

Family

Considering mediation as a default resolution process in light of new family law duties

By **Oren Weinberg**

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(August 19, 2021, 2:18 PM EDT) -- In 2020, several changes were put in place affecting Canada's federal *Divorce Act*, many of which are focused on reducing conflict and enhancing the best interests of children. One of those changes imposes a duty on all parties in a family dispute to try to resolve their issues through means other than litigation whenever possible.

All legal advisers, including family lawyers, must inform their clients of this new duty, and similarly encourage alternative forms of dispute resolution, unless it would be inappropriate to do so. Alternative dispute resolution processes, including negotiation, mediation, mediation-arbitration, and arbitration, offer families forums and tools to resolve their outstanding issues without going to court.

Mediation and mediation-arbitration can help families identify solutions more quickly, and a process can be designed around the needs of the participants. Most importantly, they are often viewed as being in the best interests of any children involved, because they can help to limit or reduce conflict better than the litigation process.

However, not all alternative resolution methods are created equal. With courts continuing to face restrictions and backlogs due to COVID-19, families are increasingly finding mediation to be an ideal pathway to efficient and effective dispute resolution.

***Divorce Act* places new duties on clients and their representatives**

While the changes to the *Divorce Act* that have received the most attention relate to the language around parenting issues and the increased focus on family violence, alternative dispute resolution methods have also been placed front and centre. Notably, s. 7.3 has been added, requiring parties in a family dispute to attempt resolution outside of court, when possible and appropriate.

Further, s. 7.7(2) revises the previous duty requiring lawyers to advise clients to negotiate matters pertaining to a "support order or custody order" and to inform clients about mediation services which could assist with the negotiation.

Under the new section, the duty is imposed on all "legal advisers," which are defined as "any person who is qualified, in accordance with the law of a province, to represent or provide legal advice to another person in any proceeding under this Act."

The duty has been further amended to require all legal advisers to inform clients of their new obligations under s. 7.3 mentioned above. In addition, advisers must now encourage clients to consider alternatives to litigation for any proceeding under the Act, unless it would be unsuitable under the circumstances. The new wording also opens the options up to any alternative resolution method, rather than limiting it to negotiation and mediation.

Mediation may offer ideal alternative to other forms of dispute resolution

While there are a variety of alternatives to litigation, each comes with its own inherent advantages and disadvantages. As lawyers, we know that a client's circumstances will sometimes help to inform

the best option, but in many cases, it will depend on client preferences.

For a lot of people, family mediation may be the ideal blend of the best aspects of other resolution methods, due to the flexibility, structure, control and privacy it offers. Since clients are not beholden to a binding decision at the end of the mediation process, there is little downside for most clients in making mediation their preferred method to resolve their family conflicts.

Mediation offers built-in methods to include children in process

One of the most significant amendments to the *Divorce Act* has been the increased prioritization of the best interests of the children involved in a family dispute. To this end, children's preferences should be considered in decisions affecting them whenever possible and where appropriate, especially among older children.

Some properly trained mediators will engage children directly, giving the children an opportunity to express their preferences to a neutral third party who can help them to speak more candidly than if they were speaking to either of their parents. This child-inclusive style of mediation is likely to continue to gain in popularity in the coming years.

Mediation provides clients with more control than arbitration

Family law clients do not want surprises when it comes to an outcome that will affect their relationship with their children or impact their financial position over the long term. For this reason, some clients view litigation as a risk, knowing a decision will be imposed on them at the conclusion of the trial, which will remain binding until or unless one party files an appeal.

As lawyers know, arbitration operates in a similar fashion. For this reason, mediation may be preferred because it provides much needed structure to negotiations while giving the parties complete control over the outcome.

At the end of the mediation process, the parties ultimately retain the ability to decide for themselves, in consultation with their respective lawyers, how they would like to proceed. If there are issues that remain unresolved and a mutually agreeable solution is out of reach, clients can opt to proceed to arbitration or litigation at that point.

Mediation is a tool we expect to see more and more families making use of to resolve disputes, especially in light of the recent changes to the *Divorce Act*. Mediation offers an ideal option for clients to attempt a resolution on their own terms. Accredited and trained mediators provide an expedient and confidential process that gives unparalleled control to the parties.

We anticipate that many lawyers will be pointing clients in this direction as an effective and efficient means of resolving a family dispute.

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