Government
of
Saskatchewan
Minister of Justice
and Attorney General
Legislative Building
Regina, Canada S4S 0B3

IAJ 10-28
Tabled by Chair(Bradshaw)
Date May 24, 2018

May 24, 2018

Mr. Fred Bradshaw
Chair of the Intergovernmental Affairs
And Justice Committee
Room 239 Legislative Building
2405 Legislative Drive
REGINA SK S4S 0B3

Dear Mr. Bradshaw,

Further to our previous appearance on at the committee for Intergovernmental Affairs and Justice, enclosed please find certain consultation materials which I agreed to provide to the member for Regina Douglas Park.

Sincerely,

Don Morgan, Q.C.

Markatos, Maria JU

From: Emanuel Sonnenschein <sonnenscheinemanuel@gmail.com>
Sent: Thursday, June 29, 2017 3:46 PM
To: Markatos, Maria JU
Cc: stla
Subject: Re: Request for Member Input re Early Dispute Resolution in Family Law Disputes

Further to your request for input on Dispute Resolution in Family Law, we would like to make the following comments:

(1) The writer had for a long time been an avid supporter of mandatory mediation.

(2) We recently had two matters crop up, which we took through Mediation Services and found to our dismay a seemingly lack of empathy and co-ordination by the Mediator.

In the first one, there was a clear-cut encroachment on our client's property and we provided a Survey Certificate, which our client paid $800.00 to obtain. We provided a Brief and found there was no dispute that there was an encroachment. The Mediator who happened to have legal training asked us to step out and meet with the other lawyer. He declined to take a position. We believe that sometimes they have the feeling that common sense should override good law or bad law. Accordingly, we did not meet with the other client. We were aware that there was a lot of extreme bad blood between the two parties. Nevertheless, with the Survey Certificate, the writer felt that the mediator should have at least suggested that there is no question there is an encroachment and it would be worthwhile to deal with it. We have a very unhappy client and we are very unhappy about it.

In the second instance, there was a lawsuit relating to an extremely controversial family or estate matter. We provided what we felt was a good Brief of Law as we had in the prior one. We tried to negotiate with the lawyer for the other party. They didn't seem to want to make a reasonable adjustment. The other lawyer asked if he could meet with our client to put the position. We thought this was only fair and reasonable. He did and we asked to address his clients. He declined and we didn't hear a comment or input from the Mediator that what is sauce for the goose is sauce for the gander and suggest that it would only be fair.

In other words, we think it is unreasonable not to have parties mediating that are prepared to stand up and express a viewpoint without necessarily taking sides, but common sense should prevail.

In both these instances, it has cost the writer considerable because we were sure that there would be some accommodation. We think that the Department before expanding should make sure they have the first house in order and have people who are prepared to use their head for something other than keeping their hair on or the lack thereof.

If we are being unkind, please forgive us. We expressed our views to the Mediators and believe that they understood why we are unhappy. They may not appreciate it and they may not be able to explain it, but certainly they ought to adjust their common sense. In other words, don't put something in unless you know where you going, why you are going there, and how you want to get there.

Thank you.

Emanuel Sonnenschein, Q.C.

On Thu, Jun 29, 2017 at 2:36 PM, <admin@stla.ca> wrote:

Dear STLA member,

The Ministry of Justice is considering amendments to several pieces of legislation that contemplate court applications for the resolution of family disputes. These include the following Acts: *The Children's Law Act, 1997, The Family Maintenance Act, 1997, The Family Property Act* and *The Arbitration Act, 1992.*

The STLA would like to gather information from our members.; please see the attached consultation paper. We request that **submissions be submitted by July 31st.**

Thank you for your attention to this matter. I trust you will have a wonderful summer.

Karen Roden

Executive Director

Saskatchewan Trial Lawyers Association

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Markatos, Maria JU

From: Martin, Jonathan <jomartin@millerthomson.com>
Sent: Tuesday, July 04, 2017 11:07 AM
To: Markatos, Maria JU
Subject: Early Dispute Resolution proposal document

Hello,

A couple of suggestions.

1. There should be stronger consequences for self-help remedies that people take, especially for running off with property or children. The Alberta *MPA*, section 33, makes it an offence to remove any property from the family home without the other's consent or a court order once a family law proceeding is commenced. This is a good start, but I would propose that the law should go further and punish moving children or goods from the family home or locking the other out of the family home, unless there is abuse or danger, without consent or a court order. Strong rules against self-help remedies would force the parties to negotiate right from the start, rather than what happens now with one party gaining an unfair advantage through self-help and then expecting the other to negotiate in good faith. This door needs to be closed.
2. The parenting coordinator is a good idea. There should also be a regime like in some other provinces where maintenance orders can be automatically updated based on financial documents without a court order.
3. Proposed section 4(2) is problematic. The PC's primary role is the faithfully interpret the court order or the parenting agreement. There should be a presumption that these represent the best interest of the child. The Parenting Coordinator should first seek to faithfully apply these documents and the best interest of the child should only be one interpretive tool among others. If parties cannot have confidence that the Parenting Coordinator will faithfully apply the agreement they have made, but can make their own determinations as to the child's best interest, it takes away from the parties the certainty and peace of mind of having an agreement to begin with.

JONATHAN MARTIN
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Markatos, Maria JU

From: Jan Katerynych <jan@dklo.ca>
Sent: Thursday, July 13, 2017 4:03 PM
To: Markatos, Maria JU
Subject: Early Dispute Resolution in Family Law Disputes

In response to your questions:

Question 1: Mandatory? Early dispute resolution in family law disputes should be mandatory unless an application is made to the Court of Queen's Bench for an exemption.

Question 2: Appropriate processes? Mediation with binding agreements (similar to Pre-trial Agreements), Arbitration, and Parenting Coordinators should be appropriate and encouraged

Question 3: Need to file proof? Unless an exemption has been granted (see Question 1) a certificate from the Mediator/Arbitrator/Parenting Coordinator should be filed before a chamber's judge hears a family law dispute

Question 4: Failure to respond? Costs should be awarded to the cooperative party

Question 5: Proposed provision? FABULOUS!!!

Question 6: Arbitration? Appropriate: Property disputes, support disputes, make orders for parenting coordination Inappropriate: same as your proposed x(5)
Arbitrators should be considered Lower Court Hearing Officers similar to ORT, Labour Standards, etc.

Question 7: Experience practicing in family law, training in arbitration, experience writing decisions, special training to recognize power imbalances in spousal relationships

Question 8: Good idea. But weak unless Coordinators a fully recognized as decision-makers by the Court of Queen's Bench

More Comments: What the province really needs is more access to custody assessors!

Jan D. Katerynych

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Markatos, Maria JU

From: Maureen Jickling <MJickling@saskschoolboards.ca>
Sent: Wednesday, August 02, 2017 3:31 PM
To: Markatos, Maria JU
Subject: Early Dispute Resolution in Family Law Disputes

Dear Ms Markatos:

I have reviewed your paper and my only comment is in response to p.5 relating to the proposed provision (2)(b). Saskatchewan School Divisions will likely be the recipients of the authorizations to provide information respecting a child or a party pursuant to provision 2(b). Kindly note that provision 2(b) will be subject to *The Local Authority Freedom of Information and Protection of Privacy Act* (LAFOIPP).

Practical impact of provision 2(b) on School Divisions

From a practical perspective, provision 2(b) can be anticipated to affect the workload of Saskatchewan School Division's Privacy Officers. Privacy Officers are typically Directors of Education or Superintendents who are responsible for supervising school staff and providing student support. Privacy Officers work out of School Division head offices and, generally speaking, there's been a reduction of head office staff as a result of recent budgetary cutbacks.

LAFOIPP legal custodian access to information/records considerations and provision 2(b)

Legal custodians are authorized pursuant to s. 49(d) of LAFOIPP to request a minor student's information/records. Section 49 provides:

> **Exercise of rights by other persons**
> **49** Any right or power conferred on an individual by this Act may be exercised:
> (d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the head, the exercise of the
> right or power would not constitute an unreasonable invasion of the privacy of the individual;

There are two elements that must be addressed – first, whether the applicant is a legal custodian and second, whether the release of the information would be an unreasonable invasion of the privacy of the student.

Legal custodian
The determination of whether an individual is a legal custodian will be made by reference to *The Children's Law Act, 1997*, custody orders and guardianship relationships.

Privacy rights
Pursuant to LAFOIPP, the student's records belong to the student, not the legal custodian. The legal custodian's ability to exercise the rights of the student regarding the information are limited. If the board of education believes that the release of the information would be an unreasonable invasion of the privacy of the student, the board cannot release the information, even with the written permission of the legal custodian.

Some of the factors that might be considered by the board are the nature of the information requested and the impact the release of the information may have on the student. A significant example is counselling records where the notes of counsellors will generally not be released even to the parent, and this is supported by caselaw.

In addition, the school division will consider whether it will require the consent of the student before releasing the information. This decision will be determined by the age and maturity level of the student. This determination will be

made on the assessment of the school personnel with regard to the necessity or advisability of involving the student in the particular request so as to ensure that their privacy rights are respected.

(Note: Where adult student [over the age of 18 years] is a person with disabilities, *The Adult Guardianship and Co-decision-making Act* should be considered. Section 49(d) of LAFOIPP statutorily ceases to apply upon the student being 18 years of age and a party needs to rely upon other provisions in LAFOIPP's s. 49 to access the adult student's records.)

LAFOIPP and cost of access to information/records

LAFOIPP and its regulations describe costs to gain access to School Division records:

- The application fee ($20) which may be waived by the Division
- Search & production fees are described in the regulations

The appropriate process for making information requested from school is to send the request to the central office of the school divisions. Requests sent directly to school should be forwarded by them to the central office. School divisions now hold the majority of student records in electronic form.

For further discussion about LAFOIPP in the education context and involvement of third parties, you may be interested in reviewing the Guide at this link: http://www.publications.gov.sk.ca/details.cfm?p=79252 You may also be interested in the Privacy and Access in Saskatchewan Schools website at this link: http://saskschoolsprivacy.com/

Thank you for the opportunity to provide comments. Please contact me if you have any further questions.

S. Maureen Jickling, B.Soc.Sci., LL.B., CIC.C
Solicitor

400-2222 13th Avenue Regina, SK S4P 3M7
Phone: 306-569-0750 Ext. 121 | Fax: 306-569-2317

Markatos, Maria JU

From: Pottruff, Betty Ann JU
Sent: Tuesday, August 15, 2017 12:55 PM
To: Markatos, Maria JU
Subject: FW: Consultation Now Attached - FW: Last Chance for Consultation - Early Dispute Resolution Legislation
Attachments: Early Dispute Resolution Consultation Paper - July 2017.pdf

Here are my comments, but I had some difficulty with the format so I hope it all comes through. Basically, I strongly support parenting coordinators, but the draft didn't make it clear to me in what circumstances the court would make such an order....

I don't support broad use of ADR for family matters that involve children where the proceedings are on-going like disputes about custody and access as I think a court needs to consider the full file when deciding on next steps; I think the exceptions are too narrow; and most importantly people have forgotten or ignored the right of the child to have their views heard in any proceedings affecting them under the UN Convention on the Rights of the Child including mediation etc.

I don't think arbitration is appropriate for any matters involving children as the test is best interests of the child not what an arbitrator might decide unless the artibrator is bound by the same legal principles and statutes as a judge and then what do you gain with an arbitrator and isn't an arbitrator's role inconsistent with consideration of best interests and views of the child?

From: Monteen Dent [mailto:monteen@cbasask.org]
Sent: Monday, August 14, 2017 1:50 PM
Cc: Monteen Dent
Subject: Consultation Now Attached - FW: Last Chance for Consultation - Early Dispute Resolution Legislation

Sorry everyone, this was my fault not David's and please send your comments directly to David although I will be sure to pass along any that inadvertently come to me.

Thanks,
Monteen

MONTEEN **DENT**
Executive Assistant

T: (306) 244-3898 | 800-424-8288 *(SK Only)*
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SASKATCHEWAN

From: CBA Saskatchewan
Sent: August 14, 2017 1:31 PM
Cc: Monteen Dent
Subject: Last Chance for Consultation - Early Dispute Resolution Legislation

Just a quick reminder that if you wish to comment on the attached paper that I need to receive your comments very quickly as the deadline is **August 25**.

This paper outlines several amendments to the legislation that contemplate court applications for the resolution of family disputes and our input as the CBA is well considered.

Any questions or comments please send to me at dcouture@ktllp.ca as Chair of CBA SK Family Law South.

David A. Couture
Direct: 306.949.4251
dcouture@ktllp.ca

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SASKATCHEWAN

Early Dispute Resolution in Family Law Disputes

July 2017

1. Introduction

In 2014 the Ministry of Justice undertook the Justice Innovation Agenda to take a critical look at the justice system to find ways to promote access to justice. The goal of the Justice Innovation Agenda is affordable, faster, citizen-centred dispute resolution. The Innovation Agenda is seeking to reduce the number of civil disputes before the court by promoting the use of out-of-court dispute resolution processes for family disputes where appropriate. Parties to a dispute need to be aware of the range of options available for early settlement and to maximize these opportunities to reduce the financial and emotional costs of separation.

The Ministry of Justice is considering amendments to several pieces of legislation that contemplate court applications for the resolution of family disputes. The proposed amendments will support additional streams of resolution for family disputes, while continuing to offer courts as one, but not the only, source for resolution. The Acts being considered include: *The Children's Law Act, 1997, The Family Maintenance Act, 1997, The Family Property Act* and *The Arbitration Act, 1992.*

Recently you may have participated in a survey regarding mandatory alternate dispute resolution (ADR) in family disputes. This paper is informed by the results of that survey, but in addition to mandatory ADR it also considers arbitration of family disputes, and the introduction of parenting coordinators as a resource where an order or agreement is already in place.

The Ministry of Justice is consulting interested parties and organizations to obtain their views respecting the proposed amendments to a variety of family law legislation. We would appreciate your feedback on the topics and proposed provisions set out below.

2. Alternate Dispute Resolution in Family Law Disputes

Family disputes may be about custody, access, maintenance, and property division. Mandatory ADR in family disputes may be a cost effective alternative to full court proceedings. Family disputes can be high in conflict and allegations exchanged through pleadings and additional materials, such as affidavits, may intensify conflict between parties. Early ADR may also encourage parties to resolve and narrow certain issues leaving others to be determined through the usual court process. The Ministry of Justice is interested in introducing legislation to require parties in applicable family law proceedings to make efforts to resolve issues either before pleadings are filed or immediately after the close of pleadings.

(a) Types of ADR

Mandatory ADR would permit parties to participate in their choice of ADR. There are a variety of ADR methods that may assist parties in the early resolution of family disputes. Mediation is likely the most well-known and expressly considered in *The Children's Law Act, 1997* at section 10 and *The Family Maintenance Act, 1997* at section 15. In each of those Acts on application of a party the court may

appoint a person to mediate a matter. Similarly, collaborative law services are referenced in each of *The Children's Law Act, 1997, The Family Maintenance Act, 1997* and *The Family Property Act* at each of sections 10, 16 and 44.1 respectively. In each of sections 10, 16 and 44.1 respectively, lawyers are required to inform their clients of the availability of alternative methods to resolve matters including collaborative law services and mediation services.

The Ministry of Justice's Family Matters program is another early ADR process. Family Matters is a new program that is offered to assist families who need information, support or guidance during the transition of their family structure. The Family Matters program provides information and resources to deal with a changing family situation and assistance to resolve urgent and outstanding issues. The program aims to help parties build a cooperative parenting relationship, minimize the effect of separation on family members, especially children, and allow families access to early, affordable and informal opportunities to resolve issues.

(b) Timing

As indicated, the proposed provisions would permit parties to participate in their choice of ADR the timing of which would either occur before pleadings are filed or immediately after the close of pleadings. Participating in a form of ADR before pleadings are filed would allow the parties to meet and discuss issues without the additional animosity created by potential accusations and allegations set out in pleadings.

Where parties have not attempted to resolve issues before applying to court, participation in an ADR process would be required immediately after the close of pleadings. If all issues are not resolved through an ADR process, it is anticipated that issues proceeding through a court resolution process will have been clarified and narrowed.

(c) Non-participation

If mandatory ADR is implemented, parties will be required to provide proof of participation in an ADR process before proceeding any further with their claim. Also, in certain circumstances ADR may not be appropriate and parties may seek to proceed with an action without participating. For example, the Ministry of Justice recognizes that early resolution processes may not be appropriate where there is a history of domestic abuse or where a child has been abducted. There must also be a consequence in place for parties who refuse to participate or attempt to thwart the initiating party's attempts at resolution.

Proposed Provision

The proposed provision below would require parties to participate in a form of ADR before proceeding any further with their action. Similar to the parenting course, parties who fail to participate run the risk of having their claim struck or not being permitted to make any further submissions to the court. Unlike the mandatory mediation required in civil litigation pursuant to section 33 of *The Queen's Bench Act,*

1998, in a family law dispute the screening and appointment of an ADR provider will proceed separate and apart from regular civil disputes.

Family dispute resolution

x(1) In this section:

"family dispute resolution" means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues without court intervention, and includes:

(a) mediation, arbitration and collaborative law services; and
(b) any other process or service prescribed in the regulations.

"family law dispute" means a dispute to which an application pursuant to *The Family Maintenance Act, 1997, The Family Property Act,* or Part II, except for a hearing pursuant to section 12 and Part IV of *The Children's Law Act, 1997* is made.

(2) Subject to subsection (5), if they have not already, the parties to a family law dispute must immediately after the close of pleadings:

(a) participate in family dispute resolution; and

(b) file with the court a certificate of participation in family dispute resolution, in the form prescribed in the regulations.

(3) Subject to subsection (5), a party who fails to participate in family dispute resolution is prohibited from:

(a) taking any further step in the proceeding; and

(b) filing with the court any further application for relief.

(4) If a party fails to participate in family dispute resolution, the court, on application, may:

(a) strike out the party's pleadings or other documents;

(b) refuse to allow the party to make submissions on an application or at trial;

(c) order the party to participate in a type of alternative dispute resolution;

(d) order costs or any other relief.

(5) On an application without notice, the court or a prescribed person, may exempt a party from the requirement to participate in family dispute resolution pursuant to this section if:

(a) there is a restraining order between the parties;

(b) a child of the parties has been kidnapped or abducted by one of the parties;

(c) there is a history of interpersonal violence between the parties;

(d) the party provides proof of attempts to engage the other party in family dispute resolution; or

(e) in the opinion of the court, there are extraordinary circumstances.

Question 1: Please share any comments you have about mandatory alternate dispute resolution in family law disputes? I think mandatory alternate dispute resolution after the filing of pleadings is more appropriate t filing to ensure the issues are clearly established along with the potential to establish exceptio

Question 2: What types of processes should be included as appropriate alternate dispute resolution for family law disputes? I think ADR is most appropriate with the initiation of disputes, but is less useful if the dispute is a continuation of a dispute, i.e. on-going problem in custody, access or maintenance compliance where the cou

Question 3: What should be filed to demonstrate that the petitioner has attempted ADR?

I am not sure.

Question 4: What should happen if the responding party fails to respond to requests and refuses to participate? There could be an consideration in costs if the non-responding party is not successful in court.

Question 5: Any comments on the proposed provision? I found the definition of family law dispute confusing as I don't know what parts of the Children's Law Act are intended to be subject to this regime. I do not feel that parts IV, V or VI should be -subject to the court ordering parties to mediation or parent coordinator as the court has to look at the history of the file as to what is appropriate. I also feel the exceptions are too limited: there could be conditions in criminal orders and not just restraining orders; there could be a history of violence towards other family members or pets and not just between parties; and child abduction may not be the only exigent circumstance - I think that ground should say "exigent circumstances" and give abduction as an example along with other situations where time is of the essence. I also think this discussion ignores the rights of the child to participate according to the UN Convention on the Rights of the Child to have their views heard whether mediation or trial and these amendments present a real opportunity to make advances in recognizing the rights of the child whether in court or ADR to be part of the process.

3. Arbitration

The Arbitration Act, 1992 does not expressly exclude the arbitration of family disputes, but it also does not expressly contemplate resolution of such disputes through arbitration. Adding provisions to the Act that would specifically reference the arbitration of certain family law disputes may provide another viable stream for resolution outside the court system. The proposed provisions would include building in an appeal process, establishing criteria for recognition as a family law arbitrator, and establishing requirements for entering an agreement to arbitrate. A family law arbitrator will be able to make binding decisions to resolve family law issues out of court. The criteria will be set out in regulations to allow expertise to build over time. Arbitration for certain family disputes is regularly used in British Columbia and Ontario.

Question 6: What types of family law disputes could be resolved effectively through family arbitration? Are there any family law disputes which should not be resolved through family arbitration? I don't believe arbitration is appropriate in any situation that involves the rights of the child and determination of best interests, unless the arbitrator is required to consider the views of the child and to make decisions in accordance with legal standards such as best interests. I am not convinced that arbitration is appropriate for matters involving children.

Question 7: Criteria for a family law arbitrator will be set out in the Regulations. What qualifications should someone have in order to be qualified as a family law arbitrator? The arbitrator would need to be a lawyer familiar with family law, family dynamics theories, etc. as the arbitrator would need to recognize and deal with power dynamics, potential for abuse or intimidation, etc.

parties in high conflict relationships an avenue for resolution that does not involve more court applications.

The Ministry of Justice is considering creating new provisions respecting parenting coordinators. The proposed provisions below would establish a framework for the operation of parenting coordinators in Saskatchewan including the requirement for an agreement, disclosure to the parenting coordinator, the authority of the parenting coordinator and application to court if the parenting coordinator makes a determination outside the scope of his or her authority. A parenting coordinator's qualifications and minimum training requirements would be set out in the regulations.

Question 8: Any comments on the proposed provisions below?

Proposed Provisions

1(1) A parenting coordinator may assist only

(a) if there is a parenting coordination agreement or order in place; and

(b) for the purpose of implementing an agreement or order respecting parenting arrangements, contact with a child or other prescribed matters.

(2) A parenting coordination agreement or order may be made at the same time as, or after, an agreement or order respecting parenting arrangements, contact with a child or other prescribed matters is made.

(3) A parenting coordinator's authority to act ends two years after the parenting coordination agreement or order is made, unless the parenting coordination agreement or order specifies that the parenting coordinator's authority is to end on an earlier date or on the occurrence of an earlier event.

(4) Notwithstanding subsection (3), a parenting coordination agreement or order may be extended by a further parenting coordination agreement or order, but each extension may be for no more than two years.

(5) Notwithstanding subsection (3), a parenting coordination agreement or order may be terminated at any time as follows:

(a) in the case of an agreement, by agreement of the parties or by an order made on application by either of the parties;

(b) in the case of an order, by an order made on application by either of the parties;

(c) in any case, by the parenting coordinator, on giving notice to the parties and, if the parenting coordinator is acting under an order, to the court.

2 A party must, for the purposes of facilitating parenting coordination, provide the parenting coordinator with:

(a) information requested by the parenting coordinator;

(b) authorization to request and receive information respecting a child or a party from a person who is not a party.

3 A parenting coordinator may assist the parties in the following manner:

(a) by building consensus between the parties in the following manner:

(i) creating guidelines respecting how an agreement or order will be implemented;

(ii) creating guidelines respecting communication between the parties;

(iii) identifying and creating strategies for resolving conflicts between the parties; and

(iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;

(b) by making determinations respecting the matters prescribed for the purposes of section 4.

4 (1) A parenting coordinator

(a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations;

(b) must not make a determination respecting any matter excluded by the parenting coordination agreement or order, even if the matter is a prescribed matter, and

(c) must not make a determination that would affect the division or possession of property, or the division of family debt.

(2) In making a determination respecting parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only.

(3) A parenting coordinator may make a determination at any time.

(4) A parenting coordinator may make an oral determination, but must put the determination into writing and sign it as soon as practicable after the oral determination is made.

(5) Subject to section 5 a determination:

(a) is binding on the parties, effective on the date the determination is made or on a later date specified by the parenting coordinator; and

(b) if filed in the court, is enforceable under this Act as it if were a court order.

5(1) On application by a party to a determination made by a parenting coordinator, the court may change or set aside the determination if the court is satisfied that the parenting coordinator

(a) acted outside his or her authority; or

(b) made an error of law or of mixed law and fact.

(2) If the court sets aside a determination, the court may make any order that the court may make under this Act to resolve a dispute between the parties.

(3) If the court does not set aside a determination, the court may make any order that the court may make under this Act to enforce compliance with the determination.

5. Conclusion

If you have any comments regarding the topics and proposed provisions considered in this consultation document please provide them prior to **August 25, 2017** by email to:

Maria Markatos, Senior Crown Counsel
Legislative Services, Saskatchewan Justice
800 - 1874 Scarth Street
REGINA SK S4P 4B3
Fax: (306)787-9111
E-mail: maria.markatos@gov.sk.ca

Thank you in advance for your contributions.

Please be aware that your responses will form part of the public record and may be used in the ongoing development of this legislation.

Markatos, Maria JU

From: David Couture <dcouture@ktllp.ca>
Sent: Tuesday, August 22, 2017 9:29 AM
To: Markatos, Maria JU
Subject: RE: early dispute resolution - consultation paper -- KT Matter No: 34337-0005
Attachments: Arbitration; RE: Early dispute resolution - consultation paper -- KT Matter No: 34337-0005

Maria

I have received two replies from members of the Family Law South Section of the CBA. I have attached both of those emails. If I receive anything more before Friday I will forward those as well.

Yours truly,

David A. Couture
Direct: 306.949.4251
dcouture@ktllp.ca

Kanuka Thuringer LLP
1400-2500 Victoria Avenue | Regina, SK S4P 3X2
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From: Markatos, Maria JU [mailto:Maria.Markatos@gov.sk.ca]
Sent: June 23, 2017 9:16 AM
To: David Couture
Subject: early dispute resolution - consultation paper

Dear David,

The Ministry of Justice is considering amendments to several pieces of legislation that contemplate court applications for the resolution of family disputes.

I am sending the attached consultation paper to you in your capacity as chair of the CBA Family Law Section and I would be obliged if you could circulate the attachment to your members. We would be pleased to have your comments with respect to the attached paper. In order for your comments to be considered, we need to receive them by **August 25, 2017**.

Please let me know if you have any questions.

Maria

Maria Markatos
Government of Saskatchewan
Crown Counsel
Legislative Services Branch, Ministry of Justice
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Markatos, Maria JU

From: Korpan, James <JKorpan@mcdougallgauley.com>
Sent: Monday, August 14, 2017 2:22 PM
To: David Couture
Subject: Arbitration

Hi David,

I think arbitration would be perfect for family law matters. Early and informal viva voce hearings would get people to the finish line quickly on most matters.

I would support this so long as the legislation clearly sets out the powers of the arbitrator, has a mechanism for appeal, and also prescribes a rigorous accreditation process. In my view, only experienced family law counsel should fill this role.

Those are my two cents on the paper.

James N. Korpan, Q.C.
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Markatos, Maria JU

From: Jeremy N. Ellergodt <j.ellergodt@mckercher.ca>
Sent: Wednesday, July 19, 2017 11:48 AM
To: David Couture
Subject: RE: Early dispute resolution - consultation paper -- KT Matter No: 34337-0005

Hi David,
I'm sure lots of people have the same comments but mine are as follows:

1) Requiring ADR before pleadings can be filed with significantly disadvantage parties where an application needs to be made quickly such as in cases of unilaterally terminating parenting time. Status quo will develop to the detriment of one party while they arrange for a suitable date for the mediation to occur. This will result in significant prejudice. If an application has to be brought to get an order that ADR does not need to occur that will simply increase fees for parties as well as the time necessary to bring an application. Waiting two months to get to ADR before making an application for support or parenting time is simply unacceptable.

2) ADR at an early stage is often not helpful given the lack of disclosure that has occurred. Impossible to come to a resolution on any property or support issues without disclosure. Compelling disclosure before ADR will only result in further delays.

3) I don't think arbitration would be very helpful. Getting a matter in front of a judge for chambers is usually pretty quick and I don't see arbitration being any cheaper or quicker.

4) If parties could resolve a dispute using a parent coordinator then they would be smart enough to resolve it between themselves without one.

Thanks!

Jeremy Ellergodt
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From: Monteen Dent [mailto:monteen@cbasask.org]
Sent: Thursday, July 13, 2017 1:01 PM
To: Monteen Dent <monteen@cbasask.org>
Subject: Early dispute resolution - consultation paper -- KT Matter No: 34337-0005

As Chair of the CBA SK Family Law South Section, please see the below email from Ms. Maria Markatos from the Ministry of Justice and the attached Consultation Paper she references.

If you have any comments on this paper that you would like to be considered, please direct them to me and I will forward them all to Ms. Markatos before August 25.

David A. Couture
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From: Markatos, Maria JU [mailto:Maria.Markatos@gov.sk.ca]
Sent: June 23, 2017 9:16 AM
To: David Couture
Subject: early dispute resolution - consultation paper

Dear David,

The Ministry of Justice is considering amendments to several pieces of legislation that contemplate court applications for the resolution of family disputes.

I am sending the attached consultation paper to you in your capacity as chair of the CBA Family Law Section and I would be obliged if you could circulate the attachment to your members. We would be pleased to have your comments with respect to the attached paper. In order for your comments to be considered, we need to receive them by **August 25, 2017**.

Please let me know if you have any questions.

Maria

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Markatos, Maria JU

From: Wiegers, Wanda <w.wiegers@usask.ca>
Sent: Thursday, August 24, 2017 4:11 PM
To: Markatos, Maria JU
Cc: Newsham, Kim JU
Subject: Response to the Early Dispute Resolution Consultation Paper
Attachments: Early Dispute Resolution in Family Law Disputes Final.docx

Hello Ms Markatos,

I attach a response to your Early Dispute Resolution Consultation Paper that I, along with Professors Koshan and Mosher, am submitting for the Ministry's consideration. Please do not hesitate to contact me if you have any questions or concerns regarding this submission.
Thank you for the opportunity to comment on the proposed changes.

Wanda Wiegers
Professor
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Early Dispute Resolution in Family Law Disputes 2017

Comments on Proposed Provisions

Wanda Wiegers, College of Law, University of Saskatchewan
Jennifer Koshan, Faculty of Law, University of Calgary
Janet Mosher, Osgoode Hall Law School, York University

Thank you for the opportunity to comment on the proposed provisions related to Early Dispute Resolution under provincial statutes dealing with support, property division and custody and access. The proposals promote the mandatory use of alternative dispute resolution (ADR) prior to or after the filing of pleadings as well as greater use of arbitration and parenting coordinators. The apparent objective is to encourage early resolution outside the court system and thereby reduce conflict and costs for parents, children, and courts.

Our comments will not address all of the proposals comprehensively but will rather focus on their potential impact on access to justice for low income disputants and those affected by intimate partner violence and abuse. Regarding the latter, we have questions regarding how an exemption for interpersonal violence will be interpreted and applied, as to whether training on DV issues will be mandated and how confidentiality will be maintained.

A. Access to Justice for Low Income Disputants

The proposed provisions would require that parties certify or provide proof of participation in an ADR process before pleadings are filed or immediately after the close of pleadings. If proof is not provided, there are significant consequences. The claim can be struck or the claimant prevented from making submissions, among other possibilities, as per s (3) and (4). The hope is that resort to ADR could narrow the issues between the parties and encourage early resolution. Mandatory ADR is being proposed as a "cost effective alternative to full court proceedings."

In terms of facilitating access to justice for persons living on low incomes, the proposals raise a couple of concerns. First, it is not clear whether or how legal advice will be provided to parties. Will they be required to attempt settlement of the issues without having the benefit of legal advice if they are self-represented or cannot afford to obtain a lawyer? Mediators do not provide legal advice and will typically, at least in Saskatchewan, confer with parties independently of family lawyers. It is not clear the extent to which mediators will be expected to provide legal information if ADR is made mandatory[1] and whether mediators who are not lawyers will be expected to receive training in legal norms.

In the absence of legal advice, the parties may end up giving up legal entitlements or otherwise exposing themselves to unanticipated risks in the course of settlement. Many of the legal norms in the family law context were intended to protect vulnerable parties through presumptions of equal division and support obligations, and to protect children through norms such as the best interests of the child. These entitlements are important in terms of equalizing power imbalances that may arise where parties have

[1] see eg Amy G Applegate and Connie JA Beck, "Self-Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room" (2013) 51:1 Family Court Review 87 at 98.

unequal financial status or are victims of serious domestic violence or abuse. They provide an important benchmark against which interests can be assessed and are more important for women on average.[2] In the absence of full legal advice, parties may also end up running risks they had not contemplated. For example, an agreement about custody may have implications for the amount of child support payable that can impact both parties. The proposals do not tell us how participants will be protected in this process. Nor do they address the role of children in these processes.[3] Are children to be involved? If so, to what extent and what protections should be put in place for them?

In terms of costs, mandatory ADR may well have the effect of reducing overall costs both to the parties and the court in some cases by, for example, reducing the inflammatory impact of affidavits, and the length of proceedings. Whether these measures ultimately reduce costs will depend on the intensity of conflict and how effective the particular type of ADR is in resolving conflict compared to conventional settlement negotiations between lawyers (that presumably will not qualify as ADR initiatives) or self-representation.

However, unless ADR services (including mediators, collaborative lawyers and parenting coordinators) are publicly funded or subsidized to a substantial extent, these provisions will impose an immediate additional financial cost on parties. Low income parties may be unable to afford the costs of ADR, or as a result of these added costs, may be forced into self-representation as their only viable option. Further, where ADR is inappropriate and the parties are entitled to an exemption, the cost of applying to a court or "a prescribed person" will also impose costs both in financial and personal terms, as discussed below. Unless high quality services are publicly funded, the proposals may impede rather than facilitate access to justice for low income parties.

Other jurisdictions have funded mediation services for family law disputes. Quebec generally mandates parenting and mediation information sessions prior to a court action but provides a five hours of free mediation for those in the process of separating.[4] Ontario does not mandate mediation prior to a court action but the Ministry of the Attorney General does fund wholly or substantially the provision of mediation services out of court houses for all families.[5] British Columbia allows a party to require the other to participate in mediation in some circumstances and funds it for low income parents in some cases.[6] In the US, Arizona has had a free court-based program since the 1980s.[7] In 2006, Australia required that family law litigants attempt family dispute resolution before going to court but between

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[2] Wanda Wiegers and Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 Osgoode Hall Law Journal 733-72.

[3] Ballard, R.H., Holtzworth-Munroe, A., Applegate, A.G., D'Onofrio, B.M., & Bates, J.E. (2013). A randomized controlled trial of child-informed mediation. *Psychology, Public Policy, and Law*, 18, 271-281.

[4] See https://www.justice.gouv.qc.ca/en/couples-and-families/separation-and-divorce/family-mediation-negotiating-a-fair-agreement/duration-and-cost-of-mediation/ The session is mandatory unless a certificate is filed attesting to fact that assistance has been sought from a Victim's Assistance Association for help as a victim, *Code of Civil Procedure* CLR C c 25.01, s 417.

[5] See Ministry of Attorney General, Ontario at https://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.php#fms.

[6] *Law and Equity Act,* RSBC 1996 c 253, s 68; *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, ss 13, 23.

[7] Connie J. A. Beck, Michele E. Walsh, Robin H. Ballard, Amy Holtzworth-Munroe, Amy G. Applegate, and John W. Putz, "Divorce Mediation With or Without Legal Representation: A Focus on Intimate Partner Violence and Abuse" (2010) 48:4 Family Court Review 631 at 641.

2006 and 2008 also established a network of community family resolution centres that offer free services and can issue certificates allowing a case to proceed.[8]

If dispute resolution services are only available to families with wealth, these proposals will increase the gap between the realities of impoverished families and the objectives of family law.

B. Access to Justice and Victims of Domestic Violence or Abuse

It is well known that a higher proportion of people separating or divorcing experience domestic violence than in the population at large. In the US, interpersonal violence or abuse is one of the main reasons for seeking a divorce and at least one party in more than 50% of divorce mediations report having experienced it.[9] In particular, the period of separation can be a time of enhanced risk for more severe and frequent partner violence including lethal outcomes against female partners.[10] Saskatchewan has the highest rate of police-reported domestic violence of all provinces in Canada and we have recently witnessed the murders of both wives and children in the context of actual or impending separation.[11]

It is also widely known that domestic violence and abuse, particularly coercive controlling violence, can have long term negative effects on abused parties, affecting their physical well-being and psychological health, their self-esteem and sense of self-efficacy.[12] Intimate partner violence and abuse also increases risks to children. Coercive domestic violence in particular, as opposed to isolated instances of minor violence, is correlated with negative parenting and child abuse.[13] The abuse can continue and indeed escalate post-separation. Parents who have experienced domestic violence may also agree to custody

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[8] Family Law Act 1975 s 607. Even where a mediator or conciliator is state-funded, however, there may be concerns that he or she will act as an "agent of the court whose job is to settle disputes and reduce caseload congestion rather than an agent of the parents whose job is to facilitate communication and cooperation", Barbara Glesner Fines, "Book Review" (2016) 54:3 Family Court Review 525 at 527.

[9] Amy Holtzworth-Munroe, "Controversies in divorce mediation and intimate partner violence: A focus on the children" (2011) 16 Aggression and Violent Behavior 319 at 319. Studies in Australia suggest that the majority of separating or divorcing clients are affected by family violence or abuse in some form, "It is the normative experience, not the exception," Helen Cleak & Andrew Bickerdike, "One way or many ways: Screening for Family Violence in Family Mediation" (2016) 8 Family Matters at https://aifs.gov.au/sites/default/files/fm98-hcab.pdf.

[10] Linda C Neilson, "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases" (2014) 52:3 Family Court Review 529 at 537-39; JC Campbell, "Commentary on Websdale: Lethality assessment approaches: Reflections on their use and ways forward" (2005) 11 Violence Against Women `106-1213; Molly Dragiewicz & Walter DeKeseredy, Study on the Experiences of Abused Women in the Family Courts in Eight Regions in Ontario (Oshawa, ON: Luke's Place Support & Resource Centre for Women & Children, 2008) at 11.

[11] Marta Burczycka "Police-reported family violence in Canada – An Overview" in *Family Violence in Canada: A Statistical Profile, 2015* (Ottawa: Statistics Canada, 2017) at http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14698/02-eng.htm. Four hundred eighty people out of 100,000 reported family violence to police in Saskatchewan compared to 150 per 100,000 in Ontario. Saskatchewan had the highest rate of intimate partner violence (at 660 per 100,000) and the highest rate of violence against children (at 465 per 100,000). Burczycka notes that this likely underestimates the incidence of family violence since, according to self-reported data from the 2014 General Social Survey, 70% of spousal violence victims and 93% of child victims of physical and/or sexual abuse "never spoke to police about their experiences."

[12] Neilson (2014) at 540.

[13] Neilson (2014) at 539.

or access for many reasons, even where there are child safety issues.[14] They may be anxious to terminate contact as soon as possible or experience pressure to 'cooperate' and settle by professionals who are unaware of the dynamics of domestic violence and its impact on children.[15] They may also experience intimidation, psychological vulnerability, cultural or financial pressure, or simply lack awareness of the potential dangers.[16]

The use of mediation or ADR in cases involving domestic violence or abuse is controversial because it has the potential to raise concerns regarding safety, intimidation, revictimization, and inequitable outcomes, particularly where there is severe violence or a pattern of coercive control.[17] According to Linda Neilson, "the potential for psychological harm from renewed contact with an abuser, expanded opportunities for violators to maintain contact, to intimidate and to control or to delay final decisions; and the potential for suppression of concerns about domestic violence and safety are surfacing repeatedly in evaluation literature."[18] The opportunity to exert control may influence outcomes to the prejudice of abused parties and their children.

However, the alternative to ADR is litigation and there is controversy as to whether litigation produces better outcomes in such circumstances than settlement.[19] In both litigation and mediation, victims can have positive experiences if they feel they are believed, heard, respected and safe and negative experiences if they feel judged, blamed, disbelieved, minimized or dismissed.[20] The latter may be more likely in collaborative processes that refuse to acknowledge blame or deal with the past and expect compromise and cooperation. A court process can also focus on fact finding and thereby potentially reduce the risk of devaluing claims, as well as provide more ready access to protective orders or the variation of orders.[21] However, it can also exacerbate conflict through the exchange of affidavits and while there is insufficient empirical evidence as to the long term legal consequences of mediated agreements for victims, particularly those who are self-represented,[22] there is little evidence of significantly better outcomes in litigation.[23] Noel Semple argues that judges and family justice system workers (at least in Ontario) are also aggressively pursuing a "settlement mission" with fewer of the precautions currently used by mediators and even less sensitivity to the risks of domestic violence.[24] In

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[14] Neilson (2014) at 532. Some studies suggest agreements on child custody for families who have or have not experienced IPV do not "consistently differ on variables of potential importance to child safety and well-being," Holtzworth-Munroe (2011) at 323.

[15] Neilson (2014) at 541.

[16] Neilson (2014) at 546, 560.

[17] M P Johnson, "Conflict and control: Gender symmetry and asymmetry in domestic violence" (2006) 12(11) Violence Against Women 1003-1018; Evan Stark, *Coercive Control: How men entrap women in personal life.* (New York: Oxford University Press, 2007).

[18] Neilson (2014) at 532.

[19] Holtzworth-Munroe (2011) at 320.

[20] Echo A Rivera, Chris M Sullivan, April M Zeoli, "Secondary Victimization of Abused Mothers by Family Court Mediators" (2012) 7(3) Feminist Criminology 234-52; Lesley Laing, "Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System" (2016) Violence Against Women 1-22 (a study of 22 domestic violence survivors negotiating parenting arrangements in the Australian family law system).

[21] Wiegers & Keet (2008) at 756.

[22] Beck et al (2010).

[23] Neilson (2014) at 532.

[24] Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 Can J Women & L 207, and see Laing (2016) who found that in Sydney, Australia following the 2006 family law reforms,

the ADR context at least, there appears to be a growing consensus that systematic screening of cases should be undertaken in order to exclude some cases of intimate partner violence and abuse from joint sessions or modify the process in some way.[25]

The introduction of mandatory mediation is also very controversial, even where jurisdictions allow for the right to opt out if domestic violence is identified, as is the case in Quebec and British Columbia.[26] One concern is that this will provide abusive partners with one more forum in which to harass and control, on top of multiple motions or refusals to disclose information or negotiate, and will ultimately add to both the financial and emotional costs of the violence. Mandatory mediation can also render either participation in mediation or disclosure involuntary. Unwilling victims must disclose intimate partner violence and comply with whatever evidentiary requirements exist or be forced to participate in a process with an abusive party. The Honourable Donna Martinson and Margaret Jackson argue that:

> ...making [mediation] mandatory is a barrier to women's access to the courts. Instead, participating in mediation should be a matter of choice, informed by effective legal representation and an understanding of the disadvantages and advantages in their particular circumstances. An exemption does not address the core problem, the complexity of family violence and its impact, and the need for effective legal representation to help women navigate the complexities of the legal processes involved.[27]

Victims who would prefer to avoid or minimize direct contact with an abuser or who feel that such an attempt would be futile are thus forced to disclose their personal histories in order to proceed with their claims. However, disclosure is difficult for victims of abuse and may be inhibited by a fear of retaliation and escalated violence, a fear of other legal consequences (deportation, criminal or child protection proceedings),[28] lack of a trusting relationship with the ADR professional and a fear of being judged or re-traumatized and shamed. According to a study by Cleak and Bickerdike, about one-third of the victims in their Australian study chose not to disclose.[29] As Neilson indicates, "Mandatory disclosure could force a targeted party to choose between honesty to the JDR judge or mediator, and safety."[30] Disclosure requirements can in some circumstances put victims at greater risk.

There may be instances where victims themselves wish to mediate and force an abusive partner into mediation. However, there are questions as to how often such situations arise and as to whether a

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"when women in this study challenged the imperative to remain silent and tried to raise concerns about the risks to their children of exposure to domestic violence, they encountered a climate of disbelief. The women found that their motives in raising violence became the center of focus, rather than the allegations and the potential risks to children. Vindictive and fallacious rather than protective motives were attributed to their efforts to raise issues affecting the safety of their children" at 10.

[25] N Ver Steegh & C Dalton, "Report from the Wingspread Conference on domestic violence and family courts" (2008) 46(3) Family Court Review 454-75.

[26] Janet R Johnston and Nancy Ver Steegh "Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices" (2013) 51:1 Family Court Review 63 at 64.

[27] The Honourable Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30(1) Canadian Journal of Family Law 11 at 39.

[28] For a review of the dilemmas experienced by abused women navigating multiple legal systems, see Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32.2 Windsor Yearbook of Access to Justice 149-79.

[29] Cleak & Bickerdike (2016).

[30] Neilson (2014) at 536.

consensual-based ADR process would ultimately be of much benefit to victims in most such cases. It also raises the question as to what constitutes participation, and what should be done if a party refuses to negotiate within the session.

Assuming, however, that the Ministry chooses to proceed with the mandatory requirements subject to an exemption for victims of intimate partner violence and abuse, the following sub-sections raise questions regarding the scope of and process for establishing an exemption. In defining the scope of an exemption, it should be acknowledged that the consequences for someone seeking an exemption on the grounds of domestic violence can be far more serious than the consequences for the other party in not having access to mediation in advance of litigation. The consequences of being forced into mediation or obtaining an exemption can also be distinguished from situations where substantial proprietary rights or third party rights are at issue, as in the residential tenancies context.

1. How to define violence or abuse for the purposes of an exemption

Proposed grounds for an exemption from the ADR requirement include situations involving a "history of interpersonal violence," in addition to situations involving restraining orders or child abduction. One assumes that the term "interpersonal violence" is intended to be interpreted in accordance with *The Victims of Interpersonal Violence Act.*[31] Section 2(e.1) of that Act defines interpersonal violence as (i) any intentional or reckless act or omission that causes bodily harm or damage to property; (ii) any act or threatened act that causes a reasonable fear of bodily harm or damage to property; (iii) forced confinement; (iv) sexual abuse; (v) harassment; or (vi) deprivation of necessities. This is a relatively narrow definition relative to definitions in the civil protection legislation of other jurisdictions which have included references to emotional, psychological and financial abuse.[32]

In this context, where the central issue is whether one can participate in a process safely and effectively, a broader definition of violence should be adopted. For example, in Australia, where mediation was made mandatory in 2008, concerns regarding the safety of parents and children resulted in an expanded statutory definition of family violence or abuse in 2011. It included behavior that was controlling or caused a family member to be fearful.[33] The amendments specifically included, verbal, emotional, psychological and economic abuse "(d) repeated derogatory taunts; ... (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; ... (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; ... (i) preventing the family member from making or keeping connections with his or her family, friends or culture; ... (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty."

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[31] 1994 SS c V-6.02, s 2(e.1)

[32] Jurisdictions such as British Columbia, Manitoba, Newfoundland Labrador, Yukon, Northwest Territories and Nunavut.

[33] Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) s 4AB(1) (2).

It is widely known that emotional or psychological abuse can be as, if not more, painful and destructive than physical abuse.[34] A pattern of coercive control and demeaning abuse, without actual or threatened physical violence, can still profoundly affect one's ability to participate in a negotiation effectively. This is recognized by screening mechanisms such as the Mediator's Assessment of Safety Issues and Concerns (MASIC), which screen for psychological abuse and control in addition to actual or threatened physical or sexual violence.[35] Coercive control is identified through an examination of patterns established over the history of the parties' relationship; restricting one's assessment to discrete incidents of actual of threatened physical violence will underestimate the risks and severity of harm.[36]

2. How the exemption should be established

Under section (5), a court or "prescribed person" is able to grant an exemption. The consequences of failing to participate or failing to establish an exemption are significant. Such a party may be unable to take further steps in the proceedings or make submissions; they may have the pleadings struck out or be ordered to participate or pay costs, as per sections (3) and (4). For a potential victim, these consequences could lead to serious hardship including an inability to divide property, obtain support or deal with custody and access. Refusal to grant an exemption can amount to a denial of a substantive legal entitlement vital to the economic survival and well-being of parents and children.

One issue is what kind of proof, if any, should be required to establish the exemption. Physical abuse may be capable of being documented through medical or police records but only if victims have visited a hospital or reported the violence. Coercive control or psychological abuse is extremely difficult to document unless behavior that is belligerent or controlling is witnessed before or during the mediation, and even then, this provides relatively little information as to the depth and extent of coercion and control experienced in the relationship.

There are many potential ways of dealing with the establishment of an exemption based on domestic violence and abuse. Recent amendments under residential tenancy legislation allow victims of interpersonal violence to end their leases before the expiry of their term.[37] The amendments here in Saskatchewan require a certificate of a person appointed by the Minister who must be satisfied that "there is a risk from a cohabitant to the safety of the tenant or a cohabitant of the tenant" if the tenancy continues. The tenant must also provide a copy of a court order (an emergency intervention order, victim's assistance order, restraining order, peace bond or any other similar court order) OR alternatively, a statement from a professional indicating that in his or her opinion the tenant or a cohabitant of the tenant has been the subject of interpersonal violence. Persons able to make such a statement under s 12.4(4) include registered social workers, psychologists, doctors, practicing nurses,

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[34] D Follingstad, "The role of emotional abuse in physically abusive relationships" (1990) 5(2) Journal of Family Violence 107-120.

[35] Amy Holtzworth-Munroe, Connie JA Beck & Amy G Applegate, "The Mediator's Assessment of Safety Issues and Concerns: A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain" (2010) 48(4) Family Court Review 646-62 and Connie JA Beck & Chitra Raghavan, "Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control" (2010) 48(3) Family Court Review 555-65.

[36] Linda Neilson, "Assessing mutual partner abuse claims in child custody and access cases" (2004) 42 Family Court Review 411-38; Mosher (2015) at 153-57.

[37] *The Victims of Interpersonal Violence Act,* SS 1994 c V-6.02, s 12.1-12.5; *The Residential Tenancies Act, 2006* SS 2006 c R-22.001, s 64.1-64.3.

psychiatric nurses, a police officer or "(g) a person approved by his or her employer to provide statements pursuant to this section and who is employed: (i) by an agency or organization to assist persons for whom the agency or organization provides accommodation in an emergency or transitional shelter because of homelessness or abuse; or (ii) to provide support for victims of interpersonal violence" as well as any other person approved in the regulations."

Ontario's law is more liberal in that it requires only that the victim complete and sign a form that includes a statement about sexual or domestic violence and abuse that has caused bodily harm or fear for one's personal safety or that of one's child.[38] This process is more accommodating of victims and would be even more appropriate in the context of dispute resolution where, unlike the *Residential Tenancies Act,* no third party rights are at issue.

We would argue that where an alleged victim discloses a history of intimate partner violence and abuse and does not want to participate in ADR, that disclosure should itself provide an automatic exemption from the process. Requiring a person to participate in a process that is experienced as unsafe or abusive is likely only to be counter-productive, if not dangerous. Fear on the part of the victim has repeatedly been verified as one of the most reliable predictors of risk.[39] Even if the allegations are contested, according to Neilson, "targeted intimate partners are usually best able to assess their own ability to participate fully, as well as the violator's likelihood of negotiating and adhering to agreements and orders in good faith."[40] Moreover, "cases that involve major disagreement over facts or that require major findings of credibility are seldom good candidates for settlement processes."[41]

For victims who cannot provide documentary evidence of their history, a more onerous process for an exemption may also expose them to "secondary revictimization."[42]

3. What qualifications or training of ADR personnel, arbitrators and parenting coordinators should be required

In all ADR settings, even where victims wish to proceed with ADR, screening should be undertaken to identify cases where joint mediation is clearly inappropriate or to identify whether modifications to the process should be implemented. Ensuring a safe, equitable process depends upon the knowledge, skill and discretion of the person screening and the efficacy of the screening instrument.

Available empirical studies suggest that in practice many mediators fail to detect or underestimate the severity or impact of intimate partner violence or abuse.[43] Even if screened, the victim's experience may eventually be marginalized or discounted. There are concerns that ADR personnel will act dismissively

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[38] see *Residential Tenancies Act 2006* SO 2006, c 17, ss 47.1-47.3.
[39] Neilson (2014) at 541.
[40] Neilson (2014) at 541.
[41] Neilson (2014) at 539.
[42] See Rivera et al (2012); Laing (2016).
[43] See sources cited by Wiegers & Keet (2009) at 750.

of abuse allegations where there is no independent evidence of abuse, treating the allegations as simply "she said/he said" allegations, as mutual violence, as irrelevant or simply too complicated to deal with.[44]

Effective screening at the outset and on an ongoing basis could prevent or minimize these impacts but requires personnel with an accurate understanding of the dynamics of domestic violence, an ability to take both physical and psychological abuse seriously and an ability to distinguish coercive violence from resistant violence and isolated, minor violence.[45] There are a wide variety of screening mechanisms that have been employed in the context of mediation including DOVE (Domestic Violence Evaluation),[46] DOORS (Detection of Overall Risk Screening)[47] and MASIC (the Mediator's Assessment of Safety Issues and Concerns).[48] Screening is a difficult process which entails eliciting disclosure, monitoring for more subtle forms of pressure or intimidation and also determining whether joint mediation is appropriate or what modifications may be required. Modifications to the process may include staggered arrivals and departures, phone mediation, shuttle mediation (separate sessions), a gender balanced mediation team, etc. There are no empirically established or widely validated guidelines that can be used in determining whether joint mediation is appropriate or whether other procedural modifications are required.[49] Thus a complex assessment of the forms of abuse, the severity, frequency, recency and impact of intimate partner violence is needed.[50]

Training in these dynamics and related issues (such as domestic violence in the context of indigeneity, cultural difference, disability, sexual orientation, and immigration status) is encouraged or mandated by regulations in some jurisdictions. Quebec requires that mediators have at least six hours of training in domestic violence.[51] In British Columbia, family dispute resolution professionals (mediators, arbitrators and parenting coordinators) must take at least 14 hours of domestic violence training, and must screen in order to determine whether the process is appropriate and safe.[52] In Ontario, arbitrators must

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[44] See Rivera et al (2012) at 242 and David Greatbatch & Robert Dingwall, "The Marginalization of Domestic Violence in Divorce Mediation" (1999) 13 Intl JL Policy & Family 174; Sara Cobb, "The Domestication of Violence in Mediation" (1997) 31 Law & Society Review 397.

[45] Neilson (2014) at 540.

[46] D Ellis & N Stuckless, "Domestic Violence, Dove and Divorce Mediation" (2006) 44(4) Family Court Review 658.

[47] JE McIntosh, Y Wells & J Lee, "Development and Validation of the Family Law DOORS" (2016) 28(11) Psychological Assessment 1516-22.

[48] Rossi, F. S., Holtzworth-Munroe, A. Applegate, A. G., Beck, C. J. A., Adams, J. M., & Hale, D. F. (2015). Detection of intimate partner violence and its impact on recommendation for joint family mediation: A randomized controlled trial of the Mediator's Assessment of Safety Issues and Concerns and a standard clinic screen. *Psychology, Public Policy & Law*

[49] Holtzworth-Munroe (2011) at 322.

[50] Cleak & Bickerdike (2016).

[51] *Regulation Regarding Family Mediation,* s 2(4).

[52] The *Family Law Act Regulation*, BC Reg 347/2012, ss 4-6, http://canlii.ca/t/8rdx, dictates that all family law mediators, arbitrators, and parenting coordinators are required to take domestic violence training. Section 8 of the *FLA* requires family dispute resolution professionals to assess whether family violence may be present. See also the *Notice to Mediate (Family) Regulation*, BC Reg 296/2007, http://canlii.ca/t/85bd, which applies to proceedings under the *FLA* and *Divorce Act*, and states that in pre-mediation settings, mediators must screen for domestic violence (s 13), and parties need not attend pre-mediation settings if granted a protection order under the BC *FLA* or a peace bond under the *Criminal Code* (s23).

complete training in domestic violence and confirm their training and their use of a screening process in writing for each arbitration.[53]

Similar requirements should be implemented here in Saskatchewan.

4. What provisions are needed to ensure confidentiality, privacy and safety

ADR agreements typically provide that communications made during the process are confidential and cannot be used in later litigation if an agreement is not reached. Provisions requiring confidentiality and maximizing privacy are important in this context, as in other contexts such as amendments to residential tenancies legislation.[54] These obligations should be made explicit in the legislation.

As indicated, disclosure for victims is difficult and often accompanied by shame and embarrassment. These effects should be minimized. The limits of confidentiality, for example, where there are child protection concerns or imminent harm, should also be clearly identified for parties involved in the process. Further, protocols should be established so that information about victims and children that can compromise their safety (including residential and employment addresses and screening information that could provoke retaliation) are not released to abusive partners.[55]

Conclusion / List of Recommendations:

We would respectfully ask the Ministry to consider the following recommendations:

1. **That instead of making ADR mandatory, the Ministry encourage and wholly or substantially fund access to ADR professionals and to legal information and advice prior to the closing of pleadings or immediately thereafter;**
2. **That, if the Ministry chooses to proceed with mandatory ADR, the following measures be undertaken:**
    a. **The Ministry ensure that parties can access information and advice as to their legal entitlements prior to such sessions;**
    b. **The Ministry consider what role children should play in the mediation process and how their interests can be protected;**
    c. **That an exemption from mandatory ADR for domestic violence be more broadly defined to include not only actual or threatened physical or sexual harm, stalking or confinement, deprivation of necessaries but also emotional, psychological and financial abuse including coercive control;**
    d. **That certification by a victim of sexual or domestic violence or abuse be sufficient to establish an exemption;**

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[53] *Arbitration Act, 1991,* SO 1991, c 17, s 58; O Reg 134/07, ss 2-4. The adequacy of the training should also be monitored.
[54] See eg *The Victims of Interpersonal Violence Act,* s 12.5.
[55] Neilson (2014) at 536.

e. **That all ADR professionals, arbitrators and parenting coordinators be required to obtain training in the dynamics of intimate partner violence and abuse and related issues;**
f. **That all ADR professionals, arbitrators and parenting coordinators be required to screen for intimate partner violence and abuse;**
g. **That the legislation provide explicitly for confidentiality of disclosures and negotiations subject to clearly defined limits which are disclosed in advance to participants;**
h. **That protocols be established to ensure that information that could compromise safety for partners and children is not released to abusive partners.**

The research in this submission was supported in part by a grant from the Social Sciences and Humanities Research Council (SSHRC) for the project Domestic Violence and Access to Justice Within and Across Multiple Legal Systems (Koshan et al).

Markatos, Maria JU

From: Ray Friesen <mediation@sasktel.net>
Sent: Thursday, August 24, 2017 4:31 PM
To: Markatos, Maria JU
Subject: Reply to "Early Dispute Resolution in Family Law

Early Dispute Resolution in Family Law Disputes

1. Mandatory Alternate Dispute Resolution in Family Law Disputes

I believe this to be an excellent step forward in our province. All parties in family law disputes will benefit from this. Though current legislation requires discussion of ADR by lawyers and clients, anecdotal evidence would suggest such discussions can be cursory and not of the kind that would, in fact, encourage clients to use ADR. ADR in family law creates the distinct possibility of lowering levels of hostility, creating more workable solutions, and doing less damage to the children involved. ADR absolutely should be mandatory in Family Law. With the stipulation that all formal agreements be written by lawyers and each party must have independent legal advice, the rights of both spouses/parents are protected. At the same time, in mediation more so than the other two contemplated processes, with the presence of a neutral mediator, the interests and needs of the children can be highlighted. In collaborative law, the lawyers must still each focus on their clients' needs, interests, and rights and in arbitration we get pretty close to court (see below). A mediator is able to make sure that the rights and interests of ***all*** parties—both parents/spouses and children—are ***equally*** considered.

2. What types of processes?

Mediation should be mandatory with but rare exceptions. **Collaborative law** could be a second choice. However, as indicated above, without a neutral third party in the room, it is should clearly be a second choice and used only if there is a good reason not to use mediation. Mediation could be with or without lawyers present.

Arbitration closer to the court process than it is to Mediation or Collaborative Law, is in fact essentially the same process as family court with an arbitrator making the decisions rather than a judge. It has the same potential for most of the detrimental effects of court that Family Court has.. Therefore, it should not be grouped with the other two. It, like court, involves each side making arguments, thereby creating not only the opportunity but almost the necessity that one side will make the other side look as bad as possible. It therefore has the same potential to increase hostilities and to end with an outcome unsatisfying in many ways to both parties. It also means each side has to spend a lot of money on finding evidence to support their arguments and having those arguments rather than settlement discussions made by a lawyer. If the parties have to pay for the arbitrator and if an appeal to a judge is possible, costs could, in fact, increase significantly with no beneficial results from the process.

In business disputes Arbitration may be a true Alternative. I do not believe the same is true in Family matters.

3. What should be filed to demonstrate ADR has been attempted

The Mediator and/or the two collaborative lawyers (depending on process used) should file a signed document/certificate verifying that ADR has been attempted and that in the estimation of the person signing, both parties participated in good faith.

4. What if a party refuses to participate?

As in the court process, a person who refuses to participate should be found in default with the very real possibility that a judge will find in favour of the other party. No documents should be accepted in court from a person who refuses to participate in ADR unless an exemption has been granted.

5. The proposal

I think it looks very good, with one need for adjustment, as outlined in #2 above and #6 below. Parties should not be allowed to use arbitration before they have attempted mediation or collaborative law. I would recommend that the collaborative law process be amended to require a mediator to be present. The Mediator could also ensure that the parties themselves are involved in the negotiations and their interests and concerns are truly heard. In my experience as a mediator, the interests of a lawyer and his/her client are not always the same and a mediator who is neutral would be able to identify that.

6. Arbitration

Using arbitrators may take pressure off the court system and allow for speedier treatment of matters. Currently, disputes are often delayed much too long. Arbitration **should not** be used in place of mediation and/or collaborative law. However, might Arbitration if there are issues that simply cannot be resolved by the parties in mediation/negotiation. The down side of this is parties who prefer "the fight" or would prefer that someone else make decisions rather than work at matters collaboratively could simply sabotage the mediation process by refusing to cooperate and get "their day in court," with an arbitrator or a judge. QB court could become a "court of appeal."

7, Criteria for Arbitrators

- Demonstrate sound knowledge of family law
- Demonstrate sound knowledge of family court decisions
- Demonstrate sound understanding of family dynamics
- Demonstrate an ability to hear both sides and provide fair decisions, not easily swayed and not biased.
- Experience in the area of family disputes as lawyer, mediator and/or social worker.

8. Parenting Coordinators

All family agreements that I mediate include the provision that if the parties encounter difficulties in implementing the provisions of the agreement or any other parenting or financial matter, they will go to mediation before seeking recourse in any other process. That seems to provide the same protection and assistance as a Parenting Coordinator. One or the other is absolutely essential.

9. Other comments

One of the pieces not addressed by your paper is the provision of family mediation. In civil disputes, the mediation is provided by government at no cost to the parties. In the case of Family Disputes, family mediation is an important part of many mediation practices and removing this from the private sector could have a significant and adverse effect on the provision of any mediation in the province. Certainly in a place like Swift Current, a private mediation practice without family mediation work would not be viable. A few options are possible. They are listed below in descending order of preference.

a) ***Parties choose a mediator of their choice and pay for same.*** This would allow the status quo in terms of practitioners to continue, except that their case load would increase significantly. Given the cost of hiring lawyers for the court process and the high cost of same, it is unlikely that parties would spend more money than they do now. It most case they would spend a lot less.
The province should not be providing fee for service family mediation in competition with private practitioners. However, like Legal Aid is available for those on low income, the province should provide subsidized and/or free mediation service to those whose low income warrants same.

b) ***Parties choose their own mediators from a list of mediators on contract to the government.*** In this case, the service would be provided by private mediators but paid for by the Province. The Province should ensure that their mediation rates in terms of payment of mediators be fair and reflect fees in the market place.

c) ***The government provide mediation through staffed office and/or contractors.*** In the event of the use of contractors, the Province should again ensure that fees paid to contractors are fair and reflect the market place.

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"helping resolve difficult situations one conversation at a time"

Markatos, Maria JU

From: Holly Ann Knott QC <hollyann@sasktel.net>
Sent: Thursday, August 24, 2017 5:56 PM
To: Markatos, Maria JU
Subject: Early Dispute Resolution in Family Law Disputes - Feedback

Early Dispute Resolution in Family Law Disputes

Question 1: I am in favour of mandatory alternative dispute resolution. People surprise themselves with what they are capable of when they meet with a competent ADR professional.

Question 2: I think the listed processes are the appropriate ADR processes for family law disputes.

Question 3: to prove attempts at ADR, a certificate of attendance should be provided by the ADR professional. A sample form could be prepared and the professional could check off boxes or fill in blanks. The ADR professional should report on a lack of genuine effort by a party.

Question 4: If genuine efforts were not made by one party, a judge could order the parties to a different ADR professional and there should be cost consequences for that party.

Question 5: the proposed provision is a good start. As a collaborative professional, I refer to it as the "collaborative law process" rather than service.

At (4) I would rework the first sentence: "the court, with or without an application, may do any or all of the following:"

At (5), every time another application is required, that means more time and expense for my clients. There are court filing fees ($10), costs for the order ($20), plus the legal fees. Even with costs awards (possibly "in the cause ") those costs awards are seldom enforced or get bargained away in the negotiation at a pretrial conference.

Question 6: I am not opposed to family law arbitration with specialist arbitrators. I might even be interested in being one. Other specialized areas, such as labour and employment law, already have their own separate dispute processes.

The main objection would be whether clients could afford arbitration which so far has been privately paid for. If one of the goals identified in this paper is to reduce the number family law cases in court, then the government should be able to fund arbitrators which would undoubtedly be cheaper than judges.

Question 7: qualifications for a family law arbitrator should include family law experience.

Question 8: the concept of a parenting coordinator seems good, but I lack experience with it.

Rewrite 1(2) , e.g.: A parenting coordination agreement or order may be made at the same time as or after, an agreement or order respecting parenting arrangements, "contact with the child ", etc. The phrase "contact with

the child" is really awkward, but I have thought of a good substitute. Therefore, the whole sentence probably needs to be rethought.

I am supportive of the direction taken in this paper and encourage further development. I think there will be a better outcomes for children if more decision-making around their best interests is removed from the adversarial litigation process.

If anything, I would like to see specialists work with families on parenting plans as early as possible. This would not be one-shot and you're done. Rather, the parties would try a plan for two or three months and then go back for review. This could be repeated more than once if necessary. In the initial stages, parents are in a state of flux, so their plans might need to change accordingly. And child support could be flexible, too, in those early stages, ensuring the children's needs are met, and discouraging the all too common fight for 40%.

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Markatos, Maria JU

From: Keet, Michaela <m.keet@usask.ca>
Sent: Friday, August 25, 2017 7:57 AM
To: Markatos, Maria JU
Cc: Keet, Michaela
Subject: submission Early Dispute Resolution in Family Law

Dear Maria,

Thank you for the opportunity to respond to the government's proposal. I am writing in follow up to a submission you will have received yesterday, from Wanda Wiegers, one of my fellow faculty members. I am also a joint researcher with Wanda, and others named on that submission, on a SSHRC-funded exploration of DV at the intersection of legal processes. I support Wanda's submission, but am writing separately to pass along this set of comments. As you may know, my teaching and practice background is Dispute Resolution, and I have also written about Collaborative Law, mandatory mediation, and other processes.

Professor Wiegers has focused in on the risks of the mandatory structure which has been proposed, and has suggested that those risks be managed with an expanded definition of 'domestic violence' and an expanded scope or operation of exemptions. I agree, generally, that this would help. I also think, however, that there is potential to be a bit more creative about how to manage these risks – and improve parties' experience with the justice system more generally. Let me start with this point: We all know that the full range of process options (from ADR to litigation and court-based options) are often damaging in cases where there has been a history of coercion between the parties. To create exemptions from mandatory mediation requirements is one approach, but this approach potentially misses something – because "falling back" to *either* system may not be effective. (Either ADR, or court-based – as they currently tend to operate.)

I see this as a good opportunity to encourage more critical thought about what is needed in cases where there are concerns about coercion and abuse. Where these concerns arise, perhaps the approach should be to expand the definition of "ADR" rather than expand the operation of the exemption. What I mean is this: It is not the idea of exploring settlement which is dangerous in those cases, but HOW those settlements are explored. Is resolution being explored in ways that are indeed protective and empowering, guided by lawyers and other professionals who are well-trained in the risks of engagement in such cases? I hope that, in the tough cases, there could be more creative and responsive ways to define the technical relationship between "mandatory ADR processes" and the exemption escape clause. Perhaps, where legitimate concerns are raised, there could be a loop back (before the exemption stage) to another category of thoughtful or protective ADR (or even, more broadly, process design). This might include variations of ADR which would not normally meet the mandatory test, in the average case. The message would remain consistent – that resolution and early effective outcomes are the priority. But rather than kicking these kinds of cases out of the mandatory regime, the regime would encourage steps to ultimately improve the 'justice experience' for those parties, even if (and especially if) they continue on to litigation.

I am not sure if I am explaining this well, but I do think that there is potential to go a step further in some innovative system design, and that this is the time to encourage it.

Michaela Keet

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Markatos, Maria JU

From: Mary E. Neufeld, Q.C. <m.neufeld@mckercher.ca>
Sent: Friday, August 25, 2017 11:48 AM
To: Markatos, Maria JU
Subject: R2048966 EARLY DISPUTE RESOLUTION IN FAMILY LAW
Attachments: R2048966.pdf

Maria, attached please find my response to the Early Dispute Resolution document that you circulated. I also provided an earlier draft of this to the Collaborative Professionals of Saskatchewan Inc. who requested input from the board and potentially the membership, so you may receive it more than once.

Sincerely,

Mary Neufeld, Q.C.
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McKERCHER LLP
OFFICES IN SASKATOON & REGINA

INPUT REGARDING EARLY DISPUTE RESOLUTION IN FAMILY LAW DISPUTES

1. **Please share any comments you have about mandatory alternate dispute resolution in family law disputes**

I support alternate dispute resolutions in family law and am now limiting my practice to out of court resolutions, and in particular the collaborative process, after over 20 years of family law practice including court and collaborative practice/out of court resolutions. I believe that the government should support initiatives such as the collaborative practice, including with public information campaigns about collaborative practice and alternate and early dispute resolution and also by providing funding to related organizations (such as the Collaborative Professionals of Saskatchewan Inc.). The government could consider providing a tax credit or some other financial incentive to parties who use out of court processes to resolve their family law disputes. While the provincial government has mandated mediation in the past in family law in the early 1990's, it was not successful in the family law context and was discontinued. Perhaps there is a reason for that, and another approach such as collaborative practice should be promoted by the provincial government. The collaborative practice has changed over the past 15 years since it has been established in Saskatchewan in 2002. The membership (in Saskatchewan, other provinces, and many other countries) now includes mental health professionals and financial professionals to better address separating parties' needs and those of their children. The province should invest and promote this process, rather than creating their own separate program. The government could also consider incentives for family law lawyers to not only offer, but also to actively promote, alternate and early dispute resolution and particularly collaborative process to their clients. This is an important aspect of making these out of court processes desirable to clients who often rely heavily on the lawyer's recommendations regarding such issues. If a lawyer is dismissive about such a process, or does not engage in the process, the client is unlikely to accept the process.

2. **What types of processes should be included as appropriate alternate dispute resolution for family law disputes?**

As indicated above, mandatory mediation was not successful in Saskatchewan in the early 1990's in family law. Part of the lack of success may be that what was offered was more of an "information session" rather providing parties to a dispute with access to mediation over a period of time. In addition, because many mediators are not lawyers, some of the mediated resolutions actually achieved in mediation did not withstand legal advice as the mediated agreements did not properly take into account parties' substantive rights and obligations in accordance with the applicable legislation. There appears to be an underlying mistaken belief that family law issues are easy and can be quickly resolved with little or no disclosure or time and without legal expertise. This is not a realistic view of family law issues. A separating family may need to deal with any or all of the following issues: valuation and division of family property including complex corporations or assets, determination of quantum and duration of child and spousal support including income determinations for self-employed persons, determination of the appropriate custodial and parenting arrangement and the dissolution of

the marriage. Parties may have been together for months or many decades. There are at times mental health issues of the parties and children. These are not issues which will realistically resolve quickly or easily or by people without a law degree. Documentation (disclosure) about assets, debts and income and the assistance of those with legal expertise is required in almost every case before there can be a resolution of the financial issues. Independent legal advice is required to ensure the enforceability of Interspousal Contracts pursuant to The *Family Property Act.*

Because of the need for financial and property disclosure, a 2 hour session (or even an all-day session), will be unhelpful if there is no reliable documentation or verification about assets, debts and income, particularly if there is a lack of understanding of the legal issues. There is often a lack of meaningful compliance with Notices to File Financial Information and Notices to Disclose (and other disclosure processes) in the litigation process. Courts are very slow to award meaningful costs awards against parties who continually refuse to disclose relevant information and documentation, making non-disclosure a successful tool to delay resolution and a fair division of property and income. The lack of disclosure delays or halts resolution in litigation, and lack of meaningful disclosure will likewise prevent appropriate resolution outside of court in processes such as mediation and collaborative law. The desire for out of court resolutions or early resolutions should also promote fairness or appropriateness of the resolutions and not just a resolution at any cost.

The collaborative process requires the parties and the lawyers to commit to providing information informally (without the court process, questionings and so on). The parties and the lawyers sign a Participation Contract which includes a lawyer disqualification clause if all of the matters do not resolve successfully and require a contested court application. That means other lawyers from other firms must deal with the matter if the matters (or some of them) cannot be resolved outside of court. Lawyers lose the clients and the clients have to start over again. The disqualification provides the ongoing incentive for the parties and lawyers to find a meaningful and lasting resolution. Parties and lawyers meet face to face to try to save time and avoid the misunderstandings and hard feelings often caused by pleadings, lawyer's correspondence and affidavits. The parties can access collaborative mental health and financial professionals also committed to the parties' goals to resolve out of court. The process may be cheaper than court, but even if it is not, it is a less adversarial process which can focus on the interests of the children and the parties, rather than focusing on the past and "winning." The collaborative process can better consider parties' individual needs.

3. What should be filed to demonstrate that the petitioner has attempted ADR?

Absent issues of family violence or absconding with the children or property or a complete denial of parenting time, parties should be required to make meaningful efforts to resolve out of court. This may require more than attendance at one meeting. It may also require a judge to consider an affidavit outlining the attempts and a determination as to whether a party has made meaningful efforts. If a collaborative lawyer provided a certificate that the parties signed a participation agreement and had 2 or more sessions each of at least 2 hours each, that may

suffice to show an attempt to stay out of court. Also once an emergency issues was resolved, perhaps the balance of the issues could be returned to ADR, if appropriate.

4. **What should happen if the responding party fails to respond to requests and refuses to participate?**

   Absent issues of family violence or absconding with the children or property, parties who refuse to negotiate out of court without very good reason should face some consequences. The consequences set out for those who do not attend parenting courses are rarely, if ever, invoked by the court. A failure to attend a parenting course at best results in an adjournment of the matter, and rarely are there other consequences, such as meaningful costs or striking pleadings. More often than not, parties are simply ordered to attend to the course, and that order may not be complied with by one or both parties.

5. **Any comments on the proposed provision (regarding "family law disputes")?**

   The definition of "family law dispute' does not appear to include parenting/custody applications pursuant to *The Children's Law Act* dealing with custody and parenting. These should be included. The reference to Part II seems to be missing the reference legislation. Property disputes between parties who have lived together for less than 2 years should be included or referenced, as they don't fall under *The Family Property Act.*

   The subsection (5) should require the ability of the court's decision to be reviewed or to should expressly allow the court to adjourn the determination to allow the other side to respond. Claims of "interpersonal violence" that amount a minor incident or an incident which occurred many years previously should not automatically entitle a court to exempt the parties from participation without hearing the other side.

6. **What types of family law disputes could be resolved effectively through family arbitration? Are there any family law disputes which should not be resolved through family arbitration?**

   Currently, there does not seem to be any use of arbitration in family law in Saskatchewan. It does not seem that family arbitration would provide a mechanism to provide "access to justice" particularly for those who have less financial means. As the government document does not provide any information about the planned provisions regarding arbitration, it is difficult to comment. If parties have difficulties affording to pay lawyers, it is difficult to understand how they could afford to pay a lawyer and an arbitration and for the forum in which it is conducted. It would appear that family law arbitration in other jurisdictions such as Ontario, is chosen by people of means who wish a faster resolution to their issues that is private and provides the means to have a say in who is adjudicating the issues. It does not appear that the court system in Saskatchewan is under the same strains as the court systems in Ontario or other jurisdictions. Arbitration could be provided for to allow those with means to access out of court process with a mechanism provided. To some extent that may free up some court time, but it is difficult to know if arbitration would be adopted by the numbers that would make a difference in the court docket in Saskatchewan. The single paragraph of information on this

issue does not provide any insight as to what would be legislated regarding arbitration that would increase access to justice to those otherwise denied such access.

In Ontario, consent of the parties is required for family law arbitration and the parties must be screened for family violence and/or power imbalances. There is also a requirement that the decisions reached by the arbitration must be in accordance with the law of Ontario or another Canadian jurisdiction chosen by the parties. These are important consideration.

7. **Criteria for a family law arbitrator will be set out in the Regulations. What qualifications should someone have in order to be qualified as a family law arbitrator?**

The person should be a lawyer eligible to practice law who has practiced for at least 10 years and has had a significant practiced family law within the past 5 years.

8. **Any comments on the proposed provisions below (parenting coordinator)?**

This provision appears to give "judge-like" powers to a parenting coordinator, so the authority would have to be quite limited (dealing with the in place order or written agreement dealing with parenting issues). The powers set out in the provisions provided appear very broad and include ordering parties to provide information, and even child or spousal support. Only issues concerning "division or possession of property or the division of family debt" are outside the mandate of a coordinator. It appears parenting coordinators, whose qualifications are not yet known, could make custody determinations, determine mobility applications, and make child and spousal support determinations and income assessments. They should not be dealing with support issues. When these are used in other jurisdictions like Ontario, they are in conjunction with arbitration legislation. That it not spelled out in the proposal by government.

9. **Qualifications for a parenting coordinator?**

A parenting coordinator should have a law degree, be a practicing lawyer and have significant and recent experience in family law (10 years) and/or be a social worker or psychologist with relevant experience.

Markatos, Maria JU

From: David Couture <dcouture@ktllp.ca>
Sent: Friday, August 25, 2017 1:50 PM
To: Markatos, Maria JU
Subject: FW: Memo -- KT Matter No: 34337-0005
Attachments: Mediator Memo 2017-08-25.doc

Maria

One final straggler. I expect this will be the last

Have a great weekend

Regards,

David A. Couture
Direct: 306.949.4151
dcouture@ktllp.ca

From: Deborah Giles [mailto:dgiles@scharfsteinlaw.com]
Sent: August 25, 2017 1:06 PM
To: David Couture
Subject: Fwd: Memo

Hi David,
Please find attached comments on the consultation paper for ADR in family matter from the family law lawyers at Scharfstein Gibbings Walen Fisher

Deb Giles

Sent from my iPhone

Begin forwarded message:

> **From:** Kristy Oleksyn <koleksyn@scharfsteinlaw.com>
> **Date:** August 25, 2017 at 12:55:33 PM CST
> **To:** Deborah Giles <dgiles@scharfsteinlaw.com>
> **Subject: Memo**
>
> **Kristy Oleksyn**
> Legal Assistant to Deborah L. Giles, Samantha J. Neill & Kate L. Crisp
> *Direct Line: (306) 667-1819*
> email: koleksyn@scharfsteinlaw.com

Further to the Early Dispute Resolution Consultation Paper our comments are as follows:

ALTERNATIVE DISPUTE RESOLUTION IN FAMILY LAW DISBUTES

1. General comments re: mandatory ADR in Family Law

a) We have a concern regarding the training of mediators
   - Having mediators who are not lawyers this could create a dangerous situation that will only lead to increased litigation. For example, a member of our office had a situation where a mediator did not know that SSAG exists and assisted the parties in reaching an agreement on spousal support where the payee was taking home $1,000 less per month then the low range of the SSAG
   - Pressure to agree to parenting arrangements that may not be in the child's best interest and create a status quo that is difficult to fix
   - Another member of our office had a situation where the mediator said a property agreement did not need legal advice. As a result the agreement is now being challenged, again resulting in prejudice and increased litigation.
   - Another example was a mediator informing the parties that parenting had to be on a 50/50 basis as that is the presumption. This is of course not correct.
   - Another example provided was that a mediator did not tell parties spousal support is taxable.

b) Main issue to there being mandatory mediation working is where there may not be an equality of bargaining between parties. Violence or abuse screening may not be sufficient.

c) Other issues/ concerns are as follows:

   - Parties entering into Agreements without knowing what their rights are
   - 1 party using the process to delay (creating status quo)
   - If this is meant to streamline matters, this could infact delay matters more where one party does not act in good faith
   - If people could resolve in this setting, probably could do so without litigation in any event
   - Creating a process that won't be used, like Parenting After Separation Course –rarely if ever has a Court exercised its discretion to strike out pleadings for failure to have attended the course – never refuse submissions, but instead order that the course be taken within the next 60 or 90 days
   - Only under provincial legislation – people can get around by applying under the Divorce Act
   - Access to justice – creating obligation to add Application without Notice for exemption which could have the effect of penalizing the wrong people (ie in abuse situations where mediation is not appropriate)
   - Immediacy issues re: parenting and child support that may need to get to court before mediation

2. **What type of processes should be included as appropriate ADR**
   Include four-way meetings between clients and lawyers as an option

3. **What should be filed to demonstrate that the petitioner has attempted ADR?**
   Certificate signed by mediator or lawyer that mediation was attempted – or in the affidavit of the party bringing the application that mediation was tried but they couldn't get cooperation.

4. **What should happen if the responding party fails to respond to requests and refuses to participate?**
   Proof of efforts, ie: correspondence sent, requests made to authorize the exemption

REGARDING ARBITRATION

a) Arbitration

- We would submit that arbitration could be used in family matters on simple property matters, school location, simple support issues
- It should not be used for alienation, or mobility – where credibility is an issue

b) What Qualifications should a mediator have

- Lawyer with many years family law litigation – so are able to assess credibility
- We should be cautious to allow arbitrators without special training and experience with family law matters

PARENTING CO-ORDINATORS

a) To require parties to participate for two years is a long period of time for the following reasons:

   a. A coordinator may be appointed and one party may feel the coordinator is not properly acting, then would be required to make application to change

   b. concern for people thinking co-ordinator always siding with one party

   c. obligated if court ordered to have this person in their life for 2 years may not be appropriate

Markatos, Maria JU

From: Shirley Costron <lakeviewoffice@sasktel.net>
Sent: Friday, August 25, 2017 3:30 PM
To: Markatos, Maria JU
Cc: James Morrison
Subject: Responses - Early Dispute Resolution Paper
Attachments: Responses - Early Dispute Resolution Consultation Paper.pdf

Attention: Maria Markatos

Thank you for the opportunity to supply the thoughts of some of our members pertaining to the Early Dispute Resolution Consultation Paper that you forwarded to us. Please find these responses attached. If we can provide any further information or details, please do not hesitate to contact us.

Thank you
Shirley Costron, Executive Director
Collaborative Professionals of Saskatchewan Inc.

Shirley Costron
Executive Director for
Collaborative Professionals of Saskatchewan Inc. (CPSI); and
Conflict Resolution Saskatchewan Inc. (CRSI); and
Executive Assistant: Saskatchewan Administrative Tribunal Association (SATA)

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Responses to Early Consultation Paper from Members of Collaborative Professionals of Saskatchewan Inc.

Question 1: Please share any comments you have about mandatory alternate dispute resolution in family law disputes?

- **I really like that the principle of self-determination is included in this process by allowing the families to select the method of ADR they wish to try. I also think it's good that things be stalled if they do not adhere to using ADR.**
- Initial ADR should be required prior to filing pleadings. Parties at that point have not read filed affidavit that may be accusatory and may be more willing and open to resolving all of their family law issues through the ADR process. After completion of the initial ADR the parties can also choose to proceed to court (i.e. pleadings, etc.) If they choose to proceed to court, after pleadings have been filed, they should be required to complete the full ADR process before being able to proceed any further with litigation.
- What mechanisms will be put in place to deal with mental health issues. Will the process allow for matters to be suspended to deal with pressing mental health issues/concerns of one or both of the parties that present themselves?
- I support alternate dispute resolutions in family law and am now limiting my practice to out of court resolutions, and in particular the collaborative process, after over 20 years of family law practice. I believe that the government should support initiatives such as the collaborative practice, including with public information campaigns about collaborative practice and alternate and early dispute resolution and also by providing funding to related organizations (such as the Collaborative Professionals of Saskatchewan Inc.). The government could consider providing a tax credit or some other financial incentive to parties who use out of court processes to resolve their family law disputes. While the provincial government has mandated mediation in the past in family law in the early 1990's, it was not successful in the family law context and was discontinued. Perhaps there is a reason for that, and another approach such as collaborative practice should be promoted by the provincial government. The collaborative practice has changed over the past 15 years since it has been established in Saskatchewan in 2002. The membership (in Saskatchewan, other provinces, and many other countries) now includes mental health professionals and financial professionals to better address separating parties' needs and those of their children. The province should invest and promote this process, rather than creating their own separate program. The government could also consider incentives for family law lawyers to not only offer, but also to actively promote,

alternate and early dispute resolution and particularly collaborative process to their clients. This is an important aspect of making these out of court processes desirable to clients who often rely heavily on the lawyer's recommendations regarding such issues. If a lawyer is dismissive about such a process, or does not engage in the process, the client is unlikely to accept the process.

Question 2: What types of processes should be included as appropriate alternate dispute resolution for family law disputes?

- **Arbitration, Mediation, Med/Arb, Collaborative Law, Facilitation, Kitchen Table Negotiations**
- As indicated above, mandatory mediation was not successful in Saskatchewan in the early 1990's in family law. Part of the lack of success may be that what was offered was more of an "information session" rather providing parties to a dispute with access to mediation over a period of time. In addition, because many mediators are not lawyers, some of the mediated resolutions actually achieved in mediation did not withstand legal advice as the mediated agreements did not properly take into account parties' substantive rights and obligations in accordance with the applicable legislation. There appears to be an underlying mistaken belief that family law issues are easy and can be quickly resolved with little or no disclosure or time and without legal expertise. This is not a realistic view of family law issues. A separating family may need to deal with any or all of the following issues: valuation and division of family property including complex corporations or assets, determination of quantum and duration of child and spousal support including income determinations for self-employed persons, determination of the appropriate custodial and parenting arrangement and the dissolution of the marriage. Parties may have been together for months or many decades. There are at times mental health issues of the parties and children. These are not issues which will realistically resolve quickly or easily or by people without a law degree. Documentation (disclosure) about assets, debts and income and the assistance of those with legal expertise is required in almost every case before there can be a resolution of the financial issues. Independent legal advice is required to ensure the enforceability of Interspousal Contracts pursuant to The *Family Property Act.* Because of the need for financial and property disclosure, a 2 hour session (or even an all-day session), will be unhelpful if there is no reliable documentation or verification about assets, debts and income, particularly if there is a lack of understanding of the legal issues. There is often a lack of meaningful compliance with Notices to File Financial

Information and Notices to Disclose (and other disclosure processes) in the litigation process. Courts are very slow to award meaningful costs awards against parties who continually refuse to disclose relevant information and documentation, making non-disclosure a successful tool to delay resolution and a fair division of property and income. The lack of disclosure delays or halts resolution in litigation, and lack of meaningful disclosure will likewise prevent appropriate resolution outside of court in processes such as mediation, arbitration and collaborative law. Presumably the government's desire for out of court resolutions or early resolutions also wants to ensure some level of fairness or appropriateness of the resolutions and not just a resolution at any cost.
The collaborative process requires the parties and the lawyers to commit to providing information informally (without the court process, questionings and so on). The parties and the lawyers sign a Participation Contract which includes a lawyer disqualification clause if all of the matters do not resolve successfully and require a contested court application. That means other lawyers from other firms must deal with the matter if the matters (or some of them) cannot be resolved outside of court. Lawyers lose the clients and the clients have to start over again. The disqualification provides the ongoing incentive for the parties and lawyers to find a meaningful and lasting resolution. Parties and lawyers meet face to face to try to save time and avoid the misunderstandings and hard feelings often caused by pleadings, lawyer's correspondence and affidavits. The parties can access collaborative mental health and financial professionals also committed to the parties' goals to resolve out of court. The process may be cheaper than court, but even if it is not, it is a less adversarial process which can focus on the interests of the children and the parties, rather than focusing on the past and "winning." The collaborative process can better consider parties' individual needs.

Question 3: What should be filed to demonstrate that the petitioner has attempted ADR?

- **Sworn Affidavits of both parties, Summaries of type of ADR participated in, Agreements/decisions made/reached/granted during ADR**
- A certificate
- Absent issues of family violence or absconding with the children or property or a complete denial of parenting time, parties should be required to make meaningful efforts to resolve out of court. This may require more than attendance at one meeting. It may also require a judge to consider an affidavit outlining the attempts and a determination as to whether a party has made meaningful efforts. If a collaborative lawyer provided a certificate that the parties signed a participation

agreement and had 2 or more sessions each of at least 2 hours, that may suffice to show an attempt to stay out of court. Also once an emergency issues was resolved, perhaps the balance of the issues could be returned to ADR, if appropriate.

Question 4: What should happen if the responding party fails to respond to requests and refuses to participate?

- **Court Order to participate or result in default judgment**
- (a) Draw adverse inference.... In all, the proposed provision seems appropriate.
- Absent issues of family violence or absconding with the children or property, parties who refuse to negotiate out of court without very good reason should face some consequences. The consequences set out for those who do not attend parenting courses are rarely, if ever, invoked by the court. A failure to attend a parenting course at best results in an adjournment of the matter, and rarely are there other consequences, such as meaningful costs or striking pleadings. More often than not, parties are simply ordered to attend to the course, and that order may not be complied with by one or both parties. That is likewise the case in failure to provide disclosure: the available remedies are rarely used by the court, making non-compliance a successful tool to delay and avoid. Large costs awards for a person who fails to respond or participate may encourage compliance.

Question 5: Any comments on the proposed provision?

- **I think this is a terrific idea.**
- Looks good.
- The definition of "family law dispute' does not appear to include parenting/custody applications pursuant to *The Children's Law Act* dealing with custody and parenting. These should be included. The reference to Part II seems to be missing the reference legislation. Property disputes between parties who have lived together for less than 2 years should be included or referenced, as they don't fall under *The Family Property Act.* The subsection (5) should require the ability of the court's decision to be reviewed or to should expressly allow the court to adjourn the determination to allow the other side to respond. Claims of "interpersonal violence" that amount a minor incident or an incident which occurred many years previously should not automatically entitle a court to exempt the parties from participation without hearing the other side.

Question 6: What types of family law disputes could be resolved effectively through family arbitration? Are there any family law disputes which should not be resolved through family arbitration?

- **I believe a Med/Arb approach would better serve families so that they have the opportunity to come up with their decisions/agreements themselves first before having an Arbitrator make the decisions for them**
- **Parenting, property division, living arrangements and financials**
- **I think that Arbitration is satisfactory for all disputes within family law as long as the parties have exhausted other options, as in they have already attempted mediation and reached an impasse**
- It does not seem that family arbitration would provide a mechanism to provide "access to justice" particularly for those who have less financial means. As the government document does not provide any information about the planned provisions regarding arbitration, it is difficult to comment. If parties cannot afford lawyers, it is difficult to understand how they could afford to pay a lawyer and a mediator and for the forum in which it is conducted. It would appear that family law arbitration in other jurisdictions such as Ontario, is chosen by people of means who wish a faster resolution to their issues that is private and provides the means to have a say in who is adjudicating the issues. It does not appear that the court system in Saskatchewan is under the same strains as the court systems in Ontario or British Columbia. Arbitration could be provided for to allow those with means to access out of court process with a mechanism provided. To some extent that may free up some court time, but it is difficult to know if arbitration would be adopted by the numbers that would make a different in the court docket in Saskatchewan. The single paragraph of information on this issue does not provide any insight as to what would be legislated regarding arbitration that would increase access to justice to those otherwise denied such access.

  In Ontario, consent is required for family law arbitration and the parties must be screened for family violence and/or power imbalances. There is also a requirement that the decisions reached by the arbitration must be in accordance with the law of Ontario or another Canadian jurisdiction chosen by the parties. This is also an important consideration.

Question 7: Criteria for a family law arbitrator will be set out in the Regulations. What qualifications should someone have in order to be qualified as a family law arbitrator?

- **Q. ARB from ADRIC**
- **Minimum 1 year working in Family Dispute Resolutions**
- They should be a lawyer, dispute resolution officer, social workers, counsellors, psychologists, or certified mediator already and have go to through a set number hours of training on family law issues and governing statutes and rules.
- The person should be a lawyer eligible to practice law who has practiced for at least 10 years and has had a significant practiced family law within the past 5 years.

Question 8: Any comments on the proposed provisions below?

- **Parenting Coordinator sounds like a really valuable inclusion! I think this would help so many people with the transition involved in separating a family and provide an incredible amount of support and guidance for these parents.**
- 1(1)(a) They should be able to assist if there is a parenting coordination agreement, separation agreement or order in place.
- 4(1) must not create or change the existing parenting arrangements, agreement, or order, in place.
- 5(1) – will there be a time limit? i.e. within 90 days.
- Will the parenting coordinator be able to make applications to the court?
- This provision appears to give "judge-like" powers to a parenting coordinator, so the authority would have to be quite limited (dealing with the in place order or written agreement dealing with parenting issues). The powers set out in the provisions provided appear very broad and include ordering parties to provide information, and even child or spousal support. Only issues concerning "division or possession of property or the division of family debt" are outside the mandate of a coordinator. It appears parenting coordinators, whose qualifications are not yet known, could make custody determinations, determine mobility applications, and make child and spousal support determinations and income assessments. They should not be dealing with support issues. When these are used in other jurisdictions like Ontario, they are in conjunction with arbitration legislation and practices. That it not spelled out in the proposal by government.

Question 9: Qualifications for a parenting coordinator?

- A parenting coordinator should have a law degree, be a practicing lawyer and have significant and recent experience in family law (10 years) and/or be a social worker or psychologist with relevant experience.

Markatos, Maria JU

From: Umoh, Itemobong JU
Sent: Monday, August 28, 2017 1:59 PM
To: Markatos, Maria JU
Cc: Muller, Stacy JU
Subject: Re: Early Dispute Resolution Consultation Paper - DRO Response
Attachments: Mandatory ADR Document.docx; ATT00001.htm

Good afternoon Maria,

Please find our response from the DRO attached. My apologies for sending this in later than Friday's deadline - it was an oversight on my part. Please let me know if you need anything further from us at this stage.

Regards,
Itee

Itemobong (ITEE) UMOH
Government of Saskatchewan
Mediator
The Dispute Resolution Office, Ministry of Justice
323 - 3085 Albert Street
Regina, Canada S4S 0B1
Phone: (306) 787-8646
FAX: (306) 787-0088
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Response from the Ministry of Justice – Dispute Resolution Office

Stacy Muller & Itemobong Umoh

Alternative Dispute Resolution in Family Law Disputes

Question 1: Please share any comments you have about mandatory alternate dispute resolution in family law disputes?
The current reality is that families seeking assistance with separation more often think court before they think of any other process. In addition to the projected benefits already reflected in the paper, this would be a huge step towards shifting culture towards defaulting to the most constructive and appropriate approaches in dealing with family separations.

Question 2: What types of processes should be included as appropriate alternate dispute resolution for family law disputes?
It would need to be a process that engages qualified service providers in a recognized ADR process that engages parties in working through issues collaboratively. As already highlighted in the paper, Mediation, collaborative law services and the Family Matter's program would meet these criteria.

However, there might be a need for clear definition of these processes in the act. For example, a collaborative law process involves a defined contract. As such, parties might engage in collaborative negotiations with each other through their lawyers but not have been party to a collaborative law process. Similarly, the fact that parties sat down with a trusted neighbor to attempt to talk through their issues could by definition be mediation, but might not be enough to meet the requirements of the act. Therefore, clarifying what manner of engagement in these processes meets the requirements of the Act would be helpful.

It might also be helpful to identify a list of "qualified/recognized ADR service providers" for this purpose. This would likely require that a system/office/individual be put in place for determining who qualifies for this list and updating it as needed. An added responsibility here would be to assess whether or not further alternatives that have been engaged outside of the list meet the criteria.

Question 3: What should be filed to demonstrate that the petitioner has attempted ADR?
There could be a standard compliance form similar to what is currently filed in the civil litigation process to demonstrate attendance in mediation. This could either be signed off by "qualified service providers" or by a neutral office following an approval process.

Question 4: What should happen if the responding party fails to respond to requests and refuses to participate?
In addition to the remedies/consequences provided in the proposed provision, the court should be given discretion to enter judgment in favor of the applicant who engaged the process.

Question 5: Any comments on the proposed provision?
N/A

Below are some additional thoughts on this initiative:

- *Consideration needs to be given to how long parties need to have been engaged in a process to qualify for compliance. A minimum could be something like the family matters session which has an intake process and a half-day session. Parties would of course be at liberty to engage in more extended processes as needed.*

- *Consideration will also need to be given to accessibility of ADR services both in terms of finances and geography.*
    - *Further on finances, if citizens are required to use a service there needs to be an affordable option readily available. The ministry would have to take on this responsibility.*
    - *Further on Geography, private ADR services may not be available in all areas. There would need to be flexibility of service providers to meet needs in at least every location that has a court. There might also be a need to develop a model that employs online and/or phone services.*

- *It would be helpful to have an intake process set up that allows appropriate triaging of citizens that engage the services that Government provides.*
    - *This can be used to appropriately direct those with more sensitive issues. For example, there are ADR processes that can be tailored to some cases involving domestic violence with appropriate safety and security considerations worked in.*
    - *This can also be the place that deals with granting exemptions where appropriate and further triaging as needed.*
    - *Further, it can have a built in process of providing initial information that will be educative and empowering to citizens.*

Arbitration

We generally agree that Arbitration is a good option for dealing with Family disputes. We are open to it being applied wherever is deemed appropriate.

Parenting Coordinators

We also generally agree with this proposal and the provisions as provided.

Markatos, Maria JU

From: Fitzsimmons, Sherry <sfitzsimmons@mcdougallgauley.com>
Sent: Wednesday, September 06, 2017 10:02 PM
To: Markatos, Maria JU
Subject: Feedback

Maria Markatos, Senior Crown Prosecutor
Legislative Services, Saskatchewan Justice
800-1874 Scarth Street
Regina, SK S4P 4B3
Fax: (306) 787-9111
E-mail: maria.markatos@gov.sk.ca

Ms. Markatos,

Thank you for the opportunity to provide input with respect to the matters raised in the document titled "Early Dispute Resolution in Family Law Disputes – July, 2017".

It is recognized that early dispute resolution is a laudable goal. Many family law disputes are resolved in this manner at the current time with the assistance of counsel and mediators. It is my guess that currently far greater than one-half of family law disputes are resolved outside of the court process.

Saskatchewan lawyers are required by legislation to make clients aware of alternative methods of dispute resolution. Prior to that requirement being legislated it was my experience, and that of my colleagues, that for a number of years most lawyers practicing in this area were already advising clients contemplating commencing court action of the dispute resolution processes available to them and pointing out the pros and cons of each.

As I indicated, due to summer holidays, it has been difficult to gather as a group to discuss the proposed changes. I would like to see the proposed changes circulated again with more specificity as to what is being contemplated along with draft regulations prior to any changes being implemented. In many instances I can see that that the content of the regulations would be critical to a clear understanding of what is being proposed as changes.

Generally speaking, based on what has been made available for review thus far, my comments are below:

Mandatory mediation

1. Family matters were previously exempted (removed) from mandatory mediation for reasons which are still prevalent today. What consideration has been given to those reasons and what has been the discussion surrounding reintroducing mandatory mediation in family law?

2. If mediation is to be mandatory for family law matters, the definition of mediation should be broad enough to include mediation / settlement discussions between the parties' respective counsel. A certificate of counsel could satisfy this requirement. This is likely to the same point – who is going to be deemed qualified to provide family law dispute resolution? Who is going to be qualified as an ADR provider? What model regulations are being reviewed / contemplated to see if there is a "fit" with Saskatchewan practice?

3. These changes would apply only to unmarried couples?

4. Timing of mediation is critical. It is a very significant concern that early mediation would in many cases be meaningless as full disclosure is required in order for parties to be properly informed and to receive adequate legal advice.

5. There is a concern that reintroducing mandatory mediation without regard for the past difficulties and the current practices will simply be additional layer of process which would further bog down parties. In this way, what is being proposed may very well not be a "fix" at all, but rather an additional problem in trying to improve access to justice.

6. **It is critical that choice of process remain in family law disputes. Removing choice by imposing process is not, in my view, improving access to justice.**

Arbitration

Arbitration as a process choice is a welcome addition because it adds a process choice that is likely to mean quicker, less expensive, and less cumbersome access to a meaningful process and decision. In saying this, there is concern that those providing arbitration services in family law disputes should have a depth of knowledge which renders them the most qualified people available to make sound and consistent decisions in this area of law. I have talked to some other senior family law lawyers and consistently we feel that 10 years at the bar practicing in this area should be the minimum requirement. Public respect for judicial process is critical. This is one of the reasons that it is believed that knowledge of the area (all areas of family law) which is kept current through continuing legal practice and legal education, as well as the history of family law jurisprudence and practice, is required in order to provide those that choose this process choice a meaningful service that retains the respect of the public and those that choose to participate.

Inconsistent decisions and the very real potential for wrong decisions are of concern if the bar is not as stringent as suggested herein.

All types of family law disputes could be resolved by arbitration.

Parenting Coordinators

It appears that this would be a choice that parties can opt for? If that is the case and it is not going to be mandatory or ordered, then it could be helpful but again the concern is choice of process, not a process which is imposed or which locks the parties in. Some of the proposed provisions appear to do this.

Seeing the proposed provisions presented it appears that in order for Saskatchewan practitioners to have a clear of understanding of what is being proposed further discussion is required as well as well as the draft proposed regulations circulated.

Thank you,
Sherry

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Markatos, Maria JU

From: stla <admin@stla.ca>
Sent: Friday, September 15, 2017 2:30 PM
To: Markatos, Maria JU
Subject: STLA Member Response Letter
Attachments: STLA Early Dispute Resolution in FL Disputes Response Ltr 15 Sept 2017.pdf

Importance: High

Dear Ms. Maria Markatos,
As per your request, please find our association's comments regarding your consultation paper entitled "Early Dispute Resolution in Family Law Disputes."

Please reply to this email to acknowledge receipt and thank you for the extension to make comments.

Sincerely,
Karen Roden
Executive Director

Saskatchewan Trial Lawyers Association
P.O. Box 1482
Saskatoon, SK S7K 3P7
Tel: 306.955.7850 (Saskatoon) or 1.888.955.7850
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Email: admin@stla.ca Website: www.stla.ca
Our Mission: *dedicated to the pursuit of justice through education and advocacy*

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P.O. Box 1482 Saskatoon, SK S7K 3P7
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Email: admin@stla.ca – Website: www.stla.ca

September 15, 2017

Ms. Maria Markatos, Senior Crown Counsel
Legislative Services, Saskatchewan Justice
800 – 1874 Scarth Street
Regina, SK S4P 4B3

Delivered via email: maria.markatos@gov.sk.ca

Dear Ms. Markatos,

Thank you for allowing the Saskatchewan Trial Lawyers Association (STLA) an extension for your request for input on the "Early Dispute Resolution in Family Law Disputes," July 2017 Consultation Paper.

We have canvassed our members and submit their comments herein. Should you have any questions or concerns please do not hesitate to contact us.

Sincerely,

K. Roden

Karen Roden
Executive Director

1. **Should there be mandatory ADR of family law files?**

Comment 1:
In my view, mandatory ADR will not improve many issues in the family justice system.

While I am a strong proponent of mediation, collaborative law and other ADR processes, I believe that these processes generally work best when parties are willing participants. Further, there are many circumstances where I believe that parties will be materially disadvantaged and injustices will occur if further requirements and delays are baked into the family justice system.

Personally, I believe that many of the challenges of the family justice system are systematic failures of the court process. I believe that active case management through the justice system to ensure the orderly resolution of family law files is absolutely required. There will no doubt be a cost associated with active management of family law files, but it is money well-spent. To reduce such costs for the taxpayer, I believe that many procedural issues in the courts should be handled by individuals paid far lower than a judge (the equivalent of a master in Alberta).

I would be surprised if the experience of other jurisdictions was that access to justice, cost barriers or time efficiencies were substantially reduced because of mandatory ADR.

Recognizing that this is going off topic, I believe that one of the major challenges of access to justice is that, to make any actual impact, money will have to be spent. As an example, increasing money to Legal Aid would have a tremendous impact on access to justice. Certainly, adding additional programs, such as mandatory ADR, have the advantage of cost neutrality for the government; I am just not convinced that it does anything for the public or addresses access to justice issues.

Comment 2
Mandatory mediation is not appropriate for all circumstances.

2. **Should there be any exceptions, such as in the case of family violence, or situations where one parent has abducted the child? Are there other situations that should be exempted?**

Comment 1:

Yes, I believe that power imbalances created by long-standing family violence make mediation unworkable. However, the question is how that is screened at the front end to make the determination as to whether there should be an exception created.

There should definitely be an exception for child abduction. Those applications have to be brought extremely quickly and it would be a substantial injustice to require a party to attend ADR at the front end.

Comment 2
That has nothing in fact to do with whether there has been family violence or not. It is often the mind-set of the parties that has more to do with whether mediation is appropriate than not.

Also given the lack of qualified mediators in small centers this just increases cost often where parties will be unable to afford it. Thus until they get a mediating system in place that ensure equal access to all parts of the provide this is unfeasible.

If they want some time of mandatory mediation and if the accessibility issue is not addressed.

3. **When should the mandatory ADR occur? Immediately following the close of pleadings, as in other civil proceedings? Should it occur prior to issuing a Petition, as in New Zealand and Australia?**

Comment 1:

In my view, mandatory ADR should not occur at all.

If ADR is going to be mandated, it would be far too early for parties to attend mandatory ADR at the close of pleadings. Further, the court action should not be stayed until the ADR has occurred, as that would create an injustice for many individuals who need more immediate relief.

Just as an example, let's take the example of a fictional client, Mary. Mary would like to get divorced. She works part-time and largely raises her children, aged 4 and 8. Her husband of 15 years, Todd, owns a business, earns a very good income and wants to see his children for 50% of the time. Mary has moved out of the home and the parties do not agree on the parenting arrangements. Let's assume that Mary commences the divorce proceeding, seeking support, joint custody (with primary residency) and a division of property. Todd counter-claims requesting shared parenting and an unequal division of property.

If we then require Todd and Mary to attend a mediation, what will likely occur?

1. There will be a delay while a mediator can be found to assist Mary and Todd. Given that there are a limited number of mediators, it takes 4 weeks to see a mediator now that everyone has to go through this process;
2. During those 4 weeks, Mary is trying to survive off her job where she earns $20,000 a year. She has to rent a substandard apartment or stay with friends (with her children), while she waits for a mediation date;
3. Todd, meanwhile, is barely seeing his children because Mary does not trust that Todd is not going to refuse to bring them back (or perhaps Mary has a fear that he will harm them). He has to wait out the 4 weeks seeing the children at Mary's house;
4. The parties then attend the mediation after 4 weeks. Both parties start the mediation angry with each other over the lack of support and parenting time. The mediator tries valiantly to assist the parties, but is hampered by the fact that there has been no financial disclosure so no one knows the income that might be available to Todd from his business. Mary has stuck in her heels on parenting. Property can't be discussed because there has been no disclosure. The mediator suggests that further mediation sessions be booked, but Mary needs more immediate financial support and Todd can't be without his children for another few weeks;
5. The parties then, having been delayed a month with no support or proper parenting arrangements in the interim, go off and hire lawyers. They gear up chambers applications (rather than writing a couple of letters asking for disclosure or making interim proposals because their clients have already been delayed too long). Those chambers applications get heard in about 30 days (approximately 2 ½ months after the counter-petition was filed and 3 ½ months after the petition);
6. Applying the law as it currently stands, the chambers judge determines that, given that the parties have been living separate and apart for approximately 3 ½ months and the mother has had primary residence of the child for that entire period, the status quo prevails in the interim and she will retain

primary residency of the child (thus disadvantaging the father). The mother will obtain interim child and spousal support, but not retroactive as that is an issue to be resolved at trial;

7. Todd and Mary, fed up with the system, have spent thousands of dollars, wasted several months and still gone to court.

This hypothetical is likely to occur for a number of families.

Keep in mind, that we essentially have an ADR type of process (a settlement pre-trial conference). Other provinces do not have similar pre-trial conferences. Those work wonders in resolving matters because they are booked at a time when the parties might be able to resolve their dispute (ie. After disclosure and interim arrangements have been addressed).

Now, I think that there are certainly cases that are most appropriately addressed through ADR. If those cases could be screened through a case management process, I think that you could have good success (such as occurs now with the high conflict mediation program). However, simply applying a mandatory ADR process in all cases is unwise.

4. **What types of mediation or ADR services should be included within the definition of "mediation"? In other words, who all should be able to provide out of court dispute resolution services which would meet this requirement?**

Comment 1:

Without seeing a proposed model, it is difficult to see what is intended in this regard. For instance, if the intention is to simply require parties to engage in attempts to resolve matters outside of the court system, then perhaps we should require parties (or their lawyers) to certify that attempts at resolution have been made, such as we presently do for pre-trial conferences (where we have to certify that settlement efforts were made and provide a date for the same). Frankly, lawyers writing a letter making a proposal is a form of ADR, as it does not engage the court system. Thus, lawyers should be able to meet this requirement by indicating that they have made efforts to resolve issues.'

Comment 3:

- Mandatory
    - Can a 4-way meeting count as a "family dispute resolution" method?
        - Why limit to mediation, arbitration, collab?
        - What would constitute "proof of participation" in that fashion?
    - Timing
        - If "before pleadings are filed", how do you ever get interim child support and access resolved?
            - Litigation advantage to the party with money that can drag it out, or the party with the kids who can drag it out.
        - If "after the close of pleadings", some files never close pleadings
            - Answer not filed or Counter-Petition not issued until prior to pre-trial, and then only as a formality
- The proposed exemptions are good, but it only allows a party to make an application without notice for a Court-ordered exemption from the requirement to participate. This is another added step and cost

- For 5(d), what constitutes "proof of attempts to engage the other party"
  - A simple letter?
  - Text messages
  - Emails
  - For how long, how many times
- 5(e) is concerning
  - "Extraordinary circumstances" would seem to preclude child support as that is a usual circumstance of files

Answers to 8 Questions set out in the paper:

1. It could free up litigation time and make the process less time consuming and expensive for parties and lawyers alike.
2. A 4-way meeting with 2 Members of the Law Society (each party having a lawyer) should count as mandatory ADR.
3. Filed to demonstrate:
   a. In the case of arbitration/mediation, a letter/certificate from the arbitrator/mediator stating that the parties engaged in the process and attended on however many occasions.
   b. For collab or a 4-way meeting, an indication (certificate, joint letter) signed by both counsel indicating the dates of collab or 4-way meetings.
   c. In the case where one or more parties don't have a lawyer, a sworn declaration as to the attempts to put an ADR process in place (emails, phone calls, appts made, etc.)
4. Automatic costs award of $300. Further Elevated costs if unsuccessful in litigation steps.
5. See my comments above.
6. Arbitration could resolve narrow issues of law. It could determine spousal support, property division, post-secondary.
7. Arbitrator must have knowledge as a family law lawyer. They need to know the law, and in particular family law.
8. Agreed – they make sense