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NOVEMBER 2016

Effective Use of Mediation-Arbitration

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Over the past 15 years, mediation-arbitration (or "med-arb") has grown into a popular method of resolving family law disputes. As its name suggests, med-arb combines the most effective features of both mediation and arbitration. Why has med-arb become so popular? When does it work and when it does not? What are the ethical and practical issues that must be considered?

What is Med-Arb?

Med-arb is a hybrid process in which the parties select a neutral to mediate the case. If the mediation is successful, then the case is over; however, if the mediation is unsuccessful, the parties then proceed with an arbitration. In most cases the arbitrator will be the same person who conducted the mediation, although the parties can agree on a new person to arbitrate.

In Ontario, family law arbitrations are governed by both the *Arbitration Act* and the *Family Law Act*. While many of the rules that govern commercial arbitrations are also applicable to family law arbitrations, there are specific provisions that only apply in the family law context (for example, what matters can be arbitrated, the applicable law, the contents of arbitration agreements and enhanced supervisory powers of the court).

The starting point for any mediation-arbitration is the med-arb agreement. That agreement commits the parties to the med-arb process. Unless both parties consent, neither party can abandon that process. That agreement also identifies the mediator/arbitrator and provides for the issues to be determined and the procedure to be followed. A lawyer's certificate of independent legal advice must be completed confirming that each party understands the process and is participating willingly. The mediator/arbitrator also signs a certificate confirming that he or she has the appropriate qualifications, that the parties have been appropriately screened, and that he or she will conduct any arbitration in accordance with the *Arbitration Act*.

Before entering into med-arb, each party must be screened for domestic violence or power imbalance. The *Arbitration Act* does not specify who conducts the screening or how the screening is to be conducted. The mediator/arbitrator can conduct the screening personally or delegate the task to a third party.

Once the screening has been completed and the med-arb agreement executed, timelines are set for the exchange of briefs and the mediation itself. Subject to a few differences discussed below, the mediation in a med-arb is no different than a stand alone mediation. If the mediation is successful, the terms of the settlement are incorporated into minutes of settlement or a memorandum of understanding or a separation agreement. If the mediation is unsuccessful with respect to some or all of the issues, timelines are determined (typically at a pre-arbitration meeting) for the various steps preceding the arbitration and for the arbitration itself.

Why Do Parties Choose Med-Arb?

There are a number of reasons why parties choose med-arb. They include the ability to select the neutral, the confidentiality of the process, accessibility of the neutral, the ability to determine the procedure, savings of time and cost and the guarantee of finality. Unlike the court process, a mediation can often be scheduled within six weeks of the initial contact and an arbitration (if required) can often be completed within two or three months of the mediation.

The most compelling reason why parties choose med-arb is its success rate. Between 80% to 90% of med-arbs settle in the mediation phase. Settlements arrived at in mediation take less time and money and are much more likely to be adhered to by the parties than decisions imposed by the courts. Finally, parties who settle in mediation are more likely to preserve a positive relationship which ultimately benefits both the parties and their children.

Cases That Are Not Suitable

Not every case is suitable for med-arb. Where there is a history of domestic violence or power imbalance that cannot be remedied by the presence of counsel or protective procedures, med-arb may not be appropriate. Where the issues are beyond the arbitrator's jurisdiction, where there are third parties who need to be bound by the process, where the parties do not have sufficient financial resources, or where enforcement of an arbitral award is expected to be problematic, med-arb may not be the right choice. Where disclosure is a problem, it may make more sense to defer entering into med-arb until disclosure has been obtained (through the courts or otherwise).

Ethical and Practical Problems

Med-arb is not free of both ethical and practical problems. Its critics say that allowing the mediator (who has heard settlement discussions and confidential communications from a party that are not disclosed to the other party) to later become the arbitrator will create, if not actual bias, at least a reasonable apprehension of bias in one or both of the parties. Its critics also say that med-arb is inherently coercive: that parties will feel pressured into accepting the mediator's recommendations because he or she knows that the mediator will later become the arbitrator if there is no settlement in mediation. While these criticisms can be addressed by providing in the med-arb agreement that the mediator and arbitrator shall be two different people, doing so undermines much of the efficiency of the med-arb process. The best answer to these criticisms is that med-arb is a voluntary process that parties should only enter after a careful explanation and understanding of the process. For most parties entering into med-arb, their first priority is an early settlement and these criticisms of the process are of little concern.

Nonetheless, when the mediator and arbitrator are the same person, he or she must take certain precautions to ensure the fairness and integrity of the process. While in the mediation phase, the neutral should avoid giving any evaluations of the case that might suggest that he or she has pre-judged the matter.

Conclusion

Med-arb is not the solution to every family law case. However, for parties looking for an early and economic resolution, easy access to and control over the choice of the neutral and the process, confidentiality and finality, med-arb offers a process that appeals to many separating spouses.