Family Law Mediation and Arbitration Proceedings

Between:

_____________________

And:

_____________________

And:

John-Paul E. Boyd Q.C.,
John-Paul Boyd Arbitration Chambers

After-Hours Emergency
Evaluative Mediation-Arbitration Agreement

Introduction

A. ______________________ and ______________________ have an urgent legal dispute that they need to resolve as quickly as possible.

B. Evaluative mediation is a confidential, private process in which an impartial person, a mediator, encourages communication between the people involved in a legal dispute and attempts to promote mutual understanding and a settlement of the dispute, while providing an assessment of the strengths and weaknesses of each person’s position.

C. Arbitration is a confidential, private process in which an impartial person, an arbitrator, listens to the evidence and arguments of the people involved in a legal dispute and then makes a decision resolving the dispute.

D. In evaluative mediation-arbitration proceedings, the impartial person serves as both mediator and arbitrator, and attempts to settle a dispute through evaluative mediation before turning to arbitration and making a decision resolving the dispute.

E. The parties to this agreement, and the dispute resolution process it describes, have the primary responsibility for resolving their dispute during the mediation phase of the process. They are solely responsible for providing evidence and making arguments about how their dispute should be resolved during the arbitration phase of the process.
F. The parties to this agreement and the mediator-arbitrator for the dispute that is the subject of this agreement intend to make a serious effort to settle this dispute fairly, without turning to arbitration. If, despite their best efforts, one or more of the issues in this dispute cannot be settled, the parties agree that they will resolve those issues through arbitration.

G. The parties to this agreement and the mediator-arbitrator for the dispute that is the subject of this agreement intend to participate in these proceedings honestly, cooperatively and in good faith.

In consideration of John-Paul Boyd Arbitration Chambers providing after-hours evaluative mediation and arbitration services in this dispute, _________________ and _________________ understand, acknowledge and agree to the following terms.

Agreement to mediate and arbitrate

1. _________________ and _________________ wish to resolve the issues in their legal dispute on an urgent basis, without resorting to or continuing any litigation on those issues for the time being.

2. This agreement is an arbitration agreement under the Arbitration Act of Alberta, for mediation-arbitration proceedings sited in Alberta, or under the Arbitration Act of British Columbia, for mediation-arbitration proceedings sited in British Columbia. It is effective when it has been signed by all parties to the agreement.

3. The parties are aware of the importance and benefits of receiving legal advice before signing this agreement. Although the parties may not have been able to obtain legal advice because of the urgency with which the legal issues in their dispute must be resolved, _________________ and _________________ nonetheless have read carefully, and agree to be bound by, the terms of this agreement.

4. The mediator and arbitrator for this mediation-arbitration is John-Paul E. Boyd Q.C. of John-Paul Boyd Arbitration Chambers, referred to in this agreement as the Mediator-Arbitrator.

5. The parties may sign this agreement separately, and a scanned or photographed copy of the parties’ signatures on this agreement is sufficient to show that they have signed and agreed to be bound by this agreement.

Waiver of right to litigate

6. _________________ and _________________ waive their right to litigate the legal issues identified below, at paragraph 11 of this agreement, subject to the rights of
judicial review and appeal set out in the Arbitration Act of Alberta or the Arbitration Act of British Columbia.

7. Nothing in this agreement limits or prohibits the exercise of any enforcement rights that the parties may have through the courts or otherwise.

8. On application by the parties, and subject to the court’s discretion, the terms of this agreement may be incorporated into an order to be made with the consent of the parties, called a consent order.

Duties of Mediator-Arbitrator

9. The Mediator-Arbitrator will:

   a) remain independent and impartial in all contacts with _______________________ and ______________________;

   b) treat _______________________ and _______________________ fairly and equally, while also assessing the strengths and weaknesses of their respective positions;

   c) not advance the interests of one party over those of the other; and,

   d) at all times remain open to persuasion despite any assessments he may provide of the strengths and weaknesses of each party’s position.

10. _______________________ and _______________________ understand and agree that while the Mediator-Arbitrator is a lawyer, he is not acting as legal counsel for either party and is not providing legal advice to either party, including legal advice about this agreement.

Issues to be resolved

11. _______________________ and _______________________ agree to submit the following legal issues to evaluative mediation and, failing settlement of those issues, then for determination by the Mediator-Arbitrator on a final basis:

   - a) decision-making in respect of children;

   - b) parenting time or contact with children;

   - c) the payment of child support, including payment of children’s special or extraordinary expenses;
☐ d) the payment of spousal support;

☐ e) occupation and use of the family home, and use of the personal property in the family home;

☐ f) costs; and,

☐ g) other issues, identified in the list attached to this agreement.

Screening

12. The parties to this agreement agree that, because of the urgency with which the legal issues must be resolved, the Mediator-Arbitrator will not screen for power imbalances and the risk or presence of family violence.

Confidentiality

13. The mediation-arbitration proceeding governed by this agreement is confidential and private, except as described below and except:

a) to the extent necessary to implement or enforce any settlements reached by the parties or awards made by the Mediator-Arbitrator;

b) for the awards of the Mediator-Arbitrator; and,

c) as may be necessary for the purposes of appeal or judicial review.

14. Unless required by law or by court order, the parties and the Mediator-Arbitrator will not disclose any documents or information about this mediation-arbitration proceeding, and the documents, information and evidence provided in the course of the mediation-arbitration.

15. _________________ and _________________ acknowledge that the Mediator-Arbitrator may be required to disclose information obtained during the mediation-arbitration where the Mediator-Arbitrator believes that:

a) a child is suffering or at risk of harm, under the Child, Youth and Family Enhancement Act of Alberta or under the Child, Family and Community Service Act of British Columbia; or,
b) there is an imminent risk of death or serious physical or psychological harm to an identifiable person or group and the disclosure is necessary to prevent such death or harm.

Disclosure and production of documents

16. ___________________ and ___________________ acknowledge and agree that they must each provide complete and accurate documents and information to each other for the purpose of resolving the legal issues identified at paragraph 11 of this agreement.

Time limit

17. ___________________ and ___________________ agree that, in light of the need to resolve the legal issues as speedily as possible and in consideration of the flat-rate fee charged by the Mediator-Arbitrator, the time allocated to this mediation-arbitration proceeding will be limited to one hour, subject to the discretion of the Mediator-Arbitrator.

The mediation phase

18. In order to attempt to resolve the legal issues between the parties to this dispute, the Mediator-Arbitrator will, in the mediation phase of this mediation-arbitration, attempt to:

a) isolate points of agreement and disagreement;

b) explore alternative solutions;

c) assess the strengths and weaknesses of each party’s position; and,

d) identify potential accommodations and areas of compromise.

_____________________ and ___________________ expressly agree that the Mediator-Arbitrator is not disqualified from adjudicating any of the legal issues as arbitrator because he has acted as a mediator with respect to those issues, expressed his views on those issues or provided his assessment of the parties’ positions on those issues.

19. ___________________ and ___________________ agree that all discussions taking place during the mediation phase of this mediation-arbitration are settlement negotiations and that any offers to settle or compromise a party’s position on the legal
issues made during mediation will not be considered by the Mediator-Arbitrator in the arbitration phase of this mediation-arbitration.

20. Agreements reached between the parties during the mediation phase of this mediation-arbitration are binding only when the terms of those agreements have been reduced by the Mediator-Arbitrator to a written memorandum summarizing the parties’ agreement or have been incorporated in the Mediator-Arbitrator’s written award.

21. Mediation will end when:

   a) the parties have settled all of the legal issues and the parties and the Mediator-Arbitrator has prepared a memorandum or written award summarizing the parties’ agreement; or,

   b) the parties have settled some or none of the legal issues and one or both of the parties or the Mediator-Arbitrator declares that the legal issues cannot or are not likely to be resolved by continued mediation.

The arbitration phase

22. The arbitration phase of this mediation-arbitration proceeding will begin when mediation has ended under paragraph 21(b) of this agreement, and the Mediator-Arbitrator will make a decision resolving the legal issues that were not settled in the mediation phase.

23. The law to be applied by the Mediator-Arbitrator in determining the unresolved legal issues is the law of:

   □ a) Alberta; or,

   □ b) British Columbia.

24. The Mediator-Arbitrator may rely on the documents and information exchanged during the mediation phase in determining the unresolved legal issues.

End of arbitration hearings

25. The arbitration phase of this mediation-arbitration proceeding will end when:

   a) all of the legal issues that were not settled in the mediation phase are settled by the agreement of the parties during the arbitration phase;
b) the parties advise the Mediator-Arbitrator that they have no further evidence to present or arguments to make; or,

c) the Mediator-Arbitrator determines that continuing the hearings is unnecessary or inappropriate.

**Arbitration awards**

26. The Mediator-Arbitrator will provide an oral award addressing all of the legal issues once the arbitration hearing has ended, and:

a) will provide summary reasons for his decision in writing, as soon as possible after the arbitration hearing has ended;

b) if any of the legal issues have been settled by the agreement of the parties during the mediation or arbitration phases of this mediation-arbitration proceeding, the Mediator-Arbitrator will record the terms of settlement as an award made with the consent of the parties, called a consent award; and,

c) any consent awards will be made without reasons.

27. Either party may apply to the Mediator-Arbitrator, or the Mediator-Arbitrator on his own initiative may decide, to change the written award to correct:

a) clerical or typographic errors;

b) accidental errors, slips or omissions; and,

c) arithmetical errors in calculations.

28. An application by a party to correct a written award must be made within 14 days of delivery of the award.

29. Subject to and as required by the *Arbitration Act of Alberta* or the *Arbitration Act of British Columbia*, ________________ and ________________ agree that they are bound by the terms of the Mediator-Arbitrator’s award.

30. On application by the parties, and subject to the court’s discretion, all or some of the terms of the award may be incorporated into a consent order.
Appeals

31. The award of the Mediator-Arbitrator may be appealed by a party in accordance with section 44 of the Arbitration Act of Alberta, for mediation-arbitration proceedings sited in Alberta, or in accordance with section 31 of the Arbitration Act of British Columbia, for mediation-arbitration proceedings sited in British Columbia.

32. _________________ and __________________ express that the award of the Mediator-Arbitrator may not be appealed on the ground of the Mediator-Arbitrator’s perceived, potential or actual bias in expressing his views on the legal issues or in assessing the strengths and weaknesses of each party’s position in the mediation phase of this arbitration-mediation.

End of the arbitration phase

33. The arbitration phase of this mediation-arbitration proceeding will end when:
   a) the parties reach a settlement resolving all of the legal issues; or,
   b) the Mediator-Arbitrator has made an oral award addressing all of the legal issues.

34. The Mediator-Arbitrator may make an order ending the arbitration phase if:
   a) the parties withdraw all of the legal issues that were not settled in the mediation phase from mediation-arbitration; or,
   b) the Mediator-Arbitrator concludes that the continuation of the arbitration phase has become unnecessary or impossible.

Enforcement

35. Subject to the rights of judicial review and appeal set out in the Arbitration Act of Alberta or of British Columbia, the Mediator-Arbitrator’s award may be enforced by either party under section 49 of the Arbitration Act of Alberta, for mediation-arbitration proceedings sited in Alberta, or under section 29 of the Arbitration Act of British Columbia, for mediation-arbitration proceedings sited in British Columbia.

Termination of agreement

36. Neither _________________ nor __________________ may unilaterally terminate this agreement. The Mediator-Arbitrator will continue the mediation-arbitration even though a party no longer wishes to participate or has ceased to participate.
Evidence of Mediator-Arbitrator

37. Because mediation and arbitration are confidential, private processes aimed at resolving disputes outside of court, ______________________ and ______________________ agree that:

   a) all communications between the parties, the Mediator-Arbitrator and John-Paul Boyd Arbitration Chambers are made on a without prejudice basis, are privileged and may not be disclosed whether or not a communication contains an offer to settle or compromise a party’s position;

   b) neither will ask or require the Mediator-Arbitrator to provide information, give evidence, or produce documents in any litigation between the parties concerning the communications, discussions, evidence and content of this mediation-arbitration; and,

   c) any documents or information retained by the Mediator-Arbitrator or John-Paul Boyd Arbitration Chambers will not be subpoenaed by the parties or their lawyers.

38. The parties acknowledge that the Mediator-Arbitrator may, in certain circumstances, be compelled by a party to testify in litigation proceedings despite the other terms of this agreement. The parties acknowledge that calling the Mediator-Arbitrator as a witness in such circumstances is a breach of their obligations under this agreement and that the party who calls the Mediator-Arbitrator as a witness will:

   a) immediately to pay the Mediator-Arbitrator the sum of $2,500 as liquidated damages for breach of contract; and,

   b) pay to the Mediator-Arbitrator the sum of $425 per hour, plus any applicable taxes, for all time spent by the Mediator-Arbitrator in consequence of being called as a witness, including time spent reviewing his file and preparing to give evidence, whether or not the Mediator-Arbitrator actually testifies in the legal proceeding.

Appointment, retainer and fees of Mediator-Arbitrator

39. ______________________ and ______________________ jointly appoint and retain the Mediator-Arbitrator.

40. ______________________ and ______________________ agree that the Mediator-Arbitrator will be paid a flat rate of:

   a) $600 plus tax if this arbitration-mediation concerns a single legal issue;

   b) $800 plus tax if this arbitration-mediation concerns two legal issues; or,
c) $1,000 plus tax if this arbitration-mediation concerns three or more legal issues.

41. Subject to an award of costs to the contrary in the final award, ___________ and ___________ agree that they will each be responsible to pay one-half of the Mediator-Arbitrator’s account. Interest will accrue at a compounding rate of 1% per month, 12.68% per annum, on all accounts that are not paid within 30 days of the date on which they are due.

42. In the event that one of the parties fails or refuses to pay their share of the Mediator-Arbitrator’s account, the Mediator-Arbitrator may accept payment of the defaulting party’s share from the other party and exercise his discretion regarding costs to make a further award requiring the defaulting party to reimburse the other party for the amount of any such share.

43. ___________ and ___________ agree that the Mediator-Arbitrator may withhold delivery of his written award until the Mediator-Arbitrator’s account is paid in full.

Waiver of liability

44. ___________ and ___________ waive any claim or right of action they may have against John-Paul Boyd Q.C. arising out of this mediation-arbitration.

Acknowledgments

45. In the case of mediation-arbitration proceedings sited in Alberta, the parties acknowledge that:

a) decisions about decision-making in respect of children and parenting time or contact with children will be made taking into consideration only the best interests of the child;

b) the Arbitration Act provides that an arbitration agreement may be only cancelled by the court under the law of contract, which includes legal questions about issues such as incapacity, duress, undue influence, coercion, mistake and misrepresentation; and,

c) the Arbitration Act provides that an award may be cancelled by the court if a party signed an arbitration agreement while under a legal incapacity or the award of the Mediator-Arbitrator was obtained by fraud.
46. In the case of mediation-arbitration proceedings sited in British Columbia, the parties acknowledge that:

a) decisions about decision-making in respect of children and parenting time or contact with children will be made taking into consideration only the best interests of the child; and,

b) the Arbitration Act provides that an arbitration agreement and a mediator-arbitrator’s award may be cancelled by the court if

i. a party has taken improper advantage of the other party’s vulnerability, including the other party’s ignorance, need or distress,

ii. a party did not understand the nature and consequences of the arbitration agreement, or

iii. other circumstances exist that would cause all or part of a contract to be cancelled under the law of contract, which includes legal questions about issues such as incapacity, duress, undue influence, coercion, mistake and misrepresentation;

c) the Arbitration Act provides that a mediator-arbitrator’s award may be set aside by the court if the award was improperly procured; and,

d) an award for the payment of child support or spousal support is a “maintenance order” under the Family Maintenance Enforcement Act.
47. _________________ and _________________ further acknowledge that failure to disclose all relevant documents and information may be grounds for cancelling, staying or setting aside an agreement reached through mediation or appealing an award of the Mediator-Arbitrator.

Signed by _________________ on _____________________ 2020, at _________________, in the Province of _________________________________.

____________________________
____________________________

Signed by _________________ on _____________________ 2020, at _________________, in the Province of _________________________________.

____________________________
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JOHN-PAUL BOYD ARBITRATION CHAMBERS

Per:

____________________________
John-Paul E. Boyd Q.C.,
Family Law Mediator and Arbitrator