
Austin Kemp

MEDIATION

Mediation

Prior to making certain family applications the applicant must attend a family mediation information and assessment meeting (MIAM). The court may not issue an application if the applicant has not attended a MIAM. Whilst attendance at a MIAM is compulsory for most applicants, there are circumstances in which attendance will not be required.

Exemptions

In certain circumstances attendance at MIAM does not apply where an applicant claims that any of the following exemptions apply:

1. There is evidence of domestic violence (specific evidence has to be supplied).
2. There are child protection concerns.
3. Urgent applications.
4. In the four months prior to making the application (relating to the same or substantively the same dispute):
 - a) the applicant attended a MIAM or participated in another form of non-court dispute resolution, or
 - b) the applicant filed a relevant family application confirming that a MIAM exemption applied.

Various other exemptions can also apply.

Relevant family proceedings

The MIAM requirements do not generally apply to public children law proceedings.

Private children law proceedings

Amongst other things, the MIAM requirements apply to a private children application for:

1. A child arrangements order, and other orders with respect to a child or children.
2. A parental responsibility order or an order terminating parental responsibility.
3. An order giving permission to change a child's surname or remove a child from the UK.
4. A special guardianship order.

MIAM requirements do not apply when the proceedings are for:

1. A consent order.
2. An order relating to emergency proceedings, care proceedings or supervision proceedings.
3. An order relating to a child or children who are the subject of an emergency protection order, a care order or a supervision order.

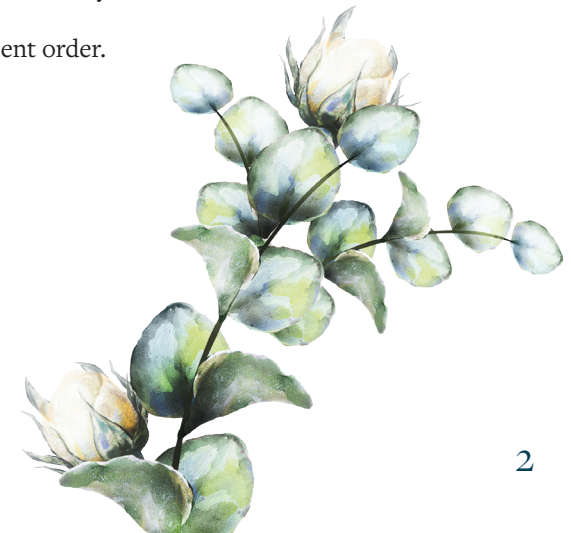
Financial remedy proceedings

Amongst other things, the MIAM requirements apply to the following applications for a financial remedy order for:

1. Maintenance pending suit.
2. Periodical payments.
3. Lump sum provision.
4. Variation.
5. Pension sharing.
6. An order for financial provision for children.
7. An order for alteration of a maintenance agreement.

MIAM requirements do not apply when the proceedings are for:

1. Enforcement of any order made in financial remedy proceedings or of any agreement made in or in contemplation of proceedings for a financial remedy, or
2. A consent order.



The sort of things you might choose to discuss in mediation

- Where and with whom the children will live and how and when they will see the other parent.
- A parenting plan - how you are going to make decisions in the future about the children.
- If you are not married, parental responsibility for the father.
- What sort of housing you both need.
- How the family assets are going to be divided (the family home for many people will be the major asset, but there may be a family business, a family trust and usually there will be pensions to consider).
- How each member of the family is going to be financially supported, both in the short term and in the longer term.

Assessing suitability for mediation

The primary reason to assess suitability for mediation is to determine if it is safe or suitable to commence the process.

What happens in mediation?

Assuming that mediation is deemed suitable, as the session's progress, the mediators will:

- Set out the ground rules for negotiation.
- Agree the issues to be settled and exchange information.
- Look at possible options and solutions.
- Negotiate with each other over options.
- Reach agreement and record in writing.

You will have a preliminary session either individually or together at which the aims of mediation are explained and you will both have the opportunity to set down what it is you would like to discuss.

If you are going to discuss your finances, you may be asked to sign an Agreement to Mediate. You will then be asked to fill out forms disclosing your finances and you will be asked to evidence this with the relevant financial documentation. It will probably take you some time to get the information together and there may be a gap of some weeks between the first and second session, if there are no immediate pressing decisions to be made.

Having established what the issues are, and, in the case of your finances, having disclosed all the information, the mediator will then help you to consider all the options and work through the pros and cons of each one with you.

How many meetings will there be?

This depends on the number and complexity of the issues and the amount of co-operation that already exists between you. However, on average couples reach a solution within four to six sessions. Sessions last between one and two hours.

What will I get at the end of mediation?

The aim of mediation is to work towards a written Memorandum of Understanding setting out all those matters on which you have reached agreement. The document itself will not be legally binding but it will be in a form that you can then take to your solicitors. The Memorandum can be used as the basis of a Separation Agreement or it can be turned into a court order to become binding and enforceable if that is what both of you agree should happen. It is usual to do this in financial matters.

Who makes the decisions?

The mediator(s) has no power to impose a settlement; responsibility for all decisions remain with you. Mediation is, therefore, different from arbitration. Mediation involves helping people to decide for themselves, whereas arbitration (or adjudication) involves helping people by deciding for them.

How much will it cost?

Some mediation services can offer legally aided mediation to those falling within the financial limits set down by the Legal Aid Agency. Some people will automatically be entitled if they are on certain State benefits.

The mediator(s) will discuss the basis of their private charges with you if you do not fall within the financial limits set down by the Legal Aid Agency.

Advantages of mediation

Control

In mediation, it should be easier for you to control the course of your separation or divorce and avoid the need for court proceedings where the courts will impose their own timetable. Both of you are given the facts simultaneously and fully, using language which is familiar rather than legal jargon.

Acceptance

Acceptance of what you have negotiated should come more easily. Something that you participated in working out the best solution. Negotiation involves compromise; although you may not feel wholly satisfied at the outcome, you will have rejected the alternatives in choosing a plan or plans.

Cost

Mediation is not always free but mediators do not usually have the same level of overheads as solicitors. The expense is likely to be less than the “adversarial” system of two solicitors handling a divorce from start to finish. Even if not all the issues can be agreed in mediation, much of the preparatory work will have been done, thus saving on solicitors’ fees. Discussing issues directly can sometimes save couples great amounts of time and money, rather than if they instruct solicitors to handle everything for them.

Timing

You can control the pace of the mediation in a way that suits you. Divorce proceedings may more easily be postponed while interim arrangements are considered and put in place.

Limiting Mediation can avoid adversarial positions being taken too quickly.

Conflicts

When solicitors negotiate matters, inevitably they express one partial point of view with the expectation that the other point of view is going to be expressed by the other solicitor. As a result, positions can become entrenched quickly and views can become polarised. In mediation you hear from each other directly, without legal language being used or views being expressed in ways which might create a misunderstanding.

Disadvantages of mediation

Emotional exhaustion

After a particularly fraught session of mediation many wish they had instructed a solicitor to do the negotiating for them, for it is undeniably difficult to confront your soon to be ex-spouse face-to-face when you are both emotionally overwrought.

Difficulty in keeping objectivity

All mediators should be aware of the difficulties that can arise if a couple carry dominant personalities from their own relationship into mediation. For example, if one of the couple characteristically dominates, it is difficult in mediation to redress this imbalance to get the other to speak up, to fight his or her own corner. Women, in particular, often feel they are in a less powerful position to negotiate, especially over finances. Mediators, as a group, have been made aware of this potential gender power imbalance. If there has been a background of violence, mediation is probably unsuitable because of the fear that will permeate. Where there is an imbalance, however, the mediators must be skilled and experienced enough to ensure equality of negotiation. It is vital that each party’s voice is heard, and indeed feels that it has been heard.

Difficulty in achieving balance in negotiations for both parties

Mediation is not free, but mediators sometimes do not have the same level of overheads as solicitors. Even when a solicitor - mediator is involved, the expense is likely to be less than the adversarial system with two solicitors handling a divorce from start to finish. Even if not all the issues can be agreed in mediation, much of the preparatory work for the respective solicitors will have been done in advance. This in itself will save on solicitors' fees.

Duration

Mediation can be drawn out, and so it is a potentially slow process. For example, one or both of those involved may urgently want to buy a house, yet the urgency may be at odds with other issues being addressed in mediation.

Does it achieve the best settlement?

One of the criticisms of mediation is that settlement reached ultimately may not be as good for either of the participants as would be negotiated by two individual solicitors. In the process of giving and taking, not all the issues may have been highlighted and brought out sufficiently. Critics say that the mediation process puts too great an emphasis on reaching a settlement, rather than on reaching a settlement that deals thoroughly with all the needs of all parties, both now and in the future.

It is worth remembering that solicitors, who are ultimately instructed after the mediation process, can deal with any areas that remain outstanding. However, it is often difficult after the hard work of mediation to consider fresh issues and the couple may be disinclined to refine any aspect that has been negotiated over a long period of time, for fear of being seen to be going back on the terms reached.

How successful mediation is depends very much on the attitude of those involved. It is important to be aware of what you are trying to achieve, and to have realistic expectations of what can and cannot be managed. If either spouse remains obstinate, those issues may ultimately have to be resolved in a court room, whether negotiations have started within mediation or through solicitors.



Austin Kemp | By Your Side

Austin Kemp Solicitors Limited are authorised and regulated by the
Solicitors Regulation Authority - SRA number: 513203.