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Collaborative Processes

In collaborative settlement processes, the parties, their lawyers and their counsellors work together as a team to find a resolution of the issues arising from the breakdown of the parties' relationship, and consult experts such as child specialists and financial specialists as the need arises. The collaborative process is meant to address both the legal and the emotional consequences of the breakdown of a relationship.

This section provides a provides a brief introduction to collaborative settlement processes, a step-by-step overview of what happens, and a description of the roles played by each of the team members.

Introduction

The breakdown of a relationship is an extraordinarily difficult experience for everyone involved. Contrary to the impression you might form from much of the rest of this website, a couple's legal difficulties are only one part of the whole experience of ending a long-term relationship. The purpose shared by all collaborative processes is to provide a non-adversarial space for the parties to resolve their issues and emerge, at the end of the process, as emotionally- and psychologically-whole people.

Litigation, which used to be the primary mechanism for resolving family law disputes, is adversarial by nature. Rather than improving things, it usually aggravates the emotional difficulties couples face when their relationship breaks down. In collaborative processes, on the other hand, the parties agree that they will not go to court, and sign an agreement to that effect, and mental health professionals are included in the process as necessary.

Of course, not every couple is suited to a collaborative approach. This process requires honesty and good faith, both to oneself and to others. Sometimes the breakdown of a relationship is so full of anger and bitterness that no approach will work except for litigation. If each party isn't willing to use and embrace the collaborative process, it simply will not work.

Overview

The following discussion takes a general look at collaborative settlement processes. Since collaborative approaches are very much tailored to the unique circumstances of each couple, their preferences and those of their lawyers, you should read what follows with a grain of salt. This description may not represent how you or your collaborative lawyer will prefer to do things.

Finding a collaborative lawyer

The first step is for each spouse to find and hire a lawyer. You should look for a lawyer experienced in collaborative law, or, at a bare minimum, one who is open to the idea; most lawyers who practise collaborative law will expressly describe themselves as collaborative lawyers or collaborative practitioners in their promotional materials. The lawyers will then explain the collaborative process to their respective clients, and contact each other to prepare a collaborative process participation agreement.

A good place to start looking for a lawyer is the website of the collaborative law practice group nearest you, such as:

- Collaborative Divorce Vancouver [1],
- Collaborative Association in Metro Vancouver [2],
- Victoria's Collaborative Family Separation Professionals [3],
- Okanagan Collaborative Family Law Group [4], and
- Collaborative Law Group of Nelson [5].

A quick Google search [6] for "`collaborative law bc`" should net you some additional resources, including collaborative family law lawyers in your area.

Signing the participation agreement

The parties and their lawyers will then sign the participation agreement that commits them to working together, using non-adversarial problem-solving techniques and cooperative negotiation strategies, to reach a fair settlement without going to court.

The participation agreement will contain a number of terms that are very important to understand. Among other things, most participation agreements will provide that:

- the parties are to discuss the issues in a frank and respectful manner, and not make unfounded accusations,
- while the collaborative process is underway, neither party will start proceedings in court,
- if litigation starts, both lawyers must withdraw and cannot continue to represent their clients,
- the lawyer must end the collaborative process if his or her client withholds or misrepresents information, and
- all communications generated during the process are to be kept strictly confidential.

Most participation agreements say that there is no settlement until a separation agreement has been signed. This is to make sure that everyone is committed to the settlement and prepared to be bound by its terms.

Hiring the professional advisors

The parties and their lawyers will then start talking about whether any other help is likely to be needed, such as from divorce coaches, child specialists (if there are children involved), or financial advisors (if there are complex financial issues). These professionals are neutral in their approach and are not hired to represent or advocate for either party. Rather, their role is to help the process along by providing objective options and opinions about the subjects at issue.

Where the legal and emotional issues are straightforward, it's possible that no other professionals need to be hired. If something comes up during the process which suggests that it would be helpful to recruit a new team member, the professional can be hired then.

Making disclosure

The team then begins the process of making disclosure of all documents and information relevant to the issues between the parties. The collaborative process is not a poker game, with each spouse bluffing the other and trying to take advantage; this process is transparent and requires absolute and unswerving honesty. Relevant documents often include:

- current and historic statements for bank accounts, retirement savings accounts and investment accounts,
- current statements for loans, mortgages and credit cards,
- tax returns,
- corporate financial statements and corporate tax returns, and
- confirmation of income.

The parties produce their documents and information to each other on the understanding that the information (except for certain legal documents such as financial statements) and the content of the negotiations will never be used in court, but will remain private and confidential among those involved in the collaborative process.

Starting discussions

Once full disclosure has been made, the parties then begin to talk about what their personal interests and expectations are, and about what potential settlements might look like. This can be a short process or a long process, depending on the complexity of the emotional issues and the distance between the outcomes each party hopes to achieve. It may be necessary to delay things to get financial advice or for a property or business to be valued, to get some counselling, or to get an opinion from the child specialist.

Discussions between the parties and their lawyers will continue until a resolution is reached with which both parties are as happy as possible. You can expect that this will be a process of mutual compromise, and that the ultimate

resolution will reflect neither party's original position.

Along the way, depending on the nature of the issues, one or more temporary agreements may be reached. These are not meant to be a final determination of the issues, rather they are temporary, stop-gap solutions intended to deal with problems like the sale of the family home, the parties' time with the children over holidays, and so forth. These interim agreements will all be replaced by the final agreement.

You may want to have a look at "Tips for successful mediation" in the section on Family Law Mediation in this chapter. It has information about communication skills that can be helpful during the negotiation process.

Signing the final agreeement

The terms of the settlement will be put into a formal separation agreement by one of the lawyers. The parties and the other lawyer will all be asked for comment. Changes and adjustments will be made before the separation agreement is signed.

The collaborative process normally ends with the signing of the final agreement. However, until and unless the participation agreement is cancelled or set aside, the lawyers will remain bound by the terms of the agreement and cannot start a court proceeding on things covered by the separation agreement, even to enforce the agreement.

Read the Separation Agreements section in the Family Agreements chapter for a discussion about separation agreements and their effect.

The team

The collaborative team includes the parties' lawyers, who are family law lawyers with special training in collaborative processes. It may also include mental health professionals, usually psychologists or registered clinical counsellors, who work as the parties' divorce coaches. Where appropriate, a financial specialist and a child specialist may also be part of the team. All team members work cooperatively with each other and the parties, and sometimes the parties' children.

The degree to which each of these professionals may become involved will depend on the particular circumstances of each couple. For some couples, the child specialist will become the key team member, for others it may be their divorce coaches. A financial specialist may be unnecessary when the financial issues are straightforward, but when they are particularly complicated, the financial specialist may be critical to the success of the collaborative process.

The lawyers

The role of the lawyers in the collaborative process is to advance the needs and protect the interests of their respective clients. The lawyers advise their clients on their legal rights and obligations, and provide them with information about the law, and the probable long- and short-term results of any particular decision.

However, in the collaborative approach to dispute resolution, the lawyers are also part of a team that is collectively dedicated to finding a comprehensive settlement. As a result, the parties' lawyers can be expected to behave in a much more transparent manner and work in a manner that is geared towards both parties' success.

The divorce coaches

The divorce coaches are psychologists and counsellors. They help guide their clients through the emotional turbulence of the breakdown of their relationship, and assist each party to maintain a relatively objective view of the situation. They may also help their clients develop their views on the issues and help them develop more effective communication strategies.

The divorce coaches will talk to each other and to the lawyers during the collaborative process, and share their respective clients' experiences and concerns. The divorce coaches may also work together, sometimes in joint sessions with the parties, to develop strategies and solutions for the benefit of everyone.

The financial advisor

This financial advisor is a neutral party in the process, someone without any loyalty to either party, who is able to look at things objectively and impartially. His or her job is to present options to help the parties deal with the financial aspects of their relationship and their short- and long-term needs.

The child specialist

This child specialist is another neutral party. His or her job is to represent the interests of the children, without any duty of loyalty to either parent. While all of the team members are of course concerned about the best interests of the children, the purposes of the child specialist are to ensure that the children remain a primary concern, to help the parties develop a proper parenting plan, and to identify and address issues regarding the children's future care.

Resources and links

Legislation

- *Family Law Act*

Links

- BC Collaborative Roster Society [7]
- Collaborative Divorce Vancouver [1]
- Collaborative Association in Metro Vancouver [2]
- Victoria's Collaborative Family Law Group [3]
- Okanagan Collaborative Family Law Group [4]
- Collaborative Law Group of Nelson [5]

✓ **The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.**

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[6] http://www.google.com/search?q=collaborative+law+bc
[7] http://www.bccollaborativerostersociety.com

Family Law Mediation

Mediation is a process in which the two sides of a dispute work with a neutral third party, a mediator, to reach an agreement that deals with all or some of the issues in dispute. Mediation is not couples counselling; it is a legal process intended to help resolve a dispute without going to court. Mediators are usually trained professionals, and lawyers who are family law mediators are specially accredited by the Law Society of British Columbia [1].

This section provides a brief overview of mediation, a description of the mediation process, some tips for making the most of mediation, and an introduction to the mediation services offered through the provincial government.

Introduction

At its heart, mediation is a cooperative, managed process of negotiation. Both parties must be willing to work together and each must be prepared to give a little and take a little. Because the mediation process is based on a cooperative effort to achieve a common goal, a settlement, there is usually a lot less of the bitterness and acrimony that can accompany litigation. Mediation is also much, much cheaper than litigation.

A couple can start mediation as an alternative to court or as a settlement process after a court proceeding has started. The result of a successful process of mediation is usually a separation agreement. If litigation has started, a settlement can be recorded as either a separation agreement or as an order that the parties agree the court will make, called a "consent order." If a couple are married, a consent order may make sense since they'll require an order for their divorce anyway.

Just the people involved can attend mediation with their mediator, or they can bring their lawyers with them as well. The mediator's job is to facilitate the parties' negotiations, to provide a neutral third party perspective, and to help ensure that any settlement is reasonably fair to all concerned, including the children of the relationship.

As a mediator myself, I often appreciate having the lawyers present; it makes my job easier if I can rely on the lawyers to explain the law or to point out why a particular position is ill-advised.

The mediator has no stake in how the mediation turns out, and should have no bias in favour of either party and no special connection with either party. The mediator's position as a neutral third party is probably the mediator's most important role. It allows the mediator to be absolutely frank with each of the parties, and to point out when a party's expectations on an issue are unrealistic. Someone involved in mediation is a lot more likely to accept that his or her position is unreasonable when a mediator says so, rather than the other party.

The mediation process

The first step is for each party to hire a lawyer. Even if you don't intend on hiring the lawyer for the whole mediation process or have the lawyer present at the mediation, it can be critical to meet with a lawyer before the process begins to get some proper legal advice about the law that applies to your situation, and a sense of the general range of likely outcomes and the options available to you.

If you plan on retaining the lawyer for the mediation process, the lawyer will have the names of three or four mediators with whom he or she prefers to work. Mediate BC [2], formerly the BC Mediation Roster Society, maintains a list of many, but not all, of the people who are trained as lawyers in this province. Their website can help you find a mediator and offers more information about the mediation process. Many family law lawyers, who may or may not be members of Mediate BC, are also accredited family law mediators; lawyers who work as mediators will usually say so in their advertising.

Getting organized

If mediation is being undertaken as an alternative to litigation rather than to achieve a settlement in the middle of the litigation process, the mediator may ask everyone to come to an initial meeting in order to assess the dynamic between the parties, explain the process of mediation, talk about the exchange of documents, and discuss costs. Some mediators prefer to arrange separate, individual interviews with the parties, while others will ask the parties to each fill out a questionnaire, and others will be happy with a couple of telephone calls.

Next, the parties and the mediator will agree to a schedule of meetings, the ground rules for these meetings, and the objects or goals of the process. Sometimes the decisions as to ground rules and goals are left to the parties themselves; it is their process, after all, not that of the mediator. If the parties are using lawyers, this step may be left out since ground rules aren't required or because the lawyers will be able to agree on the ground rules between themselves. Whether there are multiple meetings or not depends largely on the parties and the number of issues outstanding. Often a single half- or full-day meeting will produce a settlement.

Exchanging information

The parties will then begin to assemble the documents required to explain their separate financial situations. Normally this will consist of simply completing a Financial Statement. This is a court form that sets out each party's income and expenses, and assets and debts.

Supporting documents will have to be gathered as well, which will usually consist of things like:

1. income tax returns,
2. paystubs or other proof of income,
3. property assessments or appraisals, and,
4. corporate financial statements and tax returns.

It is critical that both parties are honest and forthcoming about their finances; nothing will damage the mediation process more than the discovery that someone is hiding information or acting in bad faith.

These documents will then be exchanged between the parties in preparation for the first mediation session. Based on the documents disclosed and the issues on the table, additional documentation may be required to be produced and exchanged. A party who is self-employed may have to produce corporate financial statements and corporate tax returns in addition the usual materials. The extent of any additional materials will depend entirely on the circumstances of each couple and their children.

As well, the parties may need further additional input and information from people such as child psychologists, accountants, and the like. If these people are needed to help settle matters, there may be an additional waiting period while these experts conduct their investigations and prepare their reports.

Exchanging briefs

Where the parties are represented by lawyers, the mediator may ask the lawyer to prepare *mediation briefs*. Mediation briefs are summaries of the parties' relationship and each party's position and, when a position is legally complex or technical, an explanation of the law or facts supporting that position. The lawyers will give copies of their briefs to each other and to the mediator ahead of the first mediation session.

Mediating the dispute

Once all the information, reports, and briefs have been gathered and exchanged, and everybody has had a chance to digest everything, the parties, the lawyers and the mediator will meet at one or more mediation sessions. The mediator will first welcome everyone to the table, and ask the parties to sign a mediation participation agreement before anything else happens. The mediation participation agreement sets out the terms of the mediation sessions, requires the parties not to use the discussions held during mediation in any litigation, and describes the terms on which the mediator will be paid.

After the mediation participation agreement has been signed, each mediator will have his or her own preferred way of doing things. Most will ask someone to provide a general overview of the relationship and describe what exactly is at issue. Each party will have the opportunity to state their position on things. If lawyers are being used, they will inevitably do most of the talking, but the parties themselves will have ample opportunity to speak their minds... and they really should, it's their dispute!

Once this initial exchange of positions is complete, the mediator may keep everyone in the same room or may split the parties into separate rooms. If the parties are kept together, the mediator will press on and work on the problem, issue by issue. The mediator will keep some control over how the discussion flows, tamp the emotions down when things get heated, and keep everyone focussed on their interests and the law rather than their emotions and the grievances of the past. If the parties are split into separate rooms, the mediator will alternate working with each party and will shuttle between each of the rooms. You may hear people call this style *shuttle mediation*.

Assuming the mediation process is successful, the mediator will often prepare a list describing how each issue has been resolved, called *minutes of settlement*. The minutes are usually rather informal and are meant to record the bare bones of the settlement in the expectation that a more complete document, like a separation agreement or a consent order, will be prepared in the future. The parties and sometimes their lawyers will be asked to sign the minutes to acknowledge the settlement that was reached.

Formalizing the settlement

The final stage involves the putting the terms of the agreement into more formal language in a legal document that both parties, or, depending on the type of document, their lawyers will sign. Typically, a settlement will be recorded as a separation agreement or, if there is an existing court proceeding or the parties need to get divorced, an order that the parties agree the court should make.

If a party changes his or her mind before the separation agreement or consent order is filed, the minutes of settlement can be enforced in court as evidence of the deal reached between the parties. In fact, in certain circumstances the mediator's notes alone may stand as proof of the parties' agreement. As long as it is plain what has been agreed to and that the intentions of the parties were finally settled, the minutes or the mediator's notes can be used as evidence of a binding agreement.

Note that if you are relying on a mediated settlement in court, it is important that the settlement be conclusive and leaving nothing else for further negotiation or confirmation. In the 2005 British Columbia Supreme Court case of *Alcock v. Alcock* [3], 2005 BCSC 603 (CanLII shows this case under *S.A.A. v. P.W.J.A.*), the court held that the parties couldn't rely on an agreement that was "subject to confirmation" as a final, binding agreement. In that case, the agreement was subject to the wife producing financial information which, when produced, did not confirm the

information provided at mediation.

Tips for successful mediation

In mediation, as in all other forms of negotiation, the goal is to produce a fair agreement in an efficient and co-operative way. There are lots of things you can do that will hinder this process, and other things you can do that will help. The following are a few tips on how to make mediation work for you.

1. Remember that the more you argue about a particular position of yours, the more you wind up being stuck with that position. Many people find that after they've argued a particular point to death, they're stuck with it because they can't back down without losing face. Try to focus on interests rather than on positions, and to always ask yourself "Why not?" when you hear what the other side has to say.
2. One of the most important skills you can bring to your mediation session is the ability to actively listen to what the other side is saying. Active listening involves paying close attention to what the other side is saying, and restating his or her position to ensure that you know what the other side means and to ensure that the other side recognizes that you're hearing what he or she is saying. Phrases like "What I hear you saying is..." and "If I understand you correctly, what you're saying is..." can be extremely helpful. At the same time, you must also take some care in how you choose to express yourself. Instead of saying "You did..." or "You're a...," try something like "When you did that I felt..." or "I feel that..." This may all seem a bit flaky, but believe it or not it works.
3. You must be able to talk directly about a problem in an assertive, direct manner. Talk about the issues; don't skirt around them, no matter how uncomfortable or awkward you might feel. Take care in how you express yourself, but when you're in a private session with the mediator, don't mince words.

Things to do

The following points boil down to just a few central ideas: respect yourself and the other side; be flexible and avoid taking absolute positions; and, be honest and open. When you go into the mediation session, try to have a few options prepared, a few other alternatives that you might be happy with, rather than a single fixed, rigid goal.

- Be honest. Trust is essential to the mediation process.
- Be empathetic. Use phrases that indicate you understand and respect how the other party is feeling and thinking, like "I understand how you're feeling..." or "I appreciate the effort you've put into this..."
- Ask for a break when you're feeling too wound up or upset to continue, rather than abandoning the session.
- Dress comfortably and be prompt.
- If you disagree with something, say so. You must respect, and articulate, your own thoughts, opinions and feelings.
- Bring the documents you were asked to bring. If you don't, matters will only be delayed and the other side may be irritated by the inconvenience.
- Watch your body language! Making disgusted grunts, rolling your eyes or slamming your fist on the table won't help anything.

Things not to do

Suspicion and dishonesty will damage the mediation process, sometimes beyond repair. If the mediator doesn't believe you and the other party doesn't believe you, it might be impossible to arrive at a negotiated settlement. Likewise, bitterness, jealousy and resentment can also be triggers that undermine each party's faith in the other and make resolution by a judge at a trial inevitable.

Try to avoid letting your emotions get tangled up with your analysis of the problem at hand.

- Don't hide information, financial or otherwise, on the assumption that the other party won't find out. They usually do, and if they do the process is likely at an end.
- Don't raise your voice or make comments that are hurtful.
- Don't interrupt. Wait until each person has stopped speaking before you interject, no matter how upset you might feel with what he or she is saying.
- Negotiations are stressful, but don't use drugs or alcohol to calm your nerves. Drugs and alcohol will impair your judgment and reduce your ability to be objective.
- Don't feel that you must give an instant answer when you can't. Take a few moments or a few minutes to compose your reply; no one will begrudge a considered response.
- Don't make personal attacks or threats.
- Don't play on the other person's sense of guilt or otherwise be emotionally manipulative.

Government mediation services

The provincial government offers mediation for family law disputes through the Family Mediation Practicum Project [4] and its successor the Regional Mentoring Program [5], both of which are operated by Mediate BC [6]. There are also family justice counsellors [7] with the Provincial Court, and they work in Family Justice Centres [8] across BC. Other agencies and organizations may provide mediation services, like UBC's CoRe Conflict Resolution Centre, however make sure that they can help with family law disputes before trying to get help.

Regional Mentoring Program

The Regional Mentoring Program [5] was introduced in April 2012.

In the Regional Mentoring Program, a highly qualified mentor mediator and a mediator in training as mentee co-mediate family disputes. The mediators provide legal information, and support in developing options to resolve disputes, including property division. The mediators can document an agreement. To reach Family Mediation Services of Mediate BC about this program call:

> Phone: 604-684-1300 ext. 23
>
> Toll-free: 1-855-660-8406

Family justice counsellors

Mediation is available from family justice counsellors through those Provincial Court registries that are designated as Family Justice Centres [8]. Family justice counsellors are fully trained mediators, certified by Family Mediation Canada [9], who work with separated parents to assist in resolving disputes over the care of children, child support, and spousal support. Family justice counsellors can't deal with property issues and they usually can't help with support when someone's income is not straightforward.

Clicklaw includes a current list of Family Justice Centres [8].

Resources and links

Legislation

- *Family Law Act*
- Family Law Act Regulation [10], Part 3
- Notice to Mediate Regulation [11]

Links

- Mediate BC Website for Family Mediation Services [2]
- Family Mediation Practicum Project [4]
- Regional Mentoring Program [5]
- Provincial Court family justice counsellors [7]
- Family Justice Centres [8]

✓ **The above was last reviewed for legal accuracy by JP Boyd, March 24, 2013.**

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