

FAMILY LAW LITIGATION – AN OVERVIEW

All family law issues can be decided by agreement between the parties, in private proceedings such as arbitration, or in court. Whether particular issues in a given case should be decided by a judge or through other means is a matter best determined with the advice of a competent matrimonial lawyer. Litigation is expensive as well as physically and emotionally demanding. The outcome of contested matters cannot be predicted with certainty. Most family law cases nevertheless result in court action of some kind. Not all differences between spouses can be resolved without court intervention. Even those that might otherwise be privately settled sometimes expose a gulf between the parties that is simply too wide to bridge through negotiations.

Litigation must be commenced if the parties in a family dispute cannot reach agreement, if there is no way to protect one spouse from the other, or if there is no way to protect children from one of the spouses. Courts will act swiftly to guard the welfare of spouses and children and to protect their physical and financial interests. In extreme circumstances, judges may grant emergency temporary relief even before scheduling a hearing at which the opposing party is present. Litigation is obviously required if a spouse is physically abusive, refuses to provide necessary financial support, refuses to disclose financial information, conceals assets, or otherwise attempts to subvert conscientious efforts to resolve family disputes.

The filing of a domestic relations lawsuit does not necessarily mean that a

case will not later be settled out of court. Parties are routinely encouraged by judges to resolve their differences. In matrimonial cases, most court orders are entered largely because the parties cannot or will not settle the matter themselves.

A number of separate trials and hearings may be required to resolve a domestic relations lawsuit. Each of the issues discussed separately above—divorce, alimony, child custody, child support, and equitable distribution—may be tried at separate times before different judges in different courts. If interim relief such as temporary spousal support or child support or temporary custody must be sought, separate trials or contested hearings will usually be required to resolve each of these issues. Compliance with time constraints built into the Rules of Civil Procedure, the necessity of conducting formal discovery, and crowded court dockets make scheduling these hearings difficult under the best of circumstances and usually mean that contested family law cases move ahead at a slow and sometimes frustrating pace.

ALTERNATIVES FOR THE RESOLUTION OF FAMILY LAW ISSUES

Virtually all family law issues can be resolved by agreement if the parties are willing, or by private means such as mediation or arbitration that do not involve courtroom proceedings. Each of these alternatives has advantages and disadvantages, which vary according to individual circumstances. State law and local rules sometimes require parties to engage in mediation before going to court, even when the matter is set to be heard by a judge sometime later if an

agreement cannot be reached.

The matter of divorce must be handled in open court in all cases, however. A judgment of absolute divorce is a public document whether or not all other issues relating to the dissolution of the marriage have been resolved by agreement or in private proceedings. It is not necessary in this state for either or both parties to be present in court when a degree of absolute divorce is granted.

Collaborative Law

Collaborative law is a relatively new method of dispute resolution and is authorized by statute in North Carolina. As the name implies, the collaborative process is based on consensus and cooperation rather than on the resolution of issues through adversarial proceedings. The parties in a collaborative case enter into an agreement to disclose all assets and debts, to negotiate in good faith, and to deal fairly with one another. If the parties are committed to these objectives, collaborative law is a dignified and private way to resolve issues relating to custody, child support, spousal support, and property division. The parties often use attorneys and other professionals (such as accountants and counselors) to assist in finding solutions to family law issues.

Collaborative law is not for everyone. There are significant adverse consequences to the parties if collaborative law agreements are violated and the process collapses. Unless both the parties and their attorneys are committed to collaboration at the outset, the process is not likely to succeed.

Mediation

Mediation is a non-confrontational procedure in which the parties themselves retain an independent facilitator, usually a lawyer who is not otherwise involved in the case, to help resolve issues in dispute.

A mediator is a neutral participant and does not have the power to make decisions or impose orders. The mediator's objective is to move the parties toward a consensus. Mediators do not represent either side and do not give legal advice, tax advice, or valuation advice. They may give opinions to the parties and their lawyers if asked to do so.

Most mediations involve private negotiations conducted while the parties are present in one general location but situated apart from one another, usually in separate conference rooms. Mediations do not always result in agreements or resolve disputes, but when an agreement is reached during mediation settlement documents are usually prepared and executed immediately. Mediation is thus a method of achieving what amounts to a negotiated settlement and parties are legally bound after mediation by the terms of any agreement they reach.

Mediation is mandatory under North Carolina law in child custody cases and, under local rules in some counties, in equitable distribution proceedings as well.

Arbitration

Arbitration is an adversarial method of dispute resolution that is, nevertheless, an alternative to court action. Under North Carolina law, arbitration may be conducted either according to statutory guidelines or pursuant to an agreement between the parties. Arbitration decisions are generally binding on the parties, although it is possible to engage in non-binding arbitration.

In arbitration proceedings, the parties select and pay an independent third-party (usually an experienced family lawyer) to decide issues based on evidence offered during a confidential hearing. A panel of arbitrators may be retained in rare instances to hear and decide the case. Arbitration hearings can be scheduled at the convenience of the participants and conducted in private facilities rather than in courtrooms open to the public. Arbitration proceedings are generally less ceremonial than courthouse trials, although both sides present sworn testimony, offer documentary and illustrative evidence, and make legal arguments. Conventional rules of evidence may be dispensed with at arbitration hearings, depending on understandings adopted by the parties.

CONCLUSION

The preceding discussion does not cover all aspects of family law and should not be relied upon as legal advice. Consultation in person with a qualified family law practitioner is essential in order to evaluate the particular facts and unique circumstances of each case.