

Dispute Resolution

Family Mediation in England and Wales: A guide for judges, magistrates and legal advisors

'I commend this helpful and brief guide to family mediation. Mediation is an established and valued part of the dispute resolution process of which the Family Court also forms a part. It is important for judges to be aware of the advantages that mediation can bring to resolving disputes between separated parents and to bear these in mind when cases come before them which may benefit from mediation. I would also encourage judges to become familiar with the mediation services which are available in their areas.'

Sir James Munby, President of the Family Division

History and legislative framework

Family Mediation has been available in England and Wales for over 30 years. The practice of mediation has grown to cover all areas of divorce and separation including finance and property.

Called 'All Issues' mediation, it was acknowledged that when making decisions about children's futures post-separation, decisions about where families would live and how to share the marital/relationship assets went hand-in-hand with making future arrangements for the children.

In recent years, a number of statutes have sought to increase the use and relevance of family mediation, as its benefits have become increasingly recognised and more widely understood:

- Family Law Act 1996;
- Access to Justice Act 1999;
- Children and Adoption Act 2006;
- Legal Aid, Sentencing and Punishment of Offenders Act 2012;
- Children and Families Act 2014.

Regulation and governance

Family mediators are regulated and governed by six member organisations, all of which are members of The Family Mediation Council (FMC).

The FMC provides the Code of Practice for family mediators and sets minimum standards for the practice requirements of

family mediation. The FMC is responsible for the accreditation of family mediators.

In mediating agreements family mediators are required to have regard to the child's welfare and to consider how the child's wishes can be considered.

The process and practice of family mediation

Pre-proceedings: The Mediation Information and Assessment Meeting (MIAM)

Attendance at a Mediation Information and Assessment Meeting (MIAM) is required for any Applicant in relevant family proceedings (see s 10 of the Children and Families Act 2014) and is expected and encouraged for all respondents.

Additionally, a MIAM can be ordered as an activity under s 11A and 11C of the Children Act 1989.

These provisions ensure that parties have an opportunity to find out about mediation and other forms of family dispute resolution.

The MIAM provides an opportunity for parties to meet with a mediator. At this meeting the mediator will:

- provide information about the process of mediation and other forms of family dispute resolution;
- start to clarify the areas where there are disputes, and provide options for resolving them;

- identify other sources of support including financial, emotional and legal;
- provide parties with more detailed information about additional services that encourage reaching settlement.

At the MIAM the mediator will talk to the parties about their concerns and their immediate priorities, with the aim of setting an agenda for areas to be negotiated. This typically includes children, finance and property issues. Discussions will take place with the parties separately until or unless it is recognised to be safe for any meeting to take place together.

As well as providing information about what mediation can provide, the mediator is making an assessment about the parties' ability to mediate. In some cases mediation might not be suitable.

There may be other over-riding factors which mean the court does not consider attendance at a MIAM is suitable in any particular case. FPR 2010, r 3.8(1)/(2) sets out the circumstances in which a requirement to attend a MIAM does not apply.

In summary, the main exemptions are:

- domestic violence/child protection;
- bankruptcy;
- the unavailability of an authorised mediator within a specified geographic area or timescale;
- a MIAM has already been attended in the four months prior to making the application.

The full definition of these exemptions can be found at paras 20–27 of PD3A.

In the absence of evidence which satisfies the domestic violence exemption criteria, judges should be aware that the MIAM incorporates risk and safety screening although mediators have no statutory authority and are not able to undertake risk assessment in the same way as Cafcass and CAF/CASS Cymru. A mediator may determine that mediation is unsuitable, for reasons of domestic abuse, violence or client capacity, even where the applicant was unable to meet the evidential requirements for exemption from MIAM attendance on the ground of domestic violence.

Court obligations to review opportunities for non-court dispute resolution

- (1) The Child Arrangements Programme makes clear that mediation and other forms of non-court dispute resolution should be considered at every stage of a court process.
- (2) FPR 2010, r 3.10 requires judges, if appropriate when making a decision on allocation and in any event at first hearing, to inquire into whether any MIAM exemption claimed has been validly claimed. If it is determined that the exemption was not validly claimed then the judge can direct the applicant, or both parties, to attend a MIAM and can adjourn proceedings for that purpose. Paragraphs 35, 36 and 37 PD3A also provide guidance on the specific nature of the inquiries to be made.
- (3) The Judge can assist parties, especially litigants in person, to understand the choices available to them and the likely outcome of continuing court involvement, with or without Cafcass/CAF/CASS Cymru, mediation or other non-court dispute resolution interventions.

What can mediation achieve?

Mediation works well for many people; it needs to be safe and the parties must be willing and able to negotiate. Part of the outcome of the MIAM is to ensure parties know if it is right for their situation.

Mediation can help sort out the options available on:

- arrangements for children;
- child maintenance payments;
- how to divide property and money, including savings, joint debts, pensions and mortgages.

It can also help parties develop skills for working together in the future as separated parents. Mediation is confidential and privileged.

The mediation process

Family mediation is governed by four principles:

- mediation is **voluntary**, both parties and the mediator have to agree mediation is suitable;

- mediation is **confidential**, except where there are concerns of risk of harm to a child or vulnerable adult;
- the mediator is **impartial**, he/she facilitates negotiation and has no vested interest in the outcome;
- **decision making** rests with the participants to the mediation.

These four principles are central to the practice of family mediators in England and Wales. They are embedded in the FMC Code of Practice, and applied by the six mediation Member Organisations of the FMC. They are reproduced in documentation provided by these family mediators to clients.

Working within these principles ensures that mediation provides a highly effective non-court dispute resolution process.

A voluntary process

At the MIAM, clients are fully informed of the principles, process, benefits and any cost of mediation. The clients *and* the mediator have to agree that mediation is suitable. Mediation will not take place until the 'agreement to mediate' is in place and signed by all parties.

Mediation differs fundamentally from Cafcass and CAFCASS Cymru dispute resolution services. These are court based services which can be quite directive in nature, and which does not require the consent of the participants; it is Court directed and the outcomes of Cafcass and CAFCASS Cymru dispute resolution can be shared with the Court. Mediation on the other hand is facilitative and consensual and confidential.

Confidentiality and legal privilege

A MIAM is a confidential meeting. Mediation is a confidential process. The only exception to this arises in the rare case where a statement made in mediation indicates a safeguarding risk or discloses a criminal offence.

Any client entering a mediation process is asked to sign an 'Agreement to Mediate' which sets out both the scope of, and limitations to, confidentiality.

By signing the agreement to mediate, the parties understand that all communications, (except the disclosure of financial information) are made solely for

the purpose of attempting to reach a settlement and are made on the basis that the communications are:

- (a) confidential;
- (b) will not be referred to in evidence in any court proceedings about the same issues;
- (c) will not be used in affidavits or statements. However, this promise of confidentiality does not prevent the mediator disclosing information where there is significant risk to the life, health or safety of children, the parties, or anyone else, or in relation to money laundering/other unlawful act/s.

Similarly, the court is not able to require mediators to disclose information about any mediation which has taken place except where there is an over-riding obligation in law.

Mediation privilege can be waived with the consent of both parties. Confidentiality can only be waived with the consent of both parties and the mediator or where there is an over-riding obligation in law as above.

If agreement is reached, the mediator will draft a memorandum of understanding. This can be used to form the basis of a consent order or a binding agreement. Participants in mediation are advised to take legal advice, both during mediation and on any proposals they have made.

Impartial mediators

Mediators act as an impartial third person, and facilitate negotiation to assist people to reach their own, informed decisions. It is, therefore, important that mediators are understood to be independent of the court.

Decision-making rests with the participants

Mediators help to achieve an outcome which suits the whole family. Typically, more than one session is required to reach an enduring outcome which is likely to stand the test of time and deal with underlying issues of conflict. The court may need to adjourn the proceedings to allow this process to be completed.

Mediation appointments take place within a time-frame that is practical for clients, and can involve testing agreed arrangements (as would often happen at

court through short duration orders). Despite the adjournment period, the time taken in mediation to reach full agreement is usually considerably shorter than the full court process.

Costs of family mediation

Legal Aid is available for MIAM attendance and for mediation for those who are eligible. Parties can check whether they are eligible at www.gov.uk/check-legal-aid

A mediator with a Legal Aid Agency (LAA) contract is able to undertake the eligibility assessment. The LAA will cover the costs of **both** parties to attend a MIAM if one party is eligible. This encourages anyone who is not eligible for Legal Aid to find out about family mediation.

Legal Aid is also available for legal advice provided under the LAA's 'Help with Mediation' scheme. This can provide advice on proposals discussed and made in mediation and assistance with drafting consent orders.

The LAA allows court premises to be used as designated outreach facilities for the purpose of assessing suitability and eligibility for legally-aided mediation. This only covers the cost of delivering the MIAM.

Before mediation proper can take place the client has to produce means evidence to confirm their entitlement to public funding.

It is unlikely that parties at court have with them proof of income evidence and, therefore, parties should understand that if mediation is to take place in the precincts of the court and before income evidence is produced, there will be costs associated with the mediation delivery.

Mediation providers working in courts will have available a schedule of their charges.

Authorised mediators

Family mediators are specialists who work with all aspects of divorce and separation. They are skilled at negotiating agreements and accustomed to working with conflict.

Only authorised mediators who are qualified and approved by the Family Mediation Council, the governing body for family mediators, should be used for court referred MIAM attendance (and this requirement is made clear to applicants who may need to arrange to attend a MIAM prior to making a relevant family application through guidance notes on relevant court application forms).

An online database of authorised family mediators can be found at:

www.familymediationcouncil.org.uk

Family Mediation Council, P.O. Box 593,
Exeter, EX1 9HG

Family Justice Council