

Three Words: Mediation, Arbitration, and Conciliation

Mediation. Arbitration. Conciliation. Three words that sound alike and come up frequently in the family law context but have different meanings and implications. I could write a blog post on each one, but here is the “down and dirty” on what you need to know about each one so you can talk intelligently with either your spouse or a lawyer and do not get tripped up along the way.

Mediation is a process where two parties meet with a qualified and neutral third party and discuss their various issues to try to come to an agreement or a series of agreements on those issues. The third person is the mediator. The mantra of good mediators is “getting to yes.” The mediator’s job is to facilitate dialogue and achieve agreement.

In the family law context, mediation is usually parties alone, without lawyers, but any good mediator is going to suggest that each party retain his or her own lawyer because the mediator is not there to give legal advice or assess the pluses and minuses of a proposal. The mediator’s only job is to get the parties to agree.

I have several clients going through some form of mediation and they generally check in with me either before or after each mediation session to discuss either the issues to be addressed in the session or the proposal for a resolution that has come out of the last session. Also, mandatory mediation is of growing popularity among the county courts around Pennsylvania for child custody cases.

For mediation to work, the parties need to feel that they are dealing with each other on equal footing and one party is not using the mediator to “double team” the other party. Another aspect of the parties being on equal footing is full and fair disclosure on the part of the two parties. This is where the skill and experience of the mediator come into play. A good mediator will set the ground rules and expectations of the parties in the first session then build from there.

Mediation is a form of a concept with growing popularity in the legal system called alternate dispute resolution or ADR. A second form of ADR is arbitration. Arbitration is different from mediation in that there are no discussions about working out the parties’ differences. There is a neutral party who listens to the two parties and then makes a decision to which the parties have contractually agreed to be bound. In essence, arbitration is a private court system.

Crowded court dockets and backlogs in recent years have fueled an increase in arbitration as an alternative to the court system. The effects of the COVID-19 pandemic on the court system have increased even further the interest in arbitration. The benefits of the arbitration process are efficiency and a relatively quick resolution of the dispute, at least as compared to the court system. The downside is twofold. First, there is the issue of cost. The two parties are paying the arbitrator hourly. Second, if one party is not happy with the result in the arbitration, there are only limited rights to appeal. Those appeal rights are limited to some fault in the arbitration process and generally do not go to the result, hence the term “binding arbitration.”

Arbitration lends itself to economic family law issues like child support and equitable distribution. Traditionally, child custody has not been an area where arbitration has been used; however, some recent changes in attitudes inside the court system and a proposed piece of Pennsylvania legislation may change the process.

The third of our “-ation” words is conciliation. Conciliation is a part of the child custody procedure in most Pennsylvania counties. When filing an initial complaint for child custody or when seeking a modification of an existing child custody order, the parties will be sent to a custody conciliator to try to resolve the issues.

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The custody conciliator is a court employee paid by the court system. All the custody conciliators I am aware of are lawyers, some work full-time for the court system and some work part-time.

Depending on the county, some custody conciliators have more authority than those in other counties. After a custody conciliation conference, all conciliators make "recommendations." In some counties, without question, those recommendations become an interim custody order. In other counties, the conciliator's recommendations do not carry significant weight. In every county, the parties have the right to a custody trial in front of a judge after the conciliation conference.

Finally, in a bit of an overlap, some Pennsylvania counties have both custody mediation and custody conciliation. In mediation, there are no lawyers, and nothing is binding unless agreed by both parties. In conciliation, lawyers are involved. If there is no agreement, the court can impose a decision, at least in the interim, upon the parties.

The family law attorneys at Weber Gallagher have experience with all three, mediation, arbitration, and conciliation, and can answer any questions you may have. Also, my colleague, Carolyn Mirabile, acts as a Montgomery County Custody Mediator and acts as a mediator in both custody and equitable distribution cases.