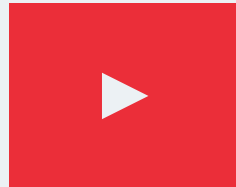




## Collaborative family law

Provincial Advocates  
Training Conference 2021



**CLICK HERE  
TO WATCH THE WEBINAR**



A background image showing a group of people in a meeting or mediation session. A woman with glasses is on the left, looking towards a man in a plaid shirt. In the center, a person with curly hair is seen from the back. On the right, a man with a beard is gesturing with his hands while speaking. The image is overlaid with a semi-transparent dark blue filter.

# Collaborative Family Law, Mediation and Arbitration in Family Law Matters

**Presented by Karen Tse**

Partner, Family Lawyer & Family Law Mediator

**Rockies Law Corporation – Fernie, BC**

*I acknowledge my respect for and share my deepest gratitude to the Ktunaxa peoples  
on whose homelands I am honoured to live and work.*



## Agenda

1. *Overview of Alternate Dispute Resolution Options*
2. *Collaborative Family Law*
3. *When to choose Collaborative Family Law*
4. *Mediation – Overview and Steps*
5. *Arbitration*
6. *Preparing clients for mediation*
7. *Preparing clients for arbitration*
8. *When is Mediation or Mediation Arbitration appropriate?*



# Alternate Dispute Resolution Options

---

- Collaborative Separation (BC Collaborative Roster Society)
- Private mediation or mediation-arbitration (med-arb)
- Family Justice Counsellors
- Dispute resolution through the court system:
  - Judicial Case Conferences
  - Family Case Conferences / Settlement Conferences
  - CFCSA Rule 2 Case Conferences
  - Child Protection Mediation

# Collaborative Family Law

---

- Each spouse hires a lawyer who practices in Collaborative Family Law
- BC Collaborative Roster Society
- Agreement is signed promising to work together
- Goal is to settle case fairly without court
- If process does not work, lawyers withdraw from case



# Why Choose Collaborative Family Law?

---

- Focus on needs of parties and children
- Not meant to be adversarial
- Make sincere effort to understand each other's concerns
- Prompt disclosure of relevant information
- Communicate with honesty and respect
- Lawyers meet to find settlement that is right for both parties
- Skilled team of caring professionals
  - Divorce coaches, financial specialists, child specialists

# Divorce Coach & Specialists

---

- Divorce Coaches
  - Explore emotions / Communication skills
  - Co-parent strategies / Build co-parenting plans
- Financial Specialists
  - Usually certified financial planners
  - Gather financial information / Provide financial knowledge
  - Identify tax issues, create budgets and debt repayment plans
- Child Specialists
  - Focuses exclusively on children / Assess children's needs and concerns
  - Create co-parenting plan / Give children tools to navigate transition



# When is it appropriate?

---

- Both parties must be willing to work together with honesty and respect
- Being high conflict is not a bar to participation, however, both parties must be willing to engage in process in good faith
- Cost – will need to seek out professionals and ascertain if fee structures are feasible
  - May overall be less expensive than traditional litigation
  - However, may still be out of reach for many families



# Mediation in Family Law

---

- A managed process in which two (or more) parties work with a neutral third party to reach an agreement
- Negotiation process with assistance of mediator
- Intended to help resolve disputes without going to court
- Parties motivated to work together
- There will be some 'give and take'

# Why Mediation?

---

- Less expensive than court
- Less acrimonious than litigation
- More expeditious
- Allows for re-building of relationships
- Allows room to rebuild trust



# Who are Mediators?

---

- Mediators – trained professionals
- Lawyers who are family law mediators are specially accredited by the Law Society of British Columbia



# When can we mediate?

---

- Available any time during a process
- Before litigation begins
- During litigation
- Any time prior to a trial
- Can be compelled
  - *Family Law Act* s. 61(2), 222, 224, 227
  - Court can compel participation in family dispute resolution

# What is the outcome of mediation?

---

- Typically, a Consent Order or a Separation Agreement



# Who can be at a mediation?

---

- Typically the parties
- Can also include:
  - Their lawyers
  - Social workers
  - Other important people



# What is the role of a mediator?

---

- Facilitates negotiations
- Provides third party perspective
- Ensure settlement is reasonable and fair
- Cannot provide legal advice
- This is the role of the lawyer for each party
- Could discuss whether or not a party is being realistic about their expectations

# How does the mediation process work?

---

- Optional step: party engages a lawyer who might help them with the mediation to get initial advice
- Parties select the mediator
- Pre mediation meeting
  - Mediator will meet with parties separately
  - Screen for family violence
  - Discuss expectations
  - Get to know the parties
  - Get to know the issues



# Next Steps in Mediation Process

---

- Set framework
  - Decide on scheduling
  - Set rules
  - Set goals
  - Decide on location
  - Decide on method
    - In person? By video conferencing? In the same room? Shuttle mediation?



# Next Steps in Mediation Process

---

- Exchange of information
  - Financial statements
  - Other reports (accountants, counsellors, psychologists, etc.)
- Exchange mediation briefs
  - Often prepared by lawyers or advocates
  - Summaries of key facts
  - Parties' positions
  - Application of law

# What happens during the mediation?

---

- Welcome
- Sign Mediation Agreement
  - Without prejudice discussions
  - Payment of mediation services
- Set agenda and discussion topics
- Parties take turns to give overview and share thoughts
- Parties may be in the same room or separate rooms (shuttle mediation)



# During the Mediation

---

- Mediator helps parties express and share their concerns
- Discuss interests (underlying needs) rather than positions (specific outcomes)
- Explore the “Why” question
- Maintain a respectful discussion
- Prepare Minutes of Settlement describing how an issue is resolved



# Typical topics covered under a Family Law Mediation

---

- Guardianship
- Parental Responsibilities
- Parenting Time
- Child Support
- Spousal Support
- Property Division
  - Family Residence, real property
  - Vehicles
  - Pensions
  - RRSPs, bank accounts

# Tips for a successful mediation

---

- Express interests in a productive and respectful way
- Openness to ideas
- Be mindful of whether your emotions are getting the better of you
- Avoid threats and personal attacks
- Full and frank financial disclosure
- Discuss 'best' and 'worst' case scenarios with your lawyer beforehand
- Don't interrupt
- Ask for time to consider or a break if necessary
- Be honest and empathetic



# What is Arbitration?

---

- Arbitrators play a private judge-like role
- A family law arbitrator will make binding decisions to resolve family law issues out of court (in lieu of a traditional trial)
- Parties are asking the Arbitrator to make the decisions after hearing both sides

# What is Mediation Arbitration or Med-Arb?

---

Med-Arb allows the mediator of an unresolved dispute to assume the role of arbitrator in relation to all or particular issues that remain in dispute between the parties

## Advantages

- Time and cost effective, especially in assize system
- Scheduling is very flexible
- Private
- Can pick the mediator arbitrator
- More buy-in from parties



# How to design a Med-Arb

---

- Process can be streamlined and crafted with assistance of mediator arbitrator
- Closed (shuttle between rooms) or open session (parties all in the same room and can hear the evidence of all)
- Multiday vs. single day
- Exchange of information after mediation fails (Expert Reports / Financial Statements)
- Traditional (taking the stand type) vs. Summary (affidavits only)
  - Presentation by affidavits only, with deponents available for cross examination



# Preparing Clients for Mediation / Med-Arb

- Explain process to client
- Screening for family violence
  - Safety concerns
  - Open vs. shuttle mediation
- Experts or support people being available
  - Family members, accountants, counsellor by phone
- Reports
  - Property Valuations / s. 211 Views of the Child Report
- Witness statements & Mediation Briefs
- Property and Debts Division Schedule
  - Editable version ready in electronic form
- Support Guidelines calculations
  - (best, mid and worst-case scenarios)
- Draft orders or draft separation agreements





# Preparing Clients for Mediation / Med-Arb

- Mediation can still occur even if parties are high conflict or there are power imbalances
  - Just need to modify process
- Run cost benefit analysis
- Explore clients' interests and work with them to look beyond their positions
- Discuss emotional, verbal and/or physical triggers for each party



# Preparing Clients for Mediation / Med-Arb

- Explore workable solutions outside of what a court may order
  - Not the necessarily the scripted options of court but rather what works best for their family
- Encourage clients to be creative
- Create plans with longevity
- With financial issues: come with business-hat on, so they can have some control over the outcome
- Get pre-approvals from bank and tax advice



# Preparing Clients for Mediation / Med-Arb



- Facilitative or Evaluative approach (evaluative offers views and suggestion / weighs in on issues)
- Great mediators poke holes in each party's position
- Mediator can telegraph possible outcomes or strength of the case to each side
  - Especially helpful with difficult clients
  - If the client is difficult / not hearing your advice, mediator can help client see weaknesses and options

# Preparing Clients for Mediation / Med-Arb

- Briefs will be read by all
  - A highly adversarial approach is likely not helpful
- Can be effective to include goals that might be important to client
- Clients should be told how the mediator's fees will be paid
- Litigation Risk: clients should have a true understanding of the merits/risks of their case
- Discussion of range of quantum of damages
- Litigation Costs: math based on the tariff – typically not all costs are reimbursed







# PREPARING CLIENTS FOR ARBITRATION

- Last best offer vs. arbitrator decides based on evidence
- Last Best Offer / Baseball Arbitration
  - Limits an arbitrator to choosing the final offer made by one of the parties / both sides make a pitch and arbitrator decides between the two
  - Arbitrator selects one of the parties' proposed settlements instead of calculating the award
- Nighttime Baseball Arbitration – arbitrator comes up with decision independently, then gets to see both final offers and selects the one closest to it

# Why Mediation?

## From the Honourable Justice Kent & Justice Mahoney

- Ultimate objective is achievement of a judicious outcome that all parties can live with, put behind them and move on
- Parties may be persuaded to resolve the dispute once the weaknesses in their own case is revealed to them, given the uncertainties of litigation
- Having a qualified and experienced mediator outline the strengths and weaknesses of each party's case may cause parties to modify their settlement positions
- Creative payment solutions
- Even if the parties are unable to reach a settlement
  - May be able to narrow down or agree on some issues
  - At the very least, getting together to refine the legal issues and plan the next court steps results in cost savings
- See: Matsqui First Nation v. Canada (Attorney General), 2015 BCSC 1409 & IBM Canada Limited v. Kossovan, 2011 ABQB 621



# Why Mediation?

## From the Honourable Justice Kent

- The beauty of mediation lies in its confidentiality and flexibility
- Parties are free to speak to each other directly and to frankly express their concerns and interests without fear of prejudicing the litigation should the matter not settle
- Empathy and apology can play a powerful role
- Creative remedies not available to the court can be forged to bridge differences
- Important relationships can be repaired



# Why Choose Mediation?

- Without prejudice
- Parties control the process, the outcome and the settlement
  - Making your own settlement
- Choice of decision maker
- Process is shaped by the parties and not dictated by a trial or application judge
- Can create outcomes that is not dictated by case-law and can work in trades
- Possibility of transformative experience, forgiveness and apologies
  - An apology can form part of a mediated settlement and this can be a key point in achieving resolution





# Why choose Mediation?

---

- A venue to air emotions (including some that would be inappropriate at trial), then moving past them
  - Venue to express more personal points of view
- Sometimes concerns that may be irrelevant from a formal court perspective, or evidence that may be inadmissible (hearsay) can be voiced and discussed
- Addressing fears that are not legal but clearly need to be resolved to move the matter to settlement



## Why choose Mediation?

---

- Clients want faster and less expensive resolution
- Sacrificing on some things to make other more long-term solutions work
- Client may be a bad witness on the stand
  - “Alternate business endeavors” or practices
- Client is closed to offers
- Bad evidence
- High net worth and high risk
- Want privacy for some issues
- Don't want competition, shareholders, employees to be aware of certain facts





## Why choose Med-Arb?

---

- Guaranteed conclusion and result
  - Med-Arb produces definitive result over just mediation
  - Less expensive than trial after mediation
- Can reserve guaranteed time slot
- Can be limited to arbitrate the one issue that can't be resolved
- Can customize the process more than court

# Questions & Thank you

