



# Private Trials in Family Cases

By Paul Siegel



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Florida's private trial statute, Section 44.104, was passed in 1999.<sup>1</sup> However, the statute has been little used as an alternative to litigating family law cases in state court. This lack of use may be due in part to the lack of knowledge. Many lawyers simply don't know that the statute exists. Another reason for the lack of use may be due to the difficulty in convincing litigants to try a new court system.

Private trials were first used in California, and later were adopted in a number of other states. Private trials offer many advantages over the state judicial system. Private trials save money, as they can be resolved much more quickly than in the state court system. Additionally, the private trial system allows litigants to choose which judge they want to use, as opposed to the blind lottery of the state court system.

The only barrier to entry into the private trial system is a stipulation signed by both parties in a civil dispute.<sup>2</sup> An application for voluntary trial resolution must be filed with the clerk of court, and fees paid as if it were a complaint initiating a civil action. The clerk of the court handles and accounts for voluntary trial resolution as if they were civil actions, except that the clerk of court keeps the records of the applications for voluntary trial resolution separate from all other civil actions.<sup>3</sup> Additionally, the filing of the application for voluntary trial resolution will toll the running of the applicable statutes of limitation.<sup>4</sup>

Can family cases be tried privately? The answer is maybe. One dif-

ficulty in having family cases tried privately involves the statute itself. The voluntary trial resolution statute specifically excludes disputes involving child custody, visitation or child support.<sup>5</sup> The dispute language is more complicated than it appears. The statute does not simply eliminate private trials which resolve disputes relating to those issues, but any lawsuits that *involve* children's issues.<sup>6</sup> However, if a couple does not have minor children, the statute does not prohibit them from resolving their dispute in the private trial system.

The private trial system offers many advantages over the state court system. This is especially true for high profile parties such as sports and entertainment figures. It is also true for high net worth litigants, who may not want the public to access their personal information. In the private system, the parties have the ability to try their disputes in a private office, as opposed to a public courtroom. The private trial system allows the parties to select the judge they want to use. While there are new state rules regulating the filing of confidential information, there is no real privacy in state court. Parties in the private system do not have to fear reading about their finances or peccadilloes in the press.

Not surprisingly, the private trial system has attracted the Hollywood jet-set. Perhaps one of the best-known family cases tried before a private judge was the Brad Pitt and Jennifer Aniston divorce in California. A report of the private divorce was reported on National Public Radio.<sup>7</sup> Last December a Bill was introduced before the Florida Legislature that would have eliminated the limitation on family cases involving custody, visitation and child support. The bill did not pass, but it is expected that the Bill will be

proposed again next year.

There is another advantage to resolving family cases in the private system. In my experience on the bench, I have found that many cases did not settle because one of the parties wanted to, "talk to the Judge". In the private trial system, the parties get the opportunity to engage the judge more closely. Additionally, the judge will have had years of substantial experience in family law. The private judge could read the parties' financial affidavits, the important pleadings, listen briefly to the parties, admit or exclude evidence, accept proffers, and listen to the argument of counsel. At the conclusion of the private trial, the private judge would announce the decision which he or she would have made if presiding.

Currently, private trials can only be used in family cases not involving children's issues. However, the statute could be amended. If amended as proposed, private trial may become a far more useful tool in resolving family litigation. Irrespective of whether the statute is amended, there is a way to benefit from the private trial system in family cases, even if children are involved. At the conclusion of a private trial, the decision of the private judge will not be binding on anyone. However, if both parties agree, the private judge's decision can be reduced to writing, and form the basis of the parties' marital settlement agreement.

The private trial system offers litigants a more inexpensive, private and faster way to resolve family law cases than the state court system. The statute presently excludes private trials from cases involving child custody, visitation or child support disputes. However, the private trial system offers the parties the chance to have an experienced family law judge rule on



their case after hearing the evidence. Although not binding, the private ruling can be used as the basis for a later marital settlement agreement.

*Paul Siegel has been a member of The Florida Bar for 50 years. He was educated at the University of Miami, where he served as Editor-in-Chief of the Law Review. For 33 years he litigated family cases, including seven as a Circuit Judge in the Family Division in Miami. In Family Court, Siegel conducted UCD's in French, Spanish, Italian, German and Creole, in addition to English, when official interpreters were not available. At present he mediates civil and family cases and serves in other quasi-judicial capacities. He also promotes private trials as an ADR technique to relieve some of the burdens on the court system. Siegel wrote FLORIDA TRIAL OBJECTIONS, a comprehensive work on evidence and other trial issues.*

**Endnotes:**

- 1 See §44.104, Fla.Stat. (2011).
- 2 See §44.101(1), Fla.Stat. (2011) (allowing parties to agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigation of the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved.)
- 3 See §44.104(5), Fla. Stat. (2011).
- 4 See §44.104(6), Fla. Stat. (2011).
- 5 See §44.104(14), Fla.Stat. (2001) (This section shall not apply to any dispute involving child custody, visitation, or child support . . .).
- 6 See *Toiberman v. Tisera*, 998 So.2d 4 (Fla. 3d DCA 2008) (holding that the term "dispute" in section 44.104(1) and (14) was intended by the legislature to reference the complete action between the parties, as opposed to the "issues involved" in the dispute. Thus, by specifying that section 44.104 "shall not apply to any dispute involving child custody, visitation, or child support," the legislature intended to exclude from arbitration all lawsuits that involve issues of child custody, visitation, or child support.). *Accord Martinez v. Kurt*, 45 So.3d 961 (Fla. 3d DCA 2010) (finding that the underlying logic of *Toiberman* is that a decision on the financial issues in a matrimonial case can affect the ability of one or both parties to comply with the provisions governing child custody, visitation or (where applicable) child support. The court extended *Toiberman* to both the initial dissolution proceedings and post-judgment proceedings.).
- 7 See Melissa Block, *Private Judge Handles Aniston-Pitt Divorce*, NPR radio broadcast (August 23, 2005) available at <http://www.npr.org/templates/story/story.php?storyId=4812658> (last visited October 28, 2012).

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