

Collaborative Family Law

<http://collaborativefamilylawgroup.com/>

250.704.2600

info@collaborativefamilylawgroup.com

Welcome to the Summer 2015 edition of our newsletter, featuring articles by two of our lawyers for this first of two legal editions. Eugene Raponi, QC, writes about the role of mediation within the collaborative process, providing useful information about its value and effectiveness whenever a fresh perspective is needed. Jennifer Cooper, QC, looks at the role of the law in collaborative process, a topic that is often utmost in the minds of anyone who is newly separating from their partner. If these articles spark further questions about collaboration, mediation and legal options in general, you may contact any one of our collaborative lawyers, or consider an appointment with one of our divorce coaches who can meet with you to discuss your situation and consider what process might work best for you before deciding on the kind of professional assistance needed. (See the Getting Started tab on our website.)

Mediation: Collaboration's Helpful Cousin

I've been asked to write an article about the use of mediation in the Collaborative process. My practice has been largely devoted to mediation (and, more recently, mediation/arbitration) for a good many years. I've also been a member of the Victoria Collaborative group for many years – I joined within a year of its formation (so I can't technically call myself a founding member).

I've had the opportunity to act as a mediator within collaborative cases on a number of occasions. I'd like to discuss when you may wish to consider using mediation in a collaborative case.

First, some definitions. I've taken the following definitions from an information sheet that was prepared for the Victoria Collaborative group:

"Collaboration" is a process in which the parties, their lawyers, and appropriate separation professionals such as Coaches, Financial Specialists, Child Specialists and Business Valuation Experts work as a team. The members of the team enter into a written agreement to cooperate to resolve the issues arising out of the parties' separation without going to court or using the threat of court. The collaboration professionals assist the parties to create their own solutions that address the values and goals of both parties and their children. The objective is to reach an efficient, fair, and comprehensive settlement that meets the present and future needs of all family members.

"Mediation" is a process in which a Mediator, a neutral professional, is retained by the parties to assist them (either with or without their lawyers) in reaching an agreement based on the values and goals of the parties. If the mediation proceeds without lawyers, the parties will be advised to obtain independent legal advice before the agreement will become binding. The process may include other separation professionals, as needed. If the Mediator is a lawyer, that individual may also prepare the Separation Agreement (or, alternatively, Minutes of Settlement) to reflect the consensus that has been reached.

You will see that the underlying approach to Collaboration and Mediation is the same: interest-based negotiation aimed at achieving a consensual resolution. That's why I have referred to Mediation as Collaboration's cousin. Sharing the same "bloodline" is what allows Mediation to be another tool in the collaborative professional's toolbox – hence the reference to the word "helpful" in the title.

The assistance of a mediator can be enlisted from the start, in the right case, or in the event of an impasse – when it is looking like a negotiated settlement may not be possible.

(Continued on next page)

The questions that arise are these:

- If the underlying principles of Collaboration and Mediation are the same, isn't one process redundant to the other?
- If resolution has not been possible within the collaborative process, how can the introduction of Mediation possibly help?

The answer lies in the power of the neutral to facilitate and evaluate.

A skilled mediator is experienced in developing and refining the negotiation process. Collaborative professionals are likewise skilled, but sometimes it can be difficult to act as both an advocate and a facilitator. The neutral will bring a fresh perspective – a new way of seeing or discussing an issue – that is difficult for the advocate to bring to the discussion.

The other reason that a mediator can add value to the resolution of a dispute is the mediator's experience in the substantive issues in dispute. Again, unlike the advocate, the mediator's analysis comes from a neutral perspective. The mediator can act as a neutral "sounding board" to counsel and the parties. This can be particularly helpful where the impasse is rooted in the way that the parties and their counsel are analyzing the facts or the law in a given case.

Although impossible to measure precisely, the literature suggests that Mediation results in successful outcomes in 75-80% of cases (this was confirmed by a survey performed recently by Mediate BC). Successful outcomes are critical to the parties. If a collaborative case is proving difficult to resolve, think seriously about involving a mediator.

If you choose to use Mediation in a collaborative file, you and your counsel/coach will want to consider the following:

- Who is the right mediator for your case? Mediators have different styles and strengths. Match the parties and the issues to the mediator.
- What approach should you take in Mediation – everyone present throughout all the discussions, or will it be more productive to break from time to time and meet separately with the mediator (called caucusing)? Caucusing is a powerful tool but the parties might feel left out of part of the discussion.
- Should you plan for an all-day Mediation, or break it into half-day sessions?
- Who should be present in the Mediation – the parties and: counsel? Coaches? Child Specialist? Financial Specialist?
- If you include members of the team, will they attend for all or part of the session(s)?
- Where will you hold the Mediation – a new, neutral venue or the same place that has been used for the team meetings?
- What information should you provide to the mediator to ensure the greatest likelihood of success?

A negotiated resolution to the issues arising from a separation is the surest way to build a positive future for your family. That principle is at the heart of both Collaboration and Mediation. Sometimes it just makes sense to combine them.

© Eugene Raponi, QC, July, 2015

Eugene Raponi, QC is a lawyer, mediator and arbitrator (and long-time member of the CFSP). He practices primarily as a mediator and mediator/arbitrator.

The Role of the Law in a Collaborative Divorce

I just want to be fair.

Fairness means different things to different people. Some people think it means absolute equality: let's divide everything in half – the kids, the property, the debts, and the family income. For others it has to do with effort or ownership: I earned more, bought more, or came in with more – so I should get more. For still others it is related to need: you have a wealthy family, you have resources from before we even met - I need more so I should get more.

So how is it possible to determine what is “fair” when people have different ideas of fairness?

Isn't the law supposed to say what is fair?

The law is generally what the government and/or the judges have decided is fair. So it is interesting to understand what the laws are and to take them into consideration. But remember that the laws have to apply across a broad spectrum of fact situations. So while the laws might be fair in most cases, they might not necessarily be fair or sensible or appropriate in your case.

Secondly, “the law” does not always give a clean, clear and precise answer. That's why there are lawyers: to help you interpret and understand the law. And that is why there are courts: because often people and even lawyers can't agree on what the law is. Or how it applies to a particular situation.

The beauty of a collaborative divorce is that you can be as creative as you wish in deciding what you want to do. The court is quite strict in ensuring that dependent children receive the benefit of their parent's resources. But otherwise you have quite a lot of latitude in deciding how you will settle. So yes you will be given information by your collaborative lawyers as to what the legal principles are, and what a court might do when applying those legal principles. But you will be able to take into account a number of other factors including:

- The particular circumstances and characteristics of your family such as your need for security.

- Your sense of entrepreneurship or your capacity to endure or embrace change.
- The interests and priorities of yourself and your children and your partner including the importance of a family home, or travel, or family time.
- The practical realities such as how good you are with handling money, what the bank is willing to do to help you out, and your willingness to take financial risks.
- And of course your own personal sense of fairness.

Your collaborative lawyers will tell you about the law and will tell you when there are inconsistencies or uncertainties in the law. But as a collaborative matter, you will not need to spend valuable family resources, including emotional resources, trying to determine what exactly the law thinks is fair for you and your family. You will learn about the law, talk about the law, consider it, and apply it as you decide together. What you won't do is *fight* about the law.

© Jennifer A. Cooper, QC, July, 2015

Jennifer Cooper, Q.C.

Collaborative family lawyer since 2005.

Certified family law Mediator and Arbitrator.

jennifer@cooperfamilylaw.ca