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HOPPE  
FAMILY LAW  
+ MEDIATION

PROCESS OPTIONS GUIDE

# How To Use this Guide

This guide is intended to provide general advice regarding process options available at the outset in most family law matters. This guide is not a substitute for receiving personalized advice from a lawyer regarding the process options available in your individual circumstances. Where process options are compared in this guide, the comparisons are made based on generalizations, which may not be representative of the outcome in every matter. Such comparisons should not be interpreted as providing any assurance or guarantee that a chosen process will result in a particular or better outcome of your matter. The choice of which process option will be the best fit for your matter will depend on your individual and your family's unique circumstances.

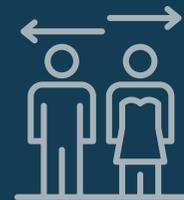
# Process Options Overview



This guide reviews the following 5 main process options:

1. DIY
2. Mediation
3. Collaborative
4. Lawyer Negotiation
5. Arbitration
6. Court

# DO IT YOURSELF



Spouses may agree on how to settle the issues arising from the breakdown of their relationship, and want to formalize those terms into a separation agreement. Even when spouses agree, it is still important for each spouse to retain a lawyer to receive independent legal advice before signing an agreement, as this helps to ensure the agreement is legally binding and enforceable. In this guide, the "DIY" process refers to situations where spouses directly negotiate with one another about how to settle their legal issues, but retain lawyers to provide independent legal advice and finalize those terms into a legally binding separation agreement.

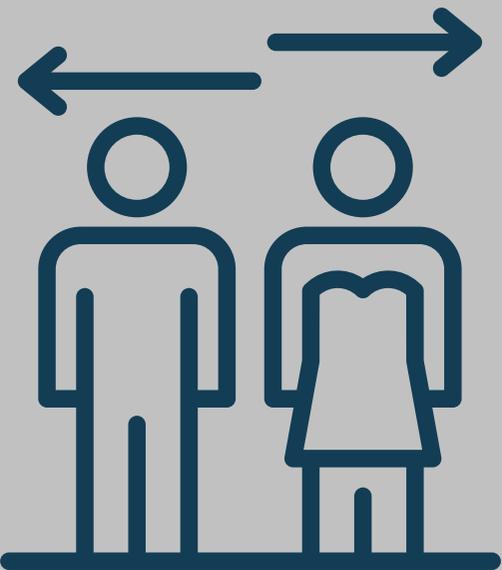
# DO IT YOURSELF

## PROS

- Can be cost effective when it works
- May keep lines of communication open between spouses
- Parties maintain control over outcome

## CONS

- May ultimately result in increased costs and conflict if an impasse arises
- Not appropriate for complex legal issues
- Not appropriate where there are power imbalances between parties



## BUT IF WE AGREE WHY DO WE NEED LAWYERS?

Here's the fine print:

Separation agreements must be in writing, signed and witnessed to be valid. There is no formal requirement that lawyers be used to create a separation agreement. BUT there are certain requirements that must be met for a separation agreement to be binding and enforceable by the court in Ontario, namely:

1. Both parties need to understand the nature and consequences of the agreement;
2. Both parties need to exchange complete and honest financial information; and
3. Neither the terms of the agreement, nor the manner in which the Agreement was negotiated, may violate the rule of contract law.

When these requirements are not met, a separation agreement risks being set aside.

With respect to the first criteria, it is not sufficient that you simply understand what the terms of the agreement say. You must also understand the legal consequences of the agreement, and whether the agreement constitutes a fair settlement for you and your spouse based on the relief that is available to you under the law. A lawyer is the proper professional to help analyze and explain this to you.

With respect to the second criteria for financial disclosure, it is important that you exchange the proper documents with your spouse. Financial disclosure is necessary to determine each party's rights and obligations with respect to property and support. The requirement for financial disclosure thus goes hand in hand with the requirement that you need to understand the nature and consequences of the agreement. You need to fully understand what your support and property rights and obligations are, before you can sign a binding agreement either accepting, waiving or exceeding those rights and obligations. Again, a lawyer is best qualified professional to explain to you your rights and obligations under the law based on the financial disclosure exchanged between you and your spouse.

With respect to the third criteria that the agreement does not violate any rule of contract law, there are some specific contract law provisions in the *Family Law Act* that if included in a separation agreement are automatically deemed unenforceable. Of more common concern, is the general rule of contract law that the negotiation and signing of an agreement take place in the absence of duress. This means that both parties are voluntarily consenting to the terms of the agreement, and one party is not bullying the other into accepting the terms and signing. Lawyers are the experts on assessing whether an agreement meets the rules of contract law, and can safeguard against concerns surrounding duress.

The best way to satisfy all three of these requirements and protect the enforceability of a separation agreement is to consult with a lawyer, and have the lawyer execute a "Certificate of Independent Legal Advice". This certificate affirms the lawyer explained the terms of the separation agreement to you, you appeared to understand the terms, and that you appeared not to be under duress in making and signing the agreement. Agreements where both parties have obtained certificates of independent legal advice are much more likely to be binding and upheld.

Even if you trust your spouse to abide by the terms of the agreement and cannot foresee the agreement ever requiring review by the court, the failure to obtain independent legal advice on a separation agreement can pose unexpected future problems . For example, many financial institutions will insist on certificates of independent legal advice being appended to separation agreements relied upon for mortgage lending purposes. There are also many examples of estate law cases where separation agreements have been challenged after one spouses' death. And, inevitably legal fees associated with defending or trying to set aside a separation agreement that has been signed without legal advice, are higher than fees for obtaining independent legal advice prior to signing the agreement.

To formalize the terms of any agreement you have made with your spouse into a legally binding and enforceable contract, it is always recommended that you consult a lawyer and receive proper independent legal advice.

# MEDIATION



In mediation, spouses meet with an independent third party mediator who assists them with negotiating terms of settlement. A mediator may be a lawyer, therapist, financial or other professional. The mediation process is voluntary. If settlement is reached, the mediator prepares a memorandum of understanding ("MOU"). A mediator cannot give legal advice to the parties and an MOU is not a legally binding contract. It is recommended parties take the MOU to their lawyers for independent legal advice to have the terms incorporated into a legally binding separation agreement. It is generally best to consult with a lawyer to receive preliminary legal advice prior to attending mediation, as knowledge of your rights and obligations beforehand helps to avoid situations where a party changes their agreement with the terms of an MOU after consulting with a lawyer. In the context of this guide, the mediation process refers to mediation where the parties attend without lawyers. Mediation with lawyers is also an option commonly associated with arbitration, and canvassed in that section of this guide.

# MEDIATION

## PROS

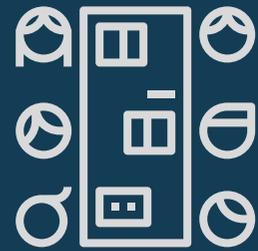
- Cost effective
- Process may improve communication between parties
- Parties have benefit from involvement of a professional while maintaining primary control over the negotiations and the outcome

## CONS

- Mediator may not be qualified to mediate all types of legal issues
- May not be appropriate where there are complex legal issues or power imbalances between the parties
- Parties may back out of MOU after obtaining legal advice, increasing costs and conflict



# COLLABORATIVE



In the collaborative process each party retains a collaboratively trained lawyer. The parties and lawyers sign a participation agreement affirming their intentions to resolve their matter respectfully, outside of court. The agreement stipulates should the matter go to court, the parties must retain new lawyers, thus removing the threat of court as a negotiation tactic during the process. Family professionals (social workers, therapists) and financial professionals, are commonly retained as part of the collaborative team. The process takes place in a series of settlement team meetings between the parties, their lawyers and other practice team professionals. Negotiations use an interests based (win-win) approach and the process is forward looking. Once the parties reach a settlement, the terms are incorporated into a binding separation agreement prepared by the lawyers. It is uncommon for collaborative cases to escalate to Court and the nature of the process generally results in lasting resolutions.

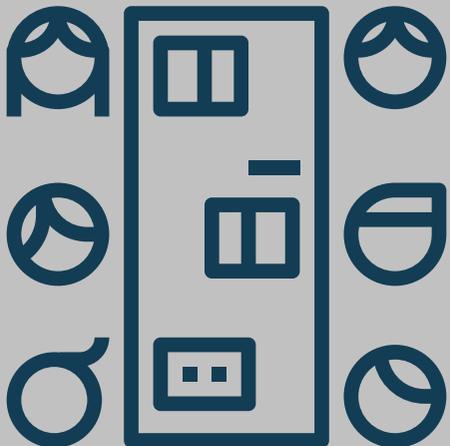
# COLLABORATIVE

## PROS

- Settlement focused, forward looking process
- Advice from several professionals working as a team
- Communication between parties may be improved
- Parties receive ongoing legal advice during process
- Complex legal issues can be addressed
- Parties retain control over outcome

## CONS

- Requires sufficient spirit of cooperation from both parties
- May require new counsel if process breaks down
- May not be suitable to situations where there are serious power imbalances or domestic violence
- Additional professionals may attract additional costs



# LAWYER NEGOTIATIONS



Lawyer to lawyer negotiations take place when each party retains a lawyer to represent him or her in the negotiation of a settlement. Negotiations may take place through a series of letters, calls and settlement meetings. Depending on the instructions the lawyer receives, the issues at hand, and the lawyer's practice style, some lawyers will apply cooperative win-win bargaining and others will apply win-lose or positional bargaining strategies commonly used in adversarial processes like court. Without a formal agreement not to litigate, conflict in these negotiations may escalate, leading to arbitration or court. If the parties are successful in negotiating a settlement, the terms are set out in a separation agreement.

# LAWYER NEGOTIATIONS

## PROS

- Can address power imbalances
- Complex legal issues can be addressed
- Cost effective compared to adversarial processes
- Parties determine outcome

## CONS

- Parties lose primary control over negotiation process
- Positional bargaining may increase conflict between the parties
- May escalate quickly to arbitration or court if settlement cannot be reached



# ARBITRATION



Arbitration is a voluntary process where the parties consent to a neutral third party, typically a senior lawyer, being appointed to make a binding decision for them. An arbitration is similar to a trial and an arbitrator acts like a privately retained judge. Parties are generally represented by counsel during the process.

Frequently the parties will attempt mediation with counsel present before the matter moves to an arbitration hearing. This process is referred to as mediation-arbitration. The same professional may act as both mediator and arbitrator. As the arbitration process is adversarial, it is common for lawyers to advance their client's positions during the mediation process, making mediation in this context often quite different from mediation without lawyers and outside of the arbitration process. In this guide, "arbitration" refers generally to both arbitration alone and mediation-arbitration processes. While not specifically compared in this guide, it is possible for parties to attend mediation with their counsel, without consenting to an arbitration hearing.

# ARBITRATION

## PROS

- Potential opportunity to mediate first and arbitrator may dedicate more time encouraging settlement than is available in the court conference process
- Faster route to adjudication than court
- More cost effective than attending court represented by counsel
- Can address power imbalances

## CONS

- Parties lose control over outcome
- Adversarial (win-lose) process increases conflict
- Resolution may not be long lasting, requiring future legal intervention



# COURT



While you likely understand what Court is, you may not be familiar with the process of Family Court in Ontario. A minimum of three mandatory conferences (case, settlement and trial management) must be held before a matter can proceed to a trial. At each conference, briefs are filed and the parties appear before a judge to canvass settlement options and determine the procedural readiness for trial. At a conference, a judge can only make procedural orders. If a party requires an order for substantial relief before a trial, it is necessary to file and argue a motion. If there is no settlement, a trial is scheduled where another judge will hear all of the evidence in the case and make a final decision which is binding on the parties.

Typically conferences are scheduled months apart and it is not unusual for a matter to take 1-2 years to reach a trial. It is not mandatory to have a lawyer to represent you, but given the complexities and risks involved, it is always recommended. Given the number of court filings and appearances, fees for full legal representation can be significant. The process is inherently adversarial, and parties frequently end up back in court in the future.

# COURT

## PROS

- An order can be made forcing an uncooperative or difficult spouse to comply with his/her legal obligations
- Can address power imbalances between the parties, including situations of domestic violence

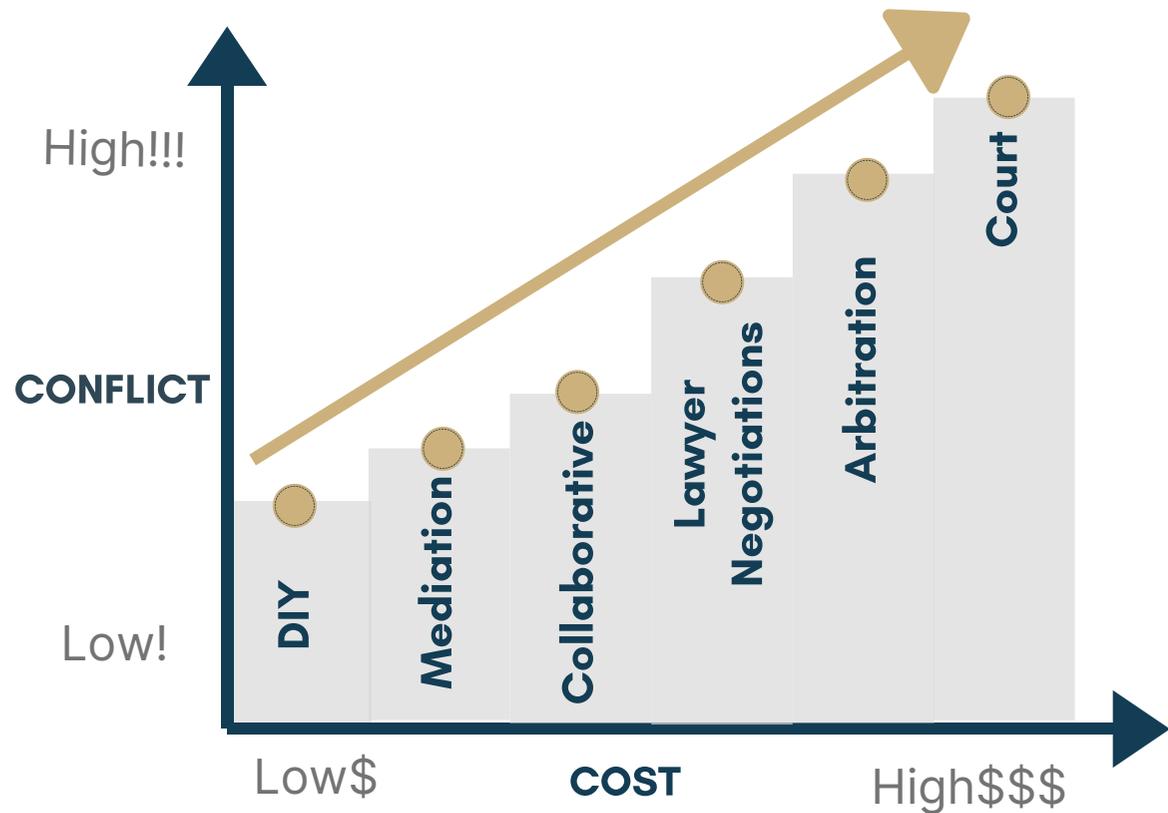
## CONS

- Parties lose control over outcome
- Adversarial (win-lose) process increases conflict
- Significant delays and legal fees
- Future legal intervention is commonly required
- Public process



# NOW LET'S COMPARE

This chart compares process options generally with respect to both costs and conflict. The time to reach a resolution generally also follows a similar same pattern.

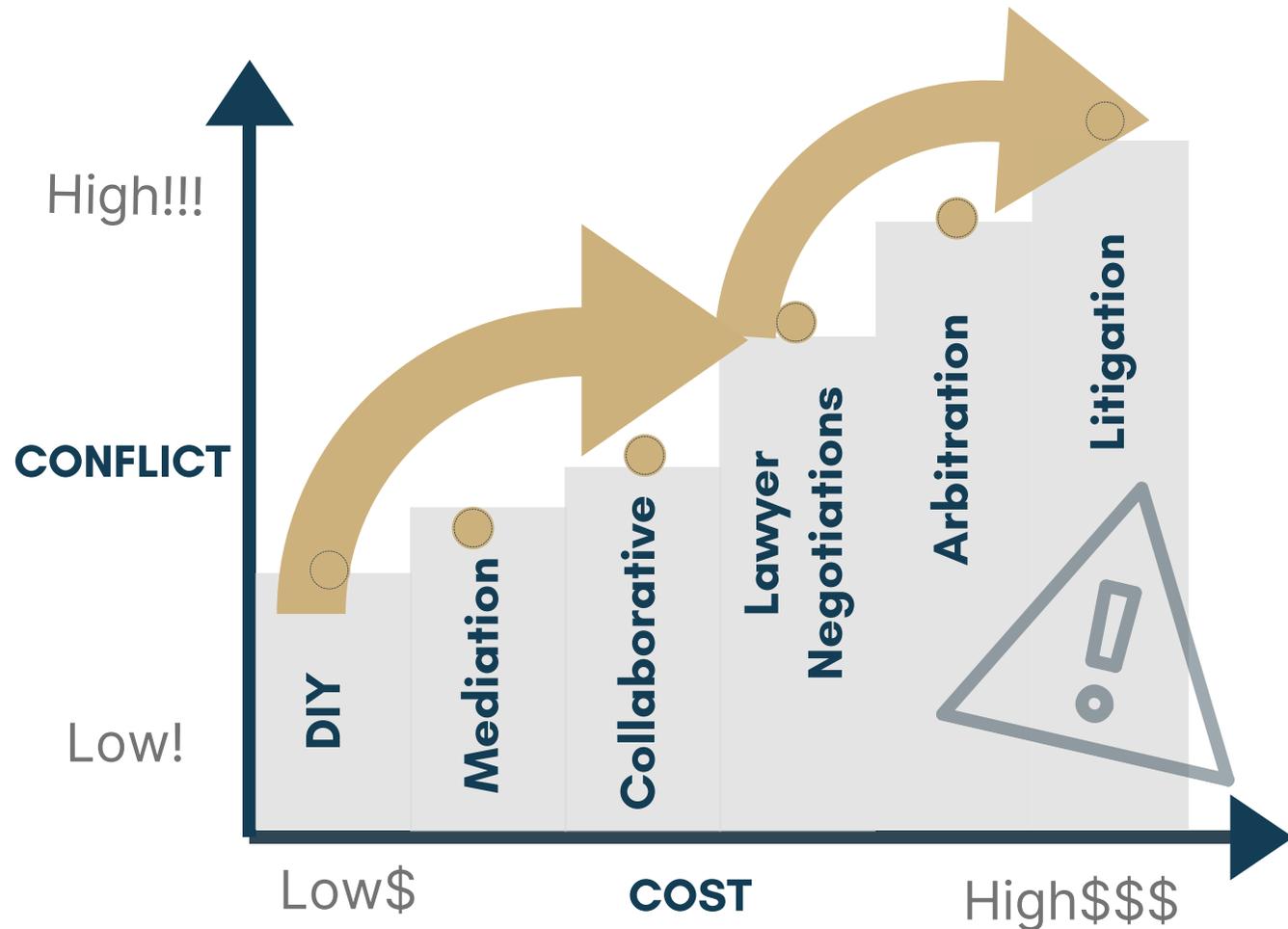


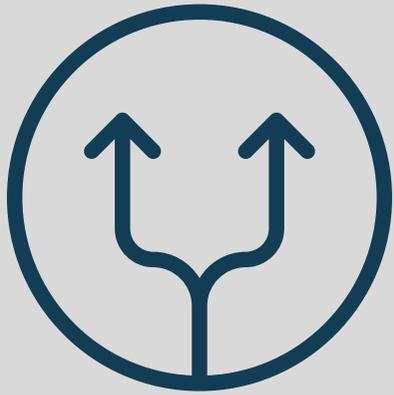


You may be thinking to save on legal fees, you and your spouse should work out your own settlement, and retain lawyers only to provide independent legal advice. This may be viable option for your circumstances and is then encouraged. BUT it is important to think about what may happen if your negotiations reach an impasse. The conflict created by your failed direct negotiations or mediation may lead to having your lawyer negotiate on your behalf. In certain circumstances this can further inflame conflict, and may escalate a matter to Court. Hiring a lawyer with mediation or collaborative training and experience may minimize the risk of escalating conflict, as such lawyers generally apply interest based (win-win) negotiation strategies that help foster resolution, rather than positional (win-lose) strategies . But it is important to recognize that choosing the wrong process for your circumstances based only on cost considerations might cost you much more in the end, not only in legal fees but also time and your relationship with your separated spouse. Oftentimes choosing a process like mediation or collaborative from the outset is a better alternative.

# CAUTION:

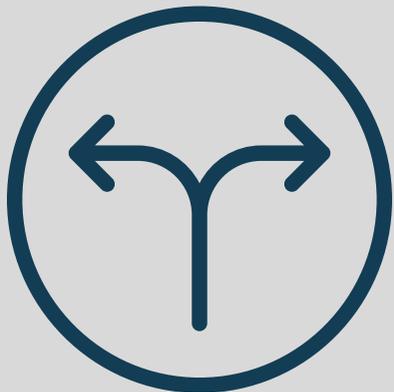
Choosing the wrong process based solely on a consideration of costs may result in higher costs and conflict if the process breaks down and more intervention is required. Choosing the right lawyer and the right process initially can minimize these risks.





Conversely, maybe you're thinking your spouse is so uncooperative nothing short of court order will be effective. There certainly are cases where this is true. However there are many more cases where, with the right team of lawyers and professionals, the underlying emotions fueling your conflict and your respective concerns for your future can be addressed, so that you can effectively negotiate a settlement together. The collaborative law process is designed to do just that.

In circumstances where you anticipate the conflict between you and your spouse is too high for negotiations to be effective, it may be wise to consider using a process like arbitration from the outset. However as a voluntary process your spouse will need to consent.



Every family's circumstances are unique, and these process options exist because there is no one process that is right for everyone. The following chart compares some additional factors worth considering in making a decision.

	Mediation	Collaborative	Lawyer Negotiation	Arbitration	Court
<b>Parties Control Outcome</b>	Yes	Yes	Yes	No	No
<b>Likelihood of obtaining goals</b>	Prioritized	Prioritized	Possible	Unpredictable	Unpredictable
<b>Role of Lawyers</b>	Depends	Settlement Focused	Positional	Adversarial	Adversarial
<b>Privacy of Process</b>	Private	Private	Private	Private	Public
<b>Time to Resolution</b>	🕒	🕒 🕒	🕒 🕒	🕒 🕒 🕒	🕒 🕒 🕒 🕒
<b>Costs</b>	\$	\$\$	\$\$\$	\$\$\$\$	\$\$\$\$\$
<b>Likelihood of future conflict</b>	Low to Moderate	Low	Moderate	High	Very High



Separation is stressful and it can feel more overwhelming when you have options to chose from about how to resolve your legal issues. One important role of a lawyer is to help you chose which process option is most appropriate in your case. I can draw upon my years of experience to inform you and help you weigh which option will fit YOUR unique circumstances.

Contact me to book an initial appointment and let's chat!

*- Melissa*





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