

## **AGREEMENT TO MEDIATE**

THIS AGREEMENT TO PARTICIPATE IN MEDIATION is entered into between Hirsch & Ehlenberger, P.C., (hereinafter “Mediator”) and the undersigned parties, and others present or otherwise participating in the mediation process, including attorneys, experts and others. By signing below, the undersigned understand and agree to the following:

1. **Your Mediator:** Hirsch & Ehlenberger, P.C. has designated one of its attorneys, Brian M. Hirsch, to serve as your mediator. Mr. Hirsch graduated law school in 1985. He is certified as a family mediator by the Virginia Supreme Court, and has been licensed by the Commonwealth of Virginia as an attorney since 1985. Mr. Hirsch’s law practice is limited to family law.

2. **The Mediation Process:** Family mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the parties’ voluntary agreement. The family mediator assists communication, encourages understanding and focuses the parties on their individual and common interests. The family mediator works with the parties to explore options, make decisions and reach their own agreements. The process may include: a) an orientation to mediation and exchange of information; b) a facilitated discussion of the specific issues; c) the generation of options for solution and the evaluation of those options; and, d) efforts to reach an agreement and put that agreement into writing.

3. **Role of the Mediator:** The role of the Mediator will be to listen carefully to each party; clarify statements made and information exchanged for full understanding; ask questions designed to elicit information the parties may need; keep the parties on track and focused on the issues; assist the parties in gathering information from each other and to identify ways to gather other needed information; help the parties test and examine potential agreements; suggest when outside experts, such as tax consultants, therapists, appraisers, subject matter experts, *etc.*, may be needed; and otherwise facilitate negotiations.

4. **Styles of Mediation:** Your Mediator may offer you one of three styles of mediation: (a) facilitative, (b) evaluative or (c) a hybrid of facilitative and evaluative. Each style is described below:

A. **Facilitative Style of Mediation.** In facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually-agreeable resolution. The mediator asks questions; validates and normalizes parties’ points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, give his own opinion as to the outcome of the

case, or predict what a court would do in the case. Although the facilitative mediator does not make recommendations to the parties, he may generate options for the parties to consider. The facilitative mediator may provide legal information to the parties, such as copies of the Virginia statutes that pertain to the issues of custody, visitation, spousal support, child support and property division. However, the facilitative mediator will not provide legal advice.

B. Evaluative Mediation Style. Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the strengths and weaknesses of their cases, and predicting what a judge would be likely to do in the event the case is litigated. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. In an evaluative mediation, the mediator helps the parties evaluate their legal position and “the costs versus the benefits” of pursuing a legal resolution rather than settling in mediation. It is important to stress that even with evaluative mediation, the process remains voluntary. Neither party is required to accept the opinions of the mediator. The evaluative mediator may provide legal information to the parties, such as copies of the Virginia statutes that pertain to the issues of custody, spousal support, child support and property division, and he may provide his opinion as to how the court will likely apply such statutes to the parties’ case in the event the issues are litigated. However, the evaluative mediator will not provide legal advice.

C. Facilitative/Evaluative Hybrid Mediation Style. The third mediation style offered is a hybrid between facilitative mediation and evaluative mediation. With the facilitative/evaluative hybrid style of mediation, the mediator begins the discussion of each issue using the facilitative style of mediation. If neither party requests the mediator to evaluate the parties’ respective positions, the mediator will not do so. However, if either party requests the mediator to evaluate the positions, the mediator will do so using the evaluative style. If the parties appear to have resolved an issue through facilitative mediation, the mediator may inquire whether either party desires an evaluation of the proposed resolution. If neither party desires an evaluation, the mediator will not do so and will move to the next issue. However, if either party indicates a desire for an evaluation of the proposed resolution, then the mediator will share his opinion.

5. **Confidentiality**: By Virginia Code Section 8.01-581.22, the communications made during and in connection with mediation are confidential as follows:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except:

- (i) where all parties to the mediation agree, in writing, to waive the confidentiality,
- (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation,
- (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation,
- (iv) where a threat to inflict bodily injury is made,
- (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime,
- (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint,
- (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation,
- (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or
- (ix) as provided by law or rule.

6. **Mandatory Reporting**: According to Virginia Code §63.2-1509, if mediators have reason to suspect that a child is abused or neglected, they must report the suspected abuse immediately. Therefore, the information about the abuse is not confidential.

7. **Full Disclosure of Assets**: In domestic relations cases involving divorce, property, support or the welfare of a child, each party agrees to provide substantial full disclosure of all relevant property and financial information. The parties may discuss what happens in mediation with their spouses, advisors or others unless they agree otherwise by amending this Agreement in writing. Even if so amended, the parties may always discuss what was said and done in mediation with their respective attorneys, and the parties may jointly waive confidentiality by written agreement.

8. **Voluntary.** The mediation process is voluntary and shall continue until any party or the Mediator terminates the process, or until an agreement is reached.

9. **Joint and Separate Sessions:** The Mediator may ask the parties to participate in joint sessions, where the Mediator and all parties are present, and at times the Mediator may ask to meet separately (known as a caucus) with each party, in turn. If during a caucus a party wants to share information with the Mediator that the party does not want repeated to the other party, then such position shall be stated to the Mediator during the caucus.

10. **Participation:** The parties agree to participate in good faith, treat each other and the Mediator with respect and courtesy, and allow others to speak without interruption.

11. **Legal Information and Advice:** The Mediator may provide the parties with legal information, forms, copies of statutes, *etc.* The Mediator does not provide legal advice. Each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so.

12. **Terminating Mediation:** Any party or Mediator may decide that the process is not useful and terminate or indefinitely suspend the mediation. Before terminating the mediation, the parties and Mediator are encouraged (but not required) to discuss the reasons for the termination and consider any options offered for continuing.

13. **Agreement:** The parties agree that all terms of any agreement are considered settlement proposals and are non-binding until reduced to a final writing and signed by all parties. Any mediated agreement may affect the legal rights of the parties. Each party in the mediation process should have any draft agreement reviewed by independent counsel prior to signing the agreement.

14. **Court, Hearing and Other Important Dates:** The parties must keep themselves informed of any court or other hearing dates or other obligations set by the court or other agency in their case. Referral to and/or participation in mediation does not halt or delay the schedule of a court or administrative case until a settlement agreement is filed and properly brought by the parties to the attention of the court or agency.

15. **Fees:** The parties agree to pay for the Mediator's services at the rate of \$330.00 per hour. Services include all time the Mediator spends in an effort to assist the parties in the mediation process and includes, but is not limited to the following: (i) conducting the introductory session and individual telephone or in-person conferences to discuss and arrange mediation, (ii) preparing for a mediation session, (iii) conducting mediation sessions, (iv) researching or obtaining legal information for the parties, (v) drafting agreements and memoranda of understanding for the parties, (vi) drafting letters and emails to the parties and/or their respective counsel, and (vii) telephonic communications with the parties and/or their respective counsel. Unless the parties agree otherwise in writing, each party shall pay 50% of the Mediator's fees. Payment of the Mediator's fee is expected at time of service. The Mediator shall have the right to require payment of an advance fee before providing mediation services. The advance fee will be placed in the trust account of Hirsch and Ehlenberger, P.C. and will be used to pay fees as they are incurred. An advance

fee is not a quote or fixed price for a service, but is instead a deposit to be applied to the actual cost of services based upon the Mediator's hourly rate and the actual time it takes to complete the task. If and when the advance fee is exhausted, payment in full will be expected at the time services are rendered, or the Mediator may require a supplemental advance fee. If mediation is terminated before all of the funds held in trust have been applied to earned fees, then the parties will receive a refund of the remaining unused portion of the advance fee. All refunds will be paid to the parties according to the ratio of the parties' contributions to the advance fee. If the actual cost of preparing a written settlement agreement exceeds the amount of the advance fee paid, the Mediator shall have the right to withhold the release of the written settlement agreement until the parties have paid in full the fees incurred for the preparation of the written settlement agreement. The Mediator may hire Retirement Paralegal Services, Inc. or use the firm's paralegals for assistance with issues concerning the division of retirement assets. The cost of such paralegal services will be billed at the paralegal's then current rate, which rate will be substantially less than the rate charged by the Mediator.

16. **Counsel.** If either or both parties have counsel participate in the mediation, your counsel will be bound by the confidentiality rules set forth in this Agreement. Your counsel will be required to sign the Agreement for purposes of indicating their agreement to be bound by the confidentiality rules set forth in this Agreement.

Additional terms: \_\_\_\_\_  
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This Agreement was entered into on \_\_\_\_\_, 20\_\_, as indicated by the signatures below.

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Brian M. Hirsch  
Hirsch & Ehlenberger, P.C.