

WHAT ARE YOUR RIGHTS IN COURT MANDATED MEDIATION FOR DIVORCE AND CHILD CUSTODY ISSUES?

This document, created by the End Domestic Abuse Wisconsin — Wisconsin Coalition Against Domestic Violence — Legal Department, does not constitute legal advice.

I. A word of caution surrounding mediation when there is domestic abuse:

Mediation is often ordered in custody and/or physical placement disputes. Court-ordered mediation when domestic abuse is present can place survivors at risk compromising their safety and autonomy. Mediation often fails by physically forcing close contact between a survivor and the abusive person. Further, even if there is no physical abuse, or there are physical barriers in place in mediation to account for physical abuse (such as the parties being situated in different rooms), survivors are often negotiating under duress or trauma from the power imbalance or psychological violence.

This can lead to unfair or even dangerous outcomes. This document discusses the mediation process in Wisconsin, as well as the laws in place designed to protect survivors of abuse. The reality, though, is mediation can still be a very challenging and difficult process for a survivor of domestic violence.

On the other hand, where a survivor is voluntarily participating in mediation and any needed safeguards are in place, it can be a useful tool not only to potentially save on costs and time of a lengthy court process but can also be an opportunity for survivors to be empowered to regain control over decision-making. (See this [article](#) for more discussion about this.)

II. Overview of Mediation Process in Wisconsin:

A. What is mediation?

It means a cooperative process involving the parties and a mediator, the purpose of which is to help the parties, by applying communication and dispute resolution skills, define and resolve their own disagreements, with the best interest of the child as the paramount consideration. [Wis. Stat. 767.405\(1\)\(a\)](#)

“It is a confidential, cooperative, problem solving process that allows parents to meet with a neutral third party, or mediator, to work on solutions to the issues that bring them to family court. In many instances, parents can work with a mediator to find a solution acceptable to both of them and reduce or eliminate the need for court appearances .”— [Sauk County Wisconsin](#)

B. What is a mediator?

1. A mediator is a person with special skills and training in dispute resolution. [Wis. Stat. 767.405\(1\)\(b\).](#)
2. A *family court appointed mediator* must meet the following *training* requirements:
 - At least 25 hours of mediation training, OR
 - At least 3 years of professional experience in dispute resolution, AND

- Every mediator shall have training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children. [Wis. Stat. 767.405\(4\)](#)

C. What is the role of the mediator?

The mediator is a neutral 3rd party who is there to help with the mediation process through such methods as:

- Facilitating the process by bringing the parties together or by shuttle mediation, which is keeping the parties separated and moving back and forth between them.
- Helping to move the discussion along.
- Making suggestions to the parties.
- Making comments on the parties' discussion.

D. What happens during the mediation process? (This may vary by county or mediator)

- Mediator gives an opening statement.
- Mediator sets ground rules on how mediation will progress.
- Mediator may allow each party to give an opening statement.
- Issues to be discussed are outlined.
- Parties can begin brainstorming and discussing resolution of the issues.
- If the mediator believes it will benefit the parties, they may separate the parties.
-This is a one-on-one meeting with the mediator, known as a caucus.
- Or the mediator may use shuttle mediation. The parties are separated for the remainder of the mediation, and the mediator goes back and forth between them.

E. What happens if an agreement is reached during mediation?

If an agreement is reached, it shall be in writing, reviewed by the attorney, if any, for each party and by a guardian ad litem appointed, and submitted to the court for to be included in the court order as a stipulation. The court may approve or reject the agreement, based on the best interest of the child. [See Wis. Stat. 767.405\(12\)\(a\).](#)

F. What if an agreement is not reached during mediation?

The parties or the mediator must notify the court. Once the court is informed that mediation did not work, the clerk will place the case back on the court's calendar for a future hearing. The case continues as if mediation had not taken place. The court will then likely appoint a GAL, and the court may also refer the matter to a legal custody or physical placement study. [See Wis. Stat. 767.405\(12\)\(b\).](#)

Note: it is important that the parties clarify with the mediator who will inform the court that a settlement was not reached.

G. Communications and confidentiality protections during mediation:

Information told to the mediator is confidential. However, the court or circuit court commissioner shall inform the parties that, "the confidentiality of communications in mediation is waived if the parties stipulate under [sub. \(14\)\(c\)](#) that the person who provided mediation to the parties may also conduct the legal custody or physical placement study under [sub. \(14\).](#)" [Wis. Stat. 767.405\(5\)\(a\)\(1\).](#)

In some counties the parties must attempt mediation, but if it fails, the parties are asked to sign a consent waiver. The consent waives confidentiality, which allows the mediator to switch from being a neutral third party to a custody evaluator.

Confidentiality and inadmissible evidence:

- Except as noted above, and under certain other circumstances listed in the statute, communications made during mediation cannot be used as evidence or be subject to discovery or compulsory process in any judicial or administrative proceeding. [See Wis. Stat. 904.085\(3\)\(a\)](#)
- Likewise, except as noted above, and under certain other circumstances listed in the statute, a mediator cannot be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation, or to give an opinion about the parties. [See Wis. Stat. 904.085\(3\)\(b\)](#)

III. Mediation and the Court Process:

A. When do courts mandate mediation?

1. In any action affecting the family, in which it appears that legal custody or physical placement is contested, the court or circuit court commissioner shall refer the parties to the director of family court counseling services for possible mediation of those contested issues. [Wis. Stat. 767.405\(5\)\(a\)](#).

However, and importantly, the court may waive this requirement to attend at least one mediation session if the court determines that attending the session will cause undue hardship or *would endanger the health or safety of one of the parties* and the bases on which the court may make its determination. [Wis. Stat. 767.405\(5\)\(a\)2](#).

Note: a survivor can request that mediation be waived if the survivor is comfortable disclosing the abuse. This can be requested at a Temporary Order Hearing, if there is one, or by using this [form](#). (This is Dane County specific so you can check your county to see if there is a similar form. If not, this could be used as a template.)

2. Upon request of the parties who both wish to have joint legal custody, the court or circuit court commissioner shall refer the parties. [Wis. Stat. 767.405\(5\)\(b\)](#)
3. Upon request of any person who is awarded periods of physical placement or a child of that person, a person with visitation rights, or a person with physical custody. [Wis. Stat. 767.405\(5\)\(c\)](#)

B. If mandated, must the client attend a mediation session?

In any action affecting the family, in which it appears that legal custody or physical placement is contested, the parties **shall attend** at least one session with a mediator and, if the parties and the mediator determine that continued mediation is appropriate, no court may hold a trial of or a final hearing on legal custody or physical placement until after mediation is completed or terminated. [Wis. Stat. 767.405\(8\)\(a\)](#)

However, a court may, in its discretion may hold a trial or hearing without requiring attendance at the session if the court finds that attending the session will cause undue hardship or would endanger the health or safety of one of the parties. In making its determination of whether attendance at the session would endanger the health or safety of one of the parties, the court shall consider evidence of the following:

1. That a party engaged in child abuse.
2. Interspousal battery or domestic abuse.
3. That either party has a significant problem with alcohol or drug abuse.
4. Any other evidence indicating that a party's health or safety will be endangered by attending the session.

The initial session shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation. [Wis. Stat. 767.405\(8\)\(c\)](#)

Further, a mediator, who is guided by the best interest of the child, has many powers and duties assigned to them, including the discretion to terminate mediation if any of the following facts exist:

1. There is evidence that a party engaged in child abuse.
2. There is evidence of interspousal battery or domestic abuse.
3. Either party has a significant problem with alcohol or drug abuse.
4. Other evidence which indicates one of the parties' health or safety will be endangered if mediation is not terminated.

[Wis. Stat. 767.405\(10\)\(e\)](#)

C. Does the action “continue” during the course of mediation?

The court process generally stops while mediation is attempted.

D. What issues can be discussed during court-ordered mediation?

Generally, it is issues related to child custody and/or physical placement only. However, property division, maintenance or child support can be mediated if any of those issues are directly related to the legal custody or physical placement issue. In that case, both parties must agree in writing to consider the property division, maintenance or child support issue.

[Wis. Stat. 767.405\(9\)](#)

E. What happens if a party does not follow the mediation agreement?

Once an agreement is signed and presented to the court, it usually will become part of a court order or judgment. Noncompliance with that order may result in a finding of contempt. A party can try to “seek relief” from that order (ask the court to vacate it) if there is a good reason. It is best not to sign the agreement if you are unsure, rather than try to change it once it has been entered as an order of the court.

F. How does a mediator differ from a guardian ad litem (GAL)?

- A mediator is a neutral person who tries to help disputing parties reach an agreement.
 - The guardian ad litem (also known as a GAL) shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. [Wis. Stat. 767.407\(4\)](#)
1. It is likely that a GAL will not be appointed until mediation is tried and fails.
 2. A GAL in Wisconsin must be an attorney.
 3. A GAL represents the “best interests of the child.” They are not the child’s attorney.
 4. A GAL must investigate if there is domestic abuse or interspousal battery and must report the results of the investigation to the court.
 5. If there is both a GAL and a mediator, they have separate roles.
 6. Because the GAL functions independently, the GAL and mediator can speak freely. A mediator shall be guided by the best interests of the child and may include the counsel of any party or any appointed guardian ad litem in the mediation. [Wis. Stat. 767.405\(10\)](#)
 7. The GAL shall communicate to the court the wishes of the child with regard to custody and placement, unless the child requests that they not.
 8. The GAL shall review and comment to the court on any mediation agreement and stipulation made under [s. 767.405\(12\)](#).

IV. Domestic Violence and Mediation: What are the laws and other considerations when there is domestic abuse present?

- A. See II. H. above** on Communications & confidentiality protections during mediation.
- B. See III.A.1 above** about how the court may waive the requirement to attend at least one mediation session if the court determines that attending the session will cause undue hardship or *would endanger the health or safety of one of the parties* and the bases on which the court may make its determination.
- C. See III.B. above** about when the *courts* have the discretion to hold a hearing or trial without a mediated session and when the *mediator* has the discretion to terminate mediation when there is among other things, child abuse, domestic abuse or interspousal battery.
- D. Can I stop mediation if I do not think it is working? How do I do this?**
If you do not think that the mediation is working, you may simply inform the mediator that you wish to stop.
- E. Can an advocate be with me during mediation?**
Yes. A complainant has the right to select a service representative to attend, with the complainant, hearings, depositions and court proceedings, whether criminal or civil, and all interviews and meetings related to those hearings, depositions and court proceedings, if abusive conduct is alleged to have occurred against the complainant.
[Wis. Stat. 895.45\(2\)](#)

F. Can I talk with the mediator separately from the other party?

Yes. If the parties and the mediator are in the same room, a party can request a caucus with the mediator. A caucus is a confidential, individual meeting with the mediator.

If a party does not feel comfortable being in the same room as the abuser, they can ask to be placed in a separate room and ask the mediator to use shuttle mediation. This means that the mediator will move from room to room and the parties will not meet face to face.

G. Can mediators adequately identify domestic violence?

Every mediator shall have training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.

[Wis. Stat. 767.405\(4\)](#)

While the mediator may have training, they will only identify domestic violence dependent on the quality of their training and the extent of their experience.

H. What should I do if the mediator does not believe there is domestic violence?

You can either ask the mediator to hold a caucus (private meeting) with you and discuss the issue, or you can end the mediation by informing the mediator that you would like to stop the process. If you end the mediation, the case will be put back on the court's calendar for further hearing. It is important to find out from the mediator whose responsibility it is to notify the court that the mediation ended without an agreement.

I. How, if at all, do mediators address power imbalance during mediation?

There are several methods that a mediator may use to address power imbalances, some of which might be:

- a. Shuttle mediation, where the parties are separated and the mediator moves from room to room.
- b. Caucuses, which are confidential, individual meetings with the mediator.
- c. Separate interviews, which the mediator completes prior to the start of the mediation.
- d. Staggering the parties' arrival times at mediation so they do not see one another.

J. What are the effects of mediation on the safety of the abused parent and on the children?

Some victims wish to engage in mediation as they believe it is their only opportunity to be heard. Other victims report retaliation after engaging in mediation because the victim breaks the silence. Each victim must assess their immediate and long-term safety if engaging in mediation.

K. Given the safety risks, should mediation be used with victims of domestic violence?

Prior to mediation, a survivor should know what mediation entails and the safety risks involved. Ultimately, they must decide if they are willing to engage in this process.

L. How does domestic violence affect the outcome of mediation?

Each victim must assess their immediate and long-term safety if engaging in mediation.

V. After mediation concludes:

1. Who should write the stipulation agreement?

The drafting of an agreement is a very difficult question. Usually, mediators are encouraged *not* to draft the document and to have the parties' lawyers do it. Obviously when a party or both parties are pro se (unrepresented), the question becomes more difficult. The parties can ask the mediator to summarize their agreement in a written document, and the parties can submit the document to the court for review. Whenever possible, even a pro se litigant, should try to have any agreement reviewed by an attorney. This agreement will most likely become part of a final divorce judgment. Changing the judgment later can be difficult, if not impossible.

2. What can I do if the mediator is strong-arming the process?

You can inform the mediator that you would like to stop the mediation process. It is important to ask the mediator who is responsible for notifying the court that no agreement was reached and for requesting a court date. If the mediator does not do so, it is your responsibility to inform the court.

3. What if I am not happy with the proposed stipulation?

- You can inform the mediator that you are unhappy with the stipulation and will not sign it.
- You can tell the mediator that you would like to have time to think about it.
- You can inform the mediator that you would like to have an attorney review the stipulation prior to you signing it.

VI. Safeguarding Your Rights and Your Safety:

Before Mediation, If You Are Concerned About Your Safety:

1. Make sure you send information regarding your history of domestic abuse to the mediator beforehand.
2. Ask to be in a separate room from your abuser, which is called shuttle mediation.

During Mediation, If You Are Concerned About Your Safety:

1. Ask to be in separate rooms throughout the mediation, which is shuttle mediation.
2. Ask to speak with the mediator in a caucus, which is a confidential, individual meeting between a party and the mediator.
3. Do not sign a stipulation you do not agree with, or about which you are not sure. Ask for time to think about it and time to have an attorney review the stipulation.
4. You have a right to end mediation at any time if you do not think you are being heard, are unsafe, the process is not working, etc.
5. You have a choice. If mediation is not working, you can stop and say that you want to go to court instead. There are pros and cons to this decision.

After Mediation:

1. If you think the mediator did not listen to you, did not understand there is history of domestic violence, or acted inappropriately, you may write a letter to the judge and let them know this. Be sure to document what you did to inform the mediator of the domestic violence. (**NOTE:** you must send a copy of the letter to the other party to avoid ex parte communication).
2. The court has to determine if the stipulated agreement is in the best interests of the children. (**NOTE:** If you signed the stipulation agreement and then later realized it is not in the best interest of the children, you may be able to convince the court not to sign the agreement because it is not in the best interest of the children. However, it is best not to sign it in the first place if you know it is not in the best interest of the children, as there is no guarantee the court will change the outcome.).

VII. Specific issues that arise during mediation for victims of domestic violence:

1. It is important to have a specific plan for exchanging children. Leaving placement decisions for holidays “to be determined by the parties” or not arranging for a 3rd party to assist with the transfer of the children can create safety problems for victims of domestic violence by exposing them to their abuser.
2. There may be problems with granting joint legal custody (an abuser can use this as an opportunity to try to talk to the victim all the time, to harass the victim, etc.).
3. It is crucial to make it clear to the guardian ad litem (GAL) and mediator whether/how the domestic violence affects the children (even if the children are not physically abused, they can have emotional damage).
4. Abusers often manipulate the judicial system and the mediator.
5. Domestic violence is taken into consideration in family law cases. There are specific laws surrounding legal custody and physical placement when there is domestic violence. The victim of domestic violence should make sure to inform the mediator and court about the domestic violence. The victim of domestic violence should also ask the court to take the violence into consideration when making decisions regarding custody and physical placement.