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52nd Annual Refresher: Family Law

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Process Options in Mediation/Arbitration: How Much Justice Do We Really Need?

Prepared for: Legal Education Society of Alberta
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PROCESS OPTIONS IN MEDIATION/ARBITRATION: HOW MUCH JUSTICE DO WE REALLY NEED?

INTRODUCTION

This paper and attached appendices are, as one might expect, not a treatise on the use of mediation and arbitration in family law. They are meant to be a quick reference for looking at process options and process design to help parties and their lawyers choose a process that best fits for them and their issues.

When I say parties that is because I have written in the expectation that some lawyers may send their clients a copy of this to help with a discussion about process.

Much more could be done, but it is hoped that this paper and materials give a useful starting point for discussions on this issue of process design.

For more on mediation/arbitration, like what it is, why it is a good idea, a summary of case law and practical tips related, etc., contact my assistant Nancy at nancy@calgaryfamilylawyers.com and ask her to send you a copy of my Super Conference paper titled "Med/Arb Secrets Exposed: The Ultimate Users Guide for Alberta Family Lawyers 2015." It has a detailed table of contents and summaries and handouts that allow one to quickly find and read what they need without reading the whole thing.

As a starting point – a reminder to read the *Arbitration Act*. And reread it occasionally if you are going to be doing this work. Much of what we see go sideways in arbitration is often a result of a lack of a foundational understanding of what to expect and how things work (or not, as the case may be).

SUMMARY

Arbitration is arbitration. It is not private court.

It is meant to be faster, cheaper, and easier. At least usually. To achieve that goal, we must be careful, as lawyers and judges, not to "legalize" it. The *Arbitration Act* allows for matters to be determined without the Rules of Court or the strict laws of evidence.

Why then do lawyers always want to make it just like court?

That I suggest is more about our own level of comfort. I have found that when given clear choices and options with a discussion of consequences that clients are prepared to compromise on process.

The *Arbitration Act* is well done. Read it. It allows for parties to contract out of much of the *Act*. With some exceptions. The main one being that the process must do natural justice.

With that in mind parties can choose to design or build a process that fits for their dispute. No more process and no less process than is needed to satisfy everyone that natural justice will be done.

Very often there are no or only limited factual disputes and parties don't need the delay, time, and effort involved in a "full" hearing. They need an answer and to move forward.

Doing it just like court is only one design option when choosing how to do arbitration.

The only limit to process design seems to be our imagination and that the process do natural justice.

The shift to promoting non-court dispute resolution in the proposed changes to the *Divorce Act* together with the need to consider proportionality set out in *Hryniak* by the SCC reminds us we can take advantage of the ability to 'fit the forum to the fuss' and design our process to give clients a balance of fast, good, and cheap.

Having the option of an abbreviated, less costly process is welcomed by most clients. And with informed consent about the merits and risks parties should be free to go there and live with the results.

Lawyers, mediators, and arbitrators can serve clients in the way they really want and need. Stop, pause, and spend the time to plan and design (with client input on those choices of good, fast, and cheap) how best to do it for each family.

INFORMED CONSENT

If one is having an operation, the hospital will always make sure it is known that death or other bad results can happen. Medicines provide a list of potential side effects and incompatible drugs.

In family law we have much more to consider. Having a fulsome discussion about all the potential results and ripple effects from any decision about process can be overwhelming to a client. But we must have some kind of discussion and client buy in about any process choice including going to court and the options related to dealing with a court application or moving to trial.

As always it is key to have the clients understand and acknowledge our advice particularly when they are giving up options and taking risks on process. Every decision is a bet or a risk. Even going to court is a bet or a risk.

As each case is unique and the merits are unique to each case, I have given up on designing a one size fits all informed consent acknowledgment, or at least in time for it to be included in this paper.