



Family Law

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YOUR EX DOES!



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LAWYER

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My ex and I entered into a separation agreement 6 months ago in which he was to pay child support. The separation agreement included a dispute resolution clause providing that if we are unable to resolve a dispute, we would resort to mediation/arbitration (med/arb). For the last 3 months he has not paid me child support. Can I proceed to Court directly or do I have to participate in med/arb first?

A

You would be bound by the med/arb clause if in addition to the separation agreement, you signed a separate mediation/arbitration agreement, witnessed, and with independent legal advice. The mediator-arbitrator must be identified in the agreement. The med/arbitrator must confirm that he/she will treat the parties fairly and they must have the requisite training approved by the Attorney General of Ontario, and that they have screened the parties for power imbalances and/or domestic violence.

Horowitz v Nightingale, 2017 ONSC 2168 is one of the leading cases on this issue. It states that *agreeing to pursue med/arb* in a separation agreement or minutes of settlement is not the same thing as *signing a mediation/arbitration agreement*. This is because the separation agreement or minutes of settlement do not

normally contain the mandatory requirements as set out in s. 2 of O. Reg. 134/07 under the *Arbitration Act, 1991* as outlined above.

You would not be bound to pursue med/arb before litigation if you did not sign a med/arb agreement or if you signed one which does not meet the formal requirements. Whether you can proceed directly to litigation to enforce your child support claims depends on the quality of the clauses in the separation agreement and the executed med/arb agreement, both of which should be reviewed by a family lawyer.

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