



Alternative Dispute Resolution and Family Law

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CCMW

Canadian Council of Muslim Women
Le conseil canadien des femmes musulmanes



Canadian Council of Muslim Women (CCMW) has prepared this information to provide Muslim women with basic information about family law in Ontario as it applies to Muslim communities. We hope to give answers to key questions about whether Muslim family laws can be used to resolve family law disputes in Canada.

Alternative Dispute Resolution and Family Law

This booklet is meant to give you a basic understanding of legal issues. It is not a substitute for individual legal advice and assistance. If you are dealing with family law issues, get legal advice as soon as possible to protect your rights. For more information about how to find and pay for a family law lawyer, see FLEW's booklet on "Finding Help with your Family Law Problem" on FLEW's website at www.onefamilylaw.ca.

When you and your spouse separate, you will have to deal with several legal issues. For example, you must decide about financial support, how to care for your children and how to divide the family property. You can go to court to make these decisions. You can also make informal arrangements or use **alternative dispute resolution (ADR)**.

Do **not** use ADR to settle a dispute with someone who has been violent or abusive. Do **not** use it with someone who has tried to bully you, or someone who has more power than you.

What is ADR?

Alternative dispute resolution, or ADR, is an informal way to settle a disagreement. People can negotiate, or work with a mediator or an arbitrator. Negotiation, mediation and arbitration are different types of ADR. You cannot be forced into ADR for a family law case. You and your former spouse must choose it freely.

If you are thinking about using ADR, **talk to a lawyer**. If you do not, you may give up rights that you do not know you have.

When you could use ADR:

In some family law cases, ADR can be better than going to court. Here is why:

- you can have more control over what happens to your case;
- you can choose how to deal with your case;
- it can be faster and cheaper than a court case;
- it may be less upsetting than going to court.

If you can be open and honest with your spouse, ADR may be a good way for the two of you to work out the issues you have when your relationship ends. If possible, you should have a lawyer assist you.

However, ADR is not good for all kinds of disputes. ADR is not recommended if:

- you feel your spouse does not listen to you or respect you;
- you cannot talk to your spouse;
- you cannot work cooperatively with your spouse;
- your spouse has been abusive or violent;
- your spouse has tried to bully or scare you;
- your spouse can take advantage of you;
- your spouse has more power than you.

What are the different kinds of ADR?

There are four kinds of ADR that can be used to deal with family law disputes: negotiation, mediation, arbitration and collaborative family law.

1. Negotiation

Negotiation can be very informal. You and your former spouse talk to try to come to an agreement. You can speak to each other, or you can hire lawyers to talk on your behalf. Sometimes one person has a lawyer and the other person does not, this is not recommended. Most lawyers will try to negotiate before they decide to take the case to court. It is not necessary to use lawyers in all cases of negotiation.

When you negotiate, you may come to a spoken agreement. Make sure the agreement is written down and signed by both of you. If the agreement is not in writing, it will be very hard to enforce.

2. Mediation

A **mediator** helps people talk to each other and come to an agreement.

A mediator knows how to deal with conflicts. Mediators are usually social workers, psychologists or lawyers.

Some Muslim couples turn to their Imam for help in sorting out the issues between them when their relationship breaks down. In this sense, the Imam is acting as a mediator. Unlike family law arbitrations (discussed below), family law mediations do not have to follow any set process or rules. This means a mediator can consider religious principles in the course of trying to help you and your spouse reach an agreement.

The mediator must be fair. They can not favour you or your spouse in the dispute. They can suggest ways to solve the conflict, but you do not have to take their advice. They cannot offer legal advice.

You should talk to a lawyer before you take part in mediation. A lawyer can explain your rights and responsibilities to you but does not usually come with you to the mediation.

If you are not happy with the mediation, you can leave and it will be over. The mediator, even if it is your Imam, cannot force you to agree to anything you don't want to. If you cannot reach an agreement, the mediation will end. At that point, you could try a different kind of ADR, or go to court. If you come to an agreement at mediation, do not sign the agreement until you get a lawyer to read it.

Mediation is free. You can find a mediator at any family court in Ontario. You can also hire a private mediator, if you can afford it. If you are getting legal advice, you may have to also pay the lawyer.

A *khul*, a negotiated divorce, could be a negotiation, if you and your spouse reached an agreement by talking between the two of you. But it could also be a mediation if your Imam or another person helped you work out the agreement.

3. Arbitration

In arbitration, you and your former spouse hire a third person to resolve your conflict. This person is called an **arbitrator**. An arbitrator cannot grant a divorce or an annulment but can decide on custody, support, access and how to divide property. They can only decide on the issues you ask them to resolve.

Arbitration is like a court case, but it is less formal. Most people have a lawyer. At the hearing, both you and your former spouse can give evidence and say what you think is fair. After each of you has talked, the arbitrator will make a decision. That decision is called an **arbitral award**. All family law arbitral awards must be in writing.

In April 2007, there were some important changes to the law about family law arbitrations in Ontario. There are now special rules about who act as a family law arbitrator and how family law arbitrations can be conducted.

Because of these changes to the law, family law arbitrators who are not lawyers must have some training in family law. Also, all arbitrators must have training in how to recognize the signs of domestic violence. **This means that a private decision made by someone who is not a family law arbitrator is not legally binding and cannot be enforced.**

Sometimes, women are pressured into asking someone they respect, like a doctor or religious leader, to make a decision about a family law dispute. If the person is not an arbitrator, their decision is not legally binding and cannot be enforced. If you are worried that the person making decisions about your case is not a real arbitrator, ask to see proof that they are qualified to do this work.

Another important change to the law is that all family law arbitrations must now follow Canadian law or the decision will not be legal. For example, an arbitrator can not rule that your husband can take more than half of the family's property because Canadian laws say that each spouse should get half of the property when a couple gets a divorce. There are still Muslim lawyers, Imams and others who advertise "arbitration" services in accordance with what they claim to be "*shariah* principles". **Because of the changes to the law, arbitration awards that are based on "*shariah* principles" are not enforceable.**

If you do not know your rights under Canadian laws, talk to a lawyer before agreeing to arbitration. Once arbitration starts, you **cannot** decide to walk away. You must obey the arbitrator's decision even if you do not agree with it. As long as the arbitral award follows Canadian laws, it is legally binding.

You always have the right to ask the court for **permission to appeal** an arbitral award. You can not give up that right. If you challenge the award, the court can substitute its own decision for the arbitral award. The court may do this if the arbitral award says anything not related to family law or if it orders something that the court would not have ordered. Courts will also check that arbitral awards about custody and access follow the *Children's Law Reform Act*. The court will only enforce orders that are in the best interests of the children.

Arbitration can be expensive because you should have a lawyer. You may also have to pay the arbitrator. Even if you do not have a lawyer with you at the hearing, you must prove that you got legal advice before agreeing to arbitration. The cost will depend on how much the arbitrator and lawyer charge. Legal Aid will not pay for family law arbitration.

You can only decide to use arbitration at the time your relationship breaks down. Any clause in a marriage contract or cohabitation agreement to use arbitration is not enforceable. You cannot promise in a *nikahnameh* or *aqd* that you will use arbitration to resolve your family law issues.

How are arbitral awards enforced?

After arbitration, you can bring an application in the family court to enforce the award. Once the application is filed, the court can decide to enforce the arbitration award as if it were a court order if it meets certain conditions.

Can I enforce my "shariah" arbitration decision if it was made before the changes to the law?

No court has yet been asked to do this. It is very unlikely that the court would enforce a "shariah-based" arbitration award. If you and your husband disagree about the terms of the "shariah" decision, you could try to negotiate an agreement. If you are not able to reach an agreement, you could agree to another arbitration following the new rules, or you could apply to the court for assistance in dealing with the issues.

4. Collaborative Family Law

The last kind of ADR that is used in family law is collaborative family law, a new form of ADR. You, your former spouse and your lawyers work together to resolve the issues. This is a very different way for lawyers to work. In court, lawyers must fight for their client's rights without considering what the other person needs.

Collaborative family law is usually faster and cheaper than going to court. It is also more relaxed than court. But it is not a good idea for every couple. It can only work if people respect each other and work together to solve their problems. Only people who can afford to hire a lawyer can use collaborative family law.

Sometimes, couples who use collaborative family law do not reach an agreement. If this happens, you must hire a new lawyer to represent you in court.

Collaborative family law can be expensive because you must have a lawyer. The cost will depend on how much you are paying your lawyer. Legal Aid will not pay a lawyer to help you.

Case Scenarios:

1. Nadia and Ameen go to their Imam for advice on how to deal with their family law issues when their marriage breaks down. Their Imam offers advice based on shariah. Nadia and Ameen incorporate the Imam's advice in an agreement that they sign. Is the agreement an arbitration award? Is it enforceable?

Answer: The agreement is not an arbitration award. Although the Imam offered advice, he did not make a decision. Going to someone for advice is not the same as binding arbitration. However, the agreement may be enforceable as a separation agreement if both Nadia and Ameen signed it before a witness. The law allows people to give up certain rights in negotiating settlement agreements.

2. Alma and Besim agree in writing to submit their family law issues to their Imam for resolution. He has training as an arbitrator from an accredited Ontario community college. He does not ask Alma and Besim to get independent legal advice. The Imam determines all issues of support, property division and ownership in accordance with shariah principles. Is the arbitration award enforceable?

Answer: The award is not enforceable. While the Imam appears to have the proper training, his decision is not enforceable because Alma and Besim did not get independent legal advice, and because the Imam relied on shariah law, not Canadian family law principles.

This booklet is made possible by Family Law Education for Women (FLEW), a public legal education project funded by the government of Ontario. FLEW's goal is to provide information to women about their family law rights in Ontario. FLEW has also produced materials on the following topics: Alternative dispute resolution; custody and access; child protection; child support; criminal and family law; domestic contracts; family law arbitration; family law issues for immigrant, refugee and non-status women; marriage and divorce; finding legal assistance in family law; property division and spousal support, For information about materials available in other languages and formats, please see/visit www.onefamilylaw.ca and www.undroitdefamille.ca.

This booklet is available in multiple languages. Please see www.onefamilylaw.ca for more information. You can also find additional materials on the website to help you understand your family law rights.

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www.ccmw.com

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