



Family Law News

Milka Vujnovic

Keeping the Client and the Process Out of Court!

ADR - it may be easier, cheaper and faster for clients but is it really easier for the lawyer advising family law clients contemplating entering into an ADR process? In this article, I'll be looking at what a family law lawyer should consider when advising a client involved in or contemplating a hybrid Med/Arb process.

The practice of family law has morphed into a myriad of dispute resolution processes that contemplate both lawyer and non-lawyer as decision maker. This growth reflects the ever-changing needs of the family law client and our attempts to find the best solutions outside the courtroom to help them resolve their disputes. In no other area of law has there been such a proliferation of "Alternative" Dispute Resolution processes. From Mediation, to Arbitration, to hybrid Mediation/Arbitration, to Mediation and Arbitration, to Collaborative Family Law, to Cooperative Family Law, to Parenting Coordination – these processes have all sprung out of the belief that the best interests of clients and their children are served outside courtroom. Further, each of these processes has different models of practice that add even more choices and potential confusion for lawyers and clients. The expectation

today is that the family law lawyer must be as involved in and knowledgeable about the non-litigious dispute resolution processes as they are about the traditional court process in order to best serve the clients needs.

ADR processes provide excellent potential for out of court resolution that is respectful, less stressful, more controlled, and more cost efficient in the long run. However, as lawyers we often can become involved in processes which our clients undertake about which we actually know very little. We often recommend to clients mediation/arbitration. We are expected to give legal advice to the client both prior to entering into a Med/Arb agreement and represent them during the process (see any of the Med/Arb agreements and the ILA requirements – it's your signature on the Certificate!) However, what do most of us really know about the processes?¹

The hybrid method of Med/Arb involves one person acting as both mediator and arbitrator i.e. conducting the mediation and if it is not successful assuming an adjudicative function as an arbitrator. Another method involves an agreement whereby one person mediates and then if there is no resolution, the matter goes to another person for arbitration. The hybrid Med/Arb process can prove to be the more challenging

of the two processes. The obvious potential problem with the hybrid process is the ability of the arbitrator to maintain neutrality (or the perception of neutrality) during an arbitration after completing an unsuccessful mediation. In effect, the person, who is really hearing settlement discussions, is going to be making decisions for the parties as an arbitrator. How do you think your client will react if he/she perceives the mediation "not going their way" and knows that the same person will be making final decisions about issues in dispute? Clients need to be prepared for this possibility, just as they need to be advised of the ramifications of the *Arbitration Act* and what steps could be taken to challenge or review the decision of the Arbitrator. These matters need to be considered before getting into the process. It's too late after the fact, especially if things go bad for your client in an arbitration.

We all expect that if we send a dispute to Med/Arb it will be less work for us, cheaper for our clients and no trial preparation - this is often how we sell the process to our clients. We expect a looser, less structured and less formal process. However, unless you have a clear idea of what you want to have happen, what issues you want the arbitrator to deal with, and how you want to deal with them within the process, it may actually be more work and expense to your client, especially if you get an arbitration award that is not favourable and you are looking for ways to get your client out of it. In a high conflict case, if there is a lack of clarity with the process, there may be even greater potential for increased conflict as there is more to fight about both before, during and after the Med/Arb process e.g. drafting of the Med/Arb agreement; an application under the

Arbitration Act to challenge, appeal or set aside an unfavorable decision. This puts you right back in court, just where you didn't want to be! Clarity is the key to a successful process. When advising clients, you need to be just as familiar with the *Arbitration Act*,² as with the *Family Law Act*, *Divorce Act* or the *Rules of Practice*. The *Arbitration Act* creates a procedure to ensure the arbitrations are conducted fairly and that there is no bias or unfair or unequal treatment of the parties. It provides for a judicial supervisory intervention (s.6) and has a process whereby an arbitrator can be challenged (s.13(1) and 13(2)). Further, the act provides for the potential removal of an arbitrator (s.15), appeal of the arbitration award (s. 45(1), (2) & (3)), the setting aside of an arbitration award (s.46), and the ability to declare an arbitration award invalid (s.48). The changes made to the *Arbitration Act* in 2006, specifically dealing with family arbitrations are embodied in s.59 of the Act. They provide for the mechanics of enforcing an arbitration award in ss. 59.4, 59.6 and 59.8.

Unlike the *Family Court Rules*, which provide a structured process that deals with all aspects of litigation i.e. pleadings, documentary disclosure, pretrial conferences, rules regarding evidence, trial and appeals, etc., the Med/Arb process does not. Whatever their faults or pitfalls, at least with court rules you know what you are dealing with. Crafting your own process is one of the benefits of Med/Arb. However, if not done carefully, it could prove to be disastrous (see *Marchese* below). It takes extra thought, time and effort to create and consider the Med/Arb agreement that will be the foundation of the process, which agreement will be different for each case. Each new case requires its

own set of "rules" regarding issues to be considered, interlocutory matters, disclosure, rulings, evidence and hearing process. Blindly following the standard Med/Arb Agreement used by the arbitrator is also fraught with difficulties. The arbitrator will pass on to you the responsibility of ensuring that the parties understand the agreement and the process and it will be your signature on the Certificate of ILA! Further, it is a mistake to think of an arbitration as anything other than an "out of court" trial. It's foolish to think that the Med/Arb process allows you to "hand over" a problem file to the mediator/arbitrator in a last ditch effort to avoid a trial, for a "quick fix" in a process with a casual or informal atmosphere.

The Ontario Court of Appeal, in *Marchese v. Marchese*, 2007 ONCA 34, confirmed that a "one-liner" in a court order indicating that the parties shall attend mediation/arbitration with a named arbitrator, was enough to create a binding enforceable agreement to arbitrate subject to the *Arbitration Act*. In that case, after numerous court orders and significant legal costs, (you can just imagine the frustration of the lawyers hoping that some else would "fix" their problem) one of the lawyers suggested an ADR process and the parties signed a written consent that included the following clause: "The parties shall attend at mediation/arbitration with Phil Epstein regarding all issues in this action." That one line was enough to create a binding agreement to arbitrate. As the mediation progressed, it soon became evident that it would not be successful. The appellant refused to proceed to arbitration and brought the matter back to the court. The motions judge stayed the court proceedings under s.7 of the *Arbitration*

Act. The appellant argued at the Court of Appeal that s.7 has no application as the motions judge erred in finding that there was an agreement to arbitrate (not binding as "Med/Arb" was too ambiguous). He was not successful in this argument. The OCA stated that there was no ambiguity in the words "mediation/arbitration" and that it was a well recognized term of art referring to a hybrid dispute resolution process in which a named individual acts first as a mediator and, failing agreement, proceeds to conduct an arbitration. As the *Marchese* case illustrates, once you're in the process, you're stuck with it, so make sure that the foundation document is property crafted.

During the arbitration process, the arbitrator must ensure that the basic rules of evidence are maintained and procedural fairness is upheld. Lawyer arbitrators or mediator/arbitrators are more likely to be aware of these requirements than are non-lawyers. The *Arbitration Act* does not distinguish between them. Non-lawyer mediators or mediator/arbitrators or mental health professionals are often used to dealing with difficult custody and access issues. They are subject to the same rules and requirements as are lawyers who act as arbitrators. As legal advisors, we must be even more vigilant in ensuring that our clients understand the binding nature of the process, especially if they are involved with a parenting coordination process with non-lawyers, which can be perceived as a far more casual process where lawyers may not be directly involved.

In *Kainz v. Potter*, a June 19, 2006 decision of Justice Linhares de Sousa of the Ontario Superior Court of

Justice, the parties had entered into a Separation Agreement with a dispute resolution clause which provided for negotiation, mediation and then arbitration, with a fairly detailed and structured process. The arbitrator, who was a psychologist, changed a custodial arrangement from the mother to the father. The mother appealed the award arguing procedural unfairness, bias and non-compliance with the detailed provisions of the separation agreement with respect to the hearing. The court took an in-depth look at the arbitration hearing and found that the procedural and evidentiary flaws were flagrant and manifest so as to deny the mother equality and fairness. The court allowed the appeal and set aside the order of the arbitrator. Justice Linhares de Sousa held that the arbitrator must comply with the detailed arbitration agreement. The court strictly interpreted the terms of the arbitration agreement and found that failure by the arbitrator to follow the provisions a fatal flaw. It was held that even though the arbitrator was a psychologist and could not have same understanding as a lawyer of the evidentiary and legal process, a minimum standard would be expected of him to conduct the

arbitration hearing in a fair and equal fashion that allowed both parties to fairly present their case and respond to the case of the other side. This did not happen and as such, the decision was set aside. This case highlights the importance of careful crafting and attention to the dispute resolution clauses and arbitration agreements, and the importance of selecting a qualified mediator/arbitrator. It is well written and a must-read for those with clients in a Med/Arb or arbitration with a non-lawyer.

The *Marchese* and the *Kainz v. Potter* decisions are wake-up calls to all those contemplating the use of the hybrid Med/Arb process by way of an agreement or court order. The “Dispute Resolution” paragraphs in the domestic contracts or court orders that we all frequently draft actually do have meaning, are binding and can be enforced whether your clients like it or not. As there is great potential for some unexpected and unwanted results, you need to review it in detail and understand the ramifications of each of the clauses in an agreement and the impact of the decision to enter into a Med/Arb process on your client.

The moral of the story – it isn’t easy being a family law lawyer! ADR has now been added to the ever-growing list of areas in which we need to have training and expertise, in order to serve our clients with ever increasing complex issues. The irony is that, if we’re not careful, the out of court processes can put us back in court to clean up the messes created by the out of court processes!!

¹ A good start would be to attend the HLA - Family Law Seminar “**Why Can’t They Just Get Along? Emerging Family Law Strategies For Clients Who Can’t**” being held on May 22, 2008, from 1:30 – 5 pm at the Chamber of Commerce. Alf Mamo will share his knowledge and skills in the Med/Arb process. You’ll gain strategies for working with high conflict families and learn about another new model of assisting parents with therapeutic reintegration and reconciliation counseling.

² 1991, S.O. 1991, c. 17, as amended in 2006. ■

Milka Vujnovic is a Family Law Lawyer and Mediator practising in Westdale. She can be reached at 946 King Street West Hamilton ON, 905-521-8777, milkavujnovic@mvfamily.ca or at her website www.mvfamily.ca. If you would like a copy of any of the cases outlined in this article just send a request to the email address above.