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Binding Arbitration and the Problem of Protecting the Survivor of Domestic Abuse

by Anne Argiroff

I. Introduction

Over the past decade there has been an increasing emphasis on alternative dispute resolution (ADR) in domestic relations cases. ADR includes mediation and arbitration. Proponents of these processes state that parties save time and money and that such alternatives clear congested court dockets.[1] These two processes have benefits, but they also present serious concerns, most pointedly in those family law cases involving domestic violence and issues of power and control.[2]

This article examines the advantages and disadvantages of using arbitration to resolve domestic disputes and concludes that the court system is best equipped to protect victims of domestic violence. Also discussed is how some states are incorporating domestic violence issues into their arbitration statutes, but how many do not explicitly address these matters through legislation. The examination of these statutes also reveals leaving family law cases involving domestic violence to the courts is probably best.

II. The Nature of Arbitration

While the focus in the literature has been on problems in mediation, arbitration also presents issues for the domestic case involving abuse. Arbitration is a

[1] When compared to more traditional forms of dispute processing, divorce mediation may not necessarily result in time and cost savings. Many studies touting the time and cost benefits of mediation contain "severe methodological flaws." *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). Other studies indicate that in most divorce cases in court an overwhelming number of couples resolve their own issues anyway. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979). Further studies indicate that couples who use third-party assistance to resolve their disputes resolve 40 percent of their issues themselves. Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179, 180 (1991). Accordingly the efficacy advantages of mediation have been overstated. This may be the case even more so for arbitration. Parties to arbitration must pay the arbitrator as well as their own attorneys. This must be weighed against the cost of court delays. Any cost savings of arbitration, however, should not be overemphasized to the client.

[2] The terminology in this article will not be gender neutral. Statistically the overwhelming number of domestic abuse victims is women. *See, e.g.*, *Thurman v City of Torrington*, 595 F. Supp. 1521, 1528 n.1 (D. Conn. 1984) (women are victims in 20 of 30 spouse abuse cases); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983) (finding that 95 percent of victims are women). This article reflects those statistics.

Anne Argiroff (16610 Mack Ave., Grosse Pointe Park, MI 48224; (313) 882-8116) has her own appellate practice and concentrates on family law; she was director of Oakland Livingston Legal Aid and a legislative advocate for Michigan Legal Services.

process where parties submit their case to a neutral third party who acts as a decision maker. Unlike mediation, arbitration is binding, that is, the decision is final, and there is usually no right of appeal, or at best there is an attenuated right of appeal. In addition, the rules of evidence may not be applicable. Arbitration usually takes place in an office setting, and the arbitrator's decision must be approved by a judge. Arbitration can occur before a complaint is filed, when the suit is filed, during the court process, or even after final judgment.

A. Advantages

One advantage of arbitration is that the parties may get a speedier determination of their case. Another is that the parties can shop for a favorable decision maker. In fact, many feel that choosing an arbitrator is the chief benefit of the arbitration process because the parties can choose someone experienced in family law who understands the complex issues of a divorce.

The arbitration process lets the parties decide whether to arbitrate, who will be the arbitrator, where the arbitration will take place, whether custody, visitation, support, and property division will be arbitrated, how discovery will proceed, whether the rules of evidence will apply, and other ground rules.

B. Disadvantages

While arbitration may work well in cases where the parties are interested in the process and have relatively equal bargaining power,[3] a family law case that involves domestic violence and issues of power and control may be a different matter. An abused party may wish to have an arbitrator who understands domestic violence, but the party may not be able to get the batterer to agree. The likelihood of agreement may be slim because the batterer has an opportunity to be part of every decision and is empowered with more control than through typical court procedures. The very nature of the arbitration system may leave an abused party in a vulnerable position each time agreement is negotiated. Even though attorneys assist in the arbitration process, they cannot protect a client against these increased, and often subtle, opportunities for manipulation, and they cannot alleviate fear.[4]

Although arbitration is a more formal process than mediation, it still does not have the institutional protection of the court system. As already noted, binding arbitration often precludes appellate review. Unlike the court system, an abused party who arbitrates is severely limited, if not barred, from appeal. In addition, subtle differences are also significant. For example, the effect a formal court procedure may have on the batterer is important. Lectures from the bench concerning the inappropriateness and seriousness of violent behavior improve the future conduct of some parties and can help deter a batterer from violence.[5] With arbitration, however, an abused party may be left with the perception that her case is relegated to a lesser forum or that she does not deserve a judge as a decision maker.

C. Privatization Versus Public Accountability

Arbitration is privatized and one step removed from public accountability. Judges, on the other hand, are publicly elected or appointed officials, who are probably aware of public opinion. They are also subject to state monitoring. Arbitrators have little, if any, accountability and make decisions within

[3] Arbitration probably works best where, generally not a divorce case, the parties are at arm's length. In this same vein, arbitration may be inadvisable in business situations where an imbalance of power between the parties is obvious.

[4] An attorney cannot be with her client at all times. The arbitration process creates a situation that requires more communication and agreement concerning procedural issues. The court system also allows opportunity for harassment or coercion; however, as discussed in this article, the more formal setting works to control batterer behavior.

[5] *See, e.g.*, L.S. Sherman & R.A. Berk, *The Specific Deterrent Effect of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984).

an insulated system that is often confidential—no public censure, no court watch, and no judicial tenure commission. Requiring a record of the arbitration improves accountability but does not by itself make an accountable system. In any event, the existence of a record is useless without a real right of appeal. Although attorneys may not use a bad arbitrator again, an aggrieved party is essentially stuck with a bad decision.

While there are problems in the court system, it at least offers more protection to litigants than the arbitration system. Arguments that there are bad judges can be countered with the argument that there will be more bad arbitrators, even with choice, because the number of arbitrators is greater than the number of judges. Moreover, the parties must always agree, leaving the possibility that neither may be satisfied, and they risk having attorneys unfamiliar with domestic violence issues or the selection of arbitrators.

D. Arbitrator Authority Limited

Arbitrators do not generally have the authority to issue domestic violence protection orders, find contempt, or order a jail term for violation of an injunction. Accordingly a case involving domestic violence can be splintered. Judges might issue protection orders and determine contempt while an arbitrator might address the issues of custody, visitation, support, and property division.[6] A case, therefore, would be cumbersome and impractical, and there would be two decision makers instead of one.

III. State Arbitration Statutes

A review of some state arbitration laws[7] reveals that few legislatures have incorporated domestic violence issues within their statutory frameworks, and states that have squarely addressed some of the issues still fall short of safeguarding victims of domestic violence.

A. States That Do Not Incorporate Domestic Violence Issues

In California a court may order to arbitration the division of the community estate if the parties have not agreed in writing to a voluntary division.[8] The provision does not, however, address custody or other issues. Kansas[9] allows divorces and disputes involving domestic relations to go to arbitration. The Kansas Dispute Resolution Act[10] incorporates part of the state's arbitration statute and calls for the development of ADR programs. A mediated agreement may be approved by a court and can be enforced like a court order. Information shared between a party to a dispute and a neutral person conducting a proceeding under the Act is confidential and may not be subject to discovery or admitted as evidence.[11]

Nowhere in the Kansas Act, however, are domestic violence considerations

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[6] That the arbitrator would appropriately consider the effect of domestic violence on these issues is not certain. E.g., in Michigan domestic violence is a factor in child custody determinations and a fault element in alimony and property determinations. MICH. COMP. LAWS § 722.23(k) (1993). The likelihood of appropriate consideration of domestic violence is increased when there is only one decision maker.

[7] More than one-half of the states now have authorized the courts to order some type of mediation in divorce cases. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law*, 30 FAM. L.Q. 779 (1997); *see* KAN. STAT. ANN. § 23-601–5 (1995); TEX. FAM. CODE § 153.0071 (1995). States that have mediation include Alaska, Arizona, California, Delaware, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, West Virginia, and Wisconsin. This article, however, focuses on arbitration. Far fewer statutes concern that form of alternative dispute resolution.

[8] CAL. FAM. CODE § 2554 (1994).

[9] KAN. STAT. ANN. § 5-509 (Supp. 1995).

[10] KAN. STAT. ANN. § 5-501–17 (1995).

[11] Linda D. Elrod & Robert G. Spector, *Family Law in the Fifty States*, 30 FAM. L.Q. 846 (1997).

specifically addressed. Nevada specifically exempts domestic relations actions from mandatory arbitration, but it does not specifically cite domestic violence. Other examples of the general failure to address domestic violence issues include North Dakota, which provides for mediation or arbitration of grandparent visitation cases,[12] and Oklahoma, which allows arbitrator appointment for joint custody disputes.[13] Oklahoma's approach could have serious ramifications in a case involving abuse or imbalances of power and control, particularly if a domestic violence victim with joint child custody refuses arbitration.

Washington's exemption of cases involving a history of domestic violence is a strong statement concerning abuse and power and control issues in alternative dispute resolution.

A final example of a state's ADR policy is Vermont, which requires that parental-right agreements include procedures for resolving disputes. These procedures may include mediation and binding arbitration but are silent about domestic violence.[14]

B. States That Incorporate Domestic Violence Issues

Washington has clearly considered domestic violence within its ADR context more than any other state. Its law specifically provides that in making a permanent parenting plan a court may not order a dispute resolution process if it finds either parent cannot afford the cost of the process.[15] In addition, ADR may not be ordered if there is a history of domestic violence.[16]

Washington includes further protection provisos to the dispute resolution process: when the process is not precluded or limited, a court must consider differences in power and the financial circumstances of the parents if the differences would affect their ability to participate in the process. Washington's exemption of cases involving a history of domestic violence is a strong statement concerning abuse and power and control issues in ADR. This and the other protection provisions of the Washington statute certainly help victims of domestic abuse and should be used as a model for other states.

Michigan has also addressed domestic violence concerns. The state legislature is considering a bill that would define the arbitration of domestic relations cases. The recent case of *Dick v Dick*[17] paved the way for arbitration of domestic matters. The court specifically authorized arbitration as an allowable form of dispute resolution in domestic cases, including custody, visitation, property division, and alimony.[18]

Michigan's proposed legislation, H.B. 4277, does not contain a domestic violence exemption like Washington's, but it provides that if the parties agree to arbitrate and there are allegations of domestic violence, each party must be represented by an attorney, and the

[12] N.D. CENT. CODE § 14-09-05 (1995).

[13] OKLA. STAT. ANN, tit. 43, § 109 (1990).

[14] VT. STAT. ANN. tit. 15, § 666 (1989).

[15] WASH. REV. CODE § 26.09.191 (1997).

[16] *Id.* 26.09.191 (1).

[17] Dick v. Dick, 210 Mich. App. 576, 534 N.W.2d 185 (1995).

[18] Problems with the analysis in the *Dick* decision are numerous. The arbitration agreement in *Dick* specifically reserved the right of appellate review. The court found that there could be no broad appellate review of binding arbitration decisions and noted that an award could be vacated only if it was procured by corruption, fraud, or other undue means. The opinion avoided analysis of standard contract law and did not address whether one or both of the parties might have declined to arbitrate had they known there would be no right of appeal. See Hanley Gurwin, *Divorce Arbitration in the 1990's*, 19 FAM. ADVOC. 29 (1997), for a detailed analysis of the *Dick* decision and the arbitration process.

court and attorneys representing the parties must ensure that each party's consent to arbitrate or to suspend the formal rules of evidence be informed and voluntary. In addition, the court must place consent on record, and arbitrators must be attorneys with domestic violence training.

IV. Conclusion

When a client makes a decision concerning arbitration, she must understand that she is forfeiting a right of appeal and that the process will be the only means of being heard. Furthermore, arbitration is probably not appropriate for low-income clients who cannot afford to pay attorneys, let alone an arbitrator. The stakes of arbitrating are high and are even higher for an abused party because the parties must agree on numerous issues. Binding arbitration, therefore, presents overwhelming problems for domestic abuse cases.

While safeguards can be built, most do not reach the level of protection afforded litigants in the courtroom. Many states' arbitration statutes do not address domestic violence, although Michigan and Washington offer examples of places where some domestic violence issues have at least been considered when legislation was made.

The Washington statute, with its exemption of cases with a history of domestic violence, is the best example of protection. But Michigan's provisions do not go far enough to safeguard victims of domestic violence in the arbitration process. The training requirements are not specific, and whether a party in the middle of a domestic abuse situation can make an informed and voluntary decision concerning arbitration, even with the assistance of an attorney, is questionable.[19]

For the abused party, the court system, even with its flaws, still offers the best protection. As domestic violence advocates, we should concentrate on making the courts even more user friendly, expediting case resolution, and expanding judicial education concerning domestic violence.

[19] Attorneys in general should be aware that to recommend binding arbitration to an abused party may be malpractice.