Mediation and Arbitration
Alternatives to Litigation of Matrimonial Matters

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A commentator on alternative dispute resolution wrote 31 years ago that although matrimonial matters are a specialized area of law, "[p]arties most often wait up to two or three years to litigate a complex divorce involving property division or financial support among other issues."[1]

Another analyst wrote, 40 years ago:

> "The courts cannot handle all of the load now, and even if they could handle all of it well, the judicial process is too slow and too costly . . . Private mechanisms need to carry the bulk of the case load, if the whole dispute setting process is not to break down with serious consequences."[2]

Both of those comments are unfortunately applicable to the present resolution of matrimonial and family law matters in New York State. It is still a common complaint from judges, lawyers and especially litigants that it takes too long and costs too much to finalize matrimonial litigation. With no decrease in the divorce rate likely, it is clear that the delay that is now endemic in matrimonial actions will not abate, despite the often herculean efforts of the judges who preside in the dedicated matrimonial parts.

However, there are alternatives to litigating these disputes. The most prominent are negotiation between counsel, mediation and arbitration. This article assumes that negotiation has not been successful and proposes, as did both a special task force created by then Chief Judge Judith Kaye,[3] and the Miller Matrimonial Commission Report to the Chief Judge,[4] the use of mediation and arbitration as less expensive, more efficient, and ultimately more client-acceptable, alternatives to the resolution of matrimonial matters in the courthouse. The authors suggest it is time for lawyers in New York to more fully utilize these alternatives to matrimonial litigation.

Mediation is a consensual, confidential, neutral and informal proceeding that culminates in a mutually agreed upon resolution of the matrimonial dispute or any portion of the dispute. The authors do not suggest that divorcing couples proceed to mediation without counsel. Rather, properly understood and handled by a neutral mediator, the matrimonial attorney and the clients can work together with the mediator

The authors acknowledge the assistance of Jeanine M. Rooney an associate of Schlissel Ostrow Karabatos, PLLC and Jane Chen, a summer associate at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP and a 3L at the Maurice A. Deane School of Law at Hofstra University.

[1] Elkour, Frank, How Arbitration Works (BNA 1985), p. 8.

[2] Kerr, "More Peace-More Conflict," Proceedings of the 28th Annual Meeting of NAA, pp. 8, 14 (BNA 1976).

[3] New York State Bar Association Committee on Alternative Dispute Resolution, "Bringing ADR Into the New Millennium - Report on the Current Status and Future Direction of ADR in New York, at p. 18, et seq. (1999).

[4] Matrimonial Commission Report to the Chief Judge of the State of New York (2006).

to reach a fair resolution of the issues that might otherwise bind the clients to years of needless litigation expense and the angst that comes with the often-pitched battle that is matrimonial litigation.

From its inception, mediation of matrimonial disputes is self-guided because the parties have decided themselves to come to mediation for the very purpose of resolving their dispute. This measure of self-determination is understandably missing in our over-crowded matrimonial parts. Self-determination is an issue about which matrimonial litigants most often complain: 'someone not selected by us is telling us what to do with our home, our finances and our children'. This complaint can be eliminated from the outset. The parties, not the random selection wheel of the courthouse, select the neutral mediator – a person highly experienced and trained in matrimonial matters. Also, mediation affords the parties, together with their respective attorneys, the opportunity to craft the contract between the parties and the mediator that will govern the entire mediation process. Mediation of matrimonial disputes works because it encourages the parties to take some measure of responsibility for the outcome of their case and, at the same time, affords the parties the objective ear of the neutral who is solely dedicated to hearing their case. The neutral mediator facilitates the parties' willingness to communicate. If the neutral is engaged early enough, and before the parties' positions become intractable, the neutral mediator can offer the parties an objective assessment of the strengths and weaknesses of their cases. The neutral can also assist the parties through the discovery process. When the basic structure of the resolution is reached, the mediator can assist the parties and their attorneys in resolving disputes that may arise when drafting their final agreement. Once the final agreement is signed, it is no different than any other separation agreement or stipulation of settlement and may be enforced as a contract.[5]

Of course, a very important factor for many persons involved in matrimonial disputes is the privacy afforded by mediation. The mediator is bound to maintain the confidentiality of the proceedings. The mediation is conducted in a private and neutral setting away from the public square that the courthouse has become with the ubiquitous media looking for a story.

If the process of mediation does not result in the resolution of some or all of the issues, or if the parties choose to forgo mediation, they may agree to seek a resolution of the matter in the confidential setting of an arbitration forum. Indeed, they may agree to ask the neutral mediator to continue as the neutral arbitrator or they may opt to employ the services a new neutral arbitrator.

[5] See, e.g., Trolman v. Trolman, Glaser & Lichtman, 114 A.D.3d 617, 981 N.Y.S.2d 86 (1st Dept. 2014); Shah v. Wilco Systems, Inc., 81 A.D.3d 454, 916 N.Y.S.2d 82 (1st Dept. 2011); Graham v. New York City Housing Authority, 260 A.D.2d 541, 688 N.Y.S.2d 591 (2d Dept. 1999).

Why should parties choose to arbitrate rather than litigate? Matrimonial arbitration is, compared to litigation in the matrimonial courts, less costly, quicker, more efficient, private, and assures that the dispute will be determined by a person or persons who are experts in the family law field. It provides the divorcing couple with closure and the ability to move on with the rest of their lives.

Arbitration in the family law area is the process by which spouses, or even former spouses facing post-judgment issues, agree to submit one or more of the issues that need to be resolved to a neutral third party or parties outside the court system. Like mediation, arbitration has the distinct advantage of being a private and confidential process. Again, like mediation, the parties start from a perspective of self-determination because they, together with their attorneys, select the arbitrator and participate in the drafting of the contractual relationship between them and the arbitrator. The arbitration contract shapes the rights and obligations of the parties and the arbitrator, specifies the issues to be resolved by arbitration and establishes the timetable for doing so. Arbitration may be utilized throughout the matrimonial process, including during the discovery phase, or it may be utilized after all discovery is complete. Thus, the parties may refer the "trial" of all or select issues to be held before the designated arbitrator. Also, arbitration may be used to resolve post-divorce matters. It can (with some limitations -- see infra) address all outstanding issues, or just those the parties agree to submit to the arbitrator. Today, because of the burgeoning matrimonial dockets, it is not uncommon for litigants and their counsel to have to wait many months for the case to be tried notwithstanding the completion of discovery. Often, costly motion practice addressed to ongoing *pendente lite* issues occurs during that waiting period because of the contentious nature of most matrimonial disputes. Parties who select arbitration as a means of finally resolving their litigation can have their matter addressed within a very short period of time after engaging the arbitrator.

Arbitration is an adversarial process in which the litigation skills of the parties' attorneys remain important – but, they are utilized in a more private setting with a "judge" selected by the parties. Working closely with the arbitrator, matrimonial attorneys are better able to exercise control over pre-trial discovery, set a hearing time table and even set a date by which the arbitrator is to render the award, which they would otherwise not have the autonomy to do.

The cost of matrimonial law arbitration is almost always less than a trial in a civil court. This is because the cases are often resolved sooner and, thus, the parties will incur less legal fees. Delays are avoided because the parties' chosen "judge" is a private attorney or former jurist who will not have to interrupt the arbitration proceedings to attend to other litigants' emergency applications or proceedings. A private lawyer or former judge, acting as an arbitrator, or mediator, effectively provides a concierge service to the parties. The arbitrator more often has the ability to clear her or his calendar and conduct the hearing "day-to-day" and all day – this is simply not possible in many matrimonial parts due to the extraordinary caseloads. With "day-to-day" hearings, the additional legal costs necessarily incurred for duplicated preparation when the hearing isadjourned is reduced or even eliminated. Anecdotal evidence indicates that it is not uncommon to have an

arbitration hearing go full day to full day without interruption until completion. Upon completion, the attorneys are bound to submit their post-hearing memoranda and the arbitrator will render the award, all within the reasonable contracted-for deadlines.

There is the potential for significant cost savings by having the arbitrator involved very early in the process. Engaging an arbitrator to address and resolve discovery issues reduces the need for extensive motion practice in the courts, as most of the work can be accomplished in meetings conducted by the arbitrator with the parties and their attorneys. In the courthouse, the litigants, except in the rarest of circumstances, have no opportunity to personally address the presiding judge. This is another example of arbitration permitting the parties some measure of self-determination.

One additional cost difference is the fees of the arbitrator. For the long run, the attorney considering arbitration as a cost saving measure should present the client with a reasonable comparison of the costs expected to be saved by not proceeding in a matrimonial court, notwithstanding the additional fee of engaging an arbitrator.

While many arbitrations involve relaxed rules of evidence and procedure, that is often not advisable, especially in the family law area. What is suggested is that the arbitration contract specify which rules of evidence and procedure the arbitrator will be bound to follow. In fact, many ADR providers like NAM (National Arbitration and Mediation) have their own rules and procedures in place that also govern the arbitration process and which should be reviewed by counsel. Doing so resolves an oft-cited complaint about arbitration -- that an arbitrator need not follow the law. However, he or she must follow the rules set forth in the arbitration contract. Indeed, under CPLR article 75, the failure to adhere to the contract and acting outside the bounds of the specifically granted authority is a basis to upset the ultimate award.[6]

Yet another significant cost savings results from the finality and binding effect of the arbitrator's determination (subject only to limited review under CPLR Article 75, unless the parties specifically agree that there shall no review). Thus, post-determination motion challenges to the award and any appeal(s) are virtually eliminated. Inherent in the arbitration process is that the parties, with the guidance of counsel, will choose a matrimonial law expert as their arbitrator. Because the arbitrator is chosen by the parties, they may have greater confidence in the ultimate result. Thus, as with negotiated agreements, there should be significantly less incentive and ability to challenge or appeal arbitration awards since the parties have participated in choosing and shaping the process.

It is important to the ultimate success of matrimonial arbitration that the parties engage arbitrators with expertise the area of matrimonial law. This is a significant advantage of arbitration as opposed to court-resolved litigation. Many judges often spend only short periods of time sitting in a dedicated matrimonial part and thus, as a result, have less experience and expertise. Of course, those judges who dedicate themselves to

[6] CPLR 7511:. Bower v. Bower, 50 N.Y.2d 288, 428 N.Y.S.2d 902 (1980).

matrimonial law issues often develop such expertise but, unfortunately, they are burdened by very large caseloads.

As part of its support for matrimonial arbitration and to assure well-trained arbitrators, the American Academy of Matrimonial Lawyers ("AAML") has been training its Fellows to be arbitrators since 1991. As of September 2015, the AAML had certified over 300 Fellows as matrimonial arbitrators. The AAML training is an extensive program designed to prepare the Fellows, all of whom have a substantial number of years of experience as matrimonial lawyers, to act as arbitrators themselves or to represent clients who decide to participate in matrimonial arbitration. The AAML has created a "Model Family Arbitration Act and Rules", which can be found at the AAML website[7], as well as recommended forms for matrimonial arbitrations.

Another benefit to any arbitration, and especially matrimonial arbitration, is the fact that it is private. It can be done in the arbitrator's private office, often in a conference room. It is "behind closed doors". Privacy is often a crucial factor for many involved in divorce litigation, whether it is a desire to keep finances private, or the potential for embarrassment due to a "personal situation". While certain New York laws seek to assure the privacy of divorce litigation, too often details find their way to the media because the courtrooms are open to the public, including the media. A person of public or media interest who wishes to keep financial and personal aspects of her or his divorce private would be well-advised to consider arbitration before commencing litigation in civil court.

There are limited aspects of matrimonial disputes for which arbitration cannot be final and binding in New York. Thus, while parties can agree to arbitrate custody and visitation issues, the arbitrator's determinations of such issues are not final and binding on the parties. Indeed, New York Courts have held that their jurisdiction as *parens patriae* to determine the best interests of the children involved cannot be usurped.[8] Nevertheless, the parties may, acting rationally, accept the recommendations of the arbitrator as a means of resolving the custody and visitation issues and incorporate those recommendations or some variance thereof in a separately negotiated agreement.

Similarly, some courts do not approve of the arbitration of child support issues.[9] Great care should be taken to assure that any child support issues are arbitrated subject to rules governing child support awards, including those now set forth in the Child Support Standards Act and the case law interpreting that Act.[10] Again, this is a matter of drafting the arbitration contract appropriately so that the arbitrator can apply the relevant law.

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[7] www.aaml.org.

[8] See, e.g., Weisz v. Weisz, 123 A.D.3d 917, 999 N.Y.S.2d 1336 (2d Dept. 2014); Glauber v. Glauber, 192 A.D.2d 94, 600 N.Y.S.2d 740 (2d Dept. 1993).

[9] See, e.g., Berg v. Berg, 85 A.D.3d 952, 927 N.Y.S.2d 83 (2d Dept. 2011); Matter of Hirsch v. Hirsch, 4 A.D.3d 451, 774 N.Y.S.2d 48 (2d Dept. 2004).

[10] See, e.g., Berg v. Berg, supra; Matter of Hirsch v. Hirsch, supra.

As it is obvious that litigants do not want to spend three to five years in a courtroom arguing over their divorce-related issues, matrimonial lawyers with experience in alternative dispute resolution should be consulted at the earliest stage of their separation or divorce situation. In the best interests of matrimonial clients and their families, the time has come for the bar to embrace the use of mediation and arbitration as viable, efficient, cost-effective and self-guided means of effectuating closure for their clients.

Originally written on behalf of NAM (National Arbitration and Mediation) for The New York Law Journal Matrimonial Special Report published on July 25, 2016.

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