

How does mediation work in family law matters?

Author: Ben Smith
Email: ben@smithfamilylaw.com.au
Date: Monday May 13, 2024

When the issues in question are as important as your children, well-being, or home, it is important that you are at the forefront of the decision-making process. Mediation is one of several alternative dispute resolution processes in family law, which can provide a forum for both parties to negotiate their options and reach an agreed resolution. It can allow the parties to arrive at a mutually beneficial outcome whilst avoiding lengthy and costly court hearings.

What is mediation?

Mediation is an alternative dispute resolution process which allows parties involved in a dispute to reach an agreement with the assistance of an independent third-party mediator.

The mediator will not provide legal advice, take sides or make decisions. Rather, the mediator is there to guide the discussion in a productive way that assists progression and resolution of the matters in dispute.

Mediation is often used in family law matters.

Parties can attend mediation in person or remotely, and (provided it is appropriate), are encouraged to make a genuine effort to resolve matters in dispute at all stages of their family law proceedings. This includes before, during, and, if required, following the finalisation of the matter.

Do you need a lawyer for mediation?

Parties can choose to participate in mediation without a lawyer. However, where matters are more complex, the parties may choose to participate in lawyer assisted mediation.

When parties are on good terms with each other or the matters at hand are not particularly complex, mediation without lawyers can be an appropriate option to resolve a dispute without the involvement of lawyers. If parties elect to engage in mediation without the assistance of lawyers, it is prudent for both parties to obtain independent legal advice before proceeding or signing any written agreement.

However, where the matters in dispute are complex or one or both parties are feeling anxious or intimidated (for example, there is family violence), it may be more appropriate to undertake lawyer-assisted mediation. In this situation, if you are not confident engaging in mediation on your own, a lawyer can assist in providing expert advice and will negotiate on your behalf to reach an agreement.

Reaching a final agreement at mediation

Where safe and appropriate, mediation is a highly beneficial first step to take in your family law matter. At mediation, the issues between the parties can be identified, and the process can provide the attendees with a better understanding of what elements of the dispute can be settled outside of court.

Mediation can also be the first step in creating legally binding and enforceable agreements in relation to parenting or property matters, such as:

- Consent Orders (for parenting and/or property matters);
- Binding Financial Agreements (for property matters); and/or
- Child Support Agreements.

If the matters in dispute are settled at mediation, the agreement reached can be made legally binding by the parties, properly formalising the agreement by way of one of the above documents. Once a Consent Order is drafted and signed by both parties, the court will review the agreement to ensure the proposed settlement is just and equitable.

Mediation can even be used to decide one particularly important or sensitive element of a family law matter, for example what high school a child is to attend or the return or exchange of household items. This can significantly reduce the time your matter is in court and the costs involved as you have already reached an agreement in relation to some of the smaller issues.

If the parties cannot reach an agreement at mediation, they can consider whether to apply for their matter to be heard and resolved by the court. At this point, mediation is not necessarily lost as a potential avenue but rather, if appropriate, continues to be an available option for resolving the issues before proceeding to a trial.

Genuine Steps Certificate

Parties in a family law dispute who are looking to progress their matter in court will need to obtain a Genuine Steps Certificate. This is part of the pre-action procedures required before a court application can be filed.

Attending mediation is one of the genuine steps parties can take to resolve their family law matter before considering making an application to the court. In relation to parenting matters, at the conclusion of the mediation, whether or not a resolution has been reached, parties can obtain a 'section 60I certificate' from the mediator, which certifies they have undertaken genuine steps to resolve their matter.

In parenting matters, there are some exceptional circumstances when parties may not have to attend a mediation prior to attending court.

Such circumstances can include the following:

- There is an immediate risk of harm to a party or the children;
- There are family violence or child abuse factors;
- There is an urgent matter that needs to be dealt with (e.g., a risk that a child may be taken overseas);
- A person is unable to participate effectively (e.g. due to incapacity or geographical location); and/or
- A person has shown a clear disregard for a court order made in the last 12 months.

What are the benefits of mediation in family law?

Mediation provides more choice

Mediation in family law matters is often preferred because it allows the parties involved to have more control and autonomy over the outcome of their matter compared to litigation (where a court decides). Mediation works in a way that allows the parties to negotiate the terms of settlement to find practical options and solutions that work for everyone, which, in some cases, the court may not have the power to make.

In family law mediations for parenting matters, the primary focus is usually to agree to a Parenting Plan. Mediation can afford you more choice when it comes to matters relating to your children as it allows you to make your own decisions and can ensure successful ongoing communication between you and the other parent.

Mediation can help narrow issues in dispute

Going through the mediation process can assist to narrow the issues in dispute. For example, the dispute may simply be a mis-communication. The mediator can work with the parties to resolve mis-communication and mis-understandings. This can often lead to parties resolving their issues early and avoiding lengthy and costly court proceedings.

Mediation can reduce family law costs

Litigation (going to court) can result in significant legal fees. Another benefit of settling your matter outside of court through mediation is that mediation can reduce costs by avoiding the legal fees incurred through prolonged and lengthy court proceedings.

In some cases, there is no other option but to litigate to reach a just and equitable outcome, but the majority of family law matters are able to be settled by consent of the parties. Mediation provides parties with a forum for open discussion and compromise so that parties can reach the most desirable outcome for all involved. This is why most family law matters settle by consent rather than being decided by a judge through litigation.

Alternative dispute resolution options as your matter progresses

While you may still be required to attend certain court events to progress your matter, this does not mean that you are not able to settle elements of your dispute along the way.

In addition to mediation, there are several other alternative dispute resolution methods available, such as a conciliation conference. Another option for parties is arbitration which differs from mediation in that the independent third party will play an active role by making a determination to resolve the dispute, rather than merely guiding the discussion. These options can be accessed at any point during your family law proceedings.

Exploring mediation and other alternative dispute resolution options can lead to substantial cost savings, reduce stress and frustration and provide more mutually beneficial outcomes for you and your family.

How a family lawyer can help

Deciding whether to participate in mediation concerning your family law matter can be a daunting prospect. Smith Family Law can advise you as to the options available for your specific circumstances, any potential avenues for settlement, and to advise and negotiate on your behalf at a mediation.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.