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Aller au sommaire du numéro

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Résumé de l'article

Le droit de la famille n'est qu'un morceau de casse-tête lorsque les couples vivant la séparation ou le divorce tentent de gérer leurs conflits et de régler les problèmes concrets qui en résultent. Le divorce est un processus multidimensionnel et non un événement ponctuel. Les conséquences de la rupture matrimoniale peuvent nécessiter, sur le plan émotif, un traitement thérapeutique prolongé tandis que les questions économiques et de garde doivent être réglées rapidement. On suppose que les conjoints vivant une rupture n'ont pas le choix que de résoudre leurs conflits devant les tribunaux alors que moins de quatre pour cent des divorces vont à procès. En fait, les coûts des litiges sont élevés autant sur le plan émotif que financier et c'est pourquoi ces disputes sont souvent réglées à l'aide de la négociation par l'intermédiaire des avocats. Cependant, l'inflexibilité et l'attitude de « gagner à tout prix » doivent être évitées afin que la négociation fournisse, à bon marché, les résultats désirés par les familles. La « Principled negotiation » telle qu'adoptée par Roger Fisher, William Ury et Bruce Patton, peut générer des résultats optimaux pour tous les intéressés, même les enfants. C'est pourquoi la médiation ou la méthode par laquelle les familles ont recours à un tiers indépendant pour les aider à arriver à un consensus, connaît actuellement un essor. Dans ce cas, le médiateur contrôle le processus et la famille assure la résolution matérielle du conflit. Il ne s'agit donc de rien de plus qu'une négociation structurée. Si par contre la médiation n'aboutit pas à une entente finale, les parties peuvent avoir recours à l'arbitrage. Dans ce dernier cas, le tiers a le pouvoir de décider des droits et obligations de toutes les parties au litige. De plus, il est possible de combiner les deux méthodes soit, la médiation et l'arbitrage afin d'assurer la célérité des procédés et une résolution finale du conflit. Toutes ces méthodes sont complémentaires aux procédures judiciaires traditionnelles et devraient être considérées par les familles faisant face au séisme cataclysmique qu'est la rupture matrimoniale.

Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options

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ABSTRACT

Family law is only one piece of the puzzle as separating and divorcing couples attempt to manage the conflict and deal with the practical problems arising on marriage breakdown. Divorce is a process, not an event. It is multi-faceted. The emotional dynamics of marriage breakdown may require a time consuming therapeutic response but parenting and economic arrangements must be resolved expeditiously. There is a tendency to assume that spouses who are locked in conflict will find themselves in court. In reality, fewer than four per cent of divorces proceed to trial. The costs of litigation are far too high, both financially and emotionally. Most disputes are resolved by negotiation, often with the

RÉSUMÉ

Le droit de la famille n'est qu'un morceau de casse-tête lorsque les couples vivant la séparation ou le divorce tentent de gérer leurs conflits et de régler les problèmes concrets qui en résultent. Le divorce est un processus multidimensionnel et non un événement ponctuel. Les conséquences de la rupture matrimoniale peuvent nécessiter, sur le plan émotif, un traitement thérapeutique prolongé tandis que les questions économiques et de garde doivent être réglées rapidement. On suppose que les conjoints vivant une rupture n'ont pas le choix que de résoudre leurs conflits devant les tribunaux alors que moins de quatre pour cent des divorces vont à procès. En fait, les coûts des litiges sont élevés autant sur le plan

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assistance of lawyers. If negotiations are to bear fruit at a manageable cost to family members, hard bargaining that reflects "a winner take all" mentality must be avoided; principled negotiation, as espoused by Roger Fisher, William Ury and Bruce Patton in Getting To Yes,[1] *can generate optimal results for all interested parties, including the children. Recent years have witnessed the growth of mediation, whereby a neutral third party assists family members in searching for consensus on matters in dispute. The mediator controls the process but the family members control the substantive outcome of their deliberations. Mediation is nothing more than structured negotiation where a third party facilitates resolution of the dispute. If a final settlement cannot be reached, one possible option is recourse to private arbitration in which a third party is given the authority to determine the respective rights and obligations of the spouses and their children. It is possible to combine the aforementioned*

émotif que financier et c'est pourquoi ces disputes sont souvent réglées à l'aide de la négociation par l'intermédiaire des avocats. Cependant, l'inflexibilité et l'attitude de « gagner à tout prix » doivent être évitées afin que la négociation fournisse, à bon marché, les résultats désirés par les familles. La « Principled negotiation » telle qu'adoptée par Roger Fisher, William Ury et Bruce Patton, peut générer des résultats optimaux pour tous les intéressés, même les enfants. C'est pourquoi la médiation ou la méthode par laquelle les familles ont recours à un tiers indépendant pour les aider à arriver à un consensus, connaît actuellement un essor. Dans ce cas, le médiateur contrôle le processus et la famille assure la résolution matérielle du conflit. Il ne s'agit donc de rien de plus qu'une négociation structurée. Si par contre la médiation n'aboutit pas à une entente finale, les parties peuvent avoir recours à l'arbitrage. Dans ce dernier cas, le tiers a le pouvoir de décider des droits et obligations de toutes les

1. R. FISHER, W. URY, B. PATTON, *Getting To Yes*, New York, Penguin Books, 2d edition, 1991.

processes for the purpose of reaching a complete settlement of matters in dispute. These processes are complementary to the judicial process and should be closely examined by all families faced by the cataclysmic disruption generated by a failed marriage.

parties au litige. De plus, il est possible de combiner les deux méthodes soit, la médiation et l'arbitrage afin d'assurer la célérité des procédés et une résolution finale du conflit. Toutes ces méthodes sont complémentaires aux procédures judiciaires traditionnelles et devraient être considérées par les familles faisant face au séisme cataclysmique qu'est la rupture matrimoniale.

TABLE OF CONTENTS

I. Recent Trends in Family Dispute Resolution

Many lawyers and judges have joined their critics by acknowledging the limitations of the legal system in dealing with family conflict and dispute resolution between separating or divorced spouses. Marriage breakdown often provokes a "fight or flight" response. Some spouses use the court room as a battleground. Others take the law into their own hands, for example, by disappearing with the children or by draining the bank account. Then, there are those who give up and fail to protect their own legitimate interests. Fight or flight responses are inappropriate. Before attempting to resolve the economic and parenting consequences of separation and divorce, spouses should address the emotional dynamics of the breakdown of their relationship. This may require counselling or therapy.

A new type of family law practitioner is slowly emerging in Canada. Following developments that have occurred in the United States, some Canadian family law practitioners are beginning to opt into so-called Collaborative Family Law. This approach differs from the traditional practice of family law in that its practitioners focus on settlement to the exclu-

sion of litigation. Written agreements are executed to provide full disclosure and to waive discovery and recourse to litigation for a stipulated period of time. During this period, negotiations are undertaken by the clients and their lawyers in an effort to achieve a settlement. If no settlement is reached, the lawyers withdraw from the case and cannot participate in subsequent litigation. Opportunities exist for made-to-measure individualized Collaborative Family Law Participation Agreements that can reflect the specific interests of the spouses and children.

Statutory provisions, regulations and rules of court governing such matters as financial disclosure, case management, pre-trials, mediation, independent expert assessments, and formal offers to settle, manifest the realization that litigation must be regarded as a last resort in the resolution of family disputes. It is now mandatory for litigating spouses to file financial and property statements to provide data that will expedite the adjudication of support and property disputes. In contested custody disputes, independent expert assessments may be ordered by the court to determine the needs of the children and the respective abilities of the parents to accommodate those needs. It is only a matter of time before parenting plans become mandatory in contested custody proceedings. Diverse pre-trial processes are now in place to help reduce or eliminate contentious issues. The discretionary jurisdiction of the court over costs is being exercised to promote the consensual resolution of issues. The consolidation of disputed issues in a single court proceeding has been facilitated by statutory changes and by amendments to provincial rules of court. These and other procedural changes have proved their worth, but the legal system has remained adversarial. Separating and divorcing parents are legally perceived as being in conflict with each other. "Fighting it out" is still the legal norm. Significant progress has, nevertheless, been made. In several provinces and territories, parenting education for separating and divorce couples is readily available and voluntary recourse to mediation is encouraged. In some urban centres, Unified Family Courts have been established with a comprehensive jurisdiction over family law matters and access to support services that may

deflect the need for lengthy and costly litigation. However, there still remains considerable room for improvement in the development of alternative processes to litigation that will aid in the constructive resolution of family disputes. There is a desperate need for family law to focus much more on processes for dispute resolution. Sections 9 and 10 of the *Divorce Act*[2] pay lip service to the benefits of counselling, negotiation and mediation as processes for resolving family conflict and disputes over custody and support but these provisions do little to foster the use of these processes. More far reaching statutory provisions respecting mediation are found in some provincial statutes. Legal aid is sometimes available to meet the costs of mediation. Several provincial law societies have endorsed the practice of family mediation by legal practitioners. Although court-connected mediation services are not new to Canada in family dispute resolution, they are likely to play a more substantial role in the future as governments seek to reduce the cost of access to justice. Budgetary restraints will, of course, continue to limit the resources available to promote the consensual resolution of family disputes with the aid of court-connected services. Consequently, there will be a growing demand for private and community services. These are all signposts for the future.

II. The Crises of Marriage Breakdown

For most families, marriage breakdown provokes three crises : an emotional crisis; an economic crisis; and a parenting crisis. Both of the spouses and their children suffer severe emotional upheaval when the unity of the family disintegrates. Furthermore, few families encounter separation or divorce without suffering financial setbacks. The emotional and economic crises resulting from marriage breakdown are compounded by the co-parental divorce when there are dependent children. Bonding between children and their absent parent is inevitably threatened by marriage breakdown.

2. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

Constructive resolution of these three crisis requires the passage of time and appropriate intervention by professionals who are consulted by the family members. The dynamics of marriage breakdown, which are multi-faceted, cannot be addressed in isolation. In the search for appropriate processes to deal with breakdown, divorcing couples must not lose control over their own lives. Judicial decrees and expert assessments that exclude the family members from decision making are insufficient. Omniscience is not the prerogative of any profession and the family's right to self-determination should not be lightly ignored.

III. THE EMOTIONAL DIVORCE

When marriage breakdown occurs, a grieving process is experienced by each of the spouses and their children. This grieving process or "emotional divorce" passes through various stages, including denial, hostility and depression, to the ultimate acceptance of the death of the marriage. Working through the spousal emotional divorce rarely takes less than two years. In the meantime, permanent and legally binding decisions are often made to regulate the economic and parenting consequences of the marriage breakdown. Separated spouses, lawyers, courts, and mediators must become more aware of the risk of premature settlements negotiated at a time when one or both of the spouses are undergoing the emotional trauma of marriage breakdown. Indeed, when either spouse is going through severe emotional turmoil, a cooling-off period would be desirable during which time any negotiated settlement should focus on the short term, rather than the long term, needs and concerns of the spouses and their children. Spouses, lawyers and mediators should assess the potential for temporary agreements being only the first stage in the resolution of the economic and parenting consequences of the marriage breakdown.

Although divorce is rarely painless, especially when children are involved, the trauma of marriage breakdown can be eased by therapy, counselling and by access to informational and educational programs. In some urban centres, divorcing parents are required to attend programs that exa-

mine the impact of their conduct on the children and offer advice to parents that can reduce harmful conduct, such as using children as weapons or pawns in the spousal conflict, fighting over the children, criticizing the other spouse in the presence of the children, or competing for the children's affection. Time may also be spent in dealing with practical matters such as household budgets, reaching fair child support arrangements and providing guidelines or structures for parenting arrangements. Separate courses are sometimes provided for the children of divorcing parents that are designed to help the children deal with their own feelings of loss, guilt, fear and grief.

IV. Marriage and Family Counselling

Counselling is readily available to families in crisis who reside in urban centres. Professionals in private practice who have expertise in social work, psychology or psychiatry, offer marriage, family and individual counselling on a fee paying basis. Community agencies may provide counselling services free of charge or assess a fee based on a sliding scale to reflect the ability to pay.

In previous generations, marriage and family counselling focused on reconciliation. A couple contemplating divorce was urged to reconcile. Today, reconciliation is regarded as only one option. Marriage and family counselling is increasingly directed towards helping families understand how they will be affected by separation or divorce and how they can deal with the emotional, economic and parenting consequences of marriage breakdown.

Marriage and family counselling is regarded as therapeutic in nature, even if it falls short of providing a sustained program of family therapy. The day-to-day consequences of marriage breakdown are important aspects of family counselling. Family members may be referred to specialized community services, such as safe havens for battered women, alcohol and drug addiction treatment centres, vocational retraining programs, social assistance agencies and housing services. In recent years, community-based Family Service Agencies have provided mediation services to deal with parenting disputes

between separated and divorced spouses. They rarely mediate disputes concerning property or spousal support.

V. NEGOTIATION

Less than four percent of divorces involve a trial of contested issues in open court. Divorcing spouses usually settle their disputes by negotiation, often with the benefit of legal representation. Couples caught up in the emotional dynamics of marriage breakdown have difficulty communicating with each other. Their emotions cloud their judgment. One or both may not have worked through the emotional divorce. The interplay between the emotional dynamics of marriage breakdown and regulation of the economic consequences of marriage breakdown may be demonstrated by the following examples. A needy spouse who makes no claim for spousal support may be manifesting a hope for reconciliation or a state of depression. A guilty spouse may seek to expiate guilt by asking for too little or by giving too much. A hostile spouse, who is seeking revenge for rejection, may exact too heavy a price, even at the risk of triggering acrimonious negotiations or protracted litigation. These are all inappropriate responses to dealing with the practical consequences of marriage breakdown. The object of any negotiation is to reach a reasonable settlement that both spouses can live with and that reflects the interests of any children.

Equitable and workable settlements in the emotionally charged atmosphere of marriage breakdown or divorce often necessitate the intervention of lawyers or other third parties, such as mediators, who can bring objectivity to the bargaining table.

A. THE IMPORTANCE OF NEGOTIATION

Negotiation is the most effective way of resolving disputes. It leaves the decision-making authority with the family members. It is cost-efficient and time-saving when compared to other means of dispute resolution. Good negotiation skills are a prerequisite to the constructive resolution of family disputes.

B. NEGOTIATION TECHNIQUES

There are three basic approaches to negotiation : (i) hard bargaining; (ii) soft bargaining; and (iii) principled negotiation. These approaches are analysed by Roger Fisher, William Ury and Bruce Patton in their bestselling book, *Getting to Yes.*[3] At the risk of over simplification, the following summary may provide some insight.

Hard bargaining reflects a competitive or adversarial approach to negotiation. The hard bargainer takes a position and is difficult to shift from that position. He or she makes concessions reluctantly but demands liberal concessions from the other side. Hard bargaining does not necessarily involve unethical or improper conduct but does imply that the dispute involves a contest of wills which the hard bargainer is striving to win.

Soft bargaining signifies an excessive degree of compliance and the avoidance of confrontation. Soft bargainers make too many concessions without demanding a fair return. Soft bargainers are particularly vulnerable when negotiating with hard bargainers.

So-called principled negotiators, unlike hard and soft bargainers, strive to avoid positional bargaining. They perceive themselves as joint problem solvers. Fisher and Ury have identified the following five characteristics of principled negotiation :

1. Separate the people from the problem;
2. Focus on interests, not positions;
3. Generate options that will be advantageous to both parties;
4. Insist that the result be based on objective standards;
5. Know the best alternative to a negotiated agreement (BATNA).

Separating the people from the problem in family disputes signifies that the disputants must attack the problem, not each other. Negotiations must avoid the "blaming game". Allegations of blame lead to guilt and hostility, neither of which is helpful in the search for a reasonable settlement of

3. R. FISHER, W. URY, B. PATTON, *op. cit.*, note 1.

the economic and parenting consequences of marriage breakdown. Discussions should focus not on who was responsible for what happened but on how current problems are to be dealt with.

Fisher and Ury's insistence that negotiations focus on interests, not positions, implies that behind every demand there is a need, desire or concern. Interests may be material, such as money or property, or they may be psychological, such as the need for recognition or security. Focusing on interests can identify complementary and disparate interests of the disputants and provide opportunities for compromise or trade-offs that lead to agreement.

Generating options for mutual gain fosters successful negotiations. For example, it may be better for both the spouses and the children if the parents share responsibility for raising their children, rather than leaving the responsibility to one of the parents and relegating the other parent to the status of a passive bystander. Options that are advantageous to both sides increase the prospect of reaching a mutually acceptable solution.

The use of objective standards to evaluate possible solutions promotes reasonable settlements. Objective criteria relied on by family law practitioners include relevant statutory provisions, case law and, most recently, the *Federal Child Support Guidelines*.[4]

Knowing and keeping in mind the best alternative to a negotiated agreement enables disputants to accept reasonable settlements and reject unreasonable proposals.

The idea that principled negotiation will substitute win / lose solutions for the win / lose philosophy of adversarial bargaining is not without its critics. It may, nevertheless, prove attractive to separated and divorced spouses who can ill-afford to engage in hostile legal negotiations or protracted litigation. Even when the disputants are themselves hard or soft bargainers, lawyers and mediators can apply the aforementioned characteristics of principled negotiation to promote a fair and lasting settlement.

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4. *Federal Child Support Guidelines*, SOR/97-175, (1997) 131 *Can. Gaz.*, part II, 1031.

VI. MEDIATION

A. NATURE OF MEDIATION

The essence of mediation is that the family members are themselves responsible for determining the consequences of their divorce. Self-determination with the aid of an impartial third party is the cornerstone of mediation. The mediator must defuse family conflict to a level where the parties can communicate with each other. They can then look at their options and apply objective standards with a view to negotiating a reasonable settlement. Mediation is not to be confused with family therapy. Divorce mediation is a process that is aimed at facilitating the consensual resolution of the economic and parenting problems that result from marriage breakdown. It is a time-limited process that is intended to produce a formal settlement. Mediators are not discharging the functions of marriage counsellors or therapists. They deal with the consequences, not the causes, of marriage breakdown. First and foremost, mediation is a process by which people attempt to resolve their disputes by agreement. Important secondary goals include improving communication and reducing tension between the disputants.

A mediated agreement is usually reduced to writing and executed in accordance with established legal requirements. Many non-legally trained mediators prepare a memorandum of understanding that constitutes the basis for a formal legal contract to be drawn up by the lawyers for the disputants. This memorandum summarizes the issues on which consensus was reached by the disputants and may include an express provision stating that the memorandum is not legally binding on the parties until a formal contract has been executed.

B. APPROACHES TO MEDIATION

Mediation is not a monolithic process. Systems and processes vary, even though the goal of consensual resolution is constant. Mediators may be engaged in private practice. They may be connected with courts. They may work in community agencies.

Many mediators are social workers, psychologists or lawyers. Mediators without legal qualifications usually confine their practice to parenting disputes. A growing number of mediators have no direct link with the established professions and are self-made, and in some cases self-proclaimed. Successful mediation presupposes high standards of competence and integrity because of the control a mediator exercises over the process and because one or both of the clients are frequently disadvantaged by the trauma of marriage breakdown. The substantive dispute may belong to the parties but a successful outcome is dependent on the expertise of the mediator. Family members who look to private mediation as a means of dispute resolution must undertake careful inquiries to ensure that they have recourse to a competent and experienced mediator.

There are two schools of thought respecting the fundamental nature of the mediation process. Some mediators characterize the process as transformational. They contend that it is a process that empowers disputants to foster their personal growth on their way to resolving the particular disputes that brought them into mediation. Others regard the mediation process as being far less ambitious in scope. They believe that mediation focuses on the resolution of practical problems rather than on transforming the disputants who have recourse to the process. The difference between these two schools of thought may be one of degree, rather than kind. It is noteworthy, however, that court-connected mediation services often place a heavy emphasis on rights-based, rather than interest-based negotiation, and positive evaluation of these services is premised on the settlement rates achieved.

C. REASONS FOR MEDIATION

Common human responses to conflict are "fight or flight". Neither is the right response. Mediation provides an alternative when spouses or former spouses cannot negotiate directly with each other but wish to avoid the adversarial postures of the legal process. For many couples, mediation

offers greater opportunities for them to retain control over their own lives. Mediation can facilitate tailor-made solutions to individual problems. Family members are often intimidated by the formal complexity and adversarial nature of the legal process. Mediation is less threatening than the legal process and its self-determined agreements may prove more durable and adaptable than court-ordered settlements.

Successful mediation is much cheaper than protracted litigation. However, comparing the costs of successful mediation and litigation is misleading. Not all mediation attempts are successful. Furthermore, the vast majority of divorces involve the negotiation of settlements by lawyers. Very few divorces involve a trial. Assisted negotiation through the mediation process is not necessarily cheaper than assisted negotiation through the legal process.

In parenting disputes, mediation can establish a framework for future communication and an ongoing exchange of information and ideas respecting the upbringing of the children.

D. CIRCUMSTANCES IN WHICH MEDIATION IS INAPPROPRIATE

Mediation is not appropriate for everyone. In some cases, inequalities of bargaining power between the spouses may render mediation inappropriate. People with a "winner take all" mentality are not good candidates for mediation which requires an attitude of "give and take" and compromise. Some feminist commentators have suggested that mediation is always disadvantageous to women because of an inherent imbalance of power between the sexes. It is questionable whether legal processes, or any other processes, assure any greater protection to women in the absence of domestic violence. Many mediators contend that mediation is inappropriate when either of the parties is physically violent, addicted to alcohol or drugs, or cannot face the reality of the death of the marriage. Spouses falling within the third category may need and receive counselling or therapy as a prelude to participating in mediation.

E. ROLE OF MEDIATOR; NEUTRALITY OF MEDIATOR

Unlike the lawyer, whose role is to represent the interests of his or her client, mediators must preserve a neutral stance; they must also be perceived as non-partisan by the disputants. If a mediator is perceived as taking sides, his or her credibility is destroyed and the parties will lose confidence in the process. The term "neutral" does not mean a mediator must be passive. Mediators can take active roles to facilitate settlement and their training and personal value systems will clearly affect their overall approach to the mediation process. Intervention, though quite legitimate for such purposes as restructuring the lines of communication or identifying new avenues for exploration, must stop short of taking the decision-making authority away from the parties.

F. REDRESSING POWER IMBALANCES

Mediation can be an empowering process in so far as it fosters respect and cooperation but a successful outcome depends on active participation by both spouses and requires a relatively balanced capacity to negotiate. True equality in the balance of power may be impossible to achieve, but the mediator must prevent an abuse of power by either disputant. Mediators can use a variety of techniques to redress an imbalance of power between the parties. For example, if inequality of bargaining power stems from lack of knowledge, information can be provided. Unequal negotiating skills can sometimes be balanced by insightful intervention and restructuring by the mediator or by the allocation of joint assignments to the parties. Intimidating negotiation patterns can be interrupted and reframed in order to provide support to the disadvantaged party. However, when the imbalance of power is considered to be so great that the mediator cannot intervene without endangering his or her neutrality, the mediator should recommend other means of resolving the dispute.

G. SOME GROUND RULES FOR THE PRACTICE OF MEDIATION

1. Full Disclosure and Confidentiality

Mediation requires full disclosure of all relevant facts. For example, a frank exchange of information concerning income and assets is essential to the mediation of support and property disputes on marriage breakdown.

Mediators stress the advisability of predetermining what can or cannot be disclosed to third parties, including lawyers and the courts, during and following the mediation process. The parties may select "open" or "closed" mediation. Open mediation signifies that they waive their rights to confidentiality in any subsequent litigation. Closed mediation implies that confidentiality is guaranteed and that neither the parties nor the mediator will be permitted to give evidence in any subsequent litigation as to what transpired during mediation.

2. Involvement of Third Parties

There is a difference between using third parties, such as lawyers and accountants, for information purposes and involving third parties, such as children, cohabitants or in-laws, as active participants in the mediation process. At an early stage, it is important for the mediator and the disputants to define the direct or indirect involvement of third parties. These decisions partly depend on the preferences of the negotiating parties and partly on the approach taken by the mediator. For example, a "family systems" mediator may adopt an holistic approach that directly involves third parties, such as grandparents or "common law spouses". A lawyer/mediator may be more likely to see only the disputants.

H. MEDIATION STRATEGIES TO CIRCUMVENT OR REMOVE IMPEDIMENTS TO SETTLEMENTS

Mediators use diverse techniques to avoid or remove impediments to settlement.

1. Dealing with Anger and Hostility

One way for a mediator to defuse tension and also clarify feelings is to allow the disputants to let off steam before turning to substantive issues. This is what mediators refer to as "controlled venting". Another technique widely used by mediators to neutralize highly emotional outbursts, such as accusations, is to reframe or restate what was said in such a way as to focus on the issues — not the people.

Mediators can adopt a highly interventionist role when emotional outbreaks threaten the lines of communication. If a session becomes hostile and unproductive, the mediator may adjourn for a short time to allow tempers to cool. Alternatively, the mediator may adjourn the whole session to allow the intensity of feeling to abate. However, this last course of action can backfire and bring the entire mediation process to an abrupt end.

Hostilities occurring during parenting disputes can often be diverted if the mediator reframes issues so as to place emphasis on the child's need to preserve positive relationships with both parents and the disputants are made aware of the psychological damage that children may suffer as a consequence of continued friction. Many parents can be brought to reason by asking them to focus on their child's welfare, rather than their own personal desires.

When childless spouses become hostile in support and property disputes, the mediator may encounter more difficulty appealing to the better judgment of the spouses. Much greater emphasis may then be placed on the legal rights and obligations of the parties, the uncertainty inherent in the substantive law and the legal process, and the high costs of contested adversarial proceedings.

2. Resolving an Impasse

Deadlocks can usually be broken by broadening the terms of reference, by reframing an issue, by asking the disputants to explore options, or by the application of objective standards. The aim is to change adversarial perspectives into cooperative perspectives. With some disputants, it is useful to emphasize the emotional and financial cost of not resolving an impasse.

Many mediators stress the value of temporary agreements to preserve the status quo or to test available short-term or long-term options. Experimental arrangements can sometimes eliminate an impasse, for example, with respect to parenting arrangements.

Spacing the sessions and the strategic use of adjournments can be particularly effective to resolve an impasse caused by lack of information. Disputants may be assigned tasks of gathering or supplying additional information or seeking input from third parties. As a last resort, arbitration can be used to resolve an impasse. However, the better solution may be to seek an expert opinion on the matter. If legal norms are applicable, a written opinion can be sought from senior counsel when the facts are not in dispute. This obviates the expense, inconvenience or apprehension of a personal appearance by the disputants at an arbitration hearing. Information or an independent expert opinion may also be sought from accountants, appraisers and estate planners. The use of independent custody assessments prepared by psychologists or psychiatrists is more problematic. Assessments are intrusive, expensive and time consuming — they usually constitute an alternative, rather than an adjunct, to mediation. Counselling or therapy to complement the mediation process may, however, be helpful in eliminating emotional roadblocks to a mediated settlement.

3. Private Caucusing

At the very outset of the mediation process, the parties and the mediator should resolve whether private caucusing will be used. Private caucusing involves the mediator meeting with each disputant separately. Some mediators consider that private caucusing can reduce or eliminate logjams when either party is extremely sensitive or hostile. Other mediators are uncomfortable with private caucusing.

4. Restoring Trust and Respect

The mediator must foster cooperative solutions by re-establishing trust and respect between the disputants. In

order to establish a positive ambiance, mediators adopt a number of useful strategies, such as setting joint budgetary assignments, or encouraging trial parenting arrangements. The rationale is clear; joint tasks promote the search for mutually acceptable solutions and shift attention away from recriminations and fault finding. Mediators and disputants cannot expect to resolve chronic emotional problems, but more limited success may be within their grasp if they focus their attention on workable solutions to practical pressing problems.

5. Steps in Mediation Process

There are four basic steps in the mediation process, namely, a) setting the stage; b) defining the issues; c) processing the issues; and d) resolving the issues.

a) Setting the Stage

After the disputants meet with the mediator and exchange preliminary information concerning their needs and the qualifications, experience and fees of the mediator, the stage is set for the mediator to explain the process and the ground rules that will be applied. The mediator explains his or her approach to mediation, how the meetings will be conducted, and how issues will be dealt with. The mediator emphasizes that mediation is voluntary and may compare mediation to alternative methods of conflict resolution. Most mediators insist that the process be confidential so that the mediator cannot be called as a witness in any subsequent litigation between the parties. The mediator will explain his or her role as that of an impartial facilitator who assists the parties in their endeavours to resolve the problems with which they are faced. The mediator will impress on the parties that, while the mediator controls the process, the parties themselves control the substantive outcome of their dispute.

b) Defining the Issues

In divorce mediation, the substantive issues typically relate to one or more of the following matters: (i) property

sharing; (ii) spousal support; (iii) child support; and (iv) parenting arrangements ("custody" and "access"). The parties may have dramatically opposite views on all or any of these matters. At the outset, the areas of agreement and disagreement must be identified. The mediator will assist the parties in segregating their feelings from the substantive issues. Relationship problems may warrant counselling or therapy but mediation must focus on dealing with the economic and parenting consequences of the marriage breakdown. To quote the now familiar precept, separate the people from the problems. In assisting the parties to define issues, the mediator seeks to move them from positional bargaining to an identification of their interests.

c) Processing the Issues

Processing the issues involves an examination of options. The mediator will encourage the parties to "brainstorm", which signifies generating a wide variety of options without evaluating any of them. After the listing of options has been exhausted, the parties can evaluate their respective strengths and weaknesses. This presupposes effective communication between the parties. Mutual trust, self-confidence and the ability to exchange opinions without rancour may need to be re-established between the spouses by the mediator's use of techniques that can promote a climate for meaningful dialogue between the parties. A cooperative search for options that will maximize the advantages to both parties goes a long way towards providing the basis for a fair and reasonable settlement. Mutually advantageous options may be easier to discover when issues relating to the children are the focal point or an integral part of the mediation process. Even in property and support disputes, however, it is usually advantageous to both parties to avoid expensive and emotionally wearing litigation.

d) Resolving the Issues

Resolving the issues involves sifting through all the options until a comprehensive settlement is reached. Although

the parties may have temporarily resolved specific issues at different times in the mediation process, it is generally understood that such arrangements are tentative until such time as all issues have been resolved. At that point, the mediator often prepares a memorandum of understanding that can be subsequently converted into a formal legal contract.

The parties may find that they can agree on certain matters and not on others. In these circumstances, it is open to the parties to terminate the mediation process with a partial settlement.

I. PROFESSIONAL AND COMMUNITY RESPONSES TO MEDIATION

The future of family mediation will largely depend on its use by professional groups and by Canadian families in crisis. There is a public need for broadly based and ongoing sources of information, whether provided through the mass media, the schools, community agencies, or under professional auspices, such as the Church, Medicine and Law. The professions must themselves become educated.

Information is required to dispel the myths of mediation. Members of the legal community, who view their vested interests as being threatened by the emerging process of mediation, have to be reassured that the legal system is not undermined by mediation. Indeed, the legal system and mediation are complementary, rather than competing or contradictory, processes. Both seek to provide a solution to disputes. Each has its place. Neither is self-sufficient.

J. THE FUTURE OF FAMILY MEDIATION

Mediation, whether court-connected or private, has found a growing place in the resolution of family disputes during the last fifteen years. At first, divorce mediation in Canada was largely confined to parenting disputes. This was being done primarily by mediators with training in social work or psychology. On rare occasions, support and property disputes on marriage breakdown were mediated. In recent years, the mediator is just as likely to be a lawyer. The division of function, whereby non-lawyers mediate parenting disputes while

lawyers mediate the economics of divorce, is a division of convenience that is currently acceptable to most, but not all, mediators. In the long term, comprehensive or "total package" mediation will become commonplace.

A closer association must be established between lawyers and other professionals engaged in advising and assisting families in crisis. Universities must assume a greater responsibility for fostering interdisciplinary education and training by shifting away from the pigeon-holing of human problems into segregated professional disciplines. Ideally, the time will come when community centres, staffed by lawyers, doctors, psychologists, social workers and other professionals, as well as by volunteers, will provide a comprehensive approach to the resolution of the multi-faceted crises of marriage breakdown and divorce. In the meantime, the various professions and federal, provincial and municipal governmental agencies (including Departments as diverse as Communications, Education, Employment, Housing, Finance, Revenue Canada, Health and Welfare, Social Services, and Justice), which are directly or indirectly involved in the systemic management of the process of family breakdown, must recognize their own limitations and foster effective lines of communication in the search for holistic solutions to the emotional and socio-economic crises arising from separation and divorce.

VII. Arbitration

Mediation of family disputes leaves decision making to the parties. If they cannot resolve the issues, an independent arbitrator may be called upon to determine their respective rights and obligations. Traditionally, this function has been discharged by courts.

Private arbitration has displaced litigation as a means of resolving labour disputes. To a much lesser extent, arbitration has also been recognized as an effective means of resolving commercial disputes. The use of binding arbitration instead of litigation to resolve spousal disputes respecting property division, spousal and child support, and child custody and access on marriage breakdown or divorce is rare in Canada.

A. ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Private arbitration has the following potential *advantages* over litigation as a family dispute resolution process :

1. The parties are directly involved in the appointment of the arbitrator. An arbitrator can be selected having regard to the nature of the dispute and the arbitrator's qualifications and expertise. In litigation, the parties are not free to select a particular judge. Furthermore, the judge is not usually a specialist in family law and may have no interest in, or even an aversion to, adjudicating spousal or parental disputes;
2. Litigants are often intimidated by the formality and adversarial atmosphere of the court. An arbitration hearing can be as formal or informal as the parties wish;
3. Arbitrators make themselves available to suit the convenience of the disputants;
4. Arbitration can be procedurally less complex and much speedier than contested litigation;
5. Arbitrations are conducted in private; courtrooms are open to the public and the media;
6. Arbitration is more expeditious and, therefore, is usually cheaper than litigation, even though the disputants pay the arbitrator's fees;
7. The costs of arbitration are more predictable than those of litigation.

Some *disadvantages* of arbitration may be :

1. Arbitrators, unlike judges, may not be bound by substantive and procedural laws. The absence of "due process" could lead to arbitrary results;
2. Arbitrators may be inclined to split the difference on substantive matters in dispute, without sufficient regard to the merits of the case;
3. Some arbitrators are disinclined to order costs in favour of either party.

B. COURT-ANNEXED ARBITRATION

Some form of court-annexed arbitration might ultimately be endorsed in Canada as an alternative process for the resolution of family disputes. Court-annexed arbitration has

been introduced in several jurisdictions in the United States to cope with the flood of civil litigation. Court-annexed arbitration differs from private arbitration in several ways. Court-annexed arbitration is usually mandatory rather than voluntary and the arbitrator is assigned by the court and not chosen by the disputants. Most importantly, court-annexed arbitration is usually advisory, rather than binding. If the disputants accept the arbitration award, it is entered as a court judgment and is enforceable as such. If the arbitration award is rejected by either party, the issues go to trial and are adjudicated without reference being made to the arbitration award. Most court-annexed programs impose penalties on a disputant if the trial judgment affords no greater relief than that given under the arbitration award.

C. EVALUATION OF ARBITRATION

Arbitration is a rational alternative to litigation for separated and divorced spouses. They should be entitled to opt for binding private arbitration, with or without a right of appeal, instead of being compelled to resort to overcrowded trial courts. A residual discretionary jurisdiction should be vested in the courts, however, to override an arbitration award when the best interests of a child necessitate judicial intervention.

VIII. MED-ARB

Mediation and arbitration need not be exclusive of one another.[5] "Med-Arb" is a process that utilizes both approaches. Typically, a fixed time will be set aside for mediation, with the understanding that if no consensus is reached, the mediator will then act as an arbitrator who will give a final and binding decision. Knowing that unresolved issues will proceed to arbitration may help parties to reach a consensus in the final stages of the mediation process.

5. For complications that may arise from an agreement to pursue med-arb process, see *Duguay* v. *Thompson-Duguay*, [2000] *O.J.*, n° 1541 (Sup. Ct).

CONCLUDING OBSERVATIONS

This paper has focused on counselling, negotiation, mediation, arbitration and med-arb as processes that can be used as alternatives to, or in conjunction with, litigation as means of resolving the emotional, economic and parenting consequences of marriage breakdown. It does not canvass or even catalogue all of the processes that can be applied or adapted to family conflict management and dispute resolution. Nor does it recommend the rejection of legal processes in favour of other processes. Indeed, separated and divorced spouses will usually find it advantageous to avoid locking themselves into a single process in their attempts to resolve the multi-faceted problems generated by their marriage breakdown. A few examples may suffice to demonstrate when it is appropriate to utilize more than one process. Negotiations continue even after legal proceedings have been instituted. Indeed, the institution of legal proceedings may trigger an early negotiated settlement and, when matters proceed further, eve of trial settlements are common. Divorcing or divorced couples can use different processes to deal with different aspects of their marriage breakdown. Individual or family counselling and therapy may be appropriate as a prelude to mediation. Arbitration may be used to resolve an impasse that has been reached in mediation. Parenting mediation may co-exist with a motion to a court, perhaps on consent, to determine urgent matters relating to interim possession of the family home or the amount of spousal or child support.

Separated and divorced couples must be made aware of the diversity of processes available to foster family conflict management and dispute resolution. Only then can they examine their options in such a way as to reflect their respective interests and those of any children.

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