Law Society of Ontario | Barreau de l'Ontario

TAB 6

Family Law Refresher 2020

Choosing the Appropriate ADR Process (Chart)

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These charts summarize important points differentiating the various alternative dispute resolution (ADR) processes in order to choose the appropriate one for each client. They also includes examples from case law that have emerged in the past year.[1]

CHART 1: Particularities of Mediation, Arbitration and Mediation/Arbitration

	Mediation	**Arbitration**	**Mediation/Arbitration**
General purpose of the process	Mediation is appropriate when parties require a neutral third party to assist them in reaching a settlement.	Arbitration is appropriate when a mediation is unsuccessful but the couple does not want to resort to a court process.	As a secondary process, the couple can agree to arbitration in advance if the dispute is not resolved through mediation. OR As a primary process, parties can obtain an interim Award through arbitration instead of risking the failure of the mediation. They can then return to mediation.
Who retains decision making ability?	Parties still retain decision making ability in the sense that both have to agree before a deal is finalized. Mediation is voluntary and can be terminated by either party at any time.	Parties must cede decision making ability to arbitrator. Neither party can unilaterally withdraw from arbitration, although the parties can jointly agree to terminate or the arbitrator can withdraw.	Arbitrator can make a binding decision regarding a specific issue while the rest of the issues can be decided in mediation (or in court). Arbitrators' jurisdiction is limited to the issues agreed upon in the Arbitration Agreement unless parties consent or "acquiesce" (2019 ONCA 624, leave to appeal

[1] I thank Andrea Kim for her discussion points and Camille Slaght (University of Ottawa, JD Candidate 2021) for her research assistance.

	Mediation	Arbitration	Mediation/Arbitration
			to SCC refused 2020 CarswellOnt 457).
Relationship dynamics between the parties	Offers an alternative to court for parties who <u>can cooperate</u> and have productive conversations. Client should be confident in their ability to interact directly or indirectly with the other party and come to a settlement.	Offers an alternative to court for parties who <u>cannot cooperate</u> very well or have productive conversations. If there is a possibility of intimidation or power imbalances, arbitration or court may be more appropriate.	Offers an alternative to court for parties who want to increase their odds of settling outside of court by adding another layer of ADR in the agreement in case the mediation is not successful.
Dynamics between Mediator/Arbitrator & clients	<u>Evaluative mediation offers expertise</u> When parties require someone who can offer expertise in a specific area and break the tie. <u>Facilitative mediation offers guidance</u> When parties require someone to facilitate discussions that do not focus solely on extremes. Purely facilitative mediators do not provide opinions. <u>Transformative mediation offers opinions</u> When parties require a process that resembles counselling, and are willing to attempt to create change in their relationship.	<u>Arbitration provides a decision</u> When adversarial principles similar to court are required to navigate the relationship, but parties could benefit from more flexible evidentiary rules, affordable costs, and privacy. When parties require a timely resolution of an issue that may not meet the threshold for "urgency" in court.	<u>Med/Arb offers a chance of settlement while also providing closure</u> Parties are interested in having the same individual as mediator and arbitrator in order to save time and costs. This is a fit for a client who can tolerate ongoing feedback. OR Parties are interested in a different arbitrator in order to have a fresh start in the event mediation fails.

	Mediation	Arbitration	Mediation/Arbitration
Confidentiality	Open mediation Interpretation of "open" can vary depending on the mediator e.g. providing courts access to the topics discussed, assessment of behaviours, and/or other observations. Closed mediation: Information and discussions cannot be divulged in arbitration or in court. Can be helpful when parties want to be steered away from court-like behaviour and want to eliminate fear of conversations coming out and prejudicing them in court.	Proceedings are private and confidential except as needed for enforcement or implementation, on judicial review or appeal, or as required by law. Arbitration awards are not public.	Although settlement discussions during the mediation stage are "without prejudice", the parties can consent to information exchanged during the mediation to be used in the arbitration. Having the same individual act as both mediator and arbitrator is suitable if counsel are willing to allow evidence and other work from the mediation to be used in the arbitration.
Screening for power imbalances (domestic violence, mental health)	Screening by mediator.	Screening by third party (*not* the arbitrator).	Screening by third party OR Screening by mediator/arbitrator if they are the same person.
Potential effects on the family dynamic	Aims to reduce conflict and avoid hostility. Can make the transition easier for children by working on communication and co-parenting strategies, limiting exposure of conflict to children, and	Can add to hostility between parties as it is an adversarial process.	Can increase chances of resolution out of court.

	Mediation	Arbitration	Mediation/Arbitration
	encouraging parties to take accountability.		

CHART 2: When should ADR be considered, and which is the right process?

A. ADR, IN GENERAL

Appropriate	Inappropriate	Other comments
- Want some privacy or a more expeditious process with an out-of-court settlement. - Want a creative solution. - Do not wish to engage in a system that pre-supposes a combative, win or lose, system. - Offers an alternative to court for parties who can generally cooperate and have productive conversations even if those conversations are difficult. - The relationship dynamic itself, rather than the legal issues, is interfering with settlement. - People can choose the right person for the job e.g. the ADR professional may be chosen because that individual has a specific expertise in the area.	- Complete lack of cooperation, participation, attendance of one or both parties (Rodobolski v Rodobolski, 2019 ONCJ 546). - Attempting to delay matters. - Mental health interferes with capacity (Devaney v. Devaney, 2019 ONSC 1942). - If there are safety or domestic violence concerns then ADR may not be a safe venue from both a physical and emotional safety perspective. - There is also a concern from the perspective of the lawyer that the "settlement" may be involuntary or under duress where there is power imbalance.	- A process that is less adversarial may offer more protection to victims, provided there are other safeguards in place (e.g. with counsel, parties not residing under the same roof, etc.). - Mental health is not a total bar to ADR, only if it impacts capacity. An individual who signs an agreement while suffering from depression can still be bound to that agreement as long as they understood its implications when they signed it (O'Dacre v Cross, 2019 ONSC 2265). - In the absence of an agreement to arbitrate, the Court does not have jurisdiction to impose arbitration on the parties (Pierre v Pierre, 2019 ONSC 832).

B. MEDIATION

Appropriate	Inappropriate	Other comments
- Clients who want to have a discussion and have the ability to try to persuade the other before having to battle. - Where a referee is needed to break the tie between clients or between lawyers.	- Clients who are seeking a "right and wrong" approach or a "truth-finding" exercise. Mediation can involve "gives and trades" and not all aspects of the law are black and white. Litigation or mediation-arbitration may be more satisfying for a client focused on what is factual and legally "correct". - History of abuse, criminal behaviour, need for a restraining order (*GJB v DRK*, 2019 ONSC 2631). - One party suffers from mental health conditions likely to impede ability to attend mediations or causing mediation to be discontinued (*Devaney v Devaney*, 2019 ONSC 1942). - Charge of assault and order of no contact with other parent (*Rothschild v Rothschild*, 2019 ONSC 568). - High conflict, concerns about children's well-being (*T v D*, 2019 ONSC 644).	- With counsel mediation can help overcome many of the difficulties. Sometimes the lawyers require the mediator more than the clients. - It is important to consider the style of mediator or mediation that may be helpful. Facilitative mediation lends itself more to creative solutions. - Mediation is strongly encouraged these days. - Mediation can be considered for complex issues and should be considered as a potential remedy even prior to bringing a contempt motion (*Jackson v Jackson*, 2016 ONSC 3466).

C. MEDIATION-ARBITRATION

Appropriate	Inappropriate	Other comments
- The addition of Arbitration allows for closure and a more expeditious (and sometimes less expensive) process.	- It is important to note if parties are comfortable using the same person or a different person as mediator.	

D. PARENTING-COORDINATION

Appropriate	Inappropriate	Other comments
- High Conflict families. - If the circumstances require a more clinical process resembling social work. - If the parents require long-term guidance and coaching. - If the parties require ongoing negotiations for a period of time as opposed to a quick settlement. Parenting coordination contracts usually last 12 to 24 months. - The process is appropriate if there are children who should have a voice in the process (through direct meetings with the PC). - If parents are at an impasse over day-to-day issues. - It must be for enforcement and resolving disputes within a parenting plan, not for changing custody or the regular residential schedule. In fact, the PC does not have	- Allegations of abuse between parents, mistrust of each other, pattern of non-communication, history of verbal attacks, refusal to acknowledge other parent at access exchanges (*NS v RM*, 2019 ONSC 4215). - It is evident or very likely that parents' cooperation will not improve. - It would only provide another forum for the parties to enter into conflict. - It is not in the children's best interests (*NS v RM*). - If a parent seeks an order or wants to change the agreement, e.g. the regular schedule. - If the goal is to punish a client who will not respect a court order or separation agreement.	- Whether courts have jurisdiction to order PC is inconclusive (*NS v RM*). - Unless already set up well (e.g. with a clinical professional who is a separate individual from the PC), alienation cases are not suited well to a PC process.

jurisdiction to change custody or the regular schedule.		

E. COLLABORATIVE FAMILY LAW

Appropriate	Inappropriate	Other comments
- When parties want to create a binding agreement and are willing to collaborate and work as a team in order to find solutions. - When the client is somewhat concerned about the other party's interests and values, not only the legal model. - When parties want to avoid the adversarial and hostile nature of the litigation process. - When the client will not be upset if the collaborative lawyer is friendly with the other party's lawyer.	- When parties are unable to collaborate. - When clients seek traditional advocacy and want their lawyer to react and respond in threatening ways.	- In *Dowell v Hamper*, a British Columbia case, the psychologist who had recommended the collaborative family law process moved away. Subsequently, the father introduced an action. The failure of the collaborative process could be attributed in part to the sudden interruption in counselling that occurred (*Dowell v Hamper*, 2019 BCSC 1266). - If one party has already begun an action before entering into collaborative law process, it may be an indication that they are looking for a traditional adversarial process (*Fisher v Oates*, 2019 BCSC 2162).