

Alternative Dispute Resolution: Court Employing Neutral Case Evaluation to Relieve Docket Pressure

By: Hon. Edwin W. Kelly and Molly Brown

Judicial Officers Participating in NCE

Retired Master Deborah Rein
Retired Master Alice Love
Judge Robert Foley
Retired Judge Pam Albee
Judge John Yazinski
Master Tom Cooper
Judge Julie Introcaso
Judge Michael Ryan
Judge John Pendleton
Judge Charles Greenhalgh
Judge David LeFrancois
Referee Philip Cross

Starting this fall, certain parties with active cases in the New Hampshire Family Division will be encouraged to participate in free neutral case evaluation (NCE) as part of an effort to alleviate impending docket pressures caused by a stream of judicial retirements expected in late 2016 and early 2017.

This new NCE program will enlist retired and sitting judges and marital masters to evaluate cases at no additional cost to parties, generally following First Appearance and an initial round of mediation, but prior to the first hearing. Courts in Manchester and Brentwood are expected to be hit hardest by the upcoming reduction in judicial staffing, and therefore parties in these locations are most likely to be asked to participate in NCEs, as well as other forms of alternative dispute resolution, as a part of this effort. However, cases in other courts may also be offered the opportunity to participate in the NCE program. The case selection process is currently based solely on internal review, but if any lawyer with a marital, parenting or brought-forward case scheduled in Manchester or Brentwood after Jan. 1, 2017 is interested in a referral to NCE, the lawyer(s) may contact the clerk of the appropriate court (by phone or in person) and file a motion for NCE with the court to make the request. Those requests will be given a high level of consideration for inclusion in NCE, depending on the availability of judicial officers to conduct sessions.

NCE sessions will usually last three hours. A second session may be offered when requested by the parties. Cases involving attorneys, as well as those with self-represented litigants, will be eligible to participate. In cases that do not involve lawyers, court case managers will assist parties in drafting settlement documents, including parenting plans and final decrees.

Neutral case evaluation is an evaluative process in which all parties to a case have the opportunity to present their claims, evidence and opinions on supporting law to each

other and a neutral third party. The neutral will then offer his or her evaluation of the case based on his or her experience. Any evaluation offered is nonbinding and will have no effect on the case should the matter not settle during the NCE. The process offered through this Family Division NCE program is not rigid, however, and the parties may and should use it to create a confidential space to have effective and efficient facilitated settlement discussions.

This process is also completely confidential, which means that nothing said or done during the NCE, including any documents prepared in preparation for the NCE, may be used later in the case for any reason.

The NCE may take place in a courtroom, a conference room, or judicial officer chambers, depending on the circumstances. No record of proceedings will be made. After the NCE has concluded, the judicial officer conducting the session will submit a report to the appropriate court stating whether the case settled (in full, or in part), or not, and no other information will be included. That judicial officer will then have nothing more to do with that case unless the parties request further ADR processes specifically with that person.

The benefits of this NCE process include offering the parties a unique opportunity to settle their case without prolonged and expensive litigation, facilitated by experienced and knowledgeable judicial officers, free of charge. NCE can also provide litigants and attorneys with a realistic idea of what the outcome of their cases may be should they move forward in litigation – a “reality check” of sorts. If the parties do not settle, the NCE may at least provide an opportunity for the clarification of issues or law, allowing for a shorter and smoother path toward resolution of the case.

Moreover, in this situation, NCEs offer parties to Family Division cases an opportunity to move forward with their cases in courts where hearing times are limited and judicial officer resources scarce. New Hampshire family law attorneys are encouraged to take advantage of the process and make the most of this opportunity.

Note: As of 2018, NCE is being offered in most Family Division locations.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____
Case Name: _____
Case Number: _____
(if known)

ASSIGNMENT to NEUTRAL CASE EVALUATION

1. Assignment relating to:
 Petition for Divorce/Legal Separation/Civil Union Dissolution Parenting Petition
 Modification Enforcement Other: _____
2. Issues
- | | |
|---|---|
| <input type="checkbox"/> Parenting Rights and Responsibilities:
<input type="checkbox"/> Decision-Making
<input type="checkbox"/> Residential | <input type="checkbox"/> Property Distribution:
<input type="checkbox"/> Real Estate
<input type="checkbox"/> Personal
<input type="checkbox"/> Pensions
<input type="checkbox"/> Business Interest |
| <input type="checkbox"/> Grounds | <input type="checkbox"/> Distribution of Debts |
| <input type="checkbox"/> Child Support | <input type="checkbox"/> Health Insurance |
| <input type="checkbox"/> Alimony | |
| <input type="checkbox"/> Tax Exemptions | |
| <input type="checkbox"/> Other: _____ | |
3. Have the parties engaged in mediation or other ADR? Yes No
4. Are Rule 1.25-A disclosures complete? Yes No. Disclosures must be complete by NCE.
5. Both parties consented to participate in NCE by:
 In-person affirmation in courtroom Motion/pleading
 Other: _____
6. (optional) Three requested dates, agreed to by parties, for an NCE session of three hours:
- i. _____
ii. _____
iii. _____

Recommended:

Date

Signature of Marital Master

Printed Name of Marital Master

So Ordered:

I hereby certify that I have read the recommendation(s) and agree that, to the extent the marital master/judicial referee/hearing officer has made factual findings, she/he has applied the correct legal standard to the facts determined by the marital master/judicial referee/hearing officer.

Date

Signature of Judge

Printed Name of Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____
Case Name: _____
Case Number: _____
(if known)

NEUTRAL CASE EVALUATION PARTICIPATION AGREEMENT

By participating in this process, I acknowledge that:

1. I agree to participate in this Neutral Case Evaluation ("NCE") process. I affirm my willingness to speak about the issues in dispute and to provide information as requested.
2. I understand that I am not required to settle my case during the process.
3. I understand that the Neutral Case Evaluator's ("Evaluator") role is to provide us with useful information and to help us consider options for agreements, without making decisions for us. I understand the Evaluator's evaluation and/or opinion is based on the Evaluator's experience as a judge or marital master. I also understand the evaluation and/or opinion is non-binding; I am not required to follow it.
4. I understand that the Evaluator is not providing me with legal advice or counseling services and, although it is not required, I understand that it is recommended that I consult an attorney prior to signing any settlement agreement.
5. I understand that I will receive approximately three (3) hours of NCE services. I also understand that I may receive more than three (3) hours of NCE services if so ordered by the court, or by agreement with the Neutral Case Evaluator.
6. I understand that, except as otherwise required by law or rule, everything said or written during the NCE process is confidential. The parties and the Evaluator will hold confidential the written and oral communications that occur in preparation for, during, or after the NCE process. I further understand the session will not be recorded.
7. I understand that I will not be able to subpoena the Evaluator as a witness in, or request the Evaluator's records for, any court, legal or administrative proceeding arising from the NCE process. I understand that the Evaluator will destroy any notes taken before or during the NCE process.
8. I acknowledge that if settlement is reached through the NCE process, any signed agreement generated by the process and approved by the court shall be legally binding and may be enforced.

Date

Petitioner

Attorney for Petitioner (if present)

Date

Respondent

Attorney for Respondent (if present)

Date

Neutral Case Evaluator

Neutral Case Evaluation Protocol

- I. *Purpose.* The Court offers Neutral Case Evaluation (NCE) as one process option for parties in a divorce or parenting case filed in the New Hampshire Circuit Court Family Division.
 - a. **Opinion.** NCE is an opportunity for parties to discuss issues in their case without the formality of trial procedures, identify areas of disagreement, generate options for how to resolve those disagreements, and hear the opinion of a Judge, Marital Master, Referee, or Retired Judge or Marital Master—the Neutral Case Evaluator (the Evaluator)—about how the Evaluator would decide those areas of disagreement at trial.
 - b. **Relation to mediation.** Whereas mediation leverages a mediator’s neutrality to assist parties in generating options for resolution, NCE leverages an Evaluator’s opinions to address legal issues and assist parties in generating options for resolution.
 - c. **Resources.** NCE is an opportunity to narrow issues for trial or resolve the case in entirety before trial. This saves the Court resources and time to focus on issues that are most appropriate for a Judge, Marital Master, or Referee¹ to hear in a trial setting. It also saves the parties resources and time.
- II. *Case Eligibility*
 - a. **Scope.** NCE is available for divorce or parenting cases filed in any New Hampshire Circuit Court Family Division. This includes reopened divorce or parenting cases.
 - b. **Post-mediation.** The parties shall have attended mediation, authorized by RSA 461-A:7 or RSA 458:15-c, prior to NCE, unless mediation is not appropriate in the case.
 - c. **Appropriate use.** NCE is available to discuss one, some, or all issues in a case. Issues appropriate for NCE include, but are not limited to: child support, parenting rights and responsibilities, alimony, and division of assets/debts.
 - d. **Inappropriate use.** The Court expects parties and counsel have attempted settlement through direct communication prior to NCE, and that NCE is requested to further assist with settlement. NCE is not appropriate for a party who has not begun considering what s/he wants. It is also not appropriate for an attorney who has not conducted initial discussions with the attorney’s client or with the other party. NCE is not a mini-trial, nor should it be used as a fast-track to a Judge. The Court will monitor use of NCE and, if it is being used inappropriately, will consider modifications to its use.
- III. *The Evaluator*
 - a. **Judge, Marital Master, or Referee.** The Evaluator shall be a Judge, Marital Master, Referee, or Retired Judge or Marital Master from the New Hampshire Judicial Branch. The Evaluator shall be a member in good standing with the New Hampshire Bar Association.
 - b. **Training.** The Evaluator shall have received NCE-specific training from the New Hampshire Judicial Branch.
 - c. **Relation to Hearing Judge.** The Evaluator shall not have overseen substantive hearings, ruled on substantive motions, and/or issued substantive orders related to the case.
 - d. **Ruling on motions or making orders.** The Evaluator shall not rule on any motions nor make any orders related to a case for which the Evaluator will be, is, or has been an Evaluator. An exception may be made for non-substantive uncontested motions.
- IV. *Assignment*
 - a. **Request.** Parties may request assignment to NCE at any time after mediation has been completed, or, if mediation is not appropriate, at any time after filing. The Hearing Judge retains discretion to make the assignment.

¹ Hereinafter referred to as “Hearing Judge.”

- b. **Court assignment.** The Hearing Judge may assign appropriate cases to NCE. When evaluating appropriateness, the Hearing Judge considers the case eligibility criteria and any other relevant information.
- c. **Consent.** Regardless of method of assignment, both parties must consent to participate in NCE prior to the case being assigned to NCE. Consent may be in writing or in person at a hearing.
- d. **Location.** The NCE session shall be held at a New Hampshire Judicial Branch Court.
- e. **Time allotted.** Parties may request a time allotment. Due to the Court's schedule, that time allotment may or may not be available. The Courts' Notice of Neutral Case Evaluation shall include the time allotted for NCE.
- f. **Impact on case.** Assignment to NCE does not impact the right to a trial in the future. Assignment does not bar the filing of additional motions. The parties' choices whether to participate in NCE are not given weight in the case.

V. *Pre-NCE Communication*

- a. **Telephonic contact.** The Evaluator may make telephonic and/or electronic contact with parties prior to NCE. If the Evaluator makes contact with one party, the Evaluator shall make every effort to make contact with the other party.
- b. **Compliance with Rule 1.25(a).** Prior to the NCE session, the parties shall either exchange documents as required by Rule 1.25(a) or waive the requirement in writing.
- c. **Pre-NCE briefs.** The Evaluator may require parties to submit written communication to the Evaluator prior to the NCE. The Evaluator will have read the case file in advance.

VI. *The NCE Session*

- a. **Failure to appear.** If a party or parties fail to appear, except for good cause and at the discretion of the Evaluator, the case shall be scheduled for the next event.
- b. **Caucus.** The Evaluator may choose to meet with a party individually, outside the presence of the other party. Prior to such meeting, the Evaluator should discuss with both parties any confidentiality afforded such meetings. If the Evaluator meets with one party individually, the Evaluator should meet with the other party individually.
- c. **Additional persons.** If a party wishes to bring additional persons, including counsel, to the NCE, the party must alert the Evaluator and the other party prior to the NCE session.
- d. **Agreement.**
 - i. Full agreement. If the parties come to agreement on all essential issues, the agreement shall be in writing and signed by the parties. The signed agreement becomes an order when it is approved by the Hearing Judge or other appropriate judicial officer. The parties or the Evaluator may draft the agreement. If the Evaluator drafts the agreement, the Evaluator shall read the agreement back to the parties to ensure the accuracy of the agreement prior to the parties signing the agreement.
 - ii. Partial agreement. Parties may come to agreement on any matters at issue, even if the agreement does not resolve all issues in the case. This includes coming to agreement on the next event in the case. The agreement shall be in writing and signed by the parties. The signed agreement becomes an order when it is approved by the Hearing Judge or other appropriate judicial officer.
 - iii. Legal Review. The Evaluator shall encourage all parties to seek legal review of the agreement prior to signing it. If a party or parties wish to seek legal review, the Evaluator shall request the parties alert the Court as to the status of the agreement no more than 30 days after the NCE session.
- e. **Additional sessions.** If both parties agree that further NCE would be beneficial, the parties may request an additional session. The Evaluator retains discretion to hold an additional session.

- f. **No agreement.** If the parties do not come to agreement, the case shall be scheduled for the next event, if not scheduled already. The Evaluator shall complete the ADR Report indicating, "Case did not settle; court to schedule next hearing," without further comment.

VII. *Post-NCE Communication*

- a. **Approval of agreements.** If a written agreement is made, the agreement shall be returned to the Hearing Judge. The Hearing Judge may review and approve or reject the agreement. The Hearing Judge may not modify the agreement without the consent of both parties.
- b. **Judicial communication.** An Evaluator shall not communicate about the NCE with the Hearing Judge.

VIII. *Nature of Proceedings*

- a. **Non-binding evaluation.** No evaluation, opinion, or statement made during the NCE process is binding upon the parties.
- b. **Inadmissible communication.** No communication—oral, written, or otherwise non-verbal—made by the Evaluator or either party in preparation for or during NCE may be disclosed at a subsequent court proceeding. The exceptions are:
 - i. If abuse or neglect of a child is disclosed in the NCE, then any person in the NCE is required to report it to the appropriate authorities;
 - ii. If a party is alleged to have made a material misstatement of fact in the NCE, which would have constituted perjury if made under oath;
 - iii. If an attorney engages in a violation of the New Hampshire Rules of Professional Conduct; or
 - iv. If the Evaluator has received information about a felony, suicide, or misdemeanor that is about to be committed.
- c. **Not shared with Hearing Judge.** No communication—oral, written, or otherwise non-verbal—made in NCE may be shared with the Hearing Judge. This includes impressions of the Evaluator as to the likelihood of settlement, issues still to be resolved, or reasonableness of the parties.
- d. **Subpoenas.** Per the Neutral Case Evaluation Participation Agreement, the Evaluator may not be subpoenaed by any court of competent jurisdiction in this state for any subsequent court proceeding of the case in which the Evaluator served, including any proceeding if the case is reopened.
- e. **Immunity.** Per RSA 490-E:5, no mediator, arbitrator, or other neutral party involved in dispute resolution under contract with the New Hampshire Judicial Branch shall be held liable for civil damages for any aspect of Judicial Branch dispute resolution processes, unless such person acted willfully.

For Publication in the Bar News:

Trust Docket Neutral Case Evaluation Program To Begin In April 2018

By: Hon. David D. King, Beth Kissinger, & Heather Scheiwe Kulp

Following the success of the Neutral Case Evaluation (NCE) Program initiated in the Family Division as a pilot program in 2016, and to be instituted statewide in March, the Circuit Court Probate Division is pleased to announce that it will begin its own NCE Program for cases transferred to the Complex Trust Docket beginning in April 2018.

NCE is a confidential dispute resolution process offered at no cost to the parties to facilitate full or partial resolution of their disputes. It is an evaluative process in which all parties to the case have an opportunity to present issues important to them, documents or other material in support of their perspective, and substantive applicable law to a neutral third-party Evaluator, who is a judge or referee, sitting or retired. After each party talks about their side's views, the Evaluator offers a non-binding opinion on the possible outcome should the case proceed to trial. Parties thus have an opportunity to receive a neutral evaluation of the strengths and weaknesses of their case pretrial. This evaluation may assist parties in reaching a settlement of their disputes without the cost of trial. The NCE process thus offers parties a valuable opportunity to resolve a matter or narrow the issues for trial without prolonged or expensive litigation, with the assistance of an experienced judicial officer who can provide a realistic assessment of the case. At the very least, the Evaluator can clarify the law and provide insight into the likely outcome at trial, giving parties a sense of the strengths, weaknesses, and risks in their case.

The Trust Docket NCE program is tailored to the special challenges that complex trust and estate cases present for parties and the Court. Trust Docket matters often involve novel or complex issues of law, multiple estate planning documents, and parties with entrenched and competing interests that, unless resolved by alternative dispute

resolution, will likely necessitate multiple days of trial. Trust Docket disputes are often expensive and emotionally taxing for the parties.

Trust Docket cases currently are assigned to either Presiding Judge David D. King or Judicial Referee (and former Presiding Judge of the Trust Docket) Gary R. Cassavechia. In Trust Docket NCE, either Judge King or Judge Cassavechia will be appointed as the neutral Evaluator of matters that have not been assigned to them. They will conduct a confidential half-day, or longer if necessary, NCE session and offer an opinion on the likely outcome based upon his knowledge of the case and underlying law. Parties and counsel should expect a frank evaluation of the case from jurists with decades of experience in probate matters.

The NCE will take place in a courtroom or court conference room, however, no recordings will be made. Parties will have an opportunity to engage further in settlement discussions following the evaluation. If an agreement is reached, the parties will submit that agreement to the Presiding Judge for review and, if found acceptable, approval.

After the NCE has concluded, the Evaluator will submit a report to the Presiding Judge stating that NCE was completed, the party-participants, and whether the case has settled (in full or in part), or will proceed to trial. No other information will be included in the NCE report, to ensure the confidentiality of settlement discussions. The Evaluator will then have no other contact with the case, unless the parties request, and the Evaluator agrees to preside over, an additional ADR session with that Evaluator. Should the NCE not result in settlement, the matter will be scheduled for and proceed to trial as is customary in the Trust Docket.

All matters transferred to the Trust Docket will be eligible for NCE. For new matters, the Presiding Judge will discuss NCE, as one of the ADR options available to parties, at the initial status/structuring conference. Counsel and parties in existing Trust Docket matters will have the opportunity to request NCE, by motion filed with the Court, beginning in April. Usually, only parties consenting to the process will be offered an

opportunity to engage in NCE, however, in Trust Docket NCE, as distinct from divorce/parenting NCE, the Presiding Judge will have the authority to order the parties into NCE if he determines that they would benefit from a realistic evaluation of the case prior to proceeding to trial. Trust Docket staff will assist with scheduling the NCE session.

The Evaluator has discretion to set up a telephonic conference and/or request information in advance and Trust Docket staff will reach out to you if the Evaluator decides that this is necessary. In the normal course, parties will not be asked to prepare substantial briefs or exhibits for NCE, as it is not intended to be a mini-trial, an arbitration, or an evidentiary hearing, but is instead a facilitated negotiation between parties. However, in some cases involving novel questions of probate law, parties will be asked to prepare memoranda outlining their view of the applicable law and facts of the case for review by the Evaluator. In other instances, the Presiding Judge may suggest that the parties, prior to NCE, review and brief for the Evaluator certain issues of law that may impact the path or outcome of the case that may not be readily apparent to the parties at the initial status/structuring conference.

The Probate Division and Office of Mediation and Arbitration look forward to implementing NCE for the complex and challenging matters in the Trust Docket. Additional information and forms will be made available on the Probate Division website prior to implementation of the program in April.