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The reality of separation and divorce is that most people wish to preserve their assets and reduce costs associated with lengthy litigation. Recent cases have aptly demonstrated warring parties can easily spend in excess of a half a million dollars on an issue such as whether a single additional overnight of access is warranted or not[1]. Most experienced trial lawyers will advise clients that no matter how good the evidence may appear after preparation, the results of a trial or arbitral hearing are simply not certain. The uncertainty and expense of traditional litigation has resulted in the growth of a variety of different approaches to resolving family disputes including mediation, collaborative law and cooperative law, along with a significant growth in arbitration in an effort to avoid the court system. There are significant differences between these various types of alternative dispute resolution (ADR).

***Arbitration*** - is a process just like a court trial. The same procedural steps, like questioning, interim motions for relief such as disclosure and interim support, are available to the parties and the same rules of evidence are followed. There are a number of reasons parties may wish to pay an arbitrator rather than availing themselves of the publicly funded court system for a trial. First of all, arbitrators may determine matters in a summary fashion, for example, relying only upon written argument, and that may be a huge time and expense savings if the matter in dispute is a single issue. Second, arbitration is a closed process whereas court is open to anyone who wishes to attend. This means parties who wish to ensure their matter is addressed without public disclosure (for example where parties wish to avoid exposure to the Canada Revenue Agency or are involved in a highly competitive business) may well choose to proceed to resolve matters through arbitration. Third, parties have more control in choosing who will hear the matter. They can ensure, for example if there is a complex tax issue, the arbitrator is knowledgeable about family law and tax. Judges in the publicly funded family court system are assigned to cases without any input from the parties and there is a variation in the degree of expertise in family law. Over the last number of years, it has been common for parties to choose a mediation/arbitration model which means they attend at mediation with either the same person who will become the arbitrator or they may choose, for reasons to do with neutral evaluation at the arbitration in the event that the mediation fails, to have different persons act as mediator and arbitrator.

***Mediation*** - involves obtaining the opinion of a neutral third party professional who is usually an experienced family lawyer about the issues in dispute. Mediations may take place at any stage of the dispute. The parties are in control of the choice of mediator and may choose to participate with or without counsel[2]. Mediators do not conduct hearings and do not make binding decisions. Mediation is an attempt to short circuit the process of arbitration or litigation in obtaining neutral third party input regarding the issues in dispute at an earlier stage of the process in the hopes that the parties may be convinced to enter an agreement or at least narrow the issues. Like an arbitrator, the parties usually share the fees of the mediator. The public system also provides for judges to act as mediators during mandated conferences taking place at various stages during the litigation. The difficulty is that judicial dockets are crowded. Whereas a private mediation may take place over the course of an entire day, judicial mediations are usually limited to a few hours since the judge managing the conference will have a number of other matters on his or her list for the same day, and will not have the same opportunity to get to know the parties and understand their goals in the resolution of the disputed issues.

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[1]See for example, M. v. F., 2015 ONCA 277, referring to the trial decision of Justice Whitaker in which costs were ordered in the amount of $500,000, which was unpublished.

[2]Mediators are obliged to encourage parties to seek independent legal advice of separate counsel both before and during the mediation process: see commentary in s. 5.7 of the Rules of Professional Conduct.

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## COOPERATIVE LAW AND WHY IT WORKS - continued from page 10

***Collaborative Law*** - requires the parties to sign an agreement both in regard to good faith and in regard to not continuing to use the same counsel if the litigation fails. Many people who want to save costs and want more control of the process of resolving their dispute believe collaborative law is the best approach but unfortunately there are many pitfalls in the process. Good faith cannot be implemented where one of the parties chooses not to be candid, not to make disclosure or to drag out the proceedings. Often in the collaborative process parties are not required to prepare financial statements until very late or at all, relying on the assumption the parties are bound to make full disclosure. However, sworn financial statements are fundamental to identifying each party's position and are the documents in which parties swear they have disclosed all of their income and assets and have set out any claims for an exclusion or deduction from the calculation of net family property. The failure to get such statements can result in significant fees, with minimal results, and ultimately a failure of the collaborative process. If the collaborative process fails, new lawyers must be retained often resulting in the institutional knowledge of the file being simply lost.

***Cooperative Law*** - is an approach to problem solving that keeps the very best approaches of the litigation model and the collaborative law model without giving up the advantages of each. Lawyers can agree at the opening of the file to try to resolve matters in a cost efficient and emotionally responsible manner, in an attempt to keep matters out of court while always retaining the right to go to court. A lawyer who truly has an eye on the client's interests will provide him or her with written evaluations of the issues and often be able to think of a creative and effective resolution to address concerns both of his or her own client and to persuade the opposing party of the reasonableness of the approach. It is true that there are often legal issues that do not have simple and predictable answers. This does not mean the problem is not capable of resolution by taking into account both the cost of litigation and the likelihood of success. Cooperative lawyering permits parties to utilize tax planning and other innovative solutions that are not available in the court or arbitration model. Courts or arbitrators are simply required to follow the statute and will not do tax planning so if the goal is to make more funds available to the family, creative and cooperative lawyering is the solution.

*"The question to be considered is whether or not the parties and their counsel are prepared to really give the cooperative approach a genuine attempt. Cooperative lawyering works and there is no downside."*

So, why don't more people use cooperative lawyering? The first obstacles to cooperative lawyering are the need for full disclosure and a willingness of opposing lawyers to speak frankly to each other about the relative merits of his or her case. This means being candid about the weaknesses of his or her own position. Since all such discussions are without prejudice they cannot be relied upon if the matter does not settle and has to proceed to court. Another obstacle is that lawyers will often cede the leadership role rather than actively move towards settlement by providing clear opinions to their clients and attempting to implement creative solutions. In some cases, counsel may fail to maintain their objectivity and may have aligned themselves too closely with their client's cause to be able to participate in a sensible resolution. There are also certain clients who may not be prepared to resolve the matter without the intervention of an independent third party evaluator. The question to be considered is whether or not the parties and their counsel are prepared to really give the cooperative approach a genuine attempt. Cooperative lawyering works and there is no downside. If it breaks down, parties and their lawyers can choose to litigate with all of the background work in regard to the file useful and available to move the file to resolution.

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