ADR and Removal Cases: Necessity Has Spawned an Invention

Hanan M. Isaacs, M.A., J.D., A.P.M.
Amy E. Jensen, Esq.

This article explores alternative dispute resolution ("ADR") processes solely in connection with child removal cases. ADR in the child removal setting reduces the time, costs, publicity, and aggravations attendant upon litigation of such cases. The negotiations-based and theoretical underpinnings of this article first appeared in Fisher's and Ury's Getting to Yes (Penguin, 2d ed., 1991), a short, highly readable, and well recommended book available online and in bookstores.

Removal Proceedings: An Overview

N.J.S.A. 9:2-2 provides that a minor child may not be removed from the State of New Jersey by a custodial parent without consent of the non-custodial parent, unless a Family Part judge orders such removal for good cause shown. Under the statute (as reinterpreted from time to time), the custodial parent must demonstrate a real advantage from the proposed move and that the move is not inimical to the best interests of the children. Cooper v. Cooper, 99 N.J. 42, 56 (1984).

Under Cooper, the burden is then placed on the non-custodial parent to prove that a proposed parenting time schedule is unreasonable. Id. at 57-58. In Holder v. Polanski, 111 N.J. 344, 352-353 (1988), the "for cause" factors

stated in Cooper were modified: any good faith reason for the proposed move will now suffice. Establishing a "reasonable [parenting time] schedule . . . that will provide an adequate basis for preserving and fostering a child's relationship with the noncustodial parent" remains an important consideration. Cooper, 99 N.J. at 57. The proposed parenting time schedule between children and the non-custodial parent is closely entwined with the best interests of children. Holder, 111 N.J. at 352.

Under the Cooper/Holder analysis, the parent seeking removal has the burden of producing "evidence to establish prima facie that 1) there is a good faith reason for the move and 2) the move will not be inimical to the child's interests. Included within that prima facie case should be a [parenting time] proposal." McMahon v. McMahon, 167 N.J. 91, 118 (2001).

Once the custodial parent establishes a prima facie case, it is the noncustodial parent's burden to produce evidence opposing the move as not in good faith or not in the children's best interests. Id.

The Cooper/Holder analysis is applicable when there is a clear custodial parent. However, in joint physical custody cases, the Cooper/Holder analysis does not apply. Rather, in such cases, the removal application is first governed by changed circumstances and then by a best interests analysis. Baures v. Lewis, 167 N.J. 91, 116 (2001).

In removal proceedings, the court engages in a fact sensitive determination, in which trial courts must assess the following factors:

> 1) reasons for the move; 2) reasons for the opposition; 3) past history of dealings between the parties as bears on the reasons for and against the move; 4) whether the child will receive comparable educational, health and leisure opportunities; 5) any special needs or talents of the child that require accommodation and whether such accommodation is available in the new location; 6) whether a parenting time and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; 7) the likelihood that the custodial parent will continue to foster the relationship of the child with the noncustodial parent; 8) the effect of the move on extended family relationships; 9) if the child is of age, his or her preference; 10) whether the child is entering senior year of high school; 11) whether the noncustodial parent has the ability to relocate; and 12) any other factors bearing on the child's interest.

Baures, id. Not all factors may be relevant or equally weighed, nor is a single factor deemed dispositive on the issue of removal. Id. at 117.

In Rampolla v. Rampolla, 269 N.J. Super. 300, 306. (App. Div. 1993), the Appellate Division held that in removal actions, a trial judge must consider the feasibility of the non-custodial parent's relocation, as a method of (A) preserving parent-child relationships and (B) assessing the reasonableness of both the proposed relocation and resistance to it. In that case Mrs. Rampolla wanted to move to Staten Island with the children. Mr. Rampolla resisted the move, even though he commuted daily to Lower Manhattan. The disputed issues appeared to be excellent for mediation, as we shall discuss later.

In sum, the public policy underlying the removal statute is to evaluate the competing interests of a custodial parent who legitimately seeks to move, the fundamental rights of a resisting and non- custodial parent to a quality relationship with his or her children, and the best interests of those children.

Alternatives to Litigation

While it clearly gets the most attention from judges, lawyers, parties, and the media, the trial court system is almost never the final decision maker in child removal cases. Removal disputes almost always resolve themselves the same way as almost all civil litigation ends: through negotiations that are often aided or completed by ADR.

In Fawzy v. Fawzy 199 N.J. 456, 462 (2009), our Supreme Court held that the constitutionally protected right of parental autonomy encompasses parents' choice of the dispute resolution forum, a choice in which the court system ordinarily should not interfere.

New Jersey's Complementary Dispute Resolution Programs, set forth in Rule 1:40-1, et seq., Rules Governing the Courts, encourage parties to choose facilitative, adjudicative, and/or neutral evaluative processes to assist them in their quest for a high quality outcome.

A facilitative process, such as mediation, offers parties the chance to sit down with a neutral who encourages the parties to seek resolution. An adjudicative process, such as arbitration, provides a neutral who listens to testimony, considers evidence, and issues either a binding or a non-binding decision -- as the parties may decide in advance. An early neutral evaluation, whether used in conjunction with the above processes or independently, permits parties to consult with a mental health expert, perhaps in concert with an experienced matrimonial practitioner or former judge, to provide a non-

binding and early opinion on the merits of each party's position, including the best interests of children.

A four-way conference, while not strictly an ADR process, is a tool by which lawyers and their clients come together to seek negotiated solutions to the disputed issues, and may be used in conjunction with mediation and early neutral evaluation.

Collaborative law, in which lawyers and parties commit to non-adversarial dispute resolution, also may be used in conjunction with mediation, four-way conferencing, early neutral evaluation, and arbitration.

A description of each of these processes follows, together with special tools for consideration and use in those processes, as they relate to child removal disputes.

Mediation

According to the New Jersey Association of Professional Mediators, "mediation is a process in which a trained neutral, called a mediator, facilitates the resolution of a dispute . . . . Mediation is non-adversarial with the objective of helping the parties reach a mutually acceptable agreement." The mediator makes the negotiations process easier for parties and their legal counsel, but is not a decision-maker.

The Supreme Court's Guidelines for Mediators in Court-Connected Programs uses a similar definition for mediation, as does the Uniform Mediation Act of New Jersey (the latter discussed at length below).

The Supreme Court has implemented a mandatory statewide mediation program for custody and parenting time disputes. Parties who file a dissolution or a family type (“FD”) action and who have legitimate custody and parenting time disputes are required to participate in mediation prior to appearing before a judge. If the parties are able to resolve their disputed issues in mediation, there is no need for a court appearance, except to memorialize the resolution.

Mediation is also used widely in the purely private sector. Parties often seek out mediators before any pleadings are filed, many times before they even consult with separate legal counsel. Those mediations are handled somewhat differently than the court-based mediations, and require the mediators to assess the parties’ ability to negotiate without legal counsel present. Mediators, whether in-court or purely private, should screen for domestic violence and substance abuse issues.

If the parties are able to proceed without legal counsel, then the private mediator will do so, but should strongly urge the parties to seek advice from legal counsel before entering into any final agreements. Some lawyer-trained mediators will produce a settlement agreement for the parties’ signatures at the end of a successful mediation; most lawyer-trained mediators and all non-

lawyer trained mediators (the latter to avoid unauthorized practice of law sanctions) will produce a "memorandum of understanding" that the parties will take to separate review counsel for finalization.

The court system's post-MESP economic mediation program, also statewide, does not deal with custody and parenting time issues, except if the parties decide to expand the scope of the mediator's function -- which does happen. In that setting, lawyers are much more likely to attend from the beginning, although many times the lawyers do not attend every meeting. This mediation style is closely approximate to the private sector mediation model discussed above, and requires no replication here.

In Levine v. Bacon, 152 N.J. 436, 441 (1998), our Supreme Court stated that trial courts ordinarily should refer parties to mediation in removal cases. The Court cited R. 1:40-5(a), which currently reads:

> [Except in cases where a preliminary or final order preventing domestic violence is in effect, a]ll complaints or motions involving a [bona fide] custody or parenting time issue . . . shall be referred to mediation for resolution in the child's best interests.

The Uniform Mediation Act ("UMA"), N.J.S.A. 2A:23C-1 to -13, applies to mediations required by statute, court rule, administrative agency rule, or purely private agreements. It also applies to disputes referred to mediation by a court, administrative agency, or arbitrator. N.J.S.A. 2A:23C-3(a)(1).

Under the UMA, unless otherwise agreed by the parties, confidentiality and privilege may only be waived by express agreement of the mediator, the

parties, and/or third party participants such as lawyers and experts. N.J.S.A. 2A:23C-5(a). There are limited exceptions to mediator privilege. There is no privilege for a mediation communication made in the following circumstances:

> 1) a written agreement signed by all parties to be bound; 2) a threat or statement of a plan to inflict bodily injury or commit a crime; 3) where mediation is intentionally used to plan or attempt to commit a crime, or to conceal an ongoing crime or criminal activity; 4) where the mediation communication is sought or offered to prove or disprove a claim or complaint filed against the mediator arising out of a mediation; 5) where the communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party, based on conduct occurring during a mediation; or 6) where the evidence is sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participated in the mediation.

N.J.S.A. 2A23C-6(a)(1), et seq.

If a trial court, arbitrator, or administrative judge finds, on a party's application, that (A) there is no available evidence except for the subject mediation communication sought to be discovered or produced and (B) the need for the mediation evidence outweighs the public's interest in preserving mediation confidentiality, then the evidence may be ordered discovered or admitted. This exception involves a high threshold, but one that is possible to meet. The exception includes "a proceeding to prove a claim [of,] to rescind or reform, or a defense to avoid liability on[,] a contract arising out of the mediation." N.J.S.A. 2A:23C-6(b). This exception covers a party's claim of an oral settlement agreement that the other party denies. Even under this

exception, and unlike any other privileges recognized in New Jersey law, mediators may not be compelled to provide evidence, although the mediator (unwisely) may choose to testify if all parties consent. N.J.S.A. 2A:23C-6(c).

In Evidence Rule 519, our Supreme Court has embraced all of the privilege protections and exceptions set forth in the UMA, which is vital information for the Family Part bench, lawyers, and family/divorce mediators and arbitrators.

How does mediation work in a child removal dispute?

Removal proceedings may take place simultaneously with a dissolution action, but often occur in the post-judgment context. In either setting, a mediator helps parents to cooperatively resolve their dispute. Mediation is highly beneficial in a removal action, because it focuses the parents on cooperation, compromise, and the best interests of children, which are integral attributes of successful co-parenting. For example, in the Rampolla case previously cited, the parties' litigated case dragged on for 6 years or more. Could the parties, with urging from the trial court and the lawyers, have done better for their children and themselves in mediation?

One of the authors mediated a removal case while the Rampolla parties were heavily litigating theirs. The parties in the mediated matter, let us call them "Mr. and Mrs. Jones", were aware of the Rampollas' litigation and appellate history. The Jones's dispute occurred post-judgment of divorce.

Each party had a good job at the time of divorce, hence alimony was mutually waived, and while they had a shared custody arrangement, the mother was the primary custodial parent. By the time the parties came to mediation, the father had remarried and relocated his work to Connecticut. He stayed in Connecticut during the week, and commuted to see the children on alternating weekends. The mother continued to live in the Princeton area, where she worked for a major corporation.

Mr. Jones wanted to move the children to Connecticut. According to Mr. Jones, the children had expressed a strong interest in living with his new wife and him. Mrs. Jones believed that Mr. Jones had "brainwashed" the children, and she was shattered by the joint prospects of "losing the kids" and not seeing them regularly.

If the parties had litigated their dispute, Mr. Jones first would have had to seek a change of custody, and then pursue a removal application, and Mrs. Jones would have had to fight one action, possibly two. The parties' investment of time, money, and aggravation in such proceedings would have been astronomical.

Instead, Mr. and Mrs. Jones negotiated something in mediation that would have amazed Mr. and Mrs. Rampolla:

A. Mrs. Jones agreed to seek and accept an intra-company transfer to a Connecticut facility, if possible, and would relocate to Connecticut. She agreed to live in close enough proximity to Mr. Jones and his

new wife so that the parties could reconstruct the same custodial and parenting time arrangements with their children as before.

B. If Mrs. Jones could NOT negotiate such a transfer, then Mr. Jones agreed to pay Mrs. Jones temporary alimony for relocation purposes, for up to 24 months, until she could secure a position with a new company. With the assured funding, Mrs. Jones was prepared to make the move. An imperfect outcome, but for her, far preferable to her litigation prospects.

This negotiation took place when the economy was considerably more robust than the one our clients face today, so the alimony requirement may have been longer if negotiated today, or perhaps the deal would not have worked. However, some other creative arrangement might have succeeded (such as both parties agreeing to live in the same town or in close proximity, an hour from each party's work).

For those who see the self-advantages, necessity spawns invention, creativity, and problem-solving.

Mediation succeeds when both parties are willing to negotiate, compromise, and reach agreements that work for them and are in the children's best interests. Unlike judicial or arbitral proceedings, the mediator sets the tone and constructs the process, but the parties make the final decisions. Andrew Kaplan. "The Advantages of Mediation in Resolving Child Custody Disputes." 23 Rutgers L. Rec. 5, 11 (1999).

In a removal mediation, the mediator may recommend the parties' use of experts to help the parties evaluate their options. The experts could make recommendations, which the parties are free to accept, reject, or accept in part. The parties must decide up front whether the experts later will be "useable" by either or both of the parties if the mediation fails. This is an important consideration, and should be handled at the beginning of the process, in a party-signed writing that is admissible in evidence

Four-Way Conferences

While not strictly an ADR proceeding, a four-way conference is nevertheless a settlement process, in which lawyers jointly facilitate settlement negotiations and the parties make the final decisions. Evidence Rule 408 generally protects the contents of such negotiations from after-discovery or evidentiary use.

The purpose of a four-way conference is to settle as many of the outstanding issues as possible. It is intended to be a cooperative meeting between parties and their respective attorneys. If it is successful, the lawyers will construct a full settlement agreement, to be signed by the parties and entered into evidence in an appropriate proceeding, whether arbitration or litigation.

Akin to mediation, parties to a four-way conference maintain full powers of decision. Appendix XVIII to the New Jersey Rules of Court, Statement of Client Rights and Responsibilities in Civil Family Actions, Par. A-10, states as

follows: "Clients have the right to make the final decision as to whether, when, and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case." Lawyers in four-way conferences should pay close attention to that language. It is the clients, acting on attorney advice, or perhaps knowingly ignoring it, who get to decide their own fate.

In a removal dispute, a four-way conference could be highly beneficial. In McCoy v. McCoy, 336 N.J. Super 172, 180 (App. Div. 2001), the court sought to harmonize our increasingly mobile society with the need to construct a meaningful parenting time schedule. The parent opposing the move does not want to lose or damage his or her relationship with their children. A four-way conference could permit parties to brainstorm creative solutions to maintaining the parent-child relationship. In McCoy, the court was particularly enamored of Skype as a method of maintaining frequent electronic contact between father and child. If this were a mediated or lawyer-negotiated resolution, the authors doubt that Mr. McCoy would have been satisfied with such limited contacts. However, the teaching point is that creativity, technology, and planning are essential to whatever dispute resolution process the parties may use.

An excellent variation on a four-way conference could involve the lawyers and parties bringing in a mediator for the limited purpose of helping parties express interests, explore options, and develop, as much as possible,

a “win-win” set of outcomes. The mediator could caucus with each group separately, to explore hidden issues -- such as what is driving the negotiations on each side -- and test possible resolutions, all without requiring the parties to commit in advance to anything.

If the negotiations are successful, then the lawyers will finalize a settlement agreement, just as they would after any party-negotiated settlement.

Arbitration

Arbitration is a process in which each party, with or without legal representation, presents his or her case to a neutral third party, who then renders a specific award. R. 1:40-2(a)(1). The parties may stipulate in advance whether or not the arbitration award will be binding. Id. “Our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternative forum.” Wein v. Morris, 194 N.J. 364, 375-76 (2008) (quoting Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 489 (1992)). Arbitration can be a faster, more private, and less expensive alternative for resolving disputes. Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981).

Although encouraged and utilized in a wide spectrum of cases, arbitration may offer particular benefits in Family Part cases, including removal disputes. Arbitration has the potential to minimize the harmful effects of divorce litigation on both children and parents. Fawzy, 199 N.J. at 471.

Under Fawzy, arbitration of family law matters should be governed by the Uniform (Revised) Arbitration Act ("URAA"), N.J.S.A. 2A:23B-1 to 32. Id. at 481. Fawzy supplemented the URAA's requirements with respect to child custody and parenting-time issues only. Id. at 480. Accordingly, "a record of all documentary evidence shall be kept; all testimony shall be recorded verbatim; and the arbitrator shall state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interests standard." Id. In Johnson v. Johnson, 2010 N.J. Lexis 1259 (2010), the New Jersey Supreme Court clarified its holding in Fawzy. Johnson held that if the Arbitrator's award contains a recitation of what the parties said, as well as the Arbitrator's observations, and the award is fully detailed, then an adequate record for review has been created. Johnson, 2010 N.J. Lexis, 36.

While, under Johnson, a verbatim transcript is no longer technically required in child custody and parenting time arbitrations, the authors believe that a tape recorded proceeding or, if the parties may afford it, a transcribed proceeding, is far preferable. A tape recorded or transcribed record best protects the parties, the lawyers (if present), and the arbitrator if future litigation or appellate challenges should arise.

An agreement to arbitrate is, "at its heart, a creature of contract." Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006). For parents to agree to arbitrate their custody and parenting time disputes, the agreement must be in writing or recorded in accordance with N.J.S.A. 2A:23B-1. Fawzy, 199

N.J. at 482. The Court in Fawzy additionally required that the arbitration agreement clearly state the following, id. at 480-81:

> 1) that the parties understand their entitlement to a judicial adjudication of their dispute and are willing to waive their right; 2) that the parties are aware of the limited circumstances under which a challenge to the arbitration award may be advanced and agree to those limitations; 3) that the parties have had sufficient time to consider the implications of their decision to arbitrate; 4) that the parties have entered into the arbitration agreement freely and voluntarily, after due consideration of the consequences of doing so.

Parties may choose to arbitrate specific issues, rather than their entire dispute. Id. at 482. If this is the case, then the arbitration agreement should state which issues are to be decided in that forum. Id. Additionally, parties may agree to a broader legal review than the ordinary provisions of the URAA would allow. Id. at 482 n. 5. This is important in cases where the parties or their lawyers are concerned in advance about the arbitrator making a "knucklehead" decision (which, unfortunately, does happen).

Absent special provisions for review, a "knucklehead" decision is likely to be upheld, except if it is egregious – in which case the trial and appellate courts may choose to review the matter under a "public policy" exception to ordinary non-review – an exception to an exception you should not count on. See, e.g., Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 442-43 ("[I]f the arbitrator's resolution of the public policy question is not reasonably debatable and plainly would violate a clear mandate of public policy, a court must intervene to prevent enforcement of the award").

Absent special review language, trial court and appellate consideration of a binding and arbitrated child removal award is ordinarily constrained by the URAA -- unless there is a claim of adverse impact to the child. If there is no alleged harm to a child, then parties are limited to the remedies provided within the URAA to uphold, vacate, or modify the award. Fawzy, 199 N.J. at 480. Where harm to a child is claimed and a prima facie case of harm has been shown, then the trial court must determine the harm issue. Id. at 478. "Where the hearing yields a finding of harm, the [trial] court must set aside the arbitration award and decide the case anew, using the best interests test." Id. at 479.

Be Vigilant With Similar But Distinct Arbitration Statutes

In Manger v. Manger, No. A-2919-09T1 (N.J. App Div. Dec. 27, 2010), the Appellate Division stated that parties may designate whether the proceeding will be governed under the Alternative Procedure for Dispute Resolution Act (APDRA), N.J.S.A. 2A:23A-1 to –30, or the Uniform (Revised) Arbitration Act ("URAA"), N.J.S.A. 2A:23B-1 to –32. Parties must expressly elect to be governed by the APDRA. In the absence of an express election to be governed by the APDRA, the arbitration will be governed by the URAA. Id.

Attorneys and parties must craft their pre- or post-dispute arbitration agreements carefully to assure their selection of the Act that will govern the arbitration.

There are significant differences between the URAA and the APDRA. Parties and their legal counsel should consider these differences when choosing the controlling law. APDRA is "designed to balance streamlined procedures necessary for efficient repose with substantive safeguards necessary to protect public rights." Johnson, id. at 32.

APDRA has established procedures for factual development through discovery. N.J.S.A. 2A:23A-10, -11(e). It also provides for a procedure to take expert testimony. N.J.S.A. 2A:23A-11(f). To provide substantive protection, APDRA requires the arbitrator to submit a written opinion stating findings of fact and conclusions of law. N.J.S.A. 2A:23A-12(a). APDRA also requires that the arbitrator's award be in accordance with legal principles. N.J.S.A. 2A:23A-12(e), -13(c)(5), -13(e)(4). The Court in Johnson contrasted APDRA with the URAA, noting, id. at 32:

> The Arbitration Act does not require any particular procedures, mandate discovery, compel the maintenance of a record, command a statement by the arbitrator regarding his findings and conclusions, or an expression of the reasons why he reached the result that he did.

Many family lawyers have been taught, we believe incorrectly, that APDRA should be written into pre- or post-dispute arbitration agreements, as a "better" body of law than the URAA. In truth, each Act serves a distinct set of needs that may – or may not – be appropriate in a given case.

The URAA serves many dissolution parties well, with the Fawzy "add-ons", including the required maintenance of a record, and the fact that

parties may elect an expanded right of review. Parties may negotiate for the best of both worlds, but their legal counsel must understand how to customize the language of the pre- or post-dispute arbitration agreement to so reflect. .

Care must be taken, or, despite their best expectations, the parties and their legal counsel may get a jarringly different result than the one for which they bargained.

Parenting Time and Continued Contact

For removal to be granted, a realistic parenting time plan must be created. Holder, 111 N.J. at 352-353. According to Levine,152 N.J. at 439, the trial court should not limit itself to the first parenting scheduled offered. The parties should submit alternative custody and parenting time schedules and the court should offer suggestions as well. Id.

Courts have regularly referred the issue of forming parenting schedules to mediation. Id. If parties use ADR for a removal dispute, they must still create realistic parenting time plans.

Children's best interests are closely related to their continued contact with the non-custodial parent. Winer v. Winer, 241 N.J. Super 510, 575 (App. Div. 1990).

In a removal dispute, the parenting time schedule must foster pre-existing relationships as much as possible. Zwernemann v. Zwernemann, 236 N.J. Super. 37, 46 (App. Div. 1988). If parents significantly co-parented after a dissolution, then limited or occasional parenting time with the non-custodial

parent would not foster the prior relationships. McMahon, 256 N.J. Super. at 536.

When a parent seeks to relocate out-of-state, but within a reasonable driving distance from the other parent, the parties may agree to alternate weekend parenting time. Morgan v. Morgan, 2010 N.J. Super. Lexis 1941, 15 (App. Div. 2010). Parents also could share transportation time and expense by driving halfway to pick up and drop off children, or alternating driving responsibilities. Id.

Where a parent seeks to relocate far from his or her present community, particularly at distances that require airline travel, a parenting plan must be carefully designed to assure that the non-removing parent is able to maintain a viable relationship with the child. Some parents offer the non-removing party large blocks of time, such as three months during the summer, and other weeklong school vacation periods. Zwernemann, 236 N.J. Super. at 43. Custodial parents also encourage daily cell phone use or internet communications such instant messaging or Skype, to foster relationships. McCoy, 336 N.J. Super. at 180. As noted previously, the authors doubt whether electronic contacts meaningfully enhance a geographically distant parent-child relationship.

The financial constraints of parenting time are an important consideration. If the non-custodial parent would be unable to afford to visit

the removed child, then the parties must design a solution that preserves the pre-existing parent-child relationship. It may be appropriate in some cases for the removing parent to pay for part or all of the noncustodial parent's transportation costs. Horswell v. Horswell, 297 N.J. Super. 94, 102 (App. Div. 1997). Courts have also considered reducing child support or applying arrearages to travel costs to offset the financial burden of transportation for parenting time. Levine, 152 N.J. at 439. If parties cannot create a financially feasible parenting time plan, then a trial court or an arbitrator may determine that removal is not in the best interests of the child. Id. at 441-42 (Held: trial court properly denied removal application due to financial burden on the non-removing parent).

Use of Guardian Ad Litem

Under R. 5:8B(a), on motion of a party or the court, a judge may appoint a guardian ad litem ("GAL") in a dispute regarding parenting time and custody, to advocate for the best interests of the child. The GAL is required to file a written report to the trial court stating findings and recommendations with respect to custody and parenting time. Id. The GAL acts as an "independent fact finder, investigator and evaluator as to that furthers the best interests of the child." R. 5:8B Comment.

A GAL could be useful outside the court as well. In a removal dispute, a GAL could make recommendations (A) to counsel, the parties, and a mediator; (B) for use in a four-way conference setting; and/or (C) directly to an

arbitrator. A GAL's role is similar to an early neutral evaluator's, and addresses directly the best interests of children. Although the parents decide the outcomes in mediation or a four-way conference, and an arbitrator will make a decision, an unbiased evaluation of what is in the children's best interests could give the parties and neutrals powerful assistance in developing an appropriate solution.

Fawzy held that a GAL may not simultaneously serve as an arbitrator, 199 N.J. at 483, whereas the Appellate Division held that a GAL may not simultaneously serve as a mediator, Isaacscon v. Isaacson, 348 N.J. Super. 560 (App. Div.), certif. denied, 174 N.J. 364 (2002). These roles are in clear conflict because neither an arbitrator nor a mediator may be compelled to testify, whereas a GAL is subject to being called as a witness, including on cross-examination.

Use of a Lawyer for the Children

In a custody or parenting time action, Rule 5:8A permits the children or a party to seek appointment of an attorney for the children, whose sole allegiance is to the child's perspective, and not to the abstract standard of "the children's best interests". There are cases in which both a lawyer for the children and a guardian ad litem are called into service.

One of the authors successfully applied for appointment of a lawyer for a 16-year-old, let us call him "Max", in a bitterly contested and post-judgment

parenting time dispute. Max was caught between his parents, feeling loyalty to an abusive mother with whom he lived, but afraid to stand up to her when she refused to let him see his father. The father had abusively demanded that Max assert himself, which only made Max more miserable. After directing therapy for the father, the trial court realized that the parents were not hearing Max's voice. The appointed lawyer instituted a rule that neither party could ask Max any questions or make any comments about custody and parenting time; he would advise the parties' counsel of Max's wishes; and neither party could retaliate, or the Max's lawyer would report him/her to the court. We "grew" Max from high school to college to emancipation. Max is a well-functioning young adult today, and enjoys a relationship with both parents.

Use of Mental Health Professionals

Mental health professionals may be highly useful to neutrals, parties, and legal counsel in a removal dispute, whether in a four-way conference, a mediation, or an arbitration. Psychologists provide comprehensive, objective and impartial custody/parenting time evaluations that parties or an arbitrator may need to make decisions in the best interests of the child. See Board of Psychological Examiners, Specialty Guidelines for Psychologists Custody/Parenting time Evaluations (2009). A psychiatrist could provide a comprehensive evaluation with regard to whether a party is mentally fit to parent or whether a child has special needs. Marc J. Ackerman and Andrew W. Kane, Psychological Experts in Divorce Actions. §1.7 (4th ed. Aspen

Publishers 2005). Social workers may evaluate children's developmental needs, each parent's emotional and/or economic stability, and each parent's ability to address the child's needs. Id. at §1.9.

In a removal dispute, these professional evaluations often provide the most valuable insight to the negotiating parties, their lawyers, a mediator, or an arbitrator. When making decisions in relocation cases, Doctors William Austin and Jonathon Gould recommend consideration of seven factors, id. at §4.10:

1. The child's developmental age.

2. Opportunities for the non-custodial parent to have parenting time in the child's new community.

3. The mode and cost of transportation. The non-custodial parent may not have the funds to travel frequently to visit the child. If not, then the custodial parent could agree to offset some of the non-custodial parent's travel expenses.

4. As children grow and develop the parenting time plan will need to change as well.

5. There should be liberal "virtual" parenting time in relation to the child's age. Communication technology makes it possible for children to keep in touch with the non-custodial parent through a variety of means, such as by cell phone, Facebook, texting, and Skype.

6. The child's preferences should be taken into account in determining relocation and parenting time. The older the child, the more weight will be given to the child's stated preference.

7. If there is poor communication between parents, a parenting coordinator should be used to facilitate communications.

Parenting Coordinator

A parenting coordinator is used "to aid parties in monitoring the existing parenting plan, reducing misunderstandings, clarifying priorities, exploring possibilities for compromise and developing methods of communication that promote collaboration in parenting." Notice to the Bar: Parenting Coordinator Pilot Program, §I. C., 188 N.J.L.J. 169 (April 9, 2007). Parties are given the opportunity to be heard on all issues submitted to the parenting coordinator. Id. at §IV (2). The parenting coordinator's role is to facilitate decision making between the parties. When the parties are unable to come to a joint-decision, the parenting coordinator will make a recommendation with a focus on the best interests of the child. Id. at §I. If agreed to by all parties, the recommendation will become effective immediately. However, if either party objects to the recommendation, he or she may apply to the court for determination of the issue, and the parenting coordinator's recommendations are permitted to be considered by the reviewing trial judge as part of the record in the case. Id. at §IV (5).

A parenting coordinator may be appointed by the court or by parties' consent. Id. at §II (A). A parenting coordinator may not modify any order, judgment or decree. Id. at §II (C)(3). The parenting coordinator's job is not to remake the deal; it is, rather, to facilitate or recommend pathways to better parenting functioning in high conflict cases.

A parenting coordinator could be hired to assist parties in a removal proceeding, because his or her objective is to explore such issues as time, place, and manner of pick up of children, childcare arrangements, scheduling, and other logistical issues post-divorce. Id. at §II (C)(2). These same issues may apply in removal cases. Parties in a removal action could work with a parenting coordinator before or after court intervention.

If the parties are able to resolve their disputes, the matter could proceed on an uncontested basis and neither party would be required to litigate. If the parties are unable to resolve their disputes, then they could arbitrate or litigate, with a narrower focus on the removal issue, but certainly a parenting coordinator's assistance could be useful.

Collaborative Law

Collaborative law is a process that blends the principles of mediation and four-way conferencing. Steven Keeva, Transforming Practices, (Contemporary Books 1999). Parties agree to settle their dispute through negotiation and not litigation. Advisory Committee on Professional Ethics, Collaborative Law, 182 N.J.L.J. 1055 (December 12, 2005). Each party is expected to provide full and honest disclosure throughout the process. In collaborative law, each party retains an attorney for the negotiation process, and other experts, such as financial or mental health professionals, may also be retained when necessary.

According to the Advisory Committee, if a lawyer represents a client in collaborative law, that same lawyer may not then represent that client in litigation, should settlement not be reached. In fact, both attorney representatives must withdraw at that point, as neither one is allowed to take his/her respective client to court. To permit that arrangement and also comply with RPC 1.2(c) (limitations on an attorney's engagement), the lawyer must advise the client of the risks and benefits of engaging in the collaborative law process, as well as the availability of other ADR methods. The client must give informed consent before the attorney may represent him or her in a collaborative proceeding. Id.

Because of the liberal flow of information and the emphasis on retaining mental health experts, the use of collaborative law should certainly be considered in a removal action. However, collaborative law is not for everyone. Where parties have a damaged relationship and poor communication skills, the Advisory Committee states that the negotiation process may not work. If, in the attorney's opinion, collaborative law will fail or is not in the client's best interests, then the attorney is obligated to decline the collaborative undertaking. Id.

Use of a Dissolution Coach

A dissolution coach represents a new professional development. S/he is someone who works with parties in a litigation or ADR proceeding. A dissolution coach serves as a mentor throughout the process. Linda

Lucatorto, What Does a Divorce Coach Do & Why Do I Need One? http://www.divorcenet.com/states/illinois/what_does_a_divorce_coach_do. A dissolution coach does not advocate for the client, but rather assists the client in setting goals, making decisions, and making the transition to single or co-parenthood. Each parent in a removal action could retain his/her own dissolution coach, in addition to his/her own attorney and other needed professionals.

A dissolution coach could be used in conjunction with all of the other methods discussed thus far, along with the use of mental health experts and parenting coordinators.

Conclusion

As stated in Baures v. Lewis, "The critical path to a removal disposition . . . is not necessarily the one that satisfies one parent or even splits the difference between the parents, but the one that will not cause detriment to the child." 167 N.J. at 114. Engaged in a cooperative process, creative and innovative parents produce well-designed and thoughtful custody and parenting time schedules. This prospect offers clear benefits to parents and children in removal cases. It also offers clear benefits to the professionals who serve them.

As one of the authors says in Mediation Training courses for ICLE and NJAPM, "It takes a village to help these people separate."

Removal proceedings are lengthy, costly, public, stressful, and have an unavoidably terminal aspect. There is much at stake. If removal is granted, the non-custodial parent will lose day-to-day relationships with his or her children. If it is denied, then the custodial parent feels trapped in circumstances s/he may no longer control, or has to decide to leave the State without the children -- often an untenable outcome.

The use of ADR processes provides the best, perhaps the only, opportunity to decrease these highly destructive outcomes. ADR in removal disputes helps parties come to a solution that is at least workable, and at best a “win-win” for parents and children.

As described above, there are many processes, providers, and tools available by which parents may focus on the best interests of their children while getting their own lives in order.

Using these processes, providers, and tools, the parties have the best chance to maintain control of their own lives, at a lower psychic cost, and in a purely private setting. Unlike litigation proceedings, ADR typically takes less time and costs less money. With careful use of ADR, the parties have a chance to produce measurably superior outcomes, both objectively and subjectively, to anything that court and counsel can possibly do for them – in most cases.

For all the rest, there is litigation.