Alternative Dispute Resolution

Kenneth J. Rigby
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THE NEED

In the last few years, the tremendous increase in the amount and complexity of litigation, both civil and criminal, has overburdened the judicial system of the United States. This increase has resulted in crowded dockets, delays, and assembly-line adjudication. The response has been increases in the number of courts, judges and other court-related personnel and their attendant increases in the cost to the public of administering the judicial system. The problem of the "crowded courtroom" syndrome has received the attention of all levels of the judicial system. In 1978, Chief Justice Warren E. Burger observed: "[T]oday, American courts are hopelessly unequipped to handle the tremendous workloads imposed on them by our burgeoning population and modern technology." Additions to judicial machinery have failed to keep pace with the increase in litigation. In 1982, Chief Justice Burger wrote: "We must now use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools . . . . We need to consider moving some cases from the adversary system to administrative processes, . . . or to mediation."

Prior to the Civil War, divorce was not a social phenomenon warranting statistical recordation in the United States. Divorce statistics were first collected in 1867; in that year, the total number of divorces in the United States was 9,937, or about .03 divorces for every 1,000 people. By 1967, the number increased to over 500,000, or about 4.2 divorces for every 1,000 people. In 1980, 1.19 million couples ended their marriages in the United States. This increased to 1.21 million divorces in 1981, a divorce rate of approximately 5.3 divorces for every 1,000 people. 1982 marked the first decline in twenty years, with approximately 1.18 million couples obtaining a divorce, for a divorce rate of 5.1 divorces for every 1,000 people. Many commentators predict the continuation of the national trend of a slow rise in the divorce rate during the next decade or two.

In Louisiana, the trend in divorce rate parallels the national trend

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6. C. Vetter, supra note 4, at 11.
but has levelled off to a yearly ratio of about 3.3 or 3.4 divorces for every 1,000 people, slightly below the national average. National estimates indicate that four out of every ten marriages entered into in recent years will end in divorce. In Louisiana, the estimate is that one out of every three recent marriages will end in divorce.

As the divorce rate has increased, the number of children affected by divorce has likewise increased. The number of children involved in divorce has tripled since 1954, and until 1964 rose at a much more rapid rate than did divorce itself. About fifty-five per cent of divorces today involve children. Over one million children have been involved in divorce every year since 1972. In the middle 1950's, 6.5 of every 1,000 children were involved annually in a divorce. By 1979, the rate increased to 18 for every 1,000, with nearly 1.2 million divorces affecting nearly 1.5 million children.

The multifold increase in the population, coupled with the increase in the rate of divorce, has multiplied the impact on the legal system. Family law cases constitute a substantial portion of the civil docket of all of the Louisiana district courts. Although no statistical data are kept on the nature of district court civil cases in Louisiana, but only the totals, the concensus of attorneys and judges is that family law cases have been the greatest contributor to the increase in the civil caseload of Louisiana trial courts. There has been a corresponding increase in the number of reported appellate family law cases. In 1951, the Louisiana Supreme Court—the appellate court handling all family law cases at that time—handed down only 10 family law opinions. In 1983, the courts of appeal and the supreme court rendered 177 decisions in family law cases, not including unpublished opinions and decisions granting or denying writs. Substantial jurisprudential changes and numerous legislative enactments have reflected national and local changes in family values, social mores, and attitudes concerning marriage and divorce.

Court congestion—the overloading of the system and the inability of the system to absorb and adequately process the influx of family law

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7. Id. at 15.
8. Id. at 13.
9. Id. at 15.
10. A survey by the author of the docket entries for the First Judicial District Court, Caddo Parish, Louisiana for January 1984 revealed the following:

<table>
<thead>
<tr>
<th>Total Cases</th>
<th>Family Law</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. New suits filed</td>
<td>677</td>
<td>146</td>
</tr>
<tr>
<td>2. Minute entries</td>
<td>2348</td>
<td>754</td>
</tr>
<tr>
<td>3. Cases on trial docket</td>
<td>380</td>
<td>71</td>
</tr>
<tr>
<td>4. Cases on argument calendar</td>
<td>124</td>
<td>14</td>
</tr>
</tbody>
</table>

See also N. Pearson & R. Thoennes, supra note 1, at 52, for similar observations of the impact of divorce cases in courts of original jurisdiction in other states.
cases—has not been the only significant result. An equally important, yet often overlooked and undocumented, result of those trends and changes is the increasingly larger number of married persons who are compelled to resolve their marital differences within the legal system and the effect of that experience on them. There is a growing feeling and increasing evidence that the adversarial system is not the most appropriate forum in which to resolve the disputes arising out of disrupted spousal and parental relationships. Commentators have listed several problems with the judicial adversarial system: (1) it increases trauma and escalates conflict; (2) it encourages “cat and dog fights” that run counter to the best interest of children involved; (3) it fails to address unresolved feelings about the marriage and separation that often precipitated custody and other conflicts in the first place; (4) it fosters low commitment to the eventual agreement or judgment; (5) it encourages spouses to take extreme positions that are unnecessarily divisive; (6) it fails to enhance cooperation, communication and the problem-solving skills of the parties; (7) it emphasizes the coercive nature of adjudication; (8) it increases costs and delay in dispute resolution; and (9) it requires the involvement of persons who are neither trained nor necessarily sensitive to interpersonal relationships and the psychological mechanisms and nuances involved in the decision-making and dispute resolution made necessary by the disruption of these close personal relationships (i.e., judges and lawyers).

Most family law practitioners and judges agree that in a majority of disputed family law cases both parties are dissatisfied with both the judicial process and the results obtained. The purpose of this article is to explore some of the alternative means of resolving disputes arising out of marriage and its termination as suggested by Chief Justice Burger.

Available Alternatives

Besides simply adding more judges and other court personnel, a number of alternate methods of dispute resolution in family law cases have been suggested. Separate family courts or divisions of civil courts, the following statistics:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>TOTAL CIVIL FILINGS</th>
<th>RULES HEARD</th>
<th>SEPARATIONS GRANTED</th>
<th>DIVORCES GRANTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>3912</td>
<td>1024</td>
<td>1088</td>
<td>1918</td>
</tr>
<tr>
<td>1981</td>
<td>3832</td>
<td>1016</td>
<td>1066</td>
<td>2116</td>
</tr>
<tr>
<td>1982</td>
<td>3989</td>
<td>1016</td>
<td>998</td>
<td>1913</td>
</tr>
<tr>
<td>1983</td>
<td>4033</td>
<td>1042</td>
<td>1066</td>
<td>2116</td>
</tr>
</tbody>
</table>

12. Wolff, supra note 5, at 222-23; Flanders, supra note 11, at 239.
13. Pearson & Thoennes, supra note 11, at 72.
14. The Family Court for East Baton Rouge Parish reports the following statistics:
15. The Civil District Court for the Parish of Orleans has a Domestic Relations Sec-
the appointment of magistrates, special masters, and other hearing officers, and simplified procedural and substantive rules are alternative judicial remedies. Non-judicial alternatives are administrative processes, arbitration, conciliation, mediation, and clinical determinations of disputes. This article will primarily discuss these non-judicial alternatives. The suggested judicial remedies might relieve the burden on the trial courts of

tion, to which are assigned not less than two judges. This Section is assigned all cases involving domestic relations problems, including the following:

(1) Actions for divorce, separation from bed and board, annulment of marriage, establishment or disavowal of paternity of children, alimony, support of children, custody by habeas corpus or otherwise, visitation rights, and all matters incidental to any of the foregoing proceedings.

(2) The issuance, modification, or dissolution of conservatory writs for the protection of community property.

(3) Actions attacking the validity of surrender agreements made by parents with licensed adoption agencies for the placement and adoption of children, actions by persons alleging authorization by law to gain access to confidential information, where such is available, in adoption records and adoption agency files, and any other contention or attack upon the interlocutory decree or final decree of adoption, or any cause of action germane thereto based upon circumstances arising before or after such decrees, including, but not limited to, issuance of writs of mandamus and prohibition addressed to the bureau of vital records in connection therewith.

(4) The issuance of writs of fieri facias and garnishment under judgments for alimony, child support, and attorney fees, partition proceedings following separation from bed and board, and partition proceedings following divorce judgments.

B. Domestic relations problems, as used herein, shall not include tutorship proceedings and suits for separation of property.


Rule 3(f) of the Rules of the Civil District Court for the Parish of Orleans defines the cases to be heard by the Domestic Relations Section to be:

(f) Domestic Relations cases shall consist of all domestic matters, including suits for divorce, separation from bed and board, or annulment, alimony, child support matters, custody of children, partition of community property, adoption matters, all matters related to or incidental to domestic or family matters, and any other similar matters which this Court En Banc may designate as domestic relations matters or cases.

16. The Nineteenth Judicial District Court, East Baton Rouge Parish, is authorized to appoint two commissioners, whose powers include the conducting of evidentiary hearings and submission to the court of proposed findings of fact and recommendations for the disposition of the matter. They do not possess adjudicatory power. La. R.S. 13:711-713 (Supp. 1984). This statutory scheme does not divest the judicial power in the judge of the court as long as the judges retain the responsibility for making ultimate decisions in the case. See Bordelon v. Louisiana Dep't of Corrections, 398 So. 2d 1103, 1105 (La. 1981).

The Civil District Court for the Parish of Orleans is similarly authorized to appoint three commissioners with corresponding powers. La. R.S. 13:1171 (1983).


In Utah, family court commissioners serve as judges pro tempore, masters or referees on assignment of the court, and with the written consent of the parties, hear and determine contested and uncontested issues, including default divorces. Utah Code Ann. § 30-3-15.3 (1976).
general jurisdiction, but they do not address the perceived inability of
the adversarial system to adequately resolve disputes in matrimonial cases
and the resulting trauma to the participants and their children. A grow-
ing body of support exists for the use of the non-judicial alternatives in
these type cases.

Administrative Agencies

One non-judicial alternative is the filing and processing of marriage
termination issues and disputes in administrative agencies created for that
purpose. There are limited examples from which to compile data or draw
conclusions.

In the People's Republic of China, a couple who mutually desire a
divorce appear together before the agency for the registration of
marriages. A form of administrative hearing is held before the registrar,
who looks at the letter of introduction and first determines whether or
not the consent given by both of the spouses is indeed voluntary. He
then verifies whether proper arrangements have been made for the children
and the property of the spouses, with a view to seeing that the woman
receives what is due to her under Article 23 of the Registration Ordinance
of 1955, i.e., the property originally belonging to her and her share in
the common profit. Having confirmed this, the registrar's only task is
to register the divorce. Courts have jurisdiction over contested divorces
and related family matters. The Chinese legal system is not judicially
oriented and deals only with serious crime and some civil disputes.
Traditionally, other disputes have been handled in the Orient through ad-
ministrative processes on various levels and through other private dispute-
resolving techniques.

Article 763 of the Japanese Civil Code authorizes married couples
to obtain a divorce by registering their signed divorce agreement at the
proper office. No court action is required. The vast majority, over ninety
per cent, of Japanese divorces are accomplished in this manner.

Freedom of divorce was declared in the first decrees of the Soviet
government as the counterpart of freedom of marriage, both important
aspects of the freedom of individuals. During the first twenty-seven years
of the existence of the Union of Socialist Soviet Republics, the right to

18. M. Meijer, supra note 17, at 214.
19. Id. at 215.
20. Id. at 216.
   5, at 220-21.
23. Id. at 191-92; Wolff, supra note 5, at 221.
divorce was unconditional. The only requirement for divorce was its registration in a governmental bureau called the "ZAGS" office. No inquiry was made as to the grounds or motive for the divorce. From 1944 until 1965, freedom of divorce was sharply restricted by the requirement that a divorce be considered by three separate courts. First, a reconciliation hearing was conducted in the District People's Court. Then, an action for divorce was considered by the Provincial Court. Finally, the highest court of the Republic, the Supreme Court, decided the outcome of the action if the lower court's decision was appealed. Additionally, an announcement about the pending divorce was required to be published in the newspaper, and filing and advertising fees exceeded the average monthly wage. In 1965, divorce procedures were revised. The advertisement requirement was abolished, and court procedures were simplified. Divorce by registration was reinstated but was restricted to instances in which no children were born of the marriage or one spouse had been declared missing by a court, declared mentally incompetent by the court, or convicted of a crime carrying a sentence of not less than three years' imprisonment. Other issues, such as custody of minor children, division of property, and alimony, require court action.

In Guatemala, the spouses may petition jointly for a divorce or a separation by submitting a petition describing their settlement regarding children and/or property. Upon receipt of the document, the judge of the family court requests that the couple report back to a general official in eight days. On the eighth day, the general official asks the couple for the last time if they believe that any possibility for reconciliation exists. If the couple responds negatively, the divorce or separation is granted.

These methods of processing divorces administratively on demand or by registration do not require the administrative agency to undertake fact-finding functions and adjudicate contested issues. Therefore, they relieve the courts only to a very limited degree. As a viable alternative to the judicial adversarial resolution of disputes, an administrative agency must possess adjudicatory power in order to resolve disputes rather than simply process uncontested divorces.

Administrative agencies developed as the result of rapidly developing problems in segments of society that called for regulation, control, and decision-making by persons possessing both expertise and facilities in a

25. Id.
26. Id.
27. Id.
28. Id. at 173. For a comprehensive history of divorce in the Soviet Union and a comparison between no-fault divorce laws in California and the Soviet Union, see Bolas, No-Fault Divorce: Born in the Soviet Union?, 14 J. Fam. L. 31 (1975).
29. Luryi, supra note 24, at 172.
specialized field. The consensus was that such agencies could perform both regulatory and adjudicatory functions in these areas better than the traditional judicial process and machinery. Supportable parallels exist between the history of divorce, with its unique monetary, property, and child custody issues, and other societal developments that resulted in administrative agencies to regulate and adjudicate the issues and disputes arising from these developments. These parallels include the rapid development of the problem, the overriding governmental interest in the problems and their resolution, the widespread effect on the populace, and the need for specialized knowledge, training and experience in resolving the resulting conflicts and disputes. Administrative dispute resolution would not diminish governmental control over marriage and its dissolution, but would transfer the exercise of that control from the court to another governmental body, an administrative agency. Additionally, this alternative might reduce some of the negative aspects of the adversarial courtroom method of resolving disputes to the participants.

Legislatures have had considerable experience in establishing and supervising the operation of administrative agencies. Such agencies have a long history of operation, resulting in much expertise in functioning. A body of administrative law has developed which could in large measure be adapted to marital disputes. Administrative agencies are familiar structures in the landscape of government, thus having a higher degree of public acceptance than a newer, unfamiliar concept. Court decisions have firmly established the relationships between administrative agencies, their decisions, and the right of judicial review. Administrative agencies have relieved the judicial system in numerous burgeoning areas of law, including utility regulation, transportation, minerals, labor, civil service, social security, veterans' affairs, workers' compensation, unemployment compensation, and many others.

Both the Congress31 and the Louisiana legislature32 have enacted administrative procedure acts. The Louisiana act is adopted from the Uniform

State Administrative Procedure Act. Each act details the rules governing fact-finding administrative hearings and the right of judicial review. These acts could be modified to cover family law cases, or they could serve as models for separate administrative law procedure statutes applicable only to family law cases.

Although little support probably exists at present in the United States for this type of administrative handling of marital disputes, the proposal merits consideration. Little, if any, evidence proves that courts are equipped to do a better job than could properly qualified administrative tribunals with law-trained judges and other staff specializing in the resolution of marital disputes. Administrative agencies have traditionally been staffed with consultants and other personnel trained and experienced in that agency’s area of responsibility. Courts have limited authority to enlist or invoke the expertise and assistance of other governmental agencies. They must basically rely upon what is produced and developed by the parties themselves in the adversarial process.

Although the granting of a divorce, the awarding of custody or visitation rights, the partition of marital property, and the other decisions incidental to the termination of a marriage have traditionally been within the exclusive province of the judiciary, they need not be. With the availability of investigators, counsellors, mental health professionals and others, an administrative agency arguably is better equipped than a court to decide divorce, custody, support and property issues, and hence is a better forum for the adjudication of these issues than is a court. If the granting of a divorce should remain an exclusive judicial function, the court could retain the right to decree the divorce with an administrative agency handling all other issues, subject to judicial review.

Implicit in such a proposal is the issue of whether judges (with legal
backgrounds) or persons of other disciplines (such as mental health and family counseling professionals) are better equipped by training and experience to make the kinds of decisions required in marital cases, especially in custody and other basically non-monetary issues. Also involved is what role the government should play in the formulation, administration, and termination of marriage. How much is marriage a private matter between the spouses, and how much is it a governmental matter? Is the public interest overriding? If so, how can society, through its government, best regulate the incidents of its termination? Can the protection of that societal interest be accomplished only by judicial supervision of the termination of a marriage? Or may that interest be safeguarded by administrative, rather than judicial, procedures? The administrative handling of the termination of a marriage is more likely to protect that societal interest than are other alternative methods, such as mediation and arbitration, in which the process and results are more under the control of the spouses themselves.

Arbitration

Arbitration is a dispute-resolving method in which the disputing parties mutually choose a neutral third party or agency to resolve the dispute by rendering a decision which is binding upon the parties. Statutory provisions for the enforcement of arbitration awards have been enacted in a large number of states, including Louisiana. The process used in arbitration is adjudicatory, but it is normally less rigid and formal than court proceedings and usually conducted in private. Attorneys may participate in the arbitration process.

34. The arguments in favor of and against "divorce by consent" are enumerated in MacKenna, Divorce by Consent and Divorce for Breakdown of Marriage, 30 Mod. L. Rev. 121, 122 (1967). The reason usually advanced for the condemnation of "divorce by consent" is that it reduces marriage to a mere private contract terminable at will, and that it confers complete autonomy on the spouses to end their marriage without public restrictions whatsoever. In other words, divorce becomes "private divorce," leaving no room for society's interest in family stability to assert itself. However, it is the spouses, not society generally, who decide that the marriage should come to an end. Therefore, although the parties must conform to legal rituals, their marriage is being terminated because they will it to be terminated. Bodenheimer, Reflections on the Future of Grounds for Divorce, 8 J. Fam. L. 179, 209-11 (1968).


36. Forty-two states, the District of Columbia, and Puerto Rico have enacted such modern arbitration statutes providing for judicial enforcement of arbitration awards. Am. Arb. Ass'n Family Dispute Services 5.

Arbitration addresses some, but not all, of the criticisms of the judicial adversarial system. It may reduce court caseloads, decrease the psychological effects of the formal combative atmosphere of the courtroom, may not be restricted to legal rules of evidence, may be conducted in private in a more informal setting conducive to negotiation and settlement, may be less expensive, and may consume less time. If the participants have agreed upon the selection of the arbitrator, they may be more likely to accept and be more satisfied with the conclusions of the arbitrator than those of a judge, in whose selection they did not participate. Acceptance or dissatisfaction with a decision has a direct effect on post-decision compliance or resistance to enforcement.

Although permitting the parties an opportunity to present their conflicting views and demands, arbitration, like the judicial adversarial system, affords the parties no right to participate in the resolution of the dispute. They have no direct input into the actual decision that resolves the dispute, so the decision is still coercive in nature. The decision is made for them by a third party whose decision is final and who, in their perception, may differ little from the judge in the courtroom except that they may have agreed to his selection as the one to render the decision. Like judicial proceedings, an arbitration procedure is basically adversarial, albeit more informal. The parties' right to agree upon the arbitrator may better assure the selection of an arbitrator who is competent by education, experience and temperament to adjudicate the controversy. The parties can choose from a large selection of persons having differing skills, such as accountants, psychologists, social workers, other mental health professionals, and attorneys.

38. Rule 11 of the American Arbitration Association’s Arbitration Rules for the Interpretation of Separation Agreements provides: “The Arbitrator shall have broad discretion as to how testimony and evidence shall be received. The hearing shall be informal. In addition to direct statements from the parties, the Arbitrator may receive documents and affidavits, giving them such weight as they may merit.” Cf. La. Civ. Code art. 3112 (“The parties, who have submitted their differences to arbitrators, must make known their claims and prove them, in the same manner as in a court of justice, by producing written or verbal evidence in the order agreed on between them or fixed by the arbitrators.”). And Civil Code article 3110 provides:

The arbitrators ought to determine as judges, agreeable to the strictness of the law.
Amicable compounders are authorized to abate something of the strictness of the law in favor of natural equity.
Amicable compounders are, in other respects, subject to the same rules which are provided for the arbitrators by the present title.


Like administrative procedures, arbitration has gained wide acceptance in dispute resolution, especially in labor-management, business and industry disputes. The United States Arbitration Act is limited to maritime transactions or contracts evidencing a transaction involving commerce, but it excludes contracts of employment of seamen, railroad employees, or any other class or workers engaged in foreign or interstate commerce. Louisiana has long had a number of statutes providing for arbitration in a variety of situations, including the arbitration of medical and dental services or supply contracts between patients and doctors, dentists, hospitals and nursing homes; small claims in city courts; contracts for professional design services entered into by the state; medical malpractice claims; controversies between buyers and sellers regarding the composition of an agricultural product; controversies and issues that may arise in or among barbers individually or as groups, or between cosmeticians, beauticians, hairdressers, estheticians, owners, operators, teachers and

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42. La. R.S. 9:4230-4236 (1983) provides for voluntary arbitration agreements between a supplier of medical, dental or nursing home services and the patient, and contains a sample arbitration agreement which, when executed, is irrevocable and enforceable, except as is provided in the statute. The arbitration proceedings are governed by the provisions of the Louisiana Arbitration Law (La. R.S. 9:4201 et seq.).
43. La. R.S. 13:5207(C) (1983), governing small claims divisions of city courts, provides that a judge may refer small claims cases to an attorney at law who shall serve as arbitrator provided the parties agree to be bound by his arbitration. The attorney must conduct the arbitration proceedings in the manner described in La. R.S. 13:5208(A) (1983). 13:5207(D) provides for the entering of a summary judgment in accordance with the arbitration award. 13:5208 mandates that the judge shall serve as an arbiter responsible for eliciting facts relevant to an impartial determination of the case in the interest of a party not represented by an attorney. He has the duty to conduct an informal hearing and to develop all of the facts in the case. He may attempt to conciliate disputes and encourage fair settlements among the parties.
44. La. R.S. 38:2314.1 (Supp. 1984) requires that all contracts for professional design entered into by the state shall require that all claims, disputes, and other matters arising from that contract shall, at the option of the state, be decided by arbitration. To the extent possible, such arbitration proceedings shall be conducted in accordance with the Construction Industry Association rules of the American Arbitration Association.
45. Medical malpractice claims that are subject to valid agreements for submission to a lawfully binding arbitration procedure are exempt from the medical review panel provisions of La. R.S. 40:1299.47 (1983). The State Treasurer is authorized to issue warrants against the patient’s compensation fund for claims arising out of a final award in an arbitration proceeding against a health care provider. La. R.S. 40:1299.44(A)(5), 1299.44(A)(7), 1299.44(B)(3) (1983).
46. La. R.S. 3:855 (1983) provides that in the event of controversy between buyers and sellers regarding composition of an agricultural product, upon request, the Commissioner of Agriculture and Immigration may appoint an arbitration committee composed of three disinterested parties to resolve the matter.
47. La. R.S. 37:383(4) (1983) provides that the Board of Barber Examiners, an administrative agency exercising regulatory functions, may “act as mediator or arbitrator in any controversy or issue that may arise in or among barbers individually or as groups.”
students in the beauty culture and hair dressing industry; labor disputes; claims under uninsured motorist coverage; disputes among partners regarding the apportionment of profits and losses; the fixing of the price in a sale; disputes concerning the value of livestock killed by a train; to determine the work necessary to relieve natural drainage obstructed by a railroad; and disputes as to whether lands within the Tensas Basin Levee District are subject to be listed and assessed. Title XIX of the Civil Code of 1870, entitled "Of Arbitration," carried forward many of the provisions of the Civil Codes of 1808 and 1825 governing arbitration. The Louisiana Constitution of 1921 mandated that the Legislature had a duty to pass laws governing voluntary arbitration. Louisiana has a modern arbitration statute entitled the "Louisiana Arbitration Law," contained in Louisiana Revised Statutes 9:4201-4217. Arbitration is clearly not an unfamiliar method of resolving disputes in Louisiana.

The Civil Code articles governing arbitration place no restrictions on the subject matter of arbitration and provide that parties generally may submit to arbitration everything in which they are concerned or of which they may dispose. The only restrictions on the subject matter of arbitration contained in the Louisiana Arbitration Law are contracts of employ-

48. La. R.S. 37:541(A)(5) (Supp. 1984) empowers the Louisiana State Board of Cosmetology, an administrative agency exercising regulatory functions, to act as mediator and arbitrator in any controversy or issue that may arise among or between cosmeticians, beauticians, and hairdressers, and estheticians, individually or as groups, and in any controversy or issue that may arise among or between owners, operators, teachers, and students individually or as groups.
49. La. R.S. 23:861-876 (1964), as it appeared prior to its repeal by 1972 La. Acts, No. 406, creating the Louisiana Labor Mediation Board, mandated one of the functions of the Board to be mediation and conciliation in labor disputes.
54. La. R.S. 45:452-458 (1982) provides for optional arbitration to determine the work that is necessary to relieve the natural drainage obstructed by a railroad.
55. In case of disagreement between the parish tax assessors and taxpayers as to whether lands are subject to be listed and assessed under the provisions of law regulating the Tensas Basin Levee District, La. R.S. 38:1446 provides for the compulsory arbitration by two arbitrators, one selected by the assessor and one by the taxpayer; if they fail to agree, these arbitrators select a third, whose decision is final.
57. La. Digest of 1808 bk. 1, tit. 1, arts. 1-35.
59. La. Const. of 1921, art. III, § 36.
ment of labor, contracts for arbitration controlled by valid legislation of the United States, and contracts made prior to July 28, 1948.61 However, Civil Code article 140 provides: ‘‘Separation is to be claimed, sued for and pronounced in the competent courts of justice; it can not be made the subject of arbitration.’’ This restriction is limited, however, to the rendition of a separation or divorce decree.62 No statute prohibits the submission of any of the other incidents of a separation, divorce, or partition proceeding to arbitration. Nevertheless, a matter that is not subject to non-judicial determination, such as custody of children, might not be subject to arbitration.63 If the state, as a matter of public policy, wished to grant to spouses the right to submit separation, divorce and child custody matters to arbitration, appropriate legislative changes and authorizations must be enacted. Sufficient statutory authorization already exists for the submission of all other issues to arbitration.

Reputable and respectable arbitration associations have been established. The American Arbitration Association,64 a public-service, non-profit organization, offers both arbitration and mediation services in family disputes.65 The services are available to negotiate the terms of an amicable separation agreement based upon the best interests of the spouses and the best interests of their children, or to negotiate a contract arrangement under which the spouses can continue to live together. If the parties cannot agree on a particular issue, that issue can be submitted to arbitration under the arbitration rules of the Association. The final drafting of the separation agreement and filing of any subsequent petition to a court for legal separation or divorce are handled by the family attorney. Although the separation or support agreement was not originally arbitrated or mediated, an agreement may provide for arbitration of any future disputes

62. This legislative policy is of long standing in Louisiana, appearing in La. Civ. Code art. 140 (1825), La. Digest of 1808 bk. 1, tit. 1, art. 6, Code Napoleon art. 234 (1804), and Projet du Gouvernement, bk. 1, tit. VI, art. 4 (1800). The latter also stated, ‘‘Voluntary divorce is prohibited.’’ Id.
63. Some subjects have been held not to be susceptible to arbitration and disputes must be judicially resolved. Agreements for arbitration of disputes in regard to alimony have generally been held valid. Annot., 18 A.L.R. 3d 1265, 1266 (1978). The courts have usually upheld provisions for the arbitration of disputes regarding support payments for a child or for a wife and child. Annot., 18 A.L.R.3d 1265, 1269 (1978). Provisions for the arbitration of disputes involving child custody or child visitation rights have been held valid in some cases and invalid in others. Annot., 18 A.L.R. 3d 1265, 1272 (1978). But cf. Stone v. Stone, 292 So. 2d 686, 689 (La. 1974) (citing L. Domke On Commercial Arbitration § 13.08 and using custody of children as an example of a subject matter that is not subject to non-judicial determination and hence not subject to arbitration).
65. The Association offers mediation services for the negotiation of the terms of an amicable separation agreement and arbitration services both for those issues not resolved by mediation and for disputes concerning the meaning or application of provisions of a previous separation agreement.
to avoid litigation. Such arbitration clauses may be limited to certain issues (such as future adjustments in the amount of support or maintenance), or they may exclude certain issues (such as custody or visitation).

The American Arbitration Association has promulgated and published the Arbitration Rules for the Interpretation of Separation Agreements.\(^6\) Under these rules, the Association, not the parties, appoints the arbitrator from its National Panel of Marital Arbitrators, subject to comments and objections of the parties.\(^6\) Any party may be represented by counsel.\(^6\)

If economic issues are involved, the parties at the first hearing must produce all information reasonably required to provide a full and complete statement of assets and liabilities, including financial statements already prepared and previously furnished to others, income tax returns, and bank statements.\(^6\) The arbitrator may require either party to supplement this information. Hearings are private and informal.\(^7\) Both parties are entitled to attend, but children and other interested persons may be present only with the permission of the arbitrator, who may sequester witnesses.\(^7\) The arbitrator has broad discretion as to how testimony and evidence is received.\(^7\) In addition to direct statements from the parties, the arbitrator may receive documents and affidavits, giving them as much weight as they may merit.\(^7\) In custody-related issues, the arbitrator is authorized

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66. These rules became effective on February 1, 1982.

67. Rule 3 provides for the appointment of an arbitrator and states:
   
   The AAA shall appoint one or more Arbitrators from its National Panel of Marital Arbitrators. A person appointed as Arbitrator shall disclose to the AAA any circumstances likely to create an impression of bias or any past or present relationship with the parties. Based upon such information, and the comments of the parties, the AAA shall decide whether the Arbitrator should serve and shall inform the parties of its decision, which shall be conclusive.

   Rule 4 provides: "If any Arbitrator should resign, die, be disqualified or otherwise be unable to serve, the AAA may declare the office vacant. Vacancies shall be filled in accordance with Rule 3."

68. Rule 5 permits any party to be represented by counsel.

69. Rule 8 provides:

   At the first hearing, if economic issues are involved, the parties shall produce all information reasonably required to provide a full and complete statement of assets and liabilities, including financial statements presently prepared and previously furnished to others, income tax returns, and bank statements. The Arbitrator may require either party to supplement such information as to such assets or as to anticipated economic needs.

70. For Rule 11, see infra note 72.

71. Rule 9 provides: "Hearings are private. Both parties are entitled to attend, but children and other interested persons may be present only with the permission of the Arbitrator. The Arbitrator may require the retirement of any witness not a party during the testimony of other witnesses."

72. Rule 11 provides: "The Arbitrator shall have broad discretion as to how testimony and evidence shall be received. The hearing shall be informal. In addition to direct statements from the parties, the Arbitrator may receive documents and affidavits, giving them such weight as they may merit."

73. Id.
to interview a child privately in order to ascertain the child's needs as to custodial arrangements and visitation rights. This rule provides that, in conducting the interview, the arbitrator shall avoid forcing the child to choose between parents or to reject either of them. With the approval of both parties, the arbitrator may obtain a professional opinion relevant to the best interest of the child, which opinion must be submitted to both parents sufficiently in advance of the closing of the hearings for the parents to comment on it. The cost of the opinion is shared by the parties.

During the arbitration, either party may request a court of competent jurisdiction to issue a temporary injunction to restrain the disposition of property, molesting or disturbing the peace of the other party or of any child, use of the family home, removal of a child from the jurisdiction, or any other injunctive relief that is appropriate and available under local law. The form and scope of the award are defined in Rule 20. Other rules under which the arbitration procedure is conducted, including the fee schedules and other charges, are provided in the Rules of the American Arbitration Association.

74. Rule 12 provides: "In custody-related issues, the Arbitrator is authorized to interview a child privately in order to ascertain the child's needs as to custodial arrangements and visitation rights. In conducting such an interview, the Arbitrator shall avoid forcing the child to choose between parents or to reject either of them."

75. Rule 13 provides:

With the approval of both parties, the Arbitrator may obtain a professional opinion relevant to the best interests of the child. Such an opinion shall be submitted to both parties in sufficient time for them to comment thereon to the Arbitrator before the hearings are closed. The cost thereof shall be shared by the parties.

76. Rule 15 provides:

During arbitration, either party may request a court of competent jurisdiction to issue a temporary injunction:

(a) to restrain any party from transferring, encumbering, concealing or in any way disposing of property except in the usual course of business or for the necessities of life, and to require the party to account to the court for all extraordinary expenditures made after the order is issued;

(b) to enjoin a party from molesting or disturbing the peace of the other party or of any child;

(c) to exclude a party from the family home or from the home of the other party when there is evidence that physical or emotional harm would otherwise result;

(d) to enjoin a party from removing a child from the jurisdiction;

(e) for other injunctive relief proper under the circumstances.

No such application to a court shall be deemed a waiver of the party's right to arbitrate.

77. Rule 20 provides:

The award of the Arbitrator shall be in writing and shall be signed either by the sole Arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law. The Arbitrator may assess arbitration fees and expenses in favor of either or both parties.

78. Rule 22 provides that the parties agree not to include the arbitrator or the American Arbitration Association as a party or as a witness in any judicial proceedings.
Unlike some other suggested non-judicial alternatives for dispute resolution in marital disputes, arbitration has a high acceptability factor, arbitration machinery exists, procedures are promulgated and tested, arbitration is legislatively and judicially recognized, and this method of dispute resolution is presently available to the disputants.

Conciliation

A number of countries require attempts at conciliation at some stage of the divorce litigation. Canada requires the court to direct inquiries to the parties as to the possibility of their reconciliation. If such a possibility exists, the court adjourns the proceedings and appoints a person trained in marriage counselling to assist the parties with a view toward their possible reconciliation.\(^9\) If a divorce has been granted on certain grounds, Puerto Rican law imposes a duty on the judge, before fixing a trial date, to subpoena the parties for a preliminary hearing or act of conciliation. The judge places the case on the trial calendar only if one of the spouses shows a firm and irrevocable purpose not to resume marital relations.\(^9\) In Scotland, if the court at any time feels that a reasonable prospect of a reconciliation exists, it must continue the case to enable the spouses to attempt such a reconciliation. If the parties cohabit with each other during the continuance, the court does not take account of such cohabitation in the divorce action.\(^9\) Pursuant to section 75 of the first implementing regulation of the Marriage Law of Austria, the plaintiff in a

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\(^9\) Section 8 of the Canadian Divorce Act, Can. Rev. Stat., ch. D-8 (1970). Where there has been such an adjournment and fourteen days have elapsed from the date of the adjournment, either of the parties may apply to have the proceedings resumed, and the court must order the resumption. Bodenheimer, The New Canadian Divorce Law, 2 Fam. L.Q. 213, 222 (1968). Section 7 of the Act also requires that the lawyer filing a petition for divorce endorse upon the petition a certificate (1) that he has informed his client of the marriage counseling or guidance facilities known to him that might endeavour to assist the client and his or her spouse with a view toward their possible reconciliation, and (2) that he has discussed with his client the possibility of the client's reconciliation with his or her spouse.


See also Deech, Comparative Approaches to Divorce: Canada and England, 35 Mod. L. Rev. 113, 121-22 (1972), Wolff, supra note 5, at 219. Australia imposes similar obligations on the attorney and the court. Wolff, supra note 5, at 218-19. Additionally, the court may adjourn the proceedings in order to afford the parties an opportunity to become reconciled, interview the parties in chambers with or without counsel, or refer the parties to an approved marriage guidance organization or person. Finlay, Australian Divorce Law and Marriage Conciliation, 3 Fam. L.Q. 344, 352-54, 364-68 (1969).

\(^9\) P.R. Laws Ann. tit. 31, § 331 (1967).

divorce proceeding is required to request a reconciliation attempt.\textsuperscript{82} One of the purposes of the initial hearing\textsuperscript{83} is to allow the judge to attempt a reconciliation or settlement.\textsuperscript{84} A preliminary conciliatory meeting of the spouses is likewise mandated in Bulgaria.\textsuperscript{85} The procedure is designed to maintain and strengthen the family, not to facilitate the redress of infringed rights. In Hungary, the court attempts to reconcile the married parties at the first hearing in a divorce suit.\textsuperscript{86} If the reconciliation is successful, the court discontinues the suit. Conciliatory proceedings are compulsory in Poland.\textsuperscript{87} Before fixing the date of the first court hearing, the chairman of the court summons the parties to appear in person at a conciliatory session conducted by a judge designated by him. This judge tries to persuade the parties to reconcile their differences, taking into consideration, above all, the well-being of the children and the social importance of the stability of marriage. In the Union of Socialist Soviet Republics, a three month waiting period is required between the issuing of the petition for a divorce and an absolute declaration of divorce.\textsuperscript{88} During this waiting period, the court attempts to reconcile the parties.\textsuperscript{89} The court may postpone the case for six months,\textsuperscript{90} thus giving the parties further time for a reconciliation. The court may seek assistance from social institutions, including officials of the parties' communes, trade unions, and other organizations.\textsuperscript{91} According to statistics of the Supreme Court of the U.S.S.R., twenty-five per cent of such postponed actions end in a reconciliation of the spouses.\textsuperscript{92} Japan has a compulsory preliminary conciliation proceeding before an action can be brought regarding personal status.\textsuperscript{93}

\begin{thebibliography}{99}
\bibitem{83} A first hearing is primarily designed for separating adversary from non-adversary cases and for raising certain procedural defenses. \textit{Austrian Code Civ. P.} § 239 (ZPO).
\bibitem{84} Fasching, supra note 82, reports that in practice this mandatory attempt rarely helps facilitate a reconciliation, and even if the dispute appears to have been settled, after a few days it normally flares up again with hardened positions.
\bibitem{86} Paragraph 2 of § 265 of the Code of Civil Procedure of Hungary.
\bibitem{87} If an appearance by one of the parties would be difficult, the court may accept an application by that party to omit the conciliatory proceedings. Although no statistics are available, the effectiveness of these proceedings is limited and are treated as a pure formality. Los, Access to the Civil Justice System in Poland, in \textit{I Access to Justice} 785, 800 (1978).
\bibitem{88} Luryi, supra note 24, at 172.
\bibitem{89} Id. Both spouses must attend a court session with a view toward effecting a possible reconciliation. Luryi, supra note 24, at 173; Bass, \textit{A Comparative Comment}, 10 \textit{Manitoba L.J.} 211, 221 (1980).
\bibitem{90} Luryi, supra note 24, at 174.
\bibitem{91} Id. at 175; Bass, supra note 88, at 223.
\bibitem{92} Luryi, supra note 24, at 174; Bass, supra note 88, at 222.
\end{thebibliography}
Sweden, China and West Germany also have mandatory conciliation requirements in divorce cases.

These various conciliation provisions undoubtedly effect some judicial economies due to the termination of litigation when the reconciliation is effected. They are aimed, however, at the preservation of the family unit by a reconciliation of the parties, not at providing a means of resolving their conflicts.

Two foreign jurisdictions have laws which are designed to resolve marital disputes in a non-adversarial manner. The courts in British Columbia may assign "family advocates" and "family counselors." The primary role of a family advocate, who is an officer of the court, is to assist the family in resolving issues in the best interest of the family. If the matter proceeds to court, the family advocate insures that the case is brought to court quickly with independent, objective evidence and complete discourse of the facts. This procedure results in a speedier resolution of the case. Family counselors attempt to assist spouses in reaching agreements on such issues as child custody, access, and maintenance. Such agreements are put in written, sworn affidavits which are filed in the provincial court's family division. Although not official orders of the court, the provisions of these affidavits are enforceable by the court as if they were contained in a court order.

In Japan, family conciliation is governed by the Laws for the Adjudication of Domestic Relations, supplemented by rules issued by the Supreme Court. Family conciliation is handled by a family court. An applicant applying for conciliation simply states what he seeks and what the controversy is about, and this may be done orally. The conciliation procedure is informal and devoid of technicality, and the hearing is not open to the public. Representation by a lawyer is not prohibited, but the parties must appear personally. The conciliation proceeding is conducted by a conciliation board composed of three members—the chairman, who must be a judge, and two lay persons. Hearings may be held at night to facilitate the attendance of parties. The conciliation board can utilize the family court's own full-time investigating and medical staff, including sociologists, psychologists, and medical doctors. This staff of specialists may attend hearings and give advice, as well as conduct preliminary investigations. If an agreement is reached and recorded, it has the same effect and can be enforced in the same manner as a court judgment.

95. Meijer, supra note 17, at 215.
Additionally, the court may issue a summary order to perform the agreement. Japan reports over a number of years a success rate in family conciliations of approximately forty-two per cent.99

Japan also has a unique system of administrative agencies which have been created specifically to offer mediation, conciliation, arbitration and adjudication services in settling disputes between citizens.100 These agencies operate on national and local levels, and the procedures have been instituted for labor disputes, environmental pollution disputes, building contract disputes, administrative complaint counselling, civil liberty disputes, traffic accident disputes, and consumer disputes. These procedures are advantageous because they are fast and inexpensive.

Mediation

Although the terms conciliation and mediation are frequently used interchangeably, they are different concepts. Historically and conceptually, conciliation has been an attempt to effect a reconciliation of the parties.101 There have been a variety of statutory and textual definitions of mediation. Broadly speaking, mediation is a process to facilitate the clarification of the issues, identify alternatives, reduce acrimony existing between the parties, assist the parties in resolving any controversy, and help the parties reach a mutual agreement. The parties, assisted by the mediator, negotiate their disputes and reach their own agreement. A third party does not resolve the dispute for them, as is the case in litigation and arbitration. Mediation is typically utilized to assist the spouses in reaching an amicable written separation agreement—incorporating such matters as property distribution, support, custody and visitation—after the spouses have agreed to terminate the marriage.

Despite the differences, the terms and concepts of conciliation and mediation have become intermingled in use and application. For example, California has long offered court affiliated conciliation services, which were originally limited to efforts to effect a reconciliation of the spouses. Later, the focus changed, and today the principal purpose of these services is to assist judges in making custody and visitation determinations.102 In Florida, although named the Family Conciliation Unit, the dual purposes of this adjunct service of the Circuit Court for Broward County, Florida, are stated to be:

1. The mediation of marital and divorce conflicts.

99. Id. at 721.
100. Id. at 727-33.
102. Mclsaac, The Family Conciliation Court of Los Angeles County, in Alternative Means of Family Dispute Resolution 131 (1982) [hereinafter cited as Family Dispute Resolution]. The history, function, and services offered by the Family Mediation and Conciliation Service of this court are outlined in this article by the director of the service.
2. The prevention of needless marriage dissolutions where possible, and if not possible, the reduction of the negative effects and after effects of divorce on husbands, wives, and children.  

The following are perceived to be advantages of mediation over the judicial adversarial method of dispute resolution in marital cases:

1. Mediation opens communication between the divorcing parties.
2. Parties make their own agreements instead of having settlements imposed upon them by a third party.
3. The peaceful solution of conflicts helps to prevent problems from escalating.
4. The mediation process takes problems out of the adversarial win-lose setting of the court into a setting which is non-adversarial and neutral.
5. Solutions reached through mediation last longer because these solutions represent the views of both parties and are perceived as fair and acceptable over time.
6. Mediation is less expensive and quicker than court processing, especially of minor disputes.
7. Mediation helps the spouses identify the issues, reduce misunderstandings, vent emotions, clarify positions, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement.
8. Mediation is conducted in private.
9. Mediation permits the airing of all grievances, not only those that are legally operative.
10. It is procedurally simple and more likely to lead to truth finding.
11. It is capable of dealing with the causes of problems, not just the problems.
12. It reduces the alienation of the litigants and opens communication between them.
13. It aids disputing parties in resuming workable relationships with each other.
14. It enhances the adjustment of children following separation or divorce by promoting parental cooperation, reinforcing parent-child bonds and encouraging visitation.

103. Orlando, Where and How—Conciliation Courts, in Family Dispute Resolution, supra note 102, at 111. The services rendered and the procedure in the Family Conciliation Unit of the Circuit Court in Fort Lauderdale, Florida are outlined by the supervising judge of the court.
15. It reduces the anger, feelings of loss, sense of injustice and separation from their children that many non-custodial parents experience.

16. It promotes child support payment performance of fathers following divorce.

17. It reduces governmental interference in the ordering of marital and family affairs.

18. It diminishes the emphasis of fault-finding and blameworthiness.\textsuperscript{104}

The disadvantages and shortcomings of mediation are perceived to be:\textsuperscript{103}

1. It requires the cooperation of both spouses and their willingness to work together for the solution of the marital dispute.

2. It is inapplicable to certain types of disputes.

3. It is not necessarily less expensive or less time consuming than litigation.

4. One spouse may be able to take advantage of the other spouse in the mediation process.

5. The potential use of admissions and information submitted during mediation in later litigation, in the event of failure of the mediation process, inhibits honesty and frankness.

Mediation may be offered in the public or the private sector. Public sector mediation is mediation available or required by statute or court rule. It may be conducted by public agencies or by private mediation services. Public sector mediation may be authorized legislatively by specific statutory provisions enacted for that purpose, implicitly by existing statutes, or by county, parish or other local ordinances or enactments. Public sector mediation may be authorized judicially by state supreme court rules.


The statutory purposes of the recently enacted Louisiana Mediation Law, La. R.S. 9:351-356 (Supp. 1985), are “to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close continuing contact with both parents after the marriage is dissolved.”

\textsuperscript{105} Comeaux, Procedural Controls in Public Sector Domestic Relations Mediation, in Family Dispute Resolution, supra note 102, at 79, 84; Crouch, Mediation and Divorce: The Dark Side is Still Unexplored, 4 Fam. Advoc. 27 (1982); Folberg, supra note 35, at 26-29; Pearson & Thoennes, supra note 11, at 28.
judicial administrative orders, and local court rules and orders, or it may be created by the executive branch of state government.106

A number of states have specific statutory authorization for mediation, conciliation, or counseling in disputes arising out of divorce, separation, custody, visitation and related matters.107 Although these differing terms are used for the process in the various states, few substantial differences appear in practice. The Alaska, California108 statutes authorize mediation. Arizona, California, Connecticut, Iowa,109 Indiana, Kentucky, Montana, Nebraska, Ohio, and Utah provide for conciliation. Florida, Kansas, Maine, Michigan, North Dakota, Pennsylvania, Washington, and Wisconsin authorize the referral of parties for counseling.

Some states limit jurisdiction of conciliation courts to controversies which might affect the welfare of any minor child of the spouses or either


The 1984 Louisiana Legislature enacted two laws authorizing mediation in custody and visitation proceedings. 1984 La. Acts, No. 786, amending La. Civ. Code art. 146; 1984 La. Acts, No. 788, enacting La. R.S. 9:351-356 (Supp. 1985). These enactments limit mediation to contested custody or visitation proceedings. It may be mandatory, and may be ordered upon the motion of either party or upon the court's motion. The court has the right to select the mediator if the parties fail to agree. The qualifications of the mediator, his impartial role, and his function in mediation is spelled out. Any agreement reached is subject to court approval. Communications between a mediator and a party and between parties in the presence of the mediator are privileged.

108. In the California statute creating the Family Conciliation Court, Cal. Civ. Proc. Code §§ 1730-1772 (West 1982), the term "conciliation" is used consistently. In the statute governing grandparents' rights of visitation, Cal. Civ. Code § 4351.5 (West 1983), the term "mediation" is consistently used.

109. In the statute governing divorce, Iowa Code Ann. § 598.16 (West 1981), "conciliation" is used. In the statute governing custody of children, Iowa Code Ann. § 598.41 (West 1981), the term "mediation counseling" is used.

According to the Uniform Marriage and Divorce Act, Iowa Code Ann. § 305 (West 1981), if one of the parties denies under oath or affirmation that the marriage is irretrievably broken, the court may continue the matter "and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference."
of them; Arizona\textsuperscript{110} and California\textsuperscript{111} are among these. However, the courts of these two states may accept jurisdiction of a case not involving children if cases involving children will not be seriously impeded by acceptance of the case and either reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved.\textsuperscript{112}

Depending in part on the source and authority for its authorization and existence, the mediation program may be (1) established within the judicial department either on a statewide or local court basis; (2) incorporated into an existing state agency mandated to assist courts in marital and family counseling, custody investigations, adoption investigations and similar services; (3) established by the creation of a new statewide public mediation agency; or (4) contracted to private sector agencies and organizations offering mediation services.\textsuperscript{113} The types of disputes for which public sector mediation services are available vary widely and include custody, visitation, support, property, marriage counseling, premarital consent evaluations, domestic violence restraining orders and counselling.\textsuperscript{114}

The mediation process varies widely among the jurisdictions which utilize it. Mediation may be mandatory or voluntary. It is mandatory in some jurisdictions for disputes involving custody, visitation, or other issues affecting the welfare of a minor child.\textsuperscript{115} In some instances, the court may order mediation at the request of one party, and the other party must then submit to the process. A court may be authorized to order mediation on its own motion. In all jurisdictions affording mediation, it may be initiated by the joint petition of the parties, by referral from other agencies, or by self-referral.\textsuperscript{116} Most jurisdictions offering mediation provide stays or delays of court proceedings pending mediation; however, time or session limits are placed on the mediation process. Various methods are employed to encourage participation in the mediation process, including stays of litigation, contempt, and suspension of litigation.\textsuperscript{117}

Generally, mediation is conducted in private, but the classes of persons permitted to attend the sessions differ. Some jurisdictions allow only the parties to attend, while others permit attendance by attorneys, children, new spouses, and others involved in the controversy. Generally, the mediation file is available only to the parties, but in some jurisdictions, the

\textsuperscript{113} Comeaux, A Guide to Implementing Divorce Mediation Services in the Public Sector, 21 Conciliation Cts. Rev. 1, 7-8 (1983). This article offers a detailed and comprehensive review of public sector mediation services available in divorce cases in the United States.
\textsuperscript{114} Comeaux, supra note 105, at 83-84.
\textsuperscript{115} Comeaux, supra note 113, at 3; Oomeaux, supra note 105, at 85.
\textsuperscript{116} Comeaux, supra note 105, at 85.
\textsuperscript{117} Id. at 86.
file is available to their attorneys and to the court.\textsuperscript{118} The confidentiality of the proceedings varies widely, from a complete prohibition against the use of any information developed in subsequent proceedings, to a limited privilege of confidentiality, to no privilege. In some jurisdictions, the mediator is prohibited from serving as an investigator in a subsequent contested child custody proceeding if the mediation fails. Other jurisdictions permit the mediator to make his own recommendation to the court if mediation fails. No consensus appears to exist concerning the desirability or undesirability of confidentiality in mediation proceedings.\textsuperscript{119} The use of counsel is officially encouraged in some jurisdictions and officially discouraged in others. In both situations, attorneys generally participate in varying degrees in the mediation process, either by appearing at all or some of the mediation sessions, consulting with clients between sessions, or drafting or approving the final written agreement.\textsuperscript{120}

Although all commentators agree that mediation is not for everyone, those who elect mediation have a higher degree of success and enjoy a higher degree of satisfaction with the results than those who proceed through the ordinary judicial process. The following results were reported from the Denver project.\textsuperscript{121} Of 218 persons offered free mediation services for custody and visitation disputes, 123 accepted (56\%) and ninety-five rejected (44\%) the services. Of those who accepted, sixty-one (49\%) were successful in reaching an agreement in the mediation process, and sixty-two (50\%) were not. Of the sixty-two who failed to reach an agreement, however, sixty-five per cent reached a stipulation on custody and/or visitation prior to the final court hearing. Fifty-three per cent of those who rejected mediation reached a stipulation prior to the final court hearing. Fifty-three per cent of those who accepted mediation, fifty-three per cent of those who rejected mediation, and forty-eight per cent of those not offered mediation reached a stipulation prior to the final court hearing. Of those successful in reaching an agreement during mediation, seventy per cent reported high satisfaction with mediation, ninety-two per cent would recommend mediation to a friend, and ninety-three per cent would mediate again. Only twenty-two per cent of those not reaching an agreement in mediation reported high satisfaction with mediation; however, eighty-one per cent would recommend mediation to a friend, and sixty-four per cent would mediate again. Fifty-four per cent of those reaching agreements,

\textsuperscript{118} Id. at 87-88.
\textsuperscript{119} Id. at 88-90; Comeaux, supra note 113, at 13.
\textsuperscript{120} Comeaux, supra note 113, at 15.
\textsuperscript{121} Denver Custody Mediation Project results reported in Pearson & Thoennes, supra note 1, at 30-32. Similar results from Fairfax County, Virginia, are reported in Bahr, supra note 104, at 34-35.
thirty-six per cent of those not reaching agreements, forty-five per cent of those rejecting mediation, and twenty-six per cent of those not offered mediation thought that both parties had equal influence in the decision. In reporting the effect of mediation as the decision making process on relationships with the ex-spouse, a high percentage of those in Denver who accepted mediation reported improved communication, understanding and cooperation with the other spouse, reduced anger between the spouses, and an improved relationship with the children of the marriage. There was a correspondingly high compliance with the agreement reached. The group electing mediation reported considerably fewer motions to modify the agreement and considerably less serious problems with the agreement and compliance with the agreement than did those rejecting or not offered mediation.

The data gathered from this study indicated marginal savings to the parties in attorney fees and greater savings in public cost. The study also revealed that the successful mediation spouses moved the most swiftly through the court system (an average of 8.5 months). Those not offered mediation took an average of 10.2 months, and those that rejected mediation took 10.8 months. Those whose mediation was unsuccessful took the longest from filing until final orders (14.2 months) because mediation usually requires that judicial hearings and investigations be postponed until the termination of the unsuccessful mediation effort.

Other states have likewise reported satisfactory statistics. The Los Angeles County Conciliation Court reports that fifty-five per cent of the couples referred to it for custody and visitation negotiate an amicable agreement. Many others settle after being seen in Conciliation and during the child custody evaluation phase. Less than two per cent of all filings go to trial over the custody issue. In Broward County, Florida, approximately eighty per cent of the parties referred to the Family Conciliation Unit reach an agreement on custody and visitation or resolve the post-judgment dispute without further litigation. Twenty per cent of the families reach an impasse and return to the adversarial system for an adjudication of their dispute.

Where authorized as a court adjunct service, mediation is funded by increases in filing fees and marriage license fees, legislative appropriations, local tax revenues, and specific fees for the service.

Clinical Determinations

Mental health professionals have suggested that issues of child custody, visitation, and other matters affecting the welfare of children, exclusive

122. McIsaac, supra note 102, at 134-35.
123. Orlando, supra note 103, at 114.
of support, can be better decided outside the judicial system by persons more equipped by training and experience to make those decisions than judges and lawyers.\textsuperscript{125} A Task Force Report has pointed out the frequent lack of educational preparation for judges called upon to make these decisions.\textsuperscript{126} Two commentators have stated that neither law school curricula nor continuing education is specially aimed at building skills, knowledge, or attitudes needed by these judges.\textsuperscript{127} Another critic has suggested that current methods of child custody disposition following divorce or separation are inflexible and fail to meet the psychological needs of the children.\textsuperscript{128} He suggested that, upon separation or divorce, the parents should agree to joint legal custody of their children and concurrently choose a committee to resolve disputes arising out of their possible inability to decide questions concerning their children's welfare.\textsuperscript{129} The parents would mutually select the committee members and replacements on the committee.\textsuperscript{130} He proposes that the committee members include a psychiatrist, pediatrician, child analyst, educator or clergyman.\textsuperscript{131} The parents would contractually agree to send to the committee any dispute, other than financial, upon which they have not been able to agree.\textsuperscript{132} Either parent would have the right to submit the dispute to the committee,\textsuperscript{133} and both parents would agree to be bound by the decision of the committee.\textsuperscript{134} The parents would further agree to have one trusted adultly outside the family circle with whom the child could talk in confidence.\textsuperscript{135} This person would be chosen from a list of available certified specialists in child psychology, child psychiatry, or child analysis, and would have technical training and experience in the highly specialized art of listening to children. The reason for this provision is to assure that the child has someone to whom he can express his feelings honestly, but in confidence, for the guidance of the committee. The commentator who

\begin{quote}

\begin{itemize}
\item There is a consensus, too, that judges are not equipped professionally to make custody decisions and, therefore, should not have to or be allowed to . . . .
\item Thus the evidence is clear and definitive. To continue to use the present system of adjudicating custody cases is to continue doing damage to people's lives.
\end{itemize}
\textsuperscript{127} Solow & Adams, supra note 125, at 82.
\textsuperscript{128} Kubie, supra note 125, at 1197.
\textsuperscript{129} Id. at 1198.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1199.
recommended this process noted that a child is rarely able to talk to adults, and least of all to his own warring parents. To talk to either would make the child feel disloyal to the other.\textsuperscript{136} The committee selected by the parents would make no financial decisions, although it would consult with the parents concerning the financial feasibility of its recommendations.\textsuperscript{137}

The principal advantage of this committee system, other than advantages common to other non-adversarial methods of dispute resolution, is that the primary emphasis is on discovering and serving the child's changing needs, a goal too often lost in the fighting between the parents. Although courts are required to consider the "best interests of the child" in their determinations, a court normally receives information as to the child's best interests only from the dueling parents and their partisan witnesses, all of whom have their own interests to protect. These interests may or may not coincide with what is best for the child. Litigation, therefore, often considers only the parents' needs and wishes or their assertions of what the child wants and needs. With the committee system, this discovering and serving of the child's changing needs would be done by those best qualified to perform the tasks. These tasks are not legal ones to be performed by judges and lawyers, who have no expertise or other special credentials in child rearing. They are best performed by those in other disciplines who are better qualified to intelligently respond to the child's needs.\textsuperscript{138}

Whether the legal system can or would be willing to abdicate its historic role as the exclusive arbiter of the welfare of children is doubtful.\textsuperscript{139} Some cases have stated that a third party tribunal of any nature cannot be entrusted with any part of the decision-making process,\textsuperscript{140} and that a trial court cannot delegate to anyone the power to decide questions of child custody.\textsuperscript{141} However, the later cases upholding arbitration awards in child related matters may indicate an opposite trend.\textsuperscript{142} A view that

\begin{enumerate}
\item[136.] Id.
\item[137.] Id.
\item[138.] Although agreeing with Kubie that psychiatric considerations, rather than legal ones, are the best guarantors of the child's welfare, Solow and Adams suggest that an individual child psychiatrist can function as effectively as Kubie's committee of experts. See Solow & Adams, supra note 125, at 87.
\item[139.] See Note, Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests", 73 Yale L.J. 1201 (1964) (addressing this issue in connection with Kubie's proposal).
\item[140.] Annot., 35 A.L.R. 2d 629, 651 (1954).
\item[141.] Washburn v. Washburn, 49 Cal. App. 2d 381, 122 P.2d 96 (1942). The court in Fewel v. Fewel, 23 Cal. 2d 431, 436, 144 P.2d 592, 595 (1943), stated: "The power of decision vested in the trial court (in custody cases) is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attaché of the court, or anyone else."
\item[142.] See supra note 63.
\end{enumerate}
all third-party decisions respecting the welfare of the child are subject to judicial review, and that a third-party decision will be upheld and enforced if it is not detrimental to the child's best interest, would be a desirable balance between the competing interests involved.

CONCLUSION

A wide variety of alternative approaches to dispute resolution in family law cases are available. They may be utilized in whole or in part, or may be adapted to make them more appropriate to particular kinds of disputes involved in divorce cases. The principal obstacle to their acceptance and utilization is the concept that the resolution of disputes in these kinds of cases is an exclusive province of courts and judges in an adversarial system. If the legal profession reorients its thinking in this regard, it can engage in creative and imaginative crafting of legislative reforms to more efficiently and effectively resolve the disputes which arise when couples put asunder their marriages. The legal profession can accomplish this result with far less trauma and much greater satisfaction to the disputants than results in the usual judicial, adversarial resolution of these disputes.

143. As used here, third-party decisions would include those of the parents reached as a result of bargaining or mediation, the decision of an arbitrator, or a clinical decision. If an administrative agency having adjudicatory power renders a decision after an administrative hearing passing constitutional muster, that decision should be subject to the usual test for judicial review of administrative agency decisions.

144. In Louisiana, an agreement between parents respecting the support of children is not enforceable unless it meets the requisites of a conventional obligation and fosters the continued support and upbringing of the child. Dubroc v. Dubroc, 388 So. 2d 377 (La. 1980).