



A guide for separating couples.

Choosing between mediation and litigation.....

Mediation can (but Court can't)... give you the opportunity to:

1. explore your options for making arrangements (about your finances or your children) in complete confidence;
2. find common ground by talking face-to-face;
3. work at a pace which is agreed and controlled by you;
4. find a compromise by working directly together;
5. agree to disagree but reach understandings;
6. gain understanding and trust;
7. talk to each other about forming a co-operative future relationship rather than future conflict;
8. think together about your family's needs;
9. work together to find comprehensive solutions to finance, property and children's needs.

Court can (but Mediation can't) ...

1. impose outcomes and tell you what to do;
2. provide an independent view about what is best for your children or finances;
3. work through CAFCASS to investigate what your children want and need;
4. find fault;
5. find facts about what has happened in the past;
6. provide emergency solutions;
7. operate according to a strict procedure or strict protocols to move your case forward.

Both Court and Mediation will

1. protect your safety and provide a secure environment;
2. treat you with respect;
3. put the needs of your children first, involving them directly when appropriate for them and you.

Your lawyers will ...

1. help you choose which process is best for you and your family;
2. support you throughout, whatever you choose;
3. provide you with sensitive legal advice about your options;
4. support your negotiations in mediation, and lead those negotiations should you choose to litigate, and;
5. if they are collaborative lawyers, provide you with a process alternative or complementary to mediation to enable you to resolve matters by agreement.

Notes

- (a) 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.
- (b) 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.
- (c) The choice of process can always be re-visited. Many reconsider their commitment either to mediation or litigation as their case proceeds.
- (d) 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.
- (e) 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.
- (f) 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 s25 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 s1 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.

- (g) 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 seen as better achieved by mediators before or alongside the Court process.
- (h) 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.
- (i) 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.
- (j) Please remember that under the Pre Application Protocol, and save in certain exceptional circumstances, the Court will expect you to have actively considered mediation before embarking on litigation.