



Using Mediation and Arbitration in Family Law disputes

Being a litigant in the Family Court system can be time consuming, personally exhausting and expensive. However, there are more expedient alternative dispute resolution procedures that can be adopted.

The court system in Australia is adversarial which means that the party bringing proceedings is required to formally identify the nature of the dispute, and tender evidence to provide their case. This involves the process of discovery and witnesses for the Applicant and Respondent being examined and cross-examined.

Consequently, it can often take a number of years before a case can be heard by the Court and after that there can often be an extensive wait for a decision, leaving many litigants in limbo for a considerable time. It is little wonder therefore that many Family Law litigants are turning to other options such as Mediation (for property and parenting matters) and Arbitration (for property matters only) to resolve their disputes.

What is Mediation?

Mediation has a long history internationally and domestically, having been used in various forms by religious groups and cultural groups throughout time to resolve disputes. Mediation in a formal structured sense, gathered momentum in the twentieth century and developed into the current form of Mediation we have today, whereby a mediator acts as an impartial third-party mediating disputes between families, businesses, and workplace relations.

The mediator is neutral and does not take sides but allows for each party to put their position forward in a persuasive and considerate manner. Mediation is generally voluntary and therefore when parties opt-in, they have the ability to choose a mediator, time and place for the Mediation. Mediation is flexible in the way that it is conducted and can allow for litigants to speak directly with each other or via their legal representatives.

Benefits of Mediation

Aside from saving time and money, one of the key benefits to Mediation is the ability to maintain control over the outcome. By participating and reaching an agreement at Mediation you can have a unique solution that might not be what a Court may order but nonetheless suits your personal circumstances.

As soon as you file an Application to the Family Court, you are asking a Judge who does not know you or your situation to make a decision that affects the rest of your life and your children's lives. Whereas with Mediation you have the opportunity to actively participate in the decision-making process and achieve a level of satisfaction in actively contributing to the outcome.

Participants have stated that the process of Mediation allowed them to feel empowered and reduced hostility that might otherwise have been present in an adversarial courtroom and consequently Mediation also has the potential to preserve personal relationships.



Mediation keeps your dispute private and confidential, whereas Court proceedings can be open to the public. The confidentiality of Mediation may allow litigants to experience less stress than they might have in a public courtroom, where the history of their dispute is open to listeners.

In Family Law parenting matters, Mediation is required to be undertaken before any party can commence proceedings unless the matter falls within an exceptions category such as in circumstances of domestic violence.

What is Arbitration?

Arbitration has been available in Australia for many years, however in recent years, there has been a clear trend to the parties selecting Arbitration rather than waiting for the matter to be determined by a Court.

Arbitration, as defined by the Family Law Act 1975 is a process (other than the judicial process) in which parties to a property dispute present arguments and evidence to an Arbitrator, who makes a determination to resolve the dispute.

In practice Arbitration allows the parties to select a private trained Arbitrator, often a family lawyer or barrister to determine their property case. The parties then select a day (or days) for the Arbitration to take place. This can fit around special occasions and availability of their legal representative and the Arbitration can take place as soon as the parties are ready. The parties also select the venue they wish to hold the Arbitration, which can be a solicitor's office or a third-party neutral venue, depending on the parties' preference.

What happens at the Arbitration Hearing?

The Arbitration runs in a very similar way to a Court Hearing, although sometimes with less formality. The parties will file Affidavits, Financial Statements and evidence in advance of the Arbitration hearing.

The Arbitrator will hear the evidence of the parties and reserve the matter for Judgment. The Arbitrator will normally agree to hand down their award within 28 days of the final day of Arbitration. Once an award has been handed down, either party can apply to the Court to register the award, subject to no objection being raised. The Award then becomes an Order of the Court and is enforceable in the same way as a Court Order.

The key benefit of Arbitration is the opportunity to resolve a property dispute relatively quickly comparative to the current two to three years delay in the Court system and for the parties to manage the process, by selecting the Arbitrator, selecting the dates and venue, choices otherwise not possible in the normal Court system. It also allows the family to move on without the stress and ongoing cost of Court proceedings.

If you'd like to know more about Mediation and Arbitration and whether they may be to you or wish to discuss any Family Law issue, please feel free to contact [Oliver Hagen](mailto:Oliver.Hagen@batemanbattersby.com.au) or [Ken Gray](mailto:Ken.Gray@batemanbattersby.com.au) on (02) 4731 5899 or email us at familylaw@batemanbattersby.com.au.