

DISPUTE RESOLUTION MECHANISMS IN CUSTODY AND ACCESS

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1. Introduction

- Conflict is present in all human relationships and societies
- The pervasive nature of conflict and the physical emotional and resource costs associated with conflict ensure that people are always trying to develop procedures to resolve it
- Central for most clients is the avoidance of the battle and the securing of a peaceful resolution.
- Clients with family law problems, particularly divorce, know how catastrophic the aftermath of contested litigation can be on their inner peace and the harmony in their relationships with family and friends. Everyone has seen the horrors of "nasty divorces."
- Rational people when functioning at their best would agree that it is best to avoid a war in family matters. They know everyone ends up a loser, especially the children.
- It is almost trite to say that children exposed to high levels of interparental conflict are at higher risk for developing a range of emotional and behavioural problems both during childhood and later in life. Many of the adverse effects attributed to divorce can be traced to conflict rather than parental separation per se.
- A family law client's first instinct is often to decimate the other spouse and to get out of the marriage. The lawyer or mental health professional dealing with such clients has to deal with the misconceptions of what can and cannot, what should and should not be a goal. Reframing is important as, ideally, we want the client to have six main objectives in hiring a family lawyer:
 - 1) that the divorce be as amicable as possible;
 - 2) that the first priority always be the parties' child and his best interest;
 - 3) that the outcome be fair and just to both sides;
 - 4) that the high level of emotions be managed in an appropriate manner;
 - 5) that both sides be represented by competent advocates; and
 - 6) that speed of resolution be attempted.

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- As Dr. Howard Irving has expressed it, you do not get **divorced from** someone, but rather you get **divorced to** each other. By engaging in an ADR process in custody and access cases, we provide clients with the unique opportunity to consciously decide how they, as ex-spouses, will relate to each other as parents in the future. Many believe that the key to healthy children post divorce is a collaborative post-divorce relationship.
- Conflicts spawned by the end of a spousal relationship have several characteristics which are strong indicators that a collaborative resolution procedure is in order:
 - The disputants' relationship will not end once a settlement is reached. The end of the spousal relationship does not end the parental relationship. It is not only the substantive settlement to the dispute that is important but the precedent that is set for future relations.
 - As long as the child is a minor, and probably well beyond that time, some ongoing interactions between the parents are necessary.
 - There is significant mutuality of interest among the disputants. At the very least, parents have one very large shared interest: the children. While they may occasionally lose sight of this or have very different interpretations of what constitutes the children's best interests, parents do share concern for their children's well being. This is a very significant area of mutual interest. Their "common concern" is a trump card, which the mediator plays over and over in managing the parents' negotiations.
 - The parties have leverage over each other and need each other's cooperation. At a minimum, each can make the life of the other miserable and can cause emotional and financial problems by not cooperating.
 - There is a long and tragic history of lose-lose solutions to divorce conflicts. On the positive side, parents can provide a considerable amount of assistance and back-up to each other. They can reinforce each other's parenting role and practices, provide back-up child care, share in the practical logistics of child rearing which, without co-operation and dialogue can be a nightmare, particularly for the child: things like moving a child's athletic equipment between homes ("where are my tennis shoes? my hockey stick? my bathing cap?"), ensuring homework is completed, doctors appointments scheduled and attended, and providing consultation with each other about problems that may arise.
 - The issues that need to be settled go beyond questions that can be resolved by reference to legal standards. There are no good criteria for deciding how to arrange for a car-pool to nursery school or the appropriate age for a young lady to date, etc...

- A better deal is not necessarily available through adversarial proceedings. Family law is not so cut and dry that an accurate, clear and consistent prediction can be made as to the outcome of a judicial procedure. This uncertainty is a powerful motivation of divorcing families to settle out of court. Furthermore, a substantive victory may turn quickly into a defeat due to the ability of each parent to sabotage any court-imposed settlement.
- The issues involved in divorce or post-divorce proceedings are generally negotiable. There are circumstances when conflict is not negotiable but, for the most part, matters that divorcing couples must settle are not so complicated or intractable that the parties themselves cannot handle them. Often parents present an issue as an either/or proposition but it is not actually that way at all. It becomes a lawyer or mediator or other third party's task to find a more flexible formulation to allow for collaborative problem-solving.

2. How To Reach A Mutually Acceptable Agreement?

- Many options are available: Negotiation, Litigation, Mediation, Arbitration, Litigation, Etc....
- Placed on a continuum from least to greatest amount of outside intrusion into the family
- Negotiation:
 - bargaining relationship between parties who have a perceived or actual conflict of interest.
 - participants voluntarily join in a temporary relationship designed to educate each other about their needs and interest, to exchange specific resources or to resolve less tangible issues such as the form of their relationship or the procedure by which problems are to be solved
- Mediation:
 - an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited or no authoritative decision-making power
 - mediator assists the principal parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute
 - mediation leaves the decision-making power primarily in the hands of the people in conflict
 - for the most part mediation is a voluntary process in that the participants must be willing to accept the assistance of the

intervener if he or she is to help them manage or resolve their differences

- usually initiated when the parties no longer believe that they can handle the conflict on their own and when the only means of resolution appears to involve impartial third party assistance

- Arbitration:
 - generic term for a voluntary process in which people in conflict request the assistance of an impartial and neutral third party to make a decision for them regarding contested issues
 - outcome of the decision may either be advisory or binding
 - may be conducted by one person or a panel of third parties but the critical factor is that they are outside of the conflict relationship
- “Litigotiation”:
 - term coined by Marc Galanter
 - the strategic pursuit of settlement by using the court process
 - process in which lawyers expect to settle by using litigation to gain strategic advantage in negotiation
- Litigation/Judicial approach:
 - involves the intervention of an institutionalized and socially recognized authority in a dispute.
 - shifts the resolution process from private domain to the public.
 - lawyers act as advocates for clients and the case is argued before an impartial and neutral third party – a judge.
 - decision makers take into consideration not only the disputant’s concerns, interests, and arguments, but also the broader society’s standards and values. The judge is usually required to make a decision based on and in conformity with case law and legal statutes.
 - disputants lose control of the outcome but may gain by forceful advocacy of their point of view and by a decision that reflects socially sanctioned norms.
- Collaborative Law:
 - Within the broader judicial framework, but the important difference between Collaborative Practice and conventional litigation is the commitment to reach an agreement without going to court. In collaborative law, parties agree not to seek court intervention by committing to stay in the negotiation process and focus on settlement by design from the outset.

- Collaborative lawyers help resolve disputes without resorting to adversarial techniques or tactics.
- Try to understand concerns of both parties, and help them achieve win - win solutions for them and their family
- Collaborative process in the family law context presupposes two clients who want to (i) resolve their family issues themselves, mutually and privately; (ii) retain control of the process and decision-making; and (iii) preserve key relationships, with the guidance of competent counsel.
- The clients and lawyers enter into a collaborative law participation agreement that states that should a judicial decision or coercive enforcement be sought by either side, both lawyers will withdraw and the clients may retain new advocates to proceed to a court hearing.
- Once the participation agreement is executed, the parties and counsel embark on an informal and cooperative discovery process that supports informed interest-based negotiation at a series of four-way meetings until all issues are resolved.

Parenting Co-Ordination:

- PC is a post parenting plan service for high conflict families.
- Provides intensive case management for highly conflicted parents.
- Fills the void of the supports that were in place for these parents while the lawyers were still involved.
- Generally agreed to on consent and arising from a recommendation in an assessment, mediation or negotiation of counsel.
- Parents agree to a specified term of service and sign a PC agreement.
- “Hybrid role” a blending of legal and mental health functions.
- Assists in implementation, maintenance and compliance of the parenting plan.
- PC is not a therapist, but a conflict manager and problem solver, whose goal is not to change personalities but to obtain agreement between the parents about any child related issues in the context of the existing arrangements.
- If agreement cannot be reached, the PC has the authority to make binding decisions within a limited scope, the extent of which is outlined in the PC contract.
- PC cannot make decisions regarding change in geographic location, any changes to the permanent residential schedule that substantially reduces or expands parenting time, or changes to the substantive decision-making regime. In addition, the parenting coordinator does not arbitrate financial issues such as property or support.

- Goals are to improve parental communication, develop parents' problem solving skills, and educate parents about child development, effects of conflict, and effects of separation/divorce.
- Reduces chronic litigation, reliance on courts (preserve resources).

3. How Do You Choose One Process Over Another?

**When to enter into mediation, mediation/arbitration or collaborative law?
What criteria should we use to choose between them?**

- Actually giving parties the choice between various procedures for resolving their disputes advances the fundamental values of ADR:
 - allows users to tailor the process to the matters at issue, preferences and interests; and
 - honours the disputant's role in making choices about their own disputes, allows self-determination
- Informed consent key for parties to truly choose an appropriate dispute resolution process.
- Clients must understand their own capabilities, attitudes about professional services, assess risks and benefits of various processes
- Professionals must always consider domestic violence, power imbalances and their impact in the client and his/her ability to function in a particular process. Sometimes the fact of DV could mean that a particular method of dispute resolution is not appropriate.
- Mediation appropriate if:
 - Parties capable of negotiating for themselves with/without lawyers present, able to assert their interests well and/or lawyer can participate in mediation
 - If parties want neutral professionals skilled in managing conflict to manage the process, can afford some professional assistance, but want to maximize their own decision-making and want to take the lead in managing the negotiation process
 - Low risk that parties will try to take advantage of each other – although open and closed mediation are different in this regard
 - Closed mediation: negotiations are confidential, meaning that, in a legal sense, whatever is said and whatever offers are made cannot later be used against them in court or arbitration proceedings if negotiations fail. Nothing said or done during the process can be

brought to the court, nor can the mediator be summonsed to court to talk about the process or what happened.

- Open mediation: distinction between open and closed mediation relates to disclosure to the legal process during mediation. There are no clear guidelines as to what can or cannot be disclosed about the mediation process if open mediation is chosen. In some cases, open mediation means no more than the mediator reporting to the court whether there was a settlement or not and no more BUT in other cases, mediators may report much more about the process and its results. If a client chooses open mediation, there must be a contract specifying what can and what cannot be disclosed about the legal process during mediation.
 - If they have lawyers, they want to be able to keep them if there is contested litigation
 - Might go into a mediation with a collaborative minded lawyer i.e. may need legal advice and problem solving assistance during the mediation
 - Parties want a procedure that is now the subject of well developed norms of practice and studied extensively
 - A party may need the threat of litigation to motivate them to act reasonably: if cannot settle in mediations, what happens? Court or arbitration.
 - Parties prefer to avoid litigation but are willing to use it if needed to protect their interests. Parties wary of settlement pressure and willing to risk greater litigation pressure.
- Arbitration appropriate if:
 - Parties seeking greater control, privacy and cost saving
 - Clients have large degree of direction over process i.e. how process is structured, who arbitrates, appeal process, terms and procedures
 - Must have ILA on arbitration agreement: since mandatory ILA, most clients have counsel throughout
 - Generally not the first choice if clients want to learn how to negotiate or deal with each other on an ongoing basis, if you want the clients to learn how to make their own decisions
 - To large extent can set finality of awards. Unlike traditional litigation, parties can decide at the outset to limit appeal. Before recent amendments, parties could contract out of rights to appeal. Now, parties can contract out of appellate review on question of fact or a mixed question of fact and law, but right of appeal on a question of law is mandatory. Regardless, by limiting areas of appellate review, parties can increase likelihood of finality of the arbitral award. In the case of appellate review on questions of law, the Court grants the arbitrator a high degree of deference and is also loath to invoke its *parens patriae* jurisdiction.

- Both parties have to agree to arbitration and sign an arbitration agreement, which now qualifies as a domestic contract. Arbitration Agreement must be in writing, signed by parties and witnessed.
 - DV screening must take place.
 - If parties choose to oust the court by agreeing to binding arbitration and they sign an agreement which is valid, they will be forced to remain in arbitration. In fact, the arbitration can continue even if one party later changes his/her mind and no longer wants to arbitrate but wants recourse to the courts instead.
- Mediation/arbitration:
 - Hybrid process
 - Process begins as mediation. If and when an impasse is reached, the mediation terminates and the arbitration commences.
 - Some feel that, in pure mediation, parties may be freer to discuss their needs and limitations, knowing that their discussions are confidential and privileged. Mediator does not really have to assess what is actually going on, whether appearances are accurate reflections of what is going on in the family because the parties and not the mediator make the final decisions.
 - Parties in med/arb may be less likely to be frank in the mediation part of the process as they fear arbitrator could use it against them if no agreement is reached.
 - More streamlined and cost-efficient than court
 - Can choose experienced and knowledgeable decision maker
 - Need be very clear what role is being played at a particular time and a clear delineation between the 2 processes must exist.
- Collaborative law is appropriate if:
 - Parties want or need lawyers to participate directly in the negotiations
 - Parties and lawyers are able to see the bigger picture, go beyond “winning” for client to a process orientated analysis
 - Parties are willing to engage in an innovative procedure, new and not well researched or documented, still being developed and kinks being worked out.
 - Risk inherent in collaborative law is the increased cost of hiring new lawyers if the process fails. Parties and counsel sign on to a disqualification agreement; hence there is increased pressure to settle.
 - Have to be willing to risk losing your lawyer. Parties must be able to afford to pay collaborative lawyer and, possibly, a new litigation lawyer too.
 - Collaborative law is appropriate if a party does not need the threat of litigation to motivate them to act reasonably.

- Parties in collaborative law strongly prefer to avoid litigation and are willing to use it only as a last resort.
- Parties wary of settlement pressure and willing to risk greater litigation pressure.
- Traditional litigation is appropriate if:
 - Parties want their “day in court”.
 - More comfortable with a traditional process, well tested, much more black and white.
 - Extremely high conflict cases might have to be litigated
 - If parties have demonstrated an unwillingness to abide by agreements or court orders, litigation may be the only option
 - Parties want lawyers to take primary responsibility for negotiation and even outcome to a certain extent.
 - Preserve ready access to litigation instead of being bound by collaborative process.
 - Parties are willing or able to pay for substantial professional services.
 - Parties may choose litigation if there is a significant risk that one party would try to take advantage of another.
 - A party may need the threat of litigation to motivate them or the other party to act reasonably.
 - Parties prefer to avoid litigation but are prepared to use it if needed to protect their interests.
 - Parties wary of settlement pressure and willing to risk greater litigation pressure.
- Parenting Co-ordination:
 - Must have an existing parenting plan in place, either through court order or Minutes of Settlement.
 - Reserved for those families who have experienced a long-standing and continuing pattern of conflict.
 - Other processes have failed to assist them in resolving their continued conflict.
 - They have exhausted resources such as numerous lawyers, therapists, child welfare, etc.
 - For those parents who seem to come up with “one last issue” every time the negotiations are near completion.
 - For those parents who have difficulty agreeing on the simplest of issues and require a PC to assist them to navigate the day-to day details of parenting.
 - PC’s role is to assist with the implementation, maintenance and monitoring of the existing parenting plan, court order, or Minutes of Settlement
 - For young children, PC can monitor and/or implement assessment recommendations that include a gradual increase in

- parenting time.
- Effective as a monitoring function when parents have concerns about the other parent, such as behavioural concerns, worry about the misuse of alcohol or drugs or concern about the parent's mental health.
- Some debate about the appropriateness of PC with families who have experienced domestic violence. May perform a purely monitoring and enforcement function.
- PC is NOT appropriate for:
 - people who have a history of non-compliance
 - cases of sole legal custody (physical and legal) where normalization of contact not an option,
 - most cases of incompetence due to mental illness, Incarceration, ongoing maltreatment concerns although may provide a monitoring function.

4. Mediation/Arbitration: A Hybrid Process

- Mediation/arbitration is a hybrid process and a relatively new phenomenon. It has strong supporters and objectors.
- Process begins as a mediation. If and when an impasse is reached, the mediation terminates and the arbitration commences.
- Informal surveys consider 90% of med/arb cases to settle in the mediation phase. The threat of the arbitration, then, appears to be a very effective means of encouraging compromise and, ultimately, settlement.
- *Marchese v Marchese* [2007] CarswellOnt 248 (Ont CA)
 - The Ontario Court of Appeal clearly sanctioned mediation/arbitration as a valid and well-recognized dispute resolution alternative:

We do not agree with the submission that there is any ambiguity in the words "mediation/arbitration" or that those words mean "mediation or arbitration." Mediation/ arbitration is a well-recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration. (paragraph 4)

- In *Marchese*, the parties signed a written consent including a clause that they "shall attend for mediation/arbitration. regarding all issues in the action." A consent order issued, adjourning the matter and requiring the parties to attend mediation/arbitration.

- After the initial meeting, it became clear that mediation would be unsuccessful. The husband refused to proceed to arbitration, stating that there was ambiguity in the term mediation/arbitration and, therefore, no agreement to actually arbitrate as separate from mediate.
 - Husband brought matter back before the Court. Motion judge stayed the proceedings pursuant to Section 7 of the *Arbitration Act*.
 - The appeal was dismissed. The Court was quite clear that there was no ambiguity in the term mediation/arbitration. It was a well-recognized term of art in which “the named individual acts first as a mediator and failing agreement then proceeds to conduct an arbitration”. As such, motion judge did not err in rejecting the contention that there was no agreement to arbitrate.
 - The very nature of a mediation/arbitration agreement is easily reconciled with Section 35 of the *Arbitration Act*, which prevents an arbitrator from conducting any part of the arbitration as mediation. The parties had tried mediation and it failed. Hence, the mediation/arbitration agreement meant that there was an agreement to then proceed to arbitration.
- Despite the above, commentators do question whether mediation/arbitration can work: Mediator meant to focus on the interests of the parties and assist them in coming to a settlement that works for them, which does not necessarily jibe with the legal or statutory means of deciding the issue or framing each party’s rights and obligations. Arbitrator, conversely, must be fair and impartial and decide the issue on the evidence before him/her and in accordance with the law.
 - Is it a benefit to have the same person act as both the mediator and the arbitrator if the dispute cannot be resolved? Or is the process tainted if the person who tried to mediate and reach a collaborative settlement is then required to make a quasi-judicial finding?
 - Do you sacrifice certain skills to secure other talents? If you want a talented mediator, will this person also necessarily be a skilled arbitrator? In custody and access cases parties may want a mental health professional to mediate but is that same person the best placed individual to arbitrate? Is the skill set the same if a person chooses a decision maker qualified in family law and arbitration, does that imply the mental health knowledge for custody and access? Isn’t the decision to retain a lawyer or mental health professional intentional ie: know you want something different. “I’m not a lawyer so I’m not going to do this the way a lawyer would.”

- Select an experienced member of the family law bar as arbitrator results in a specialized decision-maker. In Court, litigants get the luck of the draw with respect to the judge sitting that day and whatever amount of family law experience and knowledge they have.
- Is the arbitrator who previously mediated able to make a decision in a neutral fashion, particularly if he or she has been privy to the settlement positions of the parties? On the legal scale, one might say no. But this is an alternative dispute resolution process, maybe in this case the information gleaned by the arbitrator allows him/her to make a better decision in the best interests of the child.
- Query: Are arbitrators, if properly trained, like judges are also able to ignore evidence and disregard matters that are not relevant including what took place during the mediation process if they are called upon to arbitrate. What about example of caucusing. Can the arbitrator really forget? Maybe mental health professionals are better able to do this, since they have training and experience to recognize their biases and to keep them out of the process.
- Concern that parties may use mediation process unfairly, and simply treat it as an opportunity to persuade the mediator of their view in the hopes of influencing the final arbitral award.
- Some parties believe mediation/arbitration a better process for exactly the same reason others are concerned about bias: the parties have developed a relationship with the mediator in the mediation process and want that person to arbitrate.
- A main reason why clients would choose a mental health mediator/arbitrator is for their skills with children. For example, client may trust that person to interview the children as they are qualified to do so – but then, if proceeds to arbitration, could be in the position of having collected evidence and being a witness.
- Arbitration process must be transparent.
- Concerns about a consensual process becoming a binding one. (See *Hercus*)
- Arbitration awards coming out of a mediation/arbitration process are most often challenged on two bases: failure to separate the two processes or violation of the rules of natural justice.
 - A failure to separate the mediation and the arbitration process;

- There needs to be a clear delineation between the mediation and the arbitration process. This line is normally quite evident in the case of a mediation being terminated and the parties moving to arbitration.
 - The question of an interim award blurs the line quite significantly. Parties, for example, request a mediator/arbitrator to make an interim ruling, on a parenting schedule pending a final result. The mediator/arbitrator needs to clearly set out the process for interim rulings in advance. Both parties must consent to the arbitrator making a temporary order, which implies stopping the mediation on that point and being authorized to make a decision on whatever evidence has already been heard/presented.
 - Interim ruling process should be set out in writing.
 - What about taking a break midway into arbitration to go back to mediation? Like mid-trial settlement conference but there a different judge does it. Can arbitrator do it or does it taint that person?
- o Violation of the rules of natural justice.
 - What do the rules of natural justice look like in the arbitration context?
 - Each party must be treated fairly and equally
 - Parties must have adequate notice of time and place of hearing
 - Each party must be allowed to give evidence and cross-examine
 - Each party must be allowed to make submissions and respond to the other party's submissions
 - The hearing can be conducted in writing or in the presence of both parties, but if one party wants live hearing, it must take place.
 - The process followed must ensure that both parties clearly know the case to be met
- Who arbitrates? A mental health professional or lawyer?
 - o Many people are inclined to retain mental health professionals as mediator/arbitrator in the case of children's issues. However, while these people have vast experience in mental health and can contribute a great deal with respect to parenting issues, they may or may not have mediation training and they may or may not have any arbitration training.

- Mental health professional may be ill equipped to handle the legal framework of arbitration and, in particular, the procedural fairness requirements that have to form part of the arbitration process. See *Statutory Powers Procedure Act*.
- *Kainz v. Potter* [2006] CarswellOnt. 3703 (Ontario S.C.J.)
 - Parties entered into a separation agreement which provided that if there were any disputes about their children, they would resolve them by arbitration with a named arbitrator, who was a psychologist.
 - Mother argued that the psychologist failed to conduct the arbitration in accordance with the requirements of equality and fairness as required by section 19 of the *Arbitration Act*.
 - The Court acknowledged that parties have a right to choose an alternative dispute resolution process and, specifically, that the parties in this case had the right to have custody and access disputes resolved by arbitration. Neither party argued that the arbitration agreement should be abandoned in favour of the Courts deciding the issue. However, Mother took exception to the way in which the psychologist had conducted the arbitration.
 - The Court held that contracting out of a Court proceeding does not allow the arbitrator free reign. Rather, arbitrators must adhere to standards of natural justice and, if they do not, the parties may be able to overturn the arbitrator's ruling and restart the process.
 - The Court found that, having chosen a psychologist as an arbitrator, the psychologist could not be held to the standard of a legally trained person who would be expected to know how to conduct a proper hearing. However, the fact that a psychologist is not a lawyer does not give that non-lawyer right to conduct an arbitration that was simply not fair.
 - In this case, Mother was not represented at the hearing. Father had experienced family law counsel who took over the proceeding. The hearing was filled with procedural and evidentiary flaws: references to materials that were not put before the arbitrator; Father and his counsel both questioning witnesses; Father's counsel interfering with Mother on her examination; Father's counsel repeatedly criticizing the way Mother was conducting herself at the arbitration on the record; allowing leading questions to be asked in examination in chief; admitting hearsay evidence in an unlimited fashion; allowing questioning in periphery areas; etc.

- The Court reached the clear conclusion, upon reading the transcript, that the hearing was not fair to Mother.
- The Court set aside the arbitrator's award and set a new arbitration before a different arbitrator.
- The Court did not take jurisdiction over the matter but, rather, required the parties to go back to arbitration, thereby endorsing the parties' decision to keep their disputes out of the Courts and within an ADR process.

- The arbitrator's lack of legal training and training on how to properly conduct an arbitration was a significant problem in this case. Consider whether it is appropriate for non-legal arbitrators to co-arbitrate with lawyers or to have the assistance of a legally trained neutral consultant who can assist them in the process. Otherwise, such arbitrations may violate section 19 of the *Arbitrations Act*.

- *Acimovic v. Acimovic* [2006] CarswellOnt 6228 (Ont. S.C.J.)
 - Parties had one young autistic child with special needs. They entered into a consent order which provided that they would participate in open mediation with a family therapist and, if mediation was not successful, the same family therapist would arbitrate all the issues surrounding custody and access to the child.
 - Mediation resulted in a parenting plan on consent. There were parts of the parenting plan that the parties could not agree to so family therapist was required to arbitrate.
 - Arbitration award was released in October, 2005. Mother moved to set aside the award in May of 2006 - well beyond the 30-day appeal period set out in the *Arbitration Act*.
 - Mother argued that family therapist acting as arbitrator was biased, acted inappropriately and that the Court had *parens patriae* jurisdiction which it should invoke to set aside the arbitration award.

 - Court did not find that Mother's allegation had any substance. It was significant to the Court that Mother had waited a year to raise her complaints, which they felt was inconsistent with her allegations of bias.
 - The Court declined to exercise its *parens patriae* jurisdiction. The *parens patriae* jurisdiction is usually used in custody cases if there is a gap in the legislation. There was no gap in the *Arbitration Act* and no fault was found with the process.
 - Where the parties chose mediation/arbitration, the Court held it should not substitute its view, particularly, where there is no

evidence on a balance of probabilities, that family therapist acting as arbitrator violated any of the provisions of the *Arbitration Act*.

- It appears from the decision that Mother's allegations would have had much more weight had she withdrawn from the arbitration process and/or launched her appeal immediately. However, Mother waited a year.
- Limitation periods under the *Arbitration Act* are statutory. If a party to a mediation/arbitration agreement determines that the process is biased or is outside of the terms delineated by the *Arbitration Act*, they must act immediately in bringing the matter to the Court's attention. Mother had waited seven months to challenge the decision and had never challenged the arbitrator's qualifications under the *Arbitration Act* at the time of the arbitration itself or when the arbitrator was chosen.
- *Shoval v. Shoval* [2005] CarswellOnt 2383 (Ont. S.C.J.)
 - Decision in this case is a bit of a puzzle.
 - Father moved to incorporate an arbitration award into a Court order, as provided under the *Arbitration Act*. Mother objected, stating that the Court and the arbitrator no longer had jurisdiction as she and the child had moved to Israel.
 - Mother had agreed to submit custody and access disputes to arbitration, which included the issues of (i) whether Mother had the right to refuse to send the child back to Ontario to visit with Father and (ii) whether Mother could block Father's access based on allegations of physical and sexual abuse.
 - The co-arbitrators, Philip Epstein and Joyce Epstein, decided that the abuse allegations were groundless.
 - The Court took jurisdiction of the matter and incorporated the arbitration award into a Court order, holding that the parties intended the arbitrators to retain jurisdiction in spite of the move. This fact was also relied on by the judge to allow the Court to retain jurisdiction – a position that seems inconsistent. Did the parties not exclude the court by retaining the jurisdiction of the arbitrator? (Note: since the child was no longer habitually resident in Ontario, it is questionable whether the Court could have jurisdiction in any event, whether or not the parties granted it).
 - The Court found that it had the jurisdiction to make an order under the *Children's Law Reform Act* since, under the Separation Agreement, the parties had intended that mediator/arbitrator retain jurisdiction and, hence, the Ontario Superior Court of Justice was to continue to have jurisdiction, even after the child was moved to Israel with Mother.

- The Court held that section 50 (3) of the *Arbitration Act* obligates the Court to incorporate the arbitration award into an order unless: (i) the 30 day period for commencing such an appeal or application is not yet elapsed, ii) there is a pending appeal or application to set aside the award or iii) the award has been set aside or declared invalid.
 - The Court declined to exercise *parens patriae* jurisdiction with respect to best interests as it held that the arbitration award adequately protected the child and took his safety into account by suspending Father's access until a child protection report was presented.
- Ways around problem of having mental health professional conducting arbitrations who has no arbitration training:
 - Have two arbitrators, one being a lawyer and one being a mental health professional
 - Allow a mental health professional acting as arbitrator to have a lawyer present with respect to procedural objections or to have the lawyer to consult with on procedural matters and matters relating to the *Arbitrations Act*.
 - Arbitrations are expected to have the traditional format of a civil trial in that parties will testify and be cross-examined and a neutral third party being the arbitrator will make a decision. Mental health professional must know appropriate process, evidentiary rules, etc...
- *Parens patriae* jurisdiction:
 - Pursuant to Section 56 of *Family Law Act*, the Court may disregard any provisions of a family arbitration agreement respecting the education, moral training, support of, custody of, or access to a child where, in the opinion of the Court, to do so is in the best interests of the children.
 - This is the Court's inherent *parens patriae* jurisdiction, which is normally exercised where there is a gap in the legislation or in the case of judicial review.
 - Parties to an arbitration cannot contract out of the Court's *parens patriae* jurisdiction. Hence, technically, a Court could always intervene on a *parens patriae* basis although, as an arbitrator in family law arbitration, the decision maker should be making decisions in accordance with the children's best interests in any event. In *Shoval* and *Acimovic*, for example, the Court declined to exercise its *parens patriae* jurisdiction, finding the arbitrator considered the best interests of the child.

- Courts do have the inherent jurisdiction to ensure arbitration awards are in the best interests of children. It is clear from the case law, however, that Courts will not intervene hastily where they find the arbitrator made his or her decision in accordance with the children's best interests.
- Case law has show that arbitrators are to be given a high standard of deference and that Courts should not interfere with an arbitrator's award unless it is satisfied that the arbitrator acted on the basis of a wrong principle, disregarded material evidence or misapprehended the evidence. *Robinson v. Robinson* [2000] O.J. 3299 (Ont S.C.J.)
- Parties cannot contract out of Section 46 of the *Arbitration Act* which allows the Court to set aside an arbitration award in certain listed circumstances:
 - The party entered into the arbitration agreement while under a legal incapacity;
 - The arbitration agreement is invalid or has ceased to exist;
 - The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;
 - The composition of the tribunal was not in accordance with the arbitration agreement or if the arbitration agreement did not deal with that matter, was not in accordance with the *Arbitration Act*;
 - The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law;
 - One of the parties was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of the arbitrator;
 - Procedures followed in the arbitration did not comply with the *Arbitration Act*;
 - Arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;
 - The order was obtained by fraud; or
 - The award is a family arbitration award that is not enforceable under *Family Law Act*.
- If the Court sets aside an award, it may remove the arbitrator and give directions about the conduct of the arbitration. Alternatively, the Court may decline to set aside an award, remit it back to the arbitrator but give directions about the conduct of the arbitration.