Choosing Your Approach to Resolution

By ROCHELLE GROSSMAN

By nature, divorce can be, at best, a difficult and expensive process. From the inherent emotionality of child custody and relocation, to the complexities associated with the distribution of assets and spousal support, the legal costs of dissolving the marriage can leave each party with a fraction of the marital estate they created. Litigation costs for divorce can spiral and balloon, leaving parents no choice but to tap into the college funds intended for their children's education, unexpectedly burdening children. Factor in time delays and the bureaucracy of the court system itself, the prospect can rapidly escalate from intimidating to outright daunting. Fortunately, less intimidating, less expensive, and less time-consuming dispute-resolution options are rapidly integrating into the mainstay of family law. Alternatives for "going to court" exist. Utilizing them can reduce costs, time, and family friction and preserve the marital estate for the post-divorce phase of life. What follows is a menu of more "user-friendly" alternative dispute resolution options, which can make the process more financially and emotionally manageable.

Mediation—Giving Peace a Chance

Mediation is the process in which couples meet in an informal and private setting with a specially trained third-party neutral with the goal of resolving their differences. The neutral "mediator" facilitates communication between the parties by allowing them to flush out relevant issues and share their perspectives. The mediator then explores settlement options with the goal of reaching an agreement. The key feature of mediation is that the mediator is a facilitator, not a judge or arbitrator; therefore, she can neither intervene nor make decisions in the event of an impasse.

By encouraging creative solutions that may not otherwise be available through the public justice system, the mediation process enables a couple to control their outcome. After listening to the views of each party—without taking sides—the mediator will propose different alternatives to consider. The parties are required to negotiate in good faith and openly disclose all relevant information. Although the mediator cannot provide legal advice to the couple, she will urge the parties to seek independent legal advice to coach them through the process. Equipped with an understanding of their legal rights and obligations from their individual lawyers, the parties can proceed on a level playing field, prepared to make competent and informed decisions that will result in an enduring agreement. Parties who have control over their solutions are more likely to honor their agreement, thereby reducing the likelihood that enforcement through the court will be necessary in the future.

Cost Considerations

With the exception of a "kitchen table agreement," mediation remains the most cost-effective means of dispute resolution. The lawyers' role is limited to providing advice and coaching outside the mediation process. The parties will not incur the substantial legal fees associated with litigation, which involves discovery (information gathering and exchange), preparation and submission of legal pleadings and briefs, and court appearances. Although there will be a cost for the mediator (in addition to the cost of the individual lawyers), the overall cost savings are significant. Mediation creates positive results at a fraction of the cost of litigation. Ultimately, a mediated resolution leaves the parties with the sense of satisfaction that comes from speaking their peace in a mutually respectful forum in which they find and reach a solution on their own.

Arbitration—Select Your Judge for Final Resolution

Arbitration is an alternative to the court system for litigants who are not able to resolve their conflicts by agreement. The parties will select an agreed-upon arbitrator who will provide an expedited proceeding during which she will hear all the

evidence and testimony and make a final decision resolving all disputes. Arbitration is the most traditional form of private dispute resolution. Unlike mediation, arbitration is adversarial and adjudicatory. This means that the arbitrator renders a decision at the end of the hearing. Usually, this decision, called an Arbitration Award, is submitted within 30 days of the hearing and is legally binding, subject only to a very limited court review.

The arbitrator is a neutral with expertise in the family law arena who has the authority pursuant to the agreement to arbitrate to act like a judge in making a determination of the disputed issues. The arbitration process is more flexible than the court system in that hearings are scheduled when mutually convenient to the parties, counsel, and arbitrator. The arbitration hearing will often take place in a private office setting with the conveniences of parking, coffee, and private conference room(s). Confidentiality is ensured because the public does not have access to the filings or the hearing. Relief can be immediate because the arbitrator can make interim decisions (sale of a property; preservation of a bank account) after conference call or written submission from counsel. There is no need to wait for a court listing or formal trial in the courthouse. The arbitration process is convenient for the parties and counsel, which saves the parties, ultimately. Arbitration affords the parties the ability to control the process and ensure the decision is made by a qualified expert on a timely basis. However, the parties give up their rights of appeal.

Cost Considerations

Although a third lawyer, the arbitrator, must be paid, the process will be less costly than going to court due to the efficiencies involved, such as no waiting for your case to be called or interruptions resulting from other matters scheduled before the master/judge; petitions need not be formally prepared or filed as interim issues can be submitted to the arbitrator via email or letter and heard via conference call or video conference. The arbitration hearing is much faster and more time-efficient than formal, trial proceedings, which are prolonged by the technicalities of admitting exhibits, certifying experts, and meeting the needs of a court stenographer. For example, what would take three days at trial may be completed in only one day in an arbitration setting. Efficiency results in significant cost savings despite the additional costs of the arbitrator.

Early Neutral Evaluation—Testing the Waters

Procedurally, early neutral evaluation (ENE) falls somewhere between mediation and arbitration. As in mediation and arbitration, a neutral third-party expert in the field of family law, usually a lawyer, is hired. A key difference between ENE and mediation is that in ENE the neutral provides his opinion and feedback in the form of an unbiased evaluation of the case; and unlike arbitration, the evaluator's assessment of the case is not binding.

In this adversarial process, each party's lawyer will submit to the evaluator, in writing or in person, their arguments and the documentation to support their client's claims and positions. The evaluator will assess the case based upon the lawyers' submissions and render an opinion as to the disputed issues such as the division of assets, liabilities, value of real estate or businesses, and the amount and duration of alimony. ENE is also used in custody cases to gain a neutral perspective of what the trial court might do when faced with the issues and evidence presented.

ENE is not binding but is used as a reality check of the strengths and weaknesses of each party's case. Although settlement is not the goal, ENE can be an effective settlement tool, enabling the parties to reach an agreement based upon the evaluator's assessment. Unlike mediation, counsel is present to protect each party's interests and to advocate their positions. The evaluator does not have the authority to make the final decision; and, therefore, the right to have the matter heard by the court remains, along with the preservation of appellate rights.

Cost Considerations

ENE is considerably more efficient, and, therefore, cost effective than navigating the court system, if the case settles. If the case does not settle, then ENE becomes an added cost to the already substantial cost of litigation. The efficiency of ENE lies in the fact that it takes place in a private office at a scheduled time, in contrast to the waiting that is inherent to the court system, during which clients are obligated to pay for their lawyers' time.

Collaborative Divorce—Keep Out of Court

Collaborative family law involves a cross-disciplinary team approach to settling cases and can be used to resolve all domestic relations issues, including asset/debt divisions,

	Mediation	Early Neutral Evaluation	Collaborative Divorce	Cooperative Divorce	Arbitration
Adversarial		X	X	X	X
Lawyers Involved	Recommended	X	X	X	X
Neutral Third Party	X	X			X
Binding					X
Option to Go to Court	X	X		X	

support, and custody. The process enables a separated or divorcing couple to work with their respective collaboratively trained lawyers, coaches, financial professionals, and/or psychological experts to achieve a settlement best matching their family's needs without the underlying threat of litigation. Crucial to collaboration is the requirement that the players sign a "participation" agreement in which they pledge to remain out of court. Their respective lawyers become disqualified from any and all future litigation, thereby eliminating "going to court" as a threat in the negotiation process. If the case does not settle, the parties will be required to start over with new lawyers. The commitment to an amicable resolution is the hallmark of the collaborative divorce.

The parties commit to full voluntary and early disclosure of all financial information, including assets, liabilities, and income. In addition to each party's lawyers, the team of professionals may include a therapist coach for each party, neutral financial advisor or accountant, neutral estate planner, neutral mental health professional or child specialist, and neutral real estate or business appraiser. Negotiations are conducted through a series of "four-way" meetings with the parties and their lawyers. While the process is adversarial, each party has the benefit of legal counsel throughout, and all are focused on solving the problem at hand to arrive at a resolution that works for the parties and their family. There is no neutral decision-maker or facilitator. Therefore, in the event of an impasse, the parties will be required to find new lawyers and another approach to resolution.

Cost Considerations

Each party will have their own lawyer actively engaged throughout the process and meetings. In addition, the parties will incur the costs for the team of financial and/or psychological collaborators. Meetings are scheduled at a time and place convenient for the parties. Because meetings are scheduled at a time and place convenient for the parties, money will not be wasted for the idle time waiting for the court's attention. collaborative divorce is more costly than mediation but less costly than litigation. It is a worthwhile alternative for matters requiring the input of experts and assistance of counsel to ensure the parties are on equal footing.

Cooperative Divorce—Keeping Options Open

Cooperative divorce is like collaborative divorce in that the parties and lawyers sign an agreement to negotiate in good faith. The team commits to full disclosure and integrity with an effort to reach an agreement that works for the family. However, the key difference between collaborative and cooperative is that in a cooperative divorce, if and when negotiations break down, the team may opt to go to court to break an impasse. There is no pledge to stay out of court, nor a requirement to find new lawyers if litigation ensues. Therefore, the players in a cooperative divorce case can become less than "cooperative" with the threat of going to court ever present.

Experienced divorce lawyers may engage in the process of "cooperative divorce" without realizing it. A competent divorce lawyer will work cooperatively with the opposing side by engaging in voluntary discovery (information) exchange, communicating to resolve interim issues involving custody or support or the payment of debt pending a full resolution. Lawyers for both sides should encourage and facilitate cooperation in the form of out-of-court meetings, with or without clients. Reasonable lawyers will work cooperatively with the other side in order to reduce the acrimony and costs. Children's health and family finances depend upon cooperation, reasonableness, and compromise.

In the cooperative divorce, joint experts, such as accountants and appraisers, may be retained, but there is no neutral arbiter, judge, or mediator. Parties can only control the outcome through compromise and resolution.

Cost Considerations

The cooperative divorce is an adversarial process. Therefore, each party will have and pay for their own lawyers. Costs can be controlled if the lawyers are reasonable and encourage their clients to compromise. If negotiations break down, litigation will ensue and costs will multiply.

Conclusion

Disputes among separating or divorcing couples are inevitable. However, relying upon the court system for resolution of these disputes brings with it other problems; namely, excessive costs due to the inherent inefficiencies of court processes. Clearly, as conflict increases, so does cost; but the family law landscape provides options to manage both. Parties can avail themselves of alternatives to "going to court," as discussed previously, so long as spouses and their respective lawyers keep an open mind to creative solutions. Choosing an attorney who will embrace and encourage these alternatives can be as important as selecting the most appropriate process for the couple's dynamic and finances. Divorce should not dissipate the marital estate. Fortunately, time- and cost-reducing options are available that can preserve the assets accumulated during the marriage and upon which the parties will need to rely after divorce. FA

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