

HOW SHOULD WE HANDLE THE LEGAL ISSUES ARISING FROM OUR SEPARATION?

By Anne-Marie Langan B.A., B.S.W., LL.B.

A. INTRODUCTION

Few events in life are more stressful and confusing than separating from a spouse, especially if there are children involved. Not only is separation an emotionally difficult time, it can be financially stressful since two households must now be supported. There are various methods of resolving family law disputes, including litigation, negotiation, mediation, and collaborative family law, each with its own pros and cons. This article will seek to analyze the benefits and draw backs of each method in order to assist couples who are separating in choosing the option that is most suited to their situation.

B. LITIGATION

Litigation is the most familiar and yet the least resorted to option for resolving family law disputes. Only a small minority of couples resolve their family law disputes by going to court. The public airing of personal affairs is one reason why people tend to avoid the courts. There is also a lack of understanding among the general public about the rules of the court, leaving litigants often baffled by the amount and complexity of the paperwork involved in bringing a court action. Another drawback of going to court is that it can be very impersonal. Judges do not have the time or the inclination to get to know the parties or their children on a

personal level. As a result, the judgments they render usually do not address all of the issues arising from the separation. Most importantly, statements made in litigation have a tendency to polarize the parties and cause hurt feelings that can last for a lifetime and can permanently scar relationships. High legal costs are another reason why people tend to avoid litigation. Lawyers are generally paid by the hour and it can take many hours for a lawyer to prepare and file the necessary court papers, not to mention the many hours that lawyers can spend at the court waiting for judges to hear their client's matter and in travelling to and from various court locations.

Despite its drawbacks, litigation is appropriate in some circumstances, particularly where one party is attempting to avoid meeting their support obligations or is withholding the children from the other party. There are also circumstances, albeit rarely, where a couple will have a question regarding the proper interpretation of the law in a given set of circumstances or a question regarding their constitutional rights. It is highly appropriate to bring these questions before a court as it serves to clarify the issue for all others who are separating in similar circumstances. If the parties are unable to resolve their dispute through negotiation and/or mediation, a judge can assist them in reaching a settlement agreement by advising them of what the likely outcome of litigation would be for each party.

C. NEGOTIATION

By far the most common way of resolving family law disputes is through negotiation: either direct negotiation where the parties are able to come to an agreement (written or verbal) entirely on their own, or negotiation through lawyers. If separating parties want to come to an agreement without involving lawyers in the negotiation, they should at least consider consulting a family law lawyer to get some information about

their basic legal rights and obligations. There are also resources available on the internet that impart some basic information about family law.¹

Many separating couples ask their lawyers to negotiate a separation agreement on their behalf. If the couple has already come to consensus on most of the substantive issues arising from their separation, it can be fairly simple and inexpensive for the lawyer of one of the parties to draft an agreement that reflects the couple's shared views using legal terminology. The other party can then take the draft agreement to their lawyer for review and receive some independent legal advice. Once both parties have signed the agreement, it can be filed with the courts, either on its own, or along with an application for divorce.

How quickly an agreement can be negotiated will depend on the complexity of the issues that the parties are dealing with and their ability to communicate, either directly with each other, or through their lawyers in order to come to an agreement. Couples who are not able to come to an agreement about a substantive issue arising from their separation can end up fighting through their lawyers at a substantial cost to both parties and could still end up litigating their dispute.

D. MEDIATION

Mediation is a process whereby an independent and impartial third party assists the separating couple to negotiate an agreement.² Mediation can be used as an alternative to litigation, but the two are not mutually exclusive. Some couples use the mediation process to negotiate a Parenting Plan and use litigation or collaborative family law to resolve support and property issues. Some mediations are "closed", which means that all of the information exchanged by the parties during mediation remains confidential and cannot be used in any future litigation between the parties. In other cases, clients may request a non binding

¹ See for example "What You Should Know about Family Law in Ontario" which is published by the Ontario Ministry of the Attorney General and is available on-line at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/familyla.pdf>.

² Barbara Landau, Lorne Wolfson & Niki Landau, *The Family Mediation & Collaborative Practice Handbook*, (Toronto: Lexis/Nexis, 2005).

recommendation from the mediator, for example on a parenting issue, if they reach an impasse. This is known as “open” mediation. If there are concerns about a power imbalance or significant differences in sophistication on some issues, the process can be structured to take these concerns into account, for example by using a “shuttle” process or by inviting a support person (eg a financial advisor) or the lawyers to attend for part or all of the mediation.³ The mediator can give both parties general information about the law, but cannot apply this advice to either individual, even if he/she is legally trained, as this would put the mediator in a conflict of interest with the other party.

One of the biggest advantages of mediation is that the parties can use it to create an agreement that is tailored to their family’s needs. During mediation, the parties can discuss and resolve issues that they would not have the opportunity to address through the courts. For example, mediation agreements often go into greater detail about the living arrangements for the children, how the parenting responsibilities will be carried out and how decisions will be made. Parties can also find creative solutions to property and support issues by working together to solve the problems.

Mediation is not an effective venue for all couples. If, for whatever reason, there is a large imbalance of power between the parties or if there are safety issues as a result of domestic violence or abuse, mediation may not be appropriate. The ability to reach an agreement depends largely on the ability of the parties to communicate with each other and trust each other. If one of the parties is refusing to disclose important information or is using the mediation process for ulterior motives (such as to delay the onset of litigation), this type of behaviour can be very harmful for the other party. Mediation can be a relatively inexpensive way to resolve a family law dispute, as the parties share the cost of paying the mediator.

³ Cinnie Noble, L. Leslie Dizgun & D. Paul Emond, *Effective Client Representation in Mediation Proceedings* (Toronto: Edmond Montgomery Publications Ltd., 1998) at

It is very important for couples who use mediation to resolve their family law disputes to become informed of their legal rights and responsibilities towards their children and their spouses *before* going to mediation. Some people are not aware of certain legal consequences of separation, such as tax consequences or their right to benefit from their ex-spouse's pension. Others unknowingly have misunderstood the law as it relates to their situation because of misinformation obtained from family members or friends who have given them bad advice. An agreement that is based on misleading or incomplete information could be found by a court not to be enforceable. It is therefore very important that parties consult a family lawyer prior to going to mediation and certainly before signing an agreement.

E. COLLABORATIVE FAMILY LAW

Collaborative family law⁴ is a recent development that originates from the United States. Collaborative family lawyers work together with their clients to resolve the disputes that arise from separation. Each party is represented by their own lawyer during the collaborative process and the parties meet with their lawyers in four-way meetings. At the outset, the parties and their lawyers agree they will do everything in their power to resolve the dispute collaboratively and without resorting to litigation or threats of litigation. If the negotiations between the parties are at an impasse, collaborative lawyers will often suggest involving a mediator or arbitrator, to assist the parties in resolving the dispute. In the event that the parties find themselves unable to collaborate, and decide to pursue litigation, both collaborative lawyers must withdraw from the case. This gives an added incentive to the parties and to the lawyers to reach an agreement.

One of the biggest advantages to resolving family law disputes in this way is that the couple can learn better ways to communicate with each other and to negotiate with each other while in a relatively safe environment, so that after the agreement is done the couple can continue to use these newly acquired communication skills to resolve any future disputes. This is especially valuable for couples who have children and who want to

⁴ Barbara Landau, Lorne Wolfson & Niki Landau, *The Family Mediation & Collaborative Practice Handbook*, (Toronto: Lexis/Nexis, 2005).

ensure their children do not suffer as a result of the breakdown of their relationship. Collaborative family law lawyers sometimes bring other professionals into the process to assist with various aspects of the case. For example, a child specialist can assist with issues involving parenting. Or financial advisors can be brought in to help parties decide how to deal with a family business venture after separation, or to assist with the division of other family assets and liabilities. Having one expert who is assisting both parties can be far less expensive and time consuming than having each party hire their own expert to do two separate evaluations.

Negotiating an agreement using the collaborative family law method can sometimes take a little longer than going to court, and may in some situations prove more expensive than litigation, depending on the complexity of the issues involved. However, many participants in the collaborative process have found the process to be empowering and the results more personally satisfying. Agreements reached through the collaborative process tend to be more equitable and enforceable than agreements negotiated by lawyers alone or judgments made by the court.⁵

F. CONCLUSION

There are various methods to handle any legal issue that arises from separation. It's up to you to pick the best method suited to you and your family's needs. Each method has its positives and negatives, from not having to air personal affairs in public, to finding creative solutions to property and support issues by working together to solve problems. As long as there is some degree of trust remaining between the parties, it is beneficial to both parties and their children to resolve their issues in as non-adversarial a way as possible, as this minimizes the emotional damage as well as the expense of separation and divorce. Generally speaking, the old adage "time is money" applies in this situation: the longer the parties take to resolve their disputes, the more expensive the process becomes.

⁵ For information about Collaborative Family Law in Ontario, go the following websites <http://www.coop-solutions.ca> and <http://www.collaborativelawcentre.com>.

N:\PRESS CLIPPINGS\local newspapers\collaborative law article.doc