

When is a Deal a Deal?

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Matrimonial Property Issues

Presented by:

Reneé Cochard QC

Cochard Johnson

Edmonton, Alberta

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I. INTRODUCTION

This paper will examine the enforceability of agreements which have been made in various family law situations. For those of us practicing in this area, we commonly see agreements being made in different ways through different methods. Often clients will come in with the impression that they have made an agreement with their spouse, only to find out that the agreement which they thought they had reached is unenforceable. This paper will look at agreements made in mediation, made through letters between counsel, at four-way meetings, and lastly at non-binding JDRs. I am hoping to provide some practical advice as to how to avoid litigation to enforce agreements.

II. AGREEMENTS MADE AT MEDIATION¹

Individuals who are experiencing relationship breakdowns are encouraged to try to avoid the litigation route. Mediation, since the 1980's has been promoted by mental health professionals, lawyers and judges as a method to avoid acrimonious litigation, which is seen to be destructive for all parties and particularly children. Further, in the current economic climate of cutbacks to Legal Aid and the justice system, mediation has become even more of a priority to the powers that be. Whether one agrees with this approach or not, the reality is that we live in a system where individuals involved in family law will probably be required, or at least strongly encouraged, to give mediation a try.

Mediation can take place at any time during the course of a family law file. Sometimes the parties will mediate before ever having seen a lawyer; other times mediation will occur after an action has been commenced, and at various stages of the litigation. With the requirement that an ADR process be attempted under Rule 4.16 of the Alberta Rules of Court, before setting a trial date under Rule 8.4(3)(a) mediation has become even more common. Mediation can be performed by a lawyer or a non-lawyer who is generally a mental health professional who, it is hoped, has had some training. Unfortunately, there is still a lack of standards and educational requirements necessary before a person can hold themselves out to be a mediator, which has been an on-going problem. Mediation processes also take various forms. Some mediators see themselves as strictly as facilitative and do not provide any legal information; other mediators are more evaluative and do provide legal information. Clients also vary. Some have seen lawyers before attending mediation and are quite familiar with their legal rights and others come to mediation with virtually no legal understanding. Some clients attend mediation solely for the purposes of the requirements of the rules or to look as if they are attempting to negotiate a

¹ Mediation has been defined in different ways, however, a good definition as set by the British Columbia Mediator Roster Society Standard of Conduct is "Mediation' means a non-binding process where an impartial and independent third party, with no decision-making power (a 'mediator') attempts to facilitate a mutually acceptable settlement between disputing parties. The B.C. Mediator Roster Society defines family mediation as including "mediation of issues about: reorganization of the family after separation or divorce, parenting, family support and property matters connected to separation or divorce, child protection, family business, family property or finances, family inheritance and estates, estates, responsibility for care of elderly parents, adoption, pre-nuptial issues and inter-family conflicts.