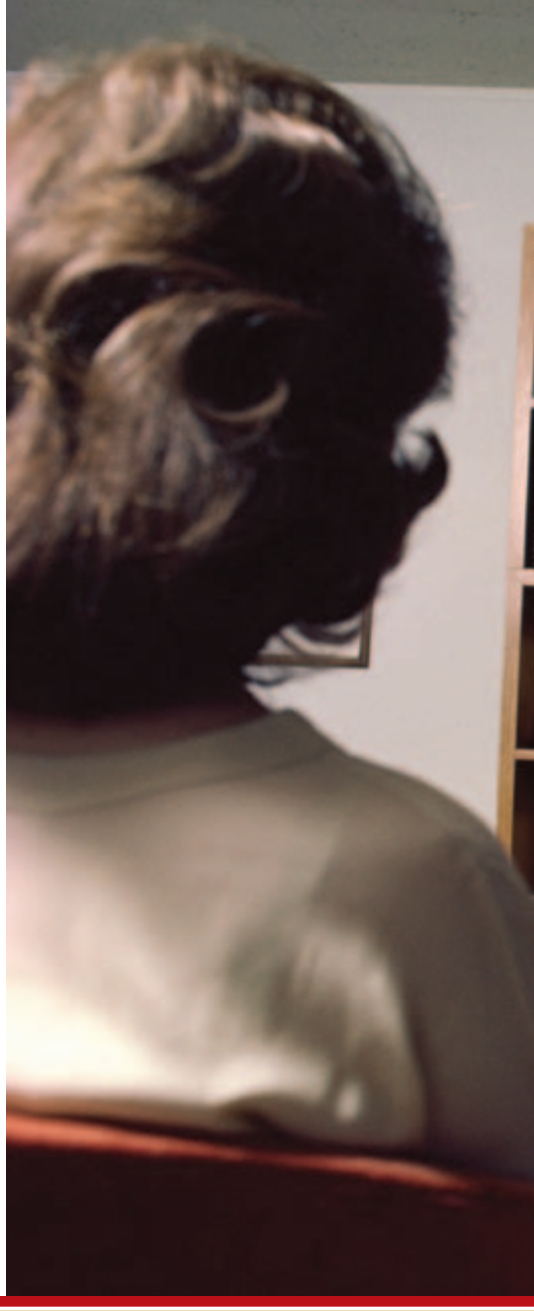


ADR Offers What the Bench Cannot

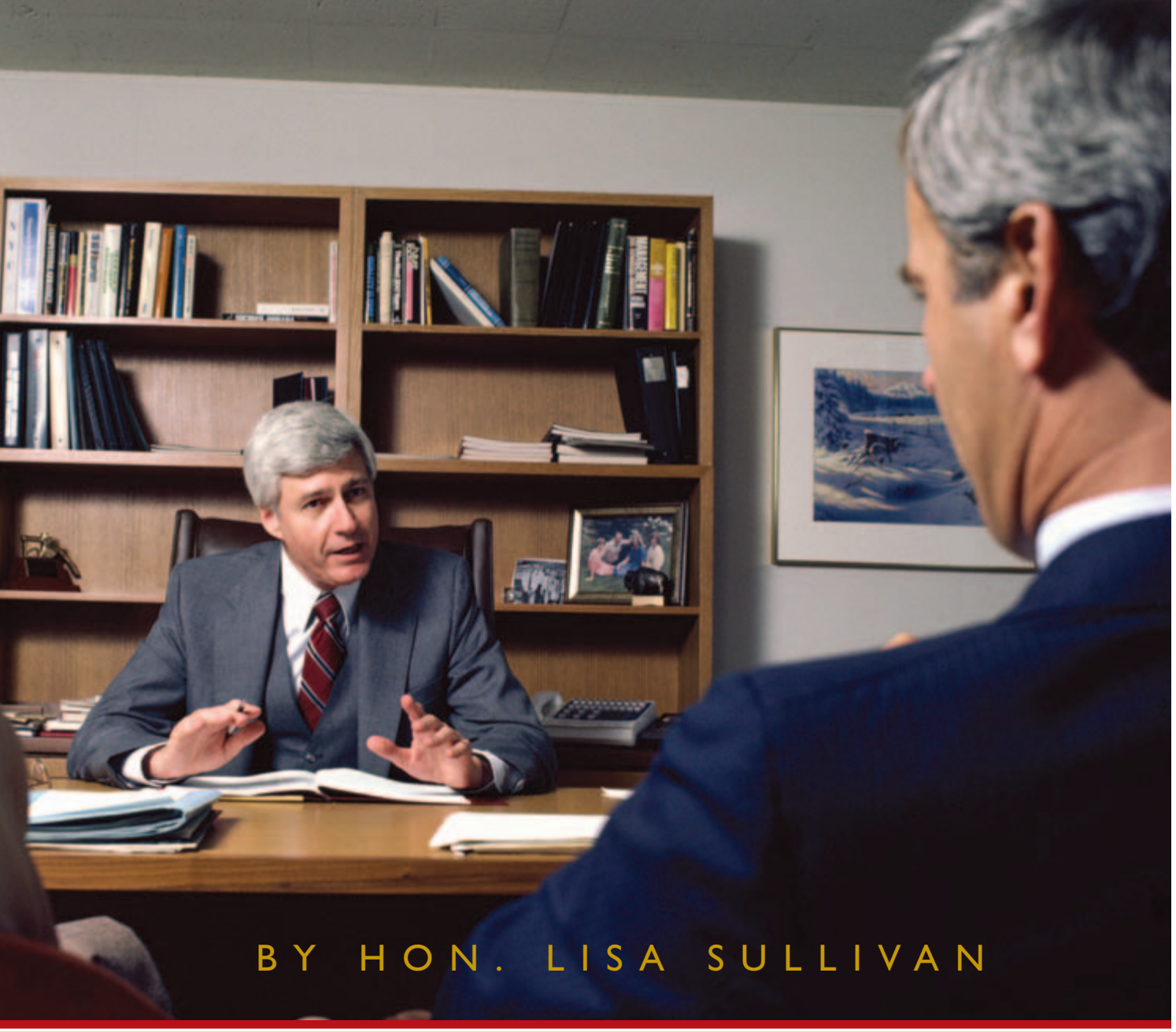
Practitioners in the area of family law have been preaching the benefits of alternative dispute resolution (ADR) for quite some time now. Unlike most civil litigation, the parties involved in domestic law usually have continued contact after a final order is entered. Therefore, the aftertaste of the process continues to impact the dynamics between the litigants. This residual effect is magnified if the parties are required to co-parent minor children in the wake of their marriage.

Traditionally, mediation has been the most popular form of ADR in family law disputes. In fact, MCR 3.216 sets forth the parameters for domestic relations mediation. More recently, however, the Family Law Section of the State Bar of Michigan was instrumental in championing the enactment of Public Act 420 of 2000, the Domestic Relations Arbitration Act. Parties continue to use both types of ADR and, at times, voluntarily agree to a binding process. Although a judge cannot abdicate decision-making responsibilities to one of these processes, he or she can certainly order the parties to try these alternate forums.

An increasing number of counties have formal mediation plans. Other counties are less formal in their structure but almost unanimously support the idea of some type of ADR. Contrary to popular belief, this support is not a mechanism to lighten a docket. There is a unique perspective to these disputes when sitting as the trier of fact. The duty to advocate one party's position is imposed upon the individual attorneys, but the judge has the responsibility to consider the "big picture." In doing so, it becomes clear that the whole really is bigger than the sum of its parts.

There are obvious benefits to ADR. It is more private. In some of the larger counties, it offers a quicker resolution. Most often, ADR is less expensive than a trial. However, there are other, less obvious advantages. Below I have summarized five significant reasons to promote ADR in family law cases. This is not a scholarly discussion of the subject; rather, I hope it can be used to encourage family law litigants to explore methods to resolve their disputes that are more palatable—and often more effective—than the courts can offer.

1. **The timing of ADR.** Quite often, parties use ADR after the close of discovery but prior to trial. This timing assures that the parties were working with a full knowledge of assets and liabilities. Usually, there has been an opportunity for appraisals or other valuations of significant assets, and disputes over the values are clearly identified. This information is certainly important, and an agreement may be easier to reach because of the certainty offered. Alternatively, some mediators indicate that there are an increasing number of requests to



BY HON. LISA SULLIVAN

negotiate a settlement earlier in the process. In fact, sometimes the requests come before a case is filed. Interestingly, many of these participants negotiate while there is a high level of trust and cooperation. Little time and money are expended on discovery or valuations. Yet the parties rarely renege on these earlier agreements, and there is often no enforcement necessary. One of the keys to the success of ADR is the parties' satisfaction with the results. Therefore, there is a tremendous benefit to using third-party assistance at the point in the proceedings when the parties have a comfort level with the information available and have an openness for a mutual resolution. Because of docket demands, a judge cannot always identify or seize this moment, but the parties (or their advocates) should.

2. **The decision-makers in ADR.** In the absence of ADR, there is one decision-maker—the judge. The parties can make their arguments, but in the end, their input may be disregarded. It is not that the court does not appreciate what the parties have to offer, but at trial, the advocacy reflects a win-lose rationale rather than a problem-solving approach. Mediators and arbitrators, on the other hand, tend to use the input of the parties because the parties approach these opportunities with some expectation—and willingness—to compromise. In essence, by acknowledging that ADR offers the potential for mutual benefit, the ultimate resolution can be shaped to a significant degree by the litigants, particularly if they can see some of their input in the final product.

3. **The venting opportunities during ADR.** A popular argument in favor of trial is that the litigants deserve—and sometimes need—their day in court. They want to be heard on their issues. The opportunity to be heard can be essential to provide some degree of satisfaction for a party. The problem with using the courtroom to vent is that what is said rarely provides a sufficient basis to justify the end result. For example, parties often vent on fault issues. Clearly, Michigan is a no-fault state, and there are considerable restrictions on the extent to which fault can be used as a factor in the court's decision-making. Moreover, it is unlikely that the emotional benefit to venting in the courtroom outweighs the substantive benefit of using that time to present relevant information

about the dispute. Because of docket demands, hearings on domestic matters can be short-changed as to time and continuity. Venting gets a party off topic and can undermine other evidence squeezed in between barbs. In fact, the comments have a tendency to mislead the court as to that party's priorities. Finally, animosity displayed during trials has a long-lasting impact on litigants, and airing dirty laundry in public provides less of an incentive to move forward under a final order. ADR, on the other hand, provides a forum for venting—sometimes without the opposing party having to be in the same room. The time constraints for ADR are more forgiving for digressions and, at times, the emotional input can be used to craft a more palatable proposal.

4. **The intangibles of ADR.** During a trial, the litigants usually have only one opportunity to make their cases to the judge. This opportunity is limited in time as well as context. The judge is left to make significant decisions for the parties—and sometimes their children—with only a snapshot of their lives. This type of presentation is risky for the parties. For instance, they may forget to include certain testimony during their time on the stand. Further, the way they present testimony could hurt, rather than help, their case. The trier of fact is given significant latitude in assessing the credibility of the parties in the short time they testify. A nervous witness may come across as angry or untruthful. Tears may appear forced or insincere. ADR provides the parties the opportunity to have a dialogue so that they can address issues on a continuum. Further, the litigants have a chance to get past any initial nervousness or frailty. A quick judgment is not made about their credibility or sincerity. This extra time helps the litigants feel more comfortable with their participation, and it assists the mediator or arbitrator in assessing the parties' needs and requests.

5. **The children of ADR.** Love hurts. Nothing could be more true than when parents bring their children into the middle of their conflicts. It does not matter that children can be interviewed on camera or that their preferences are confidential. The bottom line is that children know they have to talk to the judge because their parents cannot make a decision about their well-being. These children are scared, and they are sad that this conflict has veiled the relationship with their parents. For the parents, leaving the decisions to a judge begs for continued conflict. Coparenting is supposed to continue after an order is entered, but the traditional system offers little help with future decision-making and conflict resolution. ADR offers the parties a chance to decide for themselves—or at least have significant input into resolving—custody and parenting time problems of the here and now. Often, ADR teaches parents that they can resolve issues relating to their children without the need for outside involvement. Even if the parties agree to help from a mediator or arbitrator for future disputes, they have taken the children out of the decision-making process, and their family benefits from that decision alone.

Trials are available to litigants, and judges are quite willing to make the decisions that the parties cannot. Arguably, there is a different type of deliberation that goes into decisions regarding domestic relations because such decisions impact the day-to-day interactions of the parties and their children. Nevertheless, when these decisions are made by a judge, the parties are more likely to return to litigation in the future. The dockets can handle the repeat business, but it takes its toll on the parties. In these cases, the win-lose aspect of a trial deteriorates to a lose-lose situation. The potential for that deterioration is a significant reason that ADR is becoming more popular, and rightly so. ◆

Hon. Lisa Sullivan is the Clinton County Probate Judge, seated in St. Johns, Michigan. She also serves as a judge in the Family Division of the 29th Circuit Court. Judge Sullivan is the current chair of the Family Law Section of the State Bar of Michigan and a past president of the Women Lawyers Association of Michigan. Ms. Sullivan is a contributing author and presenter for The Institute of Continuing Legal Education.