

# **Mediation in Family Law**

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## **MEDIATION IN FAMILY LAW**

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This paper is designed to be a working resource for time strapped family lawyers who want to help their clients make appropriate process choices for resolving their family law issues. As such it is designed in a way that it is hoped makes for ease of use.

It is not intended to be a course on how to conduct mediation. There are other resources for that purpose. It is intended to assist in determining the merits in taking part in mediation, what to expect in mediation and how to prepare the client for mediation whether they attend on their own or with the assistance of counsel.

The paper is broken into sections so that discrete topics can be referenced without reviewing the whole paper.

Each section is intentionally brief and designed for quick review. It is expected that is what most lawyers are looking for in a resource like this. Those that want more are referred to the courses and texts available on ADR and mediation in particular.

At the end of this paper is a collection of handouts and client resources that it is hoped will be of assistance both to the lawyer and to their clients. Some sections of the paper will be little more than a reference to a particular handout in order to avoid duplicating the information.

## **1. Executive summary**

Mediation is a facilitated negotiation. It is non-binding by definition as compared to Arbitration which is a binding process. It is not therapy or relationship counseling.

The relationship is over and now the parenting of any children and the finances need to be restructured in a way that both parties can find acceptable and move forward in their lives.

The mediator is a neutral third party usually with training in interest based negotiation. The mediator will assist the parties to help them determine what issues need resolution, what issues are capable of resolution in mediation, help them explore options for resolution and help them either narrow the issues in dispute or reach agreements on some or all of the issues.

Usually, mediation takes place at the Mediator's office but can take place anywhere the parties might find convenient or agree upon. The length of the mediation will depend on the number of issues and the difficulties involved. Generally with most mediators, the parties will book a half day or a day at a time.

An understanding in mediation is 'generally' considered to be non-binding until the parties can formalize it into a written agreement with the benefit of independent legal advice. Parties are generally expected to have the opportunity to "sleep on it" and confirm any understanding reached after consulting with their respective lawyers. "Generally" because in some occasions parties will agree to opt out of the general rule and cement an understanding reached at mediation in a way that binds them without the opportunity for further reflection and review.

## **2. Do I have to mediate?**

Mediation is usually a voluntary process. In Alberta, at the time of writing, short of an agreement or Court Order to the contrary, there is generally speaking no obligation to mediate. It is in most cases a good idea.

Mandatory attendance at the Dispute Resolution Officer program in Calgary or the Child Support Resolution Officer program in Edmonton is a separate issue. It is suggested that attendance at either of those programs does not meet the requirement of the Rules about taking part in an ADR process before trial.

There may be a mandatory requirement in an agreement or Court Order to mediate. Usually that is there by previous agreement or consent of the parties. While the current Rules of Court encourage the parties take part in a dispute resolution process, which could include mediation and mandate it before parties can go to trial, there is no absolute obligation to mediate short of that.

Note however that Canada's Divorce Act and Alberta's Family Law Act make it the legal duty of lawyers to advise parties about mediation and the merits of using mediation. The Code of Conduct and a lawyer's duty to be competent also mandate lawyers working in family law to understand and be able to share with clients the merits of using mediation.