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SOCIAL MEDIA(TION): IT'S TRENDING
The Impact of Alternative Dispute Resolution on Family Law

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The legal system is not static. It requires regular evaluation and improvement to assure that the needs of the community are being served. As family law professionals, we know it is critical to consider the needs of the parties and their families. We must be the leaders in the continuing evaluation and improvement of the system and address restrictions in the system that impede the prompt, effective, and efficient resolution of family issues.

Many family law cases require early action to stabilize the family and their resources, even when it might be preferable to postpone pursuing an ultimate resolution. In parts of Virginia, there are judicial vacancies, limited docket time, and long waits for trial dates. From the perspective of many parties in a family law case, court procedures and evidentiary limitations inhibit their ability to fully express feelings, concerns, and goals with the person who will be the ultimate decision maker. A vacuum is sometimes created, as the court system is not always flexible enough to provide resolution early and at critical junctions in family law cases.

Nature abhors a vacuum. Family law attorneys must fill that void, improve the practice of family law, and explore better ways to serve their clients. Alternative Dispute Resolution (ADR) processes are increasingly available and should be considered and, when appropriate, utilized effectively to address the demands of the market and to avoid the detrimental impact of intense litigation on parties and their families.

FIRST DO NO HARM

All of us are familiar with the Hippocratic oath which dictates that doctors, first, are to refrain from doing harm. It would serve the interests of clients and families if family law attorneys were similarly committed to the proposition to "first do no harm."

Some family law attorneys are portrayed as scrappy, mean, tough, intimidating, and revenge-seeking. Such tactics may temporarily satisfy the desires of some clients. Over time, however, those clients will come to bristle at that "take no prisoners" approach, will balk at the cost of continuing in that manner, and may question your ability to fully and effectively represent their interests. The days of trial by combat and ordeal are over.

Of course, you should respond appropriately to challenges to your client's interests or meet intransigence with necessary court action. However, escalating the conflict and tension in the case should be avoided, whenever possible.

Family law cases often require parties to maintain a cordial and cooperative relationship because they will be dealing with each other after the case is concluded. Many times the need for that continuing relationship is due to children. Lasting relationships also exists in cases without children, due to the need to complete actions required by orders or agreements. Preserving the ability of the parties to engage effectively with each other should be a goal of any family law attorney.

Even more significantly, consideration must be given to whether an acrimonious approach to the resolution of family cases causes actual harm to the client's interests and enduring damage to the family. Numerous studies have established such a causal connection. It is well established that the manner in which parents resolve their conflicts during and after a divorce or other family law litigation can significantly impact the children. Inability of parents to resolve disputes has been found to have long-term implications for their children, including: failure to adjust, psychological disorders, educational problems, and lifelong relationship issues. Those findings were consistent even when the children did not directly witness any such conflict.[1] Research also has established that parents who reached resolution through mediation were more likely to maintain better relationships with their children and each other.[2]

Parties who resolve their family law litigation through ADR, especially mediation, report higher levels of satisfaction with the process. After attaining successful mediation resolutions, parties are more likely to be able to resolve issues in the future. They are more likely to comply with the resulting agreements and orders and are less likely to pursue litigation as an option for future resolutions.[3]

ADR provides the family law attorney with avenues to diminish the present and future harm of litigation to the client and his family. That result should be a standard by which success in a family law case is measured.

YOU ARE NOT A LUDDITE

You would not say, "I do not e-mail." In fact, you proudly share that you also text, tweet, instagram, and, on occasion, even snapchat. Similarly, you ought not say, "I do not mediate" (or participate in some other form of ADR). Your clients expect you to be ready, willing and able to offer the option to use mediation as well as other

ADR methods. Successful family law practitioners cannot be seen by their clients to be Luddites.

We are living in a world where many clients are tech savvy consumers and have expectations for the manner in which services and products should be provided. They can push a button on their telephone and have Siri educate them about the wonders of the world (including DIY Divorce). They want it all; they want it now; and they want it at a discount. They are active on social media, and have a burning need to share every thought they have. Accepting those realities, many law firms have a web presence, electronically communicate with clients and each other, and engage in web-based research, case management, and evidence presentation.

When a new client appears for her initial consultation, she will have studied her lawyer's website, on-line ratings, and any comments about the services received. She will have explored all websites relating to the best and least expensive methods for attaining the most favorable result in her case and each comment posted by anyone on those subjects.

As part of the efforts to remain relevant, family law practitioners must be prepared to provide clients with all the available avenues to a prompt, effective, and economical resolution of their case. Clients expect and, indeed, demand it.

USE THE RIGHT TOOL FROM YOUR ADR TOOL BOX

The legal system in Virginia favors the use of ADR.[4] It is recognized that ADR in family cases offers the reduction of stress on the parties and their families emotionally and economically and is capable of providing more efficient, effective and self-determined results.

Selecting the appropriate ADR method depends on what type of result you are seeking and what issues are to be resolved. The method you select for the resolution of a long-term custody arrangement may be different from the method you select to obtain a final divorce decree or a quick *pendente lite* order. You must be prepared to recommend the correct tool from your ADR toolbox.

ADR is not only for the resolution of full divorce cases. It may also be utilized to resolve other matters, including *pendente lite* issues, modifications, custody and support for unmarried parties, grandparent custody and visitation issues, and enforcement proceedings. While mediation may be the most common and effective method, there are times when using arbitration or a judge *pro tempore* may be a more

effective and appropriate option. In selecting the correct ADR tool, consideration should be given to the nature of the issues, the personality and temperament of the parties, the speed with which the resolution is needed, and the level of finality desired.

Mediation is the most commonly utilized method of ADR. It may be used effectively to resolve all family law issues. Chapter 21.2 of the Code of Virginia sets forth the provisions that govern mediation in proceedings in Virginia courts, including confidentiality requirements, standards and duties for mediators, and standards for the courts' consideration of mediated agreements. The beauty of mediation is that the parties are the sole decision makers and are able to reach a creative compromise of the issues that best suits their unique needs and interests and those of their family.

Arbitration is an effective ADR method when the parties are seeking a prompt and final determination. Arbitration might be very useful in cases involving initial determination and modification of spousal and child support and issues related to equitable distribution or enforcement of orders and agreements. For example, you might consider the use of arbitration for the selection of a realtor for the sale of real property or the determination of the value of an asset. While mediation might be a better approach to parenting plans, arbitration might prove suitable for determination of limited issues in relation to which the parents have reached an impasse.

The Uniform Arbitration Act is codified in Va. Code §§8.01-577, 8.01-581.01- et seq. Providers of arbitration services have developed sets of rules to supplement the Act and allow for the orderly handling of arbitration proceedings. In short, an arbitration proceeding is handled much like a bench trial, though with relaxed rules of procedure and evidence. An arbitration award may be confirmed in a circuit court order. Va. Code §8.01-581.09. Limited statutory bases exist to support the vacation of an arbitration award by a circuit court. Va. Code §8.01-581.010.

The Court of Appeals of Virginia has held that arbitration awards in family law cases should be treated the same as arbitration awards in any other case.[5] The Fairfax Circuit Court did find in one case that an arbitration award should not deprive the court of its jurisdiction to consider the best interests of a child.[6] That decision should have no impact on awards regarding issues unrelated to custody or visitation.

The parties may also consider seeking to utilize a judge *pro tempore* to reach final determinations on issues. Va. Code §17.1-109 permits a circuit court judge to appoint a person who is a "citizen" of the Commonwealth and a licensed member of the Virginia Bar to serve as judge *pro tempore* in a particular case pending before that circuit court. Va. Code §17.1-110 states that the parties may enter into a written stipulation for the appointment of the judge *pro tempore*, which is to be approved by a circuit court

judge "in his discretion." Upon oath, the judge *pro tempore* is then vested with the authority to make decisions on the issues stipulated as if she were an elected judge of that court. This method of ADR may be utilized for all issues and may be most effective for matters that require prompt determination. The hearing of divorce cases has been a common use of judges *pro tempore*. This approach may also prove effective in relation to issues similar to those for which arbitration might be considered; the major difference is the degree of relief available on appeal.

Many family law cases are comprised of multiple issues that may benefit from diverse ADR approaches. Those issues may be addressed simultaneously or at different stages of the case. A case in which mediation settles some issues but does not result in a final resolution of all the issues may benefit from arbitration or judge *pro tempore* proceedings for the remaining issues. Segregating difficult issues may allow the parties to reach agreement on the primary issues thus allowing the parties to subsequently address subsidiary issues. Each case must be approached as a unique puzzle with many moving parts that require individual consideration as to the most effective, economical and satisfying means of resolution.

During the past few decades, family law in Virginia has undergone significant changes in statutory and case law as well as in practice. It has come of age in this technological era. Clients demand that we pay attention and stay relevant. They expect us to be mindful of their feelings and of their desire to preserve their resources and their families. Divisive litigation is not well tolerated by most and is far too costly. Family law attorneys must continue to pursue approaches that meet the expectations of their clients by providing a more civil, less stressful, and more satisfying approach to resolution through the use of mediation and other ADR methods.

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[1] Arkowitz, H., Lilienfeld, S.D., "Is Divorce Bad for Children?", Scientific American (2013); Amato, P.R., Kane, J.B., Spencer, J., "Reconsidering the Good Divorce", Pennsylvania State University (2011); Amato, P.R., "Children of Divorce in the 1990s: An update of the Amato and Keith 1991 meta-analysis", Journal of Family Psychology (2001). See also Farber, E., Raising the Kid You Love With The Ex You Hate (2013); Emery, R.E., The Truth about Children and Divorce (2004).

[2] Amato, Kane, Spencer, *Ibid (2011);* Amato, *Ibid* (2001); Emery, R.E., Laumann-Billings, L., Waldron, M., Sbarra, D.A., Dillon, P., "Child custody mediation and litigation: Custody, contact, and co-parenting 12 years after initial dispute resolution", Journal of Consulting and Clinical Psychology (2001).

[3] Zemans, A., "The Emerging Research of International Kidnapping Mediation", RevistadeMediacion (2015), Buck, T., "An Evaluation of the Long-Term Effectiveness of Mediation

in Cases of International Parental Child Abduction", ReUnite International (2012); Emery, *Ibid (2004);* D. Ellis, N. Stickless, "Mediating and Negotiating Marital Conflicts", Thousand Oaks, California: Sage Publications (1996).

[4] Va. Code §20.124.4.

[5] Bandas v. Bandas, 16 Va. App. 427 (1993).

[6] Patin v. Patin, 45 Va. Cir. 519 (Va. Cir. 1998).