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Positive Alternatives to Divorce Court: Mediation - A New/Old Situation Or Everything Old is New Again

By Anne Freed

What is the first thing people do when their marriages break down? They run to the divorce lawyer. Often, it is a race by the spouses as to who gets to that big name lawyer first, in the hope of decimating the other spouse. Thus sets in motion the "War of the Roses". We all remember that movie's infamous chandelier scene! There is an alternative. It's called mediation.

Mediation is a process that is as old as the hills, yet for some reason is seen by the public as new and revolutionary. Part of the problem is that many people do not even know that there is an alternative to litigation. There is, in my view, not enough information being made available to the public about this alternative process.

Take a typical case: Mary and Sam have tried everything to make their marriage work, including counselling and a trial separation. They have come to the decision that they must go their separate ways. They call their friends who have been through this and ask for the names of their lawyers. Often their friends won't tell them who their lawyers were because they have been through such a miserable experience, and also because in divorce cases, it is generally a "no win" situation even for the "winner." In affluent circles, it will be a race as to who gets to the biggest and the best - and the most expensive lawyer - first. And thus the war begins. The lawyer's job is to advocate for his client. Positions quickly become polarized: black or white. The lawyer's meter begins to run and the lengthy and costly process begins to grind its slow and interminable wheels to "justice".

Mary and Sam each have the idea that justice will be done when they have their day in court. In fact many divorcing parties often do not meet a judge in the entire process. They begin to find out that, depending on which court room one is assigned, the results can be radically different! One reason is that there is so much discretion in family law that the result often depends on who the lawyers and the judge are! If one

is in court, the parties often are told to wait outside while the judge speaks to the lawyers in the judge's chambers.

(Thankfully this system has changed in recent years so that it is now mandated that the parties be in chambers with the judge and the lawyers in Case Conferences and Settlement Conferences).

The legal bills keep mounting and nasty Affidavits fly back and forth. The saddest fall out of this process is the effect on the children. In the end, Mary and Sam settle just before trial, after having expended huge amounts of money to get what they have always felt was their due, endured numerous delays and had many court appearances that often turned into costly adjournments. They settle because they cannot afford and/or stomach the war any longer.

Enter an alternative: Mediation!

This is a process in which the mediator sits down with Mary and Sam and works with them with the common objective of Mary and Sam reaching a 'win/win' settlement. Although when it gets to court and litigation, family law can be complicated because there is so much grey area and so much is in the court's discretion, in stark contrast, when the parties sit down to mediate, the steps to resolution can be short and simple. The negative emotions that are fuelled and exacerbated by the court process can be dealt with in the much more rational and low key forum that is called mediation.

So what is this new/old thing called mediation?

To put it simply, when separating spouses are unable to sit at the kitchen table and negotiate all or part of the terms of their separation on their own, or where they need a little or a lot of help in doing so, they can choose to add a third party to the equation: the mediator. The mediator is a neutral third party who acts for neither party but whose purpose is to facilitate the reaching of a settlement by the parties.

The mediator, often a lawyer, cannot give legal advice; however, she can give legal information, which can provide great assistance to the parties in settling their matters. Mediation deals not only with the legal rights and obligations of Mary and Sam, but also with the interests, wants and needs of Mary and Sam, which the court doesn't deal with. Mediation can provide creative solutions which the court does not have the time nor forum to deal with, such as negotiating detailed parenting agreements tailored specifically to meet the needs of the individual family.

Mediation can take place in many different forums: Mary, Sam, and the mediator can be in a room together; or they can be in separate rooms with the mediator going back and forth between them; the mediation can be by phone or by computer (“on-line dispute resolution”) or even in separate buildings if a party is afraid for her/his safety. The goal of mediation is that the parties reach their own agreement on all or most of the issues.

The statistics are clear that agreements reached directly by parties are far more likely to be abided by than orders imposed by a court.

The mediator in family matters is often a family law lawyer who has expertise in both custody/access and financial issues. While the mediator cannot give legal advice as she cannot act for both parties, the mediator can give legal information which can run a fairly broad gamut and considerably shorten the time and money each party has to spend on her/his lawyer.

People often think that that they must choose one or the other: a mediator or a lawyer. The optimal route, in my view, is for each party to retain his/her own lawyer to run things by and for independent legal advice, while resolving as many of the issues as possible through the mediator. In my view it is essential that Sam and Mary each have his/her own lawyer. To have one’s own lawyer is indispensable for each party to be informed of his rights and obligations (“independent legal advice”), to feel empowered and that he/she is bargaining on a level playing field. Parties can choose to have their lawyers present at the mediation meetings; and I recommend that the lawyers be present in situations where a spouse feels that they will be intimidated in the mediation by the other spouse into making a decision they do not want (“power imbalance situations”).

I recommend to my mediation clients that they seek legal advice when necessary during the mediation process and that they review and finalize the separation agreement with their lawyers.

The great part is that even though each party has her/his lawyer plus shares a mediator, they will, almost invariably, save thousands of dollars and months or even years of time that utilizing the legal process on its own would likely have taken!

In contrast with litigation, the mediation process, in itself, provides a strategy and tools for the parties to communicate after the divorce, as they must do in situations where there are children. Sometimes parties even reconcile through the mediation process, even though that was not what they initially set out to do!

Many clients told me when I was practising as a litigator that making their first appointment felt like they were “putting the nail on the coffin!” Contrast this with the mediation process, which offers hope and the real possibility for an amicable parting of the ways and a settlement that is fair to each party, with parties even able to communicate positively after the divorce, using the mediation model, for the sake of the children.

Mediation can also take place concurrently with the litigation process: legal proceedings can be stayed pending the outcome of mediation. More and more frequently the judges themselves are recommending that the parties go to mediation.

The proof is in the pudding: ask your friends who have been through the mediation process and resolved their cases what they thought about it. I would wager that their answers will be quite different than those earlier mentioned friends who have been through the litigation process!

The statistics are that 95% of matrimonial cases settle before trial. However, often, as with Mary and Sam, settlement is at the court door, i.e. just before trial and after the parties have spent a small fortune to get there. In such a settlement, legal costs are almost never reimbursed by one party to the other. Contrast that with the scenario of Mary and Sam using mediation to settle their matter. The same or better outcomes as those resulting from litigation could have been achieved at a vastly lower financial and emotional cost.

In conclusion, I urge those of you who are, unfortunately, going through a marital breakdown, to try mediation as a process offering hope for a positive solution to a very difficult, emotionally and financially, situation.

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Anne Freed is has over 25-year family law lawyer. While winning most of her cases, she observed that her clients were often not happy with the process. She obtained her Master of Laws in Alternate Dispute Resolution (mediation) and now is practising as a family law mediator with much happier clients.