



How to Navigate Custody Mediation in Cases Involving Domestic Violence

SELF-REPRESENTED LITIGANTS SERIES

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If you are a domestic violence survivor and have been ordered or referred to mediation for your custody case, this guide can provide you with some basic information. A lawyer who understands domestic violence and mediation practice in your area would be most helpful. But many survivors cannot find or afford lawyers to represent them. For this reason, we created this guide for self-represented litigants. It includes general information on custody mediation and tips for how to prepare.

Please remember that all programs are different. Some of this information may not apply to your local court or mediation

program. For more information about your specific program, please call your local court, self-help center, or law library. You may also contact the **Resource Center on Domestic Violence: Child Protection and Custody** at our confidential toll-free number, **1-800-527-3223**, or email us at info@rcdvcpc.org. Our self-represented litigants series publications, [*10 Ways to Find Help with Your Case*](#) and [*10 Steps for Presenting Evidence in Court*](#), are also on our website at www.rcdvcpc.org.

For more help, visit the website or call anytime.

How are Custody Cases Decided?

When a couple with children separates, a court order can set basic rules for how they will parent and share custody of the children. If the parents agree on everything, that agreement will usually become the custody order. If they cannot agree, they can go to court for a trial. Each side tells the judge what they want and why they think their plan is best for the children. Each parent can present witnesses and exhibits, called evidence. Judges listen to each parent and look at the evidence. Then they decide what is in the children's best interest based on the state's custody laws. The judge decides where the children live, how much time they spend with each parent, and who makes important decisions about them. The order may also include other parenting matters.

Most family courts offer other ways to resolve the case, besides a trial. These are known as "alternative dispute resolution" or ADR. There are a few different types of ADR. Mediation is the most common. Others include early neutral evaluation and collaborative law. They all have some things in common. They all use trained people like attorneys, social workers, or mental health professionals who try to help the parents reach an agreement.

Courts like ADR:

- They believe the parties will be more satisfied when they reach an agreement on their own;
- They are less expensive than trials; and
- They help reduce the court's workload.

Many parents also like ADR. Keep reading to learn how to know if it's right for your case.

What is Custody Mediation?

Custody mediation lets parents decide what arrangement works best for them. Parents meet with a mediator in private to discuss their case. They can listen to each others' concerns and talk about possible custody plans. The mediator helps them reach an agreement about where the children should live, who will make important decisions, and any other parenting issues.

When custody mediation works, parents plan for their children's future together. It can reduce legal fees for a family. It allows parents to be more creative than a judge to make a plan that truly meets their family's needs, so long as the plan meets the law's requirements. If parents can agree, mediators can help them write an agreement to file with the court. This will become their court order.

Custody Mediation and Domestic Violence

In the past, many professionals thought that mediation was never a good idea in cases involving domestic violence. They worried that mediation can be harmful to survivors and children. Custody mediation can let abusers continue their intimidation and abuse. Survivors may be afraid to assert their rights during mediation. Mediation can also be emotionally damaging and even dangerous for survivors. In addition, a history of intimidation, bullying, and abuse may not be taken into account by the mediator. When that happens, mediation can result in agreements that are unfair and unsafe for the survivor and the children. The goal of mediation is always to help parties reach an agreement that satisfies them both. This can be difficult in cases involving domestic violence.

Even though the same concerns are true today, many survivors prefer mediation to the court process and a trial. A trial can be stressful and may traumatize some survivors more than mediation. A trial may also provoke abusers to engage more threats, intimidation, or violence. If survivors are emotionally ready and have an organized plan, and if the mediation

accounts for safety, custody mediation can be empowering for survivors. Mediation can help survivors assert their needs and take control of their lives in ways that may not be possible in court. Mediation is also less expensive than a court trial. If you are considering whether mediation is right for you, this guide can help you prepare.

Deciding whether to mediate:

If your program is voluntary or allows you to request an exemption, you have a choice to make. Whether mediation is a good idea for you depends on whether you feel safe. You must be able to speak openly about your custody case with the mediator. You should also consider whether you can speak up for yourself and/or disagree with the other parent. When deciding whether to participate in mediation, you will want to think about the following topics:

MEDIATOR KNOWLEDGE OF DOMESTIC VIOLENCE:

Many programs include domestic violence education as part of mediator training. The quality of the training, however, can vary widely. And some programs do not train on domestic violence at all. Mediators who do not understand domestic violence will not understand how the violence affects the mediation process. They may not know how to help you stay safe. Ask about what training your program requires. **You can also ask to talk to the mediator before the mediation about your concerns.** Some mediators have a policy against talking to either side individually so they don't appear biased. Let them know that you want to talk about your safety concerns and your ability to speak freely. They may be more willing to talk to you in private in that case.

COLLABORATION:

Mediators are trained to help disputing parties by encouraging them to work together. In cases involving domestic violence, the coercive nature of the abuse may not allow cooperation. Abusers usually want to make all major decisions and win almost all arguments. Many survivors have experienced violence and abuse for disagreeing with their abusers, especially in front of others. Being in a joint session with your abuser could make it difficult for you

to argue for an agreement that will be safe for you and your children. This is especially true if you have a mediator who is not well trained in domestic violence. In that case, the mediator may assume that both parents bring equal bargaining power to the table and can negotiate freely and openly. The mediator may not understand or account for the impact of domestic violence on the mediation process. **If you do not feel that you can speak up for yourself or disagree with the other parent, let the mediator know before mediation begins. In that case, mediation may not be appropriate.**

CONFIDENTIALITY:

A mediator will usually tell the court whether an agreement was reached and provide a copy of any agreement. Most mediators must also report any abuse or neglect of a child. Remember that some states treat children witnessing domestic violence as reportable child abuse. **Ask your mediator about his or her duty to report before mediation begins.** Other than these exceptions, nothing else that you talk about can be shared with the court in most programs. Even though the judge will not let parents talk about what was discussed at mediation in court, it is important to remember that the other parent may find other ways to use the information learned in mediation against

you. Also, the mediator will usually not share information learned from one party in private (during screening for domestic violence or when meeting with the parties individually) with the other parent. Different programs may have different rules about confidentiality, though, so ask your local program what its rules are.

JOINT/SHUTTLE MEDIATION:

The mediator may meet with you and the other party together in joint session, where you and the other parent are in the same room with the mediator. In shuttle mediation, you stay in different rooms and the mediator moves back and forth between you. Participating in mediation by telephone or online may also be an option. Telephonic mediation is especially helpful when physical closeness may increase danger. If domestic violence is present, shuttle or telephone mediation can help avoid intimidation. **If you feel that your safety, comfort, or ability to be honest would increase with shuttle or telephone/online mediation, ask the mediator about using that format.** Regardless of which option is used at the mediation, the mediator should meet with each party privately before the mediation begins and before an agreement is signed in cases involving domestic violence.

INFORMATION SHARING:

At times, you may speak to the mediator in private. This could be in your individual orientation or through shuttle mediation. Ask the mediator whether what you say will be shared with the other parent. **If you don't want the other parent to know what you said, let the mediator know it's not safe.** This will keep the mediator from sharing something that puts you or your children in danger. For example, let the mediator know if you are living at a confidential address. That way, the mediator won't include your address on paperwork that the other parent can see. If the mediator says information will be shared even if you have safety concerns, you must decide what is safe to tell the mediator.

MEDIATOR STYLE:

Mediators can have different styles. Some see their role as limited to helping the parties make their own agreement. Others may share their opinion about how strong or weak a case is. They may give their opinion about what they think the parents should do. A mediator should never pressure you to reach an agreement, but not all mediators see their role the same. **You must be ready to stand up for yourself and your children, even to the mediator.**

NEUTRALITY:

Mediators are neutral. This means that they won't take sides. Even if the mediators are attorneys, they should not give legal advice. Mediators do not make final decisions about custody agreements—the parties do. If the parents cannot agree, the court will decide. Mediators will usually not be neutral about the best interests of the children or the safety of the parties, however. **Let the mediator know if you do not think that the other parent is acting safely or in the best interests of the children because the mediator can end the mediation for that reason.**

PARTICIPANTS:

The mediation may be limited to the parents only. Some mediators allow attorneys to attend. Some programs also allow survivors to bring a support person such as a friend or advocate, although they may or may not be allowed to come into the mediation itself. **If you think it would help to bring an advocate with you, ask the mediator before mediation.**

SCREENING FOR SAFETY:

Screening for safety is becoming more common. Many mediators now have safety screening and will take steps to increase safety. Ask your mediator about screening and what safety measures they can take. **If your mediator does not screen for safety, you may want to consider whether mediation is right for you.**

VOLUNTARY OR MANDATORY:

Mediators agree that mediation is best when the parties want to be there. But many court mediation programs are mandatory or allow survivors to opt out of mediation if domestic violence is present. Some let you request an exemption and others do not allow for exemptions at all. In some mandatory programs, you just have to show up to mediation. In others, you must attend and participate in good faith. **Even in mandatory programs, you cannot be forced to reach an agreement. Any agreement must be voluntary. You should never accept an agreement that won't work for you and your children or that doesn't feel safe. You always have the right to tell the mediator that you don't agree and want the court to make the final custody decision.**

REPORTS/RECOMMENDATIONS:

Some programs require the mediator to provide a report to the court if an agreement is not reached. The mediator may also have to make recommendations to the court. Information you share in mediation, including about the domestic violence, could possibly be used against you in the mediator's recommendations. This is especially true if the mediator does not understand the dynamics of domestic violence. **If your program requires mediators to make recommendations to the court, ask how this impacts the mediator's neutrality, confidentiality, and process.** You can ask the mediator about this during your orientation.

MEDIATED AGREEMENTS:

Custody mediation may or may not end in an agreement. Sometimes parents agree to the entire parenting plan. This is called a full agreement. Other times, parents reach a partial agreement. This means they agree only to some things and the judge decides the rest. **There is nothing wrong with reaching a partial agreement or reaching no agreement at all.**

SAFETY:

You know best how dangerous the other parent is and whether mediation will be safe. Before mediation, ask your local program what safeguards they have in place for cases involving domestic violence. Get as much information as you can to make this decision. Some courts require custody mediators to take domestic violence training, but many don't. So not all mediators understand domestic violence and how it impacts custody mediation. If the mediator permits, you may want to talk to the mediator in private before the mediation about your concerns. Try to see how well he or she understands domestic violence. Ask what precautions are in place to keep you physically and emotionally safe (before, during, and after the mediation). **A list of specific ways the mediator can increase safety are included on the next page.**

Some safety measures that can be used in mediation include the following:

- Using *shuttle mediation*. Shuttle mediation is held with you and the other parent in separate rooms. The mediator moves back and forth between the two of you.
- Participating in mediation over the telephone. That way, you don't have to be in the same location as the other parent.
- Bringing an advocate or support person with you.
- If using *joint session* (with you and the other parent in the same room), seating you next to the mediator and/or support person, by an exit, and away from and out of eye contact of the other parent.
- Using *caucuses* (small breaks from a joint session) regularly to check in with you.
- Offering staggered arrival and departure times, so that you and the other parent don't show up and leave at the same time.
- Having a telephone close at hand to call for assistance.
- Providing separate waiting rooms for you and the other parent before the mediation begins and during breaks.
- Creating a safety plan before the mediation begins. This may include signals that let you safely tell the mediator if you are uncomfortable or to ask for a break.
- Setting ground rules before the mediation begins and making everybody follow them.
- Holding the mediation in a courthouse with metal detectors, silent alarm systems, and a bailiff.

A complete guarantee of safety is impossible. And you know best how dangerous the other parent is and whether mediation is likely to be safe. Still, mediators should be willing to use these safety precautions to make the process as safe as possible. **If at any point you don't feel that mediation is safe or if the mediator is not willing to put these safety precautions in place, let the mediator know that you do not feel comfortable going forward with the mediation.**

Preparing for mediation:

Different courts use different words to describe custody arrangements between parents. Some examples are *custody agreement*, *parenting plan*, *parenting schedule*, *visitation schedule*, or something else. Regardless of the word, custody mediation usually talks about where the children will live, what parenting time will look like, and who will make important decisions about the children.

Local custody laws

If you are a survivor of domestic violence, you should understand how the violence may impact your court case before you mediate. Many state laws protect survivors in the areas of custody, visitation, and relocation. You should know and understand what rights and legal options you may have through the court system before mediation. If you do not understand your legal rights, you might accidentally give them up by agreeing to something in mediation that the court would not have ordered.

The website www.womenslaw.org has detailed information on each state's custody laws. The National Coalition Against Domestic Violence (NCADV) website also provides a list of state domestic violence coalitions. This list can

be found at ncadv.org/state-coalitions. You can also call the Resource Center at **1-800-527-3223** or email us at info@rcdvcpc.org. We cannot give you legal advice, but we can tell you what the laws say in your state and whether you have any special protections. We can also help you find your state domestic violence coalition or local legal services organization.

Parenting plans

Parenting plans include details about everything. They include big things like how major decisions are made. They also include little things like how to talk to the other parent about who picks up your child from soccer practice. You will be asked to make important decisions about your family's future at custody mediation without an attorney or judge present. Mediators cannot give you legal advice. Before mediation, you should take some time to ask yourself: what do you want your custody agreement to look like and what arrangement would be safest for you and your children? You probably won't get exactly what you want at mediation. But you should never agree to a plan that is not safe for you or your children. Some common topics that may be discussed at mediation include:

LEGAL CUSTODY:

Legal custody means which parent makes important, long-term decisions about the children. This could include where the children will go to school, what religious instruction they will receive, if any, and how major medical decisions will be made. Some states call this decision-making. It's called joint or shared when both parents make these decisions.

PHYSICAL CUSTODY:

Physical custody means which parent the children will live with. This parent will make day-to-day parenting decisions. *Joint physical custody* is when children spend about half of their time with each parent. Some states call this *shared custody*. When one parent has the children most of the time, that parent has *primary physical custody*. With *sole physical custody*, one parent has the children all the time. This is rare. If one parent has sole or primary physical custody, the other parent is called the *non-custodial parent*.

PARENTING TIME:

Parenting time is sometimes called visitation. This is when the children are with the *non-custodial parent*. This is an important topic to address in mediation. The parties should clearly understand when each parent is able to see the children and under what terms.

In cases involving domestic violence, it is usually a good idea to set up structured schedules with as much detail as possible. Schedules that are too flexible may decrease safety and increase opportunities for abuse. In addition, survivors should consider whether supervised parenting time makes sense for the other parent. This can be provided by family members or a supervised visitation facility.

EXCHANGE:

This means how the children will travel from one parent to the other. In cases involving domestic violence, exchanges can be dangerous. The plan should be as detailed as possible. It should include the specific time the children will be exchanged, who will be responsible for transportation, and if safety requires, exchange by a third-party or at a safe location (not the parent's home). In cases involving domestic violence, it may make sense to have the exchange at a school or day care, at a safe exchange program, or at a public place with video cameras. It is also important to remember that each extra exchange increases the amount of interaction with the other parent, so frequent exchanges may not be a good idea.

VACATION:

The plan will probably talk about each parent's right to take the children on

vacation. Include whether vacations can be out of state or out of the country. Some plans give each parent a set amount of days each year. Others will set the actual dates for vacation in advance.

HOLIDAYS, MOTHER’S/FATHER’S DAY AND BIRTHDAYS:

The plan should include where the children will spend holidays, birthdays and other important dates. Before mediation, consider which days are most important to you. Arrive prepared to discuss where you think the children should spend those days.

CHILD CARE:

Some plans address child care arrangements. If you want a particular child care provider, make sure it’s actually able to help with child care before mediation. That way, an agreement won’t be delayed.

RIGHT OF FIRST REFUSAL:

Some agreements include the “right of first refusal.” This means one parent asks the other parent to care for the children before calling a babysitter or using child care. Think carefully about whether this makes sense in your case. It can save money if stepparents or other relatives are not available to care for the children. But it can be a problem or even dangerous in cases with domestic violence. It increases the amount of contact between you and the

other parent and may give the other parent more opportunities to act abusively. It also lets the other parent know when you have plans to go out and do something.

EXTRACURRICULAR ACTIVITIES:

Extracurricular activities such as sports, music, or other activities can be very important to children. They can also open up future opportunities. Parents should consider and decide who will be responsible for taking the children to these events, whether one or both parents will be permitted to attend, and who will be responsible for paying for them.

RELOCATION:

One parent may decide to move to another state at some point. This may not be known at the time of mediation. But you could talk about how a move would impact the plan. You could have the plan say what type of notice (or court involvement) would be required. The plan could list conditions to meet before relocation would be allowed by the other parent.

INFORMATION EXCHANGE/ COMMUNICATION:

Parents must communicate about the children at some point. Be sure to account for safety when deciding how this will happen. Be ready to talk about any limits you want on the other parent's ability to

contact you and limits on what can be discussed. This can include by telephone, email, text, or otherwise. A number of smartphone app-based programs let parents communicate about the children with less direct contact. They also track the content of the contact, which can be used in court at a later time if needed. This can help avoid further abuse or harassment. Ask your local court or advocate about which programs they prefer.

COMMUNICATION WITH THE CHILDREN:

Parents usually want to communicate with the children when they are not with them. Be prepared to talk about how often that communication will happen, how it will happen, and any boundaries that you want in place. In cases involving domestic violence, it may make sense to have set times for telephone calls with the children so that the abuser is not constantly calling you. You should also think about whether FaceTime or Skype makes sense, as those options might allow the other parent to see into your home.

TREATMENT/SERVICES:

Mediation may address treatment and services for parents. Some services could include batterer intervention, counseling, substance abuse therapy, etc. If you want the plan to include this, come prepared to

talk about it. Have an idea of what services might be helpful in your case. Sometimes, a parent who needs services has to meet conditions before seeing the children or spending more time with them. If you want to ask for that, have a plan ready. Include what the other parent needs to do or what changes need to happen. Think about how to track whether the parent is doing what is expected. And try to include what happens if the parent does not. Also think about whether the abuser will try to make you seek treatment or services and how you would respond.

PLANS TO REMARRY:

A new marriage could affect the custody arrangement. If either party plans to remarry, it sometimes makes sense to talk about it at mediation. In cases involving domestic violence, however, this could cause more conflict and may not be helpful.

To learn more about custody mediation in general or to learn more about the custody laws in your state, visit our website at www.rcdvcpc.org, or contact us at info@rcdvcpc.org or **1-800-527-3223.**

We wish the best for you and your children.

Preparation Checklist

YOU MAY ALSO WANT TO TAKE THE FOLLOWING STEPS TO PREPARE FOR MEDIATION:

- Write down and bring to the mediation a list of any concerns and issues that you want to discuss. Include specific factors that can help increase safety for you and your children. This can help you stay focused on what is important during the mediation.
- Ask the mediator or program whether you can bring a support person. This could be an attorney, a domestic violence advocate, or even a friend.
- Bring copies of work schedules, your children’s activities, school holidays, and other important dates. This will help you discuss a parenting schedule.
- Consider how your children’s needs may change as they grow. Try to make sure that any agreement is flexible enough to address those changes. Sometimes, mediated agreements will say that the parents can request mediation again if things change.
- If possible, talk to an attorney about your options before the mediation. You may also want to have an attorney review the agreement before it is signed. Check your local legal aid program or state bar about where you might get free advice or a free consultation.
- Having to interact with your abuser will be challenging. Try to stay calm. Be firm about what you need to keep you and your children safe.
- Always focus on the children’s best interest, including safety. This is what the court will look at when deciding whether to approve the agreement. Remember, your own ability to parent your children free of fear is in your children’s best interest!
- Never forget that you are not required to reach an agreement!** If you don’t feel safe or comfortable at mediation, let the mediator know you want the judge to decide your custody case instead.

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