

Chicago Daily Law Bulletin®

Volume 159, No. 181

Family law arbitration: A way to keep divorcing couples out of court

One of the most frustrating aspects of divorce for clients is often the lack of control they feel while they are going through the divorce process. Clients cannot control how the court system works, how long their divorce will take or how much it will cost.

Overburdened courts struggling to resolve a growing number of cases with dwindling resources can do little to ease the clients' need for a swift and efficient resolution of their issues. Family law arbitration is an alternative that can provide clients with a greater measure of control, while at the same time lessening the burden on the court system.

Arbitration has been used as a dispute resolution mechanism in the United States since the early 1600s. It exists both in common law and by statute. Forty-nine states have adopted either the Uniform Arbitration Act or the Revised Uniform Arbitration Act and seven states have adopted specific matrimonial arbitration statutes.

Illinois has not yet adopted a matrimonial arbitration statute.

Although arbitration is most commonly used to resolve commercial and labor disputes, it can also be used to resolve family law cases. Family law attorney Karen Covy, who has been an arbitrator with the American Arbitration Association for years, recently attended the American Academy of Matrimonial Lawyers' family law arbitration training in Chicago. She shared some of the benefits of matrimonial arbitration.

"Family law arbitration affords divorce lawyers and their clients a tremendous number of advantages over traditional litigation," she said. "First, it is private. The arbitration takes place in an arbitrator's office, not a public courtroom. Second, the litigants and their attorneys get to choose their arbitrator. In cases with unique or complex issues, this af-

fords the parties the ability to choose an arbitrator who has the specific expertise needed to resolve those precise issues.

"Arbitration can also be a much more efficient and flexible process, both for the parties and the attorneys. Motions can be filed via e-mail. Status conferences can occur via conference call. Hearings can be set at the convenience of the litigants and the lawyers. They do not have to begin at 9 a.m. and end at 5 p.m. They can take place in the evenings or on the weekends, if the parties agree. This can be a tremendous advantage if one or both of the parties live out of state.

"Another advantage of arbitration," Covy said, "is that the process can be streamlined if the parties agree. The rules of evidence and procedure can be relaxed so that the hearing runs smoothly. Decisions can usually be rendered quickly."

Critics of arbitration argue that there is no guarantee in arbitration that the parties will properly adhere to the rules of discovery. With no judge to enforce the rules, lawyers fear that they will not get full and fair disclosure of documents and evidence. However, the beauty of arbitration is that it is a creature of contract.

If parties want traditional discovery rules to apply in an arbitrated case, they need only say so in their arbitration agreement. The parties can give an arbitrator the authority to enforce discovery rules just as a judge does. Arbitrators have the power to issue subpoenas and the parties can go to court to enforce them. Parties need not lose any discovery rights simply because they would rather arbitrate their case rather than litigate it.

Some attorneys are critical of arbitration because they do not want to lose their right to appeal if their client fails to agree with the arbitrator's award. Just as the rules of discovery and evidence can be modified based upon the

COLLABORATIVE CONCEPTS



**BETH
FAWVER
McCORMACK**

Beth Fawver McCormack is a founding principal of Kamerlink, Stark, McCormack & Powers LLC. She practices exclusively in family law matters and is a collaborative law fellow, mediator and child representative. She has been named in Leading Lawyer Network and Illinois Super Lawyers.

arbitration agreement, appellate rights can also apply in arbitration.

Another objection to arbitration is cost. Clients have to pay an arbitrator. The state, on the other hand, pays the judge. However, what clients lose in arbitrator fees, they gain in attorney fees. Attorneys do not have to spend time waiting in a crowded courtroom for their case to be called. They also do not have to waste time going to court when they can resolve an issue via conference call or e-mail. Thus, the attorneys

can focus on doing real legal work. That saves lawyers time and energy and saves clients money.

Perhaps the biggest drawback to family law arbitration, though, is that it is unfamiliar, and lawyers — as a rule — are slow to change. Yet, to stay competitive in the quickly changing legal world, matrimonial attorneys would do well to consider this alternative dispute resolution tool in cases where the clients want to use a process that is quicker, more efficient and more private than the courts. Moreover, there are ways to "test the waters" in arbitration before jumping into the deep end.

"If parties are hesitant to have their entire case decided in arbitration," Covy said, "they can still use 'bullet arbitration,' whereby they just submit one or two issues to an arbitrator for decision. This can be done on an expedited basis, which can really help move a client's case forward. Often, once the key issues in a case have been resolved, the rest of the case will settle fairly quickly. Or, at the very least, the trial will be streamlined."

Of course, arbitration is not without its limits. Only a judge can enter a divorce judgment and the court alone has the authority to decide custody issues and determine what is in the best interests of children. Therefore, not every case is appropriate for arbitration.

As such, the arbitration agreement is a key component in moving forward. In that agreement, the parties have to clearly set forth the rules that will apply in the case, including rules of discovery, procedure and evidence. The parties have to agree when, where and by whom the case will be arbitrated. If parties do not agree on those fundamental issues, a case cannot be arbitrated.

Arbitration is one more tool that can be used to give litigants and lawyers alike greater control over, and greater satisfaction with, the divorce process.

“Arbitration is one more tool that can be used to give litigants and lawyers alike greater control over, and greater satisfaction with, the divorce process.”