# SECTION 16: ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, COURT-PROGRAMS, SPECIAL MASTERS, AND COLLABORATIVE LAW.

This Section of the 2005 Hawai'i Divorce Manual discusses the principal alternatives to litigation -- mediation, arbitration, and others -- and includes practice tips and tools.

This Section of the Manual replaces Section 15 of the 2000 Hawai'i Divorce Manual (Fifth Edition).

This Section of the Manual was written by James K. Hoenig, J.D., PhD (lead); Hon. Doug McNish (ret.); Elizabeth Kent, Esq.; Tracey Wiltgen, Esq. Material on Collaborative Law was provided by Jackie King, Esq. We are honored to have an Introduction written by Judge R. Mark Browning.

**Our legal system is an *adversarial* system. So whether parties really *are* adversaries, whether they *wish* to be adversaries, or whether it even *makes sense* for them to be adversaries, the system *assumes* that they are adversaries and processes them as such. The assumed adversarial nature of their relationship quickly becomes a self-fulfilling prophecy. In short, the very system that parties turn to for resolution of disputes *forces* them to act as adversaries! Fortunately, there are alternatives.**

## Introduction

By Hon. R. Mark Browning, Lead Judge, Domestic Division, Family Court of the First Circuit.

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them the nominal winner is often a real loser – in fees, and expenses, and waste of time. As peacemaker the lawyer has a superior opportunity of being a good man [woman]. There will be business enough."

"Notes on the Practice of Law," *The Library of America. Lincoln: Speeches and Writings, 1832-1858, c.1850.*

Abraham Lincoln's words of wisdom ring as true today as they did in the 1800's. The role of any lawyer is to represent his or her client to the best of his or her abilities. This is ingrained in us by our education, by our legal community, and to some degree by the nature of our adversarial judicial system. But the family law attorney has unique responsibilities that are not specifically a part of our legal training. The role of Family Court is unique by virtue of the human dramas and realities that are presented to us, and the words of Abraham Lincoln need to be understood in the context of the consequences of the decisions we make and the advice that we provide to the people we serve.

We have a unique responsibility to recognize that we are dealing with people whose lives are in crisis and who are suffering. The nature of their crises, if not handled properly, inevitably has life-long consequences, not only for the litigants but also for their families and their children. Judges and attorneys must always be cognizant that litigants and their families are left with the consequences of how we handle their cases. Their children and their loved ones are left with the wisdom, or the mistakes, of the advice we give or the decisions we direct them toward.

My perspective as a judge is perhaps different from most of our divorce practitioners. The average divorce attorneys' scope of experience may be limited by their perspective as advocates and by the extent of their case load. As a judge I have presided over thousands of divorce cases. Many of these cases have been resolved with a minimum of trauma and litigation because of the wisdom of individual practitioners. But in too many other cases, despite my best efforts to help the parties reach a settlement, I have had to watch as parties have destroyed each other emotionally and financially. I have presided over cases where children have attempted suicide or turned to drugs to escape the agony of their parents' divorce. I have seen cases where children caught in the middle of their parents' disputes have suffered

permanent psychological and emotional trauma. I have watched as parties engage in protracted litigation to the extent that any chance of their being able to parent cooperatively has been destroyed. I have seen cases where litigation has served only to deepen the emotional wounds of the parties, leaving lasting psychological scars. And though it all I have always said to myself that *there must be a better way*.

The tragedy of the divorce calendar, unfortunately, does not end there. Most matrimonial practitioners do not realize how protracted divorce litigation spills over onto other Family Court calendars. In the Family Court of the First Circuit, we have over five thousand juveniles annually come through the judicial system. Many of those children suffer from drug issues and psychological and/or emotional problems that have manifested themselves over a course of time. But as one who has presided over thousands of these cases, I have observed that many of those youngsters' problems are a direct result of divorces that have been handled poorly by the parents and their attorneys.

I have come to believe that it is the ethical and moral responsibility of each Family Law practitioner to recognize the human stakes at issue in each case that he or she is involved in. This responsibility includes making the effort to resolve the issues in each case without resorting to protracted litigation, recognizing the hurt and human suffering of both parties and their love ones, and always striving to promote healing and resolutions so that all concerned can go on with their lives with the minimum of psychic and emotional trauma. To ignore this responsibility is to ignore the fact that justice encompasses not only fairness but also compassion and human understanding.

The above statement of the responsibilities of a Family Law practitioner is not at all inconsistent with the requirement of the *Rules of Professional Responsibility* that we, as attorneys, are to act in the best interest of our clients. In fact, the responsibility to provide healing and peaceful resolution is very much in keeping with that professional responsibility. Seeking what is best for your client and peaceful resolution are not mutually exclusive. To the contrary, one naturally follows the other.

This statement is supported by the fact that litigation is almost always harmful to people – especially those whose families' structures are being altered. And in cases that involve custody issues, litigation is invariably extremely harmful to children. Almost every divorce case involves anger. Behind the anger is hurt. Unresolved anger and hurt destroy lives and certainly destroy families. When lawyers handle divorce cases in the traditional adversarial mode, the anger is often intensified and the hurt grows deeper. A good lawyer understands this dynamic and recognizes that being a good Family Law attorney requires understanding and developing the skills to resolve cases without, or at least with a minimum of, litigation. As the Honorable Judith S. Kaye, Chief Judge of the New York Court of Appeals, put it:

> "Nobody wins the long, drawn-out divorce cases – not spouses and especially not the children who are caught in the middle. It is important for the court system to switch the focus from winning and losing in these cases to humane resolution….to minimize the trauma of the divorce process and stem the drain on family resources. …Matrimonial attorneys should be encouraging their clients to utilize ADR programs."

If practitioners are truly faithful to their obligation to act in the best interest of their clients, they must almost always choose alternative dispute resolution programs over litigation. Even if attorneys are forced to engage in litigation on behalf of their clients, they must almost always attempt to redirect their clients into ADR. By doing so, we are promoting a brighter future for the people all of us are being paid to serve, on a financial, emotional, and psychological level. ADR allows the parties to decrease the level of conflict between them in a non-adversarial manner and allows the parties to develop a foundation for achieving optimum financial and emotional stability for themselves and their children. In essence, ADR allows the parties to begin a process of healing that provides the family in question with the ability to transition through the divorce process with the minimum of trauma. In the long run, the attorneys who encourage and support ADR are encouraging and supporting the interests and needs of their clients.

## 1. Mediation[1]

Divorce and domestic conflict are unpleasant enough by themselves without turning for their resolution to a process which heightens contentiousness and perpetuates problems. Traditional litigation pits spouse against spouse in a battle for children and property which is by its very nature divisive. In court, there appear to be winners and losers, but in reality, all parties (and their children, families, and business associates) may lose. Instead of dividing the parties and focusing on disagreements, mediation attempts to unite the parties in seeking solutions and in recognizing that the responsibility of children and property may require them to work together for many years to come. Mediation gives them the tools and experience for future collaboration. It allows the spousal relationship to end in a manner which permits and encourages the preservation and improvement of future working relationships.

Mediation is more, however, than just a good idea. In Hawaii, as in many states, it is rapidly becoming a requirement. Rule 2.1 of the Hawaii Rules of Professional Conduct for attorneys provides: "In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

In 1999, Rule 94 of the Hawaii Family Court Rules was amended to state that the Motion to Set "constitutes a movant's declaration that…mediation has been attempted or is inappropriate for reasons specified in said motion…." The First Circuit Family Court requires the parties, in a Motion to Set/Pretrial Conference form, to confirm whether mediation has occurred, is scheduled, or is not appropriate for specific reasons which the parties must list.

[1] This section was written by Jim Hoenig, J.D., PhD. and Tracey Wiltgen, Esq., Executive Director of the Mediation Center of the Pacific.

### 1. Assessing Appropriateness of mediation

The manner in which mediation is first suggested — to the client and to the other side — can help set the stage for success. Of course, the attorney can point out that (s)he is in effect required to discuss mediation as an alternative to litigation, but a positive approach is more useful. The attorney should describe the process and make clear that mediation is a "no lose" option (since it neither forecloses litigation nor interferes with that process) with substantial potential benefits. The usual description of the type of case in which mediation may work fits just about any divorce case:

- The parties have, want, or may need to have ongoing relationships of some sort [e.g., they will continue to be parents of their children and therefore will need to be able to communicate and make decisions together regarding the needs of their children].
- They have a mutual interest in a relatively swift resolution.
- Litigation appears long, expensive, and risky for both.
- Both feel they are being pushed into litigation by a whirlwind of accusations and arguments.
- Although they have strong emotions, mediation would allow them a process to vent their feelings and then look more objectively at ways to meet underlying interests.
- They want the least adversarial approach to dissolve their relationship and to move on in their respective lives as swiftly as possible.
- Time is important.
- Mediation is ideal if the parties are somewhat equivocal about divorcing but want to establish clear guidelines for handling their finances. Mediation allows for the possibility that the couple might enter into a binding post-nuptial or marital agreement without divorcing.

Mediation may not be appropriate in a case in which: There is a serious power imbalance or indications of abuse (of either spouse or children); or one party's claim or

defense is unquestionably frivolous and can easily be disposed of in court; or there is a compelling reason one party wants to delay resolution.

On balance, except for cases involving physical abuse, it is difficult to find a domestic case in which mediation would not be helpful.

### 2. Explaining Advantages to Client

In discussing the advantages of mediation with a client, an attorney may want to divide them into two broad categories.

***Practical Advantages:***

- Because mediation can usually be concluded in a compact time frame, it will generally cost far less than litigation. With less delay, confusion, and uncertainty as to outcome, the parties can more swiftly (and without as much emotional damage to the parties, their family members, friends, and business associates) get on with making a living and living their lives.
- A higher degree of privacy can be maintained in mediation than in litigation. The evidentiary rules of confidentiality apply to mediation as to any settlement discussion. The entire process can be completed out of public view and with only those documents that the parties agree upon (or that Family Court requires) becoming part of the record.
- In mediation, the parties control both the process and the outcome. Because mediation is voluntary and either party can terminate the process at any time, neither party is able to intimidate, exploit, or manipulate the other.
- Mediation helps parties to recognize their own and each other's legitimate needs and to design options which reconcile and meet those needs.
- In mediation, parties can make agreements as to matters which would not be resolved by the court and can fashion creative business, financial, tax, and family solutions which would be beyond the power of the court to impose.

- A mediation agreement can (and should) include provision for a pre-agreed process to resolve future disputes, including disputes about documentation, implementation, and modification of the original agreement.
- The mediation agreement does not become final and binding until the parties understand, agree, and sign and it. It is recommended that parties who are represented have the agreement reviewed and approved by their respective attorneys before signing. Court approval is also necessary, but only rarely will the court interfere with what the parties have agreed upon.
- Parties are much more likely to comply with the terms of an agreement they have worked out themselves than one imposed by the court. Post-divorce litigation is thus greatly reduced.

***Emotional Advantages:***

- Parties emerge from mediation with their dignity and self-respect intact. Neither party emerges from mediation feeling the need to "get even" or the fear that the other party feels such a need.
- Mediation provides a safe, neutral venue for the parties to meet, to talk things over, to exchange offers and compromises, and to reach fair and dignified agreements.
- Because the parties can express their emotions during the mediation in the presence of each other and of a respected neutral, the process of mediation provides a level of emotional vindication which is impossible to obtain in court. It is not therapy, but it is therapeutic.
- Mediation is forward looking. It does not involve assessment of blame, but rather focuses on meeting real needs and on future working relationships between the parties.
- Mediation improves communication and understanding. This is especially vital when the parties will necessarily have future business or parenting relationships.

### 3. Communicating Desire to Mediate to Opposing Party.

Once a party and his or her attorney have determined that it will be worthwhile to attempt mediation, the concern often arises that suggesting it to the other side will somehow be seen as "weakness." That concern is easily overcome. First, the attorney may call the other attorney and refer to the Rules Of Professional Conduct and the clearly stated court preferences that mediation be considered. If there is concern about such a direct approach, the attorney may request the judge to suggest mediation, or the attorney may ask a mediator or an agency which provides mediation services to make the suggestion. For example, if one party requests mediation through a private administering agency like Dispute Prevention & Resolution or at a community mediation center[2], the Case Manager of the agency or center will contact the other party and explain how mediation works and why it might be helpful to mediate.

Having the neutral third party make the suggestion that the case appears appropriate for mediation eliminates any concern of an appearance of weakness. As mediation has become more mainstream, however, the perception of weakness in suggesting mediation has diminished considerably.

In suggesting mediation, one can always quote President Kennedy's 1961 Inaugural Address:

> "So let us begin anew remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof.
>
> "Let us never negotiate out of fear. But let us never fear to negotiate.
>
> "Let both sides explore what problems unite us instead of belaboring those problems which divide us."

[2] There are six community mediation centers located on each island throughout the State including: The Mediation Center of the Pacific on Oahu; Kauai Economic Opportunity Mediation Center; Mediation Center of Molokai; Mediation Services of Maui; West Hawaii Mediation Center; and Ku`ikahi Mediation Center in Hilo.

**Selecting a Mediator**

Because many of the advantages discussed in the foregoing section depend upon the skill of the mediator, careful attention to the selection process is critical to success. Considerations should include: Experience, reputation, qualifications (including training), subject matter knowledge, the type of mediation model followed, and personality.

Many mediators are attorneys, but many of the best mediators are not attorneys. As with most professions, word-of-mouth is the most helpful way to find a good mediator. The Hawaii State Judiciary's Center for Alternative Dispute Resolution also offers a free guide for the public, *Selecting A Mediator*. The guide provides some additional considerations on mediator selection but does not list or recommend specific mediators.

There are no nationally recognized training, certifying, or licensing agencies for mediators. However, most private mediators, as well as those who work for or are associated with mediation organizations and programs, have some training or experience. Most independent mediation programs impose their own training or experience standards on mediators. For example, the community mediation centers require a certain amount of training and experience, before an individual may be randomly assigned to a case. Such training includes basic and advanced mediation skills, as well as specialized training in the area of divorce.

When working with a professional mediator or private administering agency, it is important to review the background and qualifications of the individual mediator to select the appropriate person. When working with a community mediation center on the other hand, the mediators volunteer their services and are assigned by the case manager of the respective mediation center. Consequently, the background qualifications and experience of the community mediation center mediator cannot be reviewed. Therefore, rather than reviewing the background of the mediator, it is recommended that the parties or their advocates review the mediation center's policies and protocols for recruiting, training, and assigning mediators to a case. For example, The Mediation Center of the Pacific requires all mediators to complete an

apprenticeship program comprised of approximately 60 hours of training, ten co-mediations and evaluation to determine if they have mastered basic skills. The training includes Introduction to Divorce Mediation and Advanced mediation with components covering the court process and laws. Additionally, refreshers, workshops and updates are conducted for the mediators an annual basis by local mediators and divorce attorneys to insure quality services are provided.

An effective advocate, concerned with carefully selecting a professional mediator should carefully review any potential mediator's resume and focus on at least the following five elements.

- Training and experience in the process of mediation. The skills of a good mediator, while natural to some, still need to be shaped and sharpened through training and experience. Although there are no nationwide standards and no nationally-recognized training agencies, there are numerous private ADR providers and state-related agencies which provide training.
- Technical knowledge regarding the subject matter of the underlying dispute. Although a truly proficient mediator may do well without knowing the technical and/or legal aspects of disputes, parties usually find that a mediator possessing knowledge of the legalities, practices, and nuances of the matters involved will expedite the process. Is the person committed to understanding the special challenges of mediating Family Law disputes? Membership in the Family Law Section of the Association for Conflict Resolution (FKA the Academy of Family Mediators) and in the HSBA Family Law Section are useful indicators.
- The "presence" or "gravitas" of the mediator is perhaps the most important yet most difficult element to understand and evaluate. The respect which the mediator's reputation, knowledge, judgment, and demeanor generate; the weight parties give to the mediator's opinions and suggestions; and the mediator's ability to build rapport and trust often result in success where another mediator may have failed.
- Genuine optimism that settlement <u>is</u> possible, even in the face of apparent impasse, and tenacity in keeping the parties talking are important characteristics of a successful mediator. Even where there is great disparity between the

parties' positions and high emotional conflict, a mediator's ability to keep the parties talking about possible solutions often leads them to discovering unexpected common interests and concerns. Continuous optimistic engagement in the process can ignite the spark necessary to fire the settlement process.

- Whether the mediator adheres to a published set of ethical standards like the Standards for Public and Private Mediators in the State of Hawaii (Program on ADR, Hawaii Judiciary, 1986) or the Standards of Practice for Family and Divorce Mediation (Academy of Family Mediators, October 11, 1995).

Models of Mediation

Mediators apply different models of mediation to assist the participants in reaching agreements. Models range from purely "facilitative" (in which the process is often considered to be more important than the result) to "evaluative" (more like a settlement conference) -- and everything in between. A community mediation center mediator will usually employ the model preferred by that center (this may include using male and female co-mediators). A professional mediator should be familiar with all models and techniques and should be willing and able to apply those that best suit the individual needs and wishes of the parties and their counsel.

**The Role Of Attorneys In Divorce Mediation.**

The attorney's participation throughout the mediation is often important to achieving fair and dignified resolutions. Here's why:

1. When parties are in a serious dispute, they may want someone to stand by them, to protect and guide them. The presence and participation of counsel may help the parties feel more confident, relaxed, and willing to participate actively and fully in mediation.

2. Mediation may generate new information about the facts, the other side's point of view, and creative settlement ideas. Attorney assistance is then valuable in

reevaluating the strengths and weaknesses of the client's case and in making decisions about settlement.

3. During the mediation, it is common for issues of law, legal strategy, and predictions about the outcome of arbitration, trial, or appeal to arise. When that happens, the parties often choose to ask the mediator for a confidential evaluation of such issues. Counsel can provide pertinent facts and perspectives on the law to assist the client in weighing the mediator's evaluation. The "second opinion" of the mediator can also help counsel with a difficult client by providing additional reality testing about an unreasonable position.

4. Counsel's participation may promote mediation settlements by discouraging unrealistic client expectations, helping an emotional client to view matters with more objectivity, resisting outrageous demands, and helping the client to understand the likely legal outcome should no agreement be reached.

5. Active attorney participation does not mean that counsel take over the mediation. The parties still control the process. The parties attend, speak, listen, think, propose, and decide. With their attorneys' assistance, the parties not only participate fully, they benefit fully from the process.

**Preparing for Mediation**

Because mediation is an informal, loosely structured process which does not require presentation of evidence and which often occurs relatively early in the life of a dispute, it is easy to be lulled into the belief that preparation is not important and need not be carefully done. Wise counsel will, however, remember Thomas Alva Edison's observation: "I find I am most lucky when I am best prepared." At a minimum, there are four steps counsel should take in preparation for mediation.

*First*, develop the same kind of coherent "theory of the case" as would be done for trial: What happened, and how does each piece of evidence expected to be produced fit into that construct.

*Second*, make sure the client has focused on the following questions and that both attorney and client understand the answers:

- What is the most important element of a satisfactory resolution for you? This may be tangible, such as a specific piece of property, or intangible, such as an agreed-upon process for shifting visitation arrangements.
- What non-monetary considerations are so important to you that you would willingly compromise monetary expectations to receive them?
- What do you think is the most important thing the other party wants? Are you prepared to give it? In exchange for what?
- What would you like your life to look like five years from now? Ten years? What can be done in the mediation agreement to help with that?

These questions are very different from case-evaluation questions, and they enable counsel to assist effectively in finding creative, meaningful long-term solutions and, most important, to obtain for clients what will most satisfy them.

*Third*, case evaluation is important, and reasonable expectations of probable outcome should no agreement be reached will play a part in the willingness to reach agreement. Therefore, counsel should consider with the client, and be prepared to discuss with the mediator, the following issues:

- Best case scenario: What is the most you can reasonably hope to be awarded at trial *and* the probable outcome of such an award (Would it be complied with? Would the other party appeal?).
- Worst case scenario: What might the other party reasonably be awarded if he/she prevails at trial? (This is especially important, as it allows counsel to be candidly realistic with the client without diminishing the psychological anchor of being the client's protector and advocate).

- What do you *really* want out of this mediation? (What are your most basic needs, hopes, wants, fears? Right now? In five or ten years from now?).
- What would you take (or give) and still feel you could live with the outcome?
- What offer would you like to put forward first?

The first two items relate to the possible outcomes in litigation, and careful, objective consideration of those possibilities is very useful in making the last three items far more reasonable and realistic. Mediation requires preparation, and being prepared with accurate financial statements and a careful analysis of the strengths and weaknesses of the case is as useful for success in mediation as it is for success in litigation.

*Finally*, counsel should help the client to prepare an opening statement for the first joint meeting of the mediation. Having the client rather than counsel present the opening statement is important for several reasons. It personalizes the case and the client's positions. It provides a "day in court" catharsis for the client which often, by itself, enables the client to satisfy emotional needs long enough to deal objectively with the issues. It provides counsel (and the other side) an opportunity to see how credible and persuasive the client will be on the stand should the case go to trial. It provides the mediator an important opportunity to start building rapport and trust through active listening while the client is making the statement.

**Helping the Client *During* Mediation**

By encouraging the fullest participation of which the client is capable, counsel will emphasize the client's control of the process and investment in the outcome. This requires that counsel be able to put aside any personal feelings about the desirability of "winning" or "beating opposing counsel" and focus only on getting the desired resolution for the client.

During breaks, and while the mediator is meeting privately with the other side, counsel should stay focused on the matter at hand and use the time to consider steps which might be helpful, such as:

- Ask the client what they are thinking *and* what they think is going on with the other party. The client knows the other party well and may have some useful insight into what is motivating them and what might induce them to move toward a more favorable agreement.

- Speculate with the client on possible solutions; explore options, even if they seem unlikely at the time.

- Be aware that the client may need to take a walk and just relax a little; attorneys are used to much more concentrated pressure than are their clients.

Finally, staying hopeful and optimistic that settlement can be reached, and looking for ways to solve problems that crop up along the way, will add to the client's confidence that counsel is working with him/her to reach a resolution.

**Helping the Mediator to Help Your Client**

Using the mediator's assistance in presenting your case to the other side and helping to persuade them of its merits and the merits of agreeing to what you want requires planning by counsel and an understanding of how the mediation process works. Mediation works best when the parties and counsel are fully candid, open, and trusting with the mediator. The more open and honest the parties are with the mediator, the more likely they are to achieve a satisfactory resolution. The better the mediator understands what each party truly wants out of the resolution, the more creative and persuasive the mediator can be in helping to craft a resolution that works.

It is best for counsel to let the parties do most of the talking and focus on their needs and interests. Unless asked by the mediator specifically to discuss the legal issues and positions and demands, counsel should avoid taking strong positions or "posturing" the case. Of course, attorneys should always be prepared to explain -- in as informational and

non-confrontational a way as possible -- their respective positions, demands, legal theories and evidence, as a matter of educating each other and the parties.

It is often useful to think of the mediator as your assistant in educating the other side and to enlist his/her help in planning the presentation of information during the mediation. Such presentation may involve timing, demeanor, and confidentiality. Timing frequently involves trading of concessions, and the mediator can be helpful in assisting a party to understand what message is being communicated by the scope and nature of a particular concession, by the party's and attorney's demeanor in the mediation, and by the use of new or previously confidential information.

If counsel senses that the mediator does not fully understand the law or facts, educate the mediator gently — to maintain rapport — and clearly — to assist the mediator in conveying your position on the law and facts clearly to the other side. Lastly, at the conclusion of every meeting between the mediator and one party to the dispute without the other party(ies), it is important to review with the mediator anything which has been discussed that you want to keep confidential from the other party(ies).

**Agreement**

Although it is often impractical to work out all of the detailed language necessary to a complete agreement (or a stipulated decree) immediately at the conclusion of the mediation, there should at least be a written or audio taped "Memorandum of Understanding" covering all the issues and signed or otherwise acknowledged by the parties and their attorneys before everyone goes home.

Since no decree has yet been invented which is not subject to different interpretations or later dispute about implementation, the settlement agreement (and final decree) should include a further dispute resolution process to resolve any potential misinterpretations, ambiguities, implementation problems, or later conflicts or disputes arising out of the agreement/decree or alleged breach thereof.

**Why Family Law Practitioners Are Increasingly Using Mediation**

The advantages the client may obtain through mediation -- and the favor with which Family Court views mediation -- are clear, but what about its advantages for the family law practitioner?

Early mediation can help focus and facilitate discovery and exchange of information far more effectively than the usual RPODs and interrogatories. At the very minimum, mediation provides an opportunity to organize your case, try it out on a knowledgeable neutral, and obtain valuable early evaluation and assessment from the mediator. An attorney whose client insists on harboring unreasonable or unrealistic perceptions, positions, or expectations often obtains tremendous assistance from the mediator in helping to educate and move the client. Clients may also be more reasonable with the mediator than with their own attorney and thus provide an opportunity for the mediator and attorney working together with the client to come up with a better resolution than would be possible without the mediator's help.

Obviously, there is a time value to money, and settlements (and fees) received immediately have more value than those received after a year of trial (or in five years, after the appeal). Although most divorce clients are not repeat clients, attorneys who know how to use mediation effectively are more likely to have satisfied clients who are enthusiastic in singing the praises of the counsel who got them a good result relatively painlessly, and referrals account for a large percentage of family law business.

If any further reason for using mediation in domestic cases is needed, practitioners might also look to the autobiography of Gandhi, in which he said: "I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby — not even money, certainly not my soul." (Quoted in "At the Bar" by David Margolick,

*Preventive Law Journal* 1993). What better reward could counsel have than to serve the client's best interests in a manner that also serves the soul!

**Practice materials:**

Generic Clauses for mediation/arbitration

## II. ARBITRATION[3]

The philosophical belief that helping parties arrange their own divorce (with adequate oversight by Family Court) is better than having them fight over property and children in Court has led to a substantial increase in Family Law Alternative Dispute Resolution ("ADR"), which Courts have welcomed for two reasons:

1. When people can resolve issues in ways they select themselves, there is less destructive conflict impacting them, their finances, and their children.

2. ADR helps conserve limited and precious judicial resources – both initially and because cases resolved by a process selected by the parties have less post-decree litigation.

Although the best known and most widely used form of ADR is mediation, there is increasing interest in the use of *arbitration* as another alternative to litigation. Such arbitration is well known and widely used in *civil* matters. It is less well established in Family Law, but that is rapidly changing for the following reasons.

**Benefits of Arbitration:**

- ***Choice and certainty of who will be the decision maker.*** Attorneys and parties are able to select a *known* expert decision-maker who has interest

and experience both in the law and the particular circumstances and issues involved in their situation.

- ***Privacy and confidentiality.*** Arbitration is a private process; pleadings and documents are far easier to keep completely confidential than Court records. There is no public record of the arbitration, and parties are not exposed to media or nosy neighbors.
- ***Cost savings.*** The relative speed of arbitration (including the fact that decisions are usually rendered in under 21 days) reduces the time that parties' finances are impaired, frozen, or subjected to scrutiny, and reduces the time parties and their children are subjected to uncertainty, stress, and tension -- *and* it reduces overall costs. In order to hold down costs, for instance, an arbitrator may be brought into the case early to monitor and oversee discovery to keep it focused and cost-effective.
- ***Flexibility and Informality****.* The parties can agree on time, place, procedures for the hearing, and rules of evidence (for example, whether to allow affidavits or hearsay). Pre-hearing conferences can expedite discovery and establish sensible, acceptable procedures for the hearing. There is no waiting for a hearing (or *at* a hearing); the hearing is less formal than in Court; and the surroundings are usually more dignified and conducive to comfort and good order than the Courthouse public areas.
- Limited (either pre- or post-decree) issues can also receive prompt attention (for instance, if joint custodians can't agree on a school, they can arbitrate the issue swiftly and inexpensively).

<u>Finality of the award:</u>

[3] This section was written principally by Jim Hoenig, co-author of the *Hawaii Arbitration Law* textbook (HICLE 1992) and founder of the Domestic Arbitration Tribunal of Dispute Prevention & Resolution.

In general, arbitration awards are final and binding and are confirmed by the Court subject only to very limited review.[4] In the Family Law context, questions have been raised about the appropriate scope of review when support and child-related issues are arbitrated.

Clearly, parties can agree to be bound in financial matters. Just as parties can make agreements about dividing their property, they can agree to let an arbitrator decide those issues. To the extent that parties can make decisions about spousal support (as in a pre-nup, post-nup, marital agreement, or a negotiated divorce decree), an agreement to allow an arbitrator to make that decision for them should be equally valid. The state may have an interest in keeping its citizens off welfare, but short of that, the trend is to enforce spousal support agreements, including agreements to arbitrate such issues.

Where there are issues involving minor children, the few reported cases so far[5] indicate that agreements to arbitrate custody and child support matters are not void as against public policy, and the arbitrator's award is subject to review by the Court on a challenge that it is not in the best interest of the child(ren), with the burden of persuasion on the person challenging the award. Using ADR to resolve issues involving minors is already well accepted in mediation, and that is the usual standard of review. So, if parents in mediation can agree about such issues subject to review by the Family Court on that limited basis, they should be able to allow an arbitrator to determine such issues for them subject to the same standard of review.

<u>Progress of Family Law arbitration:</u>

[4] "Award" is the name for an arbitrator's decision and order. Rather than "affirm" or "reverse," Courts "confirm" or "vacate" an award, and the bases for *vacatur* are usually limited to the specific reasons set out in arbitration statutes like Hawaii's Revised Uniform Arbitration Act (HRS 658A-1 through -29).
[5] None in Hawaii.

The *Journal of the American Academy of Matrimonial Lawyers* (Vol. 18, 2003) contains a comprehensive (104-page) article detailing the acceptance of "Arbitrating Family Law Cases by Agreement." The article discusses the increasing number of states that allow such arbitration either pursuant to existing legislation (like Hawaii's Revised Uniform Arbitration Act ("RUAA"), HRS 658A-1 through -29) or by specific Family Law arbitration legislation (North Carolina and Michigan – as well as Australia and Ontario, Canada – have stand-alone Family Law arbitration statues).

A major step forward occurred in March 2005, when the Board of Governors of the AAML adopted the Model Family Law Arbitration Act ("MFLAA") with recommended rules and forms. The MFLAA is based on the RUAA, and the recommended rules and forms generally follow standard (long-used, well-established) commercial arbitration rules, with modifications necessary for Family Law issues. The MFLAA specifically provides for arbitration of spousal support, custody, and child support issues, and provides for modification or vacatur of the award as follows:

*Modification*: Section 124A of the MFLAA provides: "A court or arbitrator may modify an award for…[spousal] support, child support or custody….if a court order for…[spousal] support, child support or child custody could be modified pursuant to [here insert a jurisdiction's provisions…[for modification, such as "material change in circumstances"]]."

*Vacatur*: Section 123 provides: "Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:…" [The section then sets out the usual standards for vacatur [see HRS 658A-9] and adds:]
"(7) the court determines that the award for child support or child custody is not in the best interest of the child. The burden of proof at a hearing under this subdivision is on the party seeking to vacate the arbitrator's award….
"(9) if the parties contract in an agreement to arbitrate for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights."

The MFLAA also specifically provides for awards of interim (that is, pre-decree) relief, and it allows for the option of an agreement to arbitrate post-decree issues as well.

The agreement to arbitrate can be specifically tailored for a family's needs. (See the model agreement in the Practice Material). The agreement to arbitrate can be included in a pre- or post-nup, or in an AICD or Divorce Decree, or it can be a stand-alone agreement. The scope of the arbitration is also determined by the parties' agreement: it can be for limited issues only or for all issues in the divorce; it can be only for pre- or post-decree matters. The parties can agree to the scope, standard, and burden of court-review of the arbitration award (as in the model agreement in the Practice Material). Courts *should* (and in many states do) welcome such agreements. Agreement by the parties to arbitrate divorce issues (subject to review by the court as discussed above) can help to relieve the burden on Family Court and can encourage parties to resolve their issues in the manner they choose. Parties to an arbitration agreement involving child-related issues should be aware, however, that the ICA or Supreme Court will have the last word on the appropriate review of the arbitrator's award. (Unless, of course, the legislature adopts specific Family Law arbitration legislation like the MFLAA).

Meanwhile, an arbitration award in a Family Law matter will stand the best chance of confirmation by the appropriate court if (1) the arbitrator is carefully selected by the parties and is well-versed in Family Law matters, and (2) the award itself is well written, setting out in detail the arguments made, evidence presented, and the arbitrator's reasoning. (The redacted awards in the Practice Material are intended as examples).

Lynn Burleson (co-author of the North Carolina Family Arbitration Act) sums it up this way:

"Arbitration is a client friendly process. While a party may be unhappy with the final arbitration decision and award, he or she is almost always happy with the process."

Hawaii was in the forefront of states adopting the Uniform Arbitration Act (HRS 658, the predecessor to the RUAA, HRS 658A), and the Hawaii appellate courts have been

consistent in their support for commercial arbitration. It is hoped that the state will be equally supportive of Family Law arbitration.

**Practice materials:**

- Model arbitration agreement – specifically designed for flexibility, finality, and fit with modern case law and with the MFLAA and RUAA.
- Redacted Award (relocation case).
- Redacted Award (interim relief).

## III. COLLABORATIVE LAW[6]

The essence of collaborative law is that parties and their attorneys agree to resolve the issues in a divorce case without going to court or threatening to go to court. Attorneys agree that they will not represent their respective clients if the case does go to court. Thus, the belief that underlies collaborative law is that all attorneys, parties, and experts will be focused from the start on devising solutions that address the needs of both parties and the children rather than more rigid legal positions for trial.

Experts are sometimes jointly retained by both parents to provide neutral assistance regarding matters such as timesharing, decision-making, and finances. Each divorcing parent may also have a mental health professional to counsel and guide him/her in the course of the collaborative law process so that emotions do not hinder the resolution of issues.

Information is informally exchanged, whether or not it is asked for. All traditional litigation tools (such as formal discovery requests, custody evaluations, depositions, temporary hearings) are abandoned during the collaborative law process. The parties and all other participants sign written agreements that, if the collaborative law process fails, then each attorney will withdraw from representation, each party will have to hire separate litigation counsel, and none of the jointly retained experts can testify in subsequent court proceedings.

[6] This section was written principally by Jackie King, Esq.

Ideally, collaborative law enables parents to preserve their relationships with each other, as well as with each other's families, and enables them to conduct themselves during the divorce process in ways that preserve their dignity and are consistent with their values. For those attorneys and divorcing parties who value the intangible rewards that this process may offer, the collaborative law system is a gentler, softer way of resolving timesharing and decision making issues.

## IV. USE OF SPECIAL MASTERS FOR DISCOVERY AND OTHER PRETRIAL MATTERS[7]

The role of a special master for discovery or other pretrial matters is closely related to that of an arbitrator. The major difference is that the court becomes an essential party in determining the operating context and the duties of the special master.

Why Engage a Special Master

- To obtain immediate access to the decision maker who resolves pretrial disputes
- To insure more time to present pretrial disputes to the decision maker
- To obtain more comprehensive decisions on pretrial disputes
- To insure that the pretrial dispute resolution process is appropriate for your specific case

When to Engage a Special Master

- When you anticipate many pretrial disputes
- When decisions on pretrial disputes will have a substantial impact on your case
- When there is concern that numerous pretrial motions will delay the trial setting
- When the pretrial dispute decision maker must have a familiarity with the case in order to make appropriate decisions
- When privacy about pretrial matters is a concern

[7] This section was written principally by Hon. Doug McNish, retired Family Court judge.

- When your ability to prepare for trial efficiently will be enhanced by a pretrial dispute decision-making process designed specifically for your case

The special master's duties and obligations are determined by a negotiated contract which is approved by the court and implemented by a court order. This contract should be carefully negotiated. Attorneys for both parties and the proposed master should participate actively in its development. A lack of clarity in this document can make its own terms the subject of pretrial disputes – a situation which can seriously diminish the benefit of using a special master. Issues to consider in negotiating and drafting such an order are listed below.

1. What issues or disputes are referred to the special master? Be specific. Avoid broad terms like "all pretrial disputes" or "all discovery issues." Instead try to reference a statute, rule, case, or document that will help define which disputes are proper subjects for the master's consideration such as "any issue which arises under Hawaii Family Court Rules 26-37." Be clear about what issues must be referred to the master before relief is sought from the court.

2. Who determines in the first instance whether the dispute is one over which the master has authority? If expediting the pretrial dispute process is a reason for having a master, this power should be delegated to the master.

3. How is the master's intervention in a pretrial dispute initiated? Parties will likely have differing views about this question. Creativity and negotiation are important here. The initiation of the process could be as informal as a telephone call to the master or as formal as filing a motion in the form required by the Hawaii Family Court Rules. It may be to your benefit to have more than one method of initiating intervention, allowing parties to choose a less formal method for some issues and a more formal method for others. The important thing, again, is to eliminate ambiguity about how a proceeding is initiated.

4. What are the obligations of the attorneys and what are they restricted from doing? Describe carefully what the attorneys must do, may do, and must not do. How and what are the attorneys to communicate to the master and to each other about the pretrial dispute? Who is responsible for record keeping and court reporters? May the attorneys seek reconsideration of the master's decision with the master, or re-submit the same dispute. How and when may the attorneys seek reconsideration of the master's decision by the court?

5. What are the obligations of and restrictions on the master? This is the heart of the document. The prospective master's participation in negotiating the language of this part of the document is essential for the master to be clear about his or her role. Once again, state clearly what the master must do, may do, and must not do. What does the master do when a dispute is presented? How and what is the master required or permitted to communicate to the attorneys, parties, non-parties, and the court? Are the master's decisions announced orally, in writing, or with findings of fact and conclusions of law? How and when are the master's decisions submitted to the attorneys and the court?

6. What is the master's liability to the parties? The parties' agreements regarding waiver of liability and immunity for the master's acts and omissions in the performance of his or her duties should be specified.

7. What is the role of the trial court in resolving pretrial disputes and enforcing the terms of the order appointing the master? The document should articulate clearly what part of the decision-making process for pretrial disputes remains with the trial court. This will not only avoid disputes between the attorneys about the trial court's role, but it will also help the court understand and either approve or disapprove the arrangement. If the court is to be involved in hearing motions to reconsider master decisions (essentially an appeal of the master's decision), that process and procedure must be specified. Consideration should be given to

which standards of review and what evidence the trial court will consider when reviewing the master's decision.

8. How is the master's authority modified or terminated? It may be appropriate to allow the parties by agreement to make slight modifications in the master's authority. However, if that is the agreement, it must be stated in the order appointing the master in order to avoid the need to seek new approval from the court. Consider setting a termination date for the master's authority – a date certain, a date related to the pretrial or trial schedule, or upon the occurrence of some specified event.

9. What party submissions are filed with the court and when? If it is expected that attorney submissions to the master may be substantial, the parties may wish to limit what is filed with the court. The master might be charged with retaining the originals of all attorney submissions for filing only if one of the parties seeks a court review of the master's decision.

References: Hawaii Family Court Rules 53 and 66

**Practice Material:** Redacted Stipulation for Discovery Master.

## V. OTHER PROGRAMS[8]

Although the following programs are not strictly "alternatives" in the sense of replacing litigation, they are included in this Section on the following premise: Those going through a divorce who understand what divorce is about — the law, the way Family Court interprets and applies the law, and the emotional effect on themselves and their children — are more likely to reach informed agreements by themselves (or with

[8] This section was written principally by Elizabeth Kent, Director of the Judiciary Center for ADR, and Becky Sugawa, research assistant at CADR.

minimal assistance) and thus more likely to avoid all or part of the litigation that might otherwise accompany their divorce.

## 1. Kids First

The Kids First program is a mandatory education program for all parents in the State of Hawaii who have filed for divorce or paternity or who have filed post-decree custody matters. Children ages 6-18 of divorcing families also attend. Each Circuit has its own parent education program:

First Circuit: Kids First (Oahu) 539-4291
Wednesday evenings for divorcing parents and their minor children
Thursday mornings for never-married paternity families disputing custody or visitation

Second Circuit: Kids First (Maui) 244-2779
Second Wednesday

Third Circuit: (Hawai`i) 324-7117 x 103
Children First (Kona): Third Thursday
Children in Transition (Hilo): 959-1413
Second Tuesdays (Feb, April, June, Aug, Oct, Dec)
Second and Fourth Tuesdays (Jan, Mar, May, July, Sept, Nov)

Fifth Circuit: Kids First (Kauai) 246-3374
Second Wednesday

Parents going through divorce and their children attend the Kids First program to learn such things as:

- What resources are available to parents and children?

• What parental behaviors should be encouraged or discouraged in the context of divorce?

• What does it mean for children to be put in the middle of their parents' divorce dispute?

• What symptoms indicate that children are experiencing stress resulting from their parents' divorce?

A centerpiece of the program is the award-winning video/DVD “The Purple Family." By portraying family members divided over wearing different colors, the video teaches how to handle parental differences without the children being caught in the middle, how to avoid having children encouraged or persuaded to align with either parent, and how parents may strive to recognize and accept their respective differences while amicably maintaining a common bond among family members.

Families are encouraged to attend the Kids First Program together except in cases where there is a temporary restraining order or where domestic violence is an issue. Statistics show that 95 percent of parents who attend the Kids First Program leave with valuable information and insights about what their children are experiencing and a commitment to change their behavior.

The Kids First program addresses general issues and concerns faced by parents and their children in large group and small workshop settings. It does not address specific concerns of individuals. Parents and children who have specific concerns are referred to additional community resources.

For more information on the Kids First program, call the Kids First Coordinator Charlene Anaya at 539-4291 or leave a message at 538-5878 (hotline).

Kids First O`ahu -- Attendance Policies and Procedures**:**

Kids First O’ahu consists of two mandatory parent education programs:

A) Wednesday night is for all divorcing parents and their children ages 6 – 17.
B) Thursday morning is for separating "never-married" adjudicated parents who are contesting custody or visitation.

1. Parties or attorneys prepare a Notice to Attend Kids First and must obtain a date from the Court Clerks.
2. All parties must be pre-registered; walk-ins are not permitted to attend.
3. Includes all divorcing parents who have minor children, whether or not they are "of this marriage".
4. Step-parents attend if they have lived with children as a family unit (do not call and say, "they are not my real children".
5. Evening program: children between the ages of 6 and 17 who live on O`ahu (step-children, biological, hanai, or children adopted by parties).
   On Notice: list only names of children who will be attending the program.
6. Party must call to reschedule to different night if violence or restraining orders.
7. Party may call to reschedule for many valid reasons (i.e., if child has important school function or is on a trip).
8. No children under the age of 6 will be permitted to attend.
9. Parent's new partner or extended family member may attend on *another* night (not same night as spouse).
10. Morning Program (paternity cases): adjudicated fathers and mothers; however, no children attend.

Party or attorney must call Kids First Coordinator (539-4291) to be excused if:

1. Parents already attended Kids First within the past two years
2. Family no longer lives in Hawaii
3. Military deployment
4. Incarcerated
5. Relationship with child is limited in duration or parent never lived with child
6. Not understand English
7. Incapacitated, mentally ill, severely disabled

8. Lives on Molokai, Lanai, Niihau
9. Children adopted by others or now living in foster care
10. Exceptional circumstances (i.e., if long separation and children think parents are already divorced)

Party or attorney must write a letter to Lead Domestic Division Judge for any other exceptional circumstances where it would be detrimental for family to attend program.

## 2. Judicial Pretrial Assistant (JPA) Program

The Family Court of the First Judicial Circuit has re-established the Judicial Pretrial Assistant (JPA) Program for chapter 587 cases. This program uses alternative dispute resolution techniques to bring families, social workers, attorneys and other professionals together to work toward safe reunification of children and families and other timely permanent solutions in the child's best interest.

The JPA Program was created to:

- Promote collaborative problem solving to better meet the needs of the children and families in the child welfare system;
- Reduce the length of time to permanency for children in the child welfare system;
- Engage and empower parents in the case planning and decision making processes;
- Encourage positive participation by appropriate extended family members to assist in healing the family;
- Reduce court time in the handling of child welfare cases;
- Make more efficient use of judicial time;
- Reduce the number of contested trials in the child welfare process;
- Facilitate the development of more detailed service agreements, which address the practicalities and realities of each family's individual needs;

- Facilitate increased parental compliance with service plan requirements; and
- Improve communication and working relationships of all parties and professionals involved in the case.

Family court may refer adjudicated abuse and neglect cases to a Judicial Pretrial Assistant (JPA) as soon as they are identified as appropriate. Additionally, social workers and counsel for the parties may refer cases they believe appropriate for the JPA Program. Participation is mandatory if the court orders the parties to participate in the JPA Program. At the time of referral, the judge will set a review hearing. The JPA conference is held on-site at court at a later date, and there is no cost to case participants for the services of the JPA.

JPAs are volunteers with training in law, psychology, counseling, or social work, and have training in mediation and advanced training in domestic violence and child abuse cases. The JPA's goal is to help the parties explore whether they can reach an agreement that is in the best interest of the child and that is fair and acceptable to all parties.

At the conference, the JPA:

- Gives all parties an opportunity to express their point of view;
- Works with the parties to discuss and focus on decisions about settlement;
- Helps the parties reach an agreement that is in the best interest of the child, and is fair and acceptable to all case participants.

After the conference, the JPA notifies the judge whether the parties reached an agreement. The judge then will hear the case on the date already set (unless moved at the parties' request) and matters that were discussed at the conference may be shared with the court. All agreements made in conference must be approved by the court and made part of a court order.

For more information regarding the JPA Program, contact District Family Court Judge Michael F. Broderick at 539-4444.

**3. Volunteer Settlement Master (VSM) Process**

The Family Court of the First Judicial Circuit and the Family Law Section of the Hawai`i State Bar Association have established a Volunteer Settlement Master (VSM) process to help divorcing couples settle their financial and other issues.

Licensed attorney members of the Family Law Section may apply to be a VSM. The Senior Judge of the Family Court selects and appoints the VSMs.

The Family Court may assign a VSM to divorcing couples with whom the Family Court has a conference to set a case for trial. Cases involving restraining orders or domestic violence allegations will not go through the VSM process.

The couple will be required to organize their financial paperwork before the meeting with the VSM, to better prepare the VSM to help the couple. The VSM will meet with the divorcing couple and their attorneys for up to 3½ hours (or longer if the VSM so decides) to give them an opportunity to express their points of view. The VSM will not take sides or make decisions for the parties. Instead, using his or her skills and experience as a family law attorney, the VSM will try to help the parties reach an agreement that is fair and that everyone can accept. The VSM guides the process; the parties create the agreement.

The VSM process is confidential. Subject only to the provisions of the Hawai`i Rules of Professional Conduct and the Hawai`i Rules of Evidence, all communications among and between the VSM, the parties, and their attorneys will not be disclosed to the Family Court or anyone else. After the meeting is over, the VSM will send a report to the Family Court saying whether there was a meeting, who attended, and whether the case settled. The VSM will not tell the court anything else about the VSM meeting.

There is no cost to the divorcing couple for the services of the VSM. The VSM will give the divorcing couple and their attorneys a questionnaire to fill out and return to the Judiciary so they can write about their experience. Although exact numbers were not available when this was written, by the end of June 2005, approximately 137 cases

had been assigned to VSMs, and approximately 50% of those cases were settled, with a substantial number still in the VSM process.

Questions or comments about the First Circuit's VSM process should be directed to the Hawai`i State Judiciary's Center for Alternative Dispute Resolution at 539-4ADR (4237).

The Family Court of the Second Judicial Circuit (Maui) is in the process of setting up its own VSM program modeled after the one described above. Questions about that Program may be directed to Hon. Simone C. Polak, 244-2700.

# HOW TO SUBMIT FUTURE DISPUTES FOR RESOLUTION

**Generic Dispute Resolution Clauses For AICDs or Decrees**



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**Suggested AICD or decree language for *MEDIATION* of *future* disputes:**

Any and all matters in dispute arising from or relating to this decree/agreement, or the breach thereof, which remain unresolved after direct negotiation between the parties, shall first be submitted to confidential mediation with _____. The parties agree that a good faith attempt to resolve all issues in mediation is a pre-condition to further adversarial proceedings of any kind.

**Suggested AICD or decree language for *BINDING ARBITRATION* of *future* disputes:**

Any and all claims, controversies or disputes arising out of or relating to this decree/agreement or the breach thereof, shall be fully and finally resolved by arbitration with _____. In the event arbitration is invoked, the parties agree that _____ shall be appointed as arbitrator to hear and resolve the case. The parties further agree that the award of the arbitrator is binding upon the parties and that judgment on the award rendered by the arbitrator may be entered in the Family Court of the appropriate jurisdiction.

**Suggested AICD or decree language for *MEDIATION/ARBITRATION* of future disputes:**

Any and all claims, controversies or disputes arising out of or relating to this decree/agreement, which remain unresolved after direct negotiations between the parties shall first be submitted to confidential mediation with _____. If any issues, claims or disputes remain unresolved after mediation concludes, the parties agree to submit any such issues to binding arbitration before _____ as arbitrator. The parties further agree that the award of the arbitrator is binding upon the parties and that judgment upon the award rendered may be entered in the Family Court of the appropriate jurisdiction.

## AGREEMENT TO PARTICIPATE IN BINDING DIVORCE ARBITRATION



RE: # ___-_____-A: Arbitration of:
**XXX (HUSBAND) - and - YYY (WIFE)**

Husband and Wife ("the parties") hereby agree with Dispute Prevention & Resolution, Inc. (DPR) and [arbitrator's name] ("Arbitrator") to participate in a binding arbitration proceeding which will determine the following:

**[NOTE: USE EITHER PARAGRAPH A OR B AND INITIAL WHICH IS BEING USED AND CROSS OUT AND INITIAL THE DELETION OF THE OTHER PARAGRAPH]:**

_____**Paragraph A**: All issues relating to the divorce of the parties, including without limitation:
[**NOTE: BOTH PARTIES MUST CROSS OUT AND INITIAL THE DELETION OF ANY THAT DO NOT APPLY]:**
Property division,
Spousal support (if any),
Custody and visitation
Child support.
All other issues relating to the parties' child(ren).

_____**Paragraph B**: The following issue(s) only: **[NOTE: WRITE IN AND HAVE BOTH PARTIES INITIAL THE ISSUE(S) TO BE DECIDED]:**

Arbitrator has agreed to serve in the capacity of a neutral and unbiased Arbitrator and will provide arbitration services to the parties on an impartial basis. The parties, DPR, and Arbitrator agree to follow and abide by the DPR Arbitration Rules, Procedures & Protocols, as established by DPR, receipt of which is hereby acknowledged by the parties.

The parties agree that the above-noted issues shall be determined by the Arbitrator. The parties agree that the Arbitrator may grant any and all remedies that the Arbitrator determines to be just and appropriate under the law. In the Award of Arbitrator, the Arbitrator shall issue a determination on the issue of all arbitration-related fees and costs, including: Arbitrator's compensation and expenses; DPR's fees and expenses; and attorney's fees and costs.

The Arbitrator's Award shall state in such detail as the Arbitrator deems appropriate the Arbitrator's reasons for determining the issues. The parties agree that neither of them shall take any action seeking to have the Arbitrator's Award modified, vacated, or otherwise set aside on any basis other than those specified in HRS Section 658A. If either party does take any action seeking to have the Arbitrator's Award modified, vacated, or otherwise set aside on any basis other than those specified in HRS Section 658A, and if the judgment in its entirety finally obtained by such party is not patently more favorable than the Arbitrator's Award, such party hereby agrees to pay all of the other party's fees and costs incurred in such action. The parties agree that the Arbitrator's Award shall be submitted to Family Court for confirmation and for issuance of a Final Decree of Divorce based thereon.

The parties further agree that the Family Court to which the Award is submitted for confirmation and for issuance of a Final Decree of Divorce based thereon may vacate the Award -- (but only insofar as it relates to custody, visitation, and child support for the parties' minor child(ren)) – if it is *not clearly in the best interests of the child(ren)*, and they agree that the party seeking such vacatur shall have the burden of proof and that the Family Court, upon vacatur, may either remand to the Arbitrator with directions to amend the Award appropriately or issue its own decision. The parties further understand and agree that any Award of custody, child support, or spousal support shall be modifiable in the future by the Family Court on the same basis and to the same extent as any Final Decree of Divorce issued by the Family Court.

The DPR/Arbitrator fee is $____.00/hour, plus GET, plus any out of pocket expenses. Initially the parties are responsible for the DPR/Arbitrator's fees and out of pocket expenses on an equal basis. DPR shall collect deposits from the parties in advance for all fees and expenses to be incurred in this matter. All funds deposited with DPR shall be held in trust. DPR will issue payment to the Arbitrator at the conclusion of this matter and in accordance with this Agreement. This document may be signed in counterparts.

| | |
|---|---|
| _____ | _____ |
| XXX (HUSBAND) | YYY (WIFE) |
| Date: _____ | Date:_____ |
| _____ | _____ |
| XXX | YYY |
| Attorney for HUSBAND | Attorney for WIFE |
| Date: _____ | Date:_____ |
| | Dispute Prevention & Resolution, Inc. |
| _____ | |
| ZZZ, Arbitrator | By: _____ |
| Date: _____ | Date:_____ |