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Avoiding Court: Mediation, Arbitration and Collaboration as dispute-resolution techniques

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Almost everyone in a conflict that threatens to erupt into a full-scale court battle wants to settle. However, settlement is often impossible, unless both parties choose to be reasonable and make the necessary compromises. A settlement cannot be forced, just as a person cannot be forced to be reasonable and fair-minded.

When a couple separates, they experience many confusing emotions. A person who fears for future security may find it difficult to be what the other party regards as reasonable; a person who comes to mistrust the motives of a formerly trusted partner may find it difficult to be what the other party may consider fair. Confusing and strong emotions can stall the negotiation process to the point where one or both parties decide that litigation is the only answer.

Sometimes, one of the partners goes too far in pursuit of a settlement, and makes too many concessions to get the other spouse's signature on the agreement. Buying peace at any price is usually unwise because the conceding partner may later regret it. No matter what the motivation for an agreement, once it is signed the signatories will likely be held to it. They cannot expect to get a settlement reversed because of second thoughts, unless the agreement is completely unconscionable in its impact on one of the parties..

Since emotions can run high during what is fundamentally a business negotiation over economic matters, a couple may be wise to seek the assistance of specialists in resolving disputes after a marriage breakdown to help defuse the emotional context, and aid the spouses in arriving at a resolution. Experts can be lawyers, social workers, psychologists, psychiatrists, and occasionally accountants. Mental health professionals are particularly useful in resolving issues that relate to children, and their services are almost always preferable to court intervention in controversies over custody or access, except when compromise proves impossible. Family

lawyers manage financial issues best, with the assistance of accountants in complex cases.

MEDIATION: Mediation is a helpful, alternative means of resolving disputes when both parties are able to behave reasonably. The parties to mediation must be able to negotiate safely, voluntarily and competently in order to reach a fair agreement, and it is up to the mediator to ensure that they can. The couple usually meet with the mediator, and their lawyers are involved as the parties feel they need them, by private consultation outside the mediation meetings. The couple may feel empowered by a process that helps them to arrive at a resolution themselves, as long as the mediator can maintain an even balance and not let one side overpower the other. Power imbalances can occur in cases of physical or mental abuse; when one spouse wants to reconcile and the other does not; when one spouse is more wealthy, connected and educated; or when intimidation has occurred or is feared. Mediated settlements often end up more detailed and responsive to all the issues in the case than litigated settlements.

Mediation can be open or closed. If closed, everything said in mediation is confidential, and the mediator cannot prepare a report for the court. If open, everything said can be quoted by either party or the mediator, and if they cannot resolve matters themselves, the mediator can be asked to prepare a report and a recommended outcome. Open mediation, especially in custody/access disputes, is usually preferable because it avoids the parties and children going through the process all over again if the couple cannot settle the dispute themselves in mediation.

Varieties of open and closed mediation have evolved. For instance, the parties may agree that the mediator can file a report to the court without recommendations; that the mediator may report to the lawyers in confidence but not to the court; that a mediation team, including a psychologist, psychiatrist or social worker and a lawyer, may be able to deal with all the issues.

The professionals who assist couples to reach a settlement are not magicians. If a man or woman has always had trouble dealing with his or her spouse, chances are that the professionals will, too. If the couple were usually able to work things out together, then the open communication between them may facilitate the process.

Even if a couple choose mediation, it is wise for both spouses to have their own lawyer during the process, to advise them of their rights. The mediator and/or the couple should not draft the final

document without the services of a family law expert, to avoid potential pitfalls. During mediation, it is better to not give up any rights, such as possession of the home or ownership of property, until an agreement is signed with legal advice.

In some places, mediation is touted as so important a solution that it should be mandatory. In other places, it is strongly encouraged. But mediation is not always feasible. Spouses who have been bullied or dominated during the marriage may not be capable of holding their own in mediation, while rigid or abusive spouses may not be capable of the necessary flexibility and compromise. Cost may prove a barrier: paying for the services of a mediator as well as lawyers can add significantly to costs, particularly if the case is not ultimately settled.

ARBITRATION: If mediation is not possible, there is still another option to going to court - arbitration. Arbitrators, who are usually either psychologically or legally trained, or both, will impose a solution on the couple. Both parties must agree in advance to abide by the arbitrator's decision, but one of them may appeal that decision to a court, in the same way that a person can appeal a judge's decision. Arbitrators are paid by the spouses, however, whereas judges are paid by the government.

Most provinces have legislation allowing for arbitration of a wide variety of disputes, and these arbitration acts are also used to provide the rules for family law arbitrations. A controversy ignited recently in Ontario against the use of (Muslim) Sharia law to resolve family law disputes, on the basis that the result would be unfair to vulnerable women. The Ontario government appointed former Ontario Attorney-General Marion Boyd to review the issue and report. In her December 2004 report, she recommended that arbitration using religious law should continue to be an alternative dispute resolution option available in family and inheritance cases, as long as recommended safeguards are observed. The extensive list of recommended safeguards include permitting the courts to set aside the arbitration agreement if it is unconscionable or results in a party being on social assistance; if each party did not have independent legal advice, receive the statement of principles to be applied in a faith-based arbitration, and was advised first of Ontario law applicable to their situation. Proposed new regulations to require that the arbitrator provide written reasons for the decision, certify that they have screened the parties separately for domestic violence and are satisfied that they are signing the agreement voluntarily, and stipulate that arbitrators must keep files and report their decisions annually to the provincial government.

The Ontario government has not yet indicated whether or not it plans to implement the recommendation. The government would be wise to proceed cautiously, as the proposal makes inroads into the traditional separation of church and state and also because it permits vulnerable women to waive the right to receive independent legal advice.

COLLABORATIVE FAMILY LAW: Collaborative law is the newest method of family law dispute resolution, which uses lawyers but avoids court. It is mediation with a twist. Like mediation, spouses are directly involved in the negotiations, but unlike mediation, each has a lawyer at his or her side, acting as legal advisor, problem solver and advocate. Their goal is to achieve a settlement in a non-adversarial, amicable and principled way. The four-way settlement meeting is the structural focus, with both spouses and their lawyers present at all meetings. Letters back and forth are minimized.

Both lawyers must be trained collaborative lawyers, willing and able to work within its rules and principles. The parties sign an agreement at the outset that includes a commitment that they will not start or pursue litigation during the collaborative law process. To make this agreement effective, the lawyers who represent the parties in the collaborative process cannot be the ones who litigate for them if the negotiations break down. Each spouse must hire a new lawyer if he or she has to start court proceedings to resolve the case. As a result of this approach, everyone has a vested interest and a greater commitment to settling the case outside the adversarial rancour of the courts.

The participation agreement, which the parties and their lawyers are required to sign, includes rules of conduct *everyone* must follow– honesty, respectful communications, a commitment to act in good faith, and full financial disclosure. Parties are encouraged to set their own agendas and discuss issues with each other and both lawyers. Neutral professional experts (for example, mental health professionals for cases involving children, or accountants and valuators for financial issues) can also be added as consultants by mutual agreement. These experts then become part of the team. This inter-disciplinary approach is fast evolving as the standard when the case calls for it.

Collaborative law is *interest-based,* which means that the focus is on finding common ground to achieve a fair settlement. Before undertaking collaborative law, lawyers take specialized training in interest-based non-adversarial negotiation skills to add to their legal training.

Since 1999, seven local collaborative family law associations have been established in British Columbia, Alberta, Saskatchewan, Manitoba,

Ontario, Quebec and Nova Scotia, all of which have specific training qualifications for members.

Traditional mediation is usually interest-based, and has the partners negotiating directly with each other, normally with one mediator present who does not take sides and tries to facilitate a resolution. This means the parties do their own negotiating, and after achieving a tentative settlement, the parties each go to their own lawyer to get the agreement drafted and signed. If that is the first time they secured legal advice, one or both parties may get information and legal advice which may change their mind. There are risks in mediation: Without lawyers present, the more dominant spouse may benefit. Both collaborative law and mediation differ from traditional lawyer-based negotiations, in which the lawyers conduct the negotiations for the parties, who may or may not be in the room while the negotiations take place and may or may not have participated in the discussions.

If as the result of any of these processes, a settlement is reached, it can be incorporated into an agreement drafted by the lawyers and thereafter into a court order.

Collaborative lawyers consider the focus on the family's underlying and complicated interests to be a benefit of the collaborative process, and view traditional lawyers as often taking extreme positions which reflect a party's very "best day" at a trial. They suggest that traditional lawyers' methods rely on the threat of court and often lawyers are not able to settle until the parties are at the courthouse door after an expensive process that entrenches animosity.

The process to select is the one that suits the personalities of the parties. Some couples need the court process and a court-imposed decision, particularly if one of the parties is uncompromising or abusive or unwilling or unable to see that there is more than one side to the issues. However, even within the court structure in many jurisdictions, there is a built-in settlement-minded focus. For example, many Ontario courts require at least one preliminary "case conference" with a judge to try to settle as much of the case as possible before proceeding with any litigation.

If mediation and arbitration will not work, then litigation may be the only way to resolve the impasse. Sometimes, initiating litigation will encourage settlement; other times, it will not. Much depends on the personalities of the parties involved and the reputation and style of the lawyers. Litigation can be expensive, and the outcome is not guaranteed to satisfy the litigants. The adversarial process can be traumatic because ordinary people are not used to summarizing and justifying their lives and

their expenditures from a witness box. In the end, however, the courts are a safety valve, imposing a resolution on disputes that are otherwise deadlocked.