YOUR LIFE, YOUR CHOICE
PROCEDURES IN FAMILY COURT

As indicted in my firm profile, I am both a lawyer and professional mediator. In both capacities, I jealously protect your right to choose the process by which you shall navigate through and negotiate your resolution to your domestic issues. When couples separate or divorce, many decisions need to be made with respect to custody, access, support, property division and in some cases personal safety issues. It is imperative that the client knows their obligations and entitlements further to the law, their rights and choices in order that they may make informed and intelligent decisions in their efforts to bring matters to a final resolution. There are cases where the Court must be involved and there are processes within the formal legal system about which the client should be educated. In some cases, the clients may choose out-of court options which exist in the community and it is equally important that the clients be educated with respect to those. It is the lawyer's responsibility to discuss and educate the client about all of the options available.

I am often asked to define the various procedural options available in dealing with domestic disputes. This is an important part of the establishment of my relationships with my clients given that any choice made should be an informed choice.

OPTIONS

Mediation

The parties may agree to mediate the issues. In her article "*Family Mediation*", (A. Stitt, ed., *Alternative Dispute Resolution Practice Manual* [Don Mills: CCH Canadian, 1996], at 3122-29 and 3132-35), Barbara Landau notes that there has been a *"considerable shift from litigation to alternative dispute resolution, and particularly mediation, as a method for resolving family disputes. Mediation has a number of advantages, particularly in cases where there are ongoing relationships."* Briefly the advantages she refers to include:

i) reduction in tension benefits children

ii) improved communication

iii) timely resolution

iv) structure and clarity in parenting plans

v) more control by the parties

vi) less formality

vii) less expensive

viii) increased commitment to the result.

There are various forms of mediation. In some cases, the gender neutral mediation model is appropriate. This model provides for two trained mediators, one male, one female. In other cases and most frequently the parties meet with a trained mediator who works as an independent and neutral third party, in private meetings with them (and other deemed necessary people if appropriate), assisting the parties in reaching an Agreement. The other model which is gaining popularity is one whereby communication coaches are used during the mediation process to assist the parties to get past emotional or other

'roadblocks' which are not necessarily of a legal nature however exist to prevent the parties from moving their dialogue forwards and towards resolution.

Mediation is strictly a voluntary process which may be entered into at any time during Court proceedings. Family Division Judges are often heard to counsel the parties that it is far better for the parties to establish and agree to their own parenting arrangements which will govern their lives as they raise their children than to have someone that doesn't know them or their children impose such arrangements upon them and to be governed by those.

Mediation is available to parties in Manitoba through either private mediators (who will charge either an hourly rate or a flat based rate) or through the Department of Justice's Family Conciliation Centre. It is important to note that there are mediators and counselors who deal with parenting arrangements the cost of whose services are based on a sliding scale as against the parties' income.

Custody and Access Assessments

Where custody and access arrangements are live issues and the Court does not have sufficient evidence before it to make a determination of the issues, a custody and access assessment may be ordered by the Court or requested by the parties. A mental health professional such as a social worker, psychologist or psychiatrist may be engaged to investigate, evaluate, report and make recommendations as to what custodial and access arrangements would be most congruent with the best interests of the child(ren). The Court may Order an assessment to be conducted through Family Conciliation which is at no cost to the parties. Unfortunately there is such a significant demand for these

assessments that there is a substantial waiting period. The other option is a private assessment which is appropriate particularly in cases where a determination on the issues is required on a timely basis, and one or both of the parties is able to retain a private assessor. This is also appropriate when there are psychological issues, which must be investigated and explored, and a clinical psychologist must do this. This is common in cases where supervised access is being challenged or there are issues related to substance abuse, sexual abuse allegations, domestic violence allegations or mental health issues.

Pre-Trials

A Pre-Trial is a meeting held with a judge, the parties and their lawyers to try to avoid the high emotional and financial cost of trials. The parties must exchange and provide to the Court through their counsel, a Pre-Trial Brief which accurately and concisely sets out the parties' positions with respect to the issues. There are time deadlines for the filing and service of the briefs in order to allow counsel and the Judge to prepare for the meeting. This meeting is not only to attempt to move the parties towards resolution by turning this meeting if appropriate into a settlement conference, but is also organizational and procedural in nature in as far as the Judge may make Consent Orders with respect to matters agreed to, set timelines for other processes meant to move the litigation forward including financial disclosure and discoveries.

Pre-Trial Conferences are without prejudice meaning neither party may use anything which is stated during this conference against the other in Court proceedings. The reason for this is to encourage parties to be forthright and open in dialoguing with the other

which is required in Order to facilitate settlement. Third parties are not usually allowed to attend to pre-trial conferences unless both parties and the Judge consent. The process is completely confidential. Any briefs or documents attached to the briefs are placed in the Court's "B" file which is the WITHOUT PREJUDICE section of the file and should the matter proceed to trial or to a motion, the presiding Judge who is ALWAYS different from the Pre-Trial Judge will not have seen the B File.

Finally, it is important to note that in most circumstances the parties shall appear before the same Judge for all pre-trial conferences which is important in order to maintain the continuity of the process.

Case Management

Case Management is a process that allows a Judge to monitor and manage the progress of a court case as it moves through the legal system. This process is mandatory in Manitoba. Once a party files a Petition, Petition for Divorce, Notice of Application or Notice of Motion to Vary in Manitoba, save and except in emergency matters, the parties are obliged to set a case management date before proceeding by way of a contested basis. The parties must come to meet with a Judge and their lawyers if represented, in a settlement oriented atmosphere to try to resolve the issues together.

The Case Management Conferences are much like pre-trials in that Case Management Statements must be filed setting out the parties positions; the process is without prejudice and the Judges deal with both settlement discussions and procedural issues. The advantages of Case Management are that the *Queen's Bench Rules* provide that the Case

Management Judge may make Orders with respect to Financial Disclosure, Discoveries and Costs.

It remains, as is the pre-trial conference, an informal process geared towards steering the parties away from costly contested proceedings where a Judge hears evidence and arguments from both sides and then makes a binding decision. Judges who participate in a case conference do not take part in the contested hearing unless everyone agrees.

Four Way Meetings

At any time, the parties may decide to attempt to resolve matters by getting together with their lawyers on an informal, WITHOUT PREJUDICE, basis. The parties and counsel get together and meet to discuss, dialogue and resolve. In order for this to be effective the parties must come to the table with good faith. In some cases where emotions are running high but there still appears to be enough common ground to move matters towards settlement, counsel may choose a shuttle four way process where one party and their lawyer are in one room and the other party and lawyer are in another and the lawyers shuttle between the rooms assisting with the dialogue and exchange of information. Although to some lawyers, this seems at first blush to be awkward, it can be extraordinarily effective given that the parties are in close proximity and communication remains open and timely and progressive. Further, the emotional component is lessened impeding the escalation of conflict between the parties which often leads to stalemating and regression in cases where emotional volatility is a strong factor.

Collaborative Law

Collaborative Law is an integrated cross-disciplinary system for problem-solving in a divorce situation. The lawyers coordinate their work with other collaborative professionals who specialize in addressing emotional and financial problems of divorce. Other professionals used include communication coaches, financial planners, psychologists, child specialists, etc. Everyone works together as a team, seeking to de-escalate conflict and to help the couple or family restructure. Collaborative law encourages and in fact mandates that the process be transparent or open and full disclosure between the parties in order that the parties may fairly, reasonably and fully negotiate a successful, good faith resolution. Each lawyer is independent from the other and represents only one party in the process. No one is allowed to use threats of abandoning the process or resorting to litigation as a way of forcing settlement. In the event, that either party chooses to withdraw from the process and resort to litigation each of the lawyers must withdraw and cannot continue to act in the litigation process. To be clear, neither of the lawyers can ever represent the party who retained them in a Court in a proceeding against the other Party.

Each of the parties with the lawyers sign a binding agreement defining the scope and sole purpose of the lawyers' representation: to help the parties reach an agreement that meets the needs of the parties using creative problem solving, conflict resolution techniques and good faith negotiation.

There are a number of collaborative lawyers in Manitoba including Audra Bayer and Shannon Breckman of our firm.