

## Family Mediation

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"Don't hate, it's too big a burden to bear."  
*Martin Luther King, Sr.*

### What is Mediation?

Mediation is a voluntary process of cooperative problem solving in which a neutral third party, with special training and skills, helps individuals to work out mutually acceptable, agreements. The mediator is selected by agreement between the parties. In family mediation, probably more than in any other type of mediation, the mediator should be qualified by education and training in family related matters.

It is important to note that the mediator does not reach the solution, the parties, based on the principle of self-determination, do so, with the mediator's help.

Although conflict in family matters is very emotional and difficult to deal with, you should come to mediation with an honest desire to reach a settlement that is fair to both and workable in practice. A humane approach to problem solving benefits everyone in the dispute.

Participants in mediation must be prepared to be flexible in moving away from their initial positions to seek solutions which meet as many of their mutual interests as possible. The mediator will help you assess your capacity and readiness to mediate before the process fully begins.

Mediation is voluntary, and either party is free to withdraw from mediation any time during the process. Unless there is an existing contract between the parties which requires mediation if a dispute arises, or if required as part of a mandated court procedure, a party need not participate in mediation. In some circumstances, the mediator may also decide to end the process, if he or she believes that mediation is not appropriate or useful for the parties.

Although the process is voluntary, agreements reached through mediation can be as valid as any other contract.

### What Issues Can Be Mediated?

Most disputes arising out of separation can be dealt with through mediation. This includes parenting arrangements, child and spousal support, possession of the matrimonial home and division of property.

There are many situations when a custody battle seems inevitable. In almost every case, some factors will favour one parent while and other factors will support the other parent. If two "good" parents fight in court, both are likely to be dissatisfied with the results. On-going parental conflict is the single most damaging part of the separation for children. The mediator works with parents to help them in deciding what is in the best interests of their children.

Mediation can also assist in negotiating the terms of marriage contracts and cohabitation agreements. Even parties who have a separation agreement or court order may mediate when they wish to make changes to the agreement or order.

Other issues suitable for mediation include conflicts between adolescent children and their parents, inter-generational conflicts, disputes between family members over estates or where one family member is suing another in court for monetary damages.

There are some situations which are generally not suitable for mediation. Examples are those where there are significant power imbalances which prevent or impair the ability of the parties to negotiate fairly with each other, and if there has been a history of domestic violence.

### **The Mediation Process**

After an intake process which may involve individual meetings with the parties or the review of documents prepared by the parties or their lawyers, the mediator will meet with both parties in joint sessions lasting approximately 1-1/2 to 2 hours. The total number of sessions will vary depending on the complexity of the issues and the parties' progress towards resolution.

Each side explains their view of the dispute and information, including documents are shared. In family mediation, the parties' lawyers are usually not present during the mediation sessions, but act as coaches in advising the parties throughout the mediation process. The lawyers also co-operate with the mediator in helping their clients work through issues especially if the parties reach an impasse and cannot move forward.

Occasionally, the mediator may wish to meet individually with each party. Either party may also request an individual meeting with the mediator. Sometimes, to resolve the dispute, it may be necessary to have the participation of experts or others who have a stake in the outcome. The involvement of any non-parties should be discussed and agreed to in advance of the actual mediation session.

When the parties reach a tentative agreement, the mediator will write up a memorandum of understanding. The parties are not bound to any proposed agreement arising out of the mediation process until the agreement has been fully reviewed by their legal counsel and signed by them.

### **The Mediator's Role**

The mediator is an impartial third party neutral who is not on either party's side and has no personal interest in the outcome of the dispute. The mediator is a facilitator who helps the parties to negotiate their own terms of settlement. Although the mediator may be a lawyer, he or she will not act as legal counsel for either party to the dispute. At most, the lawyer/mediator may provide neutral legal information to the parties and may flag issues for them to discuss with their independent lawyers. The mediator is not an Arbitrator or Judge. He or she will not decide for the parties how the issues brought to mediation should be resolved, or what is fair. The

mediator will help the parties to reach their own decisions based on their own individual sense of fairness.

### **The Lawyer's Role**

Each party should be expected to have independent legal advice about their legal rights and obligations so that they can make informed choices in mediation. Although you may choose to depart from a strict legal position because of the facts and circumstances of your own case, this should only be done with full knowledge of your legal rights.

The role of counsel is to advise the client of his or her legal rights and obligations and to act as "coach" for that party during the mediation process. He or she will advise on various issues as they arise during mediation, review the memorandum of understanding and draft any other formal documents needed to carry out the terms of any agreement.

It is up to the parties to make their own informal decisions, using information from counsel as one of many factors in the decision-making process.

### **Confidentiality and Mediation**

It is generally up to the parties to decide whether their mediation process is confidential or not. In most cases, they decide that it should be confidential to encourage complete disclosure since they seek to reach a settlement based on all relevant information about the dispute. Because of this, it is important that all discussions take place in mediation on an "off the record" or "without prejudice" basis. This is often called "closed" mediation and is the most common form of family mediation.

The mediator, unless otherwise agreed in writing by the parties, will not voluntarily disclose the substance of any of the discussions which take place in mediation, nor the content of any documents prepared or exchanged during the mediation process. For mediation to be a confidential process, each party must sign an agreement not to call the mediator to testify in any subsequent legal proceeding between them.

Although the mediation process is intended by all parties to be confidential, the mediator cannot absolutely guarantee such confidentiality. The mediator may, under limited circumstances, be required by law to disclose information, such as child neglect or abuse or actual danger to the participants.

Sometimes the parties to a mediation may jointly choose to waive the confidentiality of the mediation sessions. If the parties are unable to reach agreement on all issues brought to mediation, the mediator may, if part of the mediation agreement, give his or her non-binding opinion on the terms of a possible settlement. The mediator's suggestions and recommendations for settlement can take the form of a written report to the parties and their lawyers which may be used in any subsequent legal proceedings. The mediator may be called as a neutral to testify at court and be cross-examined upon his or her written report, but will not be a witness for either party.

## The Benefits of Mediation

Mediation has a high rate of success which some studies place at over 80%. Although not for every conflict, participants find that mediation identifies the real issues in a dispute in a more efficient way than court proceedings. Mediation is also less damaging to on-going family relationships and the process is usually, but not always, faster and less expensive than traditional litigation. In family disputes, costs, both financial and emotional, can be extremely significant and clear "winners" are rare. This often leads to significantly reduced standards of living for both parents since funding the "battle" while maintaining separate residences can be extremely difficult. The result of an adversarial approach will leave scars for years to come especially on your children.

Mediation will not always result in a settlement and in that case, you are still free to seek other remedies through arbitration or court. Even in these cases, final costs are often reduced as the parties may have agreed on solutions to some of the issues involved in their dispute.

Of those individuals who reach agreement through mediation, over two-thirds agree that the settlement was fair and that they were satisfied with both the process and the results. By minimizing the atmosphere of conflict and providing a safe more reasonable environment, people are able to focus their energy in reaching creative and reasonable solutions to their disputes.