

Focus ALTERNATIVE DISPUTE RESOLUTION

Think of arbitration as a creative multi-tool



Lorne Wolfson

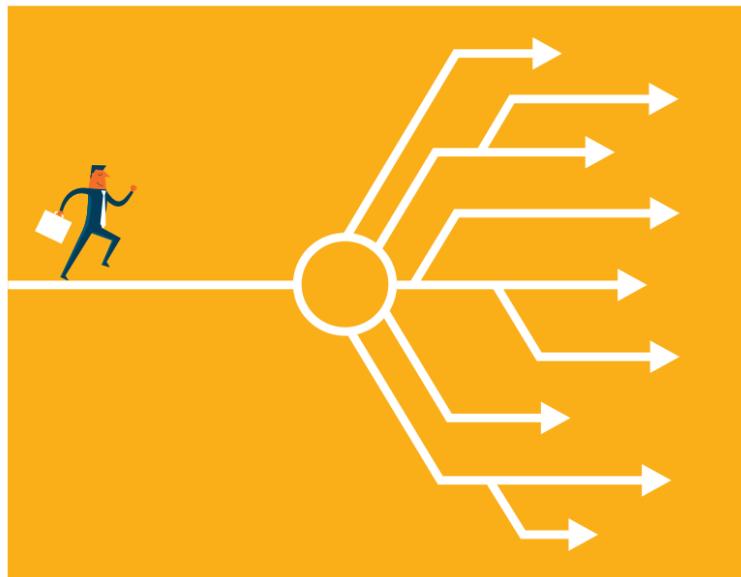
A part from the well-known advantages of arbitration in the resolution of family law disputes (accessibility, costs savings, timely resolution, limited appeal rights and the ability to choose both the arbitrator and the procedure for the arbitration), arbitration allows for a number of creative options that can meet the needs of the parties.

Types of hearings

While most arbitrations will feature a hearing, there are no limitations on what form that hearing should take. The *Arbitration Act* contains no definition of a “hearing” and allows the arbitrator to determine the procedure to be followed. Besides the traditional courtroom style hearing (in which the applicant and then the respondent call witnesses to give evidence under oath) hearings may follow the “boardroom style” (in which evidence is led issue by issue), consist of “documents only” (supplemented by oral or written arguments), consist of affidavit evidence (either with or without cross-examination), involve the parties only (with counsel as coaches but not participants) and final offer selection (in which the arbitrator selects which of the final offers most closely approximates the award he or she would have made).

Pre-hearing procedure

In ordinary litigation the pre-hearing procedure is governed by the *Family Law Rules* of the particular jurisdiction. In arbitration the arbitrator (with the input of the parties and their counsel, if any) determines the most appropriate procedure for the case. In most cases the arbitrator will convene a pre-arbitration conference during which timelines will be fixed for the delivery of position statements, witness lists, disclosure, expert reports, questioning and so on. Procedural issues likely to arise during the arbitration (for example, admissibility of expert reports and other contentious evidence) can be addressed and resolved long before the hearing. Pre-hearing problems (disclosure, interim issues, etc.) can be dealt with at the pre-hearing conference or in a motion before the arbitrator.



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Partial settlement

Family law cases typically give rise to a wide variety of issues. Many involve both financial (property, child and spousal support) and non-financial issues (custody and access). Many parties are reluctant to settle certain issues and continue to litigate others, feeling that a settlement must be “all or nothing.” One solution is to resolve the issues that can be settled and agree to arbitrate those that remain. Together with a predetermined timeline for completion of the arbitration, this approach encourages an early settlement of what *can* be settled. Often the “settlement momentum” created by a partial settlement encourages the parties to resolve those issues that remain.

Specialized arbitration

Even where a judge has family law experience, there is no guarantee that he or she has expertise in the area of the parties’ dispute. In arbitration, on the other hand, the parties can choose an arbitrator who has the required expertise. Examples include a business valuator for valuation issues, an accountant for tax issues, a mental health professional for custody and access issues, or a psycho-educational expert for schooling issues. Where the parties want both the expertise of a specialist and the procedural knowledge of a lawyer, co-arbitrators may be the perfect solution.

Summary arbitration

Arbitration can be particularly useful when the case involves a narrow issue or where the lack of time or financial resources make other options impractical. Examples of “summary arbitrations” conducted by the author include choice of school, camp, extracurricular activities or medical treatment; issues arising out of the sale of real estate (choice of agent, listing price,

whether to accept an offer, etc.); and determining the sharing of section 7 (extraordinary) expenses. Combined with a stripped-down procedure (e.g. written submissions only), summary arbitration can be very cost-effective.

Variations and reviews

Most family law settlements provide for the future variation or review of issues such as custody, access, support or security for support. By the time most parties sign their separation agreement, they have no interest in returning to litigation to address future issues.

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Where the parties have settled the case with the assistance of a mediator, they may be happy to name the mediator as a mediator-arbitrator to conduct any future variation or review if the parties are unable to resolve the issues themselves.

Combined with other processes

Arbitration can be combined with other dispute resolution processes. Mediation-arbitration is a popular process in which the parties execute an agreement by which they commit to a two-stage process (mediation, followed by arbitration, if necessary) with either the

same or two different neutrals. A lesser known alternative is arbitration-mediation, where the arbitrator renders an award but it is not released until the parties have attempted mediation. Parenting co-ordination is a process where the parties retain a neutral (usually a mental health professional with specialized training) to help the parties resolve minor issues (e.g. minor variations to the residence schedule, choice of extracurricular activities, sharing of section 7 expenses, etc.). Finally, arbitration can be added as an option to collaborative practice where the parties have been unable to settle through negotiation but do not wish to resort to the courts.

Creative arbitration

One of arbitration’s greatest features is the flexibility that it offers. The parties can select the type of hearing and pre-hearing procedure they prefer. Arbitration can be combined with a partial settlement and can be appended to other dispute resolution processes. The parties can select specialized arbitrators, summary arbitration and use arbitration for variations and reviews. The ways in which arbitration can be modified to meet the needs of the parties are limited only by their creativity.

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Announcing birth with a bang illegal in Nebraska

The birth of a baby is always a time to celebrate, but an exploding birth notice can go too far. A Nebraska father, Jon Sterkel, has been charged with setting off an explosive without a required state permit, reports dailymail.co.uk. He and his wife, Ashley, wanted to announce the birth of their son, so Sterkel used a rifle to shoot at an exploding target filled with blue powder. He posted a video of the explosion on Facebook with his voice proclaiming “It’s a boy!” The explosion alarmed local residents who called the Scotts Bluff County Sheriff’s Office. The targets are designed to explode when hit with a high-powered rifle shot to show that it has been hit. It is legal to purchase the exploding targets but they require a permit by the state patrol to be legally set off. After an investigation, police issued a Class I misdemeanor ticket punishable by a \$1,000 fine, one year in prison, or both. Sterkel apologized for the confusion, but added: “If you can go to a store and buy it, how in the world can you know it’s illegal?” – **STAFF**