

DR SEUSS ON SEPARATION & ADR

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So you have separated. Now, regarding all the matters arising out of your separation, do you: Negotiate? Mediate? Collaborate? Arbitrate? Conciliate? Or Litigate? Sounds rather like something out of Dr Seuss, doesn't it?

Separation after marriage or a defacto relationship can be hard enough without being bombarded with the multiple options available to clients to resolve the issues arising out of the breakdown of their relationship. Separating couples should come out of their first meeting with a lawyer feeling more informed and confident regarding the options available to them rather than more confused than when they went in.

Simply put, all of the options listed above are viable alternatives to resolving any dispute between the parties and can include matters relating to a division of property, children's arrangements, child support, and spousal maintenance. Which one is right for you will depend on your circumstances and the nature of your matter.

So what does all this nonsense mean, sir? Which ADR is right for me, sir?

I do not intend this article to be definitive in terms of the history of methodology involved in each alternative dispute resolution process, but rather to give some level of insight into the various options available to parties after separation to assist them to reach resolution regarding those matters arising from their separation, including the division of property and parenting issues.

Negotiation

Negotiation is now a fairly generic term and can include very informal negotiations between parties directly or "kitchen table negotiations". After such negotiations you might simply approach a family lawyer to assist you to formalise your agreement. Similarly, the term can involve the parties communicating via their respective family lawyers through a series of letters, phone calls, or even attending a round table conference with their lawyers present to try and reach resolution.

Mediation

In the context of family law matters, mediation typically involves parties attending with or without their solicitors with an impartial mediator to assist them in resolving their dispute.

In the context of parenting matters, when mediation is compulsory pursuant to the *Family Law Act 1975* prior to filing any application with the Court (save in certain circumstances), parties will quite often attend such mediation in the absence of their lawyers with a mediator who is a social scientist or an allied health professional, such as a counsellor or psychologist, to assist

them in reaching agreement and resolution regarding parenting issues.

In the context of property settlements it is more usual for parties to have their lawyers present and for the appointed mediator to be a legal professional specialising in the area of family law such as a solicitor or a barrister. In certain circumstances, parties may choose to appoint co-mediators, including a legal professional and a social scientist or allied health professional, to assist them.

Collaboration

Collaborative Practice is an alternative form of dispute resolution, which parties can commit to, in order to assist them reach resolution regarding the matters arising out of separation. Parties will each engage with lawyers who have trained in Collaborative Practice and will sign a contract to the effect that they will not progress their dispute to Court nor threaten to do so while engaging with the same lawyers. The collaborative law process will involve a series of meetings between the parties and their solicitors, together with various other neutral professionals who are engaged by the parties jointly such as accountants, financial planners and psychologists to assist them in reaching resolution of their matter. The collaborative process is inherently a respectful process and specifically prohibits a sort of adversarial behavior that is common in matters which proceed to the Court.

Arbitration

Arbitration is a private dispute resolution process whereby parties will jointly engage an arbitrator who will decide their matter for them on the evidence presented, similar to the role of a Judge in litigation. The difference is that arbitration is a process in which both parties must consent to engage and the arbitration process can be tailored to the parties' needs by agreement between the parties, their lawyers and the arbitrator. For example, the parties can choose whether or not witnesses will be cross examined, including the parties themselves, within the arbitration hearing or whether the hearing will proceed on oral and/or written submissions only by the legal representatives. The process can also be tailored in a number of other aspects to the parties' needs and provides a very timely method of adjudication in relation to property matters. Arbitration does not extend to parenting matters.

Ultimately, the arbitrator will decide the matter and publish the decision by way of an Arbitration Award, which is binding on the parties.

Conciliation

Conciliation can refer to a Court ordered dispute resolution conference in which parties are required to participate within the context of their Court matter. A conciliation conference is usually a 2 hour conference listed before a Registrar of the Court and conducted for intents and purposes like a mediation, albeit within the Court building and convened by a Judicial officer of the Court. The process is without prejudice or confidential and a Judge of the Court will not be made aware of the concessions of the parties during such conciliation conference.

Litigation

For parties who are unable to resolve the disputes arising out separation, the filing of an application with the Federal Circuit Court or Family Court of Australia remains an option. The process of litigation will involve the parties each setting out their competing positions before the Court and ultimately a Judge deciding the matter for them on the evidence presented. The Court process is highly regulated and unfortunately subject to considerable delays of up to 3

years in the overworked Court system. In the vast majority of litigated matters, parties are still able to resolve their dispute via an alternative method including those set out in this article, without the matter needing to proceed to a Final Hearing or a Trial.

Barry.Nilsson. can help you with all your post separation legal options. So, as the legendary Dr Seuss might say:

*When it's time to un-tie the knot, sir,
Be sure it's good advice you've gone and got, sir.
Resolution is the name of this game!
When divvying up your nicks and nacks, sir,
You want a lawyer who's not a quack, sir,
So call us here at Barry.Nilsson.
And we'll have an expert call you back, sir!!*

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