resolution will often hire an attorney or attorneys to give them legal guidance before or during the mediation process. Early intervention mediation usually is conducted in a series of joint meetings with the mediator.

On the plus side, early intervention mediation can be less expensive because the attorneys are used only as consultants between mediation sessions and as drafters of documents after settlement is reached. It works best when both spouses are well informed about their property and expenses. There are some risks in this process, however. Some mediators are well-trained and skillful, while others may have virtually no training or qualifications. Without attorneys present in the mediation, important assets may be overlooked or issues left unsettled. Recall that the mediator cannot give legal advice. Finally, some attorneys simply do not want their clients to participate in mediation without their attorneys being present.

Expert Evaluation—A Reality Check to Encourage Settlement

Expert evaluation isn't a divorce process like collaborative law or litigation, or a settlement process like mediation. Instead, it's a reality check for people involved in a divorce. Often parties have trouble estimating the likely outcome of their case in court because they don't have the necessary experience or are unrealistic. In those instances, an expert can be hired to consider the facts and perceived equities and evaluate how a court might decide. Parties can do this together, or one party can consult an evaluator on his or her own. Expert evaluation can be used during a cooperative process like collaborative law or during litigation by consultation with a "second opinion" attorney.

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