ALTERNATIVES TO LITIGATION IN FAMILY LAW[1]

Larry and Linda have been married for twelve years; regrettably they are now getting a divorce. They have two children and own their home. They both work, earning about the same income. They have approximately $200,000.00 equity in their home, which is their primary asset. Larry received an inheritance from his family, which enabled them to purchase the house. Larry wants to be fair but believes there should be some adjustment for this factor. Larry and Linda have both been to see lawyers and were told it could cost approximately $50,000.00 each to go to trial. They do not want to go to trial and are looking for other alternatives. What do you tell them?

With the advent of the internet, the public is becoming far more inquisitive and educated in matters involving their health, finances and the law. With regard to legal matters, couples who are divorcing are looking for a faster, more cooperative and less expensive way to resolve their disputes. Most people involved in a legal dispute do not want to go to court and are looking for a broader range of alternative dispute resolution (ADR) options. This is particularly true in the area of family law for couples like Larry and Linda.

The ***Family Law Act***, S.B.C. 2011, c.25 (the FLA) came into effect in British Columbia on March 18, 2013. The FLA represents significant changes to the practice of family law in BC. Pursuant to section 8 of the FLA, a lawyer must discuss with his/her client "the advisability of using various types of family dispute resolution to resolve the matter". The purpose of the FLA, set out in section 4, is to ensure that parties are informed and encouraged to use ADR options before making an application to court. ADR options include negotiation, mediation, arbitration, med-arb and collaborative law. This article will look at mediation, arbitration and med-arb. It is important to have an understanding of each of these ADR options, so you can properly explain them to your clients.

[1] This article is a brief summary of a paper prepared by Carol W. Hickman, Q.C. of Quay Law Centre and West Coast ADR Law Group, New Westminster, BC, as part of the Masters of Law program at Osgoode Hall Law School. The final paper will be completed April 15, 2014. To obtain a full copy of this paper or to ask questions, you may contact Ms. Hickman at cwh@quaylawcentre.com or carol@westcoastadr.com

Mediation

Mediation involves a neutral and impartial third party who acts as the mediator. The mediator works with the parties to facilitate communication and assist them in negotiating a resolution of their dispute. If the matter is resolved, the terms of the agreement reached are usually reduced to writing signed by both parties, creating an agreement that is binding and enforceable between the parties. The benefits of mediation are that the parties craft their own solution to their dispute and it is usually more affordable. The greatest criticism of mediation is that it does not guarantee that a final resolution will be achieved; because the mediator does not make a decision for the parties.

Various forms of mediation have existed for hundreds of years. Disputes were resolved by mediation prior to the existence of a formal court system. In the 1968 *Divorce Act*[2], mediation was encouraged in family law matters. The popularity of mediation has continued to grow in all areas of law, including family law.

Arbitration

Arbitration is a private form of adjudication and involves a neutral and impartial third party who acts as the arbitrator. It is a consensual process. The parties agree to retain the arbitrator to resolve their dispute. After a hearing, where each party gives evidence and makes submissions, the arbitrator makes a binding and enforceable decision. The benefits of arbitration are that it is a confidential and private process, and it is usually faster and more efficient than traditional litigation. One criticism of arbitration is that it is too adversarial and the parties lose control of the outcome.

[2] *Divorce Act,* S.C., 1968-1969, c.24.

Like mediation, arbitration has been in existence for hundreds of years and has been used to resolve a variety of disputes. In Canada, arbitration was formally recognized in legislation in 1986, primarily related to commercial disputes.[3] Arbitration subsequently expanded into other areas of law, including labour disputes. Arbitration of family law disputes has evolved very slowly. Prior to the FLA, arbitration of family law disputes was virtually non-existent. However, in other jurisdictions, including Ontario and Alberta, arbitration of family law disputes has grown in popularity, which is expected to extend to BC with the FLA.

Med-arb

Med-arb is also a consensual process; which is a hybrid of mediation and arbitration. The parties first try to mediate their dispute and if they are unsuccessful in resolving some or all of the issues, they move to arbitration. The arbitrator then makes a binding decision intended to resolve the entirety of the dispute. In most cases, a single neutral third party, med-arbiter, is retained to perform both the mediation and the arbitration. However, in some cases, the parties may choose two professionals, a separate mediator and arbitrator. In either case, the parties would agree to the process in advance and sign a Med-Arb Agreement.

Med-arb has also been used as a dispute resolution option for many years. The origins of med-arb in North America occurred during World War II, in approximately 1942, when President Roosevelt created the National Labour Board to mediate and arbitrate labour disputes.[4] Chief Justice Alan Gold is frequently credited with bringing med-arb to Canada, when it was used in the late '60s and '70s, to resolve labour disputes on the St. Laurence.[5] Since then med-arb has continued to grow in popularity, particularly in labour and commercial disputes. Med-arb was

[3] Dondy-Kaplan, P. and Bakht, N. "The Application of Religious Law in Family Law Arbitration Across Canada". Women's Legal Education and Action Fund, April 2006.
[4] Blakenship, J.T. "Med-Arb: A Template for adaptive ADR" Tennessee Bar Journal, November 2006.
[5] Telford, *supra* note 9.

expanded to family law matters in approximately 2000 and since then has grown quite quickly in popularity, primarily in large urban centers like Toronto, Ottawa and Calgary. As with arbitration, med-arb has not been used in family law matters in BC. However, it is expected to grow in popularity with the changes to the FLA.

Conclusion

The cost of litigation is increasing significantly. In 2011, the Chief Justice of Canada, Justice McLachlin cautioned that our legal system is becoming more and more inaccessible to the lower and middle class of society.[6] For couples like Larry and Linda, the cost of a trial is prohibitive and they are looking for alternatives for resolving their disputes. They may find mediation, arbitration or med/arb as a more cost effective, efficient and faster way to resolve their dispute. In addition, it will provide them with greater certainty and involvement in the process.

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[6] McKiernan, M. "Lawyers integral in making justice accessible: McLachlin", Law Times, February 20, 2011.