

FAMILY LAW FOR WOMEN IN ONTARIO



Alternative Dispute Resolution and Family Law

All Women. One Family Law.
Know your Rights.

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Education for Women
Women's Right to Know

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droit de la famille
Le droit de savoir

First edition by:



CCMW

Canadian Council of Muslim Women
Le conseil canadien des femmes musulmanes



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, it is recommended that you get legal advice as soon as possible to understand your options and to protect your rights. For more information about how to find and pay for a family law lawyer, see FLEW's booklet and webinar on "Finding Help with your Family Law Problem". There are also other resources for Muslim women on the FLEW's website. For a complete list, go to: <http://www.onefamilylaw.ca/en/muslimwomen/>.

This information has been prepared in consultation with Muslim women and is intended to provide Muslim women with basic information about family law in Ontario as it applies to Muslim communities.

When you and your spouse or partner 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)**.

ADR may not be a good option to settle a dispute with someone who has been violent or abusive, who has tried to bully you, or someone who has more power than you. If you are in this situation, it is important to talk to a lawyer about your family law options.

What is ADR?

Alternative dispute resolution, or ADR, is a less formal way to settle a disagreement, outside of Court. People can negotiate by themselves, or work with others to help reach an agreement with their ex-spouse or partner. There are some professionals who can help you, such as a lawyer, a mediator or an arbitrator. You cannot be forced into ADR for a family law case. You and your spouse or partner must choose it freely.

If you are thinking about using ADR, it is a good idea to **talk to a lawyer first**, to make sure that you know what rights you have under the law.

How can ADR help you?

Both married spouses and unmarried partners can use ADR. In some family law cases, ADR can be better than going to Court because:

- deciding on an agreement with your spouse or partner can be quicker and easier than going to Court;
- you have more control over how to settle your family issues;
- you and your spouse or partner may be more likely to follow the agreement because you chose and agreed to what is in it.

If both you and your spouse or partner can be fair, open and honest, ADR may be a good way for the two of you to work out the issues you have when your relationship ends.

ADR is not always a good solution for every situation. For example, ADR may be more difficult for couples if:

- you cannot work together to solve problems;

- you feel your spouse/partner does not listen to you or respect you;
- your relationship has been abusive or violent;
- your spouse/partner has tried to bully or scare you;
- your spouse/partner has more power to force you to agree or to take advantage of you.

If you are considering ADR with a professional, it is a good idea to ask if they are trained to understand abusive relationships and prevent abuse during the ADR process. Not every lawyer, mediator or arbitrator has this training. It is a good idea to talk to a lawyer about whether ADR is right for you.

What are some different kinds of ADR?

Different kinds of ADR can be used to deal with family law disputes, such as: **negotiation, mediation, arbitration, and collaborative family law.**

1. Negotiation

Negotiation can be very **informal**. You and your spouse or partner talk and try to come to an agreement. You can speak to each other, or you can hire lawyers to help you explain what you want. It is not necessary to use lawyers to negotiate for you, but it is a good idea.

Negotiation can be helpful even if your family law case is going to Court. You can still try to negotiate an agreement between you and your spouse/partner, before the judge decides on your case.

When you negotiate, you may come to a spoken agreement. It is important to make sure the agreement is **written down with the date**, and **signed** by both of you. Another person

must watch each of you sign, and also sign or **witness** the agreement. If the agreement is not in writing in this way, it will be very hard to prove what was agreed and to enforce the agreement. It is important to renew the agreement with a lawyer before you sign it.

Khul or Khula

A *khul* or *khula*, is a divorce requested by the wife, according to Muslim practices. A *khul* usually includes the wife's agreement to give back money that was part of the marriage agreement. The wife and husband may negotiate other family matters when they agree on a *khul*. You should know that even if you agree to a *khul*, you will also need a divorce under Canadian law, to be considered legally divorced and legally able to marry again in Canada.

2. Mediation

Mediation is a process guided by someone to help you and your spouse or partner settle your family issues. A **mediator** helps people talk to each other to try to reach an agreement. Mediation is a way for you and your spouse or partner to decide what you both can agree on.

Both partners should feel they can trust the mediator will be fair. Mediators are usually professionals, such as social workers, psychologists or lawyers. A mediator tries to understand the concerns of both partners. A mediator does not choose a side or give legal advice to one person.

A mediator might suggest ways to solve your conflict, but a mediator does not make any decisions for you. You do not have to follow a mediator's suggestions.

It is a good idea to talk to a lawyer before you take part in

mediation. A lawyer can explain your rights and responsibilities but does not usually come with you to the mediation. If you reach an agreement at mediation, it is important to review the written agreement with a lawyer before you sign it.

If you qualify for Legal Aid Ontario, you can get free legal advice before, during or after a mediation, including advice about an agreement reached through mediation.

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.

Mediation is something both partners choose. A mediator, even your Imam who is acting as a mediator, cannot force you to accept an agreement. Either partner can stop the mediation at any time. If you cannot reach an agreement with your partner, the mediation ends. At that point, you could try a different kind of ADR, or go to Court.

Where can I find a mediator?

If at least one of the spouses/partners is eligible to get Legal Aid, then Legal Aid Ontario can provide some free family mediation services to the couple.

There are also mediators at Family Courts across the province. If you use mediation services at the courthouse, it is free. If you meet somewhere else for mediation, you may have to pay a fee based on what you are able to pay. You can also hire a private mediator, if you can afford to pay their fees.

3. Arbitration

Arbitration is a process where you and your spouse/partner hire a person to make a decision to resolve your family issues. This person is called an **arbitrator**. An arbitrator cannot give you a divorce but can decide on child custody and access, support payments, and how to divide family property. They can only decide on the issues you ask them to resolve.

Arbitration is like a Court case, but it is less formal. Usually each spouse or partner has their own lawyer. At the arbitration hearing, both you and your spouse/partner can give information and say what you think is fair. After each of you has talked, the arbitrator will make a decision. That decision is called an **arbitration or arbitral award**.

There are rules in Ontario about who can act as a family law arbitrator and how family law arbitrations must be conducted:

- approved family law arbitrators who are not lawyers must have some training in family law;
- all approved arbitrators must have training in how to recognize the signs of domestic violence;
- both partners must get advice from their own lawyer about what can happen in arbitration, **before it begins**;
- all arbitration awards must be in writing.

In Ontario, all family law arbitrations must be conducted by an approved family law arbitrator and must follow the laws in Canada or the decision will not be legal. For example, an arbitrator cannot make a decision about child custody or how to divide your family property that does not follow Ontario and Canadian legal rules.

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

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 approved 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 an approved family law arbitrator, ask to see proof that they are qualified to do this work.

Muslim principles in family arbitration

Sometimes an Imam or Muslim lawyer will offer to do an arbitration using Muslim principles to resolve family issues.

If the person you choose is a qualified arbitrator in Ontario, and the decision follows the laws in Canada, then the arbitration award can be enforced in the courts.

If the person you choose does not follow these rules, you may still decide to accept their decision for your family issues, but the Court cannot force you or your former spouse or partner to follow the decision.

If you have agreed to an arbitration based on Muslim principles, it is important to talk to a lawyer about what your rights are under Canadian law, so you understand your rights and options.

How are arbitration awards enforced?

After arbitration, if your former spouse or partner does not follow the award, you can bring an application in the Family Court to enforce the award. Once the application is filed, the Court can enforce a valid arbitration award just like a Court order.

If you are unhappy with your arbitration award, you may be able to ask the Court **to appeal** it, for example, if the award says something that you did not ask the arbitrator to decide. There may be other legal rules that the award did not follow. You will need to talk to a lawyer to find out if you can appeal your arbitration award.

Know your rights under family law

If you do not know your rights under Canadian law, it is important to talk to a lawyer before agreeing to any arbitration. Under the rules of Ontario, if you agree to family arbitration you are also agreeing to NOT go to Court about the same issues. Once arbitration starts, **you cannot decide to walk away**. You must follow the arbitrator's decision even if you do not agree with it. If the decision in the arbitration award follows the law in Canada, it is legally binding.

Arbitration can be expensive because you usually have to pay the arbitrator, and you should have a lawyer. Even if you do not have a lawyer with you at the hearing, you must get legal advice before agreeing to arbitration. Legal Aid Ontario will not pay for family law arbitration.

It is important to remember how **arbitration is different than mediation**. If you are in mediation, you have choices. You can end the talks at any time or decide not to accept what your spouse or partner is offering or what the mediator

suggests. In arbitration, you have no choice. Once you agree to an arbitration, you must accept the arbitrator's decision, as long as it follows the law.

4. Collaborative Family Law

A **collaborative family law** approach is a team approach with you, your spouse/partner, a lawyer for each of you, and possibly other professionals. This approach does not use a third, independent person like mediation or arbitration.

In collaborative family law, your lawyers work together. This is different from the Court process, where lawyers must focus only on the interests of their client. If a lawyer represents you in a collaborative family process, they promise to not represent you if your case does end up in Court.

Collaborative family law is more relaxed than Court, but it may not be a good idea for every couple, because you and your spouse/partner will have to respect each other and work together to solve your problems. It can be expensive, if you pay for your lawyer, or pay for a professional social worker, psychologist or financial advisor to help with your agreement about specific issues, such child custody or money.

If either you or your spouse/partner qualifies for Legal Aid Ontario, you may be able to get up to 10 hours of free legal advice, to help you reach an agreement to settle your family issues with your ex-spouse/partner.

Case Scenarios:

Example 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 arbitration or an enforceable arbitration award.

Nadia and Ameen can follow the Imam's advice and make a written agreement. It could be an enforceable Separation Agreement if both Nadia and Ameen sign it in front of a witness who also signs. The law even allows people to give up certain rights in their family or domestic contracts, if the people who sign understand and freely accept the agreement.

If Nadia and Ameen want their Imam to make a decision for them about their family rights and responsibilities when they separate, they have the right to ask for that and to choose to follow that decision. If they want the Imam's decision to be enforceable by the Court, the Imam has to be an approved family law arbitrator in Ontario and the decision must follow the laws in Canada.

Example 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 talk to lawyers to get independent legal advice. The Imam determines all issues of support, property division and custody of Alma and Besim's children, in accordance with *Shariah* principles. Is this an arbitration award? Is it enforceable?

Answer:

It appears that the Imam is an approved arbitrator in Ontario, but this award is not enforceable. Even if the Imam has the proper training, his decision is not enforceable because Alma and Besim did not get independent legal advice. The Imam can only rely on *Shariah* principles if the decision also follows the laws in Canada. Otherwise, the decision cannot be enforced in Court.

*There are other resources for Muslim women on the FLEW website. For a complete list, go to:
<http://www.onefamilylaw.ca/en/muslimwomen/>.*

There is a greater risk of violence when an intimate relationship is ending. If you are in immediate danger, call 911. If you or someone you know is at risk, visit the FLEW website for information on getting support.

If you are a francophone woman living in Ontario, you have the right to access French language services in family law court proceedings. For more information regarding your rights, contact a lawyer, a community legal clinic, or the support line Femaide at 1-877-336-2433, TTY 1-866-860-7082.

You can find more information on how to access services in French on our website at www.onefamilylaw.ca or www.undroitdefamille.ca.

The views expressed in these materials are the views of FLEW and do not necessarily reflect those of the Province.

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Family Law topics available in English*

1. Alternative Dispute Resolution and Family Law (ENG 001)
2. Child Protection and Family Law (ENG 002)
3. Child Support (ENG 003)
4. Criminal and Family Law (ENG 004)
5. Child Custody and Access (ENG 005)
6. Domestic Contracts (ENG 006)
7. Family Law Arbitration (ENG 007)
8. Family Law Issues for Immigrant, Refugee and Non-status Women (ENG 008)
9. Finding Help with your Family Law Problem (ENG 009)
10. How Property is Divided in Family Law (ENG 010)
11. Marriage and Divorce (ENG 011)
12. Spousal Support (ENG 012)

** Booklets are available in multiple formats and 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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