

MEDARB IN FAMILY LAW – THEN, NOW AND ...?
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BY PAUL JACOBS, Q.C, C.MED., C.ARB.

In 1999 I was retained as counsel by the solicitor for a wife in a family law matter. The husband and wife had opted to move out of the court system and put their various corollary relief issues in the hands of a non-lawyer professional in family matters who was mediating and arbitrating. They signed an agreement and embarked upon a process which turned out to be fraught with problems. At a point where the wife felt she was being treated unfairly following a number of developments, her counsel tried to have her withdraw from the process, but the mediator/arbitrator would not permit that. Presumably, his view was that one might be able to withdraw from a mediation, but not from an arbitration and he considered them to be at that point, in an arbitration. What is clear in hindsight is that this particular mediator/arbitrator blurred the lines between the processes. While that type of approach is sometimes used in labour matters where all the parties are familiar with that process, in this family law matter, it led to great difficulties.

I brought an application in court to set aside two arbitral awards and for an order removing the arbitrator from the arbitration itself.

This case was argued over the course of a few days and the decision was reserved and delivered on January 30, 2001. The original judgment ran 31 pages, but the following is a case summary originally published in the Law Times newspaper in Ontario on April 9, 2001. This summary points out many of the problems in the handling of the process and points out how the court viewed these in reference to the Ontario *Arbitration Act 1991*. The case is *Hercus v Hercus* [2001] O.J. No. 534.

“FACTS: Application by the wife to set aside two arbitration awards made by M., and for an order removing the arbitration firm and the arbitrator M. personally. The impugned arbitration awards dealt with the payment of arbitration fees adversely to the wife, and the second award was entitled Arbitral Decision Regarding the Parenting Plan Review. The parties had signed a consent to resolve issues of custody, access and child support by way of mediation/arbitration, that it would be carried out under the Arbitration Act, S.O. 1991. c.17, and that the parties would be equally responsible for the costs of the mediation/arbitration. They then signed a Mediation/Arbitration Agreement which was embodied in a court order and constituted a domestic contract, It provided that custody, access, child support and costs issues including the quantum, timing and method of payment, that the issues were submitted for interim relief and final determination, that subsequent issues including variation were subject to the terms of this agreement and that the parties were jointly and severally responsible for the arbitrator’s costs.

After completing an arbitral decision concerning summer vacation access, in September of 1998, M. released a parenting plan. The plan gave custody to the wife and extended access to the husband. In April of 1999, after receiving comments from both parents that

they were unhappy with the plan, M. indicated that a review of the plan was in order. The wife responded that she was not in funds and was unable, to participate further such that she was forced into accepting the recommendations in the plan. Subsequently, Minutes of Settlement and Separation Agreement was signed by both parties incorporating the Mediation/Arbitration Agreement which confirmed the parties' intentions to follow through with the parenting recommendations. A consent judgment was entered into incorporating the foregoing.

After that time, the husband contacted M. in respect of the issue of attending parent-teacher interviews for the children which plan conflicted with those of the wife and children. In the result, M. decided to determine the issue by way of arbitration, and essentially required the meeting to proceed unless the school would co-operate in changing the dates. The letter was not received by the wife until after the date set for the interviews. Until then she had no idea that the husband had contacted M.

The husband next raised the issue of the one child's desire to reside with him and consulted with M. in that respect. He was told that the issue would be considered in the context of an overall review of the parenting plan. The husband requested that the wife not be advised of the reason for the requested meeting given his concerns about his wife's reaction to the possible change in the child's residence. From that point in time in February 2000 onwards, the wife was not advised of this particular reason for the parenting plan review. M. advised the wife that he was undertaking an overall review, and secondly, that he had concerns that the wife's portion of his account was overdue. The wife resisted participating in that she believed that the plan as crafted by M was final and she did not have the financial resources to continue the process in any event. She also indicated that she was opposed to the manner in which the issues were handled. The husband then paid the wife's portion of the overdue account and requested that M. arbitrate the issue of that payment. M. issued the first arbitral decision in issue requiring the wife to pay the amounts already paid by the husband, interest and all costs incurred by the husband in recovering the retainers paid on the wife's behalf, and an additional unexplained \$600. M. then issued an arbitral directive that the wife prepare a submission on the parenting plan, and furthermore set appointments for the children's interviews. At that time, in September of 2000, the wife was alerted for the first time to the husband's concerns that one child wished to reside with him. By that time, the wife had withdrawn her consent to M. and his firm acting as mediator and arbitrator. M. issued his arbitration decision regardless with commentary on the impediments placed upon the process by the wife's actions. Re made an arbitral award of joint custody, with the children having their primary residence with the father and access to the mother. The basis for the award was instances of physical abuse alleged to have been reported by the boys at the hands of the wife's new husband and her alienation of the children from him. The alleged physical abuse was reported to the Children's Aid Society although the award was issued prior to its report which concluded that no child abuse could be verified. The wife opposed the arbitral awards and the appointment of M. and his firm on the main grounds of his unfairness to her in the mediation/arbitration process.

DECISION: Applications were granted. A preliminary difficulty arose in that the agreement was a hybrid mediation and arbitration agreement. It was clear that the parties expected that both procedures would be used and it was reasonable to infer that they expected that mediation would be entered into first, failing which they would engage in arbitration. M. attempted to mediate some issues but not others. He moved quickly to arbitration on the issue of parent-teacher interviews without exploring mediation. It was completely bypassed when he endeavoured to set up the review process.

At that time, in addition, the wife was not advised of one of the main issues to be dealt with at the review, being the husband's wish to have the child reside with him. The manner of scheduling the parties' appointments was contrary to the agreement which provided that they were to be based on the parties' schedules. However, the wife's schedule was rarely taken into consideration. Furthermore, it was clear that the parties expected that the issues be resolved finally subject to variation as provided for in the applicable legislation. The parenting plan was final on its face. The plan was incorporated into a court judgment. However, M. on his own initiative proposed a review of the plan for which there was no framework in the parties agreement. M. had no jurisdiction to reconsider the issue of custody.

In addition, the lack of timely disclosure to the wife of the husband's concerns impaired the integrity of the process and resulted in the wife's not having been treated fairly and equally as mandated under the act. M. repeatedly asked the wife for her input into the review, without disclosing the husband's proposed claim. The wife was also not treated fairly in the context of the allegations of child abuse. M. relied upon the allegations in making his decision while the investigation was underway and before any conclusion was reached. Given the timing of his decision, it was clearly not done as a matter of urgency. The wife's refusal to participate in the process did not obviate her right to be treated fairly and equally.

Furthermore, M. considered the wife's failure to participate as a factor adverse to her. She in fact had the right to withdraw to the extent that the process was mediation and not arbitration, a distinction not clearly drawn by M. Lastly, there was no basis in the agreement for the award of \$600 in costs against the wife which was imposed over and above any retainer payment or interest. The issue of quantum of the arbitration costs was not subject to mediation or arbitration under the agreement and M. exceeded his jurisdiction in making the order. The arbitral decisions were set aside and a trial of the issues of custody and access was ordered."

In the year 2000 when the matters involved in this case were occurring, med/arb was not a heavily used process in litigation proceedings generally. It was used in some measure in family law matters and it certainly was used in labour matters. It had not yet found its way into other areas.

It becomes apparent from a review of the case summary, that the court felt that the manner in which this matter moved between mediation and arbitration, was not

appropriate and led to significant unfairness in the results in the hands of the particular mediator/arbitrator in question.

Much has changed in the last five years. For one thing, lawyers have stepped firmly into the role of mediator/arbitrator. Many of those are family law lawyers who were already mediating but were not previously arbitrating. By their training and experience, they have taken a different approach and have clearly drawn the lines between the two processes. It is probably not surprising that as a result of more structure being developed, mediation/arbitration has begun to flow over into other areas of litigation.

What are some of the changes which have occurred in these few short years that are beginning to make med/arb a more acceptable form of dispute resolution?

1. The process has become a two-step format; that is, the mediation is conducted and, if successful, ends the process. If unsuccessful, a separate arrangement is made for the arbitration.
2. There are two separate agreements; one for the mediation and, if necessary, another for the arbitration.
3. The mediation and the arbitration are conducted separately from one another at different times.
4. If the matter proceeds into arbitration, the traditional considerations respecting arbitration apply including pre-arbitration hearing or procedural agreement;
5. In seeking finality, the parties know that if the mediation fails, they can move without too much repeat or time loss into an arbitration with a person who is already informed.
6. There is cost efficiency in that the issues have already been dealt with by the mediator and are known upon moving into the arbitration process.

There are, of course, some risks in the med/arb approach. The neutral professional must be trained and experienced in both processes in order to bring fairness to the parties involved. The parties may sometimes be concerned with an arbitrator having been the mediator with whom inside secrets were shared in a mediation caucus. The parties have to trust the neutrality of the professional to fulfill not only the functions of a mediator, but if those fail to yield a settlement, then they must have equal trust in the competence and fairness of the professional as an arbitrator who is to make a final decision respecting their matters. Moreover, there is the risk that a slightly unsure party may not be prepared to disclose important matters during a mediation for fear that it might somehow taint or prejudice a subsequent arbitration.

In international matters, arbitration, particularly commercial arbitration, has been a well-known and long accepted process. Mediation is the new kid on the block, slowly gaining popularity. It will be interesting to monitor the experience over the next five years or so to see whether med/arb finds its way widely into commercial litigation and more particularly into international commercial litigation.

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