

## **Brian Loughmiller Teleseminar 2**

*An experienced family lawyer from Texas discusses alternative methods to traditional divorce, including divorce mediation and the collaborative divorce process.*

My name is Dan Couvrette. I'm the publisher of Divorce Magazine and Family Lawyer Magazine and I'm very pleased to have Brian Loughmiller, one of the top family lawyers in Texas from the firm of Loughmiller and Higgins, on this teleseminar today with me.

Our goal at Divorce Magazine is to help people who are considering a divorce or going through divorce make more informed choices by having professionals like Brian Loughmiller share information about the divorce process.

Today Brian and I will be talking about alternatives to the traditional process of divorce. We'll talk about divorce mediation and the collaborative divorce process.

You know, when most people think of getting a divorce they think about the possibility of going to court or at least preparing to go to court. But there are alternatives to this approach, which Brian will talk about today.

Brian is a certified family law specialist, and has authored legal articles on the subject of child custody and divorce. He's been named a Super Lawyer by the Texas monthly magazine since 2005 in the field of family law.

He's a member of the prestigious American Academy of Matrimonial Lawyers and is rated as an AV Preeminent Lawyer by Martindale Hubbell. In other words, Brian is one of the top family lawyers in Texas in the field of family law. His practice is in the Dallas area, and the McKinney area north of Dallas. To learn more about Brian and his firm, please visit his firm's website [Loughmillerhiggins.com](http://Loughmillerhiggins.com).

Brian, thank you very much for joining me today.

**Loughmiller:** Absolutely. It's good to be here.

**We're going to talk, first, Brian, about mediation. Can you distinguish what is mediation in divorce cases and how does it work?**

**Loughmiller:** Sure. Mediation is an alternative dispute resolution process in which the parties, with their attorneys, will meet with a mediator and discuss the different issues that they have with their case, whether it be child custody related or property issues. You do all this outside of the court process. The hope is that you reach an amicable resolution and don't have a lot of anger over the divorce itself and hopefully come to a good conclusion.

A lot of times, the mediation process will actually start after a lawsuit's been filed, and after you've gone through the discovery process. But it will happen before any opportunity to go to court for final trial.

## **When does a court order mediation?**

**Loughmiller:** In most cases, the court will order mediation as part of the trial schedule. So, if you go into a case where there's a scheduling order, the court's going to require you go to mediation at least 60-90 days before a final trial date.

There are some cases that are not suited for mediation, and in those cases you would file a motion with the court asking the court to not make you go to mediation or to waive the mediation process. The judge would generally want to know why you feel the case can't be settled in mediation and why you would have to go to court.

Probably the easiest example of that would be in a child support situation where child support in most states is calculated based on some type of mathematical equation or percentage of time with the children or percentage of income. So, there's not a lot of room necessarily to negotiate a settlement. It is what it is.

Unless you have somebody who's willing to deviate from those guidelines that are established by the various states, you're not going to settle on mediation. And the trial itself is going to be a very short trial. It's going to be maybe a one-hour or two-hour hearing at best; the court's not going to necessarily make you go through a full day of mediation for something like that.

## **Right.**

**Loughmiller:** Family law does take up the majority of time on a court docket, for example in Collin County about 50 percent of the court's docket is made up of family law related cases. So in a lot of cases they're using mediation as a process for managing their docket, and making sure that cases do get the opportunity to settle rather than just lining them up and trying to get every case that's on their docket through a trial process.

**So, one of the couple would file for divorce, or as you said they'll file a lawsuit, and then they go to court with their individual lawyers and the court says that they have to go to mediation. Is that the process?**

**Loughmiller:** Generally speaking, what will happen before you get to that point is that you'll file your lawsuit. The other side will generally file a counter petition for divorce or some type of answer. You will go through a discovery process, which is requesting documents, in some cases saying interrogatory sort of questions that you want the other side to answer.

A lot of those questions really are not geared towards why the divorce is happening as much as it's that we want information concerning your employee benefits. We want information concerning your bank accounts, property that you own.

If there is a child custody issue, we're going to want to know generally what the schedule for the children are. Who primarily takes the kids to the doctor, for example? Who will be the one that will attend parent-teacher conferences in most cases? Just general questions like that to get an understanding of how these people lived their life.

And then once you have that information, before you would schedule a trial, you generally will agree to go to mediation. If you have a side that doesn't want to go to mediation or go through that process, then you would file a motion with the court and the court would then enter the scheduling order and make you go through that process.

**What happens in the case where spouses aren't speaking with each other or there seems to be a significant power imbalance? Can those people still have success in mediation?**

**Loughmiller:** They can. The benefit of going through a mediation process is that you have enough controls in place through each side having an attorney. You have the third-party mediator who is usually an attorney.

In a lot of cases here in North Texas, the mediator is a retired judge. So the benefit there is you have a person who is not making a decision that's binding on the parties, they're giving the parties the opportunity to reach their own agreement. But at the same time, they're basically saying look, I was a judge for 20 years and I've seen your case in court. Here's what I would do if we were in court, or, on this particular issue, you have an opportunity to be creative and potentially do something that's more beneficial to you.

That helps offset some of that imbalance that you may feel you have going into the divorce process, because the mediator is going to look at, let's say, a woman who feels like her husband is very controlling and dictating what will happen in the divorce.

The mediator will have the opportunity to essentially tell that person, look, to get a fair result you're not going to be able to control everything. There are statutes that dictate what child support should be. There are ranges of settlements, property divisions that the courts will generally deem to be reasonable, and you're going to have to fall within that range.

It does help offset some of that. So there is a tremendous benefit even in cases where the parties have a lot of acrimony or they just simply don't speak. They're going to be protected. They're not in the same room together.

Unlike other mediations that you might see in a commercial litigation practice where everybody starts out in the same room where they give a position statement, and then they break up and go into their individual caucuses.

In most divorce mediations, at least in my practice here in North Texas, you don't start out in the same room. You start out in separate rooms and the mediator will work between the two rooms so that you eliminate any anxiety between the parties if they just don't feel comfortable sitting in the same room and talking to each other.

**Let's talk a little bit about collaborative law now. Can you explain what collaborative family law is and how it works?**

**Loughmiller:** Collaborative law is a procedure that's relatively new over the last few years. It's a process where you can get a divorce without any court involvement other than at the very beginning of the case when you file your divorce petition, and the very end of the case when you go in front of the judge with your agreement.

Basically, if you went to handle your case collaboratively, you file a petition and notify the court that it's a collaborative process. The court will then note the files that no hearings will be scheduled and there will be no court interaction between the attorneys. At that point, you set up conferences with the other attorney and their party.

Generally, in a collaborative process, you're going to have anywhere from as few as 5 or 6 meetings and as many as 10 or 15, depending on the issues. At the very first meeting you're establishing ground rules. Because in a collaborative process, unlike a mediation, both parties are in the same room together with their attorneys and there's not a mediator. So you've got the husband, the wife, and the two lawyers all sitting in a room.

It's important for the lawyers, from the very beginning, to establish the rules of engagement, by which I mean let's make sure we understand that we're going to be respectful of each other; and make sure that we're going to allow people to talk and finish their thoughts without the other person interrupting and trying to argue or give a counterpoint to an issue because they don't like what they're hearing. We're not going to threaten to go to court when we hear something we don't like; we're not going to call each other names; and we're going to try to keep it on a high level so that we're talking specifically about the issues.

The other difference in a collaborative case is that there's not a formal discovery process like you have in litigation. So, in one of your very early meetings you might not make any decisions other than let's talk about what we need to look at; let's talk about what documents we need to see on the financial issues; let's talk about what we need to understand as far as the child custody issues. For instance, does the husband travel in his job, and if so, how much? Do both parties work or does one party stay at home? And how is that going to change after the divorce? It's more informal information gathering so that you understand the issues as you work through it.

Then you'll schedule a third meeting where you'll actually start talking about resolution. I'm not going to want to, at the same meeting, talk about the child custody issues and then change the subject and go to the property issues, because you want to keep the meeting relatively short. You don't want to wear people down. You want to have a meeting that's going to last maybe an hour, hour and a half, or two hours. And then schedule the next meeting.

Finally, the other thing that you will do at some point along the process, depending on the issues, is you may bring in third parties to help you solve these issues. For example, if you have some complex property issues, you may bring in a CPA or a financial planner or somebody that understands stock options or that can explain to one side or the other the impact of a division.

**This is a neutral third-party you're bringing in? They're not representing either client. It's representing both.**

**Loughmiller:** That's correct. And these are all things that you talk about at the very first meeting. You talk about the concept of a neutral third-party on those issues. And at what point you may bring them in or not bring them in. With child custody issues,

you're generally talking about bringing in a psychologist or a counsellor or somebody that can address issues related to child custody.

Not just what the schedules will be, but also establishing ground rules for your children so that your children don't play one parent against the other. For example, a teenager may say, well, when I'm at my mom's house, I go to bed at 9 o'clock, when I'm at my dad's house I go to bed at midnight, so I want to live at my dad's house.

That's a very simple example, but that's where you bring in the neutral mental health provider to say, okay, how are we going to make sure that you guys are parenting in a very similar fashion as a divorced couple? So that you don't run into that situation later in life where the children are going back and forth based on which house they perceive to be the better house for them to live in.

**Just to be clear, in a collaborative process each party has their own lawyer, there's not one single lawyer. Is that correct?**

**Loughmiller:** That's correct. In any case, whether it is collaborative or otherwise, you really have to have your own attorneys because the attorney has to be able to give advice to their client. If you have one attorney in the room they really can't do that. Both sides have to feel like they're represented and able to get advice, because there are going to be times when you're going to step out of the room and ask a question. And if the process breaks down then you run into conflict issues that you can't resolve for the attorney. So, at least in Texas, both sides need to have an attorney.

**Tell me what you see as being the advantages of using the collaborative divorce process.**

**Loughmiller:** One of the biggest advantages, especially when there are children involved, is that you want people to be able to walk out of their divorce case and still feel like they are raising a child together. They don't have to necessarily want to be married. They don't have to really necessarily like each other, but they have to have a common goal in terms of how they're going to raise their child. By going through a collaborative process you avoid all of the acrimony that's associated with going to court.

When you go to court and you're up on the stand being cross-examined, you have an attorney on the other side that's trying to portray you as one of the worst parents that ever walked the face of the earth. How do you walk out of that process and then continue a relationship with your ex-spouse in a positive way in raising that child? You're going to remember what the attorney suggested in court and you're going to attribute that to something that your ex-spouse said to the attorney as information to benefit his or her case.

In a collaborative case, you don't have that. In a collaborative case, you're sitting down in a room and you're talking to both parties. You're really talking in a fashion where you say let's talk about your child and what's best for your child. Let's focus on that and not focus on each other as to what your strengths or weaknesses are as a parent. Let's come up with an agreement that works best based on your respective schedules, based on your child's schedules, and based on what other issues there may be.

Another advantage to collaborative law is that there are situations where, quite frankly, there are facts that are somewhat embarrassing to the parties that they may not want to come out in the public process, because litigation is a very public process. You're in a courtroom. There are lawyers walking in and out. There are other parties with their cases that are in the courtroom listening to the evidence when you're in the middle of a hearing.

There are those cases where you don't want that to happen. You may have a person for example that's a CEO of a company going through a divorce, and they're in a child custody case. Maybe they have a history of alcoholism that isn't very well known in the company that they work for. That person's not going to want that brought up in court in front of a bunch of strangers or in front of a judge, and potentially in front of other witnesses that are there in their case. Through a collaborative process, you can talk about things like, okay, as part of this agreement maybe you're going to go to AA meetings for the next 90 days. You're going to go see a therapist. You're going to get some help for your drinking. And nobody has to know about it.

It's a very private process that allows you to work through those types of issues. Another benefit to collaborative is that you avoid that embarrassment of a public knowledge of what those divorce issues are.

**Is privacy also one of the advantages of mediation then? It wouldn't be reported or wouldn't have to be reported?**

**Loughmiller:** Yeah, it's the same in mediation from that standpoint. It gives you that same ability to reach agreements without going through that process.

I've had some very significant cases where we've had psychological issues that have needed to be addressed, people that have bipolar disorder or other diagnosed mental health issues, and you're able to work through a process in both mediation and collaborative laws. It's a different process, but the same impact in that you can come up with methods for treatment and schedules for access to children that will protect the children and ensure that the person's remaining in treatment while they're going through that without it being known publicly. That's a very important point.

**How do people who go through the collaborative process feel about the results compared to people who have gone through litigation? How do those parties end up, in your assessment?**

**Loughmiller:** I think people that go through a collaborative process feel better about the outcome. Obviously because they've been the architect in devising what their agreement looks like and how they're going to move forward with their life.

In litigation, there's a winner and there's a loser. You're not going to get everything you want. There are a lot of things that are said in court that you're not going to like. So, I think from that standpoint, the collaborative process is a better way to handle your divorce case.

Creativity is very important, especially in child custody cases because, and really it doesn't matter what state you're in, a legislator cannot anticipate every single situation that a family is going to be in. They're going to come up with a possession and access schedule for children that may not fit every situation.

It's the same thing with the property division. You could have a situation where people have a lot of real estate or a lot of assets that are not liquid that are being divided and that doesn't help the spouse who needs the cash flow.

Well, if you go to court in a litigation scenario, the court is simply going to divide the estate. They're not going to convert assets to money necessarily.

They could order a house sold but they won't necessarily say, okay, I'm going to have you pay your wife contractual alimony in exchange for you getting this non-liquid asset. Whereas if you're in mediation or collaborative, you can sit there and you can monetize your liquid assets in terms of how are we going to settle this case in a way where both parties can move forward in a positive way.

So I think collaborative is, all things being equal, a better way to go. There are cases where collaborative won't work, but you know very early on that it won't work, so you end up in litigation.

**When would collaborative law not work? Would that be, for instance, if somebody's hiding assets and you can't trust them?**

**Loughmiller:** Yeah, that would be a very good example. If you get into the process of talking about a collaborative case, one of the things you want to find out is does your client feel like that they will have adequate information? Or do they feel like their spouse will hide information? And how do you overcome that? If you can't overcome that trust factor as it relates to the property and the information flow, then you're probably not going to be able to do a collaborative case.

Another example is a situation where somebody files for divorce and immediately gets a restraining order and files a motion for temporary orders and sets a hearing. You could still call the attorney in some cases and say, well, rather than going through this hearing, would you be interested in doing the case collaboratively? And they may say yes. Well, in that first meeting when you're talking about ground rules, before you sign any participation agreement, you may find out that, realistically, you can't do that because they're going to want to go through that hearing process.

An important factor in collaborative law that I did not mention earlier is that under the Texas Family Code, if you agree to sign a participation agreement and handle a case collaboratively, if that case does not settle, if there's an impasse, both attorneys have to withdraw and you have to get new counsel for litigation.

And so that's why, in the scenario I was just talking about, if you get into that first meeting and you've not signed a participation agreement and you feel that they're not here in good faith, and ultimately we're going to end up in court, you pretty much have to decide at that point are you willing to run the risk of having to get a new attorney very early on in the process because the other side never intended to settle.

I've had cases where I've walked into those meetings and very quickly within 20-30 minutes before signing anything I've told the attorney on the other side that I'm not going to sign a participation agreement that would require me to withdraw because I don't think your clients are in good faith, and then you decide at that point whether you're going to still go through it or not.

**Does the collaborative process allow the divorcing couple to feel protected because they each have their lawyers and they get to see more of the process? Would that be accurate?**

**Loughmiller:** Yes, that's very accurate because they are part of the process and they are really designing their divorce with the help of the attorneys. It's helpful for them to be in that because you don't have the concern of, well, what is my attorney saying to the other attorney when we're not in the room. You do get that once in a while, but they are part of it from the very beginning all the way through the end.

It's very different from the mediation process, because in a mediation process, you're not in the same room together. So, because of confidentiality rules you don't necessarily know what's being said in the other room. You don't know what arguments they're giving on each issue because if they tell the mediator that they don't want the information conveyed, then the mediator's not going to tell you what was said.

**In a collaborative process, is there negotiation between meetings or does all of the negotiation happen within the meetings?**

**Loughmiller:** One of the rules that you have in a collaborative process is that any contact that's made is made to everybody. So, you will have e-mail addresses for both the attorneys and the parties. If you have the neutral third-party financial planner or mental health provider, you'll have their e-mail addresses.

So when you send an e-mail to the attorney on the other side, you not only copy your client, you copy the other side as well. There's always this free flow of information and everybody knows what's being conveyed. Because it is an informal process, there has to be this feeling that everybody is sharing information.

One of the difficulties in doing that obviously is that you still want to protect attorney/client privilege. So there will be times where you will be communicating with your client in your office or outside of that process where you obviously don't want to have to share that information. You just have to be careful what it is you're conveying. But any time you're negotiating, whether it's in the meeting or outside of the meeting, you need to involve everybody.

**It sounds to me, Brian, at least emotionally, that the collaborative process and mediation would be a better alternative than litigation. How does it work financially? Can you generalize about the cost that somebody would pay for each of these processes?**

**Loughmiller:** Sure. I mean, initially the retainers are very similar. I think, though, if you have a case that is successfully mediated or you're successful through collaborative



law, it will be less expensive because you don't have the costs for preparation for trial and then the time that you're in court for the trial time. It is a cost savings.

With mediation, that's always something we talk about. We talk about the value of the settlement relative to the amount of money that you're going to spend if you continue the litigation process and keep fighting.

There are some cases where that cost is significant. If you have cases with significant separate property issues, a party may spend over \$50,000 just working on issues of tracing their separate property. That potentially could be avoided if you go to mediation and can get the parties to agree on a settlement that takes into consideration the separate property issues.

It's the same thing with the collaborative law process. If you can sit down in a room with both parties, look at their documents, and talk about what constitutes community property, what constitutes separate property, and walk them through the evidence that you have that you believe can establish the separate property claim, you're doing that without the need of a forensic accountant.

And if they still want to have a neutral party look at it, because that neutral party is not retained by one side or the other, it saves money because you're not going to get a second expert to look at it like you would if it was a retained expert.

## **Right.**

**Loughmiller:** Also, the level of detail is not as important so that you're not going to sit there and have somebody analyze 20 years of bank statements. You're going to walk through a process with the parties in the room and see if they will agree on certain assumptions that will allow you to reach that conclusion.

So it does save a lot of money by going through that process. It's hard to quantify the actual dollars, but the other factor that's important for people to understand is it's not just the money you're going to spend on a divorce, but it's also money you're going to save potentially in future litigation.

I'm pretty sure these statistics are very similar no matter what state you're in: cases that go to trial and, especially on child custody matters where one side effectively wins custody over the other side, those cases will end up back in court over 80 percent of the time.

Often, what the literature suggests is the reason they end up back in court is that the person who lost never recovers, or they don't get over the fact that they lost an issue they didn't think they should lose and they're looking for that next opportunity to get back in court.

By settling at mediation or settling through a collaborative process, both parties walk out feeling like that they have an agreement they can live with. And they're not going to have the potential for spending attorney fees in the future to try to recover something that they lost in litigation.

**What would you tell a client who just absolutely feels that they need to have their day in court so the world can understand their story and let them tell their story? How do you advise that client?**

**Loughmiller:** Well, generally, I would tell them that they're not going to get the satisfaction that they think they're going to get by being able to tell that story, because the rules of civil procedure really are restrictive. You know, the rules are not established to allow a person to go in and tell their story without interruption and they're really restrictive rules. They're really designed to limit the amount of evidence that comes in based on credibility of the evidence.

There's going to be objections; there's going to be hearsay issues; there's going to be witnesses that you think you can get that you're not going to be able to get to come to your hearing because they don't want to be in the middle of your divorce case. Or maybe they're not going to say what you think they're going to say after your attorney talks to them.

You don't really get that satisfaction. And if you really want to be able to give your side of the story, there is a way you can do that through a collaborative process where, although you have to be respectful and you have to do it in a way where you're not being antagonistic, you can sit in a room and tell the attorney on the other side. Here are my issues as relates to how I want to raise my children; here are my issues as it relates to our property issues and why I feel I'm entitled to this particular settlement.

So, you're going to have that ability to do that and you're just doing it in a setting where you don't have those restrictive rules from an evidentiary standpoint that, quite frankly, frustrates most people. Most people walk out of court feeling like they didn't get to tell their whole story.

An example I can give you is, if you're in a case where you are even married for 20 years and you've raised two or three children, and they're now in middle school and high school. Now you're going through a divorce and you want to go into court and talk to the judge and tell them your 20-year history of your marriage, and why you're here, and everything that's happened to you. And the judge looks at your attorney and says, okay, well, I have 20 cases on the docket today, so I'm going to give you each an hour for your hearing.

Well, there's no way in one hour you can convey everything that you would want to convey to that judge that you believe is important through a 20-year marriage. You're going to walk out of that hearing very frustrated: you're going to be frustrated with the process, with your attorney, with your spouse. Because you just don't really feel like you got that day in court.

That's why going through an alternative method is good, because you're not going to be limited to that type of time constraint. You're going to have as many meetings as you need to have.

Your mediation may last two or three days, in some cases. Or it may last eight hours or nine hours. There's no other case that's there taking up the time of the attorneys or the mediator. It's your case. So you get the benefit of all that time that you need.