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Options for Clients When Property Mediation Results in Partial But Not Total Agreements

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Abstract

Most family law property mediations result in agreements being reached. Sometimes, however, parties can agree on many but not all issues. To resolve the remaining disputes, parties may opt for the arbitration of just the outstanding issues – whilst confirming the agreements reached at mediation. This article explains how mediators can discuss with clients the option of arbitration as a complementary process to mediation.

Introduction

Most family law property mediations result in agreements being reached. Sometimes, however, parties can agree on many but not all issues. They may have worked very hard sharing information, exploring issues and identifying options. It is a pity for the clients' hard work to be forgotten. One may thus ask: what options can mediators suggest for clients to maintain the momentum of that hard work?

Mediators can assist clients by reminding them what has been potentially resolved. This can balance the tendency of clients to overlook what has been agreed and the conclusion that the mediation has been a waste of time and the other party remains entirely unreasonable. Having identified what has been agreed upon, the outstanding issues can then be identified, leading to a discussion of what might be done to resolve them.

Arbitration of Outstanding Issues

One option is for the parties to agree to commit themselves to the issues resolved and to put the outstanding issues to an arbitrator to conduct a simplified hearing, with the view to obtaining a binding arbitral award. That way, the clients' hard work in reaching partial agreements is not wasted. Parties can agree that the arbitrator accepts the agreed issues – eg on who gets the house, whether superannuation is to be split, the overall percentage and whether a particular family loan exists – and

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just determine the outstanding. Thus, whilst the parties can retain control over the agreed issues, the arbitration of the discreet outstanding issues can be conducted quickly and cost-efficiently.

What if a Mediator Assesses that Mediation is Inappropriate, or if Parties are Resistant to Mediation?

Arbitration is also an option to consider when mediation is determined by parties or the mediator to be inappropriate. Indicators suggesting that mediation is inappropriate may not apply to arbitrations. For example, a difference in bargaining power may suggest that mediation is not appropriate, but this can be overcome by decision-making being outsourced to an independent arbitrator.

In addition, clients may be resistant to mediation for a variety of reasons. For example, the lack of certainty of an outcome, or a reluctance to have to engage with the concerns or needs of their former spouse. These reservations may not apply to arbitrations.

Discussing Family Law Property Arbitration with Mediation Clients

Mediators might consider suggesting the option of arbitration when mediation has not resolved all issues, when mediation seems inappropriate, or clients are not willing to engage in mediation. The mediator can assist clients in formulating and recording what is agreed, and what the outstanding issues that can be put to arbitration. An overview of the process will assist mediators to have the discussion with parties and lawyers.

Getting a Family Law Property Arbitration Underway

Family law property arbitration can occur both when parties are in court proceedings and where there are no court proceedings. Arbitration is entirely voluntary. Clients must understand the process and agree. A family law property arbitration results in the arbitrator issuing an arbitral award and reasons. The award takes effect as a court decree under the *Family Law Act 1975* (Cth).[1] It is binding and enforceable - subject to some limited rights of review.[2]

Getting a family law property arbitration underway is straightforward. Here are the first steps:

1. Consider what type of arbitration?

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1 *Family Law Act 1975* (Cth) s 13H.
2 Ibid s 13J.

(a) Private arbitrations – This is where there are no existing court proceedings. The arbitral award can be registered with the Family Court to make it a decree of the court.

(b) Court-referred arbitrations – This is where court proceedings are underway and the parties' consent to arbitrate.

2. Select and engage the arbitrator

The arbitrator must be on one of the two lists maintained by the Australian Institute of Family Law Arbitrators and Mediators ('AIFLAM'). One list is of arbitrators who have the requisite family law expertise (ie those who are accredited as family law specialists or have practiced law for at least 5 years with at least 25% of work in family law) and have completed the AIFLAM specialist arbitration training. The second list is of advanced specialist arbitrators who have completed further studies in arbitration, including a tertiary-level assessment of their arbitration expertise. The parties may also invite AIFLAM to nominate an arbitrator.

3. Consider what is for the arbitrator to decide?

The arbitrator can be asked to accept what has already been agreed, and to only make an award in respect of identified outstanding issues. The parties retain control over agreed issues and the process will be quicker and more cost-efficient. Alternatively, the arbitrator can be asked to make an overall decision as to all aspects of the property settlement. This will take more time and at an increased cost, and the parties will lose control over more aspects of the outcome.

4. Consider what arbitration model to adopt?

There are four models of how the arbitration can be run:

I. Off the papers:

This is where the documents to be provided to the arbitrator are agreed upon. The arbitrator's award and reasons are based on those documents without a hearing. This can be streamlined to make it quick and cost-effective.

II. A short hearing for submissions:

This is held after the provision of the agreed documents to the arbitrator, where there is a short hearing of 2 or 3 hours for lawyers to provide submissions based on the agreed documents and for the arbitrator to check if they understand the proposals and the arguments of each party. This can also be quick and cost-effective and allows parties to feel heard. It avoids the conflict that may arise with the introduction of oral evidence and cross-examination.

III. A short hearing with limited oral evidence on agreed issues:

This is held after important issues are identified at the planning meeting, and the parameters of topics or time limits for oral evidence and cross-examination are established. This can allow for the hearing to be completed in a day.

IV. A full hearing:

No limits - other than that of relevance - are placed on the topics to be submitted and time for oral evidence.

The planning meetings and hearings for all four models occur privately and not in a public courtroom. This ensures that, other than registering the award and reasons with the court, the rest of the arbitration process is kept private and confidential.

5. Attending a planning meeting

The planning meeting offers the opportunity for parties to clarify the type and model of arbitration to be adopted, and to confirm the agreed issues as well as the issues that are required to be arbitrated. It also serves to ensure that the parties properly understand and consent to arbitration, and allows the parties to settle on (and sign) an arbitration participation agreement. It is the arbitration participation agreement that gives the arbitrator the authority to conduct the arbitration and to issue a binding and enforceable arbitral award. The signing of the arbitration agreement signifies the beginning of arbitration.

At the end of a well-run arbitration, the parties should not just have saved time and money. They should also feel heard and respected. The more the award reflects the substantive agreements reached prior to the arbitration (perhaps at an earlier mediation) and the client's design of the arbitration process, the greater their sense of procedural fairness and psychological recognition. This, in turn, will result in a higher level of satisfaction with the arbitral outcome, even if the determination of the award falls short of what they have hoped for. The higher the client's satisfaction with the outcome, the greater their willingness to implement that outcome efficiently.