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Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Family

Can mediation-arbitration reduce clogged courts and improve access to justice?

By **Hilary Linton**

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(December 12, 2017, 9:13 AM EST) -- Collaborative practice has grown out of disenchantment with the adversarial legal system's assumption that positional bargaining necessarily protects the interest of parents and their children. Family mediation has become the go-to solution for both the public, who are seeking to avoid having to pay lawyers, and the government, which wants to reduce the cost of providing family law justice.

In many jurisdictions, mediation-arbitration is increasingly seen as a pragmatic and cost-effective dispute resolution option for those seeking both the combined benefits of an interest-based negotiation premised on self-determination, and the backup security of a reliable and fair decision-making mechanism should negotiations fail.

In some ways, med-arb, as it is commonly known, is a higher-commitment version of open mediation in the context of a court case, where the mediator may report back to the court on what happened in the mediation if a settlement is not reached. People who decide to try mediation as a way of resolving litigation may opt for open mediation when they don't trust the other person to negotiate in good faith; they feel they need the security of reporting to the court to keep the other person honest.

There are also some fundamental similarities between med-arb and collaborative practice. In both, there is a dire consequence if the parties do not reach an agreement. The dire consequence — in the case of collaborative law, the expense of retaining new counsel, and in med-arb, the requirement to participate in an adjudication — itself is an impetus to settle.

Med-arb is wholly private. Parties enter into a contract with the mediator-arbitrator. Ideally they will choose one that meets their personal needs, as the ways in which med-arb services are delivered vary widely, especially in the family law context. Not all mediator-arbitrators are family lawyers — some, for example, are mental health and family professionals whose expertise in child matters gives them authority, while others are financial professionals. Some operate formally, others less so.

Aside from the limited requirements imposed in Ontario by the Ministry of the Attorney General in 2007, family arbitrators are free to design their mediation and arbitration components as they and the parties wish. This allows for enormous flexibility in process design, which in turn means that med-arb, in theory, offers a real opportunity for separating couples who do not find direct negotiation easy. And it can be the best process for unrepresented parties if the mediator-arbitrator is skilled at working with those without counsel, and practises in a way to ameliorate the risks inherent in this process.

What, then, are the benefits and the risks of family mediation-arbitration?

1. Parties can work with a decision-maker they trust. In a recent panel discussion at an ADRIO/FDRIO/Osgoode Professional Development program, former Ontario chief justice Warren Winkler described med-arb as a process requiring the highest degree of professional trust, and I think he is right.

Mediator-arbitrators work closely with parties in a mediation, spending time with them privately to screen for power imbalances and family violence, and to learn their respective procedural needs and also working with them separately in caucus to better understand their substantive needs. If the parties trust the mediator-arbitrator as a professional, they will be more inclined to accept the eventual decision, if one is made — even if they don't like it.

2. Parties (and their counsel) can design the process in a way that suits their needs. If the mediation fails, they can consent to using any part of that process in the arbitration. They can decide to use agreed facts and documents, affidavits and reports in an efficient way.

The *Statutory Powers and Procedures Act* applies to arbitrations, which means the rules of evidence can be more flexible as is appropriate. The process is intimate and empathetic, giving parties — especially those without lawyers — the sense that they have participated in something meaningful and cost-effective.

3. Family arbitrators are generally well trained and highly experienced. They know how to make and write good decisions, and are able to focus as much time on the case and writing the decision as the parties need — in many cases making the process more time responsive than court. There are no long wait times for a court date, no paying a lawyer to sit in court waiting to be heard by the judge. When well done, this is a highly efficient and responsive process.

There are also challenges with family mediation-arbitration. Because a high level of commitment is required, it is critical that those providing the service take time to assess whether the parties and the process are in fact well suited for each other. (Under Ontario law, family arbitrators have a duty to assess whether the case is appropriate before and during the arbitration process.)

In cases where one party is afraid of the other, where one party is manipulating the process to extend their control over the other person, or where a party or parties are incapable of complying with procedural requirements or substantive decisions, a high-commitment process like mediation-arbitration is likely to fail.

When an arbitration fails, the parties are left in the worst possible situation: no progress and often no money.

Mediation-arbitration is a highly skilled process. Those seeking to work with a mediator-arbitrator — whether they have counsel or not — should ask many questions about the process and the proposed mediator-arbitrator before signing a contract.

Hilary Linton is vice-chair of the Family Dispute Resolution Institute of Ontario *who recently co-taught a five-day course in* Family Arbitration Law and Skills, *with Dr. Richard Shields, to family lawyers, mental health professionals and paralegals from across Canada.*

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