

ADR: Architecture for Remodeling Families

By Deborah Bennett Berez



Fast Facts:

Family law practitioners should evaluate which of the many alternative dispute resolution (ADR) options available best fits a particular family and avoid a one-size-fits-all approach. Additional training may be necessary.

The potential for creative problem solving through ADR processes is particularly useful in our current economic climate—and clients have become more insistent on obtaining problem-solving assistance.

A multidisciplinary approach, such as what's used in collaborative practice, allows the emotional and financial planning needs of a family, as well as the legal needs, to be more fully addressed.

> The divorce process shares much in common with remodeling homes. Although in the current economic climate many contractors have turned to remodeling as a way to stay financially viable, most generally prefer new construction. It's easier, quicker, and less complicated to construct a new building from the ground up.

Family law attorneys, like contractors, might also prefer “new construction.” I would much rather attend a wedding than a divorce trial. I get greater joy from handling adoption cases than attending custody hearings. Yet family law attorneys are primarily in the “remodeling” business—assisting in dissolving marriages and constructing new family configurations. And just as the architects of remodeled homes work closely with the owners to understand their unique limitations and desires, so must family law attorneys understand clients' unique goals and concerns. Only then should the blueprint for attaining the desired outcome be drawn.

Most people facing a divorce want to avoid completely demolishing family relationships and bank accounts. While exceptions exist, most hope to construct a new life with the least amount of

destruction, cost, and pain. Family law attorneys in Michigan have increasingly recognized that alternative dispute resolution (ADR) processes can provide efficient and satisfying outcomes for divorcing families.

A decade after adoption of the family mediation court rule¹ and nine years after passage of the Domestic Relations Arbitration Act² (DRAA), there are varied and unique ADR processes available in Michigan and they are being used in increasing numbers in family cases. This article examines various ADR options being offered to families in transition in Michigan, provides a brief historical perspective, and suggests possibilities for future evolutions in our field.

More Architects, Floor Plans, and Neighborhoods

Ten years ago, there were comparatively few practitioners offering ADR services. Today, hundreds have taken family mediation training offered by ICLE, Zena Zumeta, and others. Further,

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arbitration in family matters has become more uniform and is somewhat more frequently used than in past years. Additionally, a promising new alternative—collaborative practice—is now available to families in our state.

Not only are there more options available and more people offering those options, Michigan practitioners are more sophisticated in customizing the divorce process to meet the unique needs of each family. Ten years ago, the approach to a given case tended to vary little, even if the facts did. If one's customary practice was to file a motion for temporary orders, it was filed irrespective of the family's particular needs—the equivalent of building the same floor plan repeatedly in 1950s subdivisions. It was simply assumed that every family was well-served by the same general approach. Today, perhaps corresponding to the increasing sophistication of many clients (courtesy of Google), attorneys, too, have broadened their understanding of alternative processes and are better prepared to discuss with clients the benefits and drawbacks of each.

Family law attorneys have also become creative in using ADR processes beyond divorce. Guardianship matters, estate settlement quagmires, gay and lesbian partnership creations and dissolutions, and elder-care disputes have all been effectively resolved with ADR processes.

ADR Options in Family Law

Mediation³

Mediation is a process in which parties meet with a neutral mediator who assists in developing options for reaching a mutually acceptable settlement. Michigan family law attorneys have become more astute about the distinctions between different types of mediation and are less engaged in defending one particular approach as the right approach or true mediation. When considering ADR, attorneys are now more likely to make distinctions regarding timing (early or late-stage mediation) as well as process (facilitative or evaluative). Before the adoption of the court rule, miscommunication was common when speaking simply about mediation.

In those areas of Michigan where *early mediation* is frequently employed, opposing counsel discuss their choice of mediator and decide whether attorneys will attend sessions or if only the clients will be present. Attorneys educate the clients to effectively engage in the process early to address separation, housing, and monthly obligations. Early mediation uses several shorter sessions (usually two hours in length) over several weeks or months. Attorneys guide clients through the process by meeting with them between sessions, suggesting options, and encouraging them to do the hard work necessary to mediate. In addition, rather than waiting until discovery and document production are completed before medi-

ating, those tasks are included as functions of the mediation process. Once completed, affidavits of assets may be signed.

Facilitative techniques are most often employed in early mediation, with the mediator assisting both parties in identifying and understanding their own and the other's underlying needs and interests. This understanding forms the basis for the parties' own development of settlement options and decisions.⁴

Late-stage mediation resembles those cases that settle at trial or "on the courthouse steps." Before mediating, motions for temporary orders are usually obtained, discovery undertaken through written interrogatories or requests for production or both, and depositions taken. Shortly before trial, mediation briefs are filed and a mediation session is held, usually for a full day, with attorneys and clients present.

In late-stage mediation, the neutral frequently employs an evaluative process, often in caucus sessions (separate conferences with each side). If the parties are unable to reach agreement, the mediator makes a recommendation for settlement that the parties may accept, reject, or modify. The emphasis is primarily focused on developing settlement terms the parties will accept and less on the underlying needs and interests.

Arbitration

Arbitration employs an experienced attorney as decision maker. All family matters except child abuse or neglect may be submitted to arbitration. This process is used for a variety of reasons, including avoiding the delay of court proceedings or a perceived proclivity of a particular judge. The frequency with which arbitration is used varies widely throughout Michigan.

Parties must be advised that submitting to arbitration is voluntary and binding and that there is a limited right to appeal, as well as other notice requirements under the DRAA.⁵ A stipulated order submitting the case to arbitration must be entered by the court. At the arbitration hearing (which must have a certified court reporter or recorder present if dealing with child custody issues), evidence is presented and testimony taken. The arbitrator then renders a written opinion, which is binding upon the parties and incorporated into a judgment of divorce. An arbitration award may only be vacated by the court under limited circumstances such as corruption, fraud, prejudice, or misconduct by the arbitrator or when the arbitrator exceeds his or her power, etc.⁶

Collaborative Practice

Collaborative practice is one of the newest options available in Michigan. It operates on the principle that families should retain control over decisions affecting their lives during and after

divorce. Sometimes referred to as “divorce without court,” collaborative practice features a disqualification or withdrawal provision that limits the scope of representation to settlement development. The Collaborative Practice Institute of Michigan provides a participation agreement, signed by clients and attorneys, which contains the following provision:

DISQUALIFICATION BY COURT INTERVENTION

We understand that in the event the collaborative process terminates without a final signed agreement, both lawyers will be disqualified from ever representing either of us against the other in any court proceeding or subsequent dispute resolution process.⁷

Collaborative practitioners believe that shifting the focus away from what a judge might do or what the law might require facilitates creativity and results in agreements custom tailored to each family. Discovery, generating and evaluating options, and agreeing on a settlement package all take place during a number of four-way sessions attended by both parties and attorneys. Little or no negotiation occurs without the clients' participation. While spouses are advised about relevant domestic relations law, other variables that may be more important to the family are allowed to take precedence. Thus, the final agreements will primarily reflect the needs of the family rather than rigid, generic legal remedies. Representing clients in collaborative practice varies significantly from traditional representation. Accordingly, attorneys who wish to practice in this area must take a required 2½-day training.⁸

A unique feature of collaborative practice is the use of other professionals specifically trained in collaborative practice. For example, mental health professionals often function as coaches to help parties discern whether issues are over-imbued with meaning because of strongly associated emotions. The goal is to allow parties to objectively evaluate whether the candlesticks are truly important in the overall settlement (crystal from Tiffany's) or simply the embodiment of pain and hurt for reasons only recognizable to the parties.

Coaching is distinct from therapy or counseling that might delve more deeply into one's past and is primarily supportive. In contrast, coaching is more pragmatic and asks, How can you make this work? A coach may even confront a client about behaviors in which he or she is engaging that are unproductive. Coaches also assist parents in remodeling their communication architecture. Old patterns are difficult to break, particularly in the highly emotional context of divorce. Yet many opportunities will exist for partners to discuss co-parenting issues and even non-divorce-related matters throughout the years. Coaches educate parents to communicate in a way that increases receptivity and understanding by the other parent.

Mental health professionals may also function as child specialists in collaborative practice. In contrast to a custody evaluation in which the goal is to determine who should be the custodial parent, a child specialist's goal is to develop the optimal shared-parenting plan that factors in the child's perspective. Thus, the child specialist meets with the parents to understand the family dynamics and the concerns and desires of each parent, and then meets with the children to get a sense of their particular needs.



Using a more therapeutic approach, the child specialist then assists the parents in creating a parenting plan.

Finally, neutral financial specialists trained in collaborative practice may meet with clients to develop budgets as well as an understanding of the long-term ramifications of various options under consideration.

Collaborative practitioners, particularly in the Washtenaw area, may also employ a mediator in collaborative cases. This can be especially effective when a full team is used, since multiple issues (e.g., emotional, financial, and legal) are being simultaneously addressed by various professionals. A mediator can also assist by functioning as a case manager to coordinate the work of the team members and clients.

Now offered in Michigan for about six years, collaborative practice originated 20 years ago and is actively used throughout the U.S., Canada, and 22 other countries. The field of collaborative practice has matured, evolved, and proven to be effective when used in appropriate cases.

Determining the Appropriate Process for a Particular Case

Family law practitioners should objectively evaluate and discuss with clients all the various options available, including litigation, arbitration, early and late-stage mediation, and collaborative practice. It is difficult to recognize that a process that I don't offer may, in fact, serve my client best. Yet an ethical attorney will not allow the desire to be hired to take precedence over the client's needs. Perhaps ideally, family law attorneys would all be capable of skillfully providing the entire panoply of available services. However, that may not be practical or even desirable. Still, family law attorneys should be trained, re-trained, and willing to refer out when appropriate.

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A crucial first step in applying the right process to a particular case is to holistically understand the client and his or her spouse (including states of mind and goals for each), domestic violence history, the post-divorce construction desired, and whether any immediate needs exist. By definition, then, an initial consult will likely take longer than the perfunctory hour for the attorney to truly listen and understand the client. A candid discussion about the benefits and drawbacks of each approach to resolving the client's needs—and those of other family members—should be undertaken in every case. *Together*, attorney and client can then choose the optimal process.

Opportunities for ADR in Family Law

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The current economic climate in Michigan has created new challenges as homes are no longer easily liquidated for the purpose of launching two new separate lives and domiciles. Clients are now considering nesting, bankruptcy, separate maintenance, or delaying divorce. ADR processes provide counsel the opportunity to thoughtfully and creatively develop cost-effective, win-win solutions rather than seeking the advantage of one client to the exclusion of the other. Increasingly, clients see the wisdom and necessity of such an approach in challenging economic times and look for counsel to assist in problem solving.

The lesbian, gay, transgender, and bisexual populations present difficult issues for attorneys given the lack of relief available under the law. ADR processes provide a path for pursuing resolution not available through the courts.

Other ADR processes might benefit from considering the multi-disciplinary approach taken by the collaborative movement. Partnering with other professionals recognizes that families in transition are dealing with far more than a legal event. Perhaps it is more accurate to recognize that divorce and other such life-altering transitions are primarily emotional events with legal and financial components. Expanding the team may be more cost-effective in the long run because the professional most trained and skilled in dealing with a specific aspect of the divorce addresses that aspect—often at a lower hourly rate than the attorney's.

Finally, attorneys interested in matching the ideal process to each client will be well-served by expanding their repertoire of skills. The old adage is true: if the only tool in your belt is a hammer, everything looks like a nail. Additional training in unfamiliar ADR processes allows a practitioner to understand all the choices available to clients. Contemporary clients are increasingly sophisticated about their choices and looking for counsel prepared to use a broad range of options.

When undertaking a remodeling project, architects balance awareness of the existing structural components (weight-bearing walls, electrical wiring, plumbing, etc.) with a particular family's desire for a dream kitchen or bath. Similarly, as family law attorneys, we must integrate existing family dynamics (extended family relationships, stay-at-home parents, financial expertise, health issues, job loss, etc.) with our clients' dreams so that reality and desire co-mingle. ADR processes provide opportunities for a more comprehensive analysis in which all parties are active participants. The end result is more often families optimally positioned to live happily ever after in their remodeled homes. ■



Deborah Bennett Berez graduated from Notre Dame Law School and practices family law with offices in St. Joseph and Grandville. Deborah has mediated more than 300 cases using facilitative and evaluative models. She regularly serves as an arbitrator and collaborative lawyer and provides collaborative practice training for the Collaborative Practice Institute of Michigan (CPIM). She is past chair of the State Bar of Michigan Alternative Dispute Resolution Section and immediate past president of CPIM.

FOOTNOTES

1. MCR 3.216.
2. MCL 600.5071.
3. To obtain family mediation training, contact the Family Mediation Council at Shirley@familymediation.com, ICLE at <<http://www.icle.org>>, or Zena Zumeta at <<http://www.learn2mediate.com>> or consult <<http://www.mediate.com>>. All websites cited in this article were accessed April 29, 2010.
4. Fisher & Ury, *Getting to Yes* (New York: Penguin Books, 1991) is the fundamental text addressing interest-based negotiation and is a good resource for counsel and clients.
5. MCL 600.5072(1).
6. MCL 600.5081(2).
7. See Collaborative Practice Institute of Michigan <<http://www.collaborativepracticemi.org/faq.php>>.
8. Information about collaborative training offered in May of each year can be obtained at <<http://www.collaborativepracticemi.org>>.