

Comment,
**ADR, TECHNOLOGY, AND NEW COURT
RULES – FAMILY LAW TRENDS FOR THE
TWENTY-FIRST CENTURY**

“Family law may well be the legal area that has the most impact on the highest percentage of ordinary citizens in the United States. Their negative experiences, apart from whether they are happy with the outcome, drive their fellow citizens’ image of our court system.”¹

The face of family law around the country is changing to accommodate the high number of family law cases that are filed each year and to increase overall satisfaction and ease with which those cases are handled. Implementation of new court rules, an increased focus on alternative dispute resolution (ADR), and expanded use of technology are some of the current trends pointing family law in new directions for the twenty-first century.

This article will examine the current developments of ADR in family law by looking at the continued use of mediation, the rapidly expanding use of collaborative and cooperative law, and how technology will enhance these methods of resolving disputes. Also, by exploring the new Arizona Family Rules of Procedure and the use of parenting coordinators in high conflict cases, this article will highlight current trends around the country and issues to watch in the years to come.

I. Alternative Dispute Resolution – Here to Stay

As public awareness of alternatives to litigation grows, methods of ADR continue to expand and diversify. The use of ADR in family law disputes will continue to develop at a rapid pace because ADR can lead to more efficient use of court resources, reduced levels of subsequent litigation, and high satisfaction rates by participants. Also, by engaging parties in the resolution process, ADR often provides longer lasting and more effective solutions to disputes.² The emerging popularity of

¹ Robert K. Downs, *Family Law: A Crucible for Change*, 93 ILL. B.J. 436, 436 (2005).

² Mark W. Armstrong, *The New Arizona Rules of Family Law Procedure*, 42 ARIZ. ATT’Y 30, 30 (Feb. 2006).

ADR methods such as cooperative and collaborative law, court adoption of rules emphasizing use of court sponsored mediation, and an increased interest among lawyers in the use of alternative methods signify that ADR is here to stay and will play a major role in shaping the structure of family law courts in the future.

A. *Mediation*

In the past twenty years, mediation of family law cases has been rapidly developed and institutionalized by courts around the country.³ In fact, mediation of family law cases in court-sponsored programs is now authorized by statute or court rule in almost every state.⁴ The statutes and rules that govern mediation vary from state to state, but nationwide, custody and visitation disputes are the most common types of cases referred to mediation.⁵ Mediation has grown to meet the needs of these types of disputes, and it will continue to expand to play a major role in the court systems of the twenty-first century.

Mediation is a method of promoting negotiation between parties with the aid of a neutral professional that helps parties reach a mutually agreed and satisfactory resolution to their dispute. Mediations can take place between the parties and a mediator, or the parties may have their lawyers present at the mediation session. The mediation process varies with the preferences of the parties and local norms. Typically, the parties are responsible for payment of the mediation process.

The use of mediation in family law has grown over the past several years, and will continue to grow as clients learn of the emotional and financial benefits this alternative to litigation can provide.⁶ Because mediation is typically a shorter process than litigation, it can also be a more cost-effective method of resolving disputes. By avoiding discovery costs, hearings, and possible trial, mediation saves clients valuable money and time. Some is-

³ Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 *FAM. L.Q.* 53, 53 (2005).

⁴ *Id.*

⁵ *Id.* at 61.

⁶ Kathy A. Hunt, *Using Mediation in Family Law Cases*, 27 *WYO. LAW.* 32, 32 (Dec. 2004).

sues can be resolved in one mediation session that might have taken months to resolve through the court system.

Mediation also leads to emotional satisfaction, since the process is recognized for preserving relationships and avoiding a win-lose decision.⁷ Mediation helps parties focus on their mutual interests while learning tools for effective communication in the future.⁸ Because parties have a chance to express themselves and explore creative solutions to their dispute, mediation agreements have been shown to be more satisfactory to participants than court-imposed resolutions.⁹ Helping parties mutually reach a workable solution is key to keeping conflict and emotional strife low for parties who may have to deal with each other for years in the future because of children or other financial ties. Overall, both parties may leave mediation happier because they were able to participate in the decision-making process and communicate their views on the issues they felt were important.

Another benefit mediation provides to family disputants is the positive effect it can have on the children of divorce. Custody mediation is mandatory in thirteen states, with an exception for cases involving allegations of domestic violence in all of them.¹⁰ The majority of the remaining states give judges discretion to order parents to enter into mediation.¹¹ This expanded use of mediation is good for the children of divorce as well as the parents. Research shows that couples that use divorce mediation, rather than litigation, decide on joint custody twice as often.¹² Joint custody is found to mitigate the traumatic sense of loss and rejection children often feel when a parent moves out.¹³ Also, children in joint custody may benefit materially, since child support is paid fully seventy-five percent of the time in joint custody arrangements, compared to forty-six percent of the time in

⁷ Carrie-Anne Tondo et al., *Mediation Trends: A Survey of the States*, 39 FAM CT. REV. 431, 432 (2001).

⁸ Hunt, *supra* note 6, at 34.

⁹ *Id.*

¹⁰ Andrew Schepard, *Law and Children; Revisiting 1985 Law Revision Report and Custody Mediation*, N.Y.L.J., Jan. 2005, at 3.

¹¹ *Id.*

¹² Roz Zinner, *Joint Physical Custody: Smart Solution or Problematic Plan?* (2000), available at <http://adrr.com/adr4/joint.htm>.

¹³ *Id.*

sole custody arrangements.¹⁴ It is likely that in the future parents will increasingly choose mediation to determine child custody issues because mediation offers parents the ability to develop their own post-divorce parenting plan detailed to the specific needs of their child.¹⁵

As mediation expands, the role of the lawyer as mediator will continue to develop. For instance, experts have recognized that power imbalances between couples may interfere with mediation.¹⁶ This imbalance is evident where one partner has been abusive to the other. Laws in twenty-nine states explicitly address the risks of domestic violence for mediation.¹⁷ Despite multiple efforts to screen for domestic violence cases prior to mediation, cases involving abusive relationships will still get to mediation. Therefore, mediators should be properly trained to identify domestic violence and conduct their own screenings to determine whether or not mediation is an appropriate process for their client.¹⁸ The identification of cases that may not be proper for mediation and how to deal with power imbalances will require training and clear rules for lawyers as mediators.

Rules concerning ethical obligations also will emerge as lawyers step into the role of mediator more frequently. A mediator, as a neutral, will have to be prepared to handle matters of confidentiality and situations in which mediated cases later go to trial. Increasingly, states are passing independent confidentiality protections for conversations and document exchanges in mediation.¹⁹ “The phenomenal growth of ADR activity among lawyers makes it clear that Alternative Dispute Resolution is here to stay, and its practice by lawyers implicates many ethical and legal duties and responsibilities.”²⁰

¹⁴ *Id.*

¹⁵ Tondo et al., *supra* note 7, at 432.

¹⁶ See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545, 1592 (1991).

¹⁷ Murphy, *supra* note 3, at 63.

¹⁸ *Id.* at 65.

¹⁹ Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 *GEO. J. LEGAL ETHICS* 631, FN 110 (1997).

²⁰ *Id.* at 669.

B. Collaborative Law

Collaborative law, sometimes referred to as the “cousin” of mediation, may be the “wave of the future”²¹ of family law. Collaborative law is a relatively new concept, as the first collaborative law initiative began a little over a decade ago.²² However, today there are more than 120 Collaborative Family Law groups across Canada and the United States.²³ The use of collaborative law to resolve family disputes has grown exponentially and is seen as, “one of the most significant developments in the provision of legal services in the last twenty-five years.”²⁴

While collaborative law, like mediation, focuses on problem-solving negotiation between disputing parties, it differs from mediation in a couple of significant ways. One difference is that no neutral intermediary or mediator figure is present at a collaboration session, and spouses are assisted and advised by their lawyers. As advocates, collaborative lawyers are not required to be neutral and thus can strongly present clients’ interests and positions. Collaborative lawyers and parties negotiate primarily in four-way meetings in which all are expected to participate actively.²⁵ Therefore, clients get the benefit of the problem-solving aspect of mediation as well as the advantage of having a strong advocate to promote their interest in the collaborative process.²⁶

One of the main differences between collaborative law and mediation or a traditional litigation model is that the participants in the collaborative approach are required to sign a disqualification agreement. Under this disqualification agreement, if any party wants to litigate, the collaborative process must end and all collaborative lawyers are disqualified from representing the par-

²¹ Diane Curtis, *Collaborative Law – Solving Disputes the Friendly Way*, available at <http://www.collaborativepractice.com/articles/public/Statebararticleoncollaborativelaw.doc>.

²² Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 186.

²³ *Id.* at 190 n.36.

²⁴ Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*, 2005 – FCY – 1E (2005).

²⁵ John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss; Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 283 (2004).

²⁶ *Id.* at 282.

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ties in litigation.²⁷ This pledge not to litigate is intended to promote settlement and cooperation and is the hallmark of collaborative law. Another difference in collaborative law and traditional litigation is the lack of formal discovery. In the collaborative process, there is an expectation that information will be shared freely and issues will be discussed openly in four-way meetings in an effort to meet the goals of both parties and their children.²⁸

A growing trend in collaborative law is the use of a collaborative team. A collaborative team utilizes specialists and outside persons to help assist the parties to make the best decisions for their future and for their children. The team members may include, but are not limited to, the disputing parties, their lawyers, mental health practitioners, financial advisors, and child specialists. For example, a child specialist may be brought in to the collaborative process to meet with the parents and the child to assess the situation and assist the parents in meeting the needs of the child.²⁹ Unlike a custody evaluator, the child specialist does not make specific recommendations, but works with parents in making informed decisions to help their child.³⁰ With the information received from the child specialist, the couple will create a parenting plan which will be incorporated into their final divorce document.

By utilizing a neutral financial specialist as part of the collaborative team, parties can gather necessary information and discuss pertinent financial issues with the help of a trained professional to help them make educated decisions.³¹ The financial specialist will work with the couple to explore present and future financial consequences of various settlement options.³² Often this information is presented in a five-way meeting with the fi-

²⁷ John Lande, *Recommendation for Collaborative Law Groups to Encourage Members to Offer Cooperative Law in Addition to Collaborative Law*, available at <http://www.law.missouri.edu/lande/publications.htm> (2004).

²⁸ Peggy Podell, *The Year in Family Law 2004 – 2005: Past Currents, Future Trends*, available at <http://www.divorcenet.com> (Feb. 2006).

²⁹ International Academy of Collaborative Professionals, *What Is the “Interdisciplinary Team Model”?*, available at <http://www.collaborativepractice.com>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

nancial specialist, the two collaborative lawyers, and the couple. Then the couple, along with their attorneys, creates a financial settlement based on the information presented by the financial specialist.³³ As clients become aware of the collaborative law process, the popularity of team model is likely to expand as clients learn of the wide range of services available to help them create well-developed and specifically tailored plans for their families.

Collaborative law will continue to be a popular choice in the future because it provides a variety of emotional and financial benefits to its participants. It is estimated that collaborative law divorce cases cost one-tenth to one-fifth what litigation costs.³⁴ The savings come because money is not being spent on discovery, interrogatories, pretrial conferences, or other miscellaneous costs of trial. Many collaborative law clients appreciate feeling protected from adversarial pressures by negotiation under the disqualification agreement that prevents the case from going to litigation with the attorneys involved in the negotiation.³⁵ Parties feel encouraged to work toward a settlement, because not settling would raise costs, and end the representation of the lawyers with whom they have built a relationship. Because of the low cost and high satisfaction rate that collaborative law offers, it will continue to gain popularity in the twenty-first century. Collaborative law is not only the “wave of the future” for family law, but could set the trend for other areas of the law as well.

C. Cooperative Law

An alternative to the collaborative law movement also catching on is the area of cooperative law. Cooperative law is similar to collaborative law except that in cooperative law the parties negotiate without signing a disqualification agreement. This method offers clients the benefit of not losing their lawyers if one side chooses to litigate. With only a few groups of practitioners around the country, the cooperative law movement is not as widespread as the collaborative law movement.³⁶ However, because a cooperative law session does not operate under the

³³ *Id.*

³⁴ Curtis, *supra* note 21.

³⁵ *Id.*

³⁶ Lande & Herman, *supra* note 25, at 284.

requirements of a disqualification agreement, cooperative law has the potential to gain popularity. Without the disqualification agreement it becomes easier to threaten litigation, and clients like the security of knowing that they can retain their lawyers if the parties do proceed to litigation. On the other hand, cooperative law clients also forego the benefit of a disqualification agreement—the incentive to settle. Watch for the development of collaborative and cooperative law as parties continue to explore their options beyond traditional litigation and mediation.³⁷

D. *The Internet and ADR*

As technology continually advances, new developments will make ADR more efficient in the family law arena.³⁸ For example, general knowledge of computers and widely available internet access make mediation sessions more accurate and time-effective. In the past, parties would take their versions of documents to mediation, work on them, and then revise and circulate revisions until everyone was happy with the finished product. Now parties can bring laptops with them to the mediation and revise and redraft throughout the day and leave the mediation session with a signed document that is ready to be filed.³⁹ This helps eliminate misunderstandings and lowers cost.

Another way technology and the use of the Internet benefit mediation proceedings is the ability to check facts in the middle of negotiations. In an instant, personal records and bank statements can be verified. Determining the cost of child-care programs, the housing market, and accessing school schedules with the push of a button can help make more detailed, accurate, and fair settlements while quashing frivolous arguments.

Remote technology may even lead to remote mediation.⁴⁰ Video or web-based mediations can be used when parties are dispersed geographically and/or when parties are unable to afford

³⁷ *Id.* at 285.

³⁸ Abigail Johnson, *ADR Goes High Tech: Technology Makes for Quicker, Cheaper Dispute Resolution*, 16 *IND. L.* 7 (2005).

³⁹ *Id.*

⁴⁰ *Id.*

to travel to the mediation session.⁴¹ Mediation over the Internet can provide savings when compared with traditional litigation, which can be extremely costly. However, cyber-mediation loses the dynamic of traditional mediation because it takes place in front of computer screens, rather than with face-to-face communication, which is one of the benefits of mediation—giving people a chance to vent their feelings and resolve issues together. While online dispute resolution, or cyber-mediation may be helpful in handling minor economic disputes in other civil cases, it is not likely that family law mediations will be replaced altogether by online sessions anytime in the near future.

Overall, look for increased dependence on the Internet for settlement drafting and fact checking in mediations and collaborative law sessions. Technology will continually enhance alternative dispute resolution methods and will change the way family law is practiced in the future.

II. The Use of Parenting Coordinators in High Conflict Cases

Another emerging trend that is likely to take off in the future is the use of parenting coordinators in high-conflict cases. Parenting coordinators are trained professionals appointed in conflict-ridden custody cases to help parents make decisions together.⁴² The judicial appointment of a parenting coordinator is a relatively recent phenomenon that flows from a basic theme: “contemporary trends of family dislocation are yielding a higher rate of parental conflict over longer periods of child development.”⁴³

More than half of the children who experience divorce do so by age six, and seventy-five percent of those children are younger

⁴¹ Llewellyn Joseph Gibbons et al., *Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 42 (Winter 2002).

⁴² Naomi Lubick, *Parenting Coordinators Ease Custody Issues*, HEALTH (October 2005) available at <http://www.health.com/health/article/0,23414,1104648,00.html>.

⁴³ Dana E. Prescott, *When Co-Parenting Falters: Parenting Coordinators, Parents-in-Conflict, and the Delegation of Judicial Authority*, 20 ME. B.J. 240, 241 (2005).

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than three years of age.⁴⁴ When the parents of young children divorce, they will likely need to deal with each other on a regular basis for several years into the future to decide visitation, discipline, schooling, and everyday decisions until their child reaches adulthood. The longer the divorced parents have to interact with each other, the higher the chance there is for heightened conflict and long drawn out battles.⁴⁵ Long-term parental battles, including disputes over custody and visitation issues, can have long lasting negative effects on children.⁴⁶ Often the effects of high-conflict on the children are worse than the effects of the divorce itself. From a psychological standpoint a child may suffer anxiety, depression, and other trauma as a result of chronic conflict.⁴⁷ One of the most rapidly growing interventions for high-conflict cases are the use of parental coordinators to help ease the effects of divorce on children and prevent long-term battles between parents.

According to AFCC Task Force on Parenting Coordination, the essential purpose of parenting coordination, “is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner. . .”⁴⁸ Judges may appoint coordinators to help parents develop or follow custody agreements with the aim of reducing chronic parental conflict and unnecessary court appearances.⁴⁹

Typically the authority of a parenting coordinator includes a range of day-to-day parenting issues such as decisions about a child’s education, activities, and health care, as well as enforcement and modification of specific provisions of the parenting plan.⁵⁰ When a dispute is presented to the parenting coordina-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Ron Neff & Kat Cooper, *Parental Conflict Resolution; Six-Twelve-, and Fifteen-Month Follow-Ups of a High-Conflict Program*, 42 FAM. CT. REV. 99 (Jan. 2004).

⁴⁷ Prescott, *supra* note 43, at 241.

⁴⁸ AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 2 (2005) available at <http://www.afccnet.org/pdfs/AFCCGuidelinesforParentingCoordinationnew.pdf>.

⁴⁹ *Id.*

⁵⁰ Prescott, *supra* note 43, at 240.

tor, the coordinator will assist parents in reaching a resolution. If the parties cannot come to a decision, the parenting coordinator will make a recommendation to the court for an order or make a decision for parties disputing over a routine matter. Unlike mediators, who have no power to make binding decisions, parenting coordinators have the authority to end minor disputes between parents that arise day-to-day.⁵¹ The parenting coordinator may take the child's opinion, information from doctors, therapists, schools or other caretakers into his or her decision. Typically, the parties may limit the decision-making authority of the parenting coordinator to specific issues or areas if the coordinator is being appointed pursuant to an agreement of the parties.

Judges are increasingly using parenting coordinators as an effective way to deal with high-conflict cases that suck up court time and resources. Parenting coordinators are also useful for families where parents have concerns about drugs, alcohol, abuse or the stability of the other parent. Parenting coordinators were first used in California, and are now used in about six states and several municipalities.⁵² This emerging method of handling parental disputes is relatively new to the family law arena, but there is evidence that the use of parenting coordination in high-conflict cases is an effective tool for reducing repeat litigation between parents. For example, a 1994 study by psychologist Terry Johnston, PhD, reported that the use of parenting coordinators reduced the average number of court visits from six per case to 0.22 in one year.⁵³

The duties of parenting coordinators vary from jurisdiction to jurisdiction but clear standards may emerge as this practice becomes more widely used. For example, in Washington D.C., judges may delegate their decision-making powers to the expertise of parenting coordinators, who are appointed as special masters of the court for high-conflict cases.⁵⁴ Through judicial appointment, coordinators have quasi-judicial immunity. In D.C., parenting coordinators can testify in court and sometimes judges will request oral reports in front of both parties if litiga-

⁵¹ Lubick, *supra* note 42.

⁵² *Id.*

⁵³ AFCC Task Force on Parenting Coordination "Parenting Coordination: Implementation Issues", 41 FAM. CT. REV. 533 (April 2003).

⁵⁴ Lubick, *supra* note 42.

tion is ongoing. A court order typically enables coordinators to speak with professionals who work with families, such as teachers, custody evaluators and therapists.⁵⁵ In California, parenting coordinators are appointed under a variety of statutes – such as those used for family mediators or arbitrators.⁵⁶ The parents pay the fees for the services of a parenting coordinator as ordered by the court and many parenting coordinators request a retainer before they begin their work with a family.

In 2005, in *Barnes v. Barnes*,⁵⁷ the Oklahoma Supreme Court considered a constitutional challenge to that state's Parenting Coordination Act. The Oklahoma Parenting Coordination Act allows court appointment of a parenting coordinator to assist divorcing parties in resolving issues. In *Barnes*, petitioner argued that the Act was unconstitutional because it applied to divorcing parents but not married parents or couples divorcing without children and thus violated the equal protection clause of the Fourteenth Amendment. Also, petitioner claimed that the appointment of a parenting coordinator violated her due process rights. The court determined that the Act did not violate the equal protection clause or the due process rights of divorcing parents. The court ruled that the state had a compelling interest in intervening in the divorce process to protect the needs of children and there was a reasonable relationship to the state interests to satisfy the constitutional challenge to the Act.⁵⁸ As stated by the court, "the extent to which a parent may be inconvenienced by cooperating with a parenting coordinator is subordinate to the need to protect the child's welfare."⁵⁹

As the twenty-first century proceeds, look for more states to adopt rules and court sponsored programs utilizing parenting coordinators for high-conflict cases. Parenting coordinators can minimize court appearances of repeat litigators and help keep peace in warring families, two important tasks that will earn parenting coordinators a prominent place in the future of family law.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 107 P.3d 560 (Okla. 2005).

⁵⁸ *Id.* at 564.

⁵⁹ *Id.* at 565.

III. Court Rule Changes

Several states such as Delaware, Florida, and Texas have adopted specialized family law rules.⁶⁰ Arizona recently joined those states and adopted a set of statewide, uniform and comprehensive rules for family law cases. Arizona's new Rules of Family Law Procedure reflect the current trends shaping the future of family law: the relaxation of rules of evidence to make them more understandable to self-represented litigants, emphasis on the use of alternative dispute resolution, and assisting family courts in the efficient administration of justice.⁶¹ As states like Arizona and courts across the country relax rules of evidence and change court rules to make the resolution of family law cases more efficient, all eyes turn to the California Supreme Court as it decides the case, *Elkins v. Superior Court of California, Contra Costa County*.⁶² *Elkins* challenges a California rule that allows judges to conduct trial in family law cases in truncated procedures in which the rules of evidence are relaxed. The outcome of *Elkins* may influence policy and the shape of future family court rules around the country.

A. Arizona Rules of Family Law Procedure

Family law cases account for over forty percent of Superior Court filings in Arizona – about 73,000 cases annually statewide.⁶³ Arizona has one of the highest divorce rates in the country, however, until recently the state did not have rules of procedure exclusively for family law cases.⁶⁴ Adoption of a comprehensive set of rules was necessary to provide clarity and uniformity in the rules of procedure for family law cases in Arizona.⁶⁵

To design the new family law rules, the Supreme Court of Arizona appointed a committee consisting of sixteen members from around the state. The committee sought to establish rules that, “fit the needs of families in conflict, to simplify and reduce

⁶⁰ Armstrong, *supra* note 2, at 32.

⁶¹ *Id.*

⁶² *Elkins v. Sup. Ct. of Cal.*, No. S139073 (Cal. filed Nov. 7, 2005).

⁶³ Armstrong, *supra* note 2, at 30.

⁶⁴ *Id.*

⁶⁵ *Id.*

unnecessary delays in court proceedings, and bring a less adversarial and more problem-solving approach to family disputes.”⁶⁶ To develop the rules, the committee reviewed the Arizona Rules of Civil Procedure and local domestic relations rules of twelve Arizona counties. The committee also considered family law rules in other states that have already adopted specialized rules, including Delaware, Florida, Hawaii, Rhode Island and Texas.⁶⁷ Also factoring into the drafting of the new rules is the fact that an estimated seventy to eighty percent of family law litigants are self-represented.⁶⁸ With a focus on the large number of self-represented litigants, the rules were created to be flexible and easy to understand for those who are unfamiliar with the legal system.⁶⁹

After meeting the goals of the committee, the rules were circulated for public comment and then approved by formal order of the Chief Justice of Arizona on October 19, 2005.⁷⁰ The new Arizona Rules of Family Law Procedure became effective for all family law cases filed on or after January 1, 2006. Some of the most significant changes brought about by the rules include a relaxation of the Arizona Rules of Evidence and a strong emphasis on problem-solving approaches to resolve family law cases, including the use of mediators, family law masters, and parenting coordinators.⁷¹ Also there are new rules to ensure the timely disposition of all family law matters and “new rules of procedure for temporary orders and post-divorce proceedings, which have never existed before on a statewide level.”⁷²

Reflecting the nationwide trend toward expanded use of ADR in family law disputes, Arizona Rules of Family Law Procedure 66 through Rule 75 encourage settlement practices and ADR procedures.⁷³ “The intent of this section is to encourage the resolution of family law cases using non-adversarial means of

⁶⁶ Norman J. Davis, *A Reference Guide to the New Family Court Rules*, 42 ARIZ. ATT’Y 42, 42 (Feb. 2006).

⁶⁷ Armstrong, *supra* note 2, at 32.

⁶⁸ *Id.* at 30.

⁶⁹ Davis, *supra* note 66, at 43.

⁷⁰ Armstrong, *supra* note 2, at 32.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Davis, *supra* note 66, at 46.

alternative dispute resolution to the greatest extent possible.”⁷⁴ Rule 66(E) imposes a duty upon all attorneys and unrepresented parties to attempt in good faith to settle or agree on an ADR process. If the parties cannot agree to use a specific ADR process, the court may direct the parties to discuss with a court-appointed ADR specialist about whether ADR is appropriate and the types of ADR that might benefit their case.⁷⁵ Staying on the cutting edge, Rule 74 provides for court appointment of a parenting coordinator to assist the court and families with the implementation of court orders regarding custody and parenting time.⁷⁶ The parenting coordinator makes recommendations to the court but also may make binding decisions to resolve short-term emergency situations or disputes between the parties. Overall, Arizona’s new rules reflect the objective of family law’s current trends – reducing conflict between the parties and achieving efficiency in resolution of disputes.

B. *Elkins v. Superior Court of the State of California, Contra Costa County*

As states around the country like Arizona establish state-wide uniform family law rules, the spotlight is on the Supreme Court of California as it resolves a dispute over the relaxation of evidence rules in family law cases. *Elkins v. Superior Court of the State of California, Contra Costa County*, arises from a dissolution action in Costa County, California, in which the petitioner, husband, appeared *in propria persona*.⁷⁷ The Contra Costa County Superior Court, in an effort to streamline the presentation of evidence in contested family law trials, adopted a local rule stating that direct testimony and evidence at trial will be presented by declaration.⁷⁸ In the dissolution case, the trial judge issued a “Trial Scheduling Order” which laid out specific rules concerning the format for declarations to be presented at trial. According to the scheduling order, the foundation for any proposed exhibit was to be specifically detailed in the declara-

⁷⁴ ARIZ. R. FAM. L. P. 66.

⁷⁵ ARIZ. R. FAM. L. P. 66(F).

⁷⁶ ARIZ. R. FAM. L. P. 74.

⁷⁷ Pet’r Pet. for Writ of Prohibition 1.

⁷⁸ *Id.*

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tions and presented to the court.⁷⁹ Because the petitioner did not correctly identify and lay the foundation for each exhibit as detailed in the scheduling order, his exhibits were excluded and a default judgment was ordered against him.⁸⁰

The petitioner sought relief from the Supreme Court of California, requesting that the default judgment against him be set aside and the case be decided on its merits by a trial court.⁸¹ The Supreme Court of California agreed to hear the case. The question before the court was whether Superior Court Local Rule 12.5(b)(3) and the trial scheduling order in the case, which prevented direct testimony and limited the presentation of evidence in this proceeding, violated the due process and equal protection of the petitioner.⁸² Contra Costa County Local Rule 12.5 governs the conduct of “Hearings and Trials.”⁸³ Rule 12.5(b)3 provides that direct examination will not be permitted except in unusual circumstances, and the court may decide issues based on the pleadings without hearing testimony from the parties.⁸⁴ The petitioner’s lawyer, in asking the California Supreme Court to take the case for review expressed his concern that by not challenging court rules such as Contra Costa County Local Rule 12.5(b)3, trials in family law cases will virtually disappear.⁸⁵ The Petitioner argued that the informality of the process as delegated under the rules and the desire to “move the case through” impedes a litigant’s right to present his case or defense and his right to have a day in court.⁸⁶

The Supreme Court did not reach the constitutional issues instead holding that the court rules were inconsistent with state law.⁸⁷ The court held that marital trials were to be accorded the same treatment as all other civil matters. Because written testimony constituted hearsay it was subject to exclusion. The court noted that the statutes afford all litigants an opportunity to pre-

⁷⁹ *Id.*

⁸⁰ *Id.* at 2.

⁸¹ Pet’r Pet. for Review 3.

⁸² Pet’r Pet. for Review 3.

⁸³ CONTRA COSTA CT. R. 12.5.

⁸⁴ *Id.*

⁸⁵ Garret C. Dailey, Pet’r Reply to Real Party in Interest’s Letter of December 23, 2005, at 13, Dec. 28, 2005.

⁸⁶ Pet’r Pet. for Review 35.

⁸⁷ *Elkins v. Superior Court*, 163 P.3d 160 (Cal. 2007).

sent relevant, competent evidence. In addressing the validity of rules designed to streamline court processes the court concluded:

Although we are sympathetic to the need of trial courts to process the heavy case load of dissolution matters in a timely manner, a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light of the importance of the issues presented such as the custody and well-being of children and the disposition of a family's entire net worth. Although respondent court evidently sought to improve the administration of justice by adopting and enforcing its rule and order, in doing so it improperly deviated from state law.⁸⁸

IV. Conclusion

Increased use of ADR programs such as mediation, collaborative, and cooperative law signify that alternative methods of resolving disputes are more than just short-lived fads. Because of the emotional and economic benefits ADR programs provide family law participants, ADR will play a permanent role in family law and will change the face of lawyering in the twenty-first century. Academic programs will play a large role in statewide efforts to encourage ADR and enhance collaborative efforts to resolve family issues.⁸⁹ The use of parenting coordinators in high conflict cases will also be utilized more frequently to help decrease repeat litigation and provide problem-solving methods for parents. The Internet and technology will continue to advance the practice of family law and provide ease and convenience in the future. In addition, more states may follow Arizona and establish uniform statewide rules of family law procedure that encourage ADR and the timely disposition of family law cases. Overall, family law in the twenty-first century will continue to strive toward providing quick and satisfactory resolutions for family law disputants and their children.

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⁸⁸ *Id.* at 161-62.

⁸⁹ Eileen Pruett and Cynthia Savage, *Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues*, 42 FAM. CT. REV. 232, 235 (2004).

