

## CHAPTER FIFTEEN

### Mediation and Other Alternatives

WORKING WITH LAWYERS AND COURTS is not the only way of resolving disputes. As people tire of the time, expense, and adversarial nature of litigation, both non-lawyers and lawyers have sought other means of solving problems. Methods of solving problems that do not involve going to court to have a judge decide the issue are referred to as **alternative dispute resolution (ADR)**.

Many methods of ADR are used in conjunction with court proceedings. For example, if a couple seeks a divorce, they may use a mediator to help them resolve issues of custody, property, and support, but the couple still will need to go to court to have a judge enter an order officially ending the marriage.

There are several alternative ways of resolving family law disputes. Mediation is the most common. It will be discussed first, followed by advisory opinions, and arbitration.

#### **Mediation**

**Mediation** is a process by which the parties to a divorce (or some other dispute) try to resolve their disagreements outside of court with the help of a mediator. The mediator cannot force a settlement, but tries to assist the parties to clarify their interests and work out their own solution.

In divorce actions, mediators often are involved in custody and visitation disputes. In some jurisdictions (particularly large urban areas), courts require

mediation of custody and visitation disputes. The mother and father must talk with a court-appointed mediator to try to resolve the problem before putting their case before a judge. The mediator cannot force a resolution, but the parties can be told to try mediation before coming to court to ask a judge to decide the issue.

Court-ordered mediation usually is provided at no cost or at low cost to the parties (other than the cost of the filing fees required to initiate the court action).

Mediators also can handle property disputes and support disputes. A couple seeking mediation of disputes on financial issues probably will have to seek a private mediator since most court-affiliated mediators deal with only custody and visitation issues.

If the parties resolve their disagreements through mediation, the attorneys for one or both of the parties still may be involved in finalizing and approving the agreement. Alternatively, if the parties feel comfortable working without attorneys and if they can get the paper work right, they may draft their mediated settlement as an **agreed order** and take it to a judge for approval.

Most mediators are either mental health professionals or attorneys. Many mediators, particularly those associated with court mediation services, have degrees in social work or psychology. Private mediators (which the parties hire on their own) often are attorneys, although many are mental health professionals.

Mediators who are mental health professionals are not serving as therapists, and mediators who are attorneys are not serving as attorneys. Instead, they are professionals who are trying to help two (or more) people work out their differences.

Mediation often has the advantage of being cheaper and quicker than prolonged negotiations by attorneys or resolution of a case by a judge after a contested trial. A good mediator can help the parties build their problem-solving skills, and that can help them avoid later disputes. Most people who settle their cases through mediation leave the process feeling better than they would have felt if they had gone through a bitter court fight.

Mediation can have disadvantages--at least in certain cases. If, for example, the purpose of a mediation is to settle financial issues and one party is hiding assets or income, the other party might be better off with an attorney who can vigorously investigate the matter. Mediators usually are good at exploring the parties' needs, goals, and possible solutions, but they do not have the legal resources of an attorney to look for hidden information. A mediator, for example, cannot subpoena documents or witnesses to gather information.

Another problem with mediation can arise if one party is very passive and likely to be bulldozed by the other. In that situation, the mediated agreement might be lopsided in favor of the stronger party. A good mediator, however, will see to it that a weaker party's needs are expressed and protected. Some mediators may refuse to proceed with mediation if it looks as though one side will take improper advantage of the other.

Some legal and mental health professionals think that mediation is not appropriate if the case involves domestic violence. One concern is that mediation will give the abuser the opportunity to harm the victim again. Another concern is that victims of physical abuse are not able to adequately express and protect their own interests. However, other professionals believe that disputes in families with a history of domestic violence still can be mediated, particularly if the person who was abused does not feel significantly intimidated by the other party at the time of mediation or if the mediator is adept at making sure the abused party's needs are explored and met.

A final potential disadvantage of mediation is that if the mediation does not succeed, the parties may have wasted time and money on mediation and still face the expense of a trial.

There are not firm, nationwide figures regarding the percentage of cases that are resolved through mediation, but studies of mediation of custody disputes in several large cities report that between 50 and 90 percent of cases settle through mediation.

### **Advisory Opinions**

Instead of going to a formal trial before a judge, the parties and their attorneys may submit their cases to one or more experienced family law attorneys for an advisory opinion about how the case probably would be decided if it went to a court in the state. In effect, this is a mini-trial that is not binding.

The attorneys for the husband and wife submit their cases to the family law attorney. With the clients present, the attorneys for the husband and wife make oral presentations and submit documents. The amount of time for this “mini-trial” is set by agreement, but one to four hours is common amount of time. After submission of “evidence”, the experienced family law attorney issues an opinion and the reasons for it. In many cases, the advisory opinion induces the parties to settle the case, although they still have the right to proceed to a trial before a judge.

In some cities, there is an established panel of attorneys who issue advisory opinions. The attorneys may hear cases and issue opinions at no charge or at a specified rate, depending on local custom. If there is not an established panel of family law attorneys to issue advisory opinions, clients and their attorneys still could seek out an attorney who would be willing to serve in such a capacity.

A variation on this approach is for the attorneys to talk to a judge before trial. The attorneys will lay out the essential facts and arguments of their case and ask the judge for an informal opinion. If the judge is willing, the judge may say something along the lines of, “If these are the facts that are proven at trial, here is how I am likely to decide. . . . On the other hand, if this fact is different, my decision will be different.”

Some judges will allow clients to sit in on these meetings; others will not. The judge’s decision to allow a client to sit in on such a meeting (sometimes called a **settlement conference**) may turn on the judge’s perception of whether

it will help the case or not. Judges do not want clients to become disruptive or emotionally upset at settlement conferences. In addition, some judges are concerned that if the client hears the judge say, “Here is how I am likely to decide the case (based on certain facts)”, the client will assume the judge is prejudiced. In fact, a judge’s comments at a settlement conference do not necessarily mean the judge is prejudiced. It usually just means that if the parties prove a certain set of facts, a certain result can be expected. If different facts are proven, there would be a different result.

### **Arbitration**

Another form of alternative dispute resolution is **arbitration**. Arbitration is not widely used in family law cases, but it is an option.

In arbitration, the parties agree to submit their dispute to a third party (other than a judge) for a binding decision. The arbitrator often is an attorney or a retired judge who is usually able to hear the case in a more expedited manner than a court would hear the case. Arbitration may be expedited in two respects. First, the arbitrator may be able to hold a hearing in the case more quickly than a trial judge, particularly if the trial judge has a calendar crowded with many cases. Second, arbitrations may take fewer days than a trial since arbitration procedures often are more informal than trials and the attorneys proceed more quickly. If the arbitration proceeds more quickly than a trial would proceed, arbitration will save time and costs.

Costs of arbitration vary, but are usually similar to attorneys' hourly rates (see chapter 14 of this book).

In most states, husbands and wives are allowed to arbitrate issues of property and alimony, although this is not an area of law in which there are many court opinions specifically approving or disapproving the practice. In most states, however, courts are not likely to approve binding arbitration of custody and child support. Courts usually view themselves as ultimately responsible for protecting a child's welfare, and courts in most states are reluctant to yield authority to an outside arbitrator.

In a New York case, for example, the mother and father agreed to have their marital disputes settled by a three-member rabbinical court that was serving as an arbitrator. The rabbinical court gave joint custody to the father and mother, but the state court declined to follow the decision because it viewed joint custody as not in the best interest of the children because of the "extreme antagonism" between the parents. The state court, however, **confirmed** (upheld) the rabbinical court's determination of maintenance.

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