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Before the First Shot is Fired: Hypothetical Use of Alternative Dispute Resolution to Avoid a Re-Enactment of the Hatfields and the McCoys - Kirkham v. Wright

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CASEBOOK CASE STUDY

BEFORE THE FIRST SHOT IS FIRED: HYPOTHETICAL USE OF ALTERNATIVE DISPUTE RESOLUTION TO AVOID A RE-ENACTMENT OF THE HATFIELDS AND THE MCCOYS

Kirkham v. Wright[1]

I. INTRODUCTION

The purpose of this Casebook Case Study is to focus on a previously adjudicated case and examine what advantages, if any, there would have been in attempting resolution through alternative dispute resolution (ADR) processes.

Kirkham v. Wright was chosen as the subject case because it represents the type of dispute that is extremely well suited to resolution through the ADR process. While some argument exists about the law in *Kirkham*,[2] the bulk of the dispute revolves around the application of the law to the facts.[3] Furthermore, this case was eventually settled after remand,[4] which leads to the conclusion that a settlement may have been possible earlier. Additionally, while the attorneys involved would not disclose the legal costs, it is a safe estimate that they ran into the tens of thousands of dollars.[5]

While the facts in *Kirkham* lent themselves to resolution through the use of ADR, researching the case was not without its problems. At the time the attorneys on the case were initially contacted, the dispute was scheduled for a second trial.[6] Settlement negotiations began shortly thereafter,[7] but most discussions with the attorneys were conducted while the dispute was still active. Because of these

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1. 760 S.W.2d 474 (Mo. Ct. App. 1988).

2. *Id.* at 478.

3. *See* Briefs for Appellants and Respondents, Kirkham v. Wright, 760 S.W.2d 474 (Mo. Ct. App. 1988) (No. 53386).

4. Joseph J. Dolgin, attorney for the plaintiffs, was contacted by the authors on March 13, 1990, at which time he informed us that a tentative settlement had been reached.

5. *Kirkham*, 760 S.W.2d at 477. The trial lasted for nine days; twenty-four witnesses were called, and over two hundred exhibits were used. In addition, extensive briefs were filed on appeal by each party.

6. *Id.* at 475.

7. The authors gained this information through telephone conversations with Gary P. Paul, attorney for the defendants, and Joseph J. Dolgin, attorney for the plaintiffs. These conversations took place in February and March of 1990.

factors there was a serious problem procuring information on the case due to client confidentiality and ethical concerns by the attorneys involved.[8]

Additionally, any attorney involved in a case will be cautious in dealing with a research project such as this Casebook Case Study for fear they will be criticized on their performance in handling the case. It is quite possible that the attorneys involved in *Kirkham* felt that the exploration of alternatives to litigation was in effect a condemnation of them for being overly litigious or for not exploring all the possibilities.[9] These factors made research of the case difficult, and limited the depth of the analysis in some areas.[10]

It should also be noted that not all disputes lend themselves readily to an ADR process. While in theory *Kirkham* appears to be an excellent case for dispute resolution, the possibility exists that for reasons unknown to the authors, settlement was initially not possible or not in the best interests of one or both of the litigants. For example, the parties in *Kirkham* may have resisted efforts by the attorneys to achieve an early settlement because they had reached a level of mental anguish where they could achieve resolution only by getting their day in court.[11]

Another possible explanation for the parties' desire not to use ADR is the existence of an insurance subrogation agreement on the side of the defendants.[12] Upon the filing of a lawsuit, this type of contract brings another party, the insurance company, into the picture, which may not be susceptible or agreeable to settlement.

Finally, and this is again speculation, pre-trial attempts at settlement may have been made without success. Perhaps the parties could not agree on what was fair and equitable. Certain disputes are initially impossible to settle on terms favorable to all parties, and it may have been in the clients' best interest to go forward with the litigation.

While, as noted above, ADR might not always be the solution to every dispute, there are many reasons that it will generally be in the best interest of an attorney to investigate the possibility of an alternative to litigation. For instance, many attorneys instinctively feel that ADR is not worth the effort because there will be little financial gain involved.[13] However, this is not always the case. In

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8. The attorney for the defendants, Gary P. Paul, did provide us with copies of the appellate briefs but would not cooperate with us any further and denied us permission to speak with his clients or the witnesses. The attorney for the plaintiffs, Joseph J. Dolgin, was willing to discuss the case with us, but wanted to wait until a final settlement had been reached.

9. *See* Patterson, *Dispute Resolution in a World of Alternatives,* 37 CATH. U.L. REV. 591 (1988).

10. For example, it was not possible to do more than speculate as to the existence and causes of personal enmity present in the dispute.

11. This is a definite possibility as both parties claimed mental distress resulting from the dispute (although the defendants' claim was eventually dismissed voluntarily without prejudice). *See* Brief for Respondents, *Kirkham*, 760 S.W.2d at 477.

12. The authors were informed of this during a telephone conversation with Gary P. Paul, attorney for the defendants.

13. This is not necessarily a criticism. Attorneys, as much as other businesspeople, have bills to pay and overhead expenses to meet. In addition, there is often pressure on the young attorney to produce income for the law firm.

most ADR scenarios, lawyers are still involved, though to a lesser degree. While litigation creates more billable hours per case, it also involves a much greater commitment of time and effort. In situations involving contingent fees, the attorney may expend hundreds of hours of work and recover nothing for his efforts. It is often the case that an attorney will find it more profitable to settle a number of cases quickly and efficiently through the ADR process, than to be involved in one or two arduous court battles.

There are reasons aside from avarice that an attorney should consider ADR, the most important being client satisfaction. A long-time client may often be more satisfied with a quick settlement than an expensive court trial, and thus may be more likely to remain a client. First-time clients may also be more likely to return if their experience was pleasant, or at least not overly traumatic.

There is also a moral justification for the use of ADR. Often (particularly as in *Kirkham*, where a continuing relationship is involved) it will be in the parties' best interests to settle the dispute amiably and with a minimum of ill will. Thus, if the attorney genuinely puts her client's interest first, she will investigate the feasibility of using the ADR process before filing a lawsuit.[14]

This study will give a comprehensive background on the subject case. The facts will be reiterated and the strengths and weaknesses of both parties' arguments will be assessed. The original relationship of the parties and the development of the dispute will be discussed including speculation as to why the parties eventually sought legal counsel. Finally, and most important, alternatives to litigation will be analyzed and evaluated based on the facts of this dispute.

It is important to note that this study will evaluate different methods of ADR based on their hypothetical availability. Not all ADR processes were available to the parties in this case.[15] In addition, not all ADR processes will be evaluated at length.[16] Instead, the authors settled on those ADR processes most applicable to the facts in this case. Through the evaluation of ADR techniques relative to an actual case, it is the goal of the authors to provide litigants and attorneys with incentives to take a different course of action other than simply saying: "sue the bastards!"[17]

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14. In some situations an attorney may need to file the lawsuit first in order to meet the applicable statute of limitations and preserve the client's rights. The attorney may then safely look at alternatives to litigation.

15. For instance, there are currently no neighborhood justice centers in the St. Louis area where this dispute took place.

16. It was the decision of the authors to limit the scope of this study to general ADR processes most well known and most applicable to the dispute in question. Because of this, new and emerging types of ADR such as "rent-a-judge" will not be discussed, nor will summary jury trials in which ongoing litigation is necessary.

17. *See* Perritt, *"And the Whole Earth was of One Language"— A Broad View of Dispute Resolution*, 29 VILL. L. REV 1221, 1224 (1984).

II. THE FACTS

The facts in this case, though complicated by details and legal maneuvering, can be reduced to a simple premise: a dispute between two neighbors that began as a minor annoyance and eventually grew into an expensive lawsuit.

The parties in this case, the Kirkhams and the Wrights, lived next door to each other in the town of Chesterfield, Missouri.[18] The layout of the properties and the eventual modifications that each party made are illustrated in Figure 1.[19]

The natural flow of water through the properties is from the Kingsfield Subdivision to the Wrights' land and then to the Kirkhams'. The east side of the Kirkhams' property tends to receive a great deal of water runoff because it is lower than the rest of the land.[20] To counteract the flow of water runoff onto the low-lying property, a swale[21] was constructed around the Kirkhams' home. (See Figure 1.)

In the fall of 1979, the Wrights began construction of an in-ground swimming pool. The pool was completed and opened the following spring. As shown in Figure 1, the pool was built on terrain which sloped downward toward the Kirkhams' property. After a heavy rain, mud, debris and mulch were carried into the pool by surface water draining down the slope. To prevent this, the Wrights, in the fall of 1980, also constructed a swale approximately nine feet wide and six to eight inches deep around the pool area to channel the water around the pool. In addition, the Wrights had tie-walls installed to terrace the slope. The net result of these changes was to cause the surface water to run off the Wrights' property in a concentrated channel flow rather than its previous sheet flow.[22]

The Kirkhams first began noticing water problems in January or February of 1980. They complained that water from the swimming pool construction site would back up along their driveway curb, forming a sheet of ice in the driveway throughout the winter.[23] The Kirkhams also complained that on three separate occasions in the summer of 1980, water entered their basement from ground level window wells on the east side of their residence.[24] Believing that the flooding was caused by an overflow of the swale around their property, Mr. Kirkham installed new non-perforated drain tile to eliminate the problem.[25]

As these events were taking place, the Kirkhams were also having problems with standing water on a low point of their lot, along their west property line. The Kirkhams believed that the standing water was the result of drain pipes that the

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18. *Kirkham*, 760 S.W.2d at 476.

19. *See* appendix at end of article.

20. *Id.*

21. A *swale* is defined as a "slight depression or valley". WEBSTER'S NEW INTERNATIONAL DICTIONARY 2543 (2d ed. 1957).

22. *Kirkham*, 760 S.W.2d at 476.

23. *Id.*

24. *Id.* at 476-77.

25. *Id.* at 477.

Wrights had installed outside their pool area.[26] Also, according to the Kirkhams, the standing water problem "was exacerbated by the Wrights' activities in cleaning their pool."[27] The effect of the standing water was to cause the Kirkhams' property to stay swampy.[28] "The swale and the walls installed by the Wrights in September 1980 did not remedy the problem to the Kirkhams' satisfaction."[29]

In October of 1984, the Kirkhams installed a drain system on their property. In July 1985, the Kirkhams obtained an easement from the Wrights and constructed a second drain on the Wrights' property. At this time the Kirkhams also built a wall along their property line that abutted the Wrights' property. The wall was designed to stop the flow of water onto the Kirkhams' property, and direct it into the drainage system. The wall caused a small pond to form on the Wrights' property.[30]

Frustration over the water problems led to a disagreement over a wall on the front yard of the Wright's property. The Kirkhams apparently believed that the wall, built by the Wrights, was encroaching onto the Kirkhams' property. The Kirkhams eventually took action and chiselled away two-thirds of the wall.[31]

The Kirkhams sued the Wrights for property damage caused by the water problem, naming the swimming pool as the chief cause. The Wrights counter-claimed, seeking to have the wall built by the Kirkhams removed. The Kirkhams then counter-claimed, seeking an action in ejectment and quiet title over the brick wall on the property line of the parties' front yards.[32]

The net result of the lawsuit and ensuing trial was a verdict of $56,600 in favor of the Kirkhams in their nuisance action against the Wrights.[33] The judge ordered a new trial after finding that the verdict was against the weight of the evidence.[34] A new trial date was set for February of 1990; however the parties decided to forego further litigation and instead seek a settlement. In March of 1990 the parties achieved a settlement.[35]

III. EACH SIDE'S LEGAL CLAIMS

An in-depth, detailed study of the legal issues involved in this case is beyond the scope of this Case Study. The reader should refer to the appellate briefs[36] and the text of the decision by the Missouri Court of Appeals for more detailed

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 478.
35. *See supra* note 4.
36. Briefs for Appellants and Respondents, *Kirkham*, 760 S.W.2d 474.

information. It is worthwhile, however, to note the basic legal claims the parties made.

The Kirkhams' (plaintiffs') main legal theory was one of nuisance.[37] They sued the Wrights (defendants) for special damages of $10,600 and requested $50,000 in general damages for mental distress and loss of enjoyment of their property.[38] Plaintiffs also filed a counterclaim for an action in ejectment and quiet title over the brick wall on the property line of the parties' front yards.[39] The Wrights' legal claims were a counterclaim in which they sought an injunction to have the tie wall built by the Kirkhams in 1985 removed,[40] and intentional infliction of emotional distress.[41]

IV. STRENGTHS AND WEAKNESSES OF EACH PARTY'S CASE

It is difficult to make an accurate assessment of each party's case without a technical fact finding as to what caused the flooding. Apparently, the jury believed the plaintiffs' story, as they awarded them damages of $56,600.[42] On the other hand, the judge felt that the verdict was against the weight of the evidence and ordered a new trial.[43] As the appellate court did not feel that this was an abuse of discretion by the trial judge,[44] a valid argument can be made that the defendants had the more valid legal claim. The fact that the plaintiffs won a large unanimous verdict, does however, raise several questions about the jury's interpretation of the facts and their understanding of the law in this case. It is possible that the jury was confused by the extensive amount of facts submitted into evidence. Or it may be that the jury did not understand the legal theories involved in the case. Finally, it may be that the jury had an emotional dislike for defendants or defendants' counsel and this affected their judgment.

In the final analysis, this is not a conflict that either side could feel much confidence in winning if a second trial ensued. As such, it would be well suited to an ADR environment.

V. ADR METHODS POTENTIALLY APPLICABLE TO THIS LAWSUIT

As an introduction to this section, it should first be noted that ADR processes do not have rigid definitions or parameters. For instance, one ADR "expert" may feel that mediation is most effective with a mediator knowledgeable in the area of the dispute, while another "expert" may feel that a lack of preconceived notions

37. *Kirkham*, 760 S.W.2d at 476.
38. Appellant's Brief at 21.
39. *Kirkham*, 760 S.W.2d at 477.
40. *Id.*
41. *Id.*
42. *Id.* at 476.
43. *Id.*
44. *Id.* at 475.

on the part of the mediator is most likely to lead to success. Moreover, some may feel that the best case for settlement is one where a party has the clear winning position, while others believe that two parties with equally strong arguments make a better case for settlement.

There is also much disagreement on how active a role a mediator should take in that process. Should the mediator's main job be to direct and guide the parties through the process by making suggestions and giving advice? Or, should a less active role be taken with the mediator's duties more analogous to that of a referee, mainly limited to preventing serious altercation and keeping discussions on course?

Arbitration as well presents many ambiguities relative to the actual process. Should the arbitrator's decision be binding? How familiar should the arbitrator be with the facts in the dispute? Is it preferable that the arbitrator be an attorney, or would a layman be a better choice?

It is also possible that the most suitable ADR process may depend on what stage the dispute has reached. For example, early on in a dispute the parties may be more receptive to a mediation format. As tensions rise and positions become entrenched, it is more likely that an arbitrator with decision power can ensure greater cooperation from the parties.[45]

A. *Expert Fact Finding*

Expert fact finding involves hiring a third party (preferably an expert in the subject area) to investigate the facts of the dispute and reach "either a determination of the disputed facts or a narrowed set of disputed facts."[46] While most often discussed as part of a pre-trial procedure,[47] it is also used successfully as a prelude to settlement.[48] In a case with as complex a fact pattern as *Kirkham*,[49] a qualified and neutral third party's investigation could have reduced misconceptions on both sides and led to an easier settlement.

It should be noted that expert fact finding is generally not considered a separate and distinct method of ADR,[50] but rather a useful tool to ease the path for reconciliation of the parties through a more comprehensive ADR process such as arbitration or mediation. It should also be noted that there are procedural questions and problems involved with the use of expert fact finding that must be addressed. These include the question of how a neutral expert is selected. How qualified must he or she be? Who will pay for the process? Is there a method for

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45. *See* Cooley, *Arbitration versus Mediation*, 69 JUDICATURE 263 (1986).

46. Patterson, *supra* note 9, at 597-98.

47. W. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 32 (1988).

48. *Id.* at 30-31.

49. *Kirkham*, 760 S.W.2d at 477. "In the course of the nine day trial, the jury heard testimony from twenty-four witnesses including two expert witnesses for the Kirkhams and one expert witness for the Wrights. The parties presented nearly two hundred photographs and exhibits." *Id.*

50. W. BRAZIL, *supra* note 47, at 32.

appealing the results? These and other questions must be considered by an attorney before calling in an expert fact finder.

Given this general description of expert fact finding, how could it have helped or hindered settlement of the *Kirkham* dispute?

The ultimate issue in *Kirkham* was whether or not the installation of defendants' swimming pool increased the flow of water onto the plaintiffs' property.[51] However, this issue is made up of many sub-issues, thus making understanding and resolution of the dispute very difficult. For example, both parties contested whether or not the water problem was caused, or at least affected, by differing amounts of rainfall.[52] During the trial, both parties supplied expert data to back up their arguments; data which of course was self-serving and incomplete.[53] In this situation, a qualified expert fact finder could have sifted through the data and reached a fair and accurate assessment as to the effects of differing amounts of rainfall on the quantity of water on plaintiffs' property.

Another sub-issue involved in this dispute was whether or not the Kirkhams (plaintiffs) suffered problems with a flooded basement before the installation of the Wrights' swimming pool. Again, the evidence was conflicting,[54] and a neutral expert might have been able to ascertain the truth.

Additionally, an expert fact finder knowledgeable in the subject area might be able to devise a solution to the problem causing the dispute. It is possible that drainage or landscaping techniques could have solved the disputants' conflict faster and more cheaply than litigation. A neutral expert would have been likely to recognize this and suggest it to the parties.

It is, of course, possible that in some disputes an expert fact finder could discover that the plaintiffs are without a valid claim or that the defendants are overwhelmingly at fault. While this would appear to be a harsh result for one of the parties, it would be beneficial in that an expensive and presumably useless court battle would be avoided. In the event that the dispute was this clear cut, it might be wise for the parties to take part in an ADR process to discover a solution to the conflict, or investigate if the dispute is possibly caused by a situation unrelated to the legal claim.

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51. *Kirkham*, 760 S.W.2d at 477.

52. Appellant's Brief at 21; Respondent's Brief at 17. Appellant cited Local Climatological Data of the National Oceanic and Atmospheric Administration of the United States. Respondent relied on testimony of expert witness Eugene Brucker. Appellant argued that there had been heavy rain before the pool was installed with no problems, while respondent of course argued that an increase in rainfall was the source of the flooding.

53. Both respondents' and appellants' data was complete only to the extent that it supported their respective theories.

54. *See supra* note 3.

B. *Arbitration*

Of all the current methods of alternative dispute resolution in use today, arbitration is probably the best known and most widely utilized.[55] Use of arbitration in the United States dates back to the year 1705.[56] Even so, many lawyers and businesspeople are unsure of the meaning of arbitration and tend to confuse it with mediation.[57] Simply put, "arbitration is a process submitted to a third party or neutral (or sometimes a panel of three arbitrators) to hear arguments, review evidence, and render a decision."[58] Generally, the disputants choose a mutually acceptable third party. Often a court will "suggest" or even mandate arbitration before any actual litigation takes place.[59] This "court annexed" or "judicial arbitration" differs from contractual arbitration in that the arbitration process is mandated but the parties are not bound by the result.[60] As a general rule, the decision reached in a voluntary arbitration process is binding on both parties.[61] As an ADR process, arbitration has been very successful and is often preferred to litigation;[62] however, as with mediation, success of the arbitration process often depends on the neutral third party.[63] Integrity, impartiality, and expertise of the arbitrator are vital if the process is to succeed.[64] As with other ADR processes, arbitration has a number of advantages over litigation in resolving a dispute. Normally, the arbitration process is faster and less expensive than litigation.[65] This is probably due in part to the efficiency of the arbitration process and the inefficiency of the court system. As one author has stated:

> The success of arbitration is a reflection of the shortcoming of the American civil justice system. Modern judicial process is characterized by high cost, excessive formality and long delays. Having gone through interminable pretrial motion practice, trial procedure and waiting out a lengthy appeal, even a "victorious" litigant may well question whether justice has been served.[66]

The result of an arbitration process is also more likely to be palatable to both of the parties.[67] This is due to the inherent flexibility of arbitration over

55. Patterson, *supra* note 9, at 592.
56. Act of 1705, ch. 150, 1 Pa. Laws (Sm. L.) 49.
57. Cooley, *supra* note 45, at 263.
58. *Id.* at 264.
59. Patterson, *supra* note 9, at 593-94.
60. *Id.*
61. UNIF. ARBITRATION ACT § 1, 7 U.L.A. 4 (1978).
62. *See* Stipanowich, *Rethinking American Arbitration,* 63 IND. L.J. 425, 427 (1987-88).
63. Cooley, *supra* note 45, at 265.
64. *Id.*
65. Patterson, *supra* note 9, at 594-95.
66. Stipanowich, *supra* note 62, at 427.
67. *Id.* at 435.

litigation. While litigation may be more effective at inducing settlement,[68] the settlement reached may not be fully satisfactory to both parties. These factors have led to extensive use of the arbitration process in the business community.[69]

Arbitration is not, of course, without its problems or critics. One concern often voiced is the lack of procedural protections in the arbitration process.[70] Generally, once an arbitration decision is made the parties are held to it and there is no opportunity for appeal.[71]

Another potential problem in the arbitration process is the basic flexibility of the system. While this is usually an advantage of arbitration over litigation, it means that the success of the process is heavily dependent on the qualifications of the arbitrator and the cooperative nature of the parties.[72] Because arbitrators have more control over the process than a judge or jury would in a litigation setting,[73] there is little chance of having a satisfactory result without a qualified arbitrator.[74] This problem is enhanced by the fact that it is not always possible to find competent arbitrators.[75]

Arbitration is also criticized by some as being more expensive than litigation in certain instances.[76] The reasons include the fact that parties involved must bear the expense of an arbitrator as well as an attorney.

Complaints are also directed at recent changes in the arbitration process; critics say that it has assumed too many legalistic, lawyer-like formalities.[77] Some commentators feel arbitration would actually be more successful if lawyers were banned from the process.[78]

Despite its critics, arbitration has been a worthwhile alternative to litigation for many years and it is the feeling of the authors that many of the issues in *Kirkham* could have been settled efficiently through the arbitration process. Thus it is beneficial to consider the dispute in *Kirkham* and determine the positive and negative aspects of arbitration with respect to different factors in the case.

Probably the most important aspects of *Kirkham* relative to arbitration are the highly complex nature of the case and the fact that the parties are involved in a continuing relationship (next-door neighbors).[79] The highly complex nature of

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68. *See* Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6, 11 (1983).

69. Stipanowich, *supra* note 62, at 429-30.

70. *Id.* at 441.

71. *Id.* at 439.

72. *Id.* at 441.

73. Arbitrators are in effect a combination judge and jury. They hear the evidence and then render an enforceable decision.

74. *Id.* at 449.

75. *Id.* at 448.

76. *Id.* at 452.

77. *Id.* at 445.

78. *Id.*

79. *Kirkham*, 760 S.W.2d at 476.

the case is a factor that weighs heavily in favor of arbitration versus litigation or versus other types of ADR such as mediation.[80] As previously noted, the evidence presented in the case involved a great deal of technical data as well as conflicting testimony of witnesses. A jury may be much more likely to be confused than an arbitrator where so much complex evidence exists. This is especially true where the arbitrator is an expert in the subject area and has conducted a fact finding in advance of the process. In this situation, it is likely that much of the confusion clouding the issues in *Kirkham* could be eliminated.

The fact that the two parties were (and are) involved in a continuing relationship presents some possible problems for the use of arbitration. Generally arbitration would be more suitable than litigation in this situation simply because it is more flexible and less adversarial, thus reducing tensions between parties that cannot avoid seeing one another in the future. It is possible, however, that another type of ADR such as mediation might be more suitable because of the continuing relationship.[81]

Many experts believe that arbitration is less suitable than other ADR process where a continuing relationship is involved. However there are many examples of arbitration being used successfully in situations where a continuing relationship exists. For example, in labor union arbitration an employee may be reinstated by an arbitrator after a wrongful discharge. Clearly, in *Kirkham*, the parties are involved in a continuing relationship, and whether this would cause arbitration to be less suitable is a factor that an attorney would have to discuss with the client.

Some experts also consider a dispute involving a long-standing feud as best settled through arbitration.[82] It is difficult to say that this requirement is satisfied in *Kirkham*. While the dispute had been going on for almost seven years by the time of trial,[83] it should be noted that in July of 1985 (only months before the lawsuit was filed) the Wrights granted the Kirkhams an easement for drainage purposes.[84] Obviously parties involved in a heated feud would not be communicating to the extent necessary to negotiate an easement. Although communication did eventually deteriorate before the trial,[85] it is difficult to argue that the parties were involved in a long-standing feud.

Considering all the factors involved in *Kirkham*, it is the opinion of the authors that arbitration would have been a worthwhile process to resolve the dispute. While arbitration might not be the optimal method of ADR in this case, it is generally to be preferred over litigation in a neighborhood dispute.

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80. Patterson, *supra* note 9, at 603.

81. Cooley, *supra* note 45, at 269.

82. *Id.*

83. *See supra* note 3.

84. *Kirkham*, 760 S.W.2d at 477.

85. *Id.* This is certainly demonstrated by the wall chiselling incident!

C. *Mediation*

Mediation, the use of a neutral third party to aid in the resolution of disputes, has been known for nearly 4000 years and was in existence before the first written laws.[86] In 1972 the first full-fledged mediation service was established in the United States.[87] Interest in mediation grew steadily during the 1970's[88] and in 1980 Congress responded by passing the Dispute Resolution Act.[89] Although this Act was never funded,[90] use of mediation continued to spread and by 1984 there were 225 conflict resolution centers in the United States.[91] In 1981 the use of mediation was encouraged by Texas State Bar Leaders at their annual leadership conference.[92]

As the use of mediation has grown, so too have the number of views about how it should best be used. The prevailing view seems to be that mediation is most successful when it is loosely structured and flexible.[93] This means that the mediator should have the discretion to alter his role as required by the situation. For instance, in the subject case, the level of tension between the parties almost certainly intensified as the dispute continued. If mediation had begun early, it is likely that the mediator could have taken a somewhat passive role, allowing the parties to cooperate and only interjecting to keep the dialogue flowing. If the dispute was more fully developed, a mediator would have had to have taken a different role, probably entailing more assertive behavior. This might encompass giving the parties advice on the resolution of some issues and suggesting elements of a settlement. Considering the facts in *Kirkham*, a mediator might have suggested new methods of drainage on the property or perhaps modifications to defendants' swimming pool to control the flow of water.

An important task of the mediator, especially applicable in this case, is the reduction of tension between the parties.[94] The dispute in *Kirkham* had reached the point where the parties were acting irrationally as a result of tension between them. This is demonstrated by the action of the Kirkhams in chiselling part of a wall between the parties' front yard property line.[95] It is obvious that the wall had nothing to do with the main dispute and a portion of it was destroyed by the Kirkhams simply to vent their frustrations. In this situation a mediator would first

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86. Patterson, *supra* note 9, at 594.

87. *See* Wahrhaftig, *Nonprofessional Conflict Resolution,* 29 VILL. L. REV. 1463, 1466 (1984).

88. *Id.*

89. *Id.* at 1467. "The Dispute Resolution Act . . . enshrined the concept into federal law, provided for a centralized resource center, and, most importantly, provided federal funding for the growing field." *Id.*

90. *Id.*

91. *Id.*

92. *See* Weber, *Mediation: The Neighborly Thing to Do,* 45 TEX B.J. 476 (1982).

93. Wahrhaftig, *supra* note 87, at 1470.

94. Perritt, *supra* note 17, at 1233.

95. *Kirkham,* 760 S.W.2d at 477.

have to act as a peacemaker and conciliator before eventually reverting to the role of mediator.

Another important role of the mediator involves helping the parties bargain over issues rather than positions.[96] While issues were very prevalent at trial, the parties in *Kirkham* appeared to be entrenched in a position mindset. Both were convinced that the other was completely at fault. Obviously, of course, as a dispute continues a party's position tends to become fixed, and thus ideally mediation should begin as early in the dispute as possible.

Assuming that a mediator could have gotten the parties in *Kirkham* to discuss issues, reaching a settlement would have been much more likely as the focus of the discussion would be changed from "Who's at fault?" to "How can we solve this problem?" Since the Kirkhams and the Wrights were next-door neighbors, the method of mediation probably best suited to their situation is that of a neighborhood justice center (NJC). A neighborhood justice center is a mediation outlet organized for the purpose of remedying neighborhood disputes.[97] The basic goal of an NJC is "to get to the root of the problem and attempt to resolve it in a friendly atmosphere, so that the parties can depart arm-in-arm."[98] While having the Kirkhams and Wrights depart arm-in-arm from a mediation session is probably wishful thinking, NJC's have been very successful in resolving disputes and are now being endorsed by prominent politicians.[99]

Had an NJC existed in the disputants' neighborhood and had they utilized it, it is likely that much time, money, and stress could have been saved especially if the parties entered into mediation early on in the dispute. Where they are in operation, NJC's have had very favorable rates of success.[100]

This is not to imply however, that mediation and NJC's do not have their critics. It is argued that the community justice movement exemplifies "the excessive growth of bureaucratic regulation,"[101] or, in other words, the creeping of government into personal aspects of neighborhood relations. Personal liberty and due process concerns have also been voiced.[102]

Ultimately, the dispute itself must be analyzed before deciding whether or not to mediate. Mediation has been said to be applicable to "practically every common conflict that occurs in business, families, or neighborhoods. . . ."[103] In a situation such as the subject case, where the parties are strong-willed but reasonable, are involved in a continuing relationship, and have much to gain from

96. Perritt, *supra* note 17, at 1234.

97. Wahrhaftig, *supra* note 87, at 1465.

98. *See* Heckenkamp, *The Neighborhood Justice Center,* 69 ILL. B.J. 462, 467 (1980-81).

99. *Id.*

100. *See* Kessler & Finkelstein, *The Evolution of a Multi-Door Courthouse,* 37 CATH. U.L. REV. 577, 581 (1988).

101. *See* Henry, *Community Justice, Capitalist Society and Human Agency: The Dialectics of Collective Law in the Cooperative,* 19 LAW & SOC'Y REV. 303, 306 (1973).

102. *Id.*

103. Weber, *supra* note 92, at 476.

a speedy resolution of the dispute, mediation would be very effective.[104] As one author has stated, the greatest value of neighborhood mediation may be that it results in "enabling individuals to help themselves in solving certain kinds of conflicts rather than relying on the formalized system to do everything for them."[105]

VI. CONCLUSION

In a dispute of the type found in *Kirkham v. Wright*, the obvious question is the following: Could this dispute have been resolved without the expense and distress of a legal battle? It is the opinion of the authors that this conflict cried out for some alternative means of resolution. While all the facts in this case have not been disclosed, this much is certain: a neighborhood dispute was zealously litigated at substantial investment of time and money, only to finally end with a settlement. While ADR is not a panacea for all disputes, in most cases, and unequivocally in *Kirkham*, it is an option worth investigating.

As the social environment of this country becomes increasingly urban, small disagreements and quarrels between neighbors are more and more likely to develop into serious conflicts due to the close proximity of dwellings. While costs and time commitments will prevent most disputants from ever filing a suit, the resulting stress and ill will is likely to lead to serious animosity between the parties and possibly even violence. An informalized system of ADR would allow disputants to settle minor differences without the time and expense involved in the judicial system. In many cases ADR could be a viable alternative even in the case of a major dispute. At the very least it would give disputants a place to begin; if the conflict could not be settled through the ADR process, the legal system would still be available.

The resistance of many members of the legal community to the ADR process is not difficult to understand. Legal education generally stresses the adversarial system from the law student's first day of class. Additionally, attorneys operate under the short-sighted belief that litigation is more profitable; failing to see that in the long run, use of the ADR process can be more cost effective. Ultimately, as court dockets continue to overflow and attorneys are forced to deal with more and more small neighborhood disputes, many will test out the ADR process. The results should be beneficial to the parties involved and local communities as a whole.

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104. Cooley, *supra* note 45, at 268-69.

105. Weber, *supra* note 92, at 477.

APPENDIX

Figure 1