

OPTIONS FOR AVOIDING THE ADVERSARIAL DIVORCE

By Robert N. Wistner

The annual domestic relations case reporting statistics filed with the Supreme Court of Ohio usually indicate that approximately 90% of all cases seeking to end a marriage wind up being terminated upon the mutual agreement of the parties – without any trial before a judge or magistrate. Nevertheless, a substantial portion of those cases start out as adversarial contested divorce cases in which the parties spend thousands of dollars and months or years of time and effort in preparation for a trial that will never take place. The resulting negative financial, emotional and psychological impact of the adversarial divorce on both spouses and their children frequently is devastating and irreparable.

Are there reasonable options available to parties that will minimize or substantially reduce the potential damage that a divorcing family may experience while it is involved in the process of restructuring its relationships and financial matters? In this writer's opinion, the answer is YES!

Let's recognize the fact that at least 10% of the cases that start out as contested divorces probably will require the intervention of a judge or magistrate to terminate the case, and that for various reasons a trial is inevitable and necessary. When there is evidence of spousal or child abuse in a case, or one of the parties has a severe personality disorder (e.g. narcissistic, obsessive compulsive, borderline, etc.), there is no reasonable expectation that the parties are capable of reaching agreement on the ultimate issues. But, for the other 90% of cases, after more than 30 years of experience acting as a guard dog for parties in contested divorces, this writer's experience has led to the conclusion that most parties are better served by family lawyers who act more like guide dogs leading the clients through the family restructuring process. In other words, rather than being the starting point for family dispute resolution, litigation should be considered the last resort, after the parties have made a good faith effort to accomplish their family restructuring through one of the following non-adversarial types of dispute resolution interventions.

COLLABORATIVE FAMILY LAW

CFL (also called Collaborative Divorce or Collaborative Practice) is a relatively new non-adversarial approach to family restructuring that provides the parties with opportunities to "divorce with dignity and respect" and to minimize the anger, alienation and loss of self-esteem that frequently result from adversarial "divorce as usual." Both spouses are represented by experienced family lawyers who have taken special training courses in the use of collaborative practice skills, including principled negotiation and some mediation techniques. All negotiations are done in joint conferences with both parties and their attorneys in the same room, to the extent possible under the circumstances of the case. In addition, if financial or child experts are needed as appraisers, consultants, coaches or evaluators, the parties try to agree on using one, rather than engage in a "war of experts." Consequently, the total cost to the parties is reduced substantially, compared to a litigated case, and the parties have control over the result and the timeline from start to finish. These cases usually move to conclusion much faster than a litigated case.



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The unique aspect of CFL is that the parties and their attorneys sign an agreement pledging to act in good faith regarding disclosures and discovery of data and in trying to negotiate a "win-win" agreement that comes as close as possible to meeting the needs and goals of both parties and their children – all without threatening each other with court action. However, in the event the parties reach an impasse, and either one wants to pursue court intervention, then both attorneys must withdraw, and both parties must retain different attorneys for the litigation phase. Consequently, the motivation is high for everyone to be flexible and creative in brainstorming potential solutions. Experience indicates that the CFL approach has a high rate of success, and reduces the total expense for lawyer and expert fees by one-half to two-thirds in most cases, compared to litigated cases.

The Collaborative Family Law movement started in Minnesota in the early 1990's, and is spreading rapidly across Canada and the United States. In Ohio, there are organized groups of collaborative family lawyers in Columbus, Cleveland, Cincinnati, and several southwestern counties. The Collaborative Family Law Council of Central Ohio has about 40 attorney members, all listed on the council's website at www.winwindivorce.org.

MEDIATION

With the recent enactment of the Uniform Mediation Act in Ohio, Section 2710.01(A), Revised Code, includes the following definition: "Mediation means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." There are various styles or approaches used by mediators, including facilitative, transformative and evaluative mediation, and some mediators may use all three styles at various times, depending on the circumstances of the parties.

Mediation of divorce cases and parenting disputes is authorized in Rule 16, Ohio Rules of Superintendence, and through the supervision and assistance of the Ohio Supreme Court, approximately 40 counties (including the Franklin County Domestic Relations Division) now have active programs to provide mediation services to assist parents in resolving disputes over parenting plans and child support. So far, none of the court programs includes mediation of disputes over other financial issues, but planning is under way to experiment with some pilot programs that will include mediation of all financial and parenting issues in a divorce case.

Some of the court supervised programs provide mediation services through mediators who are employees of the county common pleas court or in private practice. In order to become a "Court Approved Mediator," an individual must meet certain criteria established by the local court, including the completion of approved training courses of 12 hours in basic mediation skills, 40 hours in divorce mediation techniques, and additional special training in domestic violence. However, there is no requirement that a mediator must be an attorney or have a legal education, and attorneys for the parties rarely attend mediation sessions although the Uniform Mediation Act allows them to do so. Generally mediations in divorce or parenting cases with parties who have access to their own attorneys for education and advice usually are more successful than those in which the parties do not consult attorneys. Mediators function strictly as neutrals. They do not give legal advice or draft pleadings or other legal documents for the parties.

In terms of time and fees, usually mediation is the least expensive dispute resolution option available to parties who are not in a high conflict relationship. The level of conflict between the parties is an important factor regarding the probable success of mediation. The lower the level of conflict the greater the prospects are for the parties reaching a mediated solution. Also, as in Collaborative Family Law, cases involving domestic violence, child abuse or severe personality disorders are not very good candidates for success in mediation settings.

EARLY NEUTRAL EVALUATION

ENE is another new type of alternative dispute resolution intervention that is cost effective for spouses who want to terminate their marriage and do not fall into the class of high conflict, domestic violence or severe personality disorders. I find that a lot of couples who may want to terminate their marriage do not have any idea what is fair and equitable, or what options they may consider as alternatives to subjecting their children and financial resources to the negative impact of the adversarial process. They need information on the law and procedure involved in each option, as well as parenting plans, child and spousal support, and marital and separate property. In addition they want someone who will act as a neutral to give them suggestions or evaluative opinions regarding options.

Unlike CFL and Mediation, the primary goal of ENE is not the achievement of a settlement – it is education of the parties. An attorney who provides ENE services needs to have extensive knowledge of family law and years of litigation experience in domestic relations cases. Examples would be a former domestic relations judge or magistrate, or an OSBA Board Certified Specialist in Family Relations Law. The parties retain this type of attorney to act as a neutral to provide them with an early and realistic evaluation of the merits of their respective positions, and to suggest any reasonable alternative solutions they might consider. In addition, the ENE evaluator may assist the parties with the collection and exchange of necessary disclosures and discovery. However, the evaluator does not give either party specific, personal advice on what may be in his or her best interest, and does not draft any pleadings or other legal documents for the parties.

After the ENE education process is finished, the evaluator recommends to the parties that they return to their attorneys, if they already have them in place, or move into Collaborative Family Law or Mediation to negotiate the final terms of their separation agreement and parenting plan, if they are not yet represented. The main benefits of ENE are that the parties have saved a significant amount of money that otherwise would be spent on education and formal discovery during a litigated case, and they have had a "reality check" in the form of a non-binding evaluation of their circumstances by an experienced family lawyer. Then, they are better equipped to make enlightened decisions during the next phase of negotiations through mediation or their lawyers.

ARBITRATION

In domestic relations cases arbitration is authorized in Rule 15(B), Ohio Rules of Superintendence. Although this rule has been on the books since 1992, this writer's understanding is that arbitration has been used rarely in divorce cases as an alternative to reduce the negative effects of the usual docket delay and high expense involved in most litigated divorces. There are several probable explanations for this phenomenon.

As a practical matter, because in most cases the pot of marital property continues to expand right up to the date of trial, and there is no credit given to the ultimate payor of an award of spousal support for any payments of temporary spousal support while the case is pending final disposition, frequently there is no motivation for one party to accelerate the final hearing date by electing to do arbitration. The other major reason is that the Ohio Supreme Court held, in the syllabus of the case of *Kelm v. Kelm*, 2001 Ohio 168, 92 Ohio St.3d 223 (2001), "In a domestic relations case, matters of child custody and parental visitation are not subject to arbitration." Nevertheless, there are still some unanswered questions regarding the effect of the Kelm case decision, because the Supreme Court has never limited or changed the text of Superintendence Rule 15(B), and the terms "child custody" and "parental visitation" had been eliminated from Ohio statutory law before the decision was issued in the Kelm case. The new Supreme Court Advisory Committee on Children, Families and the Courts will be studying these problems later in 2005.

There are many advantages for divorcing parties to use arbitration as a dispute resolution intervention and substitute for the normal trial to the court in a litigated divorce case, and a few potential disadvantages.¹

This writer believes that, if the Supreme Court adopts appropriate modifications to Superintendence Rule 15(B), and the financial incentive for either party to stall on seeking an accelerated final disposition is eliminated from statutory law, eventually arbitration will become a more widely used and effective alternative dispute resolution intervention for parties to avoid some of the negative effects of the adversarial divorce court process.

Based on personal experience, extensive reading and the opinions of many other seasoned family lawyers, it is my belief that the vast majority of parties in litigated divorce cases would prefer to avoid the adversarial process if they are offered any reasonable alternative dispute resolution option that is effective and allows them to retain a personal feeling of dignity, integrity and self-respect. Unfortunately, the current adversarial method for processing a divorce case forces them into conduct that is counter-productive, as far as those goals and needs are concerned. However, there are alternatives available that help educate and guide those parties toward solutions that meet the needs of the parties and their children more effectively than our current litigation process. These needs and goals of the parties are of paramount importance, and deserve greater recognition and more wide-spread support from the bench and bar.

¹ "Why Don't We Arbitrate?" by Stanley Morganstern, OSBA Board Certified Specialist in Family Relations Law, in *Domestic Relations Journal of Ohio*, Vol. 14, Issue 2, March/April 2002, pp. 17-20.



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