



Holistic Family Mediation

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Choosing Between Litigation and Mediation

Mediation can but Courts cannot:

Give you an opportunity to:

- Explore options about arrangements for finances or children in complete confidence
- Be impartially informed about and evaluate possible choices
- Find common ground
- Work at a pace agreed and controlled by you
- Work to your own negotiated agenda
- Find a compromise
- Agree to disagree; but reach partial understandings
- Look forward without judgements about the past
- Gain understanding and trust
- Model a co-operative future relationship rather than future conflict; help you find solutions rather than fight
- Think together about your children's needs
- Work to find comprehensive solutions to finance, property and children's needs



Courts can but mediation cannot

- Direct you and impose outcomes
- Provide an independent view about what is best for your children or finances
- Order Cafcass to investigate what your children want and need
- Find fault
- Determine facts about what has happened in the past
- Provide emergency solutions
- Cooperate according to a strict procedure or protocols to move your case forward.

Both will

- Protect your safety and provide a secure environment
- Treat you respectfully
- Put the needs of your children first, perhaps involving them directly

Your Lawyers will

- Help you choose which process is best for you and your family
- Support you throughout, whatever your choice
- Provide you with sensitive legal advice about your options
- Support your negotiations in mediation, and end those negotiations should you chose to litigate
- If they are collaborative lawyers, they should provide you with a process alternative or complementary to mediation to enable you to resolve matters by agreement

Notes

1. There is no right way to proceed. Your choice will depend on the circumstances of your case. However, Courts increasingly encourage separating couples to try mediation and other collaborative options because research has shown they produce more lasting, cooperative outcomes.
2. In many complex finance cases or in difficult cases about arrangements for children, a combination of Courts (directive) and mediation (voluntary) may work best. Similarly, the involvement of lawyers and mediators working collaboratively together is increasingly helpful in such cases.
3. The choice of process can always be re-visited. Many reconsider their commitment either to mediation or litigation as their case proceeds.

4. Mediation is not the only way to negotiate. Most Court cases come to a negotiated settlement either through Lawyers or Cafcass. Many Lawyers also now act as Collaborative Lawyers, with a commitment to working to an agreed settlement without involving the Courts.
5. Courts will consider the needs of children for accommodation when determining the distribution of property and will also take availability of housing into account when considering contact or residence. However, litigation about children and finances normally remain distinct, whereas in mediation you can set an agenda which addresses both areas constructively, separately and together.
6. In all family matters, the law provides the Judge with wide discretion to be exercised according to a prescribed set of principles. In finance cases, this is to achieve a 'fair' solution, considering all the circumstances of the case according to the guidelines set out in s.25 of the Matrimonial Cause Act 1973. In children's cases, this is to achieve an outcome where the needs of the children are paramount, according to the considerations set out in the 'Welfare checklist' in s.1 of the Children Act 1989. In considering whether to mediate or litigate, therefore, it is important to consider how predictable the outcome of litigation is likely to be, and whether it is preferable for that discretion to be exercised by a Judge or by the parties to the dispute. This is especially true if your dispute is about allocation of resources following cohabitation.
7. In cases involving children, the Courts will involve Cafcass to conduct screening of all adults and to investigate welfare concerns. Cafcass is now less involved in direct conciliation between parents, which is better achieved by mediators before or alongside the Court process.
8. In cases involving finance, Family Proceedings Rules involve you, your Lawyers and the Judge in a series of steps and hearing to encourage full disclosure and opportunities for settlement; mediation can mirror that process with a similar requirement to provide comprehensive disclosure.
9. It is likely therefore that your choice will be influenced mainly by how far there is a need for a directive approach in your case, considering factors of cost and timing, and how far you feel mediation is likely to be helpful.

Please remember that under the Pre-Application Protocol, and save in certain exceptional circumstances, the Court will expect you to have actively considered mediation and dispute resolution options such as arbitration and early neutral evaluation before embarking upon the litigation process

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