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MEDIATIONS

SOME COMMON QUESTIONS AND ANSWERS

WHAT IS MEDIATION?

Mediation is a process where a trained person assists two or more people who are in dispute, to negotiate a mutually satisfactory resolution to their dispute. It is a form of “assisted” or “facilitated” negotiation. Before mediation, parties through their lawyers may have attempted settlement of their dispute, but without success for many reasons.

Mediation offers the parties and the lawyers, a safe and secure environment in which to take the negotiations to the next level by introducing a third neutral person (the mediator). The mediator facilitates discussions to explore the issues and concerns of the parties and help them to identify and explore options to resolve their dispute.

Two of the essential elements of mediation are the neutrality and confidentiality of the process.

(a) Neutrality

The confidence of the participants in the objectivity of the mediator is essential to the prospects of success of the process itself.

If at any stage in the process you have any concerns about issues of fairness and impartiality, please raise them directly with the mediator or through your Solicitor and the mediator will endeavour to address those concerns immediately.

(b) Confidentiality

Another equally important component of a mediation is the confidentiality of the process. This is particularly important where litigation is pending or being contemplated. An essential part of productive negotiations is the willingness and capacity of parties to discuss and identify issues frankly, to make concessions and to compromise where appropriate. The prospect of them doing so would be seriously undermined if such concessions and proposals could be subsequently used in court.

As a consequence, mediations are covered by principles of confidentiality and all parties, the mediator (Chair) and the legal representatives are bound by a legal



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prohibition, contained in the agreement, preventing them from disclosing the contents of discussions and proposals canvassed during the mediation, without the consent of both parties and the mediator. There is an exception, namely the mediator may make disclosure where the information disclosed suggests an actual or potential threat to human life or safety, or intentional or imminent serious harm to property, or if compelled by law to do so.

The Role of the Mediator

The mediator's roles include controlling the mediation process, facilitating discussion and generally assisting the parties to reach an acceptable agreement.

It is not the mediator's role to act as a legal advisor and it is not the role of the mediator to act as a Judge and to impose outcomes upon parties.

However, it is appreciated that in some cases and at some stages in mediations, parties and/or their legal representatives may feel that, given the experience of the mediator in the law, it may be of assistance in the negotiating process for him or her to express some views or opinions about the merits of some of the competing proposals and propositions in the context of considering what might be the outcome should the matter proceed to trial in a Court.

The views expressed should not be received as legal advice. Any views expressed by the mediator are necessarily based on limited information and are always to be subject to the legal advice the parties have available to them at the mediation or elsewhere.

The mediator will discuss with the parties and their lawyers in the intake session whether such a view or opinion may be sought from the mediator during the mediation conference and when and how that may occur.

The Role of the Parties

You have agreed to participate in the mediation process and your obligation is to make a genuine effort to resolve matters in dispute.

You have a duty to give full and frank disclosure, as far as practicable, of all information relevant to the issues between you and your spouse and in a timely manner.



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You have the right to be fully informed about and fully involved in the mediation. You have the right to terminate the mediation at any time.

The Role of Legal Representatives

Primarily, your lawyer continues to act as your legal advisor to protect your interests and to inform you of your entitlements at law. However, in mediation, your lawyer will also help you identify the issues that are important to you, ensure that they are dealt with in the mediation, will assist you in the development of options and help you "reality test" options to ensure that you are comfortable with them and understand their implications. Your lawyer will assist you in the negotiations between you and the other party and can draw up any agreement if one is reached.

It is likely that, during the course of the mediation, your lawyer will discuss with you not only your entitlements at law but also the risks of litigation and the benefits of resolution. Your lawyer is likely to discuss with you your best and worst-case scenarios and the likely cost of achieving them. In this way, your lawyer is assisting you in your negotiations.

WHAT EVENTS PRECEDE MEDIATION?

Typically (though every mediation process is varied), mediation involves the following steps:

- The mediator is approached by a party or their lawyer with a request to assist. Often such a request arises as a requirement of a Court that parties attend mediation.
- The mediator checks that both parties and lawyers agree to his/her appointment.
- If there is agreement, the mediator sends to each person, information about costs, the mediator's background and an Agreement relating to confidentiality and costs.
- A time and place (often a "neutral" venue) for the meeting is arranged.
- Intake or pre-mediation sessions with each party and their lawyer are arranged.



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WHAT CAN I EXPECT IN THE INTAKE (PRE-MEDIATION) SESSION?

Most commonly mediators will meet with each party and their lawyer separately prior to the mediation. This is called an intake or pre-mediation session. These sessions are important as they assist the mediator in understanding what each party considers important, why negotiations may not have been successful to date and what each party is expecting from the process. It also allows the parties to ask questions about the process itself. Each party may also discuss matters with the mediator in the intake session that are to remain confidential from the other party and their lawyer.

It is important in this private session for the participants to be open with the mediator. The open discussion of interests with the mediator, helps the mediator understand what is important to each party and helps generate fruitful exploration of issues and interests. It is quite normal for participants to experience a wide range of emotions in family law matters; some of these can be helpful to negotiations and some can be a hindrance.

Mediations have more chance of success if everyone is feeling as comfortable as possible with the process. For some people this will be the first time that they have been in the same room together since separation and it can be confronting. The intake session helps the mediator discuss these issues with the client as they will invariably have an influence on the way the party reacts to the mediation

Anything that is discussed in the private meeting is confidential and will not be disclosed by the mediator to the other party unless the mediator is specifically permitted by you to do so.

The mediator clarifies each party's concerns and what issues they wish dealt with, and then tries to identify areas where the parties are in agreement or disagreement.

HOW IS THE MEDIATION CONDUCTED ?

Generally the parties, their lawyers and the mediator conduct the mediation in joint session with the parties having the opportunity of identifying issues, exploring options and discussing settlement. The advantage of the joint sessions is that the process is very transparent as everyone is there. Also matters can be discussed immediately as they arise and it normally allows for a greater exploration of issues. Parties also normally have breaks and separate sessions to discuss matters with their lawyer alone and with their lawyer and mediator as part of this process.

Some mediations are conducted by separate sessions (sometimes referred to as shuttle mediation). These are normally conducted where there are issues of family violence. In a shuttle mediation, the Mediator will seek to have each party through their lawyers, continue to make concessions from their position conditional on knowing that the other party will do the same – in other words a two way street. Often the matter simply proceeds through negotiation, by offer and counter-offer. In a



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non-confronting way, each of the parties is encouraged to come up with possible ways to resolve each issue. An agreement is pieced together, like a jig-saw puzzle.

CAN I TALK ABOUT THE MEDIATION SESSIONS WITH FRIENDS OR PROFESSIONAL ADVISERS?

Yes, during the mediation you will have ample time to speak to your lawyer or adviser with the mediator present, if you wish. You can call a halt at any time to discuss where the matter is going or to express any concerns. During the mediation there will also be planned times for you to discuss matters privately with your lawyer and advisors. The mediation is not meant to be a coercive process. This is in stark contrast to the manner by which a case is adjudged by a Court, where the ability to discuss matters and have some control over outcome is replaced by a structured hearing directed by a Judge or Federal Magistrate.

ARE ARRANGEMENTS REACHED AT THE MEDIATION BINDING AT LAW?

If agreement is reached the parties will be expected to sign either a Heads of Agreement document or in the case of pending Court matters, final consent orders or other documents that make the mediated agreement binding.

Until that is done nothing said during the conference is binding.

In some cases that cannot occur at the mediation due to the need to take further steps or sign further documents to make the mediated “agreement” binding.

WHAT IF I FEEL UNCOMFORTABLE WITH THE MEDIATION?

You can have a break at any time – no reason is needed. You will find that dealing with some issues will be confronting. You can ask to speak to the mediator alone. Or you can express your concern immediately and the mediator will try to deal with it openly. Or, you can ask for the mediation session to be adjourned.

One of the mediator’s tasks is to try to balance the negotiating strengths of each person and to minimise any feelings of intimidation.

WHAT DOES IT COST?

Mediators usually charge a “per day” or “half day” rate and then an hourly rate for matters that go past normal finishing times (usually 5.00pm). If rooms are hired for the mediation those costs are also shared. The mediator’s costs are set out in the Mediation Agreement signed by all participants.