Nnamdi Azikiwe University Journal of Private and Property Law

RESOLUTION OF MARITAL CONFLICTS: ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO THE RESCUE.

Abstract

The use of alternative dispute resolution mechanisms has gained prominence significantly in recent times. Mediation and arbitration offer a good alternative to the adversarial divorce process that is prevalent presently. Litigation has been the mechanism employed to settle marital conflicts and this has over the years manifested it attendant negative consequences. It is against this backdrop that this research was borne out of. The aim of this paper is to highlight the relevance of applying mediation and arbitration to marital conflicts. The paper examines the ways alternative dispute resolution mechanisms particularly mediation and arbitration can be employed in successfully resolving marital conflicts. The methodology adopted in this paper is the doctrinal method of legal research. The result indicated that mediation and arbitration are rarely used in settling marital conflicts and even when they are used; it's usually the last resort when the litigation process must have commenced and most times must have ended too. It is recommended among other things that mediation and arbitration should be the first template to be adopted in settling of marital disputes and an enactment of a Family Arbitration Act in Nigeria is imbibed in the light of present-day realties and international best practices.

Keywords: Mediation, Arbitration, Marital Conflicts, Alternative Dispute Resolution, Family Law.

1. Introduction

Marriage as an institution is an important pillar of a healthy society. However, presently many marriages are experiencing marital conflicts which could be as a result of the following; adultery, barrenness, women's equal rights to property, children's right etc.[1] All these and many more factors have contributed to increased marital/family conflicts.[2] In most cases, the spouses are unable to settle their conflicts by themselves, and this often leads to a logical step of seeking for solution. Such step can lead the

[1]* **Ngozi Chisom Uzoka**, PhD, BL, Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria.Phone No: 08063212174, E-mail: nc.uzoka@unizik.edu.ng
** **Chinedu Anthony Onah**, LLM, BL, Lecturer, Faculty of Law, Nnamdi Azikiwe University Awka, Phone No: 08064794333, E-mail: ac.onah@unizik.edu.ng

J Lande, 'The Revolution in Family Law Dispute Resolution', Missouri University Legal Studies Research Paper No. 2012, 24. *Journal of the American Academy of Matrimonial Lawyers* (2012) 411.
[2]Ibid.

spouses in dispute to litigation, mediation or arbitration. Marital conflicts have deleterious effects on the mental, physical and family health of couples as well as the children. There is a growing support for the use of non-adversarial methods to reach workable settlement agreements in marital conflicts.[3] The introduction or 'revival' of multiple forms of dispute resolution within the legal system dates back to the 1976 conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice' in which the idea of a 'multidoor courthouse' was introduced in order to meet the both the caseload needs of the judicial system and the 'quality of justice' needs of disputants.[4]Alternative dispute resolution refers to the different ways people can resolve disputes without a trial.[5]Alternative dispute resolution mechanisms have been introduced in many jurisdictions of the world over the past decades with a view to dealing more effectively and efficiently with growing caseloads and to improve citizens' access to the justice system. It can also be referred to as a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.[6] ADRs are alternatives to adjudication. Examples of these ADRs are mediation, arbitration, conciliation and negotiation. It is important to note that ADR is now becoming more than dispute resolution in the strict sense of the term, and also encompasses conflicts avoidance, conflict management and conflict resolutions.

Therefore, ADR is being used not only to resolve actual disputes but also to prevent future potential disputes between parties[7]. With respect to the ADR mechanisms, mediation falls on one end and arbitration falls on the other end. While these two valuable litigation alternatives are not mutually exclusive, they are very different.

[3] MS Herman, PC Mckenry, RE Weber, 'Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement', *Arbitration Journal* (1979) 34(1).

[4] C Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution', Legal Studies Research Paper Series No. 59. (2015). Available at https://ssrn.com/abstract=2608140. Accessed on 20th June, 2023.

[5] What is ADR? Available at https://ww2.nycourts.gov. Accessed on 14th June, 2023.

[6] R Mnookin, 'Alternative Dispute Resolution'. Available at https://www.resaerchgate.net.publication/30504345. Accessed on 14th June, 2023. Hereinafter called ADR.

[7] Alexander, 'Mobile Mediation: How Technology is driving the Globalization of ADR', Australian Centre for Peace and Conflict Studies University of Queensland, (2006) Available athttps://www.apmec.uniso.edu.au.

2. Nature of Marital Conflicts

Igwe and Nwuzor acknowledged the fact that 'Dispute is part and parcel of human existence.'[8]Conflicts in human relationships are inevitable especially in marriage relationships.[9] Married couples must not allow conflicts to fester. Thus, one must not only be proactive but intentional towards conflict resolution. Conflict is a process that begins when one party perceives that another party has negatively affected, or is about to negatively affects something the first party cares about.[10] While the start of a conflict is framed as a product of perception, evidence of conflict does not surface until one or the other party's actions are influenced by these perceptions. Conflict resolution processes, therefore are likely to be more successful if they address both the actions and perceptions of both parties to the dispute. The family plays an important role in the design and stabilization of the society. Family squabbles can be resolved without creating the intense polarization that almost inevitably flows from marital litigation. Participation in litigation is a well-recognized source of anxiety.

Divorce is often regarded as the most appropriate response to irretrievable family breakdown. However, it has been observed that judicial pronouncements/decisions in marital conflict disputes may terminate an immediate battle but usually will not meet with the real wishes and needs of the family. Divorce is a painful process for all the concerned parties; the couple, the children and even the legal practitioner. The negative resultant affects ranges from bitter acrimony around child (ren) custody and access, non-payment of alimony etc.[11]Children are always the casualties of their parents' marital battles. Parents frequently use their children to salve their own bruised egos, or they vie for their children's favour, thus forcing the children into conflicts of loyalties which may well have permanent debilitating effects upon their developing personalities. Even when both parents are aware of these dangers and make conscious effort to prevent them, their own high level of anxiety throughout the entire divorce process certainly damages their parenting abilities. Post-divorce depression, is common and can last for a considerable period of time. Naturally, the children will be affected by this too. Wars need battlefields. Some divorced couples use the courts as a

[8] IO Igwe & DC Nwuzor 'Examination of Traditional Judicial Methods of Settlement of Dispute in Ebonyi State.' (2024) *Nnamdi Azikiwe University Awka Journal of Commercial and Property Law* Vol. II (I) 75.

[9]B Ola-Sammuel, Conflict Resolution in Marriage, Nigerian Tribune, August 6, 2022.

[10] A Huczynski, and D Buchanan, Organizational Behaviour (2007) Harlow: Prentice Hall).

[11] ES Lightman & H H Irving, 'Conciliation and Arbitration in Family Disputes' ,*Concil.Cts.Rev*. 14 (1976) 12.

battlefield for acting out their need to strike back at each other and gratify their need for revenge.[12] These and many more are undoubtedly many reasons why couples rush to court. Thus, the court process, with its use of the adversary system, has many undesirable effect of entrenching the very attitudes and actions that brought parties to court. In order to avoid the entire problems above, alternative dispute settlement techniques such as mediation, conciliation and arbitration should be explored by legal practitioners who seek to minimize the traumatic impact on all parties involved.[13]

3. Theory and History of ADR

Two major factors led to the growth of modern arbitration, mediation and other ADR processes. First, advocates of justice in the 1960s and 1970s noted the lack of responsiveness of the formal judicial system and sought better outcomes for members of the society seeking to resolve disputes with each other.[14] This strand of concern with the quality of dispute resolution processes sought deprofessionalization of judicial processes (i.e. a reduction of the lawyer monopoly over dispute representation), with greater access to more locally based institutions, where those with expertise in particular problems will handle the dispute resolution process. The litigation justice system polarized the results of litigation whereby one party is declared a loser, while the other is, at least nominally, a winner. ADRs are more flexible and party controlled, thus there is a reduction of harm as well as improvement of long-term relationship. Instead of the formal justice system of the courts, there is greater responsiveness to the underlying needs and interest of the disputing parties.[15]

Secondly, the excessive cost and delay in litigation required mechanisms that would divert cases from court and reduce case backlog, as well as provide other and more efficient ways of providing access to justice. This efficiency-based impetus behind ADR encouraged both court-mandated programs like court-annexed arbitration for cases with lower economic stakes, and encouraged contractual requirement to arbitrate

[12] *Ibid.*

[13] R Coulson, 'Family Arbitration-An Exercise in Sensitivity',) *Family Law Quarterly*(1969) Vol.3 No. 1, 22.

[14] JA Faris, 'An Analysis of the Theory and Principles of Alternative Dispute Resolution', Available at https://core.ac.uk. Accessed on 22nd June, 2023.

[15] *Ibid.*

any and all disputes arising from services and products provided in banking, health, case, consumer, securities, educational and communication-based industries.[16]

4. Mediation

The term mediate is derived from the latin word 'mediare' which means 'to be in the middle'. Mediation is one of the several ADR strategies. While there are many definitions of mediation, most people agree that the purpose of the process is to assist parties in reaching a voluntary resolution of a dispute. Therefore, in its simplest form, it can be said that mediation is negotiation facilitated by a third-party.[17] The United Nations Guidance for Effective Mediation describes mediation as a voluntary process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreement.[18] Mediation is a party-driven process with each party encouraged to accept responsibility and to retain authority throughout the negotiation process.[19] Mediation has also been defined as a process by which an impartial third party helps two (or more) disputants work out how to resolve a conflict. The disputants, not the mediators, decide the terms of any agreement reached. Mediation focuses on future rather than past behavior. It is pertinent to note that some jurisdictions have already legislated for mediation and provided statutory definitions for the process. For example, Article 1 of the Australian Civil Law Mediation Act 2003, mediation was defined as "an activity voluntarily entered into by the parties, whereby a professionally trained neutral facilitator (mediator) using recognized methods systematically encourages communication between the parties, with the aim of enabling the parties themselves reach a resolution of their dispute.[20] Similarly, in Nova Scotia, mediation means "a collaborative process in which parties agree to request a third party, referred to as a mediator, to assist in their attempt to try to reach a settlement of their commercial dispute, but a mediator does not have the authority to impose solution to the dispute on the parties.[21] It is important to state that mediation is not only applicable to commercial disputes only; it can be

[16] C Menkel-Meadow, *op cit*.

[17] Alternative Dispute Resolution: Mediation and Conciliation Law Reform.

[18] Basics of Mediation: Concepts and Definitions-UN Peacemaker. Available at https://peacemaker.un.org. Accessed on 14th June, 2023.

[19] LP Burleson, 'Family Law Arbitration: Third Party Alternative Dispute Resolution', Campbell Law Review (2008) Vol.30 No.2.

[20] Australian Civil Law Mediation Act 2003.

[21] Chapter 36 of the Acts of 2005.

applied on many types of dispute. In the United States, mediation is defined as 'a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.'[22]

There is a difference between the UK and US conceptions of mediation. In the UK model, the mediator, regardless of a directive or facilitative brief is seen as a party that controls the process while the disputants control the outcome. In the US model, the problem-solving approach is associated with active interventions by the mediator to facilitate an outcome, while the transformative emphasizes the mediator's role is helping disputants control both the process and outcome.[23] Problem-solving mediation focuses on understanding the underlying causes of a conflict to explicate and resolve the 'problem'. Transformative mediation however is primarily concerned with empowerment and recognition of the parties to improve their conflict resolution skills for the future.[24] In the UK model, the mediator is seen as one who controls the process while the disputants control the outcome.[25] It is important to note that several models of mediation have developed. Cloke[26] set out the various approaches of these models in the context of a family dispute as follows:

a. an evaluative approach might focus on reaching agreements regarding the issues, such as how money is being spent;
b. a facilitative approach might explore their relationships and emotional responses to each other;
c. a transformative approach might encourage recognition and empowerment;
d. a spiritual or heart-based approach might find out the kind of family they each want to have, bring awareness to the family they are actually experiencing and encourage them to speak from their hearts;

[22] Uniform Mediation Act 2004, S. 29(1).
[23] L Liebmann, ;History and Overview of Mediation in the UK', in Mediation Context, Jessica Kingsley Publishers: London, (2000).
[24] *Ibid.*
[25] RJ Ridley-Duff & A J Bennett, 'Mediation: Developing a Theoretical Framework for Understanding Alternative Dispute Resolution in British Academy of Management, University of Sheffield, September 14-16, 2010.
[26] Cloke, 'Let a Thousand Flowers Bloom: A Holistic, Pluralistic & Eclectic Approach to Mediation', (2007) 6 MCFM Family Mediation Quarterly 1 at 1. Available at https://www.mmefm.org/pdf/spring07.pdf.

e. a systems design approach might consider the conflict culture in the family and invent proactive and preventive alternatives to handle their next conflict; and
f. a holistic, pluralistic, eclectic approach might seek to accomplish each of these, moving back and forth between them as family interactions suggest different obstacles to resolution.

In addition to economic and legal skills, mediators are professionals who possess specialized technical training in the resolution of disputes. A mediator plays a dual role during the mediation process- as a facilitator of the parties' positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analyzing a dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is a product of the parties' discussions and decisions. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. Their agreement serves as a landmark and reminds parties of their historical, confrontational period, and ultimately helps them anticipate the potential for future disputes. Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. It is advisable for the parties to put their agreement in writing to create tangible evidence that they accomplished something together.[27] The written agreement reminds the parties of their newly achieved common ground and helps to prevent arguments and misunderstandings afterward. Most importantly, a written agreement provides a clear ending point to the mediation process. The agreement binds the parties contractually. In case of disputes concerning compliance with the mediated agreement (e.g., whether a party carries out an agreement) or implementation of a mediated agreement (e.g., disputes concerning the precise terms for carrying out an agreement), the agreement is enforceable as a contract, as it would be in cases of the non-fulfillment of any ordinary contractual provision. Enforceability is necessary for mediation, as an ADR process, to possess any legal strength or to impose any liability on the parties. It should be noted that, in the United States, compliance with mediated settlement agreements is high because the parties, themselves, create the terms of the settlement agreement. Thus, enforcement

[27]A Marighetto, A Sgubini, M Prieditis, 'Arbitration, Mediation and Conciliation: Differences and Similarities From An International and Italian Business Perspective', (2004). Available at https:www.researchgate.net/publication/301205322_Arbitration_Mediation_and_Conciliation_differences_and_similarities_from_an_International_and_Italian_business_perspective/links/562bb60308ae518e3480ff26/Arbitration-Mediation-and-Conciliation-differences-and-similarities-from-an-International-and-Italian-business-. perspective.pdf. Accessed on 22nd June, 2023.

proceedings are relatively rare because the parties voluntarily carry out their own agreements.

It is important to note that the process of mediation itself is non-binding, in that it is a consensual process, a party may exit at any time; on the other hand, once an agreement in mediation is reached, a binding contract may be signed, which will be enforceable in a court of law.[28]

5. Arbitration

Over the past century arbitration has been used primarily in labour and commercial law and a tremendous body of case law has been developed in those areas. Arbitration as one of the dispute resolution methods has been around for years. It is a method of ADR where the parties to a dispute submit to a third party called an arbitrator or arbitral tribunal for the resolution of their dispute.[29]An arbitrator derives authority from the written agreement of the parties which maybe evidenced by a contract or a consent order. There are generally two categories of agreements into which arbitration parties must enter. First, they must agree to place specific issues in dispute into arbitration; and second, they must agree on the rules that the arbitrator must follow in conducting the arbitration. These two categories of agreements may appear in one or in two or more documents.

Arbitration as has been established in the foregoing is a desirable alternative to litigation in other areas of law. The question that begs for an answer is, why are family lawyers left behind in its ever-increasing use? However it appears that matrimonial law arbitration is an idea whose time has come. On October 1, 1999, North Carolina became the first state in the United States of America to adopt an arbitration statute specifically designed for family law cases.[30] The statute is tailor made for family law cases and provides parties with more flexibility in arbitrating these cases. Several other states in the U.S have now adopted such statutes, but none are as comprehensive as that of North Carolina. However, it is difficult to accurately assess the level of family law arbitrations in North Carolina, as most family law arbitrations are conducted in private and confidentiality is an important consideration for many parties[31].

---

[28] C Menkel-Meadow, *op cit*.

[29] OJ Jegede & W Idiaru, 'Nigeria: Overview of Alternative Dispute Resolution Process in Nigeria'. Available at https://www.mondaq.com. Accessed on 20th June, 2023.

[30] LP Burlson, op cit. See also N.C Gen. Stat. SS 50-41-62 (2006).

[31] *Ibid.*

6. Examining the Benefits and Problems of Mediation and Arbitration in Settling Marital Conflicts.

6.1 Benefits of Mediation and Arbitration

1. **Preserves/Restores Relationships**: Mediation and arbitration in marital conflict is paramount in the sense that it affords the disputing couple the opportunity to preserve, improve and restore cordial relationship. It also increases the disputing parties' satisfaction with the outcome of their disputes. The family bond will not be severed.
2. **Confidentiality/Privacy**: Mediation and arbitration affords the parties the opportunity to have the hearing conducted out of the public view. Thus privacy/confidentiality is a critical element of successful mediation and arbitration in the sense that the participants can openly make their submissions. If discussions with the mediator or arbitrator are not confidential, the process and the potential for resolution are significantly diminished.[32]
3. **Flexibility**: Flexible scheduling offered by ADR processes is an important aspect of a civil justice system. It allows the parties to participate in the creation of new arrangement or procedure to prevent a recurrence of the incident in dispute.[33]
4. **Speed**: Conflicts are easily and precisely resolved because of the streamlined nature of the mechanisms. The disputing couple will avoid the overburdened court systems.
5. **More Informal Procedures**: ADRs increases access to justice for all users.ADR mechanisms function with less formality than typical court proceedings. Mediation or arbitration can be offered in the language and cultural context of the disputants.
6. **Lower Costs**: Mediation and arbitration reduces cost of justice for all users. There is no filing of court processes. ADRs supports economic development by reducing transaction costs of disputes.
7. **Access to Justice**: The poorest disputants or couples can afford mediation and arbitration in resolving family conflicts.

6.2. Problems Associated with Mediation and Arbitration.

1. **No Appeal:** Unless you write an appeal process into your agreement or, for very limited circumstances, a binding ADR procedure lacks the ability to appeal the decision.
2.

[32] Johnson, 'Confidentiality in Mediation', Fla St U. L. Rev.(2002) 489.

[33] Alternative Dispute Resolution: Mediation and Conciliation', Law Reform Commission Report 2010. Op cit.

3. **Not Binding:** Unless the parties are using a binding process, settlement negotiations and mediation are not binding. A party is free to say no or even renege on an agreement reached during the process — in other words; there is no guarantee of resolution. It is important to note that arbitral awards are binding on the parties and can be enforced in court.
4. **Delay Tactics:** If the process isn't binding, one of the parties may use ADR as a way to stall and push the dispute out into the future. And, if the parties are not cooperating, the process can drag on and on and on. Thus, non-encouraging behaviour of parties is a major challenge facing the use of ADR .This problem range from cross-talking, rambling and silence on the part of a party or both. The success of mediation depends unwillingness to talk. A party's silence or refusal to respond to some words or to open-up can be detrimental to ADR process.[34]
5. **Power Imbalances:** The party/ spouse with the most money and power can often sway the process. This imbalance can play out in their favor, which is why Congress recently banned mandatory arbitration for sexual harassment cases.
6. **Lack of Precedents:** In court, you can generally rely on years of precedents to help determine and guide how the process should turn out. With ADR, however, precedents are merely suggestions in many instances. The arbitrator or mediator can decide much how they wish, based on whatever evidence they want to rely on and however their sense of "fairness" dictates.
7. **Lack of Proper and Adequate Skills:** The lack of proper and adequate skills for ADR practitioner is also hindrance to ADR. Where proper skills are not applied by ADR practitioners in the process, clients become frustrated and unsatisfied. In fact, improper skills may lead to delays and waste of time, which usually would escalate the costs. It is not enough for ADR professionals, lawyers inclusive, to be well versed in divorce laws only[35].

7. Conclusion and Recommendations

While mediation and arbitration may not be appropriate for every type of conflict/dispute, they are ideal dispute resolution mechanisms in marital conflict cases than most the family lawyers might imagine. These alternative dispute resolution methods should be particularly attractive and highly used in a jurisdiction like Nigeria,

[34] S Miller, 'The Problems and Benefits of Using Alternative Dispute Resolution'. Available at https://legal.thomsonreuters.com. Accessed on 23rd June, 2023.

[35] JO Abusomwan, 'Prospects and Challenges of Resolving Marriage Disputes Through Alternative Dispute Resolution Mechanisms', *International Review of Law and Jurisprudence* 5(1) 2023.

where our courts are crowded and limited judicial resources create significant delays in getting a case before a judge. A family lawyer can never have too many alternative dispute resolution arrows in his or her quiver.[36] The more arrows, the greater likelihood that he or she will be able to release the right one to score a bull's eyes for the client and to obtain a fair and cost-effective result.

There is no question that the use of mediation and arbitration to resolve marital conflict is continuing to expand. There are clear trends in favour of mediation and arbitration in the international arena where globalization requires creative and simple processes. It is recommended among others that:

a. Family Dispute Resolution Centers be established in Nigeria to provide information, referral, advice and dispute resolution services to separating and separated families, as well as referring intact families to counseling where required.
b. Effort should be made by legal practitioners to advice couples to take matters relating to marital disputes to ADR first. The Rules of Professional Conduct should be amended to require a legal practitioner to advising a client particularly disputing couples about ADRs. Whether clients will continue to use these methods depends in great part on the willingness of their advisors to suggest them and agree to participate with clients in these processes.
c. ADR mechanisms are one of the possible solutions in this 21st century. There is also an urgent need to create an efficient legal infrastructure/ framework for settlement of marital conflicts. An act should be enacted to serve as a guide for things to consider in mediating and arbitrating in marital conflicts. To this end the Family Arbitration and Mediation Act should be enacted in Nigeria. This will contain provisions tailor-made for family law cases.
d. It is recommended by the authors that in order to improve the participation of couples in ADR mechanisms, there should be advocacy programmes and sensitization workshops on the need to explore the ADRs especially in marital conflicts as this will go a long way to reduced damaged relationship caused by adversarial ways of settling disputes.

[36] MK Kisthardt, 'The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them', *J. Am. Acad. Matrimonial Law*. 14 (1997) 353.