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Best Practices for Addressing Power Imbalances and Safety in Family Dispute Resolution Processes: Research, Protocols and the Law

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Introduction

With courts, for now, restricting services to all but emergency matters due to COVID-19, the demand for alternative dispute resolution services is growing exponentially. The need is greater than ever to ensure that those processes put issues of power imbalance and safety of clients and children first.

Private mediation or adjudication is not appropriate in all cases. Professionals should assess suitability for diversion away from court through the practice of 'screening' for power imbalances, including those arising from family violence.

The purpose of screening — to determine if a case is appropriate for diversion out of court, and, if so, how any power imbalances can be effectively managed — and the protocols to be followed are the same regardless of the dispute resolution process under consideration.

The overall utility and effectiveness of family arbitration has been enhanced by Regulation 134/07 under the Arbitration Act; it adds a specific screening requirement as well as other enhancements.[1] Because of the harm that can be caused by private adjudication, screening for arbitration is even more important than for mediation in a practical sense. Legally, it is likewise more important given that the only legal professionals in Ontario who have a statutory duty to ensure screening is done and to take it into ac- count in all they do, are family arbitrators (and parenting coordinators.) The meaning of 'due process' in the context of private, for profit-dispute resolution must evolve accordingly.

As many of the senior family law professionals who offer private adjudication services were trained in an era before these concepts were embedded in our practices, it is important that we develop a common understanding of screening, its purpose and its value to clients and professionals alike.

The risk of violence to parties in family law cases

We know that separation is the most dangerous time for many victims of intimate partner violence. And that family law professionals, along with those in the broader community, often do not know what to look for when assessing risk.

Although leaving a violent relationship may be a rational choice, it is in leaving without a safety plan that can lead to the murder of victims and their children.

Family violence, as defined in Bill C-78,[2] is pervasive in our culture and will be present in a great many of our family law mediations, arbitrations and court matters. We also know that many inti- mate partner murders and murder-suicides are both predictable and preventable.

There is vast research from Ontario and other jurisdictions establishing consistent predictors. Ac- cording to the most recent Ontario Domestic Violence Death Review Committee Report,[3] the most common predictors are (in order):

- history of domestic violence
- actual or pending separation
- the perpetrator was depressed
- obsessive behaviour by the perpetrator
- suicide threats or attempts by perpetrator
- victim had an intuitive sense of fear that perpetrator would kill them
- perpetrator demonstrated sexual jealousy
- prior threats to kill the victim
- excessive drug/alcohol use
- unemployed perpetrator
- history of violence outside the family
- escalation of violence

One of the most chilling statements I have read in that report is this, from the 2011 report:

> This case represents one of the many that have been reviewed where abuse victims have sought advice from family law lawyers shortly before being killed by their partner, usually as part of the separation process.

Most family lawyers have not taken training in how to identify and assess risk. This is one reason why the Department of Justice has convened a group of professionals from across the country to design and pilot a family violence screening tool for family lawyers,[4] to support the implementation of the expanded definition of family violence and other new provisions in the *Divorce Act* taking effect this June. I am privileged to be a member of this Advisory Committee and can report that a very comprehensive and well-explained screening tool for family lawyers is in progress. I believe this will advance understanding of this subject enormously.

In the meantime, we can look to the great body of helpful research, including two outstanding Canadian websites:

- Centre for Research and Education on Violence Against Women and Children[5]
- VEGA (Violence, Education, Guidance and Action) Project[6]

In the training that I do, I often reference an excellent 2013 paper written by Linda Neilson[7] for the Department of Justice, which lists the main indicators of continuing violence:

- a pattern of past emotional, financial, physical or sexual violence and abuse against family members
- sexual abuse
- financial control with abuse
- emotional and psychological abuse associated with coercion and control
- prior criminal conviction for violence
- the degree to which the violence is recent or is escalating in severity or frequency
- failure to comply with restraining orders, support orders or other court orders
- victim fear of the perpetrator
- unstable lifestyle
- substance abuse
- separation[8]

Compare these with the predictors associated with lethal outcome:

- access to weapons
- unemployed perpetrator
- pending or actual separation
- prior domestic violence that is escalating in severity or frequency
- the presence of children in the home, particularly those who are not biologically related to the perpetrator
- death threats
- choking
- suicidal tendencies and attempts to commit suicide by perpetrator
- stalking, monitoring

- forced sex
- victim fear of being killed
- controlling, obsessive forms of psycho- logical bond/possessive jealousy
- threats with weapons
- violence during pregnancy
- significant perpetrator life changes[9]

Signs that counsel should be alert to which might indicate a heightened risk of violence

The research tells us that certain facts are more predictive of risk than others. This is where the screening tools come in. We also know that cases involving more than one indicator of danger predict greater risk.

Certainly, if a client expresses fear of the other person, whether that fear seems founded to the professional or not, that in itself should be taken seriously. We know from the research that having an intuitive sense of fear of one's partner is often a reliable predictor of risk.

One of the greatest challenges facing family law professionals is that those who are at risk can come across as unreliable, or as lacking credibility. They may not take seriously the risk to them- selves or their children that seems apparent to the professional. We can be quick to judge such behaviours negatively or dismissively. Victims of severe violence and abuse can be suffering from PTSD and may not tell their stories in a consistent, linear fashion. They may come across as unstable, hysterical, unlikeable or unpredictable. They may change instructions, waver about what they want and seem 'difficult'. They may behave in ways that frustrate a rational professional, such as not wanting to follow advice or going back to an abusive partner.

It is therefore important for family lawyers to not only be well trained themselves, but also to pay attention to their own responses to clients, regard- less of gender, and be curious rather than judgemental about that person's seeming unreasonable conduct. As a colleague once taught me, we must seek the reasonable reason for the unreasonable behaviour.

Can lawyers simply add check boxes to their client intake forms that reflect these risk factors, or should we be doing more?

It is tempting to simply take a screening tool or checklist and add those questions to an intake form. Or to give the list to a clerk and have them take clients through it.

But without proper training in how to identify, assess and manage such risks, checklists are

not likely to be very helpful and could do more harm than good. That is because many of those at greatest risk may be disinclined to disclose any relevant information. If the interview process is not well designed and well delivered, and if it is not informed by the principles of safety planning and safe referrals to appropriate processes and re- sources, chances are people will not trust it sufficiently to disclose their true concerns.

I believe that all family lawyers should take specialized training that teaches them how to identify, assess and manage risk in their practices — including risk to themselves and their staff. They should be knowledgeable enough to use a screening tool, to be able to identify and assess risk, to understand the concept of "Safety Planning" and to know the resources in their community to assist spouses who need a safety plan to support their litigation or negotiation process.

The research is clear that we cannot determine risk on a superficial basis. It is not enough for lawyers to assume that 'they will know' when they have a high-risk case, or that their client will just disclose risk to them.

Screening tools are essential for family law professionals. The best one in use at this time, in my view, is the Holtzworth-Munroe, Beck, & Apple- gate, Mediator's Assessment of Safety Issues and Concerns (MASIC), set out at the end of this article, which is now at version 4.[10] But there are other screening resources for lawyers, including the Women's Experiences with Battering Scale[11] and the Danger Assessment.[12] And lawyers should watch for the Justice Canada screening tool, which will be piloted and tested over the coming year.

What exactly is meant by "screening for domestic violence and power imbalances"?

Screening is the process by which family law professionals determine which dispute resolution process will best suit which family.

It is done by way of a non-judging and non-fact- finding confidential interview with a client during which the client is asked to identify their concerns about participating in the proposed dispute resolution process. It is intended to be a safe place for each client to disclose to a trusted professional what they need in order to be able to fully and safely participate in the proposed dispute resolution process.

It is the means by which family law professionals identify whether they feel they are the best professional for a particular family, which process will best meet the needs of that family and how that process should be designed. It is the means by which they gain the information they need to comply with their responsibility to continuously screen for power imbalances as the process evolves, and to know when and how to terminate a process that is no longer appropriate.

And in particular, insofar as it relates to domestic violence, screening is a process of

identifying possible risks, assessing what impact those risks might have on each client's ability to fully and safely participate in the proposed dispute resolution process and determining how those risks will be managed. It is the means by which family law professionals determine what safety planning and other resources might be needed to enable the intended process to proceed fairly and safely, and, if that cannot be done, what alternate processes should be put into place.

Safety is not defined simply as physical safety. In most cases we are more concerned about the impact on clients of a process that is not safe emotionally or legally. For example, an intimate partner violence survivor might be, or feel, too traumatized to participate in a four-way meeting, a mediation, a cross-examination or arbitration with their abuser. If they have not been properly screened their own lawyer, the mediator, arbitrator or judge might misinterpret their behaviour as non-compliance. Or they might go through a process that causes them to experience re-victimization; they may be or feel bullied, judged, minimized or coerced into a pro- cess or an outcome that is not actually voluntary.

Identifying these factors, before the client commits to any process, and before the process chosen is de- signed, is helpful to ensure that these mistakes are not made.

Screening therefore is a pre-process process. It must be done before a client commits to participate in any dispute resolution process. And it is done to identify and assess any form or source of power imbalance that could, if not managed properly, result in the conclusion that private dispute resolution is not suited to a particular situation.

There has been a historic sense that screening is for the purpose of either "screening in" or "screening out". Either idea is an over-simplification. Rather, screening is for the purpose of quality process design. It enables family law professionals to design the most appropriate, safest, most satisfying, most durable, most likely to be effective and most respectful dispute resolution process for each individual and each family.

There are many process design options that can accommodate clients in a safe and respectful way without jeopardizing the principle of due process as it should be interpreted in the context of private dispute resolution. Technology is a powerful resource to enable mediators, arbitrators and parenting coordinators if it is used correctly.[13] Other options where appropriate can include written arbitration proceedings without cross-examination; setting up arbitration room spaces to accommodate clients' spatial needs; agreements in advance about the process to be followed if, during an arbitration, a party's, counsel's or the arbitrator's assessment of safety or power balance shifts; the consensual use of creative processes including a more inquisitorial approach, or a more 'collaborative' approach, to an arbitration. Once the arbitrator has been provided with appropriate detail about power imbalance and domestic violence risks, they have very substantial latitude under the Regulation, it is suggested, to apply the principles of due process in a way that addresses power imbalance concerns.

The best brief definition of screening for domes- tic violence that I have seen came from British Columbia's Continuing Legal Education Society ("CLEBC") when its *Family Law Act* was amended in 2011 to impose a new duty on all family dispute resolution professionals, including lawyers, mediators and arbitrators. That Act provides, in s. 8, that such professionals "… ***must*** *assess … whether family violence may be present… and the extent to which the family violence may adversely affect*

(a) the safety of the party or a family member and

(b) the ability of the party to negotiate a fair agreement".

The definition that was used in the CLEBC training materials was that screening is the process by which family law professionals:

1. Identify,
2. Assess and
3. Manage such risk.

British Columbia is not the only Canadian juris- diction that has decided that family dispute resolution professionals including arbitrators have a personal duty to screen for such risks. Manitoba also recently required its family arbitrators to personally screen their clients:

> Before a family arbitration begins, the arbitrator must consider whether proceeding with the arbitration could expose a party or child to a risk of domestic violence or stalking, and ask each of the parties:
>
> (i) Whether there is a history of domestic violence or stalking involving the other party or a child, or contact with a law enforcement agency about domestic violence or stalking involving the other party or a child of a party, and
>
> (ii) Whether a civil or criminal court has made an order prohibiting or restricting one of the parties from being in contact with or communicating with the other.

What does the Arbitration Act require by way of screening in family arbitration?

Prior to the 2007 amendments to the *Arbitration Act*, including Regulation 134/07,[14] and to the *Family Law Act*, there was no requirement for family arbitrators to screen for power imbalances and domestic violence. Now family arbitrators have a positive duty to ensure that appropriate screening has taken place before clients sign an Arbitration Agreement.

This is a sea change in how family arbitration is practised, one that has been understandably challenging for counsel and arbitrators who have not been trained to incorporate screening principles into their practices.

The *Arbitration Act* was amended in 2007 after extensive public hearings and consultations

with various stakeholders, including those advocating for victims of domestic violence. I participated in those hearings on behalf of the Ontario Bar Association's ADR Section. At the time, there was considerable pressure being brought to bear on the government to entirely prohibit the use of private adjudication in family law as is the case in Quebec. The changes brought about by the Regulation and amendments to Part IV of the *Family Law Act* represented a compromise between those who wanted no family arbitration at all and those who wanted no changes at all. It is an unfortunate myth that these changes were mere tokens to assuage fears of faith-based arbitration. These were substantive changes intended to improve family arbitration in Ontario.

There are sound policy reasons for requiring rigorous screening in family arbitration, a process to which parties will be required to adhere once they and arbitrator have complied with the procedural requirements of the *Arbitration Act* and Regulation 134/07. Those reasons are enforced by the recognition in Bill C-78 of the relevance of identifying family violence, not only in relation to determining the best interests of a child but also in making appropriate dispute resolution process choices.

Those who offer private adjudication services are profiting from the diversion of people from the publicly funded, publicly accountable, transparent legal system. Private, for-profit adjudicators should have a positive duty to 'do no harm' to the appropriate degree.

This evolving duty is reflected in the Standards of Practice of the Family Dispute Resolution Institute of Ontario,[15] a voluntary professional organization for Ontario's family arbitrators. It is also reflected in the changes taking place in other jurisdictions, including British Columbia and Manitoba, requiring arbitrators to personally screen their clients.

To preserve its integrity, family arbitration must be, and be perceived to be, a voluntary and con- sensual process. Those who profit from the diversion of clients from the court system have a duty to take reasonable steps to ensure that their clients are able to fully and safely participate with- out power imbalances that could undermine their ability to do so. Failure to do so will undermine public confidence in the integrity of the process.

This duty is expressed in Regulation 134/07 through its screening requirements, which admittedly create a new understanding of the meaning of "due process' in family arbitration, one that recognizes that extra precautions are required to protect the principle of voluntary, consensual participation. Screening for power imbalance and safety is a statutory obligation.

Prior to Regulation 134/07, it might have been credibly argued that an arbitrator who obtains confidential information from just one party is violating the fundamental principle of natural jus- tice.[16] But the Regulation <u>mandates</u> that family arbitrators obtain such information, either directly from the clients if they are acting as a mediator- arbitrator or parenting coordinator, or indirectly through a third party screener if they are acting as an

arbitrator alone.

The definition of 'natural justice' in family arbitration has thus been expanded. Due process in the private adjudication of family law matters not only tolerates the provision of such confidential information to the arbitrator, it requires it.

This is a fundamental change in the way family arbitration is practised relative to other forms of arbitration and relative to the way it used to be practised.

It is important to remember that screening is not a fact-finding exercise. It does not result in the gathering of evidence. It is merely a subjective, non-judging exploration of each party's procedural concerns, one that permits the arbitrator to obtain the information that will allow them to reliably determine if they can provide a fair, impartial and safe process of private adjudication.

Screening is arguably more important in family arbitration than in any other process because:

- Private adjudication is a private, profit- driven business.
- Arbitrations operate in private and are not accountable to the public unless there is an appeal.
- Appeal rights are more limited than in the courts.
- Arbitrations take place in intimate, informal settings.
- Arbitrators do not have all the powers of a judge, particularly in relation to *parens patriae* jurisdiction and contempt jurisdiction.
- Arbitrators cannot make orders for the Office of the Children's Lawyer.
- Arbitrators do not have the same access to interpreters, security, Legal Aid duty counsel, the family court (domestic violence) support workers, nor free mediators and information and referral resources.
- Arbitration is binding and expensive.

The duty imposed on Ontario's family arbitrators under Regulation 134/07 is consistent with the trend in other jurisdictions, which in turn reflects the public policy reason for screening in arbitration: such private processes can cause harm to the vulnerable and those providing them have a responsibility to ensure that the cases they accept are suitable for out of court adjudication.

Regulation 134/07 therefore requires family arbitrators to personally certify in their arbitration agreements that (these are my words):

(a) They have met the training requirements set out on the website of the Ministry of the Attorney General, which include a basic 14- hour role-play based course that teaches

arbitrators how to use screening tools, which must be repeated every five years unless they have completed 10 arbitrations during those five years;

(b) In the case of a mediation-arbitration or secondary arbitration such as parenting coordination, they themselves have screened the parties separately for power imbalances and domestic violence, that they have taken this information into consideration before deciding to accept the case and that they will continue to consider the results of their screening throughout the arbitration process, if they conduct one, for the purpose of determining whether private adjudication continues to be appropriate and, if so, what procedural accommodations are required to manage the power imbalances they have identified; and

(c) In the case of a pure arbitration, they have relied on a third party to separately screen both clients for power imbalances and domestic violence, they have considered the re- port that they received from the third party prior to determining whether to accept the case and that they will continue to consider that report throughout the arbitration for the purpose of determining whether private adjudication continues to be appropriate and, if so, what procedural accommodations are required to manage the power imbalances they have identified.

Section 59.6(1) of the *Family Law Act* provides that a family arbitration award is enforceable only if the arbitrator has complied with the Regulation.

When, by whom, and how should screening be done?

For years it was common to include a clause in separation agreements that committed parties to mediation-arbitration as their future dispute resolution method. That practice has led to many problems, and as a result, we are seeing fewer such clauses nowadays. Because private dispute resolution is a voluntary and consensual process, pre-mandating it in separation agreements, when the circumstances in which future disputes may arise could render it inappropriate, can be counter-productive. This was in essence the finding of Justice Nolan in *Wainwright v. Wainwright.*[17]

(a) **When:** Given the very purpose of screening

- to enable the arbitrator to identify, assess and determine whether they can appropriately manage power imbalances and domes- tic violence in a private adjudication process
- screening should be done before the par- ties have committed to the process. Once an enforceable Arbitration Agreement is signed, parties will be bound by their process choice subject to limited exceptions. Effective screening (*e.g.*, conducted in accordance with best practices) is therefore a crucial condition precedent to an enforceable Arbitration Agreement.

In the case of mediation-arbitration or parenting coordination, that means that the screening should take place before the Mediation-Arbitration Agreement is signed by the parties and before any mediation starts, because that is when the parties commit to the process. It may need to be updated before the arbitration starts.

In the case of arbitration, the screening should be done before the parties sign the Arbitration Agreement.

The case law on this subject has been progressing, with some decisions better than others along the way.

In *Horowitz v.* Nightingale,[18] Justice Nelson correctly found that Minutes of Settlement containing an agreement for future arbitration were not enforceable because the requirements of Regulation 134/07 had not been met, including that there had been no screening.

In *Michelon v. Ryder*,[19] Justice Kurz (then of the Ontario Court of Justice) followed a long line of authority confirming that "court orders, even on consent, do not contain a shortcut across the arbitration gateway" set out in Ontario's statutory framework. Justice Kurz declined to compel the parties to participate in a parenting coordination process even though they had previously agreed to do so in a consent order.

Then, in *Lopatowski v. Lopatowski*,[20] Justice Gray, *in obiter*, found that the court *does have* jurisdiction to make an order incorporating a requirement, contained in Minutes of Settlement, that the parties arbitrate future disputes even though the formal requirements set out in Regulation 134/07, including the requirement of screening, had not been met.

In *Giddings v. Giddings*,[21] Justice Gray continued with this line of reasoning, giving life to an arbitral process contemplated by Minutes of Settlement in which no Arbitration Agreement had been signed, none of the formalities of Regulation 134/07 had been complied with, and no screening for power imbalances and domestic violence had been conducted. Even so, Justice Gray ordered the parties to sign an arbitration agreement.

In *Z.S. v. B.P.*,[22] the parties had signed Minutes of Settlement requiring future disputes to be resolved by way of mediation-arbitration, and they both signed an Arbitration Agreement. However, the arbitrator had not yet arranged for the parties to attend for screening. The arbitrator incorrectly signed the Arbitrator's Certificate indicating however that she had done so. The husband then refused to pay his retainer and refused to at- tend for screening.

Justice MacEachern ordered him to attend the screening, finding that once he does so, the Arbitration Agreement will then come into effect. She wrote at para. 8:

> This finding is consistent with the policy requirements behind the requirement for domestic violence and power imbalance screening. The purpose of this screening is not to exclude participants from the arbitration process, but to ensure that domestic violence and power imbalance factors are considered throughout the arbitration process.

Although the result is probably technically correct given the unique facts of this case, I would suggest that this is not an entirely correct summary of the purpose of arbitration screening.

Rather, the purpose of screening in family arbitration is to enable the arbitrator to decide whether the matter is an appropriate one for private adjudication, and, if it is, to pro- vide the arbitrator with sufficient information about power imbalances and domestic violence to enable the arbitrator to comply with their duty to “consider the results of the screening throughout the arbitration”.

An outcome more consistent with the requirements and intent of Regulation 134/07 would have been to require the parties to be screened, for the arbitrator to receive the report from the person who conducted the screening and, if the arbitrator determines that the matter is appropriate for arbitration, then the Arbitration Agreement will come into effect. (This situation is a bit unique because the experienced arbitrator had incorrectly already signed the Arbitrator’s Certificate confirming that the parties had been screened.)

(b) **By whom:** Screening should be done by the person who is providing the dispute resolution service unless there is a prohibition against them doing so. This is because the person managing the dispute resolution process has the responsibility to accept cases and design processes with safety and power balance in mind. They are the ones that need the information.

Safety planning is one of the most important responsibilities of family dispute resolution professionals. The person with carriage of the process is the procedural expert. In family law, that expertise includes the ability to recognize when a safety plan for one or both parties is required in order for them to fully and safely participate, knowledge of the available safety planning resources and capability to refer clients to them appropriately. In order to do this, the professional must have the best information available about power imbalances.

Mediators who are certified by one of the Ontario Association of Family Mediation, Family Mediation Canada, the Family Dispute Resolution Institute of Ontario, or the ADR Institute of Ontario, all recognized by the Ministry of the Attorney General, are required to screen their own clients, whether they are acting as a mediator, mediator-arbitrator or parenting coordinator.

For family arbitrators, Regulation 134/07 offers two options.

In mediation-arbitration and in secondary arbitration such as parenting coordination,

the mediator-arbitrator/parenting coordinator may do their own screening. As most media- tor-arbitrators and parenting coordinators are also certified by one of the professional organizations that offer family mediation designations, they are required to do their own screening in all such cases. This is widely practiced in many Ontario jurisdictions.

In arbitration-only processes, the screening must be done by someone other than the arbitrator. The best practice is for the arbitrator to refer both parties to a trusted third party screener.

Arbitrators should not rely on counsel to each screen their own clients, as this will not provide the arbitrator with the information they need to comply with their responsibility to consider screening results during the arbitration.

(c) **How?** The best practices for screening in family mediation apply. The person doing the screening meets with each party, separately and confidentially, and asks them questions about the dynamics in the relationship be- tween the parties. The purpose is to learn the concerns that each party has about participating in a private dispute resolution process with the other person. Do they feel safe? Are they afraid? Can they fully participate without fear of reprisal or harm to them or to a child? Will they be able to fully give evidence? Do they feel they will be a good witness? Do they have PTSD or some other disability that may be better accommodated in another process? Can an arbitration be made safe and empowering for them, *etc.*?

Where the screening is being done by the mediator-arbitrator themselves, they will have the information they need if the matter progresses to an arbitration, though some mediator-arbitrators will send their clients to a third party screener for an independent re- port prior to the arbitration.

Where the screening is done by a third party screener, that professional will meet each party for a confidential screening interview. That third party screener will then send their report to the arbitrator (alone). This report will remain private and confidential in the hands of the arbitrator. If the report contains information of such a nature that the arbitrator feels they cannot proceed for any reason, then the matter should be deemed not appropriate for private adjudication.

Under what circumstances should clients be ‘screened out’ of family arbitration, and how would that happen?

It has been suggested by some commentators, including the court in *Z.S. v. B.P.*,[23] that the purpose of screening in family arbitration is not to screen cases out of arbitration, but rather to empower the arbitrator to manage them. With respect, that is not correct. The purpose of screening in arbitration is the same as it is in all out-of-court processes.

There could be any number of reasons why an arbitrator may determine that a matter should be screened out, either before they accept the case or, in rare cases, during the arbitration. My own experience is that where fulsome screening is done prior to the arbitration, the chances of it being screened out or failing later are considerably diminished.

If one accepts that the purpose of screening is to enable the arbitrator to identify, assess and deter- mine how to manage power imbalances including family violence, one can imagine any number of situations where the court may be a more appropriate process for a given family. Some examples might include:

- An obviously ‘ungovernable’ party who is not prepared to comply with the requirements of a voluntary, consensual dispute resolution process.
- One or both parties are not likely to be able to afford the full range of eventualities in private adjudication processes.
- A party is too afraid of the other to fully or freely participate in the process without fear of retribution.
- Parties or children may need the resources of the court, including security, a court or- der appointing the Office of the Children’s Lawyer, *parens patriae* or contempt juris- diction, interpreters, or immediately enforceable orders such as restraining orders.
- A party’s mental health status may render them incapable of participating in an inti- mate, closed, private process.

A matter is more appropriately dealt with in the public courts for public policy rea- sons, *e.g.*, should a child be vaccinated against diseases such as the measles.

Under what circumstances can or should information from the screening process be disclosed?

Confidentiality is a foundational element of screening. Those in high risk cases are not going to disclose their fears if there is even the tiniest chance that their disclosures might be shared with the person of whom they are afraid. Screening in- formation and results should not be disclosed to parties, counsel or to the court. The only exceptions would be the standard ones set out in Screening Agreements: if the information suggests that a child is at risk of harm then a report to a Children’s Aid Society may be warranted; if there is a serious and imminent risk to any person then a report to the police or to the at-risk person may be warranted; or if a court orders disclosure, for example if required in a child protection matter or if a party made admissions of criminal activity which might be compellable in a criminal court.

Only one case that I am aware of has considered confidentiality of the screening process,

Benson v. Kitt.[24] In that case the parties had engaged in confidential mediation that led to Minutes of Settlement which made provision for incorporating their terms into an amending agreement. When the amending agreement was not executed by Benson, who in- stead sought a court order for specified relief, Kitt sought production of the mediator's file including their "screening report". Justice Monahan found that the wording of the parties' Agreement to Mediate made clear that all documents arising out of the mediation are subject to settlement privilege and are inadmissible in subsequent proceedings. Although the ruling is correct, it is my view that Jus- tice Monahan could have gone further and acknowledged the specific protection of confidentiality that is afforded the screening process in contract and at common law.[25] This article explains this further.

What should judges hearing family law cases that involve domestic violence be aware of?

(1) Screening is a sophisticated and well-developed field of knowledge and expertise. The purpose of screening — assessing whether a proposed dispute resolution process can be provided safely and effectively — and the process by which it is provided — a confidential interview with each party that leads to a risk and suitability assessment — is the same regardless of the proposed process.

(2) The courts' traditional deference to parties' agreements to arbitrate should be subject to the requirements of Regulation 134/07. Assessing safety and suitability of process is mandatory when parties are contemplating contracting out of their rights to be protected by our courts.

(3) Rigid adherence to contractual agreements to arbitrate may not always be appropriate in family matters where dispute resolution professionals have an ongoing duty to screen. Parties can and should be 'screened out' of family dispute resolution processes, including arbitration, at any time that the process is no longer appropriate for a party or the family. Patterns of abuse and violence and power imbalances of all forms change and evolve in unpredictable ways. There is always a risk that clients will and should be 'screened out' of family arbitration and into court where their matter can be more appropriately managed.

    This is a risk that those providing private, for-profit adjudication services must accept and anticipate as best they can by incorporating rigorous screening protocols into all they do. It is also a risk about which screeners and providers of private adjudication services should inform their clients. Clients who are considering contracting out of their rights to use the courts should understand that the certainty they believe they are contracting for is not absolute.

(4) Screening is not a tactical or strategic exercise. The courts must not allow parties or their counsel to turn it into such. All elements of the screening process must remain

confidential and should be understood in the context of their limited but critical role. To do otherwise is to risk involuntarily 'outing' a victim of domestic violence in a way that could lead to retribution, without a safety plan. If there is any risk of such outing, the purpose and utility of screening will be undermined by the reluctance of clients to provide the information needed for a credible risk and suitability assessment. The necessity of screening, and the confidentiality of all steps of the screening process must therefore be vigorously protected by the courts.

(5) Safety planning is an important element of family law matters involving family violence. There are many online safety planning resources available to assist parties, counsel and the courts, including this one from Com- munity Legal Education Ontario.[26] Court-connected family mediators offering on-site and off-site mediation are good resources as they are trained to carefully screen parties and are either free (if in court) or subsidized if not in court that day. Every Family Law Information Centre has an Information and Referral Coordinator who also has training in issues of family violence. And the government-funded family court support workers are invaluable safety planning re- sources.

Conclusion

The introduction of a requirement for screening has presented arbitrators, lawyers and judges with a new tension between the way things have always been done and new thinking about how things could be done better. Traditional legal processes have not included a requirement for screening for power imbalances on the basis, among others, that judges do not screen. But private, for-profit, contractual mediation and adjudication services are entirely different from court processes.

Governments across Canada are taking steps to enhance not only the credibility and effectiveness of private dispute resolution processes, but also the safety of the parties, and their children, who opt to use them. These procedural requirements help protect the integrity of out-of-court mediation and arbitration and should be viewed as part of a progressive evolution in the field of family dispute resolution.

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