

Thought Leader

ADR in Family Law: When is it Suitable?

Most common family law issues can be addressed outside of the courtroom, avoiding many of the financial and emotional costs associated with litigation. How far does this extend, and are there circumstances where ADR is not advisable? Family law attorney Sarah Hechtman addresses these questions in the following interview, wherein we explore the benefits that mediation and collaborative law bring to a wide array of legal matters.

To begin with, please tell us a little about mediation and other methods of dispute resolution in family law. What are the processes involved, and what are the principles that underlie them?

When we talk about alternative dispute resolution (ADR) in family law, we are referring to any process that keeps the parties out of court. Any potential litigation can be negotiated to resolution, and I try to do that in all of my cases before seeking judicial intervention. In terms of formal alternative processes, there are two main ones: mediation and collaborative law.

Mediation is a process by which one neutral person guides the parties toward a resolution that is acceptable to both of them. While used in many legal contexts, mediation is especially well suited to family law both because of the personal nature of the dispute – whether it is divorce, custody, or the negotiation of a prenuptial agreement

– and also because often there is the likelihood that this personal relationship will continue in the future, such as when the parties are parents who will continue to share custody of their children.

Collaborative law is a process in which both parties retain their own lawyers but pledge not to involve the courts. The process contemplates the use of experts as well as lawyers: financial professionals to assist with budgeting or business valuations; psychologists who serve as child development experts; as well as, in some cases, divorce ‘coaches’, mental health professionals who help the parties navigate the emotions that can prevent them from reaching resolution.

The most important principle underlying any alternative dispute resolution process, in my opinion, is a focus on the parties’ underlying interests and concerns rather than their stated positions. These ADR processes are built upon empathy and compassion; it is essential that we, as practitioners, understand what is most important to the individuals involved before we can effectively attempt resolution. In other words, the traditional lawyer-as-advocate role



changes; rather than simply advocating for what your client wants, the lawyer attempts to uncover the reasons why the client wants what he or she says she wants. In doing so, the hope is to address the underlying issues through solutions that are creative and tailored to individual families' situations.

What family law matters are most commonly addressed through mediation and ADR?

Mediation is a voluntary process, and there really is nothing that cannot be mediated so long as all parties to a dispute are on board with attempting to resolve their issues in this way. In my practice, I mostly mediate divorces, but I have also mediated parenting plans for unmarried parties and gamete donor contracts. In my experience, prenuptial agreements are great candidates for mediation as these are easy cases to resolve because the circumstances around the negotiation are positive; the parties are in love and simply want to create a contract to govern their finances.

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In what way do the outcomes of family mediation and ADR typically differ from those seen in litigation?

Mediation and ADR allow for much more creative solutions than the courts are able to provide. In determining custody, for example, a court will often order that all holidays be shared by the parents in an even-odd fashion, with one parent getting

even and the other odd years. A court will similarly divide all school vacations in half.

When the parties maintain control of the process in mediation, negotiation, or a collaborative process, the parents can be thoughtful, considering their unique circumstances in crafting an agreement. If you know that your family's tradition is that the kids go to their mom's side of the family for Thanksgiving every single year, and that their dad takes the kids to Florida for Christmas to see their grandparents, you can contract for that continued

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When family law matters do go to court, most cases are settled before trial. So, no matter the process, the outcome is likely to be a negotiated agreement. The difference is in how you get there. There is evidence that agreements reached through mediation yield better results for families, with non-residential parents staying more involved in their children's lives than in litigated cases.

How do the costs and amount of time taken also differ between these methods?

Litigation of any kind is very expensive, so in addition to a more cooperative process having the potential to be a more pleasant experience, it will likely be less expensive.

Under what circumstances may mediation or other forms of ADR not be appropriate for resolving a family law matter?

There are definitely cases in which mediation is not appropriate. Mediators are trained to screen out cases where there is a significant power imbalance or a history of domestic violence as

these cases are not appropriate for mediation.

Mediation is a voluntary process, predicated on full disclosure of all financial information to which everyone would be entitled as part of the legal process. Thus, if a party is not being truthful or cannot be trusted to make full disclosure of assets, that case is also not appropriate for mediation.

During your years of practising family law, how have you seen the implementation of mediation and ADR change?

Mediation and ADR are becoming ubiquitous. In some jurisdictions, mediation is a mandated first step in matrimonial cases. I serve as a mediator on several different court rosters of mediators for family law matters here in New York City. While not mandatory, many judges will refer cases to mediation before they address the substantive issues in the courtroom. Due both to court backlogs that necessitate a mechanism for moving cases, and the fact that court is not a great place to resolve family disputes, mediation and ADR are becoming an increasingly preferred method for resolving family law matters. Personally, I am pleased to see the growing demand for mediation, given the upside for family relationships and the principles of empathy and compassion that are at its core.



About Sarah Hechtman

Sarah Hechtman serves as counsel at Rower LLC and has been a matrimonial and family law attorney for more than 15 years. She gained valuable litigation experience as a prosecutor for the New York County District Attorney's Office, where she specialised in cases involving domestic violence and sex crimes, and as a civil rights lawyer prosecuting class action cases on behalf of children. She has extensive training as a mediator and mediates matrimonial cases for the court system, as well as privately. She is a member of the New York Association of Collaborative Professionals, a certified parenting coordinator and an adjunct professor at Pace Law School, where she teaches a course on psychology and law.

About Rower LLC

Rower LLC is a New York law firm dedicated to matrimonial and family law. The firm is committed to working with empathy to recognise their clients' needs and with strength to meet those needs. Rower LLC has a skilled litigation practice for cases that require it, as well as an equally skilled practice devoted to avoiding litigation through negotiation, mediation and other forms of alternative dispute resolution, as well as intelligently crafted prenuptial and postnuptial agreements.

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