

Choosing between litigation and mediation – a Guide for separating couples

Mediation can

Courts can't

give an opportunity for you 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 how to fight
- Think together about your children's needs
- Work to find *comprehensive* solutions to finance, property and children's needs

Courts can

Mediation can't

- Direct you and impose outcomes
- Provide an independent view about what is best for your children or finances
- Work through Cafcass to investigate what your children want and need
- Find fault
- Find facts about what has happened in the past
- Provide emergency solutions
- Operate 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 lead those negotiations should you choose to litigate

Notes

1. There is no one 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, co-operative outcomes.
2. In many complex finance cases or in difficult cases about arrangements for children, a *combination* of the 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 take into account 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 finance normally remains 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 a wide discretion to be exercised according to a prescribed set of principles. In finance cases, this is to achieve a "fair" solution, taking into account all the circumstances of the case according to the guidelines set out in s.25 of the Matrimonial Causes Act 1973. In children 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 to litigate, therefore, it's 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 a *cohabitation*.
7. In cases involving children, the Courts will involve Cafcass at an early stage to see if there is scope for agreement. This process (Dispute Resolution) is a form of conciliation, but is neither voluntary nor privileged. It does however involve an element of direction which is absent from mediation.
8. In cases involving finance, the Family Proceedings Rules involve you, your lawyers and the Judge in a series of steps and hearings 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, taking into account factors of *cost* and *timing*, and how far you feel a *face to face negotiation* is likely to be helpful.