

ARBITRATION AS A RESOLUTION TOOL IN DIVORCE

THE JUDGE VS THE (WIZ)ARD OF OZ HE'S/SHE'S THE WIZARD AND SHE LIVES IN OZ

Hon. Divida Gude

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The Tornado is coming. Everything is knocked out of kilter!

Why arbitrate in Divorce? Why not go straight to trial after Discovery? Isn't Mediation the best way to resolve a divorce case? What do I have to gain/lose in arbitration?

Speaking with several Georgia divorce lawyers as to why they have not used arbitration as a resolution tool in divorce, most say "in high conflict divorces parties want their day in court, their pound of flesh."¹ That usually means they want to be heard, the other side to be admonished/punished for his or her conduct, or they seek to be exonerated for their role in the divorce. Added to this, the parties will hold hostage that "thing" or issue which means the most to the other to achieve their "win." They want a public shaming! I believe mediation is the best way to work on the "emotional" part of the divorce, while arbitration works on the reality side.

Follow the Yellow Brick Road

Georgia law allows arbitration on all issues in a divorce including child custody. Although there is an exception which requires court approval for custody decisions. The court *shall* accept the arbitrator's decision on custody, "unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interest of the child." *Duncan v. Mughelli*, 324 Ga. App. 465, 465, 751 S.E.2d 127, 128 (2013) (The Georgia Arbitration Code is contained in O.C.G.A. § 9-9-1 through § 9-9-18.) Arbitration in custody cases (O.C.G.A. §19-9-1.1)

How do I get to the Emerald City?

What is Arbitration?

Arbitration is a process where a third party, not the judge, renders a decision in a dispute. Who is this third party? It can be anyone authorized to arbitrate, (excluding your Cousin Vinny), selected by the parties to render a final decision. Unlike mediation, the parties may select someone skilled in the particular field or areas which are issues in the divorce. In mediation, as long as the mediator is trained in mediation, no special expertise in

¹ Something which is owed that is *ruthlessly* required to be paid back.

subject matter is required. If there are contested issues in a divorce case which require knowledge of businesses or real estate, the parties could choose an arbitrator with that expertise, who is not necessarily a lawyer. Or, for a custody case they may use an attorney experienced in high conflict custody cases, or a guardian ad litem as the arbitrator. Of course, knowledge of Georgia law is necessary if legal rulings are required. Many parties select retired judges who have tried hundreds of divorce cases, who are patient, good listeners and knowledgeable of the pertinent law. It makes a difference when they are not on the bench trying to conclude your case to get to the next one behind you. And, the fact that the arbitrator is being paid by the hour, calls for brevity of counsel.

But Dorothy has the Red Slippers!

Advantages of Arbitration

The best thing about having an arbitrator is that the attorneys and parties get to select the final decision maker rather than the judge assigned to the case. This allows them to establish their own criteria for the decision maker. As we know, a divorce case is subject to the court's scheduling, scheduling conflicts with attorneys, and a myriad of reasons which could delay a case for years, not months. After selecting an arbitrator and writing the contract with the particulars, the timeframe is in the hands of the attorneys. They can decide whether discovery will be formal or informal, how legal rulings will be resolved, and other issues which do not require a court date. Arbitration requires cooperation among attorneys and clients. The potential to control the process of getting divorced is in their hands.

The Lion: "I don't understand -- If I only had a brain."

The Process

Arbitration differs from mediation in many ways. It can be done in conjunction with mediation, i.e., med-arb, or arb-med. That is when the arbitrator begins as mediator and if resolution is not reached, hears a short or long version of the facts from the parties to make a binding decision. In arb-med, the arbitration is first, where the arbitrator hears the case, renders a decision, or withholds a decision, and allows the parties to participate in resolving their issues with guidance as facilitator. The standard arbitration is a shortened presentation of your case, where the rules of evidence may or may not be relaxed, and after hearing from both sides, the arbitrator makes a decision. This process is a shortened version of what would happen at trial. However, some lawyers prefer a "trial like" presentation, even in arbitration.

Can we see the Wizard?

The Contract

In choosing to arbitrate, the parties get to create a road map of how the arbitration will proceed. The contract will be signed by the attorneys and the parties and submitted to

the court. The contract sets out the parameters of arbitration, including the selection of the arbitrator. The method of how the arbitrator is chosen, who pays the arbitrator, where the arbitration will be held. Will there be limitations on discovery? How will discovery disputes be decided? Do the parties seek binding rulings of evidentiary issues and pre-arbitration rulings and motions? How will the final decision be written, bullet points or full decision with findings of fact and conclusions of law? These are all part of the contract the lawyers and parties get to create.

The Scarecrow and Tin Man.” If I only had a heart”

Obstacles to Arbitration in Divorce

For some, the main obstacle is cost. For others, the main advantage is cost savings. With more and more parties self representing in divorce cases, cost is a major issue. Not only is a lawyer not affordable for litigants in divorce cases, but paying an arbitrator’s hourly rate is not feasible. Some states provide arbitrators for divorce cases at no cost to the parties as part of court annexed ADR programs. The court establishes a list of arbitrators or panels of arbitrators similar to what Fulton County Superior Court utilized in the 1980’s in tort cases. An arbitrator or panel of arbitrators is assigned to the case and may render a binding or nonbinding decision.

Can we see the Wiz?

A lack of familiarity with the process could hinder the use of an arbitrator. Parties who have never been to court are skeptical of anything they don’t understand. When have you seen mediation or arbitration on television? Not on Judge Judy, Judge Hatchett, or Judge Mathis. It is up to the lawyers to educate and encourage the parties that alternatives to trial are time saving, reasonable and have strong possibilities of a decision without trial. It helps if the lawyer has examples to illustrate the success of this process. Advising the client that finalizing a divorce could take years, not months is always a great motivator.

Another obstacle is the finality of the arbitrator’s decision. Unless the arbitrator’s decision is found to be defective under Georgia law, it will be final and entered as an order by the court. There is no appeal. With a clear decision of findings of fact and conclusions of law, it will be difficult to challenge an arbitrator’s decision. Some believe a substantial difference exists because in a court decision, a party may appeal the proceedings in the trial, i.e., objections, admissibility and other evidentiary errors and rulings not available in arbitration.

“Where’s Toto?”

But wait, isn’t finality a good thing? Yes, for most it is. Then there are those I mentioned previously who seek that “pound of flesh”, no matter the cost. They will appeal, and appeal, and appeal, until they are either exhausted, out of money or lose in all efforts to overturn a decision. Post litigation in divorce can be as difficult as the divorce.

Binding or Nonbinding

If you have purchased an appliance, vehicle or have a lawsuit that ends up in bankruptcy court, you may be subject to binding arbitration. The good thing about divorce arbitration is that you can decide if the decision will be binding or non-binding. I know that there are those who believe nonbinding mediation is a waste of time, but not always.

Many years ago, I had firsthand experience on making a decision between binding and nonbinding arbitration. It was a case against a major corporation that filed bankruptcy. The bankruptcy court of New York, ordered mediation or arbitration; which could be binding or nonbinding. Since I had to travel out of town to the company's headquarters for the arbitration hearing, I was torn between binding and nonbinding arbitration. I decided against mediation, because I wanted a decision. I didn't want to spend my client's money traveling to another city only to reach impasse. This case had lingered for years in bankruptcy court. I decided on nonbinding arbitration because Georgia's law on the main issue was different from the law of the state of our arbitration. It was the best decision I ever made. Even though the lawyers prepared pre and post briefs on the law and facts, the arbitrator refused to follow Georgia law and ruled for the Defendant. Fortunately, I got a "do-over" mediation in Georgia and the case settled to my client's satisfaction.

Everybody Rejoice! A Brand New Day.

The above scenario illustrates a situation where nonbinding arbitration could be your best option. Time and money are the drawbacks to nonbinding arbitration. To spend a day or more, presenting your case to an arbitrator, not to mention the time in preparation and financial burden of paying your lawyer and the arbitrator, the drawback to nonbinding arbitration is time and money. Do you really want to try your case over? Also, in certain agreements, the party who rejects the arbitrator's decision is responsible for fees and costs if there is a challenge.

However, nonbinding arbitration is also a reality check for what to expect in court, and might lead to a mediated agreement. Some people utilize nonbinding arbitration "not for a guarantee, but for a prediction of what would happen if the case went to trial."² "The hope is that once the disputants learn this prediction and have the opportunity to go through a process that is similar to what they might obtain in court, they will voluntarily abide by the arbitrator's decision."³

Click your heels 3 times if you believe!

I guess you could consider a nonbinding arbitration much like a pretrial conference permitted by some judges. If the judge insinuates what he or she might do if the facts are

² Dispute Resolution, Beyond the Adversarial Model, Menkel-Meadow, Love, et al. 2005

³ Id., 475

proven as alleged, it gives incentive to the parties to resolve those issues where there is a strong possibility of an adverse ruling.

Let's ease on down the road.

Arbitration is another resolution process on the dispute resolution continuum or spectrum. Whether it is a fit for your case depends on the circumstances and your client's willingness and financial ability to participate and forego his or her day in court and, perhaps pound of flesh.

Arbitration in the Appellate Courts (Family Law)

Ciraldo v Ciraldo, 280 Ga. 602, 2006
Green v Hundley, 266 Ga. 592, 1996
Page v Page, 281 Ga. 155, 2006
Brazzel v Brazzel, 337 Ga. App. 758, 2016
Rollins v Rollins, 300 Ga. 485, 2017

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