HOW TO USE ARBITRATION AND OTHER ADR PROCEDURES
IN
TEXAS FAMILY LAW

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CHAPTER 52

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I. INTRODUCTION

"...there are good reasons to doubt whether the adversarial system of justice should remain the only widely utilized method of dispute resolution in this country. ...The twin demons of expense and delay... are a brooding omnipresence overshadowing the adversary system. ...Adversarial conflicts should be - like war - the last resort. ...Alternative Dispute Resolution, including mediation, arbitration and other court-sponsored procedures designed to settle conflicts early and less expensively than the adversary system, represents the best chance for addressing the deficiencies of the adversary system. Judges, lawyers and non-lawyers alike must convince those who are either uninformed or misinformed that ADR does not represent a threat to the right of trial by jury or threaten anyone's livelihood or turf, but rather is designed to resolve unresolved conflict. ...ADR represents the best hope we have for addressing the glaring deficiencies of the modern adversary system and easing the pain experienced by those the legal system is supposed to serve."  John Cornyn, former Texas Supreme Court Justice and present Texas Attorney General, Address to the American Bar Association on Needed Reforms of the Civil Justice System.

Both Title 1 (spouses and property) and Title 5 (parent and child) of the Texas Family Code encourage the agreed resolution of family law matters.

"To promote amicable settlement of disputes in a suit for divorce or annulment of a marriage, the spouses may enter into a written agreement concerning the division of the property and liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under some other rule of law".  TEX. FAM. CODE ANN. § 7.006(a)

"To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for conservatorship and possession of the child and for modification of the agreement, including variations from the standard possession order".  TEX. FAM. CODE ANN. § 153.007(a)

Are there viable options to the resolution of Texas family law disputes other than trial?

Yes! - and the relief can be found in Texas statutory law.

This article provides an overview and update of the alternative dispute resolution (ADR) procedures in Texas and addresses their applicability to family law with statutory references, case law, commentary, and practice aids.

II. TEXAS ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ACT

In 1987, the Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. §152.001, et seq., was enacted and Texas courts began to refer pending litigation to one of the five statutory dispute resolution processes provided in the Act: mediation, arbitration, moderated settlement conference, summary jury trial, and mini-trial. Texas was one of the early states in enacting ADR legislation and today remains a leader in ADR procedures.

A. POLICY. It is the policy of the State of Texas to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.  TEX. CIV. PRAC. & REM. CODE ANN. §154.002.

A party to a proceeding under Title 1 (spouses and property) and Title 5 (parent and child) of the Texas Family Code must include the following statement in bold face type or capital letters or be underlined in the first pleading filed by the party:
"I AM AWARE THAT IT IS THE POLICY OF THE STATE OF TEXAS TO PROMOTE THE AMICABLE AND NON-JUDICIAL SETTLEMENT OF DISPUTES INVOLVING CHILDREN AND FAMILIES. I AM AWARE OF ALTERNATIVE DISPUTE RESOLUTION METHODS, INCLUDING MEDIATION. WHILE I RECOGNIZE THAT ALTERNATIVE DISPUTE RESOLUTION IS AN ALTERNATIVE TO AND NOT A SUBSTITUTE FOR TRIAL AND THAT THIS CASE MAY BE TRIED IF IT IS NOT SETTLED, I REPRESENT TO THE COURT THAT I WILL ATTEMPT IN GOOD FAITH TO RESOLVE BEFORE FINAL TRIAL CONTESTED ISSUES IN THIS CASE BY ALTERNATIVE DISPUTE RESOLUTION WITHOUT THE NECESSITY OF COURT INTERVENTION". 

This statement must be signed by the party (not by the attorney). First pleadings include petitions, answers, and post-divorce original motions and responses. TEX. FAM. CODE ANN. § 6.404 AND § 102.0085

B. RESPONSIBILITY. It is the responsibility of all trial and appellate courts and their court administrators to carry out this policy. TEX. CIV. PRAC. & REM. CODE ANN. §154.003.

C. PROCEDURES. A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure, including an alternative dispute resolution system, a dispute resolution organization, or an impartial third party qualified under this Act. The court shall confer with the parties and determine the most appropriate alternative dispute resolution procedure. The Court may not refer if a motion to transfer venue or special appearance is pending. TEX. CIV. PRAC. & REM. CODE ANN. §154.021.

The court or counsel are authorized to recommend that a case be referred to ADR procedure, but the court may refuse referral if it determines that the proposed referral would not benefit the court or parties, and would delay the orderly disposition of the case. Downey v. Gregory, 757 S.W.2d 524 (Tex. App. - Houston [1st Dist.] 1988, no writ).

Litigants can be compelled to participate in an ADR procedure over their objections, but they cannot be forced to make good-faith efforts to settle their case during it. A court order may refer a dispute to an ADR procedure, but may not require good-faith negotiation or settlement. The Act contemplates mandatory referral only, not mandatory negotiation. Decker v. Lindsey, 824 S.W.2d 247 (Tex. App. - Houston [1st Dist.] 1992, no writ).

If a court determines that a pending dispute is appropriate for referral, the court shall notify the parties. A party may, within 10 days after receiving such notice, file a written objection to the referral. If the court finds that there is a reasonable basis for the objection, the court may not refer the dispute. TEX. CIV. PRAC. & REM. CODE ANN. §154.022.

If a party objects to the mediation referral on the basis of family violence having been committed against the objecting party by the other party, the court may not refer the suit to mediation unless, on request of the other party, a hearing is held and the court finds that a preponderance of the evidence does not support the objection. If the suit is referred to mediation, the court shall order appropriate measures to be taken to ensure the physical and emotional safety of the objecting party, including no face to face contact between the parties and separate rooms during mediation. TEX. FAM. CODE ANN. §§6.602 AND §153.0071

An objecting party must be provided 10 days to file objections once the court determines that ADR is appropriate and may not be ordered to participate in mediation within that time. Keene Corp. v. Gardner, et al, 837 S.W.2d 224 (Tex. App. - Dallas 1992, writ den'd).

Mediation, mini-trial, moderated settlement conference, summary jury trial, and arbitration are the statutory alternative dispute resolution procedures provided for by the Act. TEX. CIV. PRAC. & REM. CODE ANN. §§154.023-154.027.

For a comparative analysis of the statutory ADR procedures, see Chart 1-2, from the Handbook of Alternative Dispute Resolution by the State Bar of Texas (2nd Edition, 1990) at Appendix 1.

D. IMPARTIAL THIRD PARTIES. If the court refers a pending dispute for resolution by alternative dispute resolution procedure, the court may appoint an impartial third party to facilitate the procedure. The impartial third party
may be agreed upon by the parties if qualified under the Act. More than one impartial third party may be appointed. TEX. CIV. PRAC. & REM. CODE ANN. §154.051.

**To qualify as an impartial third party** under the Act, a person must have completed a **minimum of 40 classroom hours of training in dispute resolution techniques** in a course conducted by an alternative dispute resolution system or other dispute resolution organization approved by the appointing court. To qualify as an impartial third party in parent-child relationship disputes, a person must complete the **40 classroom hours of training plus an additional 24 hours of training in the fields of family dynamics, child development, and family law**. A court has the discretion to appoint an impartial third party who is not qualified under the Act in appropriate circumstances when the appointment is based on legal or other professional training or experience and, particularly, dispute resolution processes. TEX. CIV. PRAC. & REM. CODE ANN. §154.052.

Appointed impartial third parties shall encourage and assist the litigants in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement. Impartial third parties may not disclose to either party information given in confidence by the other unless expressly authorized by the disclosing party, and shall at all times maintain confidentiality with respect to communications relating to the dispute subject matter. All matters, including the conduct and demeanor of the parties and their attorneys during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court, unless the parties agree otherwise. TEX. CIV. PRAC. & REM. CODE ANN. §154.053.

The court may set a reasonable fee for the services of an impartial third party appointed under the Act. The court shall tax the fee for the services of an impartial third party as other costs of suit unless the parties agree otherwise. TEX. CIV. PRAC. & REM. CODE ANN. §154.054.

The Act provides a qualified immunity from civil liability for any act or omission within the course and scope of duties of a volunteer impartial third party who does not receive compensation in excess of reimbursement for expenses incurred. TEX. CIV. PRAC. & REM. CODE ANN. §154.055.

E. SETTLEMENT. If the parties reach a settlement and execute a **written agreement** disposing of the dispute, the agreement is **enforceable** in the same manner as any other **written contract**. The court, in its discretion, may incorporate the terms of the agreement in the court's final decree or order disposing of the case. A settlement agreement does not affect an outstanding court order unless its terms are incorporated into a subsequent decree or order. TEX. CIV. PRAC. & REM. CODE ANN. §154.071.

No agreement between the attorneys or parties will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record. TEX. R. CIV. P. 11.

An agreement in a divorce concerning the division of property and liabilities of the spouses and maintenance of either spouse, may be revised or repudiated prior to rendition unless it is binding under some other rule of law. Its terms are binding on the court unless the court finds it is not just and right. If not just and right, the court may request the parties to submit a revised agreement. TEX. FAM. CODE ANN. § 7.006.

In an agreement containing provisions for conservatorship and support of a child, the court may request the parties to submit a revised agreement, or the court may make orders for the conservatorship and support of the child if it finds the agreement is not in the child's best interest. If the court finds it is in the child's best interest, its terms shall be set forth in the decree and the parties shall be ordered to perform them. The terms of the agreement are enforceable as a judgment but not as a contract. TEX. FAM. CODE ANN. § 153.007

A mediated settlement agreement is **binding** on the parties if the agreement provides in a separate paragraph an underlined statement that the agreement is not subject to revocation, is signed by each party to the agreement, and is signed by the parties' attorney, if any, who is present at the time the agreement is signed. If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. This applies to both Title 1 (spouses and property) and Title 5 (parent and child) actions. TEX. FAM. CODE ANN. § 6602 and § 153.0071. If these requirements are met, a party can't withdraw consent before the trial court renders judgment based on the agreement. Spinks v. Spinks, 939 S.W.2d 229 (Tex. App. - Houston [1st Dist.] 1997, no writ). Where a mediated settlement agreement meets these requirements, a trial court is required to enter judgment on the mediated settlement agreement even if one party withdraws consent to the agreement. Alvarez v. Reiser, 958 S.W.2d 232 (Tex. App. Eastland 1997, no writ).
In order for an agreement reached in mediation to be enforceable, it must be in writing and signed by the parties. Until it is, the parties have the right to revoke their consent. A party's reluctance or refusal to sign a mediated agreement is not a breach of good faith in the mediation. Oral representations in ADR procedure are non-binding and privileged. Rizik v. Mallard, 810 S.W.2d 318 (Tex. App. - Houston [14th Dist.] 1991, no writ).

A party who has reached a settlement and executed a written agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement. It is binding pursuant to §154.071(a). The court must accept the express terms of the agreement as binding "unless it finds that the agreement is not just and right" pursuant to TEX. FAM. CODE ANN. §7.006(b). Absent such finding, the court is bound to accept the agreement and cannot add terms to its divorce decree that were not in the agreement. Ames v. Ames, 860 S.W.2d 590 (Tex. App. - Amarillo 1993, no writ); see also, In the Matter of the Marriage of Banks, 887 S.W.2d 160 (Tex. App. - Texarkana 1994, no writ).

A court cannot enter a consent decree in a divorce action after one spouse repudiates an agreement reached in court-ordered mediation. However, the other spouse retains an action for breach of contract against the repudiating spouse which can be tried contemporaneously with the divorce suit. Remedies include both contract damages and specific performance. Cary v. Cary, 894 S.W.2d 111 (Tex. App. - Houston [1st Dist.] 1995, no writ).

Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Texas Rule of Civil Procedure 11, even though one side no longer consents to the settlement. The judgment is not an agreed judgment, but rather is a judgment enforcing a binding contract. Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995).

The court can enforce a repudiated mediation agreement as a contract, but an action to enforce a settlement agreement, where consent is withdrawn, must be based on proper pleading and proof. The only methods existing to enforce a contract and obtain a judgment are: (1) summary judgment proceedings, if no fact issue exists; and (2) trial, jury or non-jury, if a fact issue exists. Davis v. Wickham, 917 S.W.2d 414 (Tex. App. - Houston [14th Dist.] 1996, no writ).

F. CONFIDENTIALITY. Alternative dispute resolution procedure communication relating to the dispute subject matter, whether before or after the institution of litigation, is confidential, is not subject to disclosure, and may not be used as evidence against the participant. Any alternative dispute resolution procedure record is confidential, and the participants or the impartial third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the dispute matter or be subject to process requiring disclosure of confidential information or data relating to or arising out of the dispute matter. Alternative dispute resolution procedure oral communication or written material is admissible or discoverable if admissible or discoverable independent of the procedure. Issues of confidentiality may be presented to the court with jurisdiction to determine, in camera, whether a protective order or disclosure is warranted. TEX. CIV. PRAC. & REM. CODE ANN. §154.073.

Disclosures made in the ADR procedure are confidential and not subject to disclosure. Williams v. State of Texas, 770 S.W.2d 948 (Tex. App. - Houston [1st Dist.] 1989, no writ).

III. OTHER TEXAS ALTERNATIVE DISPUTE RESOLUTION STATUTES

Other Texas statutes providing for ADR procedures include the Texas General Arbitration Act (TEX. CIV. PRAC. & REM. CODE ANN. §§171.001 - 171.098); Settlement Weeks Act (TEX. CIV. PRAC. & REM. CODE ANN. §§155.001-155.006); and Trial by Special Judge Act (TEX. CIV. PRAC. & REM. CODE ANN. §§151.001-151.0013).

IV. TEXAS ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Texas ADR procedures fall into three broad categories. These are mediative (mediation), adjudicatory (arbitration and trial by special judge) and evaluative (moderated settlement conference, mini-trial, summary jury trial and settlement weeks). These processes can be modified, combined or specifically tailored to any individual case (e.g., see Section VII on page 16).

A. MEDIATION. Mediation is a forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. The mediator may not impose his or her own judgment on the issues for that of the parties. TEX. CIV. PRAC. & REM. CODE ANN. §154.023.

On the written agreement of the parties or on the court's own motion, the court may refer a suit under Title 1 (spouses and
property) and Title 5 (parent and child) of the Texas Family Code to mediation. TEX. FAM. CODE ANN. § 6.602 and § 153.0071.

Mediation is the most unique and flexible ADR procedure. It is a nonadversarial and nonadjudicatory approach to conflict resolution. The role of the mediator is to assist the parties and their attorneys to focus on the real issues of the dispute and generate options for settlement. The impartial mediator functions as a non-judgmental facilitator who is neutral throughout the process. Mediation is becoming the ADR process of choice for litigants, lawyers, and judges because of its success rate and the qualities it shares with principled negotiation. The goal of mediation is for the parties themselves, with the assistance of their attorneys and the mediator, to arrive at a mutually acceptable resolution of their dispute. If a dispute could have been resolved through adversarial negotiation but was not, it is appropriate for mediation. The advantages of mediation include empowering the parties to control their own destiny, saving time and expense, minimizing risk, and improving the chances for success. Also, clients favor it.

B. ARBITRATION. Arbitration is a forum in which the parties and their attorneys present their positions before an impartial third party who renders a specific award. If the parties stipulate in advance, the award is binding and enforceable in the same manner as any contract obligation. If the parties do not stipulate in advance that the award is binding, it is not and serves only as a basis for the parties' further settlement negotiations. TEX. CIV. PRAC. & REM. CODE ANN. §154.027.

On written agreement of the parties, the court may refer a suit under Title 1 (spouses and property) and Title 5 (parent and child) of the Texas Family Code to arbitration. The agreement must state whether the arbitration is binding or nonbinding. If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines in a non-jury hearing that the award is not in the best interest of the child in a Title 5 action. The burden of proof at the hearing is on the party seeking to avoid rendition of an order based on the arbitrator's award. TEX. FAM. CODE ANN. §6601 and § 153.0071.

The majority rule in American law is that family law arbitration is valid, subject to court review. Miller v. Miller, 620 A.2d 1161 (Pa. Super. 1993); Faherty v. Faherty, 477 A.2d 1257 (N. J. 1984).

The arbitration process in Texas has also been generally strengthened and invigorated as an ADR forum by Jack B. Anglin Co., Inc. v. The Honorable Arthur Tipps, Judge, 842 S.W.2d 266 (Tex. 1992).

Binding arbitration procedures may be governed by the Texas General Arbitration Act (TEX. REV. CIV. STAT. ANN. art. 224 - 249) and/or the United States Arbitration Act, Title 9 U.S. CODE.

C. MODERATED SETTLEMENT CONFERENCE. A moderated settlement conference is a forum for case evaluation and realistic settlement negotiations. The parties and their attorneys present their positions before a panel of impartial third parties. The panel may issue an advisory opinion regarding liability or damages which is not binding on the parties. TEX. CIV. PRAC. & REM. CODE ANN. §154.025.

The moderated settlement conference is a recent and innovative ADR case evaluation process designed to encourage settlement. It is designed to provide assistance to litigants in defining the central issues in their case and evaluating strengths and weaknesses, with an underlying focus on potential settlement. It has proven very effective during settlement weeks.

D. MINI-TRIAL. A mini-trial is conducted under an agreement of the parties. The parties and their attorneys present their positions, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiations. The impartial third party may issue an advisory opinion regarding the merits of the case which is not binding on the parties unless they agree it is binding and enter into a written settlement agreement. TEX. CIV. PRAC. & REM. CODE ANN. §154.024.

The mini-trial provides a structured settlement process in which the parties engage in reality testing before third parties whose judgment they have reason to trust. Its goal is to educate the parties, perhaps persuade them, that their view of the case may be unrealistic, and thus, set the stage for negotiated settlement. It is a private, confidential, nonbinding extrajudicial procedure through which a case and its principals are prepared for settlement negotiations. Its most distinctive characteristic is that lawyers present their cases, not to a judge, an arbitrator, mediator, jury or any third party with the power to make a binding decision, but rather to the principals themselves.

E. SUMMARY JURY TRIAL. A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations. The parties and their attorneys present their positions before a panel of six jurors. The panel may issue an advisory opinion regarding liability or damages which is not binding on the parties. TEX. CIV. PRAC. & REM. CODE ANN. §154.026.
While the summary jury trial is relatively new, it offers parties a no risk method for trying their case and obtaining a jury's assessment. By providing a reliable estimate of the probable results of the trial without jeopardizing the parties' right to a conventional trial, a summary jury trial is an effective settlement tool which offers litigants their day in court and the opportunity to effect a speedy, cost effective and just resolution of their disputes.

F. SETTLEMENT WEEKS. In counties with 150,000 population or greater, there is a settlement week during Law Week and Judicial Conference Week each year or during any 2 weeks as the administrative judge of each judicial district designates. The District Courts, constitutional and statutory county courts, and family law courts, are responsible for facilitating the voluntary settlement of civil and family law cases during these weeks. TEX. CIV. PRAC. & REM. CODE ANN. §155.001.

Each judicial district's administrative judge appoints a committee of attorneys and lay persons to effectuate settlement weeks. The Chair of the local bar association's ADR Committee and the Director of any established mediation or ADR center in the county may serve on the committee. TEX. CIV. PRAC. & REM. CODE ANN. §155.002.

Any Texas licensed attorney may serve as mediator during settlement weeks under terms, conditions, and training determined by the administrative judge. Attorneys must meet the qualifications and will be governed by the rules of the Texas ADR Procedures Act. Attorneys requested by the mediator-judge shall serve as mediator during settlement weeks. TEX. CIV. PRAC. & REM. CODE ANN. §155.003.

The Texas ADR Procedures Act applies to parties and mediators participating in settlement weeks. Each court participating in settlement weeks has the authority to make orders needed, to implement settlement weeks and ensure any party's good faith participation. TEX. CIV. PRAC. & REM. CODE ANN. §155.004 and §155.005.

The administrative judge may use available funding from funds regularly used for court administration to carry out settlement weeks and shall cooperate with the local bar, director of any established ADR resolution center, and other organizations to encourage participation and to develop public awareness of settlement weeks. TEX. CIV. PRAC. & REM. CODE ANN. §155.006.

Settlement weeks have enjoyed success throughout Texas and point to the bright future of ADR and its profound impact on the administration of justice. Approximately 40% of the cases settle without risk or significant cost to the litigants. One of its best aspects is it permits a constructive collaboration between the bench and the bar and proves that ADR does work.

G. TRIAL BY SPECIAL JUDGE. On agreement of the parties, in civil or family law matters, the judge in whose court a case is filed, may order referral of the case and shall stay proceedings pending the outcome of the trial. Any or all of the fact or law issues in the case may be referred. TEX. CIV. PRAC. & REM. CODE ANN. §151.001.

Each party to the action must file a motion that requests the referral, waives the right to trial by jury, states the issues to be referred, states the time and place agreed on for the trial, and states the name of the special judge, the fact that the special judge has agreed to hear the case, and the fee agreed on by the parties. TEX. CIV. PRAC. & REM. CODE ANN. §151.002.

The special judge must be a retired or former district, statutory county court, or appellate judge who has served on the bench for at least 4 years, has substantial experience in his or her area of specialty, has not been removed from office or resigned while under investigation for discipline or removal, and annually demonstrates completion of at least 5 days of continuing legal education in courses approved by the State Bar or Supreme Court. TEX. CIV. PRAC. & REM. CODE ANN. §151.003.

A referral order must specify the issue referred and the name of the special judge. The referral order may designate the time and place for trial and the time for filing of the special judge's report. The court clerk shall send a copy of the order to the special judge. TEX. CIV. PRAC. & REM. CODE ANN. §151.004.

District court rules relating to procedure and evidence apply to a trial by special judge. The special judge conducts the trial in the same manner as the court trying an issue without a jury. The special judge has the powers of the District Court judge except contempt powers are limited to witnesses. The parties have the right to be represented by attorneys at trials by special judge. TEX. CIV. PRAC. & REM. CODE ANN. §151.005 - §151.007.

The special judge provides a qualified district court reporter to maintain a record of the proceedings. The parties share equally the special judge's fee and all administrative costs including the court reporter's fee relating to the trial. The parties are responsible for the cost of their own witnesses and other costs related to their case. The state or local government may not pay costs related to the trial by special judge. The trial may not be held in a public courtroom and public employees may not be involved during regular hours. TEX. CIV. PRAC. & REM. CODE ANN. §151.008 - §151.010.
The special judge's verdict must comply with the requirements for a court verdict and stands as a district court verdict. The special judge submits the verdict within 60 days after the trial adjourns unless otherwise specified in the referral order. If the special judge does not submit the verdict within the required time period, the court may grant a new trial if a party files a motion for new trial, hearing notice is given to all parties, and a hearing is held. The right to appeal is preserved and is from the order of the district court as provided by the Texas Rules of Civil Procedure. TEX. CIV. PRAC. & REM. CODE ANN. §151.011 - §151.013.

The private judge or rent-a-judge process, despite its front loaded costs, could provide mutual gain by unique solutions and offer an attractive option in some cases. Its advantages are speed, reduced costs and flexibility.

V. FAMILY LAW MEDIATION

"...everyone accepts that divorce is war. You enter into it not knowing when it will end, how much it will cost, or what its psychic toll will be. You are hostage to a process. ...this is ridiculous...And unnecessary. There is an alternative to traditional divorce that is faster and cheaper: mediation. ...the conventional approach is so misaligned with its purpose. ...that it will take a trial to get at... 'truth'... So a great deal of time and money is spent on the most costly avenue ever devised for resolving a dispute - two adversarial lawyers preparing for trial. While nearly every divorce in this country proceeds as if a trial will take place, the fact is that... In 97% of all divorces, the case is settled before it goes to trial. The financial benefits obviously make mediation worth your while, but what makes it an outright godsend is that it also saves you months, perhaps years, of emotional turmoil. The mediator brings in the words 'fair'. Trial lawyers laugh at that... but...that word is like a cathedral door opening. Sanity and reason come back into the world.” Spragins, Sound Advice - A Sane Person's Guide to Divorce, Advisor - The Intelligent Management of Money, Worth Magazine (September 1992).

"Child custody fights raise the level of anger between the parents to an all-time high. They are frightfully expensive - frequently exhausting the entire net worth of the parties, including funds set aside for the children's education. They are also extremely damaging to the children, producing long-term psychological and emotional problems that diminish their capacity to have successful relationships, stay in school, obey the law and have healthy self-esteem. Child custody suits have existed because, until recently, we have thought that the only non-violent way to resolve custody disputes was through the adversarial system. The adversarial system, however, was never designed for something as delicate as the dissolution of a marriage with children. The adversarial system was designed to get at the truth by pitting the parties against each other with the aid of hired 'guns.' The adversarial system depends upon presentations that advocate for each side against the other, rather than for the best solution for all the parties. The absurd question in the trial is how can these two parents, who throughout this horrible proceeding have publicly humiliated and lied about each other, work together to provide the optimal nurturing custodial care for their child. We fight spitefully to determine what is the most loving thing we can do for our children. This is like letting monkeys repair television sets with hammers. The legal community is not famous for being self-critical and has been reticent to admit that in marriage dissolution, its processes might be more harmful than helpful. This is due in part to our resistance to change (and) the absence of an obvious alternative to the adversarial system for the resolution of marital disputes... Mediation can settle child custody disputes before they become full-blown custody fights and keep the anger of the parents from becoming exacerbated. We can't keep divorcing people from being angry with each other, but through mediation we might be able to avoid accelerating their anger. The initial thinking among the family district judges in Dallas regarding mediation was that it was ideal for custody cases. ...it is usually less damaging for the child to live with either parent without a custody fight than to live with the more capable of the two after a custody fight. If parents are really concerned about the best interest of the child, they will do whatever it takes to avoid a custody fight...". Honorable Merrill L. Hartman, District Judge, 192nd District Court, Dallas, Texas, Family Law Commentary, Custody Fights - Mayhem Seeking Resolution, Texas Lawyer (October
A. ADVANTAGES. The ADR procedure best suited for most family law disputes is mediation. It allows litigants to be personally involved in authoring their own resolution, rather than having one imposed upon them by the legal system. Judges and juries are limited by time, evidentiary and procedural rules, and the nature of their respective roles. Family law mediation has the attributes of voluntary compliance, confidentiality, maintenance of on-going relationships, affordability, and the opportunity for catharsis and innovative agreements. The success rate for family law mediation by qualified family law mediators is very high, averaging approximately 90%, as compared to 80% for general civil matters.

Family law cases lend themselves to mediation as much as, if not more than, general civil cases. Examples of matters that are conducive for family law mediation include: property cases with substantial assets; single issue cases such as property valuation or characterization; tracing or reimbursement; post-divorce clarification or enforcement; child conservatorship, possession or support establishment, modification or enforcement; control and disposition of closely held businesses or professional practices; common law marriage and palimony; "continuing continuances", "out of control", and "over-lawyered" cases; multiple party cases (e.g., co-respondents, third party respondents, third party petitioners, etc.); and cases where parties need a forum for "venting". Where parents with children are motivated by fairness, it is also a beneficial adjunct to the adversarial system.

When parties, attorneys, and a mediator work together in the resolution of family law disputes, the parties benefit by having both their legal and nonlegal needs met, creating a more lasting, satisfying agreement. Mediation has become the most viable and promising alternative to family law litigation.

B. NECESSARY ELEMENTS FOR SUCCESS.

1. A qualified family law mediator. Family law expertise is critical to the mediation of family law cases.

2. All necessary parties present. All parties and counsel with authority to resolve the matter must be present for the entire process.

3. Sufficient Information. All parties and counsel must have sufficient information (e.g., through informal and/or formal discovery) to resolve all disputed issues.

4. Good faith participation. All parties and counsel must commit to give their best good faith efforts to resolve the case by agreement, if possible.

5. Adequate time. Enough time must be allocated for the process, generally at least one full day.

6. A safe environment. Privacy of the proceedings, privilege of the settlement negotiations and confidentiality of all communications to the Mediator are essential in conducting the mediation process.

C. QUALIFICATIONS OF MEDIATOR.

Family law mediation works best when the Mediator is a lawyer or judge qualified as a third party neutral in family law under the Texas Alternative Dispute Resolution Procedures Act, and preferably, a family law specialist. If the Mediator is not knowledgeable or experienced in family law, then you will have a settlement conference cordially hosted by an impartial third party. Family law mediation experience as well as personality and style are important considerations in selecting an appropriate family law mediator.

The family law mediator's major responsibilities include chairing the discussion, understanding the legal issues, clarifying communications, educating the parties and sometimes the attorneys, translating proposals and discussions into nonpolarizing terms, expanding resources available for settlement, evaluating the strengths and weaknesses of each side's case, making realistic appraisals of potential litigation results and costs, testing the reality of proposed solutions, ensuring the proposed solutions are capable of being complied with, serving as an empathetic listener for the parties venting, and protecting the integrity of the mediation process.

Family law mediators must also be neutral, impartial, objective, flexible, intelligent, patient, persistent, empathic and effective listeners, imaginative, respected in the community, honest, reliable, nondefensive, persevering, persuasive, forceful and optimistic.

D. RECOMMENDED PROCEDURE.
1. **Introduction and explanation** of the mediation process to parties and attorneys by Mediator.

2. **General privileged session** with parties, attorneys and Mediator, including position statement by Petitioner/Movant, position statement by Respondent, verification of issues and fact finding by Mediator.

3. **Private confidential sessions** where Mediator caucuses separately with Petitioner/Movant and attorney, and with Respondent and attorney.

4. **Negotiation** with continuation of private caucuses or return to general session, as necessary.

5. **Resolution and closure** by confirming settlement terms, drafting mediation agreement and obtaining signatures of parties and attorneys.

**E. ADVOCACY.**

Mediation advocacy differs from litigation advocacy in many respects. The goal of litigation advocacy is to convince a judge or jury to accept your client's position and reject that of the opponent. It is a win-lose or positional presentation approach. The purpose of mediation advocacy is to persuade the opposition, not a judge or jury or mediator, to enter into a fair and reasonable settlement. It is a win-win or principled bargaining approach. The focus changes from defeating the other side to creatively and collectively resolving the disputed issues. Conceptually, identifying the interests and needs of the parties, promoting effective two-way communication between them, and improving their working relationship are emphasized and the parties are encouraged to approach the marital dispute as a joint effort to facilitate and reach settlement in a fair and objective manner.

Prior to the mediation, the diligent mediation advocate will thoroughly familiarize himself or herself with the mediation process, fully explain the mediation process and its potential benefit to the client, objectively and realistically evaluate the case with the client, prepare a negotiation plan with settlement options and review it with the client, and timely provide all information requested by the mediator. Resources such as the Texas Family Code, Texas Family Law Practice Manual forms, a calculator, a laptop computer and printer, and pertinent family law articles should be taken to the mediation.

At the mediation, the effective mediation advocate will be organized, knowledgeable on the facts and the law, restrained and conciliatory in the general session opening statement, professionally courteous to the opposing side, cooperative with the mediator, sensitive to the client's need for catharsis or venting during the private caucus, helpful to the client in tracking the negotiations and steering them toward fair and realistic proposals to maximize the opportunity for resolution, and dedicated to ultimate settlement. The client's certified public accountant and other appropriate experts can be valuable participants in the mediation process or made available by telephone for consultation during the mediation.

Planning, preparation, presentation, participation, perception, perseverance, and patience are the keys to successful mediation advocacy. Successful mediation advocacy will also provide necessary closure, initiate the healing process and restore the parties' future ability to communicate on an acceptable basis. This is important in all cases, but is critical when children are involved.

**VI. FAMILY LAW ARBITRATION**

Family law arbitration is a voluntary process by which adversaries, usually the spouses or ex-spouses, agree to submit one or more issues in controversy to a neutral third party arbitrator, who will resolve the issues in a way that will be final and binding or advisory and nonbinding. It is a quasi-judicial, adjudicatory proceeding. An agreement to arbitrate may be contained in a written agreement signed by the parties as part of an agreement incident to divorce, premarital agreement, or marital property agreement. Some of the benefits of arbitration in family law are selection of an experienced family lawyer or former family law judge as arbitrator, convenient hearing forum, procedural and evidentiary flexibility, expedient and economical, final and binding, or advisory and nonbinding.

The parties may agree to settle one or more issues by arbitration before, during or after family law proceedings. In family law arbitration, the arbitrator hears the positions of both parties, determines the facts, applies the law and makes the decision. Family law arbitration is intended to be a simple process whereby the two parties agree to seek the decision of a neutral third party skilled and knowledgeable in all aspects of family law. Both sides present all relevant evidence of their case to the arbitrator as they would to the court. The arbitration hearing is held in a private, relatively comfortable setting, producing a final and binding, or advisory and non-binding decision in a prompt, efficient, effective and fair manner.
VII. FAMILY LAW MEDIATION/ARBITRATION

Many family lawyers and their clients are successfully utilizing a combination family law mediation/arbitration. The procedure begins as a family law mediation and concludes as a binding family law arbitration with respect to (1) any disputed issues remaining after mediation is completed and/or (2) any disputes that arise with regard to the implementation of the mediated settlement agreement.

Resolving disputed issues remaining after mediation by binding arbitration can be accomplished before, during, or after the mediation by simply adding one of the following paragraphs on a mediated settlement agreement form:

"If any disputed issues remain after mediation, the parties agree to resolve them by binding arbitration with the Mediator, whose decision shall include arbitration costs"; or

"The parties agree to resolve the remaining disputed issues set out on Exhibit ____, which were not resolved through mediation, by binding arbitration with the Mediator whose decision shall include arbitration costs".

Resolving any disputes that arise with regard to implementation of the mediated settlement agreement can be accomplished by the following paragraph on a mediated settlement agreement form:

"If any dispute arises with regard to the interpretation or performance of this agreement or any of its provisions, including the necessity and form of closing documents, the parties agree to resolve the dispute by binding arbitration with the Mediator, whose decision shall include arbitration costs".

VIII. PRACTICE AIDS


C. AGREEMENT INCIDENT TO DIVORCE, Form 17-6, Section 5 Mediation, page 17-169, Texas Family Law Practice Manual (Second Edition), State Bar of Texas.

D. AGREEMENT INCIDENT TO DIVORCE, Form 17-6, Section 6 Arbitration, page 17-170, Texas Family Law Practice Manual (Second Edition), State Bar of Texas.

E. SEE ALSO, HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION, Appendix C, Forms C-1 through C-14, State Bar of Texas (2nd Edition).

IX. CONCLUSION

The Texas ADR Procedures Act generally refers to the use of an impartial third party to facilitate resolution of a dispute outside of formal courtroom proceedings. The procedures are usually private, informal, and flexible. The Act provides an alternative to - not a substitute for - jury or nonjury trial.

If ADR does not succeed in producing a resolution, the litigants maintain the option to proceed to trial. The confidential protection of ADR provides a safe climate which frees participants to speak with candor and to negotiate in good faith. ADR can be tailored to meet the unique requirements of each case. ADR can be particularly beneficial when disputants have an ongoing personal, parental, or financial relationship, where there is a need for privacy, or when economic or other pressures favor early settlement. ADR represents a flexible, economical and creative intervention for most family law disputes and leads to more efficient use of attorney, court, and client resources.
The ADR knowledgeable family lawyer will redefine his or her goal from winning or defeating the other side to solving the problems. The principled family lawyer will gain ADR skills. Today, a working familiarity with ADR processes is as vital to a family lawyer as understanding rules of civil procedure and evidence. Without it, the family lawyer simply is not in a position to advise clients fully about their alternatives. To recommend litigation without advice about ADR is no longer professionally or ethically acceptable.

Just as family doctors do not always recommend surgery, family lawyers should not always recommend trial. In both medicine and law, the least radical and intrusive method often produces the most effective and satisfying solution.

The primary purpose of family lawyers is to resolve family law disputes. Hence, we increase our ability to serve family law clients by including ADR procedures as a part of our family law practice.

ADR is here, it works, and clients benefit from it.

"In the course of litigation, a lawyer shall not take a position that unreasonably increases the cost or other burdens of the case or that unreasonably delays resolution of the litigation."  Rule 3.02, Texas Disciplinary Rules of Professional Conduct.

"I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.”  Article 2, No. 11, The Texas Lawyers Creed - A Mandate for Professionalism, The Supreme Court of Texas.

"An attorney should be knowledgeable about alternative ways to resolve matrimonial disputes”  Standard 1.4, and "An attorney should encourage the settlement of marital disputes through negotiation, mediation, or arbitration"  Standard 2.15, Bounds of Advocacy, American Academy of Matrimonial Lawyers Standards of Conduct in Family Law Litigation.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good person."  Abraham Lincoln, Notes for a Law Lecture, July 1, 1850.
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