

ARBITRATION IN CHILDREN'S CASES: A SENSIBLE ALTERNATIVE TO DELAY IN PRIVATE LAW?

Elizabeth Isaacs KC MCI Arb, Head of St Ives Chambers, Birmingham

Introduction

Although a Children's Arbitration Scheme has been available in private law disputes relating to children since 2016, uptake of the scheme has been low, with various detriments being identified by family law practitioners as contributing to a reluctant or limited take-up of the scheme. Practitioners often argue that arbitration is too costly or doesn't benefit both parties in acrimonious disputes where it may suit one party to speed things along, but the other party wants to delay resolution. Arbitration is also sometimes dismissed as a 'private court for the rich' and out of reach for ordinary families.

This article aims to demystify the process of arbitration in private law children cases and to identify the many positives of arbitration as another tool in the Alternative Dispute Resolution (ADR) toolkit available to practitioners and families in resolving private law disputes relating to children.

What is the Children Arbitration Scheme?

Arbitration is a form of private dispute resolution in which the parties agree to appoint a fair and impartial arbitrator to resolve their dispute and make a decision about the outcome. The parties agree to be bound by the reasoned written decision of the arbitrator, which is called the Determination. The arbitrator will effectively act as the judge in proceedings which have stepped out of the court arena. It is particularly effective as a highly flexible, adaptable response to cases where there is a single issue to be resolved; for example, disputes about whether a child can attend a particular school, or whether one parent can take the child away on holiday.

The legal framework

The Children Arbitration Scheme operates under its own Children Scheme Rules, which are specifically designed for the needs of family arbitration. The administration of the Children Arbitration Scheme is managed by Resolution on behalf of the Institute of Family Law Arbitrators (IFLA). The training and regulation of arbitrators is managed by the Chartered Institute of Arbitrators (CIArb). Most arbitrators are highly experienced family lawyers – solicitors and barristers – and many already sit as part-time family judges. Some retired judges also act as arbitrators.

What are the benefits?

Arbitration offers numerous significant benefits when compared to traditional litigation, including the opportunity for the parties to:

- Handpick an experienced family law specialist arbitrator to deal with their dispute continuously from beginning to end.
- Choose where, when and on what timetable their dispute should be determined.
- Set their own procedural and evidential parameters, including:
 - the nature and extent of the disclosure required; and
 - the nature and extent of any hearing.
- Include as much or as little material in the bundle as is appropriate to the case.

- Deal singly with discrete issues, at either an interim or final stage.
- Agree how any issues regarding costs should be approached by the arbitrator.

What can the arbitrator decide?

The arbitrator has wide-ranging powers to make any case management or substantive decisions in disputed private law cases (as long as there are no safeguarding issues identified).

The arbitrator can decide:

- What issues should be included or excluded.
- Whether an expert or independent social worker (ISW) needs to be appointed.
- What evidence is required.
- What amount of disclosure of evidence is necessary.
- Whether written submissions are necessary.
- Whether an oral hearing is actually necessary, or whether the case could be decided on the papers.

How to set up the process

In the event that parties agree to arbitration, they must complete and sign an application form – the ARB1CS form – which confirms that they apply to IFLA for the nomination and appointment of a sole arbitrator from the IFLA Children Panel to resolve their dispute

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