

# LEGALFOXES LAW TIMES

## ADR IN AIDING CHILD CUSTODY RESOLUTION

By Ms. K. Prem Pavani

Divorce ends not just the marital relationship between a man and a woman, it also ends a happy family life of their children. Presence of children complicates the separation process requiring special attention of the parents in determining the rights and responsibilities of each parent. Most separation cases involve bitter wrangling between the spouses on the custody of their children. During the subsistence of marriage, parents share the child responsibilities among themselves cordially. However, when they end the marital relationship, they need to decide on these responsibilities, child custody, etc. Parents may have to end the relationship cordially atleast for the sake of their children's welfare. Here comes the role of Alternate Dispute Resolution techniques ("ADR"). Mediation, conciliation, negotiation, etc., are some of the most popular modes of ADR in vogue. Depending on the situation and the applicable regulations one or more of these may be adopted to resolve child custody related issues in an amicable manner in the least possible time. They are less expensive than court proceedings (just a fraction of the cost and time), helpful in resolving issues relatively quickly, less stressful for the parents and the children. These out-of-court processes let the parents decide the outcome through open communication between parents by moving forward amicably. ADR can help in smoothening the separation process and the fights on child custody. ADR methods are preferred over court litigation especially when child custody is of major concern. Couples knocking on divorce courts can adopt mediation to ease the divorce process.

Parents may have to decide upon various matters like: who shall have the physical custody, who has the legal custody giving the right to make decisions as to the child's schooling, sports, medical issues, etc., whether a parents can have sole custody of all above, whether both parents may be given joint custody, visitation rights, etc. Child custody can be resolved amicably in many ways. They may take the decision alone or with the assistance of ADR. These alternate dispute resolution takes place out of the court. Parents willing to work to resolve custody related

issues are more likely to resolve custody agreements in a non- confrontational method. Parents wanting for a more casual approach may opt for mediation. They may even choose to go for negotiation with or without the intervention of attorneys. Legal advisors may help them through the various process available that can assist in resolution. Alternate Dispute Resolution (ADR) is "a non-adjudicatory process, by whatever name called, in which the parties agree to resolve their dispute/s, as per procedure agreed between them, with the assistance of a third neutral person, and to abide by the terms of the settlement in writing, if any, agreed with his/her assistance, which shall be enforceable." However, such a neutral person shall not have the authority to compel the parties to accept the terms that he or she proposes."

The Indian courts have repeatedly held that the interest of the child is paramount and have even overridden the rights of parents claimed under various laws in deciding custody issues<sup>1</sup>. The courts generally look at who has taken the child responsibility previously, what is best for the child, who has the ability to raise the child, physical or mental health issues, if any, such as history of violence or alcohol dependency. However, the parents are legally responsible for the financial support of their children even after divorce. When one of the parents can pay as against the other, one parent may be directed to pay the other to help cover the costs of raising children. A non-custodial parent will pay for expenses to the parent who has the sole custody of the child.

Moreover, ADR offers a secular resolution process to the parties in India. The Guardians and Wards Act 1890 is the only legislation that regulates child custody regardless of the religion of the child. Every religion has its own child custody law: While Section 26 of Hindu Marriage Act, 1955, Section 38 of Special Marriage Act, 1954 and Hindu Minority and Guardianship Act 1956 regulate child custody law for Hindus; under muslim law, only a mother is given child custody under the right of Hizanut<sup>2</sup>; Christians need to follow the principles set under sections 41, 42 and 43 of the Divorce Act 1869.

The shortcomings of the conventional justice delivery system may have been one of the primary motivators for the development of ADR, but the ADR revolution has gained traction due to its

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<sup>1</sup> Irfan Ur Rahim Khan vs Smt. Farha Khan (Chattisgarh HC- FAM No. 165 of 2019- 09 Mar 2022)

<sup>2</sup> Until she is not convicted or found guilty of any misconduct

own merits. ADR provides a viable option for disputants who want to avoid the rigours, complexity, and short comings of formal adjudication. It provides an extra remedy for resolving disputes outside of the traditional litigative procedure and allows the parties to select the remedy that is most suited in the specific circumstances. ADR is a completely voluntary process, and the parties are able to drop out at any moment. If a party does not agree to the settlement or the continuation of ADR procedures, he has the option to stop the ADR process unilaterally and commence the formal legal process. Thus, there is nothing to lose in ADR and even if ADR turns out to be unsuccessful, the time and expense spent in ADR is put to good use as trial preparation is advanced, issues are narrowed and thoughts are clarified. Adjudicatory ADR, on the other hand, provides a fast, effective, and convenient method of resolving conflicts outside of the courts. However, the most significant advantage of ADR is finality since the disagreement is ultimately settled, eliminating the prospect of subsequent appeals and the enormous amount of time involved in the appeal process. ADR is, in reality, a joint effort by the parties to uncover and appreciate their true concerns and interests as opposed to their surface stances and assertions. It results in a win-win scenario, keeping clear of the acrimony that is inherent in the adversarial litigative process, and so increases respect and faith between the parties, sustaining relationships in the long run.

