



WATEROUS HOLDEN AMEY HITCHON^{LLP}
LAWYERS

I just separated from my spouse. What are my options?

By: Deborah L. Ditchfield, BA, LLB, LLM



This is one of the most commonly asked questions. The marriage has broken down and either the husband and wife are still living under the same roof (although separated) or one of them has moved out. They don't know what to do or who to turn to, or how to resolve issues between them. These issues may include custody of children, child support, spousal support, division of property and maintenance of benefits and insurance.

Separated couples do not have to rush off to court to start a court action to resolve these issues. In fact, an application to the court would not be recommended unless an emergency order was needed – for example, if either the husband or wife was trying to remove the children from the jurisdiction or was selling off assets. The reason for not proceeding to court immediately is that the court process is incredibly time consuming and expensive. Also, when you submit certain issues to the court to be decided, for instance, concerning custody of and access to children, you are leaving critical decisions concerning your family and your children to a judge who only knows what he or she reads about each parent and the children in court documents. Because the court process is adversarial most often both parents say negative things about each other and, therefore, the judge is left to decide what he or she thinks is best for the children.

Fortunately, there are other options to resolve family law issues. These include direct negotiation between the parties, assisted negotiation by family lawyers, mediation, family law mediation followed by arbitration or resolution using the Collaborative Family Law process. The outcome that a husband and wife want to achieve using any of these processes is a comprehensive separation agreement; a contract resolving all issues between the parties based upon full and complete financial disclosure between the parties and with both parties having independent legal advice. Very often when people come into my office they have already met with their spouse and have come to an agreement on many of these issues and they have jotted

their agreement down on a piece of paper in point form. A family law lawyer can take these points of agreement and put them in the proper legal language and incorporate these into a Separation Agreement.

Sometimes, however, the husband and wife need the assistance of a lawyer in coming to a negotiated settlement. Each of the parties is represented by their own lawyer and receives advice from their own lawyer. Then, acting on the client's instructions, the lawyers correspond with each other until they have negotiated terms of a separation agreement. Once the parties, with the assistance of their lawyers, have reached an agreement, the terms are then incorporated into a Separation Agreement.

Another option is to retain the services of a family law mediator. Very often – although not always - the family law mediator is a lawyer, but is someone who has taken the requisite courses and training in family law mediation. The family law mediator acts a neutral party to assist the husband and wife in their negotiations. Most mediators, if they are able to assist the couple in coming to an agreement, set out the terms of this agreement in a document called a Memorandum of Understanding. The Memorandum of Understanding can then be presented to a family law lawyer who can prepare a Separation Agreement based upon the terms of the Memorandum of Understanding. Of course, both the husband and wife will need independent legal advice prior to signing the Separation Agreement.

Sometimes, the husband and wife agree to mediation followed by arbitration. A mediator/arbitrator is someone who has not only completed the necessary mediation training but has also completed the additional courses and training in Arbitration. The couple must sign an agreement with the mediator/arbitrator for what is commonly called “Med/Arb”. The mediator will first attempt to resolve the issues between the parties and come to a mediated agreement, however, if this is not possible, the mediator switches hats and becomes an arbitrator and makes a decision in the same way that a judge would if a judge was hearing the case in court. Just as a judge may release reasons for his or her decision, so does the Arbitrator, and the Arbitrator's decision or award is enforceable in court just as is the decision or order of a judge.

Another out of court resolution process is called Collaborative Family Law (CFL). In the collaborative family law process, each of the parties hires a lawyer who is a member of a Collaborative Family Law Group. The Collaborative Family Law Group for this area is the Brant Haldimand Norfolk Collaborative Family Law Group and its website is www.collaborativefamilylawgroup.ca.

Once again, to practise collaborative family law, the lawyer must have taken additional education and training. In the CFL process each of the husband and wife hire a collaboratively trained lawyer. The parties and their lawyers then sign a document called a Participation Agreement in which the parties agree that while the process is ongoing they will not start a court action, they will deal with each other civilly and respectfully, they will give full and complete financial disclosure to each other related to their financial issues, and they will negotiate in good faith.

Not everyone is a suitable candidate for the CFL process. In fact, the Collaborative lawyers will screen for suitability including considering past domestic violence, power imbalances and inflexibility, among other considerations. Remember, the point of the collaborative process is that the parties want a successful outcome. In the collaborative process there are a series of face-to-face meetings, during which husbands and wives, with the assistance of their collaborative lawyers, are able to negotiate settlement terms which can be incorporated into a Separation Agreement.

The most important thing to remember is that all of the above “out of court” settlement processes afford the husband and wife direct input into the outcome, while in the court process control of the decision making is in the hands of the judge. What process would you prefer to settle matters concerning the future of your children?