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New Pilot Program:

FROs No Longer a Bar to Economic Mediation in Divorce

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Can two parties successfully mediate the financial issues in their divorce when a final restraining order (FRO) exists between them? The Supreme Court of New Jersey thinks so.

On May 8, 2015, the Supreme Court authorized the Judiciary to establish a pilot program to permit the mediation of financial issues in certain dissolution cases where a domestic violence FRO exists between the parties. The obvious goal of the program will be to utilize mediation "to promptly resolve economic disputes without the necessity of dismissing a domestic violence final restraining order in appropriate cases." The Supreme Court order "relaxed" and supplemented Rule 1:40-5(b)(1) to permit the pilot program. As most family law practitioners are aware, Rule 1:40-5(b)(1) strictly prohibits the court from referring a divorce matter to economic mediation if a restraining order exists between the parties.

According to the Administrative Office of the Courts (AOC), there are approximately 453 active matrimonial matters wherein a final restraining order exists between the parties. Prior to the relaxation of the rule, if such a matter did not settle during the Early Settlement Panel phase, it could not be referred to post-Early Settlement Panel mediation. In select counties with the pilot program, such matters can now take advantage of economic mediation.

Since the Supreme Court order, the AOC developed a protocol to guide the pilot program. As part of the program, a special seminar to train court-approved mediators was held in September 2015. The purpose of the program was to prepare mediators to handle the unique issues that may arise in mediations involving final restraining orders. I was one of the 60 participants in the training seminar. I think I speak for most, if not all participants, when I submit that the differences between domestic violence mediations and regular mediations are greater than originally anticipated.

First, not all matters in which restraining orders exists will be eligible for mediation. The existing restraining orders must be made final; the program will not permit matters that involve temporary restraining orders. Also excluded from mediation are cases in which there is a pending contempt charge for violating the restraining order or where there has been a conviction for a restraining order violation.

If there is a final restraining order and no violation issue, the next step is for the court to determine if a particular matter is a good candidate for mediation despite the existence of a restraining order. Courts must be aware of those non-protected parties who intend to use the mediation process simply to gain access to or information about the protected parties, such as an updated address or telephone number. Judges must develop a feel for each individual case and the parties involved, to determine whether it is suitable for the mediation arena. This may be a difficult task as the court making the decision will often be a different court than the one who presided over the domestic violence matter. Therefore, a matrimonial judge may have to make the determination based upon very limited information, such as reviewing a copy of the domestic violence complaint, observations of the parties in court and representations of counsel.

Even if the court determines that a specific matter is appropriate for mediation, the protected party must actually consent to take part in the mediation. If the protected party agrees, the existing restraining order will be formally amended to permit participation in the program. The non-protected party can be compelled to participate in the mediation, even if he/she does not consent.

For those matters that ultimately make it to mediation, the restrictions and accommodations are numerous compared to regular mediations. For instance, only financial or economic issues can be the subject of domestic violence mediations; they cannot be used to resolve custody and parenting time issues. N.J.S.A. 2C:25-29(a) prohibits any party from being ordered to participate in mediation on

the issue of custody or parenting time when a restraining order exists between the parties. While the Supreme Court decided to relax the requirements of Rule 1:40-5(b)(1) to permit economic mediation, the court opted not to relax N.J.S.A. 2C:25-29(a) to permit the mediation of custody and parenting time issues.

In domestic violence mediations, the protocol established by the AOC also prohibits some devices commonly relied upon by family law mediators. First and foremost, the parties will be unable meet face-to-face. Instead, they will have to remain in separate rooms while the mediator shuttles between the parties.

Unlike "typical" mediations, all mediations involving final restraining orders must be held in the county courthouse where that matter is venued. Sessions are not allowed at the mediator's office. Therefore, the effort that most mediators have put into creating an atmosphere conducive to settlement, and the comforts associated with that effort, will be lost. Moreover, mediators will not be able to charge for the time it takes them to travel to the courthouse, nor will the travel time count towards the two free hours of mediation.

This location restriction also means that if mediators would like to use any software they normally rely upon to facilitate settlements, they will likely have to bring to the courthouse laptop or tablet computers that have the software installed. The court may be able to prepare a child support guideline for the mediator; however, if the mediator wants to consult a tax or support scenario program, or use language from a master Memorandum of Understanding , it will have to be in the equipment brought by the mediator.

It is common for mediators to battle the issue of bias in matters they mediate. That issue may be more difficult in domestic violence mediations. Mediators will be supplied with a copy of the restraining order complaint that was filed against the non-protected party. The information contained in the complaint may be very prejudicial against the non-protected party. Any mediator must keep an open mind and avoid the tendency to show bias in favor of the protected party.

Maintaining confidentiality throughout the mediation process is critical. In a typical mediation, confidentiality plays a vital role in not allowing comments, positions or even documentation solely produced during the mediation to be used outside of that mediation session. In mediations involving restraining orders, the mediators must ensure that information belonging to a protected party is protected during the process. That means that all documents supplied by the protected party should be redacted of all personal information. While mediators may request that documents be redacted by the protected party in advance of a session, the careful mediator must review all documentation supplied by the protected party to ensure it does not reveal any information about the protected party.

Although a sheriff's officer is supposed to be in the vicinity of the location where the mediation is being conducted, the mediators will ultimately be responsible for maintaining order. At the pilot program's training, each mediator was urged to have a "safety plan" in case the non-protected party decides to search for the protected party in the courthouse or if that party becomes violent toward the mediator.

Mediators will also have to provide instructions to the parties at the conclusion of the mediation to ensure there is no contact between the parties. Each county will have its own protocol dealing with the parties' departure from the courthouse, but it will most likely entail the protected party leaving the courthouse before the non-protected party to allow the protected party a chance to safely distance him/herself from the non-protected party. At the close of the mediation, the protected party will receive a questionnaire in order to gauge the level of safety felt by that party during the mediation.

In November 2015, after establishing a workable protocol and training a group of approximately 60 mediators, the Superior Court launched the pilot program. The pilot program is utilized in six counties: Essex, Mercer, Middlesex, Morris, Ocean and Somerset. Based upon the success of the program in these six counties, a decision will eventually be made whether to expand the program to other counties or state-wide.

There is no doubt that mediating with restraining orders requires mediators to sacrifice a great deal. The mediators must travel to the courthouse (and not be permitted to bill for their travel time or get reimbursed for any parking fees), come equipped with all of their needs for mediation, and work within the space provided by the courthouse. The program will rise or fall on the strength and dedication of the mediators who will participate in the program. However, it will provide a great and much needed service to many victims of domestic violence who, before now, were not able to avail themselves of the service through no fault of their own.

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