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Alternatives to Court: Arbitration

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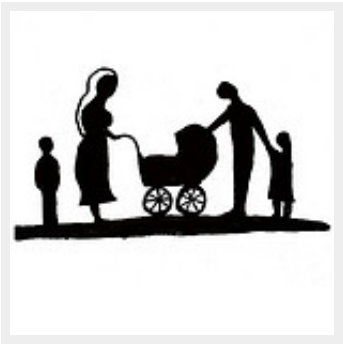

In our first column in this series, I introduced the basic alternatives to resolving family law disputes in court – negotiation, mediation and arbitration – and talked about some of the surprising research on lawyers' views about litigation. In the second column, Sarah Dargatz wrote about collaborative negotiation, a cooperative kind of negotiation in which the lawyers and their clients work together to reach a settlement resolving a dispute. In this column, I'm going to talk about arbitration.

Arbitration and litigation

Arbitration looks a lot like litigation at first glance. Whether you're going to court or using arbitration, a neutral third-party –a *judge* in litigation and an *arbitrator* in arbitration – makes a final decision that binds the parties involved in the family law dispute. Both processes are adversarial, meaning that the parties are not expected to cooperate with each other or reach a settlement. Both processes follow the principles of fundamental justice, which is a fancy way of saying that they are designed to be fair to both parties and that both parties have the right to make their case, and reply to the case against them. But that's where the similarities end.

Litigation is a public process. Hearings and trials happen in an open courtroom, and in many provinces and territories, anyone walking in off the street can review court files. Judges' decisions can be found online, although some jurisdictions try to anonymize the names of the

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Each dispute is resolved by applying a blend of statute law and case law, and according to the rules of court. Hearings and trials are scheduled when there's room in the court calendar, which might be several months for hearings and several years for trials. The evidence presented must comply with the statute and common law rules of evidence. The judges who deal with hearings and trials are randomly selected and may or may not be experts in family law.

Arbitration, on the other hand, is a private process. Hearings occur behind closed doors, no one has access to the arbitrator's files and the parties agree to keep everything that happens confidential. Arbitrators distribute their decisions to the parties only and never post them online.

Disputes may be resolved by applying the law or by applying another standard, like fairness, and the parties pick the rules for themselves. Hearings can be scheduled as soon as the arbitrator and everyone else is available. The rules and legislation about evidence do not govern arbitrations. The witness' oath or affirmation is not necessary and evidence will usually be allowed if the information is relevant to an issue in the dispute.

Best of all, in arbitration the parties can choose their arbitrator, which means that they can pick someone who isn't just an expert in family law but is an expert in the specific family law problem that's at the heart of their dispute.

Starting arbitration

It's easy to get into arbitration. First, you need to talk to your ex and make sure that he or she is willing to try it. Second, you need to pick an arbitrator. Doing an Internet search for "family law arbitrator" and the name of your town will give you some names to choose from. Contact two or three of the arbitrators and tell them about your situation without getting into too much detail, and ask about their experience with family law disputes. Be sure to ask about their fees and availability.

Once you and your ex have found someone you're interested in working with, your arbitrator will send you a participation agreement. This is a contract that talks about how the arbitration will work, your role and your arbitrator's role in the arbitration process, and the arbitrator's payment expectations.

After you've signed the participation agreement, (some arbitrators will ask you to get legal advice about the meaning and consequences of the agreement), the arbitrator will schedule a date for an initial planning conference and perhaps a date for the arbitration hearing itself. The conference is the arbitrator's opportunity to get a more detailed understanding of legal issues in your family law dispute, set dates for the exchange of information and documents, and work with you to select the rules for how your arbitration will run.

Designing the rules that will govern your arbitration

In my view, the most important benefits of arbitration are its privacy, being able to hire a decision-maker who is an expert in the subject of your dispute and the flexibility of the rules that guide the process. The speed of arbitration is also important, since getting a decision quickly almost always makes arbitration cheaper than litigation. I'm going to focus on the rules of arbitration, however, because the many ways they can be changed are often overlooked and some changes can dramatically increase the efficiency of arbitration while dramatically reducing its cost.

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In litigation, the rules of court that apply to family law disputes are the same rules that apply to all civil disputes, from motor vehicle accidents to wrongful dismissals. Even in those jurisdictions that have separate set of rules for family law disputes, like British Columbia, or a special rule for family law disputes, like Alberta, the difference between rules for family law disputes and the ordinary rules for civil disputes can be hard to spot.

In arbitration, the parties can design the process to suit their issues, needs and finances. While litigation processes provide a one-size-fits-all service, almost every aspect of the arbitration process can be tailored to the specific needs of the specific people involved in a specific dispute, giving those individuals the opportunity to create a process that is genuinely proportionate to the complexity, significance and value of their issues.

This is especially important because family law disputes are fundamentally different than other kinds of civil disputes. Most civil disputes involve people who may have no relationship with each other except that which gave rise to the dispute. They concern

events that ended long before trial and tend to involve concrete evidentiary questions that can be measured, like the length of the skid marks and the condition of the road. They determine responsibility, and, where responsibility is found, the amount of money necessary to restore the plaintiff to the position she would have been in but for the bad act.

Family law disputes, on the other hand, concern family members whose relationship with one another will continue into the indefinite future. They concern events taking place over a lengthy span of time continuing through trial. They involve difficult, ambiguous evidentiary questions about things like the quality of a child's relationship with a parent, the impact of substance abuse, mental health disorders or cognitive impairments on a party's parenting capacity, or whether a child will be better off living in a new town rather than the town in which the child grew up. They concern, not restitution for past events, nor even "winning" and "losing", but the parenting, support and property arrangements that will best provide for the future functioning of families living apart.

If settlement isn't likely and you can have a dispute-resolution process that's custom-designed for your family law dispute, rather than an all-purpose process that also handles motor vehicle accidents and wrongful dismissals, shouldn't you?

Arbitration options

Here are some of the ways that arbitration processes can be adjusted. They cover most aspects of the arbitration process, including exchanging documents and information, deciding how evidence will be presented and how and when someone can appeal the arbitrator's award. These and other changes should be discussed with the arbitrator in detail as early in the process as possible, usually at the planning conference held before the arbitration hearing.

Disclosure: You could agree that you will exchange all of the documents that you would exchange if you were going to court before the arbitration hearing, or you could agree that you will only exchange certain documents or certain types of documents. You could agree that the parties will be questioned out of court before the hearing, or you could agree that they won't. You could agree that each person can require the other to make admissions about the facts of the dispute before the hearing, or you could agree that they won't.

Mediation: You could agree that the person who is your arbitrator will try to help you

reach a settlement through mediation first, or you could agree to go straight to arbitration if settlement seems unlikely. If you decide to try mediation first, you could agree that the arbitrator will be strictly neutral when serving as a mediator, or you could agree that the arbitrator will take a directive or evaluative approach to the mediation. This means that the arbitrator will express her opinion about the strengths and weaknesses of each persons' case as a part of trying to reach settlement.

Hearings: You could agree that hearings will be held in person, by videoconference or by telephone. You could even agree that there will be no hearings at all, and that the arbitrator will make her decision based only on written information and written arguments. (I can even imagine circumstances when it might be appropriate to have hearings though a group text, using an application like WhatsApp or Messages.)

The rules of evidence: You could agree that the court rules of evidence will apply, or you could agree that they won't. You could agree, for example, that hearsay – what someone else told someone – will be admitted and that the test to admit evidence will be relevance to a factual or legal issue.

Written evidence: You could agree that all evidence will be provided though documents, like income tax returns and bank records, or that all evidence will be provided through documents and through the written statements of witnesses. You could also agree that no evidence at all will be presented at the hearing.

Oral evidence: If you are going to have witnesses provide oral evidence, and you don't have to, you could agree that their main evidence will be given in writing and that the other side will be able to cross-examine them on their written statements. Or, you could agree that the number of witnesses will be limited to a certain number, that they will give their main evidence for a limited amount of time, and that the other side will be able to cross-examine them for a limited period of time. Or you could agree that some witnesses will give their main evidence orally and that others will give their main evidence only in writing.

Hearing from children: You could agree that the views of the children will be presented through a short views of the child report or a full parenting assessment, through letters from the children to the arbitrator, or through an interview between the children and the arbitrator. You could also agree that the children will be represented by a lawyer of their own.

Arguments: You could agree that all arguments will be presented orally, in writing, or

both orally and in writing. It's possible that you might agree to let the evidence speak for itself and that no arguments will be presented.

The arbitrator's decision: You could agree that the arbitrator will make an oral decision, a written decision with only a short, summary explanation of the arbitrator's decision, or a written decision with full reasons for the arbitrator's decision. (It can take a long time to prepare a decision with full reasons, and the longer it takes to complete a decision the higher the arbitrator's bill will be.)

For example, say your dispute concerns only one or two legal issues, like whether a particular asset is shareable family property or not. That dispute might be addressed over the telephone, with oral arguments only and no evidence at all. The arbitrator's decision might be made over the telephone, without a formal written decision. Or say your dispute concerns figuring out someone's income for support. That dispute might be addressed with limited documentary evidence and limited oral evidence from the parties alone, and so you might opt for a written decision with only summary reasons.

Planning your arbitration

As you consider your options, try to keep your choice of process as simple and streamlined as possible. This can mean making some difficult decisions, like agreeing to present only three witnesses instead of ten or agreeing to limit the length of time for the cross-examination of witnesses instead of exploring every possible detail. Remember that the longer an arbitration takes to complete, the more money it will cost.

Do your best to think outside the box and challenge your assumptions about the kind of process you need. Remember that a successful arbitration can consist of nothing more than oral argument over the telephone, it can be an in-person hearing that includes all of the processes and procedures available in court, or it can be something in between these extremes. In general, most people who are planning an arbitration should try to balance speed and efficiency and the complexity, importance and value of the issues in their dispute.

Our next column in this series will talk about mediation, including neutral mediation and directive or evaluative mediation.

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