

FAMILY LAW BASICS FOR PARALEGALS AND LEGAL SUPPORT
STAFF
PAPER 4.1

Family Law Alternate Dispute Resolution

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FAMILY LAW ALTERNATE DISPUTE RESOLUTION

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I. What Is Family Law Alternate Dispute Resolution?

Family law alternate dispute resolution is any process, the goal of which is the resolution of family law issues without a hearing or trial in a Court. It is not a new concept. Section 9 of the *Divorce Act* (Canada) has long imposed a duty on family law lawyers to advise their clients to explore out-of-court resolutions. Section 8(2) of the *Family Law Act* imposes a similar duty and expands upon it.

The most common forms of ADR include negotiation, those available to litigants (Family Case Conferences, Judicial Case Conferences, and Judicial Settlement Conferences), collaborative family law, mediation, mediation/arbitration, arbitration and parenting coordination.

II. Evolution of ADR in Family Law

Negotiation is the original form of ADR and has been around forever. Family law cases have long been settled by counsel at examinations for discovery, on the Courthouse steps and at four-way meetings.

Enough changes have been made to the practice of family law that Masters and Judges have had to adapt to taking on the role of mediators in addition to being triers of fact and law. As a result, more and more litigants are able to resolve their family law issues early in the proceedings at Family Case Conferences, Judicial Case Conferences and Judicial Settlement Conferences. Where the Masters and Judges are not able to assist the parties to a resolution, they are now more willing to make recommendations to divert the parties to ADR or even made Orders that parties seek the assistance of counsellors, mediators and parenting coordinators.

With the large amount of information available on the internet, separating families are now more informed than ever as to the options available to them and are able to research ADR on their own and select a process that they feel is best for their own circumstances. In this way, many families are turning to collaborative family law processes, mediation and arbitration.

III. Family Law Is Uniquely Suited to ADR

Family law is unlike other areas of law in that it is an exercise in problem solving. Separating families present with a series or bundle of issues or problems (financial, logistical and fiduciary) that need to be solved. The issues can often be complex and are almost always heavily burdened by emotion. The adversarial process by its nature focusses on proving through argument that on a balance of probabilities a certain act occurred or a set of circumstances exists that has caused someone to suffer a loss that can be reduced to dollars and cents. That is the round hole that we have attempted to slot family law into for decades with the expectation that a decision imposed by an unbiased third party after hearing argument will bring peace and finality to an emotionally and financially divided family.

Alternate dispute resolution has been around for a long time and has been used widely to resolve labour disputes, corporate disputes and to achieve insurance settlements. ADR processes are particularly well suited to family law. Alternate dispute resolution is a problem-solving exercise and the professionals and the parties are free to work out their own procedure that will best allow them to reach consensus and resolution. ADR is not about gathering evidence to attempt to prove something and it is not about who is right and who is wrong. The participants, to some extent, can design their own resolution process. It allows for the views and expectations of the family members to be heard and considered and thus provides for the crafting of resolutions that are tailor made for that family. It can be (and in my view, should be) transformative as well as evaluative. Courts deciding family law cases have a difficult task and do their best to provide evaluative decisions that are in the best interests of children and which are meant to assist the family to move forward. Often, however, the effect is that the family has been given a new list of rules to live by without any direction on how to implement those rules. Families should be assisted to their own resolutions and should be provided with assistance, resources and tools that will allow them to make the transition in their lives and implement the decisions that they have made.

IV. The ADR Processes Available to Families in BC and How Are They Initiated

The following is a list and brief explanation of the various family law ADR processes:

- (a) Family Justice Counsellors:
 - It is mandatory in some Registries that parties in contested Provincial Court proceedings meet with a family justice counsellor prior to a first appearance date being set in Court, but they are free to meet with Family Justice Counsellors at any time. Family Justice Counsellors are able to help with parenting, financial support and some limited property issues. They are a great (and no-cost) resource for families needing help with the review of financial support.
- (b) The Courts:
 - Family Case Conferences (Provincial Court): Family Case Conferences are ordered by the Judge in Provincial Court proceedings.
 - Judicial Case Conferences (Supreme Court): Judicial Case Conferences are mandatory in Supreme Court unless an Order dispensing with a JCC has been

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obtained. They may also be scheduled by the parties and/or their counsel at any time by consent.

- Judicial Settlement Conferences (Supreme Court): Judicial Settlement Conferences must be set by consent of the parties and their counsel and are scheduled by obtaining dates from the trial scheduler.

(c) Collaborative Family Law:

- Collaborative Family Law was the brainchild of Stu Webb, who was a family lawyer practicing in the mid-western United States. He became disillusioned with the practice and decided to return to university to obtain a psychology degree. While in the course of his studies, he developed the system that we now know as collaborative family law.
- Collaborative Family Law is a team approach to the resolution of issues arising from separation and is entered into by agreement of both parties. It involves other professionals who are free to communicate with each other throughout the process and who provide:
 - Counselling and coaching by mental health professionals:
 - For the parties
 - For the children
 - Financial information and advice by financial planners, accountants, appraisers and business valuers
 - Legal assistance from lawyers.
- The Parties and the team members participate under the following rules:
 - A participation agreement describing the nature and scope of the process is signed by all participants
 - The parties must voluntarily disclose all information which is relevant
 - The parties must agree to use their best efforts to reach a mutually acceptable settlement
 - Each party must be represented by a lawyer whose representation terminates if the process ends and either party commences contested Court proceedings
 - The parties may jointly engage other professionals as needed.
 - If the collaborative process is terminated without an agreement having been reached, everything in the process is “without prejudice” except where the parties have agreed otherwise. Documents which are ordinarily compellable (such as financial documents) are not considered to be “without prejudice”.

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(d) Mediation:

- The parties either jointly engage the services of a mediator or one of the parties serves the other with a Notice to Mediate pursuant to the *Notice to Mediate (Family) Regulation* to initiate the process.
- A Mediation Agreement is signed by the parties, the mediator and any counsel who are involved in the mediation.
- The mediator is neutral and facilitates discussion and assists the parties to reach consensus and resolution.
- The parties may also involve other “team members” in mediation such as counsellors and financial neutrals.
- When consensus is achieved, the parties obtain independent legal advice from their own lawyers on the agreements reached.
- Everything discussed in mediation, all memoranda prepared during the course of mediation and the mediator’s file notes are “without prejudice”.
- Documents (such as financial documents) which are ordinarily compellable are not considered to be “without prejudice”.
- The mediator may not be called as a witness to give evidence in any subsequent Court proceedings.

(e) Mediation/Arbitration:

- The parties and their lawyers agree upon and engage the services of a mediator who is also an arbitrator and agree on a procedure for their process, including production of documents, timelines for the completion of tasks and a hearing procedure for any issues that are not resolved by consensus through mediation.
- The parties and their lawyers enter into a written Mediation/Arbitration Agreement setting out the procedure agreed upon and the issues to be resolved or determined.
- Mediation is attempted first and issues not resolved by consensus are arbitrated by way of a formal or informal hearing process.
- Everything discussed in the mediation portion of the process, including all memoranda prepared by the mediator and the mediator’s file notes are “without prejudice”.
- Arbitration is based on administrative law—it is a decision of a tribunal and is appealable to the Court, so a record of proceedings must be available if arbitration has occurred as the arbitrator’s decision is appealable to the Court. The record of proceedings may include pleadings, Affidavit materials, transcripts of oral testimony and submissions of counsel.

(f) Arbitration:

- The parties and their lawyers agree upon and engage the services of an arbitrator and agree on a procedure for their hearing process.

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- The parties and their lawyers enter into a written Arbitration Agreement setting out the procedure agreed upon and the issues to be determined.
 - The arbitrator conducts a formal or informal hearing and renders a written decision which is binding on the parties.
 - A record of proceedings must be available as the arbitrator's decision is appealable to the Court.
- (g) Parenting Coordination:
- Parenting Coordination is for families who have parenting plans in place by way of written agreements or Court Orders, but need help facilitating them, making changes or making parenting decisions. It is meant to assist them by providing a means of dealing with impasse or conflicts that arise, without the necessity of bringing on Court applications.
 - The parents either jointly agree upon and engage a parenting coordinator or the parenting coordinator is appointed by Court Order.
 - Typically, parenting coordinators are engaged for a term of 2 years.
 - The parenting coordinator's role is essentially that of a mediator/arbitrator but the scope of their services is limited to parenting issues unless the parties agree otherwise.
 - The parenting coordinator will work with the parents and the children to achieve consensus, but where that is not possible, the parties have empowered the parenting coordinator to make "determinations" which are arbitrated decisions that have the force of a Court Order.
 - When agreements are reached the parenting coordinator will draft an agreement for the parties to obtain independent legal advice on and sign. Such agreements are "agreements" within the meaning of the *Family Law Act*.
 - When determinations are made, the parenting coordinator will draft a written determination and where there are Court proceedings, it is prudent practice for the parenting coordinator to file all determinations in the Court proceedings. This can be done by attaching the determination to a Requisition.
- (h) ADR Options for low income families:
- The LSS Tariff includes some provision for mediation, arbitration and collaborative law.
 - Legal Advocates: Some community resource centres such as Sources Legal Resource Centre in Surrey, Kettle Society and Battered Women's Support Services in Vancouver, have legal advocates who can assist parties in a limited way with preparing Court documents and guiding parties through litigation and ADR processes.

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- (i) Pro bono options:
 - Mediate BC has a pro bono mediation program.
 - BC Collaborative Roster Society has had pro bono collaborative programs from time to time.
- (j) Other developing ADR processes:
 - Family Reunification Teams:
 - Some of the mental health professionals in the province have developed a team approach to dealing with parenting alienation cases. They put together a team which consist of a team leader whose role is to facilitate the process and set the procedure. Other mental health professionals make up the rest of the team and these usually consist of one support professional for each parent and child specialists for the children.
 - This may be a voluntary process where the parties themselves agree upon and engage the services of the team, but thus far it seems to be most commonly initiated by Court Order.

V. Conclusion

The enacting of the *Family Law Act* has enhanced the role and importance of family law ADR by making it a requirement that all family law dispute professionals advise and recommend out-of-court processes to parties. It is clear that family law ADR is here to stay and that it will continue to grow and evolve thanks to the many excellent and innovative professionals in the practice who are effecting positive change in this challenging area of the law. Separating families now have many options available to assist their particular needs and are being served with an ever increasing degree of success and satisfaction.

VI. Resources:

All ADR areas:

- Westminster Law Group (www.westminlaw.com) provides an overview of all areas of ADR.

Arbitration:

- Provincial Government website (www.justicebc.ca/en/fam/help/arbitrators/) provides a description of the role of arbitrators in family law cases.

Collaborative Family Law:

- IACP (www.collaborativepractice.com) provides general information on collaborative family law and also the Standards and Ethics.

Mediation:

- Mediate BC (www.mediatebc.ca) provides information about mediation and a roster of mediators.

Parenting Coordination:

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- BC Parenting Coordinators Roster website (www.bcparentingcoordinators.com) provides information about parenting coordination in BC and a roster of parenting coordinators.