

The Divorce Agreement Newsletter

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Some Practical Uses of Arbitration in Divorce Cases

Arguably arbitration is not really a form of alternative dispute resolution. It is better described as a different form of adjudication. It is a very different process from mediation in that the outcome is a binding decision by a third party.

The essential pre-condition for arbitration is an Agreement to Arbitrate. There are a many reasons why the Agreement to Arbitrate is important: (1) it's absolutely essential for the arbitration to be enforceable; (2) it may define the procedural guidelines, including pre-hearing meetings, interim rulings, discovery, and rules of evidence; (3) it sets forth the jurisdiction of the arbitrator, which may actually exceed that of a judge if the parties so choose; (4) it can establish the scope of appeal from the resulting award; and (5) it can set up the arbitration so that the parties may represent themselves, or of course they may choose to have counsel. Negotiating an Agreement to Arbitrate may be done by the parties' lawyers, through mediation, or even in collaborative practice.

Arbitration offers lots of flexibility for difficult family law cases. An arbitration can result in a binding decision on the financial and property elements of divorce even though no grounds for divorce exist. It can take place on a timetable that may be much quicker than would be available in the court system. The arbitrator need not be a lawyer, and for example might be a financial specialist in an appropriate case. A given retired judge could be selected.

There are some substantive areas where an arbitrator can be given more authority than a sitting judge. Here are a few examples: (1) tradeoffs among different categories of property, such as between retirement assets and real property; (2) spousal support based upon a formula that adjusts to future changes; (3) tradeoffs between spousal support and equitable distribution; (4) appointment of a parenting coordinator; and (5) structure and management in a family business. A regular judge cannot do any of these things in a divorce case.

The only area where an arbitrator may have less jurisdiction than a regular judge is child custody. The Uniform Arbitration Act does not exclude custody from the scope of possible arbitration. However, a 1998 Fairfax Circuit Court decision held that an arbitrator's award as to custody may not be enforced without a court review to establish that it serves the best interests of the child. Even in that case, however, the court gave great weight to the arbitrator's decision and reached the same result as the arbitrator (who was a retired circuit court judge) had done.