



Reading time .... only 8 minutes

TURNBULL HILL LAWYERS

## GUIDELINES FOR MEDIATION

This document is a general summary of contested estate legislation in NSW. Please read it carefully.

### What is Mediation?



Mediation is a process where a neutral and independent person (a mediator) helps the parties in a dispute to reach their own solution.

It is an alternative to having a Judge make a decision after a contested hearing between you and the other party. A Judge would give a decision after hearing the case, usually in open Court, establishing the evidence that is admissible and then determining how the law applies to the case.

At mediation, each party has the opportunity to voice their point of view. The mediator helps the parties to focus on the real issues of the dispute and explore options to resolve them. The mediator does not impose a solution or give tactical advice.

In mediation, the options that can be explored to resolve the dispute are often broader than those that can be considered by a Judge of the Court.

If the parties resolve their dispute at the mediation, they may make a written agreement and have orders made by the Court to finalise the case. Those orders have the same standing as orders made by a Judge, and can be enforced, if necessary.

In contrast to Court proceedings, which are open to the public, the mediation process is private and confidential. Anything said or produced in evidence at a mediation session cannot be used in a later hearing, except in exceptional circumstances.

It is the duty of all parties to the mediation to participate in good faith. A mediator can terminate a mediation session and make a report to the Court if this duty is breached.

There are numerous benefits that can arise from mediation, including:

- ✓ **Early resolution**
- ✓ **Less costs to parties**
- ✓ **Greater flexibility in resolving the dispute**
- ✓ **Finality**
- ✓ **Privacy**

### ❖ Early Resolution

If the parties resolve the dispute at mediation, the necessary Court orders will be drawn up and signed at the close of the mediation session. This usually finalises the case.

In comparison, if a case goes to hearing before a Judge, then usually some months are required to exchange evidence and prepare the case for hearing. The hearing of the case usually occurs a few months after all the evidence is prepared. At the end of the hearing, the Judge usually requires further time to prepare a judgment.

### ❖ Less cost to parties

When cases are mediated, parties and their legal representatives will generally still need to prepare some evidence, but this will be less than the preparation for a Court hearing. To prepare a case and present it for a Court hearing will be costlier than preparing for mediation.

The mediation session is usually shorter than the Court hearing and most legal fees are charged on a time basis.

As well as deciding how to resolve the dispute, the parties can also agree on how to apportion the legal costs that have been incurred up to the time of the mediation.

If the dispute goes to a hearing, the Court will charge a hearing fee that is separate to the fees charged by a party's lawyers. Further, the Court's judgment can include orders for an unsuccessful party to pay the legal costs of the successful party.

Even if a resolution is not achieved and the dispute ultimately ends in Court, the mediation process can have helped to clarify and define the real issues in dispute. This can shorten the Court hearing time and help parties to minimise eventual legal costs.

### ❖ Greater flexibility in resolving the dispute

Using mediation, the parties work out their own resolution of the dispute. A solution is not imposed upon them. Also, the parties can resolve the dispute in broader and possibly more practical ways than those the Court can consider. These aspects can be particularly important if the dispute is within a family or ongoing business relationship.

### ❖ Finality

A mediated solution is a settlement between the parties, and so generally cannot be the subject of an appeal.

### ❖ Privacy

The mediation process is conducted between the parties, without public observers. In contrast, a contested hearing before a judge is usually conducted in a Courtroom that is open to the general public. Parties to the dispute can be called as witnesses and may be required to give evidence at the Court hearing.

Once a decision is made by a Judge, his reasons and the evidence given in the proceedings may be published on the internet.

## How are cases referred to mediation?

This is done by a Court and mediation is compulsory in family provision claims once each party's evidence has been filed.

## How much does mediation cost, and who pays for it??

With Court annexed mediation, there is no charge for the mediator or use of rooms. The cost of legal representation is the responsibility of each party.

## What is Court annexed mediation?

Court-annexed mediation is where a registrar of the Court is the mediator.

The registrars and officers who conduct mediations are qualified as mediators. The majority of matters resolve at mediation.

The mediation usually takes place at the Old Supreme Court building on King Street. There is no charge for the mediator or use of rooms.

If the mediation is private, generally the parties pay for the mediator and the rooms, hence why most parties opt for Court-annexed mediation as there is no cost to the parties.

## What preparation is required?



Parties should be ready to attend the mediation with the purpose of achieving an acceptable resolution of the dispute. This usually involves some compromise. It is the duty of each party to participate in good faith. A mediator can terminate a mediation session and make a report to the Court if that duty is breached.

Each party is to attend the mediation in person.

Parties should be prepared to treat all participants in the mediation with common Courtesy.

Parties should have thought about the issues that are important to them, and possible options for resolving these. Each party will be given the opportunity to discuss their issues uninterrupted at the mediation.

Parties should also have thought about what their best outcome would be, and also the extent to which they would be prepared to compromise.

Parties should be aware of their legal costs to date, and future legal costs if the case proceeds to a Court hearing. Parties should understand that if they proceed to hearing but the judgment goes against them, they can be ordered to pay the legal costs of the successful party.

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