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PRIVATE JUDGES: A LITTLE KNOWN LITIGATION ALTERNATIVE IN FAMILY LAW CASES

BY MARILEA LEWIS

The popular television program “Divorce Court” is in its 36th season, running continuously since 1999. While watching couples pull back the curtain on details of their failed marriages may be entertaining for viewers, it is anything but entertaining for those actually involved in the process. Real-life litigation requires court appearances and surrendering control of the outcome to the judge. Divorce and family law cases are usually painful and often expensive. To reduce some of the stress, parties may utilize an alternative to traditional litigation.

Most people are familiar with mediation and arbitration as tools to resolve conflicts. Mediation is a process that allows the parties to negotiate the resolution of their case with the help of a neutral third party. Either the parties may request mediation or the court may order it on its own motion. Although parties may participate in mediation with or without an attorney, it is important to remember that the mediator cannot give legal advice. In addition to allowing the parties to determine the outcome of their case, mediation offers the additional benefit of being a confidential process. Discussions between the parties and offers made at mediation are not admissible except in very limited situations. The process allows the parties to make agreements without having to satisfy



the rules of evidence. It also removes the uncertainty and cost found in litigation. The parties maintain control over the outcome of their case. Once the parties reach an agreement and sign a mediated settlement agreement, they are entitled to a judgment that reflects the terms of their agreement.

Like mediation, arbitration provides the parties the opportunity to appear before a third-party neutral rather than an elected or appointed judge. The

arbitrator, like the mediator, is paid by the parties. The parties can contract in the arbitration agreement for binding or non-binding arbitration. If it is binding, the arbitration award is a final judgment just as if rendered by a judge, although the parties can reserve the right to appeal as a term of the arbitration agreement. Again like mediation, the parties can arbitrate with or without an attorney. The rules of evidence may be, but are not necessarily, relaxed

in arbitration. However, the distinct difference between arbitration and mediation is the arbitrator is the one to make the final decision. The Texas Family Code provides to the parties the ability to agree to arbitration but prohibits the judge from ordering parties to arbitrate unless they have agreed to it in writing. If the parties agree to binding arbitration in a case involving children, the court will enter an order that reflects the arbitrator's award unless the court finds it is not in the best interest of the children.

Although infrequently utilized, Chapter 151 of the Texas Civil Practice & Remedies Code also provides for the use of a special judge, commonly known as a private judge, to hear and determine the outcome of civil or family law cases. In order to serve as a special judge, the person must be a former or retired judge who served for at least four years, developed substantial experience in the area of specialty, not been removed from office or resigned while under investigation for discipline or removal, and completes at least five days of continuing legal education each year. The special judge has the same power and authority as a sitting judge, with two exceptions—the authority to preside over a jury trial and the ability to hold a person in contempt of court unless the person is a witness before the special judge.

If the parties agree to waive their right to a jury and to use a special judge, the court in which the case is filed may sign an order referring the case to the special judge. The order must state both the issues referred and the name of the special judge. Any

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and all issues in the case, whether of fact or at law, can be referred to the special judge. The attorneys, the parties, and the special judge will work together to determine not only when but also where the case will be heard as it cannot be heard on county property. This cooperative approach to scheduling allows everyone to have firm dates for hearings, assuring continuity in the proceeding. Although this is traditional litigation, it provides more control



by the litigants and less intrusion by the public since it is not subject to restrictions of the crowded dockets and open access found in courthouses. However, cost can be a major concern as the parties are responsible for not only the fees of the special judge, but pay for the administrative fees and for the court reporter. No public funds can be used for the costs of a trial at which a special judge presides. However, if time constraints and confidentiality are critical, this can prove to be an invaluable alternative permitting the parties to proceed with traditional

litigation, including the presentation of evidence and the making of a record, and preserves the right of appeal.

Family law cases are extremely challenging. They are not only the dissolution of a marriage, but also can involve issues of custody, support, division of property, paternity, and other very sensitive and emotional matters. The laws in Texas make it possible for litigants to have their matters heard in open court. However, parties involved in these cases need to carefully consider each alternative available to them as they navigate a stressful and emotionally charged process.



Former State District Judge **Marilea Lewis** practices with the boutique family law firm Orsinger, Nelson, Downing & Anderson in

Dallas. She is Board Certified in Family Law by the Texas Board of Legal Specialization and a member of the Texas Academy of Family Law Specialists.