

METRAC

Mediation

FACTS + ISSUES



**A handbook for women
considering mediation for
their family law dispute.**

Her Experience with



She had been abused by her husband. Sometimes, he also said she was worthless. He only gave her the way he wanted her to be. He tried to control her actions and told them that they were

Finally, sick of his abuse, she decided to stay with her parents for a few weeks. She left the children with him because she was scared he would accuse her of kidnapping them if she took them with her. At her parents' place, she found the courage to call a lawyer about getting a divorce. Still, she didn't want to tell anyone about her husband's treatment of her – she knew they didn't believe in divorce and she wasn't sure if they would believe what she said about him. While she was staying with her parents, he continued to call, text, and email her, accusing her of cheating on him and abandoning her children.

She eventually returned home because she felt guilty for leaving the children with him. She was beaten for leaving. He would not let her attend the computer classes she had been taking at the local high school, and he stopped her from talking to or going out with her friends. Then, six months later, after he beat her so badly that she had to go to the hospital, she left again.

Mediation often works to the disadvantage of women who are abused or have less bargaining power than their ex-partners.

This time, she became more serious about leaving. She took her children with her and went to a local shelter. She called a lawyer about getting a divorce, but she still wouldn't talk about the abuse. When she filed for divorce, her husband was notified. They were required to attend a mandatory referral to mediation. At this referral,

the mediator suggested that they would likely work out their differences in mediation, and that this would save them money as well as be better emotionally for them and their children.

She agreed to try, even though her lawyer had some concerns. She did not want to seem like she was unwilling to cooperate, and she thought that she might be able to part on good terms with her husband.

Mediation

er husband many times. Not only did he beat and mean things to her, and generally made her give her money when she promised to do things. This was only one of the many ways that he abused her. Sometimes, he even slapped the children when they were stupid.

It quickly became clear that she wouldn't get the results she wanted from the mediation. After a while, she got up the courage to hint that there was some abuse in their past relationship. But, every time she brought this up, the mediator reminded her that she was to "focus on the future".

She felt unable to explain the danger she felt from her husband. Since she was not as confident at speaking as her husband was, she wasn't always able express herself properly. Each time she became angry with the fake niceness her husband was showing to the mediator, the mediator reminded her that "anger does not solve problems". In the end, her fear of her husband made her unable to stand up for her rights and those of her children.

At the end of the mediation, they had agreed to joint custody of the children, even though she was always a better, more responsible parent and he was mean to them and could easily hurt them. She also received much less than 50 per cent of the property from their marriage. When she appealed to the court to have the mediated agreement set aside, her request was rejected since she has agreed to it initially.

She went through what many other women go through. Mediation disadvantages women who are abused and is inappropriate when there's a power imbalance between the people involved. Women who are considering mediation must know that it can be unfair and even dangerous for them. This handbook is intended as a starting point.



What is Mediation?

Different people describe mediation in different ways. Here are some common descriptions:

- Mediation requires people to work out their differences by talking to each other with the assistance of a mediator who is there to facilitate their discussion but not to provide the solution.
- Mediation is a process where family law disputes can be settled outside of court and is an alternative and complement to the traditional court system.
- Mediation is designed to be an informal, voluntary process where two parties with roughly equal bargaining power, supported by a neutral mediator, reach their own solution through negotiation and agreement. If any of these ingredients is missing, the likelihood of successful and fair mediation is greatly decreased.

WHAT'S THE DIFFERENCE BETWEEN OPEN AND CLOSED MEDIATION?

Closed mediation is confidential; the mediator can only report to the court on the issues you and your ex-partner resolved, and describe the issues which you were able to agree upon.

Open mediation is not confidential; the mediator reports to the court on anything discussed during the mediation of that she/he thinks is relevant.

Closed and open mediation both have their **pros and cons**. If you have chosen mediation and you are asked to pick either open or closed mediation, here are things to consider:

- Do you think your ex-partner would behave better in open or closed mediation?
- If your case went to court, would it be better for you if the judge heard about the mediation or if she/he did not?
- Would you feel more comfortable in open or closed mediation?
- Would you feel uncomfortable about revealing certain things about your relationship if the mediation was open?

WHAT IS MANDATORY MEDIATION?

- Mandatory mediation is not voluntary. That means that you're required by law to attend the mediation.
- Some people have said that mandatory mediation goes against one of the major principles of mediation – that mediation is supposed to be voluntary for everyone involved for it to be successful.

WHAT IS MANDATORY REFERRAL TO MEDIATION?

- If the court gives you a mandatory referral to mediation, you and your ex-partner have to attend an information session on mediation and you have to go through an assessment to find out if you're appropriate candidates for mediation. You attend this session and assessment separately. After the initial referral, the mediator will provide you with a certificate that says you attended the mandatory session.
- You do not have to mediate after going through the session and assessment, even if the mediator thought you and your ex-partner were appropriate candidates. But you should ask the mediator before you begin what information the judge will be given and whether his/her perception of you will be negatively affected if you refuse to mediate.
- Mandatory referrals to mediation are not the same as mandatory mediation. At present, there is a mandatory referral to mediation for certain family law disputes in Kingston, Ontario (child support variations).
- Remember, you **do not** have to mediate if you do not want to. There may be subtle pressure to mediate from different sources, such as the mediator, your ex-partner, your family, your lawyer, the judge, or the Parenting Education Meeting. Don't let the pressure change whatever decision you make, especially if you have concerns about your safety and the safety of your children.

Mediation and Violence Against Women

Mediation can be particularly harmful if your ex-partner was or is abusive towards you.

“Violence against women” may be called many things, including “gender-based violence”, “domestic violence”, “family violence”, “woman abuse”, or “wife assault”. In most cases of violence against women, abusers are men and the victims are women who know and trust them (e.g. partners, friends, family, acquaintances). It can also happen in same-sex relationships. This violence is used to control women and maintain power over them. It can be physical (e.g. hitting, blocking), emotional (e.g. name-calling), financial (e.g. controlling all of the money), or sexual (e.g. rape).

Trust your feeling and instincts. If you don't feel comfortable or safe in mediation because of the way your ex-partner treated you, don't continue with it.

If you answer “yes” to any of these questions, mediation may be particularly harmful for you¹:

DID YOUR PARTNER EVER ...

- Call you names, put you down, threaten you or your children, or spread your secrets to hurt you?
- Make you apologize for things you didn't do?
- Stalk you (e.g. follow you, watch your house, try to get information about you from your family or friends, open your mail, send you constant messages)?
- Forbid you from communicating with your friends, family, co-workers, or faith community?
- Threaten to report you to immigration or social assistance if you didn't do what he wanted?
- Control all or most of the money?
- Destroy your property or hurt your pet or service animal (e.g. seeing eye dog)?
- Make you do degrading or humiliating things?
- Force you into any sort of sexual activity?
- Use physical force, such as slapping, kicking, blocking, pushing, or breaking stuff in front of you? Or, if you live with an illness or disability, refused to help you?
- Threaten to hurt themselves if you didn't do what he wanted or blamed you for bad things they were going through?

DID YOU EVER ...

- Feel like you were “walking on eggshells” to avoid a fight?
- Stop expressing opinions if your partner didn't agree with them?
- Believe that your partner's jealousy was their way of showing love?
- Feel like you couldn't live without your partner?
- Feel embarrassed to tell other people about how your partner really treated you?



Mediation is dangerous in situations of abuse – present or past – because you will have to spend time with your ex-partner. He may be able to find out private information about you, such as where you live, how much money you make, where your children are going to school, and if you have a new partner.

Mediation may also put you at a disadvantage because an abusive ex-partner can use his power over you to get what he wants during the mediation process. He may play on the fact that you are scared of him, which could give him an advantage. This may result in you not being able to get what you need or want.

Often, an abusive ex-partner will try to “win over” the mediator and make you look like a tattler for reporting abuse. Even though it’s easy to get intimidated in this situation, what happened to you is real and important. You can end the mediation process if your ex-partner or the mediator tries to say the abuse you suffered isn’t important or tells you to “stop focusing on the past”. You can consult your lawyer and continue to pursue your claim through the traditional court system.

Mediation and Bargaining Power

Even if you were not abused, mediation may still be harmful if you and your ex-partner do not have equal bargaining power.



"Bargaining power" is a person's ability to get what she/he wants during a disagreement. If you hardly get what you want when you and your ex-partner argue, then mediation might not be fair for you.

SOME INDICATORS OF UNEQUAL BARGAINING POWER ARE²:

- you are less comfortable speaking with professionals than your ex-partner
- your ex-partner knows more about the law than you do
- your use of substances like alcohol or drugs negatively affects your ability to communicate what you want and need
- you would give up anything for custody of your children, including your own safety
- you stayed home and your partner has earned most of the money
- you do not speak English as well as your partner
- your partner blames you for all the problems in your relationship

If you feel that your ex-partner would be more advantaged than you would be in a situation of mediation, it may not be a fair process and you may not get what you need and want.

MYTHS VS. REALITIES

Myth: You can choose your own mediator.

REALITY: If the court is paying for the mediation, it may appoint your mediator. Even if you are paying, you and your ex-partner must agree on the mediator.

Myth: Mediation is better than going to court.

REALITY: Mediation is sometimes compared to going to trial, but this may not always be a good comparison. In more than



90 per cent of cases, a settlement is reached between a person and their ex-partner (with the help of lawyers) before they go to trial. Mediation is more comparable to lawyer-negotiated settlements where people don't go to court.

Myth: Mediation costs less than going to court.

REALITY: It's important to find out if the court will cover the cost of mediation and, if so, whether the court will appoint the mediator for you. If you must pay, find out what the mediator charges and how many sessions are recommended. It is important to remember that you will still need a lawyer even if you and your ex-partner decide on mediation. You will have to pay your lawyer's fees in addition to the cost of the mediation.³

Myth: Mediation takes less time.

REALITY: It's unclear whether mediation is less time-consuming than court proceedings. Mediation requires you and your ex-partner to attend a number of meetings, which could take many months depending on the issues you need to resolve. While trials can be lengthy, most issues are resolved through settlement, which can take anywhere from a few weeks to years.

Myth: Mediation promotes win-win solutions.

REALITY: If there is unequal bargaining power between you and your ex-partner, mediation can mean that he'll win and you and/or your children will lose. Most mediators promote joint custody (where both parents make decisions about the children). If you're seeking sole custody, you may not be successful in mediation. Since mediated agreements are not necessarily reviewed by a judge, there is no guarantee that the outcome will be fair, especially if you feel pressured by your ex-partner to agree to things that you don't want.

Myth: Mediation is like marriage or relationship counseling.

REALITY: Mediation will not solve problems in your relationship. If you and your partner were in conflict before mediation, it may not change that or change the way either of you deals with conflict. In fact, mediation can increase tensions. Mediators often frown on displays of anger or talk of the past, which may have the effect of driving concerns and feelings under the surface and increasing tension.

Your Safety and We Problems with Medi

THE FAILURE TO PROTECT RIGHTS

Violence against women has only been recognized in the public in recent years. This has been important for Canadian women who, over the past 20 years, have also achieved some important gains in the area of family law, in part because of cases that have recognized the rights of women.

Changes to some laws have also helped:

- Section 15(1) of Ontario's Family Law Act says that family property has to be "equalized" or divided equally upon separation;
- Section 24(3) of this same Act states that where there has been family violence, the judge must consider allowing the victim to remain in the family home;
- Section 15 of The Charter of Rights and Freedoms recognizes women's right to be treated equally by the law.

Unfortunately, the goal of mediation is for the parties to reach an agreement, no matter whose rights are ignored. It is not the job of the mediator to tell you about your rights or to ensure that they are protected. Mediation takes place outside of the courts and

is not bound by federal or provincial laws or past legal decisions. People can and do agree to anything.

Unfortunately, mediation does not protect legal rights and entitlements. People can (and do) agree to anything they like.

You may end up giving up your legal rights or entitlements because of pressure from your ex-partner or the mediator, because you do not have a proper understanding of the law, or because you are

stressed, frightened, exhausted, and/or broke and are afraid of going to court.

If your ex-partner has been charged with a crime against you, he may pressure you to "trade", saying that he'll let you have custody of the children or that he'll only pay child support if you don't testify against him in criminal court. These are difficult decisions for you to make. You may feel more comfortable making them with your own lawyer, who should help you understand what your rights are before you make any final decisions. If you and your ex-partner are in mediation and you do not have a lawyer, you may not have all the information you need to make decisions that are good for you.

Well-Being First: Mediation

Your mediated agreement will not necessarily be publicly recorded. If not, there is no official record of it, which can make it more difficult to enforce. You can get a “consent order” based on the mediated agreement. It can be filed for enforcement, which can be important if you have concerns that your ex-partner may not do what he has agreed to in mediation. This order should be prepared with the help of a lawyer.

THE FOCUS ON THE FUTURE

Mediation focuses on the future and often makes discussions of the past off-limits. The mediator will likely want you and your ex-partner to come to an agreement about how you will do things in the future and may not be as concerned about what happened before your separation.

This focus on the future can be harmful or unfair to women. If you want sole custody of your children, the fact that you did most of the parenting during your relationship with your ex-partner may not be as relevant in mediation as his promises about parenting in the future. Also, if you were abused by your ex-partner, you may be seen as a “complainer” or unable to focus on your new life if you allude to it in mediation.

This can have severe consequences:

- it can have a negative impact on your mental health
- if you end mediation to go to court, you may be seen as the “difficult” one and not deserving of sympathy
- if you agree to a settlement and he continues to abuse you afterwards, he can use the mediation as proof of how reasonable he is
- it can prevent discussions about compensation for past abuse
- it can make it more difficult to convince others that your ex-partner is stalking you (e.g. repeatedly communicating with or following you in a manner that makes you afraid).



The Bias Towards Jo

This bias can be harmful to you and your c

Many mediators may believe that it is in the best interests of children to have maximum contact with both parents. This "bias towards joint custody" may undermine the fact that you may have devoted more time and energy to your children than your ex-partner did while you were together. It may ignore the danger of having extensive contact with your ex-partner if he is or was abusive to you. A joint custody arrangement can also decrease the amount of money you will receive through support payments, even though your costs or responsibilities towards your children will probably stay the same. Finally, if you may want to move away with your children in the future, a joint custody agreement may make it more difficult for you to do.



Before agreeing to joint custody, contact your lawyer and be prepared to consider going to court if you don't think it's best for you and your children. If it will place you and your children in danger, joint custody is not a safe thing to agree to.

A list of DOs and DON'Ts for mediation:

- DO** learn as much as you can about what mediation is.
- DO** choose your mediator very carefully. You may check with your local women's shelter for suggestions and references.
- DO** make a list of what you want from the mediation and communicate this to your ex-partner and the mediator.
- DO** set a budget and timeline for the mediation.
- DO** hire a lawyer. You can check with your local women's shelter for suggestions and references. If you can't afford a lawyer, mediation may not be the best option for you.
- DO** consult with your lawyer before and during the mediation and have him/her present during mediation, if you feel more comfortable that way.
- DO** end the mediation if you feel that issues of abuse are being ignored.
- DO** have your lawyer review the mediated proposal with you carefully before you sign it.
- DO** learn about the different kinds of violence and abuse. Your local women's shelter can help you with this, and websites may also be of help to you (e.g. www.metrac.org).

Joint Custody

children.



DON'T mediate if you have been abused by your ex-partner.

DON'T mediate if you're being stalked or if the abuse is continuing.

DON'T mediate if you don't think you have equal bargaining power.

DON'T agree to joint custody until you have discussed it with your lawyer and you understand what it will mean to you and your children.

DON'T be afraid to end mediation if it's not working for you.

Community Services and Information

24-Hour Emergency Numbers

- Emergency (police, ambulance, fire): 911 or your local police
- Community Connection: 211
- Assaulted Women's Helpline: 1-866-863-0511 | 1-866-863-7868 (TTY)
- Distress Centres of Toronto: 416-408-4357 | 416-408-0007 (TTY)
- Femaide (French Crisis Line): 1-877-336-2433 | 1-866-860-7082
- Kids Help Phone: 1-800-668-6868

Legal Contacts

- Community Legal Education Ontario: www.cleonet.ca
- Family Law Education for Women (FLEW): www.onefamilylaw.ca
- Law Help Ontario: www.lawhelpontario.org
- Law Society of Upper Canada, Lawyer Referral Service: 1-800-668-7380 x5000 | www.lsuc.on.ca
- Legal Aid Ontario (for lawyer referrals, a list of community legal clinics, and more): 1-800-668-8258 | 1-866-641-8867 (TTY) | www.legalaid.on.ca
- Legal Line: 416-929-8400 | www.legalline.ca
- Ontario Women's Justice Network: www.owjn.org
- Victim Support Line (for assistance and local VWAP information): 1-888-579-2888

Other Contacts:

- Sexual Assault Centres: www.occcc.ca (for local centres, look in your local telephone book)
- Sexual Assault/Domestic Violence Treatment Centres: www.satcon-tario.com
- Shelters for Women and Children: www.shelternet.ca (for local shelters, look in your local telephone book)
- Ontario Association of Children's Aid Societies (information on child abuse and local child services): www.oacas.org
- Family Service Canada (lists local family service associations): www.familyservicecanada.org

DISCLAIMER

This booklet highlights some of the issues that may affect women who are considering using mediation to resolve their family law dispute. It is not a substitute for legal advice and if you are considering mediation, please contact a lawyer who is sensitive to your needs, women's issues, and issues of abuse.

We hope this information is helpful to all women. In an attempt to make it as inclusive as possible, we have based the material in this booklet on discussions we have had with service providers and with women. It is never possible to reflect everyone's experiences in one small publication, so please send us your story if you think it is not reflected here.

We have used the most accurate information available to us at the time of publication. If you find errors or would like to make any suggestions, please contact METRAC.

ENDNOTES

1. Based on "Warning! Mediation Can be Dangerous to your Rights: What Women Need to Know About Mediation and Family Law", Mediation Monitoring Group (1995).
2. Ibid.
3. Desmond Ellis. "Family Mediation Pilot Project Evaluation Committee, Final Report" (Oakville: Ellis Research Associates, July 1994).
4. NAWL Survey on the Custody and Access Report.
5. Ibid.
6. Ibid.

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Mediation and the Experiences of Women

"Some things cannot be mediated. Violence and abuse are good examples. To suggest that these things can be mediated is to suggest that the person who has been abused is somehow responsible for it. This is intolerable."⁴

Ontario community worker

"Women have complained that the mediator did not acknowledge a power imbalance, pressured them into agreeing or compromising in an effort to settle or resolve the matter, and promoted joint custody."

South-Western Ontario shelter worker

"There is no way of screening for family violence (during mediation). Most family violence goes unreported until the victim feels safe and far away from the violence."⁵

Ontario shelter worker

"I have had to move a woman from our transition house at the same time she was in mediation because her partner found the location of the home. Women talk of being threatened as they come and go from mediation."⁶

British Columbia shelter worker

"Abused women are used to giving in to keep safe, and because they often try to do what they perceive as the right thing, they may give away their rights (during mediation)."

Durham Region women's counselor



**Metropolitan Action Committee on
Violence Against Women and Children**

METRAC is a not-for-profit community organization that works to prevent violence against women, youth, and children.

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