# Rethinking the "A" in ADR: Normalizing Family Dispute Resolution Alternatives

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> *We need to expand significantly the availability of integrated family programs and services to support the proactive management of family law-related problems and to facilitate early, consensual family dispute resolution and to support a broader and deeper integration of consensual values and problem-solving approaches into the justice system culture…*
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> *Ministries of Justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and — to the extent appropriate — the judiciary, should contribute to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of consensual dispute resolution (CDR) procedures in the family justice system…*
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> *Canadian family law statutes should encourage CDR processes as the norm in family law, and the language of substantive law should be revised to reflect that orientation.[2]*
>
> - Action Committee for Access to Justice in Civil and Family Matters, 2013

## Alternative No More – The New Normal

Alternative Dispute Resolution is gaining even more momentum in family law. The court's resources are stretched and more and more families cannot afford legal representation in litigation (it is estimated that 50%-80% of family law litigants are now self-represented). More often than not, access to justice in the court system is a long and difficult road. We all know there are also many other drawbacks to litigation. In addition to the financial stress, there are enormous emotional costs to families and children. More and more people are seeking alternatives to court to help them transition through separation and divorce, recognizing that even though the marriage is over, the family is not. Lawyers, clients and even judges acknowledge that there are better, less damaging process options out there for most families. Out-of-Court Family Dispute Resolution is quickly becoming the new normal. Perhaps it is finally time to drop the "A" from family ADR.

The purpose of this article is to provide a bird`s eye overview of the current culture of family dispute resolution, very briefly outline some of the family dispute resolution processes available for families, and touch on just a few of the most interesting and pressing issues being discussed and debated in the field. While there is certainly much more to say on each of these topics, and many different and equally valuable perspectives, I hope that this limited collection of observations and thoughts will spark further

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[2] Final Report of the Family Justice Working Group of the Action Committee for Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) pages 18-19, http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf (also known as the "Cromwell Report").

interest and dialogue amongst family dispute resolution professionals as we strive to provide more holistic, constructive and successful outcomes for families.

More and more family law lawyers are now helping their clients to access "A"DR processes. There are a variety of process options available, including mediation, collaborative practice and arbitration. These processes are getting more sophisticated over time as they adapt to meet the needs of individual families. There is now widespread use of parenting coordination, mediation-arbitration, summary arbitration and family and financial neutrals on the collaborative team. Creative professionals can combine and mix and match these options to tailor an inter-disciplinary process that will best meet the needs of each individual family.

All lawyers should be considering these process options with their clients in an open and transparent way. There will always be a place for the courts, and some cases certainly require court intervention. However, it is clear (at least to many of us) that litigation should be the exception, not the rule. Commencing an application should be a last resort, not a first step. We need to start thinking of court as the "alternative" process for family dispute resolution, not the other way around.

Many lawyers are already practising this way. It is time to fully embrace the "paradigm shift" recommended by the 2013 Cromwell Report on access to justice and make non-adversarial and consensual family despite resolution "the norm in family law" in Ontario.[3]

**Why Court is Bad for Most Families**

> *Everyone who works in family law, including judges, agrees on two things: family court is not good for families, and litigation is not good for children. The emotional carnage resulting from family litigation, and its impact on the unfortunate children of warring parents, cannot be overstated…*
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> *Family court should be the option of last resort rather than the first place to run to, which is the approach too many people take…most couples who bring their disputes to family court do not need to and do not enjoy, or ultimately benefit from, the experience. I would go further an suggest that in many cases, the parties' ability to communicate and co-operate with each other as co-parents became worse, not better, as a result of family court litigation.*[4]
>
> \- **The Honourable Justice Brownstone, *Tug of War***

This article is not intended to be a critique of the court process, nor is it intended to be critical of judges. Rather, the focus is on the important task of educating clients, professionals and communities about family dispute resolution options and resources, so that alternatives to litigation are no longer viewed as

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[3] *Ibid*, pages 3 and 9.

[4] The Honourable Justice Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*, ECW Press, Canada 2009, pp. 3 and 11-12.

"alternative", but rather are embraced as the regular, front-line methods of resolving most forms of family conflict.

Sometimes out of court resolution is not possible. There will always be cases that require court intervention, and for those small percentage of cases the family courts will always play a critically important role. However, it is the author's view that the adversarial litigation process is not only unsuitable, but highly damaging for the majority of separating families, even where there is conflict. There are much better options available for most. In the words of Justice Brownstone, court should be the option of last resort.

In fact, many judges agree wholeheartedly that the majority of families should not be in court, and that family law cases should be settled by the family members themselves. The case conferencing system is designed to encourage settlement at every stage of a case, and many judges work very hard in a mediator-type role at those conferences, to try to facilitate settlement. Judges now routinely refer clients to court-connected mediation to try to resolve or narrow the issues in dispute. The problem is that once a family has started down the road of an adversarial process, it is much harder to establish even the minimal level of good will and trust needed to move forward in a constructive manner.

Many judges acknowledge this fundamental problem with the old, adversarial paradigm. Here are just a few examples of comments from an insightful, perhaps somewhat frustrated judiciary, faced with the difficult task of solving these problems in family court and noting the many costs to families inherent in the process:

> *Family law litigation has broader societal implications than a typical commercial dispute; unquestionably where the best interests of children are involved. In matters involving a child's best interest, the courtroom, most often, should be the place of last resort. There are an increasing number of mechanisms and forums for parents to resolve their disputes outside traditional litigation. If these are utilized early, before positions become entrenched, an opportunity exists to move off the adversarial track and move toward rehabilitation of the former spouses' post-divorce relationship. That is good for children and modern families generally.*[5]
>
> \- **The Honourable Justice Pentelechuk, Alberta Queen's Bench**

> *Alternative dispute resolution is appropriate in many family law cases. Parties are encouraged to explore alternatives to litigation to resolve their differences. The process of litigation can sometimes create animosity between parties, even when there was none before. If that happens, the victims are their children.*[6]
>
> \- **The Honourable Justice Nolan, Ontario Superior Court of Justice**

> *Litigation is expensive. Unlike some types of litigation, in family law, there is no impersonal corporation injecting funds into the settlement or judgment. The family is spending its own money, thereby reducing what is left to live on. Every*

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[5] Justice Pentelechuk, *A.J.U. v. G.S.U.* 2015 CarswellAlta 97 (Alb. Q.B.)

[6] Justice Nolan, *Wainwright v. Wainwright*, [2012] ONSC 2686

*day that family law litigation continues, the legal costs mount and the money for the family diminishes. This is but one of the many reasons for the emphasis on resolution.*[7]

- **The Honourable Justice Benotto, Ontario Court of Appeal**

*Straightforward issues of spousal support, equalization of net family properties and related matters were made out to be complex. In result, the accumulated savings from a 27 year marriage will have been spent financing this litigation. It did not have to end this way.*[8]

- **The Honourable Justice Gordon, Ontario Superior Court of Justice**

*Although we have "no fault" divorce, deep emotional issues are never far from the surface in family law cases. Parties often seek the catharsis of formal conflict over their personal issues, and family law litigation is but one of the canvasses upon which they limn their suffering.*

*The family law lawyer must manage difficult conflict resolution processes in this context. The hurts done to the heart and soul may not be addressed at all in an accounting of family furniture and pensions... Further, there is a discernible pattern to the negotiation dance in a family law context. Those familiar with "game theory" will recognize it, for it follows, remarkably, the "cold war" dynamic that gave rise to that theory. Financially, family law presents an almost perfect "zero-sum" game: the parties have finite resources and income potential, and the longer their conflict subsists, the more of those resources are exhausted in the process of conflict. The parties have a history of some level of loyalty between them that has been breached by the separation. Often, control or domination issues have bubbled under the surface for years, and now both parties have a fresh context in which to assert that relationship, or to repudiate it. The result: the parties play an almost perfect "tit-for-tat" game of "defections" from a harmonious separation process: when one of them takes an overly aggressive position, or raises deeply personal and hurtful issues, the other responds in kind, and the case spirals towards greater conflict.*

*The family law lawyer faces the daunting challenge of supporting her client through the morass of issues, some legal and some otherwise. Cases still follow the classic model of "adversarial" litigation, although the destructive qualities of this system for personal relationships is well understood. Many cases are resolved through negotiation or mediation outside or parallel to the litigation process, and the justice system itself has fashioned a collaborative, arbitration-like process of case conferencing that has as its goal filtering issues and reducing conflict prior to resolution of outstanding issues through the classic adversarial motion or trial.*

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[7] Justice Benotto, *Fielding v. Fielding*, 2015 ONCA 901
[8] Justice Gordon, *Toth v. Toth* 2015 ONSC 1174

*It is clearly in the interests of all parties, and society generally, that family law cases be resolved early, and without litigation, if possible.*[9]

- **The Honourable Justice Corbett, Ontario Superior Court of Justice**

Consider for a moment (you have undoubtedly puzzled over this already), the very nature of the adversarial process and how ill-suited it is to resolving most family disputes. Justice Brownstone's reflections on this dilemma are instructive:

> *Why is litigation such a damaging and destructive way to resolve family disputes? The answer is simple: the court system is based on an adversarial process in which "winning" is the object of the exercise. Parents who should be on the same team for the children's sake become hostile adversaries in a courtroom. They focus all of their attention and efforts on emphasizing each other's shortcomings and failings…If the parties to a lawsuit have to keep dealing with each other for many more years, as is the case with parents, the effects of litigation on their ability to do so amicably can be tragic and long-lasting.*[10]

The adversarial system shapes the nature of the conflict and the dynamics between the parties from the very start. The applicant, in his or her pleadings, is forced to take a number of positions in setting out the relief being sought. Strategically, a party may feel they must take more positions, and more aggressive positions, than what is actually desired, knowing that one hardly ever gets everything that is asked for, and that it is harder to ask for further relief later in the case. Then, they must set out all of the facts in support of the claims being made, to show all of the reasons why they should get what they are asking for and all of the reasons why their spouse should not. The respondent is forced to respond accordingly, and does the same.

As we all quickly discover through working with separating families, most of the "facts" in the family law world are subjective and contextual, since people interpret facts based on their perceptions, feelings and values. However, once each party's narrative is strategically parsed and committed to writing against the other, those stories take on a life of their own, and it becomes even harder to shift those people to help them learn to see the perspective of the other. The parties, now firmly entrenched as adversaries in battle, continue to make allegations against each other, find evidence to discredit the other, and pull those around them into the dispute. Communication becomes toxic or breaks down completely. Often spouses have no direct or meaningful contact for months or even years while they are engaged in the lawsuit. Letters from lawyers add fuel to the fire as each side papers the record to build up their arsenal. At each step of the case, the parties must "put their best foot forward", so to speak, and the irony of this seems lost on them as if they are wearing blinders. People lose sight of their interests and those of their children, and focus only on trying to win the contest. But at the end of the day, in most cases, everyone loses:

> *I have never seen a "winner" in family court. Everyone loses, especially the children…Even decades after their court cases end, many people find*

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[9] Justice Corbett, *Mantella v. Mantella*, 2006 CanLII 10526 (ONSC)

[10] Justice Brownstone, *ibid* p. 12.

*themselves still unable to let go of the hurt they feel because of what their ex-partners said and did during the litigation.*[11]

## A Deeper Understanding of Resolution

In his book, *The Dynamics of Conflict Resolution, a Practitioner's Guide*, Bernard Mayer identifies three dimensions of conflict resolution:

1. **Cognitive Resolution:** is achieved when disputants view the conflict as being resolved and believe they have reached closure on the situation. This occurs when they perceive that their key issues have been addressed and see the conflict as part of their past as opposed to their future. Family members no longer define themselves as being in conflict and move into a model of cooperation or minimal involvement with each other.[12]

2. **Emotional Resolution:** is achieved when disputants are no longer fully engaged in the conflict. This occurs when they experience the feelings associated with the conflict less often and less intensely. To some extent, emotional closure is a natural result of time and distance, but it also occurs as disputants feel heard, feel accepted as individuals with legitimate values, maintain dignity, and feel that their core needs are being respected and addressed.[13]

3. **Behavioural Resolution:** is achieved when conflict behaviour is discontinued and actions are instituted to promote resolution. There are two components to this dimension of resolution. One is to stop fighting. The second is to take steps to meet each other's needs and to implement a new model of interaction for the future.[14]

Litigation will rarely result in all three types of resolution for families. Cognitive and emotional resolution are unlikely to occur within the adversarial model. A court order may achieve a partial behavioural resolution, if it is followed. But if parents are still fighting in the old model of interaction (as spouses), behavioural resolution has not truly been achieved either. Deeper resolution and a new model of interaction are needed if the parties have to continue to have an ongoing relationship in the future, which is what happens when there are children involved.

It is unrealistic to expect to achieve full resolution for clients on all dimensions in all cases. Having said that, we should not lose sight of these goals and we should try to help clients work towards fuller resolution whenever possible. For many, a satisfactory process is as important to resolution as a satisfactory agreement. These procedural needs are all too often overlooked or dismissed in traditional, adversarial process where the sole focus is on substantive terms of settlement.

Working with families in the trenches, it is easy to lose sight of the importance of process. The fact is that the vast majority of family law cases ultimately settle regardless of the dispute resolution process used. In family court, 95-98% of cases settle before trial. Despite achieving "settlement", many of those

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[11] Justice Brownstone, *ibid* p. 12.
[12] Mayer, Bernard, *The Dynamic of Conflict Resolution: A Practitioner's Guide*, John Wiley & Sons, US, 2000, pp. 98-99.
[13] Mayer, *ibid*, p. 101.
[14] Mayer, *ibid*, p. 106.

litigants did not feel satisfied and were unhappy with the process. They are emotionally and financially drained, they have lost control over both the process and the outcome of their case. They are left to deal with scorched earth and damaged relationships as they struggle to move forward. It is hard not to question whether most of these individuals and families would have been better off in a different process. If we focus only on the substance of an agreement, without acknowledging that process and relationships matter to our clients, there will be missed opportunities for more meaningful resolution.

## A Brief Overview of FDR Process Options

The most commonly used family dispute resolution processes are:

- Mediation
- Collaborative Practice
- Traditional Lawyer Negotiation
- Arbitration
- Mediation/Arbitration
- Parenting Coordination

### *Voluntary vs. Mandatory/Consensual vs. Adjudicative*

All of the above are voluntary processes, in which both parties must agree to participate. Aside from traditional lawyer negotiation, which is distinct in that it has no defined "container" around it, each process has a written agreement setting out the rules and principles of the process, which is signed by the parties and the professionals involved.

Parties may choose to leave negotiation, mediation or collaborative process at any time. The professionals may also end the process if it is no longer suitable.

The processes which have an adjudicative or arbitral component (including the hybrid mediation/arbitration process) cannot be terminated unilaterally by one party once the initial agreement has been signed. So, while signing on to arbitration is a voluntary choice, once that choice is made the parties are locked in under the terms of the arbitration agreement and they cannot leave the process.[15]

Mediation, collaborative process and traditional negotiation are consensual, "bottom-up" processes, where the parties work together with the assistance of professionals to reach mutually agreeable solutions. Ideally, these processes are non-adversarial, interest-based and focussed on client self-determination. The outlier may be traditional negotiation with lawyers, where there are no agreed upon rules and principles and many divergent lawyering styles. Because there is no "container" around the process, the parties and their lawyers are often preparing for peace and preparing for war at the same time, with little or no direct communication occurring between the parties. This significantly colours the process, even where the lawyers are trying to be cooperative. As a result, a more positional,

[15] A party may try to have the decision-maker removed, if it can be demonstrated to a court that the appointed decision-maker is biased or in breach of the rules of natural justice, and ask that a new decision-maker be appointed, but the arbitration process itself does not end unless there are very exceptional circumstances.

adversarial negotiation strategy is often used, coupled with the threat of litigation to put pressure on the other side and elicit concessions to demands being made.

In contrast, arbitration is an adjudicative, "top-down" process, often used as an adjunct to consensual dispute resolution processes when they break down. It mirrors the adversarial system of traditional litigation, in a private setting.

## Summary of the Process Menu

### *Mediation*

- A voluntary, consensual process where a neutral third party helps clients work together cooperatively to resolve their disputes.
- The mediator helps the clients define the problems to be solved, corrects misunderstandings between them, explores options, and discusses proposals to reach an agreement.
- Aims to achieve healthy transitions for families, protect children and maintain important relationships.
- At its best, the process promotes honest dialogue that is interest-based rather than positional or adversarial. The mediator help clients hear each other and see the perspective of the other so they can arrive at mutually acceptable solutions that meet as many of their interests as possible. This dialogue helps improve communication, both during the mediation and, in many cases, afterwards as well.
- The mediator may help clients assess and discuss their options, but does not have any decision-making power. All decision-making rests with the clients.
- Generally mediation is confidential. The confidentiality rules are set out in an agreement to mediate, which is signed by both parties and the mediator:
    - in "closed" mediation, all discussions remain confidential. This encourages open negotiation, creative proposals and cooperative problem-solving, without fear of being prejudiced by those discussions should the mediation break down;
    - in "open" mediation, a report can be requested of the mediator setting out why agreement was not reached. This tends to discourage openness and creative problem-solving and maintains a more adversarial dynamic, but also discourages bad faith or unreasonable conduct as it will be reported to the decision-maker later.
- May be facilitative, evaluative or transformative; in reality, often a combination thereof. Every mediator has his or her own style of practice, and many mediators tailor their mediation style to the individual needs of the family at any given point in time.
- The mediator may be a lawyer, mental health professional, or financial professional, depending on the needs and circumstances of the parties. Co-mediation may involve more than one type of professional, either at the same time or separately.
- Mediators provide legal information and, in some cases, also provide views and opinions (in the evaluative mediation model), but they do not provide legal advice to either party. Clients may attend mediation with or without lawyers, but are advised that they require legal advice before finalizing an agreement. The majority of clients attend mediation without lawyers.

- The mediation may take place with everyone together in the same room, or in separate rooms (called "caucusing" or "shuttle mediation"). In some cases, lawyers may also meet with the mediator without the clients present.
- More cost-effective than litigation. When clients attend mediation without lawyers, it can also be more cost-effective than other processes, provided that once a settlement is reached the lawyers can step in and work well together to efficiently advise their clients and finalize a written agreement.

There are many different types of mediators, and many different views about the role of the mediator, what works in mediation and what does not work.

For example, some professionals believe that mediation is first and foremost an opportunity to facilitate communication between parties as they attempt to find their own way through the conflict.[16] This may involve helping the parties break old patterns and dynamics, and start to build trust as they work towards restructuring the family in a constructive manner. These goals are more consistent with facilitative or transformative mediation. Discussions are more likely to take place in the same room, with the parties themselves doing most of the talking and having direct input into the agenda, the issues raised, and the solutions generated. Resolution will often take place in multiple dimensions, or at least the foundation will be laid for deeper resolution over time. There are opportunities for communication to improve and for clients to learn strategies for handling conflict better in the future. Even if mediation is ultimately unsuccessful on some or all issues, the parties may experience satisfaction with the process because they have had an opportunity to be heard and to express their concerns and values.

On the other hand, some lawyers and mediators believe that clients are best served by being brought to an agreement expeditiously, without trying to improve their communication or change the family dynamics in any way. Any attempt to have parties hear each other and build communication skills is seen as counselling or social work, and not the mediator's role. Not only is it misguided and doomed to fail, it may undermine the goal of mediation and make reaching agreement more difficult. These professionals may prefer an evaluative mediation process, often coupled with the "hammer" of arbitration (the hybrid mediation-arbitration process is discussed below). This type of mediation takes place largely in separate rooms, usually with counsel present, where it is expected that strong tactics will be skillfully employed to achieve compromises:

> Mediative techniques include persuading, arguing, cajoling, and, to some extent, predicting. Mediation is a process to secure agreement, if possible. All of those techniques, as well as others, will come into play in trying to secure agreement.[17]

In this type of mediation process, the lawyers do most of the negotiating and often meet separately with the mediator – some of the best option generation may occur without any clients in the room. There is no attempt at transformation. Cognitive and emotional resolution are rarely valued and rarely pursued.

The fact is that there is no one-size-fits-all mediation process that suits all families. Some spouses want (or need) to be guided into an agreement recommended by the mediator, whose intervention they trust

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[16] Bernard Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention (2nd Ed.)*, John Wiley & Sons, US, 2012, p. 271.

[17] *McClintock v. Karam*, 2015 ONSC 1024 (OSCJ) para. 69

because of the mediator's expertise in their area of practice. In some cases trying to improve communication or achieve deeper resolution in mediation will only further inflame the conflict or pander to bullying. Full resolution may not be possible at all, or may come later with the passage of time. For others, mediation is a real opportunity to take control of the family's future, to hear and express each party's interests and to work cooperatively to brainstorm ways to achieve those interests. It is also a safe arena to work on resetting old spousal relationship dynamics and restructuring a more functional, co-parenting relationship.

***Collaborative Process***

- A voluntary, consensual process where each party retains a collaboratively trained lawyer to provide support and legal advice both individually and during settlement meetings.
- The collaborative lawyers work together as a team to guide their clients through the conflict, often with the assistance of neutral family and/or financial professionals who may work separately with the clients.
- The team takes an interest-based approach to negotiations, exploring each client's goals and generating options that meet as many of their individual and mutual interests as possible.
- At the beginning of the process, the clients and team members sign a participation agreement, which sets out the rules of the process. In the participation agreement, the clients agree to:
  - Deal with one another in good faith;
  - Promote their children's best interests as well as a loving and involved relationship between the children and each parent;
  - Communicate in a respectful and constructive manner;
  - Express each of their interests, needs, goals and proposals and seek to understand those of the other;
  - Exchange all information that may affect the choices being discussed, including financial information and documentation;
  - Use their best efforts to negotiate a mutually acceptable settlement;
  - Refrain from using threats to force a settlement, including the threat of going to court.
  - If the process breaks down, neither party may be represented by his or her collaborative lawyer in court (commonly known as the "disqualification clause") and all discussions from the collaborative process remain confidential and without prejudice. Certain documents (sworn Financial Statements, tax returns, bank and business records) survive the process, but notes, proposals, calculations and drafts cannot be used in court.
- The focus is on cooperation, problem solving, and achieving solutions that work for all parties and meet their highest priorities.
- Similar to mediation, CP aims to achieve healthy transitions for families, protect children, maintain important relationships and foster client autonomy.
- During meetings, each lawyer provides support and advocacy for his or her client and helps the client negotiate effectively. The lawyers provide support to each other as well.
- The lawyers discuss how to present the law to the clients. This is done in an honest and balanced way, including a transparent discussion of legal ranges and differing interpretations of the law. While the law is an important factor in negotiations, it is used as a tool rather than as a weapon, and creative and individualized solutions are encouraged.

- The professional team jointly prepares an agenda before each settlement meeting and progress notes afterwards. Draft agreements are jointly prepared by the lawyers before being circulated to the clients for review and comments.
- The team professionals meet briefly before and after each meeting to check in and de-brief, to make the meetings as productive as possible.
- The professional team brings a sense of hope and optimism into each meeting, which energizes the clients and helps them successfully work through difficult issues.

A key aspect of collaborative process is that the lawyers are committed to working together to solve problems, rather than fighting against each other and escalating conflict.

Collaborative professionals recognize that in order to reach a durable agreement, the terms must in some way meet the needs of both spouses and the family. In order to achieve this, the concerns and values of both are heard and considered in order to discover creative options that increase mutual gains[18]. The clients participate actively in settlement meetings and maintain control of the outcome. Each lawyer provides their client with support and advice, ensures their client is heard, and ensures their client's needs are met in the process.

One of the most common criticisms of CP is around the disqualification clause. This critique takes at least two forms: first, concern about the time, expense and emotional cost of having to change lawyers and bring a new lawyer up to speed on the file, particularly when the other party has caused the breakdown of the process; second, concern that the disqualification clause may cause clients to feel stuck in the collaborative process, or feel pressured to agree to a settlement that is not in their best interests.

Proper ongoing screening by the collaborative professionals throughout the file can go a long way towards avoiding these potential pitfalls. While professionals should not be too quick to terminate the process when the dialogue becomes difficult, nor should they permit the process to continue if it becomes ineffective or if one party is taking advantage unfairly. Litigation is always an option for the clients, they simply confirm that they wish it to be an option of last resort. Moreover, even if the process breaks down, in most cases the clients will have gained something from the process, whether by defining and/or narrowing the issues in dispute, exchanging financial disclosure that does not need to be duplicated, or achieving readiness and increased power to move forward.

The disqualification clause is an essential part of the collaborative process for a number of reasons[19]:

- The lawyers will focus all of their energies on securing a settlement (rather than, for example, focussing on papering the record with letters and martialling evidence for a potential court battle).
- The lawyers who do this work will become settlement specialists to the benefit of their clients (a "new breed of lawyer");

[18] Victoria Smith and Deborah Graham, "The Spectrum of Advocacy in Collaborative Process" (2011) http://victoriasmith.ca/wp-content/uploads/2014/03/The-Spectrum-of-Advocacy-in-CP-Final-VS+DG.pdf.

[19] Victoria L. Smith and C. Ann Nelson, "Collaborative Practice: Why Court is Not an Option" (2008), from Ontario Bar Association 2008 Institute of Continuing Legal Education.

- Removing litigation from the lawyers' arsenal reduces the risk that the lawyers will revert to more traditional adversarial negotiation techniques;
- The clients will think twice about withdrawing from the process and going to court (although research suggests that clients who choose collaborative process already share a mutual commitment not to go to court in the first place, and may not need the disqualification clause to keep them at the table);
- It fosters a spirit of openness, cooperation and commitment to finding solutions.

Collaborative process is not just for spouses who have a high level of respect for one another and agree on most issues. As collaborative practice develops and becomes more nuanced and sophisticated, experienced collaborative practitioners are able to successfully resolve more difficult cases, including cases where there is high conflict, little trust or goodwill, poor communication and power imbalance. These challenging cases may require stronger advocacy by the lawyers to make sure each client's interests are brought to the table. There may be more emphasis on the law in order to level the playing field, and the lawyers may do more of the negotiating and speaking on behalf of their clients. This must be accomplished without reverting to positional or adversarial tactics – and requires a great deal of skill and trust amongst the professionals. [20]

***Arbitration***

- Parties retain an impartial decision-maker to adjudicate the issues in dispute. The arbitrator is often selected for his or her expertise – for legal issues, this is generally a senior family law lawyer, while a mental health professional may be selected to arbitrate certain types of parenting issues (in particular issues arising out of the implementation of an existing parenting plan – see discussion of Parenting Coordination below). Arbitrator fees vary depending on the profession and level of experience.
- At the beginning of the process, the parties sign an arbitration agreement confirming the rules of the process, the issues to be arbitrated and the parties' rights of appeal (parties can contract out of rights of appeal, but at minimum they can always appeal on a question of law with leave). Each party must obtain independent legal advice before signing the arbitration agreement and certificates of independent legal advice must be attached.[21]
- Entering the process is voluntary, however once an arbitration agreement is signed the parties are prohibited from going to court other than to enforce or appeal an arbitral award.
- The arbitrator has the powers of a judge to make temporary or final determinations ("arbitration awards") that are legally binding, based on the specific jurisdiction conferred to the arbitrator in the arbitration agreement signed by the parties. Arbitration awards can be converted into court orders for enforcement.
- Unlike court, it is a private and confidential process. It is also generally quicker, less expensive and less formal than a trial. There is more flexibility to agree on procedures that meet the parties' needs.
- Family arbitrations are governed by the *Arbitrations Act*, 1991. They must be held in accordance with the laws of Ontario, and the parties must be treated equally and fairly.[22]

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[20] *Ibid*, p. 2.
[21] *Arbitration Act*, 1991, S.O. 1991, c. 17, Section 59.6.
[22] *Arbitration Act*, 1991, S.O. 1991, c. 17, Sections 19, 31, 32.

- Family arbitrators have an obligation to ensure that each party has been screened for domestic violence and power imbalances to determine the suitability of the process and implement any appropriate safeguards. Arbitrators must receive regular training on these topics.[23]
- The arbitrator can make an award for one party to bear costs of the arbitration (including his or her own fees).

Arbitration may provide a cost-effective alternative to court when a hearing is required to resolve disputes.[24] Clients choose the arbitration process so that they can select their decision-maker, usually an experienced practitioner whom they trust to "get it right" based on his or her known expertise. Arbitration also avoids the delays of the court process and allows significant flexibility for the arbitrator and parties to decide procedures.

The private aspect of arbitration is both a draw for clients and a cause for concern amongst some practitioners. While clients appreciate that their personal and business information remains out of the public domain (this feature often attracts a high net worth clientele), the corollary is that arbitral decisions do not become part of the body of legal precedent. Many of the cases that opt for arbitration, by their nature, tend to involve complex legal issues. Over time, this may undermine and impoverish the development of the common law to the detriment of public justice.

**The Hybrids: Mediation/Arbitration and Parenting Coordination**

***Med/Arb***

- A two-stage process that combines the consensual component of mediation with the adjudicative component of arbitration.
- Mediation occurs first, with the majority of files settling in the mediation phase (in part, under threat of the arbitration to come if no agreement is reached).
- If mediation is unsuccessful on some or all of the issues, the parties proceed to the arbitration phase and agree upon the procedures for the arbitration.
- The mediation and arbitration phases are completely separate. All discussions from mediation remain confidential and cannot be relied upon at arbitration.
- A unique feature of med/arb in the family law context is that the parties often choose to retain the same professional to act as both mediator and arbitrator. This requires a specific waiver of section 35 of the *Arbitration Act*, 1991 in the mediation/arbitration agreement. The arbitrator is expected to disregard all of the information and discussions from the mediation phase of the process and hear the evidence at arbitration with a completely open mind.

***Parenting Coordination***

- A subset of mediation/arbitration, dealing with the implementation of the terms of a parenting plan or parenting provisions of a separation agreement or court order.
- Qualifies as a "secondary arbitration" under the *Family Law Act*.[25]

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[23] *Arbitration Act*, 1991, S.O. 1991, c. 17, Section 58.
[24] However, this assumes that the parties would be represented by lawyers at trial. For unrepresented parties, there may be no costs to participate in a trial, so arbitrator may not in fact be cheaper.
[25] *Family Law Act*, R.S.O. 1990, c. F.3, Section 59.7.

- Parties sign a parenting coordination agreement that sets out the PC's jurisdiction, length of term of engagement and rules of both the mediation and arbitration phases of the process.
- The PC is generally given jurisdiction to deal only with minor parenting issues. The PC usually does not have jurisdiction to deal with changes to custody, permanent changes to the regular parenting schedule, and mobility.
- When a dispute arises in connection with the parenting plan, the PC attempts to mediate the issue with the parties. If mediation is unsuccessful, the issue is arbitrated.
- The PC often takes on the role of both mediator and arbitrator and, where that is the case, the arbitration phase is often conducted on a summary basis.

The dual role of the mediator/arbitrator (when the same professional is retained for both functions) is perhaps both the biggest strength and the biggest weakness of the med/arb process. Many professionals feel that the looming threat of arbitration influences parties to successfully reach settlement. Further, knowing the mediator will ultimately have decision-making authority may keep everyone on their best behaviour and it can be a powerful incentive to act reasonably in the process (for both clients and their lawyers). Indeed, the majority of these cases do result in an agreement at the mediation phase and most cases never need to proceed to arbitration.

Some professionals are concerned that the mediator may be unduly constrained in expressing his or her views to the parties as a result of the need to maintain a perception of neutrality in the event they must arbitrate, which may detract from the mediator's usefulness (in particular if an evaluative approach is sought by the parties). At the same time, there is also concern that the mediator may not be able to effectively conduct a hearing as a neutral evaluator and provide the parties with due process, after having been privy to settlement discussions during which they may have already formed opinion about the case.[26]

**Empowering Clients with Dispute Resolution Process Information**

The decision of which family dispute resolution process to use is likely the most important decision a separating family will make. Process choices impact on all other outcomes and can have life-long effects that continue even into the next generation. Therefore, the way people become educated about process options, and the manner in which they make process choices, is of critical importance. This is sometimes now referred to as family law triage.

When a lawyer is the first point of contact, there is an opportunity help the client coming in your door to find the best dispute resolution process for that particular family's circumstances. Sometimes that means turning a client away and sending him or her to another professional – for example to a counsellor, mediator, or parenting coordinator. While this may seem like a questionable business decision (especially for a new lawyer trying to build their practice), taking a genuinely client-centered approach enhances your professional reputation and will result in higher levels of client satisfaction.

Ideally, lawyers at the first point of contact will use the initial client consultation as an opportunity to educate the potential client about all of the family dispute resolution process options available, describe the pros and cons of each, and discuss with the client the most suitable process for his or her family in

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[26] Judith M. Nicoll, in "Issues in Mediation and Arbitration in Family Law", presented at the Family Law Summit, 2007, Law Society of Upper Canada, p. 5.

light of that client's particular needs, goals and circumstances. Armed with that information and advice, clients would be well-positioned to make wise decisions about the process in which they wish to engage. In reality, a lawyer's values and beliefs about conflict, resolution and relationships shape their message to clients as they assess clients' goals and advise them about dispute resolution process options. The culture of the professional community where the lawyer resides is also an important factor – for example, in some areas of Ontario virtually no lawyers are recommending mediation or collaborative process, simply because they are not familiar with these processes and they are not part of the normative professional culture.

The *Divorce Act* requires lawyers to discuss with clients the possibility of reconciliation, the advisability of negotiating matters that may be the subject of a family court proceeding, and to inform them of known counselling and mediation facilities that may assist.[27] The Rules of Professional Conduct also require lawyers to advise and encourage their clients to compromise or settle a dispute whenever it is possible to do so on a reasonable basis, including considering and informing clients about ADR options.[28] However, in Ontario there is no specific statutory direction to inform a client about the potential benefits of family dispute resolution processes such as collaborative process and parenting coordination.

In contrast, British Columbia's *Family Law Act* now incorporates a more expansive approach to family dispute resolution by:

- Bringing in specific definitions for family dispute resolution and family dispute resolution professionals in section 1, as follows[29]:

  **"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 outside court, and includes

  (a) assistance from a family justice counsellor under Division 2 [Family Justice Counsellors] of Part 2,
  (b) the services of a parenting coordinator under Division 3 [Parenting Coordinators] of Part 2,
  (c) mediation, arbitration, collaborative family law and other processes, and
  (d) prescribed processes.

  **"family dispute resolution professional"** means any of the following:

  (a) a family justice counsellor;
  (b) a parenting coordinator;
  (c) a lawyer advising a party in relation to a family law dispute;
  (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
  (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
  (f) a person within a class of prescribed persons.

- Part 2 of the Act deals with the "Resolution of Family Law Disputes", with Division 1 entitled "Resolution Out of Court Preferred" and including the following provisions[30]:

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[27] *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), Sections 9(1) and 9(2).
[28] Law Society of Upper Canada, Rules of Professional Conduct, Rule 3.2-4 (formerly Rule 2.02(2).
[29] *Family Law Act* [SBC 2011] Chapter 25, Section 1.
[30] *Family Law Act* [SBC 2011] Chapter 25, Sections 4 and 8. Division 2 of the Act deals with Family Justice Counsellors, and Division 3 deals with Parenting Coordinators.

**Purposes of Part**

4 The purposes of this Part are as follows:

(a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;

(b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;

(c) to encourage parents and guardians to

(i) resolve conflict other than through court intervention, and

(ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.

**Duties of family dispute resolution professionals**

8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect

(a) the safety of the party or a family member of that party, and

(b) the ability of the party to negotiate a fair agreement.

(2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must

(a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and

(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

(3) A family dispute resolution professional consulted by a party to a family law dispute must advise the party that agreements and orders respecting the following matters must be made in the best interests of the child only:

(a) guardianship;

(b) parenting arrangements;

(c) contact with a child.

When it comes to addressing FDR process options, Ontario has clearly fallen behind British Columbia in its efforts to normalize and encourage professionals to fully educate clients and explore all of these options with them.

Quite often other professionals are the first point of contact for separating spouses (therapists, medical professionals, financial advisors, etc.). They may not have a full enough understanding of family dispute resolution process options to be able to guide people to the right process. Others rely on guidance from friends, neighbours and relatives, who may have been involved in mediation, collaborative process, or court. In short, there is currently a gap in reliable, uniform education for the public that encompasses the full spectrum of family dispute resolution options and encourages out-of-court resolution in the early stages of family breakdown.

The reality is that there are many families in court that would have fared far better in an out-of-court process. These families ought to have been “screened out” of litigation for a variety of reasons including, amongst other factors, the emotional, psychological and financial impacts; the impact on relationships, employment and physical health; and, of course, the impact of the conflict on the

children.[31] Some of these parties are represented by lawyers. The majority, and a growing number, are not. Most likely did not understand or appreciate the realities of litigation when they made their process choices.

One of the biggest current challenges in the field is how to educate both professionals and the public on the various family dispute resolution options, along with appropriate screening techniques to help clients make the best process choices. In the FDR community, there are a number of discussions and initiatives happening on this topic and it is an exciting time to be practicing in these areas.

For the time being, it is still the case that many people are not getting access to fulsome process information and screening in the early stages of separation. While litigants are required to attend a Mandatory Information Program[32] after proceedings are commenced that has a segment explaining FDR processes, by that point they have already commenced an application, or been served with one. They have started down a course that will be harder to divert, and have formalized their roles as battling adversaries, the "applicant" and the "respondent". It can be difficult to reset those adversarial dynamics once the parties have committed positions and allegations to paper (publically, no less). Further, the MIP often focusses more on court steps than alternatives to court. The attendees, new to litigation and fearful of what to expect in court, may pay greater attention to gaining information about how to advance their court case.

There are also other mechanisms in the court system aimed to divert cases out of litigation. In some courts there is a first appearance date, another opportunity to learn about process options, and where both parties can choose to sign up for mediation services. Case conferences are often used by judges as an opportunity to refer clients to mediation. Although the parties cannot be ordered to participate in mediation, a judge can order parties to attend an intake meeting with a court-affiliated mediation service.[33] Where parties have consented to mediation, a judge has jurisdiction to appoint a mediator who has been selected by the parties.[34]

Non-adversarial dispute resolution is being welcomed by judges and litigants. Perhaps the most obvious example is the free mediation services available onsite in many courts. Families can also access heavily subsidized offsite mediation services, whether they are in a court process or not, which make mediation

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[31] Different practitioners may have different views about the process issues presented in this paper, but one thing that all practitioners in all fields agree on is that the best predictor of poor outcomes in children of divorce is being exposed to conflict between the parents.

[32] *Family Law Rules*, O. Reg. 114/99, Rule 8.1 of the requires every party to a contested family law case to attend a Mandatory Information Program no later than 45 days after the case is started. Rule 8.1(4) specifies that the content of the MIP *may* include information on the options available for resolving differences, including alternatives to going to court.

[33] *Family Law Rules*, O. Reg. 114/99, Rule 17(8)(b)(iii). Ontario does not currently have mandatory family mediation, although it has been used in other jurisdictions, including Alberta, UK, Australia and California. Unsuitable cases are screened out at the intake phase to address concerns around abuse and power imbalance in the mediation process. There is much to be said on the topic of mandatory mediation, and it is quite divisive in the profession. It is unclear if mandatory family mediation will ever be implemented in Ontario.

[34] *Family Law Act*, R.S.O. 1990, c. F.3, Section 3(1).

accessible for families where one or both spouses could not afford to retain a private mediator.[35] Many judges are now regularly referring litigants to these services.[36]

Most people are aware that Legal Aid advice counsel is available in the courthouse for people participating in onsite mediation who cannot afford a lawyer. There are now two relatively new legal aid certificates also available to help low income families obtain legal advice during mediation and/or to help them negotiate and prepare a separation agreement.

While these are welcome developments, the real challenge is how to educate families *before* they present themselves at the courthouse. Currently there is no formal gatekeeping in place before a court action is commenced. By then it may be too late, and a lot more damage needs to be undone to reach resolution.

**The Importance of Screening**

Screening is the process by which a family dispute resolution professional (be it a mediator, lawyer or arbitrator), obtains information from a client in order to ascertain potential risk factors, assess safety concerns and identify power imbalances, all with a view to ensuring that the dispute resolution process chosen will do no harm to the client and that the client will be able to participate in a meaningful way.

Screening helps ensure that clients choose a process that is safe, empowering and has a realistic chance of meeting the client's goals and interests. It provides information about whether safety-planning or other support resources are needed. It also indicates what a client might need to be able to negotiate for him or herself, what is the best role for lawyers in the process, and whether a third party decision-maker is needed.

This is a developing area within the profession and there are currently no uniform regulations around screening:

- Accredited family mediators may be required to screen potential clients before commencing mediation pursuant to standards of conduct of various professional organizations.[37] However, mediators are not currently regulated in Ontario and are not required to become accredited in order to practice;
- Arbitrators are required to consider screening under the *Arbitration Act,* 1991, but there is no prescribed method for screening and no prescribed screening report[38];

[35] To put this in perspective, if one spouse earns less than $25,000 a year, he or she will pay from $5 to $20 an hour for offsite mediation through mediate393 in Toronto, depending on the number of children.
[36] In 2014, 70% of the files in the Toronto court-connected mediation program reached a full or partial agreement, see mediate393 Fall 2014 newsletter, http://mediate393.ca/wp-content/uploads/2014/09/2014-Fall-mediate393-Newsletter.pdf.
[37] See, for example, the Standards of Conduct for accredited mediators of the Ontario Association for Family Mediation, and the Standards of Practice for FDR Professionals who are members of the Family Dispute Resolution Institute of Ontario.
[38] *Arbitration Act,* 1991, S.O. 1991, c. 17, Section 58.

- There are no screening requirements for family law lawyers. However, this may be changing, and there may be an emerging duty of care for family lawyers to screen their clients and turn their minds to a greater degree towards safety in the process.[39]

Professionals have differing views on the issue of screening. Some of the current evolving discussions on these important issues include:

- Debate about whether different family dispute resolution processes/professionals ought to have different screening needs, goals and requirements;
- Debate about whether there must be one screener who meets individually with both parties, or whether lawyers can effectively screen their own clients separately;
- What education and training should be required for professionals and how often;
- In the context of arbitration, there is concern about who will conduct screening and what information will be provided to the arbitrator. There is some concern that the arbitrator may be tainted by information obtained in a confidential screening and that this may impact of the arbitrator's neutrality and fairness of the process.[40]

Despite the nuances of these ongoing discussions, everyone agrees that professionals must ensure a safe and balanced process for their clients. Screening is something that lawyers, mediators and arbitrators should be doing on an ongoing basis, repeatedly throughout the course of a file. As circumstances change, risk factors can become more or less prominent, and new ones can emerge.

The majority of the discussion around screening has focussed on when and whether clients should be screened out of ADR processes and, if they are not screened out, how to adapt the process to ensure safety and a balance of power between the parties. There is little discussion about screening clients before a litigation process is commenced. Given that adversarial processes and adversarial lawyering escalate conflict, and escalated conflict increases risk where there are safety concerns, lawyers should also be giving serious consideration to screening and process design in each case.[41]

In some cases, where risk factors are present and/or there is a significant power imbalance between the parties, clients may be safer or more empowered in a court process, where there is the protection (albeit limited) of retraining orders, enforceable timelines and potential sanctions for bad behaviour. However, professionals should not be too quick to screen cases out of ADR processes. In many cases, the court process may not make clients safer, increase their power or provide a better outcome.

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[39] Hilary Linton, in "Safety Planning in Family Law Cases: An Emerging Duty of Care for Lawyers?" Presented at Riverdale Mediation's Duty of Care for Family Law Professionals program in April 2015, pages 11-12.
[40] This argument does not hold much water when one considers the following. First, in a mediation/arbitration process, the mediator often hears confidential and/or highly prejudicial information in caucus (including offers to settle), which is then disregarded in the arbitration phase. Second, in an arbitration (whether preceded by mediation or not), the arbitrator may be asked to make a ruling on the admissibility of evidence which, if ruled inadmissible, must then be disregarded by the arbitrator (the same is true for judges).
[41] Linton, *supra*, note 37, page 2.

## <u>When is Court Needed?</u>

There will always be a place for the courts as a last resort. The following is a summary of some of the circumstances when judicial intervention may become necessary and a consensual resolution process may be inappropriate or harmful.

### *Refusal to Participate – or the "head in the sand" spouse*

Voluntary dispute resolution processes require that both spouses choose the process and show up for the discussions. If one spouse refuses to participate, then the process cannot move forward. If multiple efforts to engage the other spouse have failed, and he or she simply will not come to the table to negotiate, the only way to force participation in a process may be to start a court proceeding.

Having said that, it is common at separation for the parties to be at very different psychological stages of grief and readiness. Typically, one person is ready to move forward and the other is not. The "ready" spouse may have accepted the fact of separation a long time ago and already dealt with the loss of the relationship, while the other spouse needs time to catch up. The best strategy here may be patience, as the resolution process (in any forum) will be much more effective once both parties are ready to meaningfully participate.

### *Refusal to Provide Financial Disclosure*

Informed, self-determined choices can only be made when both parties have (and understand) all of the information that is relevant to the decision. Financial disclosure is the cornerstone of informed decision-making in any process, whether in or out of the courtroom. Both mediation and collaborative process require participants to provide full and honest financial information. This is confirmed at the outset in the mediation agreement or participation agreement signed by the parties.

While the parties may make decisions about the type and level of financial information to be exchanged, at a minimum they must have sufficient information to be able to understand their options, the range of their potential legal entitlements, and the consequences of any agreement reached. If one spouse refuses to provide financial disclosure, the only way to compel them to do so may be to start a court proceeding.

### *Bad Faith, dishonesty, or using the process to gain unfair tactical advantage*

Consensual dispute resolution processes require that both parties come to the process in good faith. This is not to be confused with a requirement that both parties must be harmonious, see eye to eye on the issues, like each other, or even respect each other (although they must act respectfully). Anger, hostility, hurt and discord are normal in any process, after all, the clients are separating for a reason! However, in order to be effective, consensual process requires a minimum level of good faith and a mutual desire to reach a fair outcome, even if each party has a very different view of what "fairness" means to him or her.

Refusal to provide relevant information may be one example of a bad faith tactic. Other indicia of bad faith could include repeated delay tactics in an effort to gain advantage from the status quo, unilateral changes to parenting or financial arrangements without discussion, threats or intimidation, or other actions that prevent one spouse from having the power to negotiate and from being able to make fully-informed and voluntary choices about the family's future.

If one party comes to the process in bad faith and/or is not able to be honest in the process, the only way to level the playing field and achieve a fair outcome may be to start a court proceeding.

**Some (Non-Exhaustive) Grey Areas – Careful Assessment Required**

***Domestic Violence and Abuse***

Assessing the impact of domestic violence on families and how to address it both procedurally and substantively is one of the most important and most controversial issues in family dispute resolution. Where there is ongoing abuse, risk of harm or fear of the other, a restraining order or other court intervention may be needed. There is a formality and openness to the public court process that may empower an abused spouse who has been victimized privately, behind closed doors in the home. The court also provides enforceable institutional rules and protections that are not available in other process models. At the same time, it is not at all clear that an abused spouse is made safer by the court process, or that better outcomes can be obtained for these families through litigation. In fact, there are reasons to think that is not the case and that litigation actually escalates risk.[42]

While voluntary and consensual dispute resolution processes were once widely see to be inappropriate in all cases of domestic violence, the discussion has become much more complex as FDR processes have evolved and become more sophisticated.[43] There is a growing recognition amongst FRD practitioners that litigation may not be a better alternative for these families – court may not produce better outcomes for children, may not produce better outcomes for the abused spouse, and may not keep abused spouses safer in every case.

At the same time, we also cannot lose sight of the potential harm to vulnerable clients that can be exacerbated by consensual dispute resolution processes. In particular, it is critical to differentiate amongst different types of intimate partner violence and recognize that different forms of violence may have different implications for dispute resolution options and for process design.[44] For example, a pattern of coercive and controlling abuse, which is more insidious, frequent and severe than other forms of violence, may very well mean that there is little or no possibility of both spouses negotiating as equal partners.[45] Certainly both spouses would need a great deal of counselling and support in order to be able to participate in a consensual process fairly. On the other hand, where there has been situational couple violence or separation instigated violence, with no dynamic of coercion and fear, mediation may still be safe and productive if appropriate safeguards are put into place in designing the process.[46]

Another factor to consider is the issue of client autonomy. There is value in empowering an abused spouse to be able to make her own procedural and substantive choices. It may be difficult for some to understand why an abused spouse who wishes to enter mediation or collaborative process should be

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[42] Desmond Ellis, "Divorce and the Family Court: What can be done about Domestic Violence?" (2008) 46(3) Family Court Review 531 at 531, and "Safely, Equity, and Human Agency" (2000) 6(9) Violence Against Women 2012 at 1017. See also Linton, *supra*, note 37, pp. 11-12, also citing Ellis, Desmond and Stuckless, Noreen, *Mediating and Negotiating Marital Conflict,* (1996) Sage Publications, page 62.
[43] Lene Madsen, in "A Fine Balance: Domestic Violence, Screening, and Family Mediation" (2012) 30 Canadian Family Law Quarterly 343.
[44] Joan B. Kelly and Michael P. Johnson, in "Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions" (2008) 46(3) Family Court Review 476.
[45] Madsen, *supra*, pp. 5 and 9.
[46] *Ibid*, p. 9, and citing Kelly and Johnson *supra* note 19 at p. 492.

denied the power to make that choice and instead forced into an adversarial court process, as long as they are making the choice freely and can be supported throughout by skilled professionals. Client autonomy must be carefully balanced with risk assessment and consideration of the skills of the professionals to ensure a safe and empowering process can be provided in each individual case.[47] Different practitioners have different views on the issue of autonomy, and some believe that a more paternalistic approach is needed to protect the vulnerable at a time when they may be ill-equipped to make the best decision. The tension between paternalism and autonomy underlies much of the debate on this issue.

There is a great deal being written and discussed in the field about the importance of screening clients for domestic violence and designing a process that addresses safety concerns, even if those concerns are unfounded or untested. Rather than screening all cases of domestic violence out of FDR process and into court, the focus is now on how to make out-of-court processes safe where there is a history of abuse or other risk factors. Some of the most common potential adaptations to the dispute resolution process include the attendance and support of lawyers or mental health professionals, strategic seating arrangements or use of separate rooms, and staggered arrival and departure times for meetings.

***Power Imbalance***

There are power imbalances in almost every relationship. Moreover, the overwhelming loss, uncertainty and guilt that comes with separation can also leave people feeling powerless. However, when one party does not have the power to put forward their interests and concerns and to negotiate fairly for themselves, a consensual resolution process may not be appropriate.

To some extent, power imbalance may be corrected and the playing field leveled through the support of professionals. For example, a mediator can ensure that both parties' voices are heard and that they each have input into discussions. However, a mediator may not be able to address significant power imbalance without appearing to lose his or her neutrality. Where there is a financial, legal or other informational gap, other professionals can be brought into the process to assist and provide greater support and advocacy for the clients. In collaborative process, power imbalance can be addressed by stronger advocacy and increased support at meetings from the lawyers, as well as coaching of both parties. Neutral family and financial professionals can also join the team to provide information and balance in the process.

***Substance Abuse***

If there is a drug or alcohol problem and children are involved, an out-of-court process may not be appropriate. If there are safety concerns, court intervention may be needed to protect children from risk of harm. A substance abuse problem may also impact on a party's ability to participate in the process and engage in good faith negotiations.

However, if the substance abuser can acknowledge the problem and commit to treatment and safeguards for children, then an out-of-court process may be suitable. In fact, a person with substance problems may be more likely to follow through on a plan they have helped to come up with themselves, that addresses their specific needs, than an order imposed by a judge.

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[47] *Ibid*, p. 12, and citing Ellis, *supra* at note 15 p. 1023.

### *Personality Disorders*

Personality disordered individuals (whether diagnosed or not) may in some cases lack self-awareness and have little or no ability to see the perspective of the other. Because the ability to acknowledge the perspective of the other is so important to achieving interest-based solutions, this can be a serious impediment to the process. Signs of personality disorder may be accompanied by other "red flags", such as power imbalance, substance abuse, dishonesty, bad faith, etc.

These tend to be the highest conflict people, and great skill is required to coach them in a negotiation process so that they can manage emotions, increase their flexibility of thinking and moderate behaviour.[48] If one party is extremely rigid, hostile, has unreasonable/unmanageable expectations, has a fundamentally distorted version of reality and/or cannot communicate in a respectful manner with the other spouse or professionals, an out-of-court process may not be appropriate.

## Completing the Paradigm Shift

As we grapple with these issues and how to better help families in transition, one thing is clear, family ADR in its many forms should not be seen as just an "alternative" any more. The paradigm shift is upon us. The family law landscape has changed. Many professionals now practice in one or more areas of family dispute resolution. Lawyers and therapists are also mediators, arbitrators, parenting coordinators and Dispute Resolution Officers. Processes are being combined in creative ways to meet the needs of each family. Interdisciplinary professionals are working together towards more holistic solutions.

The paradigm shift in family law has been gaining ground amongst practitioners for years, but there is still a long way to go towards achieving a new, more constructive and holistic community norm for family dispute resolution. Normalizing the alternatives in our professional community is a huge step towards achieving better outcomes for families.

While many professionals have already figured this out, and already practice this way to achieve better outcomes for their clients (some of the best family law litigators hardly ever set foot in a courtroom anymore), it seems that there are still a large number who only pay lip service to these principles.

At the same time, many clients are now demanding better and more individualized process options, which is changing the marketplace. The internet has played a huge role in raising public awareness, but that information is only available to those who know to seek it out and how to find it, and even then it is often completely overwhelming, unreliable, misleading or misunderstood. Public awareness is also growing through word of mouth, as more and more people successfully resolve their disputes in consensual processes and recommend them to their family and friends. This is contrasted with the horror stories people hear of family court litigation – many clients are quite vocal about seeking mediation or collaborative process to avoid the terrible fate of a friend or colleague who was embroiled

[48] Bill Eddy, in "New Ways for Family Mediation: More Structure, More Skills and Less Stress for Potentially High Conflict Cases" (2013) and "Pre-Mediation Coaching: 4 Skills for your Mediation Clients" (2012), presented at a 2014 seminar.

in a lengthy, expensive, and highly unsatisfactory court process that only increased the family conflict and made everyone worse off (except the lawyers!).

Over the last few years, new family dispute resolution initiatives have been popping up and existing programs have been expanded. There are many opportunities for positive changes to make things better for separating families, and especially for children.

Despite these changes, there are still many people who end up in court without really knowing why they are there or what to expect. When they realize that they will most likely not get the "justice" they expected, that they will not be vindicated by the judge, that their partner will not be harshly admonished for the pain they have caused, that they will lose control of the ability to make decisions for their family, they often wonder how things spiralled so far out of their control. This is further compounded by the emotional, psychological and financial costs of litigation, the strain on physical health, employment and extended family, and the often irreparable damage to already precarious relationships, all occurring at a time of crisis when people are feeling devastated, angry, betrayed and afraid for their future and for their children's well-being.

The public needs to be educated about family dispute resolution process options far earlier. It is time for the profession at large to shift our collective consciousness and embrace the "alternatives" as the new norm in family dispute resolution.