

## Separation and Divorce through Mediation By Bev Churchill, KC

The reality is...approximately 50% of marriages end in divorce! This reality of separation is not much different for a couple that decides not to marry. It may be slightly higher.

When one first hears these statistics, it is shocking. This is not the promise we make to ourselves or to our spouse. It is not the plan for our family. However, it is reality. There may be options for couples to work towards minimizing this result for their relationship, but what if they cannot? What happens then? How can this result be managed in a manner that does the least amount of harm for all concerned, particularly for children who may find themselves caught in the middle of a battle between the 2 people they love most deeply?

The **Family Law Act** is a refreshing approach to the resolution of family law matters. It emphasizes options for the resolution of family matters through “family dispute resolution” processes, including mediation, arbitration, collaborative family law and parenting coordination. This legislation is a clear statement of the intention to encourage an out-of-court approach to the resolution of family law matters. It imposes an obligation on lawyers to discuss with their client the availability of these out-of-court processes. It also imposes an obligation on the parties to attend one of the processes. It authorizes the court to compel a party to attend such a process.

Lets talk about mediation. Mediation involves the use of a neutral third party who is the Mediator. It is a process of negotiation in which the information and documents that are relevant and necessary to negotiate a resolution are exchanged in an effort to arrive at consensual resolution. The Mediator meets with each spouse separately to identify issues, goals and concerns of each spouse. The Mediator assists to isolate points of agreement and disagreement and explore with the spouses options and solutions for those points in dispute. In other words, the Mediator works with both spouses to facilitate and assist with the communication necessary between the spouses to work towards a resolution of the matters that need to be resolved.

Communication is fundamental. Communication does not suddenly exist after the couple separates. Most often, the lack of communication is a big reason for the actual breakdown of the relationship. It would not be a stretch, therefore, to think that communication between spouses over matters involving their children and how parents may spend time with their children or how family property, debt and income are to be distributed, would be a challenge to them.

In many ways, parents need to be more skilled in their communication after the separation than before it. They need to demonstrate to their children that they can work together so their children do not find themselves in the middle of an “adult” dispute. This is particularly true as each spouses re-couples and the new ‘significant others’ want to provide their input and opinions.

Let me share a short story... I call this my “13 Court Order” story (up’ed by another lawyer who recently described their 50 Court Order story). Many clients and colleagues have heard this story over the years.

It is the situation of a potential new client who needed assistance in resolving a custody and access dispute. The client had been in the court system since the child was six months of age. The child was now six years of age. The court had made 13 court orders in relation to this child. However, the parents were still in dispute. The client was desperate for another court order to “fix” the dispute. The obvious question for this client was “what makes you think the 14<sup>th</sup> court order will do what the first 13 court orders have not?” However, the client was so distraught and focused on the dispute and how to afford more litigation, that the question could not be fully heard or understood.

This story is disturbing, but true! This story and many others like it are stories that need to be told. All family lawyers have them. The implications for families needs to be understood as these types of situations (and many other similar or worse situations) have long term, costly and negative consequences.

Mediation is a process that can be very flexible and unique to the needs of the couple and the family. It allows for the Mediator and the couple to decide how they wish to structure the way in which they will organize for each mediation session. In other words, control over the process remains with the couple, who know their situation best. Generally, and other than the initial separate meeting of the Mediator with each spouse, both spouses will be present with the Mediator at the same time, but the Mediator may also meet separately with each spouse and/or the lawyer for each spouse.

The goal of mediation is a resolution that is *thorough and durable*. It results in a written Agreement that is made possible through the active involvement of each spouse in identifying what is important to each spouse and to both spouses in designing the final Agreement. Mediation is cost effective, timely and affordable.

For those family lawyers who practice outside of the court system and within the “family dispute resolution” processes such as mediation, there is confidence that there are fewer disputes between the spouses. If there are disputes, they are often far less intense and the spouses are better equipped to address their own

disputes in the future if they occur. If there are disputes that the spouses cannot manage to resolve themselves, they will come back to the mediation process to assist to resolve them.

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