



ALTERNATIVE DISPUTE RESOLUTION: YOU HAVE CHOICES IN THE PROCESS YOU USE TO RESOLVE YOUR FAMILY LAW DISPUTES

BY MARIE A. PULTE & REBECCA TOOMAN
MARIE A. PULTE, P.C.

Introduction

Many people assume that the Judge will be making the decisions when they file a divorce, custody, support, or other family law case. In fact, only about 1–2% of all family law cases end up in a trial where the judges make the final decisions. The vast majority of cases are resolved by agreement of the parties.

Generally, subject to basic parameters set by the laws of the state, the Courts will approve of agreements reached by parties, and will enforce those agreements if either party later fails to live up to what they have said they will do. You should know that you have several choices to consider in working toward reaching an agreement. Among your choices are processes that are referred to as “Alternative Dispute Resolution” (ADR). Using ADR can save money, time, and stress, and can help a family that is in distress during the painful process of divorce or other family conflicts, to build toward healing and a positive future. ADR can also create a forum for parties to explore creative solutions that only they could formulate, given their own unique, personal circumstances.

In particular, two ADR processes are used very frequently and successfully in family cases. These are mediation, which has been used for decades in all kinds of situations, and Collaborative Law, which is a relatively new model, that can be extremely helpful in family situations. While there are other types of ADR processes, this article will focus on mediation and Collaborative Law.

The first step in exploring what process you may want to follow to reach an agreement in your case is to discuss the options with your attorney. An attorney experienced with family cases should be able to get information from you to better understand your situation and then explain the advantages and disadvantages of different types of ADR for you. To help you prepare for a discussion of ADR with your attorney, the following describes Mediation and Collaborative Law in more detail.

Mediation

Mediation is an informal process where the parties

participate to reach a negotiated agreement with the assistance of a neutral mediator. The mediation session or sessions usually take place at the mediator’s office but can also occur at different locations including the court. The parties may be in the same room or in separate rooms, depending on the situation, or could combine both of these arrangements. Mediation sessions may occur with or without the presence of the attorneys but it is always advisable to at least have an attorney provide advice both before and in between mediation sessions. The mediator may sometimes speak alone with one party or meet with just the attorneys. Mediation is a relatively fluid process and the people involved in the process may meet in any combination that is appropriate to their situation. When the parties are represented, the attorneys may be asked to provide a summary of the case to the mediator. The complexity of the issues and the parties’ cooperation are factors to determine the number and length of sessions necessary to settle the matter.

If there is a situation involving domestic violence or a very imbalanced relationship, where one party might not feel safe or comfortable with the process, then mediation may not be the best option for resolving the disputes, or if it is used, it should be tailored for that particular case. The initial screening stage offers an opportunity to discuss the dynamics of the relationship, along with the nonbinding structure, an overview of the process, and options.

Often, parties will agree to attend mediation even before the case is filed or without the court’s intervention. Once a case has been filed, if the parties have not attended mediation and appear before the court with unresolved issues, the court may order the parties to try to settle the case through mediation.

The mediator is a neutral third-party and does not make decisions for the parties. The mediator assists by setting ground rules, helping to establish the key issues to be resolved, creating a forum for discussing and exploring possible solutions, and using problem solving skills to help the parties communicate, to come up with mutually acceptable solutions to their issues.



The discussions during mediation are confidential. Neither the mediator, or the parties or their attorneys are allowed to reveal to the court what was discussed. This confidentiality helps promote more open communication and the exploration of options that might not otherwise be discussed by a party if they knew the court would be hearing about it.

Discussions between the participants in the mediation process, however, are generally open to being disclosed to all of the other participants, so if a party is talking separately with the mediator and discussing something that the party would prefer not be shared, that party should first check with the mediator to ensure that the information will be kept confidential.

If the parties are able to settle all or part of their issues at mediation, the mediator will prepare a draft written agreement which should always be reviewed and approved by both the parties and their attorneys prior to the agreement being signed. Once signed, the agreement becomes legally binding on both parties and will be incorporated into a court order or judgment.

If the parties are not able to reach an agreement, the next step depends upon whether the mediation was court ordered or not, and whether it is evaluative or not. If it is a court ordered, evaluative mediation, the mediator will also prepare a written evaluation, making specific recommendations for settlement for use by the parties and their attorneys. Evaluative mediation can only be ordered upon consent of the parties. The written evaluation may only be shared with the court if both sides agree. If either side does not agree to share the contents with the court, then the court does not see it and is not allowed to know which party did not want the evaluation to be revealed.

If it was court ordered, non-evaluative mediation, then the mediator is required to inform the court of when the parties met for mediation, who participated, whether or not they settled, and if they did not settle, then whether additional mediation is anticipated. No other information may be provided.

The mediator cannot be called as a witness in the case and the options discussed at mediation cannot be revealed to the court.

There are many styles of mediation but the two most common are facilitative and directive. The style of mediation you choose depends on the type of the dispute, how close the parties are to a scheduled trial date (as this may impose time limits on the mediation process), the style of mediation practiced by a particular mediator, and the preference of the parties and their attorneys.

In *facilitative* mediation, the mediator's opinion of how a matter should be resolved is generally not expressed.

Instead, the mediator focuses on the parties' ideas and tries to help the parties reach their own mutually acceptable resolution, (of course, with the help and advice of their attorneys).

In *directive* mediation, the mediator often shares with the parties and counsel their opinions on certain issues and facts. They often use their own judgment in suggesting solutions and tend to direct the parties toward specific resolutions. Some may find the mediator's injection of their opinions during the process as helpful; some may not.

There are also many hybrids of these common mediation styles. For example, the mediator may attempt to be facilitative and focus the parties on coming up with their own solutions, but occasionally provide direction when the parties have exhausted their own list of ideas without finding a solution.

The Michigan Court Rule regarding mediation in domestic relations cases is MCR 3.216. While the court rule makes a distinction between evaluative and non evaluative mediation, it does not distinguish between facilitative and directive styles of mediation. Regardless of what style is used, the mediation could also be evaluative if the parties consent.

It is important to know whether the mediator can provide the parties with the type of assistance they are looking for whether it be a facilitative mediation (assisting the parties to primarily come up with their own ideas), a directive mediation (suggesting to the parties what the mediator thinks they should do), an evaluative mediation (making a recommended resolution at the end if not resolved by the parties), or something in between. There are many other details related to different types of mediation which are beyond the scope of this article.

It is also important to consider when mediation will occur. In general, if the parties mediate before a case is filed, or early on in the process, there is greater time available to work through problems to a mutually acceptable solution. There is usually less animosity and more of a likelihood of success. Some people choose to mediate later in the case when all information has been gathered or exchanged. Often, mediation is not scheduled until the eve of trial when both parties may feel pressured. If started early, the mediation process itself can be used to make sure that complete information is exchanged in a timely manner. Early stage mediation allows the parties to have time to express their viewpoints, concerns and requirements to reach an agreement, while giving one another time to breath.

Mediations conducted in the later stages of the court case tend to be more directive because the parties have often become more entrenched in positions instead of openly discussing ideas. The mediator is forced to rush the process because everyone's back is against the court house wall.



Mediation offers an opportunity for both parties to find ways to discuss and listen to each other regarding important family issues in a responsive manner which generally results in resolution that is customized to meet their own needs and helps to create a foundation for future discussions.

A mediator can be chosen by agreement of the parties and counselor one of the parties can ask the court to choose one from an approved court list. If the judge suggests a mediator and the parties do not agree with the suggestion, the court ADR clerk will appoint the next mediator on the court approved list. Preferably, a mediator is chosen by the parties and their attorneys, based on their belief that particular mediator is best suited for their case.

Mediators can be found from a variety of sources such as general advertising, word of mouth, suggestions from attorneys, etc. There is a list of trained mediators, listed by county, at www.familymediation.com. The courts also have lists of mediators. Often the attorneys can agree upon a mediator who they have had positive experiences with in the past.

Collaborative Law

One of the newer forms of ADR is Collaborative Law. It has been practiced successfully for years in many other states and in other countries including Canada. It started around fifteen years ago and has been used in Michigan for three years. This process occurs before a case is filed with the court. Initially, both parties and both attorneys sign a contract which states that the attorneys are being retained for the purpose of assisting the parties in settling the case. They agree that they will not go to court, other than to file the case after the agreement is reached. Once filed, they will prepare and have a judgment entered based upon the agreement.

There are other participants who may also be involved in the process. Depending on the case, they may include; mental health professionals in the capacity of a divorce coach for either party, or as a child specialist assisting with children's issues; and financial experts acting as a neutral and assisting both parties, or as a financial coach to one of the parties. A mediator is often used as well. All of these participants must have first been trained in Collaborative Law to assist parties going through this particular ADR process and are considered part of a team. Each side is required to have an attorney for the process. The parties then decide, with their attorneys, whether other professionals are needed and if so, to what extent. Having all of the optional team members allows all of the needs of the parties to be met in the family law process, such as the emotional, and financial concerns, and not just from a legal standpoint. More information about the roles of these participants and a listing of trained professionals can be found at www.collaborativelawmichigan.com

Another main requirement of the Collaborative Law agreement is that the parties voluntarily disclose all pertinent information including assets, liabilities, sources of income, etc. This process usually involves a series of meetings with both parties and both attorneys. Some Collaborative attorneys involve a mediator in the process right from the start. All of the other team members may also be involved at various points at meetings, sometimes with the attorneys and sometimes not. Divorce, even when using Collaborative Law, can be very difficult to go through for most people. They may want a divorce coach to assist them in dealing with the emotional aspects of the process and in communication between the parties. The coach may meet with a party individually between Collaborative Law meetings to give advice, or may actually come to the meetings to assist in a more direct manner. The same is true of the other team members who can participate at various levels.

If a Collaborative Law case does not result in resolution, the parties are required by the contract to hire new attorneys to proceed to court. The initial reaction of many people when they hear this, is that it sounds like it could be very expensive. On the contrary, the attorneys hired for the Collaborative Law process, know that they will not be going to court to argue motions, taking depositions, preparing for trial and performing many other tasks that often have to be performed because of the deadlines imposed once the case is filed with the Court. This can be very costly. The Collaborative Law contract, that the attorneys must withdraw if settlement is not reached, stops either side from engaging in threats to take the other side to court whenever any small glitch occurs in the process. When attorneys are hired in the traditional court setting, oftentimes they have to perform in an adversarial manner, spending many hours that turn out to not be necessary because of the uncertainty of whether they will ultimately have to go to trial. The Collaborative Law process takes that pressure off the attorney and the parties.

Collaborative team members are often also skilled at working in the traditional court setting. In litigation, often each side would hire his or her own expert who, more often than not, would end up with differing viewpoints. This creates conflict and often results in no resolution. In the Collaborative Law setting, the parties often jointly hire the expert as a neutral as opposed to an adversary against one party or the other. Every Collaborative team members signs an agreement that they will work to help the parties come together in agreement instead of working at polarizing them. If the case does not settle in the Collaborative Process, no team member may go to court. As a result all team members are very focused on settling.

Family law cases benefit from the Collaborative Law process by helping to maintain as much of a family relationship as possible. Just as with mediation, it puts the results in the hands of the parties, is likely to keep costs down, maintains



privacy, often improves communications, and results in agreements that the parties are very likely to follow. It also increases the likelihood that parties will resolve future issues without having to go to court.

Benefits of using ADR instead of the traditional court process

ADR can be used to find solutions to a wide variety of family law issues ranging from all aspects of divorce, custody, paternity, guardianship, parent-child relations, property disputes, etc. ADR can happen by agreement of the parties or in some cases by having the judge order the parties to participate. ADR can be used at most stages of a court case and can even be used before a case is filed in the court, if it is by agreement of the parties.

You design and control the outcome. In mediation and Collaborative Law, the parties are the ultimate decision makers. While the judges will do their best to decide what they feel is right in your case, the results could very well be unexpected and disappointing to both sides. Even though your attorney can offer a range of what might happen if you go to trial, he or she cannot guarantee any specific results and parties are often not happy with the outcome.

ADR processes are private. The parties usually meet in the attorney's or mediator's office. The courts are public and the reality is that other individuals walk in and out of the courtroom constantly to conduct other business and may observe any hearing or trial. Papers filed by the attorneys during the case become a part of the public court record. Once the trial is final, the details are also available to the public.

ADR processes may allow the parties focus on communicating with each other. The parties want to be in the same room together, having discussions and voicing and listening to both side's concerns. ADR providers are typically trained to assist the parties in communicating with each other, as opposed to the courtroom where the attorneys argue to the judge for the parties. Several cases are often scheduled in the court at the same time giving the court limited time to hear your case, and often the parties do not feel as though they were heard by anyone, let alone the other party.

ADR promotes maintaining civil relationships. It helps the parties to go on as a "redesigned" family after the divorce process and allowing the children's needs to remain at the forefront.

ADR promotes workable solutions. Agreements reached through mediation are more likely to be followed by the parties because they have had a chance to consider the options and select the scenario that works best for them, as

opposed to being forced to accept a decision which has been imposed upon them by the court and which neither party may like.

ADR promotes good problem solving habits. Future disputes are more likely to be resolved without court intervention and costs because parties often learn communication and mediation skills during the process which can be used going forward and keep the parties out of court.

ADR can save money. It can be more cost effective in the long run because it focuses everyone's efforts on resolving issues instead of preparing for the court to make decisions by arguing positions, preparing for a trial, etc. In addition to the attorneys and the ADR provider, the processes often include other professionals such as child specialists and other mental health professionals, appraisers, financial professionals, etc. These are all the same people who can be involved in the court process but with ADR, they are more often retained jointly by the parties and are also focused on resolution instead of each party retaining separate professionals to arguing or support either party's position.

Choosing an Attorney for ADR

Often, the first professional a party will contact regarding their family law issue, is an attorney. If a party wants to use ADR for their disputes, it is important to first understand the different types of ADR available today and to have a discussion with the attorney about the attorney's knowledge and experience with the ADR processes. It is also important to know the attorney's opinion of ADR. Some attorneys philosophically, are not strong proponents of ADR and prefer the traditional court process. You should also discuss with your attorney whether your case requires the attorney to be at every mediation session with you, or if some sessions can include just the mediator and the parties with the parties receiving guidance (coaching) from the attorneys before and after each session.

Also, find out whether the attorney will represent you at the ADR sessions or work with you behind the scenes if the choice is made to sometimes attend sessions without the attorneys.

Choosing an ADR Professional

It is also important to find the right qualified individuals to conduct ADR sessions. There are many types of professionals available to perform ADR with varying levels of training and experience. Many family law attorneys are also trained mediators, arbitrators. A growing number are also trained in Collaborative Law. However, an attorney cannot act as both an attorney for a party and a neutral ADR provider in the same case. Therefore, when you consult



with an attorney who is also an ADR provider, you should clarify what role you are contacting that person for. Once an attorney provides you with legal advice, he or she can no longer be a neutral ADR provider in your case.

Many non-attorneys are also trained in solving disputes with ADR such as social workers, psychologists, other individuals trained in mental health, and financial professionals.

Just as when you hire an attorney or other professional, you should investigate the ADR provider you are considering.

ADR Costs

The ADR costs and fees are established by each individual professional involved in the process such as the arbitrator, mediator, therapist and attorneys. Many may charge an hourly rate and most request a retainer; money paid at the outset to cover initial fees and expenses. Some attorneys may accept a reduced retainer when they know the parties are interested in ADR as opposed to traditional court procedure, because the clients are focused on settling and avoiding higher court fees and costs.

Arbitration

Finally, a discussion of ADR processes used in family cases would not be complete without mention of Arbitration, which is different from Mediation and Collaborative Law in that it is not a negotiation process. It is binding and basically puts the judge's decision making authority into the hands of a mutually agreeable arbitrator. The court can only order parties to go to arbitration if the parties agree. An arbitrator is a neutral attorney that hears the dispute then provides a final decision or award. Before the case is put into arbitration, the parties must sign an Affidavit regarding their legal rights in the arbitration process and which are detailed in Michigan Compiled Laws Annotated (MCL) 600.5070 et seq.

There is also a court order which states that the parties are agreeing to arbitration, identifies and appoints the arbitrator, specifies the issues to be addressed, how fees will be paid, etc. There is also an Arbitration Agreement signed by the parties specifying the arbitrator's powers and duties and providing details regarding the rules and procedures for the process itself. This agreement must be signed before arbitration starts.

Parties cannot choose their judge. Their judge must follow the strict rules and procedures set out in statutes, court rules, and rules of evidence. The arbitration process is less formal than a court hearing or trial. The parties have the option to create their own procedures and evidence standards. Arbitration is an option only if both parties consent to the process. If the parties consent, the arbitrator's decision

is binding which means the arbitration decision will be honored by the courts and incorporated into a final judgment or order. It is then enforceable by the court.

Arbitration hearings are conducted in the arbitrator's office, providing privacy that does not exist in the public court setting. While the parties pay for the arbitrator's time, the hearings are scheduled to accommodate everyone involved in the process, and will generally start and end on time. In the court setting, the parties do not pay the judge but they do pay for their attorneys' time. Typically, the judge, not the attorneys, decides when the case goes to trial. What can often happen is that several cases are scheduled for the same day. There may be significant time that the parties have to pay for their attorneys to wait for their case to be called. Sometimes a trial is adjourned at the last minute because the judge is still handling a different case.

Your rights to appeal an arbitrator's award to the Court of Appeals, are more limited than if you are appealing a judge's decision. This limitation may be both a benefit and disadvantage depending on the circumstances. Additional information regarding the Michigan arbitration laws including the right to modify or appeal an arbitration award may be found in Chapter SOB. Domestic Relations Arbitration located in the Michigan Compiled Law §600.5070 – 600.5082.

Summary

The ADR processes empower the parties to make their own decisions in a private manner, often at their own pace, and customized to meet their own needs. Other benefits are a variety of skilled professionals to assist in the processes, lower costs, a process paced by the parties, with increased participation by the parties and simplified procedures.

Effective use of ADR processes will help the parties maintain civility, during and after the case, and avoid a lengthy, costly, traditional trial which almost always results in further deterioration of relationships between the parties and significant trauma to children. ADR is a rapidly growing area because of these benefits. It works, and as a result is recommended by most family law attorneys. It would be very advantageous to check out the various options available to resolve your family law disputes in a family friendly manner.

References

Bookholder, Ronald M., (2001). "ABC's of Domestic Arbitration – Michigan Style and the New Arbitration Act," *Michigan Family Law Journal*, 22 – 23.

MCL 600.5070 – 600.5082 (2006).



Moore, Christopher W., (2006). "Negotiation," <http://www.au.af.mil/au/awc/awcgate/army/usace/negotiation.htm>

Morganroth, Fred, (2001). "Alternate Dispute Resolution – When to Use It and When to Decline It," *Michigan Family Law Journal*, 40 – 44.

Rubin, Melvin, (2006). "Collaborative Family Law –Description," <http://www.mediate.com/melrubin/pg21.cfm>

Schachner Chanen, Jill, (2006). "Collaborative Counselors – Newest ADR Option Wins Converts, While Suffering Some Growing Pains," <http://www.abajournal.com>

