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Alternative Dispute Resolution

December 2019

Roxana Parsa, Program Lawyer, METRAC
Paula McGirr, Senior Barrister and Solicitor, Legal Aid Ontario

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CLEO

Community Legal Education Ontario
Éducation juridique communautaire Ontario



About our Presenters



Roxana Parsa is the Program Lawyer at METRAC's Community Justice Program, which provides legal education and information related to gender-based violence, equality and access to justice, in areas of family, immigration, criminal, employment and human rights law. She previously worked as a refugee and immigration lawyer in private practice, as well as in Aboriginal and human rights litigation at the Ministry of the Attorney General.



Paula McGirr is Senior Barrister and Solicitor at Legal Aid Ontario. She has been practicing exclusively family law since 1990, with a focus on the most difficult family law cases, including representing individuals who are survivors of partner abuse. Her practice encompasses both domestic and child welfare matters, at every court level from the Ontario Court of Justice to the Court of Appeal of Ontario. Ms. McGirr is an Adjunct Professor of Law at Osgoode Hall Law School, where she teaches an upper year law course in child protection law. She frequently instructs at other professional programs, such as the Intensive Child Welfare Institute and Legal Aid Ontario's continuing legal education programs. Ms. McGirr is also a member of the 47 Sheppard Court Education Committee, the 311 Jarvis Court Education Committee and the North York Family Court Bench and Bar Executive.

This webinar will be facilitated by Fiona MacCool, CLEO's Digital Projects Manager. Fiona manages web projects for CLEO including the Steps to Justice website, and formerly, the Your Legal Rights site. She also facilitates CLEO webinars, manages live chat services and is in charge of social media for the organization.



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METRAC

METRAC, the **Metropolitan Action Committee on Violence Against Women and Children**

- works to end violence against women, youth and children
- a not-for-profit, community-based organization

www.metrac.org

METRAC's **Community Justice Program**

- provides accessible legal information and education for women and service providers
- focuses on law that affects women, from diverse backgrounds, especially those experiencing violence or abuse

FLEW, **Family Law Education for Women** in Ontario

- provides information on women's rights and options under Ontario family law
- in 14 languages, accessible formats, online and in print

www.onefamilylaw.ca

www.undroitdefamille.ca

Presenters

Roxana Parsa

Program Lawyer, METRAC



Paula McGirr

Senior Barrister and Solicitor, Legal Aid
Ontario



Topics to be Covered

1. Introduction to Alternative Dispute Resolution
2. Mediation
3. Arbitration
4. Family Group Conference
5. Choosing ADR: What to Consider
6. What to Expect at a Mediation

Information is accurate as of December 6, 2019.



Introduction to Alternative Dispute Resolution

What is Alternative Dispute Resolution?

- **Alternative Dispute Resolution (ADR)**
 - Refers to processes where the parties can solve the problem without a judge making a decision.
 - Popular in domestic family law matters, including custody, access, child support, spousal support, child protection.

What is Alternative Dispute Resolution?

- **Why choose ADR?**
 - Avoids having to go to court
 - Less formal process
 - Can give parties more control over the process and outcome
 - Can be cheaper than going to court

Deciding if ADR is right will depend on the specific facts of the situation.

What is Alternative Dispute Resolution?

- **Different types of ADR:**
 - **Mediation**
 - **Arbitration**
 - **Family Group Conferences**



Mediation

What is Mediation?

Mediation is the most common form of ADR.

- A **confidential** process where a third party helps the couple discuss concerns, develop underlying issues, share information and create solutions when possible.
- The third party is called a **mediator**.

Role of the Mediator

- Mediator meets with the parties to facilitate discussions and try to come to a settlement.
 - Parties may or may not have lawyers represent them.
- In family law and child protection, most mediators are lawyers. Sometimes they might be social workers as well.
 - Better to have a lawyer mediator so that they are aware of the law and can make sure the agreement follows the law.
 - However, **mediator does not give legal advice.**

Role of the Mediator

- Mediator is **neutral**. This means the mediator does not “take sides”.
- Mediator cannot make decisions over any party and cannot bind them to an agreement.
- Mediator helps to “shine a light” on areas the parties might have in common to reach an agreement.
- **Compromise** is necessary to mediation.

Types of Mediation

Mediation can be **open** or **closed**.

➤ **Open mediation**

- Anything discussed can be used later in a court by either party

➤ **Closed mediation**

- All discussions are “without prejudice” for the purpose of settlement. This means the information cannot be used again in court.
- Mediator will not have to testify at a trial.

Family law and child protection mediations are usually closed.



Arbitration

What is Arbitration?

- **Arbitrator** meets with parties and their lawyers to discuss issues and help come to a decision.
- Arbitrator begins as a neutral third party, but at the end must **make a decision** about the issues.
 - Many people choose arbitration to get a decision while avoiding the high costs of litigation.
- Not used in child protection cases.

What is Arbitration?

- The arbitrator must be **independent**.
- This means they have no relationship with either party.
- Will take a position after hearing both sides.

Types of Arbitration

Decisions (“arbitral awards”) are **binding** or **non-binding**.

- **Binding:** same force and effect as a court decision made by a judge.
 - Usually cannot appeal this decision, unless the arbitrator has not followed due process or complied with principles of natural justice.
- **Non-Binding:** can be appealed by parties to a court in a “Judicial Review”.

Types of Arbitration

- **Must decide before starting the arbitration whether it will be binding or non-binding.**
 - In most cases, people decide for binding arbitration.



Family Group Conference

What is a Family Group Conference?

- A form of ADR that is used in **child protection cases.**
- Facilitated by a neutral third party called the **facilitator.**
 - Facilitator does not take anyone's side or make a decision.

What is a Family Group Conference?

- **If a child is or may be in need of protection, CAS shall consider** whether a form of alternative dispute resolution could help solve any issues related to the child's care

- This is a mandatory requirement under the *Child, Youth and Family Services Act*

What is a Family Group Conference?

- A **Family Group Conference** (FGC) can include more than just the two parties:
 - Includes extended family members who have an interest in the welfare of the children and who might be able to care for them (“**kin**”)
 - Any friends of family who might be able to take care of children (“**kith**”)

if they cannot be returned to the parents because it would put the children at risk.

What is a Family Group Conference?

- Parents can decide who to include in the FGC. **Parents' lawyers do not attend.**
- **Social workers** from Children's Aid Society who are working with the family are also included in the FGC
 - **Family Services Worker**
 - **Children's Service Worker**
 - **Kin Services Worker**
- If children are older, they often attend. **If child has been appointed a lawyer, that lawyer will attend.**

What is a Family Group Conference?

- FGC takes place with everyone in a large room.
 - Separate rooms are set aside for each family and CAS participants. They can separate to discuss issues privately (“caucusing”).
- After everyone meets, families meet without CAS or Facilitator to come up with a plan for care of the children.
- Plan is then presented to CAS and Facilitator. The Facilitator writes a summary of the plan for everyone.

What is a Family Group Conference?

The CAS does not have to accept the plan.

- They may want to add or change some of the proposals.
- If parties and family agree, then plan can be modified for CAS changes.
- If parties don't follow the plan, CAS can also change their mind later about supporting the plan.

If CAS is in court with the family, a **judge** must sign off on the plan.

If CAS is working voluntarily with the family, they can choose to agree or not.

Questions? Presenters

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Program Lawyer, METRAC



Paula McGirr
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Ontario





Choosing Alternative Dispute Resolution: What to Consider

Choosing a Mediator

- Look at whether the mediator is a member of the **Ontario Association of Family Mediators** or the **Family Dispute Resolution Institute of Ontario**.
- Not essential, but membership shows that they are accredited in this area of family law. Many lawyers do not join these organizations because of the price.
- If they are not a member, research the mediator's background and experience. Try to talk to people who have used the mediator to make sure they have the right knowledge to conduct the mediation.

Choosing a Mediator

- Other qualifications to look for can include:
 - Master's degree in ADR
 - Completion of training courses in mediation
 - Specialized family law and/or child protection lawyers
- It is not mandatory for a mediator to be accredited and many good mediators are not. However, it is important for the mediator to have experience in this area of law.
- Mediation services are also available for free at family courts, for people eligible for legal aid, OW or ODSP.

Mediation and Domestic Violence

Before agreeing to participate, consider whether there has been domestic violence (DV) in the relationship.

- If there is violence, it does not always mean that mediation is not possible. This will depend on:
 - Nature of the DV (severity)
 - Whether there are criminal charges pending
 - Whether there is a restraining order
 - Whether there is a power imbalance, fear or intimidation

Mediation and Domestic Violence

- If there is support from social service providers and the person feels safe, survivors of DV are often able to participate in mediation.
- **It is always a judgment call that must take into account all factors of the specific situation.**
 - Important element is how the survivor sees themselves in the situation.

Factors to Consider

Cultural considerations should be evaluated before agreeing to mediate:

- Are the parties from a culture where community/family rights are more valued than individual rights?
- Are the parties from a culture where women's rights are minimized?
- Are there religious considerations that might impact mediation?
- Is divorce or separation considered taboo?

Factors to Consider

Cultural considerations should be evaluated before agreeing to mediate:

- Are the parties from a culture that has its own ADR process? i.e. A religious leader providing counselling, Indigenous healing circle, other forms of restorative justice.
- Do the parties require an interpreter? A trained interpreter or will a family or friend attend?
 - Impartial trained interpreters are best but there is a cost.
 - If a female DV survivor, can get an interpreter for low cost from the Barbra Schlifer Commemorative Clinic

Factors to Consider

- It is important to pick a mediator who has cultural sensitivity and understanding of issues that might appear.
 - Ideally, the mediator has worked with parties from that culture before and has a good knowledge of factors that might appear.
- If there is DV, consider whether the mediator has been trained in a “trauma-informed” approach and is sensitive to power imbalances and the impact of violence.



What to Expect

What to Expect

- Mediator will conduct a separate **intake interview** with each party. This happens before the date of the mediation.
- If there is DV, mediator will go through their protocol checklist to determine if mediation is an appropriate choice for this case.
- Mediator will also determine if there will be lawyers at the mediation.

What to Expect

- **Usually, both parties will bring a lawyer, or no one does.** It is not fair if one side has a lawyer present and other does not.
- Both parties should be allowed to contact their lawyers during the mediation even if they are not at the meeting. It is good practice to review all documents with lawyers before agreeing to anything.
- If lawyers are not present at mediation and either party wants to get advice on a proposed settlement, the agreement should not be finalized until the party speaks with a lawyer.

What to Expect: Family Law Mediation

- At the intake interview, mediator will set the rules and expectations for the mediation:
 - Speaking respectfully to each other
 - Not interrupting, taking turns to share opinions

Mediator may request parties sign a copy of the **mediation agreement** that will list these expectations.

What to Expect: Family Law Mediation

- If lawyers are not present, parties meet together with mediator in the same room.
- If there are family members or support persons, they usually wait in separate rooms, unless mediator agrees to have them in the mediation room. Many mediators do not agree to this as the support person might influence the parties.

What to Expect: Child Protection Mediation

If a child protection mediation, mediator will usually not do intake interviews with parties.

- This is because in child protection mediation, parties are almost always represented by lawyers.
- Mediator will communicate in advance with the lawyers.
- Lawyers send a **mediation brief** that explains the background of the dispute, sets out their client's position and suggests proposals for resolution.

What to Expect: Child Protection Mediation

- Mediator might meet with the CAS representatives, their lawyers, and the parties' lawyers in the main mediation room.
- Parties will remain in their own separate rooms.
- Lawyers can go back and forth to their clients, with the mediator present.
- This is called “**shuttle mediation**”.

What to Expect: Child Protection Mediation

- **Shuttle mediation** can be more effective for child protection, when there is an **imbalance of power** from CAS being present at the mediation.
- Parents may not have good relationships with CAS workers and there might be distrust.
- Keeping them separate can minimize conflict between parents and CAS, or between parents and other family members.

What to Expect: Child Protection Mediation

- **If agreement is reached:**
 - Written and signed by everyone that day in a document called a **“Statement of Agreed Facts”**
 - This can become basis for court order if there is an open protection file in court.
 - If there is no open file, document will be written as a voluntary service agreement or temporary care agreement.

- **If parties have been working voluntarily** with CAS, lawyers might not be present at mediation. If lawyers aren't there, the agreement should not be signed that day.
 - Agreement should be given to parties and they should be informed of their right to get independent legal advice before signing

Questions? Presenters

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Additional Resources

Additional Resources

- **Family Violence Authorization Program (Legal Aid Ontario)**
 - Free 2-hour emergency meeting with a lawyer for family cases with partner abuse
 - Offered through some shelters and community legal clinics
 - Toll-free: 1-800-668-8258; TTY: 1-866-641-8867
- **Assaulted Women's Helpline** www.awhl.org
 - 24 hours/7 days; multiple languages
 - Toll-free: 1-866-863-0511; TTY: 1-866-863-7868
- **Ontario Coalition of Rape Crisis Centres** <http://www.sexualassaultsupport.ca/>
- **Network of Sexual Assault/Domestic Violence Treatment Centres**
www.sadvtreatmentcentres.net.
- **Victim Services Directory** www.justice.gc.ca/eng/pi/pcvi-cpcv/vsd-rsv/index.html
- **Barbra Schlifer Legal Clinic**
 - Toronto: 416-323-9149 x278 (legal intake) TTY: 416-3231361
 - Free counselling, referral, legal and interpreter services to survivors of violence (Family, Criminal and Immigration law)

Additional Resources

- **Find a community legal clinic:**
<http://www.legalaid.on.ca/en/contact/contact.asp?type=cl>
- **Ontario Association of Child Protection Lawyers:**
<https://oacpl.org/>
- **Canadian Family Law Lawyers Network (National)** www.cfln.ca
- **Family Court Support Workers**
 - Check local community agency or call Toll-free:1-888-579-2888 or 416-314-2447

Additional Resources

Legal Aid Ontario

www.legalaid.on.ca/en/getting/default.asp

- 416-979-1446 (Toronto)(accepts collect calls)
- 1-800-668-8258 (toll free)
- 1-866-641-8867 (TTY)

- **Family Law Information Program (FLIP)**

www.legalaid.on.ca/en/getting/flip.asp

- **Family Law Information Centres (FLICs)**

www.legalaid.on.ca/en/getting/type_family.asp

Additional Resources

- **Family Law Services Centres (FLSCs)**
www.legalaid.on.ca/en/contact/contact.asp?type=flsc
- **Your Legal Rights** www.yourlegalrights.on.ca
- **Canadian Family Law Lawyers Network (National)**
www.cfln.ca
- **Family Responsibility Office**, Ministry Community & Social Services
 - Toll-free: 1-888-815-2757

Additional Resources

- **Child protection, court process, forms-** Ministry of the Attorney General website www.attorneygeneral.jus.gov.on.ca/english/family/divorce/child_protection
- **What You Should Know About Child Protection Cases:**
http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/child_protection.asp
- **Children's Aid Society (CAS) – FLEW Website:**
 - Read: <http://www.onefamilylaw.ca/en/childprotection/>
 - Watch Online:
 - Understanding the CAS <http://onefamilylaw.ca/en/webinar/#cas>
 - Parents Dealing with CAS <http://onefamilylaw.ca/en/webinar/#dealing>
 - CAS and Teen Mothers
<http://www.onefamilylaw.ca/en/webinar/#teenagemothers>
 - CAS and Child Rights <http://www.onefamilylaw.ca/en/webinar/#CASinvolved>

Additional Resources

JusticeNet

- not for profit service
- reduced legal fees

www.justicenet.ca/professions

Law Society of Ontario Lawyer Referral Service

www.lsuc.on.ca/with.aspx?id=697

- 416-947-3330 (Toronto)
- 1-800-268-8326 (toll free)
- 416-644-4886 (TTY)