
MEDIATION

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Most parties who are facing the prospect of divorce/breakup automatically assume that they have to see an attorney. Parties are unaware that there is another option open to them. That option is family law mediation. Most lawyers, too, are either unaware of or unwilling to advise their clients to consider this option. As a result mediation is a process that is not well known to the average person going through a divorce/breakup, despite the many benefits it can offer a family that is experiencing the pain, expense and conflict of divorce/breakup.

Attorneys are not excluded from the process, rather they give important advice to their clients as the process continues and particularly at the end, once agreement has been reached but before any document is signed.

Our courts are in favour of parties mediating on issues in dispute in terms of the Children's Act. Lawyers are obliged to recommend mediation, as a result of which attorneys could be deprived of their costs, along with parties who unreasonably refuse to mediate.

The best interests of the child are the most important consideration in every matter affecting the child. What will be in the best interest of a particular child will depend on the facts of the case at hand.

Mediation is a very worthwhile form of dispute resolution in rights of contact to the minor child(ren). It may end up saving the parties quite a bit of money. It usually takes three or four sessions for the mediator to reach an agreement between the parties. The length of the mediation procedure would depend on the complexity of the matter, as each case is different. The mediator might also request to consult with the parties each alone before mediation commences to establish the problems and try and get solutions. Since the mediator is neutral and independent, they work for the benefit of the whole family.

The mediator cannot make decisions for the parties, but would help the parties to explore their options. The mediator will try and encourage a settlement that the court would be likely to approve of. The mediator is completely impartial and does not side with either of the parties.

Once an agreement is reached, it is advisable that both parents take the agreement to their legal representatives for review.

A PARENT PLAN can then be registered with the Family Advocate's office but it is advisable to rather have it made an order of the court.

WHO CAN ACT AS A MEDIATOR:

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| Family Advocate | - | The Family Advocate is an Officer of the Court employed by the Department of Justice and acts as an advisor to the Court, and as mediator between the family investigated, and the Court. |
| Psychologist | - | Preferable a psychologist that is also registered as a mediator with child psychology as a background. |
| Social Worker | - | Qualified and registered as a mediator |

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Qualified Mediator - Family Law

Family Law Attorney - Who does not act in the capacity of attorney in the mediation but if he/she chooses to provide legal information, he/she must be neutral and does not advise in the same way that an attorney would. A mediator may not act as such if he/she has previously acted for either party. The mediation, like a consultation with an attorney must be, confidential and the mediator may not provide information to any third party.

WHAT PROBLEMS CAN BE BROUGHT TO MEDIATION:

Any or all of the problems that arise when couples split up can be brought to mediation:

- a. Arrangements which concern the children, such as drawing up a parenting plan which would include contact and care arrangements.
- b. It is compulsory for unmarried parents to mediate in the event where there is dispute regarding whether or not an unmarried father fulfils the requirements under the Children's Act to hold automatic responsibilities and rights.
- c. Divorcing couples making decisions on child custody and access, maintenance and division of assets.

ADVANTAGES OF MEDIATION

- Reduce the financial and emotional costs of a legal battle.
- You make and take responsibility for your own decisions.
- Continuing relationship as parents is likely to work better.
- The parties decide on the place and time frame to settle their disagreements.
- Improved communication with your former partner and be better able to resolve disputes in the future.
- Quicker than litigation

HOW TO PREPARE FOR MEDIATION

If you are going to see the mediator without the other party present you don't have to prepare for the session.

When you meet with the other party aswell make sure what you want in the parental plan. Discuss your concerns regarding the other party. Remember the aim of the mediation is to get the best possible outcome for both parties involved and what will be in the best interest of the child(ren). Don't attack or bad mouth the other person, mention genuine concerns and facts.

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COST

The costs of the mediator vary from mediator to mediator. A session is normally about an hour to an hour and a half long. The usual agreement relating to the mediator's fees would be that the two parties would each respectively bear one half thereof. This is only fair as the two parties would normally jointly appoint the mediator. The mediator would usually charge separately for drafting the Parental Plan.

Mediation will only be successful if both parties are open and honest and IF BOTH PARTIES ARE WILLING TO PARTICIPATE IN THE PROCESS.

Case Study :- 25 August 2009 - *SA High Court obliges lawyers to recommend mediation*

Brownlee v Brownlee - The importance of mediation in family law matters and may set a precedent for the divorce process. The judgement handed down by Acting Judge Brassey in the South Gauteng High Court (Brownlee v Brownlee: 2008/25274) emphasised the duty of parties to attempt to mediate a dispute and the obligation of the respective attorneys to encourage their clients to mediate the resolution of their dispute prior to embarking on litigation and facing the delays and expense of running a trial. The judgment emphasised and extolled the virtues of mediation and also capped the fees of the attorneys on both sides because they had failed to advise their clients to attempt mediation at an early stage. The judge expressed his disapproval of the parties' conduct by making each party bear his or her own costs.

Link to full case study:

<http://www.roylaw.co.za/home/article/duty-to-mediate/pageid/divorce>