

# Why Mediation and How Does It Work?

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- Jane Henderson, QC

As a lawyer who has practiced Family Law for over 30 years , I know that the end of a relationship is very difficult for all concerned, even for the party who wants out. Not only is it likely to be emotionally devastating, but for most people who use the Court Process (i.e. Litigation) to resolve the issues that arise, such as parenting, division of property, and support, it is also extremely expensive and it may take a very long time to achieve resolution.

Litigation makes a bad situation worse. No-one feels like they have “won”. If children are involved it is particularly difficult. Just at the time when they need the best parenting possible to help them adjust to the reorganization of their family, their parents are at least distracted from, or at worst incapable of, focusing on the children’s needs.

Another lawyer once described Litigation as “the most fun you can have standing up”,..... and I think I agree.....as a lawyer. If I could create a “You Be The Lawyer” Board game I am pretty sure I could retire! But for the people who are paying the bill , it is very expensive and highly stressful, the process is often incomprehensible, the outcome is uncertain and will be determined by someone who has never met you before and likely never will again. Years may go by without any real resolution.

It doesn’t have to be that way. Mediation provides parties with a process where they, with their lawyers’ help, determine the outcome that will best meet their needs and the needs of their family. It will almost always be much cheaper than litigating. The parties are not bound by rules of Court Procedure so with the help of their mediator and their lawyers they are able to create a process and a timeline that works for them. It usually takes less time to obtain the final result than going to Court. The Mediation Process does not eliminate the pain of relationship breakdown, but it does go a long way to ensuring that more pain is not created through the resolution process.

Mediation is very much a child-centered process. As Mediator, if the children are of an appropriate age, I am often asked to speak to the children about what is going on and how it is impacting them. For most parents the results are helpful, and for some, surprising. My objective, as Mediator, is to help the parents keep their children’s needs and best interests first and foremost throughout the process.

I may refer the parents to a child specialist, or to parenting programs if available. Parenting is hard enough in an intact family and it often becomes harder when the parents live in different homes, but there are resources available to help insure that the best interests of the children continue to be met.

Mediation is informal but not casual. For the final settlement to be binding, full financial disclosure is as important to the Mediation process as it is to the Court process. Part of the mediator’s job is to ensure that all meetings are carried on in a safe, civil and respectful way and that the parties have the opportunity to obtain all the information they need to make good decisions.

As the Mediator I am a neutral party who is not going to favour one side over the other or give either party legal advice. As a lawyer with a lot of experience in family law, I may tell the parties generally what the range of legal outcomes is, and what possible outcomes are likely in Court, but I do not provide them with legal advice. Often clients attend with their lawyers from the very beginning; others do not want the expense of involving lawyers at all. But it is always my recommendation that the parties get Independent Legal Advice before they finalize any agreement. Even if their lawyers do not attend the Mediation sessions they should be consulted before the deal is finalized.

The Mediation Process may start at any time. Some parties will attend Mediation before they have even seen a lawyer. For others, Mediation happens on the eve of trial, with their lawyers, as a last effort to resolve the issues. Sometimes we start the Mediation process and then it is adjourned to enable parties to get more information, or perhaps counselling...sometimes the parties just need time to think things over...the point is that the parties control the timing, not lawyers, or the Court, or the mediator for that matter.

In a typical Mediation I will meet with each party separately, usually in person but if necessary by phone, prior to our first joint meeting. This enables the parties to get to know me and to ask any questions they may have, and it enables me to get to know them and to get an idea of the parties joint and separate issues and interests. It also enables me to determine if we have all the information we need in order to reach a resolution and if not, how to get it. That ensures that we are not wasting our time when we meet. Even though Mediation is cheaper than the alternatives, I am well aware that it is still a big expense for families so we must use our time as productively as possible.

My fees as a Mediator are \$275 per hour, plus tax and disbursements, for all the time I spend on the file. Each party brings his/her share of the retainer (usually \$1500 each, unless one party is paying all or more of the cost) to the first separate meeting to be applied to the costs of the Mediation, including those first, separate meetings. If the Mediation doesn't proceed for some reason the funds are returned less the costs of the first meetings. If the parties are represented by lawyers who agree to pay my account from their retainer then I do not require a further retainer.

When the first meetings are set up, my assistant Julia sends a letter or email confirming the dates and times, together with a copy of the Agreement to Mediate which will be signed by all parties at the beginning of the first joint session.

Depending on the number of issues and their complexity a Mediation may take as little as 2 hours or it may take several days. If lawyers are already involved they may provide briefs which set out what has happened so far, what is agreed and what still needs to be resolved. Although the preparation of briefs is an added expense for the parties, a brief may save a considerable amount of time, and therefore money.

During the Mediation, I meet with the parties (and their lawyers if present) together, but we may also meet separately when that is likely to be more productive. If necessary we may involve accountants, child experts, or any other resource that may help the parties come to the resolution which works best for them and their family.

When the parties have reached a resolution, it may be recorded as a Memorandum of understanding which the parties may then take to their lawyers for Independent Legal Advice, to eventually be finalized by way of a Separation Agreement, or Court Order if the Litigation Process has already been started. If the parties' lawyers have been present throughout the Mediation process the agreement may be recorded as Minutes of Settlement which are immediately binding upon the parties although the Minutes will usually become a formal Separation Agreement or Court Order.

As a Mediator who is also a lawyer I often draft the Separation Agreement at the request of the parties' lawyers to ensure that it is drafted in the most neutral way. If parties are not represented I may draft the agreement for them to take to lawyers for Independent Legal Advice.

If one or both of the parties wants a Divorce, then it will still be necessary to go to Court to get an Order for Divorce in order to formally change the parties' status from Married to Divorced. However if the other issues, that is parenting, division of property, spousal and child support, have been resolved by agreement then the Divorce is a much cheaper administrative process that does not require either party to appear in Court

I have spent many years in the Court room on behalf of my clients but I truly believe that most people are best served by a Mediation process and am pleased that I am able to now restrict my practice to just mediation. In addition to assisting people negotiate the end of their relationship; I also help them at the very start. Many people, whether they are planning to marry or to live together, recognize the benefits of a cohabitation agreement to set out their intentions with respect to property ownership during their relationship and in the event that it ends, either by separation or death. As a mediator I am able to meet with them together, help them work through what can be touchy issues, and draft their agreement which they can then each take to their own lawyer for Independent Legal Advice.

Cohabitation agreements (also known as prenuptial agreements and marriage agreements) may help prevent a lot of expensive grief if a relationship breaks down. I also think it can help strengthen a relationship if the parties are able to talk frankly about their expectations and assumptions from the very start. I have compared such agreements to fire insurance, no-one likes to think about their house burning down, but it wouldn't occur to us not to have insurance to protect us when it did. The sad fact is that you are more likely to have a relationship breakdown than a fire, but a cohabitation agreement may help make the recovery much easier.

Mediation is also useful for helping families resolve the issues that arise when parents are making provision for the disposition of their property among their children or after their deaths, if the children have issues in the distribution of their parents' estates. It is sometimes hard for siblings to work out how to deal with the provisions their parents have made in their wills, a mediator can be a big help in that process.

With the likelihood of major changes coming in the area of Family Law, Mediation becomes an even more useful process for resolving disputes on relationship breakdown. It is also a great tool for working through the preparation of cohabitation contracts and resolving estate issues.