

ARBITRATION: A NEW TOOL FOR CONTESTED FAMILY LAW CASES

by Mark E. Sullivan

“So what else is on your schedule this week?” I was talking to Sandy Garcia at The Barrister’s Bistro, where she’d bought me a danish and a latte to celebrate our settling an alimony case.

Sandy’s face brightened. “I have an arbitration on Wednesday in which Jack Perelli and I will be going head-to-head on alimony. I’ll sure be glad to get that case heard.”

“You sound excited, Sandy,” I replied. “But I know Jack ‘The Shark’ Perelli - he’s a real scrapper. You’ll be lucky to finish your case a week from Wednesday!”

“That’s why we chose arbitration,” she replied. “When you try a case before an arbitrator, you have a much better chance of finishing on time. Ella Jefferson is the arbitrator we chose, and she really knows how to keep cases on track. We’ve blocked out Wednesday and Thursday before her, and she sometimes works into the evening if the parties request it in order to conclude the case. The last one I had in front of her started at 8:30 a.m. and she ordered in lunch so we could keep moving forward. When’s the last time you had a judge do that?”

“Never.” I replied. “In fact, the last judge I had for an alimony case showed up at 9:30 on the bench, claiming that he’d been in a judges’ meeting that ran over, and he left the bench between 12 and 2 to speak to the Mount Airy Civitan Club because he’s up for reelection in three months! We were lucky to get him to stay till 5 p.m., since he had to pick up his kids from day care, and he pointed out to us that, although we only had 15 minutes’ testimony left, all courtrooms must be closed at 5 p.m. since there’s no money for overtime pay for the bailiffs.”

REASONS FOR ARBITRATION

“Sounds like you need a dose of arbitration in your next case, Mark,” Sandy responded. “It’s much more user-friendly than court. No dockets, no artificial time constraints, no press of other cases waiting after you to be heard. And you wouldn’t believe how *easy* it is for motions to be heard!”

It sounded like Sandy was on to something, so I whipped out my notepad and started writing down some pointers on family law arbitration. Here's what I took down:

"Most motion hearings, unless they require in-person testimony, can be handled over the telephone with the arbitrator. Jack and I just finished arguing a disputed matter about discovery to Ella, and it took us twenty minutes by phone. Jack and I had written the usual letters to each other, disagreeing about documents to be produced or withheld and where the production would occur – at our office or at their CPA's. When we realized that we were at an impasse with a week left before the hearing, we had our paralegals coordinate a phone conference with Ella and we faxed her our discovery requests and follow-up letters to let her get the picture. Then we spoke with her by phone for twenty minutes and that was it! She made an intelligent ruling – we both gained some and lost some – and she offered to write it up in a memo if we needed it for the record."

"Sounds like expedited discovery enforcement is a real *plus* for arbitration," I said. "The last one which I had required a motion to compel, an objection, a motion for a protective order, cross-notice for hearing, calendar requests, two attorneys driving to the courthouse and waiting for the motions docket to be called, then argument to the court and then the preparation of an order, which required review, comments and revisions by the other side. It must have cost thousands of dollars. What are the other advantages of arbitration?"

OTHER ADVANTAGES

Sandy was waxing eloquent. She described some of the advantages as follows:

- You can actually *pick your judge* instead of relying on the random rotation system we have in district court. There are 18 fellows of the state chapter of the American Academy of Matrimonial Lawyers, from Asheville to Jacksonville, who are trained and certified arbitrators; you can select one from www.nc-aaml.com/certifiedarb.htm. You can also choose a board-certified family law specialist; go to www.nclawspecialists.org and select Family Law. You can choose the arbitrator

whose background matches that of the case. If it's a visitation arbitration, a psychologist might be in order; if the arbitration concerns business valuation, then agree on a CPA or an economist.

- In fact, the entire process of arbitration is “agreement-driven,” since the arbitration starts out with an agreement between the parties to use arbitration to decide the dispute. Once the parties agree on arbitration, their decision is set out in an arbitration agreement. If there is a case pending, the agreement can take the form of a consent order. In general the arbitrator has the powers and prerogatives of a judge in receiving evidence, hearing testimony and reaching a decision. As soon as the parties have selected an arbitrator, they usually sit down with him or her to decide on the rules. The parties agree on the ground rules for the hearing, including, for example, the presentation of evidence, the scope of testimony, what issues will be decided, the scheduling of hearings, whether the arbitration award will be appealable and the allocation of the expenses of the arbitration.
- The forms to use for the initial agreement, motions, notices, orders and awards are available in the arbitration chapter of the NCATL's *Family Law Practice and Procedure*. The initial agreement in a filed case can be as simple as:

THIS CAUSE came before the undersigned district court judge on the joint request of the parties, as shown by their signatures below. It was made to appear to the court that the parties have agreed to enter into arbitration pursuant to the Family Law Arbitration Act, G.S. 50-41 et seq. The court finds and concludes that good cause has been shown for the entry of this order.

IT IS THEREFORE ORDERED THAT, pursuant to G.S. 50-42(a), the issues of ____, ____ and ____ shall be resolved by arbitration. _____ is designated as

the arbitrator. The parties shall set by agreement within 30 days hereof the rules to apply in this proceeding. If they have not done so, then the arbitrator shall determine these within 45 days hereof.

District Court Judge

Date: _____

**We have read the above and consent:
[signature blocks below for parties and their attorneys]**

- The rules are called the North Carolina Rules for Arbitrating Family Law Disputes. These rules (plus useful commentary on them and on the statute) can be found in *Arbitrating Family Law Cases by Agreement: Handbook for the North Carolina Family Law Arbitration Act*. The booklet was written by Professor George Walker of Wake Forest University Law School, who was a leader in drafting and passage of the Act, and it is available at the Family Law Section’s website, Legal Resources – Publications:
http://family.ncbar.org/Legal+Resources/Publications/Downloads_GetFile.aspx?id=3642. If the parties cannot agree on the rules, then the court may specify what rules apply (G.S. 40-45) or, if the agreement so provides, the arbitrator can make the decision. A sample consent order for arbitration procedures might read as follows:

THIS CAUSE came before the undersigned arbitrator. Plaintiff was represented by Sandra Garcia and defendant was represented by Jack Perelli. The parties have submitted all issues in this case for arbitration pursuant to Article III of NCGS Chapter 50, the Family Law Arbitration Act (G.S. 50-41 et seq.). The parties have executed a consent order for arbitration. This arbitration is to be conducted subject to the conditions and provisions set forth herein.

IT IS ORDERED THAT:

1. North Carolina Canons of Ethics for Arbitrators. The North Carolina Canons of Ethics for Arbitrators shall apply to this Arbitration Agreement.

2. Arbitrator. Ella Jefferson shall be the arbitrator. The arbitration shall be held at her office or at such other place of arbitration as the arbitrator shall designate.

3. Fees. The arbitrator's fees and charges are as set out in the arbitration fee agreement, which is incorporated by reference. This shall be signed by the parties. The fees will be shared equally by the parties. The defendant shall advance the costs for arbitration, and he shall be repaid at the time of equitable distribution for the one-half share attributable to the plaintiff. Based on an estimate of about 30 hours, the parties have agreed that defendant shall deposit \$8,250 in Ms Jefferson's law firm trust account. They understand that the actual amount may be less or more than this figure.

4. Rules. The North Carolina Basic Rules for Arbitrating Family Law Disputes (Basic Rules) shall apply except as follows –

a. Delete 3, 4, 5, 7, 14, 23, 34, 35, 101, 102, 103 (these last three are from the Optional Rules)

b. Add as 15(i), "The attorneys and arbitrator may communicate with each other by e-mail so long as everyone is copied simultaneously with the message."

c. Add as 17(f), "The arbitrator shall follow the substantive law of North Carolina."

d. In Paragraph 26(b), substitute "e-mail" for "telegram."

5. Arbitration Award. The parties shall faithfully abide by and perform any arbitration award.

Date: _____

District Court Judge

**We have read the above and consent:
[signature blocks below for parties and their attorneys]**

- The process is confidential and private. Unless the agreement states otherwise, the arbitration is held in a law firm conference room. This is a strong factor for many parties, since there are few things people would like to lay out in front of the public less than their matrimonial disputes, faults and finances. The private and comfortable atmosphere hearing is conducive to a more relaxed approach to the decision-making. “At a recent arbitration on custody and visitation,” says Raleigh attorney Rose Stout, “we provided coffee, juice, fruit and rolls in our conference room during the hearing. I haven’t seen any of that in a courtroom recently!”

Most attorneys recognize that going through the court system is time-consuming, inconvenient and expensive. Arbitration is an expedited process which avoids courtroom and calendar delays and can significantly reduce legal fees. “I don’t have to show up for calendar call,” Charlotte attorney Tom Cannon points out, “and then sit around and wait for my case to be heard – assuming it isn’t *bumped* by another case. Mine is the only case on the docket! I get to choose the date and the time with most arbitrators, and there isn’t a 30-60 day wait to get on the docket, either. Most of the time I can set a case on for an arbitration within two to four weeks of the request.”

With arbitration, this translates into ‘money efficiency.’ Although it costs money to pay the arbitrator, the cost is usually shared equally by the parties and the time saved as compared to courtroom procedures and delays easily justifies the money spend on a “private judge.” “I found this out in a recent case,” says Raleigh attorney Lynn Burleson, who was co-chair of a North Carolina Bar Association committee which drafted the statute. “The case had dragged on and on in court, mainly due to the

husband's being unreasonable and obstinate. When the case got into arbitration, it finished in two days. That's a real testament to speed, hard work and efficiency."

Another advantage of arbitration is in case preparation. The attorneys can arrange to "stage the case," especially if it's a complicated or a multi-issue one, into separate hearings on different days, which will give each side time to prepare separately for each issue or sub-issue. In a custody case, school issues might come on Monday morning, the psychologist's testimony on Monday afternoon, mom's testimony and witnesses on Friday and dad's issues the following Tuesday. With equitable distribution, the arbitrator can hear the issues of valuation, classification and distribution at different times, or she can schedule separate dates for testimony as to the home, the spouse's business, the pension, the personal property and the distributive factors. With alimony, one can handle earning capacity on one day, accustomed standard of living and reasonable expenses on another and ability to pay on a third day.

"On the other hand," says Raleigh lawyer Rik Lovett, "sometimes I like to get everything on the calendar at once to be heard and settled at one sitting. That's virtually impossible with a judge. I like arbitration because it lets me do what is best for my clients without regard to courtroom dockets and calendaring rules."

THE FAMILY LAW ARBITRATION ACT

What's in the Family Law Arbitration Act? "The statute is straightforward and easy to read," says Howard Bum of Asheville. "It'll take you about half an hour to read G.S. 50-41 and the following sections on arbitration. The comments after each section help to explain it. The FLAA doesn't really change North Carolina substantive family law; rather, it offers practitioners another way of resolving disputes that arise under those laws."

The FLAA allows agreements to include arbitration as an option for subsequent dispute resolution. Under G.S. 50-42, whether before, during and after marriage, the parties may agree in writing to submit any dispute to arbitration. These agreements include consent orders, separation agreements, premarital

agreements and marital agreements. They are valid and enforceable and, except upon the parties' consent, irrevocable. One exception is the issues of custody and child support before the parties' marriage; arbitration of these cannot be determined in a premarital agreement. In addition, the issue of divorce cannot be decided by an arbitrator; that power is still left with the court.

Even if someone changes his mind, the court can compel arbitration. The FLAA contains provisions to require a party to participate in arbitration who has signed an agreement to do so (G.S. 50-43).

Burleson points out that the statute contains extensive provisions for arbitral hearings. "There are rules for conducting hearings, notice, cross-examination, tender of evidence and recording the hearing at G.S. 50-47, representation of parties by counsel or the waiver of counsel at G.S. 50-48, and the attendance of witnesses at G.S. 50-49."

The decision of the arbitrator is an *award*. Pursuant to G.S. 50-51, it must be in writing, signed by the arbitrator, served on the parties and it must state the reasons for the award. It may provide for interest, costs and specific performance but not for punitive damages unless the parties agree otherwise. The agreement fixes the time within which the award must be made; typically this is thirty days after the hearing.

ARBITRATION – FINAL OR NOT?

Most attorneys think of arbitration as fixed and final, unchangeable and unappealable. With the Family Law Arbitration Act, that "ain't necessarily so." "The Act provides that the parties may agree to have errors of law reviewed by the courts, just as with the usual district court order," Professor Walker states. "And a party may always ask the court to vacate or modify a child custody or support award if it is not in the best interest of the child or if there is misconduct by the arbitrator. As for custody and support, you just can't cut that off from appeal, and the appeal and modification rules in the Act are all more liberal than in commercial arbitration." In a proceeding in court to modify the arbitrator's award, the burden of

proof at the hearing on this issue is on the one seeking to vacate, pursuant to G.S. 50-54(a)(6).

To expand further on changing the award, the FLAA states that the award can be modified (including clarification or correction) by the arbitrator before submission to the court (G.S. 50-52). Once the award is made by the arbitrator, the court may confirm, vacate or modify the award (G.S. 50-53), and the grounds and procedures for vacation (G.S. 50-54) and modification (G.S. 50-55) are specifically set out. The procedures for changing an award for alimony, post-separation support, child support or custody (based on a substantial change of circumstances) are set out at G.S. 50-56.

As to appeal, a common concern of clients is their uncertainty about the outcome of the hearing. This is usually expressed as *“What if I don’t like what the arbitrator does? If I don’t like what a judge does, I can appeal. So why would I give that up in an arbitration?”* Even though we know that it costs thousands of additional dollars to take an appeal, that the appellate court doesn’t “correct the decision” of the trial judge but only – in appropriate cases – rule on whether there is a serious, prejudicial error at the trial level, and that it can take 12-15 months for the decision to come back, clients still like this safety valve.

Durham attorney Nancy Gordon says she believes she’s found a way to shortcut the process through an arbitration appeal to an arbitration ruling. “I’ve suggested to my clients that the appeal from an arbitration be directed to another arbitrator – sometimes one who is a prior trial or appellate judge – so as to eliminate the time delay and much of the cost of an appeal to the North Carolina Court of Appeals.”

“This often comes up when we sit down initially with the arbitrator and decide whether to provide for an appeal of the arbitration,” says Gordon, who is president of the state chapter of the American Academy of Matrimonial Lawyers. “Frankly, this provision allays fears of the opposing counsel as well as of my clients; lawyers and their clients somehow see uncomfortable with arbitration, and keeping some kinds of appeal option in place helps their comfort level with this process.”

Gordon states that her own comfort level is satisfied with the arbitration decision, even one she

doesn't agree with: "The arbitrator is generally going to give the case more attention than a judge and is going to understand the legal and financial issues more thoroughly. Often with a judge my case is one of many and may be heard in bits and pieces over several days along with other pending matters. I often see a 'cookie-cutter' result in the courtroom. Judges are simply more limited in the time that they can give to each individual case. When they need more information in order to reach a decision or make a conclusion, they almost never ask for it for fear of being seen as an advocate for one side or the other, instead of a neutral decision-maker. An arbitrator is more likely to think outside the box and, if it's needed, to ask for more information. I have much more confidence that my client will get a fairer result from an arbitrator who has the time and expertise to devote to an individual case and we don't get *lost in the crowd*."

CONCLUSION

I came away from the meeting with Sandy Garcia convinced that this was a new and valuable approach to family law disputes, and Sandy made me a believer. "The Family Law Arbitration Act," Sandy concluded, "is a new way for family law practitioners to get cases resolved in a hearing that is fair and prompt. With the congestion that we face in some of our state district courts and the need for domestic clients to conclude their disputes and move on in their lives, it is all the more important for domestic lawyers to seek out and use new ways of moving cases toward completion. The comprehensive structure for resolution of domestic cases gives litigants, lawyers and arbitrators a powerful new tool to move difficult cases and complicated disputes to a swift resolution. It provides the best guarantee for a knowledgeable and trained family law decision-maker. And it affords the parties privacy and convenience at the same time. It's a statute whose time has arrived."