EFFECTIVE USE OF ADR IN FAMILY LAW

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I. INTRODUCTION

More than in any other area of the law, alternative dispute resolution ("ADR") can be the most effective in resolving family law disputes between parties. ADR is just part of the practice of family law. In most jurisdictions in Texas, some form of ADR (usually mediation) is required prior to a final hearing.

II. ADR IS STATE POLICY

Texas Civil Practice & Remedies §154.002 provides:

"It is the policy of this state 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."

Texas Courts are required to carry out that policy. Texas Civil Practice & Remedies §154.003 provides:

"It is the responsibility of all trial and appellate courts and their court administrators to carry out the policy under Section 154.002."

III. TYPES OF ADR IN FAMILY LAW

A. Arbitration

Webster's Dictionary defines arbitration as "the hearing and determination of a case in controversy by a person chosen by the parties or appointed under statutory authority."

If the parties agree, the court may refer a divorce case to binding arbitration. Tex. Fam. Code §6.601.

If the parties agree, the court may refer a suit affecting the parent-child relationship (SAPCR) case to binding arbitration. Tex. Fam. Code §153.0071.

The arbitrator's award is binding unless the court finds that the award is not in the child(ren)'s best interest.

B. Mediation

Webster's Dictionary defines mediation as "intervention between conflicting parties to promote reconciliation, settlement, or compromise."

The court may refer a divorce matter to mediation by an agreement of the parties or a court's own motion. Tex. Fam. Code §6.602.

The court may refer a SAPCR matter to mediation by an agreement of the parties or a court's own motion. Tex. Fam. Code §153.0071.

A mediated settlement agreement is binding on the parties if the agreement:

- provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that THE AGREEMENT IS NOT SUBJECT TO REVOCATION;
- is signed by each party to the agreement; and
- is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Tex. Fam. Code §6.602; Tex. Fam. Code §153.0071.

C. Collaborative Law

Collaborative Law is the newest form of ADR, which is growing quickly, whereby there is no neutral third party. The parties and their attorneys resolve the issues in controversy by a series of four-way meetings.

1. <u>History of Collaborative Law</u>

Collaborative Law was conceived by a Family Law Specialist, Stu Webb, in Minnesota, has grown into a substantial movement throughout the United States and now is moving into other countries. Texas has the first Collaborative Law Statute, and it is in the Texas Family Code. Obviously, its intended use is in the field of family law, although it is likely to spread into other areas. Many attorneys think that given time, it will become the societal norm for family law dispute resolution, to which all other forms, including litigation, will become "alternatives."

2. <u>How is collaborative law different from mediation?</u>

In most mediations, the main negotiator is the mediator instead of one of the attorneys or the clients.

The people with the best command of the facts and their interests involved usually are not allowed to negotiate directly with the other party. As in the children's game of telephone, much is lost in translation.

In collaborative four-way negotiations, communication is direct and the chances for misunderstanding and mis-communication are greatly reduced. Further, the parties are allowed to negotiate directly with the decision makers.

Mediations are typically "one-time" marathon settlement efforts. Mediation, typically, is an event rather than a process. In collaborative law, the negotiation of the settlement usually is done over the course of several sessions, instead of all at once. This allows parties and their attorneys to think things through instead of making important, binding decisions when the parties may be tired and under pressure.

Lastly, mediations are often held when trial is imminent. This means the parties already may have incurred substantial trial preparation costs, which can make resolving the already difficult conflict even more challenging. The other cost is the emotional cost. If a trial already is set, the adversarial nature of this process is higher than in a collaborative case.

3. Texas Family Code Statutes for Collaborative Law

a. Dissolution of Marriage: On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures. Tex. Fam. Code §6.603.

b. Suit Affecting the Parent-Child Relationship: On a written agreement of the parties and their attorneys, a suit affecting the parent-child relationship may be conducted under collaborative law procedures. Tex. Fam. Code §153.0072.

c. Enforceability of Agreements: Provided the formal requirements are met, an agreement reached through Collaborative Law procedures may produce "entitlement to judgment," just like a mediated settlement agreement. Tex. Fam. Code §6.603(d); Tex. Fam. Code §153.0072(d).

4. Elements of Collaborative Law

The participation agreement under which the parties and the attorneys operate must include provisions for:

a. A commitment not to go to court to resolve any dispute between the parties. The parties can "opt out" of this commitment in the event either party becomes dissatisfied with the process or in the event of an impasse.

b. Agreements concerning conduct and behavior that create a safe atmosphere to express and resolve conflict in a civil manner.

c. A commitment to concentrate on interest-based negotiations vs. purely positional bargaining.

d. Commitments requiring full disclosure of information by both the parties and the attorneys.

e. Commitments which create a structure and time-line for the resolution process. Schedules are created by agreement rather than mandated by the court.

f. An agreement that if the parties reach an impasse or opt out, the collaborative lawyers cannot represent either party in litigation.

g. Agreements containing the standard "injunctions" as to persons and property.

h. Agreements to use only mutually selected experts. These experts cannot testify in future litigation between the parties unless the parties so agree.

5. Use of Collaborative Law in Legal Aid

Is collaborative law feasible within Legal Aid in the State of Texas? Why not? Isn't it true that clients without financial resources should be given the same opportunity as clients with significant financial resources to have their family law matters handled collaboratively?

To learn more about the concept, I suggest the website for the International Academy of Collaborative Professionals (IACP) at www.collaborativepractice.com; or the Collaborative Law Institute of Texas at www.collablawtexas.com; or our law firm's website at www.ausley-algert.com.

IV. PREPARATION

As a part of your preparation, I believe it is important to meet with your client prior to the arbitration, mediation, or collaborative law four-way meeting. It has been my experience that, as lawyers, we forget to tell our clients the basics, such as what actually will occur, the structure of the event, who is present where and when, and the ground rules for whatever ADR process you are using. The goal is to have the client understand the procedures and keep him or her from being surprised

by the process. There are enough unknowns for our clients - the process should not be one of those unknowns.

As an attorney, it is important to give some thought to your case prior to the day of the ADR process. As an attorney, you should know your case and you should have considered some creative options to assist the process. One of the greatest benefits of ADR is the client's ability to structure a settlement that would not otherwise be an option if the case were tried to the court. This is a perfect example whereby the clients can focus on their interests for interest-based negotiations instead of position-based negotiations.

In any case in which the client requests orders or goals that either are not standard or which are beyond the court's powers to address, ADR definitely is the best avenue for settlement.

V. CASE LAW

Because arbitration is not used as frequently in family law and because collaborative law is a new process, most of the case law in this area involves mediation. Recent case law has strengthened the policy of enforcing parties' settlement agreements. The well- known case of *Ames v. Ames,* 860 S.W.2d 590 (Tex. App. - Amarillo 1993, *no writ*) was the first in Texas to hold that a party could not unilaterally revoke his or her consent to a Rule 11 agreement resulting from a mediated settlement agreement, pursuant to the terms of Chapter 154 of the TEXAS CIVIL PRACTICES AND REMEDIES CODE.

Subsequently, the Houston Court of Appeals distinguished Ames in the case of *Cary v. Cary,* 894 S.W.2d 111 (Tex. App. - Houston [1st Dist.] 1995, *no writ).* In *Cary,* the court held that one party could repudiate a settlement agreement prior to the entry of the agreed decree, thereby precluding the court from entering a consent judgment. The court further recognized the options of pursuing other remedies, such as breach of contract, or specific enforcement which may be tried contemporaneously with the divorce suit.

Finally, the confusion was resolved with the Supreme Court case of *Padilla v. LaFrance,* 907 S.W.2d 454 (Tex. 1995). In *Padilla,* the court basically agreed with the dicta of *Cary* and held that the court cannot enter a consent decree once a party has repudiated a settlement agreement; however**,** all other remedies at law are available to the party seeking to enforce such agreements under RULE 11 of the TEXAS RULES OF CIVIL PROCEDURE.

Enforcement of Family Law Mediation Agreement

As stated previously in this paper, a mediated settlement agreement is binding on parties in a divorce case, if the agreement:

- provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that THE AGREEMENT IS NOT SUBJECT TO REVOCATION;
- is signed by each party to the agreement; and
- is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Tex. Fam. Code §6.602; Tex. Fam. Code §153.0071.

If these requirements are met, a party is entitled to judgment on the mediated settlement agreement, notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. Tex. Fam. Code § 6.602(c).

In *Boyd v. Boyd*, 67 S.W.3d 398 (Tex. App. - Fort Worth, Jan. 03, 2002), the husband and wife were divorcing, so they went to mediation where they settled with an irrevocable mediation agreement per Texas Family Code § 6.602 and § 153.0071. The agreement divided their property and also had a residual clause which said that any property not disclosed would be owned 50/50 by the parties. The agreement also said that each party had made a fair and reasonable disclosure of the assets and debts known to them. Later, the wife discovered that her husband had intentionally concealed a $230,000.00 bonus. The total value of the estate was 10 to 15 million dollars. The husband moved to enter judgment on the agreement, which the trial court denied and set the case for trial. The trial court found that the husband had not committed a fraud; however, since the agreement did not include substantial community assets or provide for visitation with the parties' child, the trial court set the agreement aside. After trial, the husband appealed claiming the trial court erred by not entering judgment on the mediated settlement agreement. The Court of Appeals affirmed holding:

- Texas Family Code § 6.602 does not require a trial court to enter judgment on a settlement agreement that was obtained by fraud, duress, coercion, dishonest means or illegally.
- Although there was no fiduciary duty between the

husband and the wife, since they both had attorneys, when a party states that he has made a fair disclosure of assets/debts, a duty does exist to make a full disclosure; thus an intentional non-disclosure of a material fact subjects that agreement to be set aside (rescission).

- Intentional failure to disclose substantial marital assets is grounds to set aside an irrevocable mediated settlement agreement.

VI. CONCLUSION

All too frequently, we summon the sword and sacrifice the prospects of peace, or even the best interest of the children, in the name of legal justice. The adversary process, historically effective in resolving disputes between litigants where evidentiary facts have probative significance, is not always suited to the resolution of family law disputes. Especially where there are children, and parties cannot or will not recognize the impact of the disintegration of the marriage upon the children, where they fail to perceive their primary responsibilities as parents – that is, custody and visitation - we make it possible for parents to carry out that struggle by the old, adversarial, fault-finding, condemnation approach. This kind of battle is destructive to the welfare, best interests, and emotional health of their children - and even to parents, in the long run. All forms of ADR offer a clear and present alternative to allow divorcing couples to take charge of their lives, look to the long term, and ultimately, often save money, and time, while presenting a “win-win” solution to their children’s difficulties.