

TO MEDIATE OR NOT TO MEDIATE?

FAMILY MEDIATOR, **DEVORAH GREENBERG**, EXPLORES
THE BENEFITS AND IMPLICATIONS OF MEDIATION AS AN
ALTERNATIVE FORM OF DISPUTE RESOLUTION FOR COUPLES
GOING THROUGH SEPARATION AND DIVORCE

Divorce and separation can feel like a sea of stress. During these times, which may prove to be amongst the most challenging in your life, it can be very difficult to know where to go for help. Just when you need more support than you have ever needed before, you are faced with uncertainties about who to ask or how you are going to afford to pay for expert professional guidance.

- Child and spousal maintenance payments
- Practical arrangements for separating, including interim finances
- Communication now and in the future

What are the principles of family mediation?

MEDIATION IS VOLUNTARY:

Mediation is voluntary – it can only take place if the participants wish to commit to resolving their dispute in this way. For most family applications to court, you will be required to show evidence that you have attended a MIAM (Mediation Information and Assessment Meeting). This meeting is an opportunity for you to share your story and your objectives, and to assess whether mediation is the right form of dispute resolution for you. If you decide mediation is not the correct way forward, the mediator will issue you with a signed form to take to a solicitor or to show when you apply to court.

MEDIATORS ARE IMPARTIAL:

Unlike solicitors, who represent their clients, mediators are impartial. Their role is not to represent the interests of one party to the other. Their aim is to assist discussion, help minimise conflict, and assist clients to focus on future solutions, not past gripes.

YOU MAKE THE DECISIONS:

If you elect to go to court to sort out your dispute, a judge will make decisions on your behalf. You are then bound to abide by those decisions, even if one or both of you feel unhappy

If you have already sought legal advice, or applied to court, you will likely have seen numerous references to mediation, but many people who are caught up in a divorce or separation don't know what family mediation really involves.

What is Family Mediation?

The Family Mediation process helps you to explore possible solutions to the issues surrounding separation and divorce in a constructive, cost-effective and supportive way. The aim of mediation is for you and your ex-partner to negotiate your settlement and to reach decisions about your future and your children's futures. This isn't easy, and the mediator is there to help you have these difficult discussions, to give you the legal backdrop against which you can make your decisions, and to record your decisions to take forward and convert into a legally binding agreement, should you need one.

Mediators can help you discuss the following issues:

- Division of finances (such as property, savings, pensions, inheritance, or debts)
- Ongoing parenting arrangements for any children



about them. Mediation can help you to remain in control of your separation / divorce process. The mediator will assist to try and find a solution which works well for both of you and explain how to make any agreements that you reach become legally binding.

Clients are firmly in control of the process and outcome. There are no imposed decisions and the parties set the agenda defining what they wish to cover in mediation. The mediator can give you information to help you assess your options but won't give you advice or impose decisions on you.

CONFIDENTIALITY:

Mediation is a private and confidential process. Even though you will have documents to use in the divorce process ahead, apart from specific exceptional circumstances, the discussions held in the mediation room are confidential.

Other benefits of mediation

- Mediation is far more cost effective than going to court.
- The focus is on working together with your ex-partner, rather than coming to the process as adversaries.
- Mediation is less stressful than court proceedings.
- Child Inclusive Mediation, when appropriate, can allow you to hear your child's feelings and views in a safe, informal environment.
- Mediators can give you tools to help you communicate better with your ex-partner. They can direct you to courses and other support resources that will enable you to start building a more successful co-parenting journey ahead.
- Mediation can result in creative, tailored, and sustainable solutions.
- Clients can benefit from online mediation if they live in different cities.

Am I too late to mediate?

It is never too late to mediate. Even if court proceedings have started, mediation can begin.

Who attends family mediation?

Anyone can attend family mediation, including couples, ex-partners, parents, grandparents, and other family members.



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How long does family mediation take?

This depends on the matters to be discussed but it can be considerably quicker (and cheaper) than the more traditional route of communicating through solicitors or a court application.

Hearing the Voice of the Child – Child Inclusive Mediation

Mediation allows you to look more deeply at issues affecting your children. If they are of an appropriate age, children can have the opportunity to meet with a child inclusive mediator for an informal chat to voice their thoughts and feelings. Although they won't be given the burden of decision-making, having their voices heard during the process can be extremely therapeutic for children, and insightful for parents to hear their children's perspectives.

Mediation has the advantage of being able to deal with issues relating to the children at the same time as dealing with the finances. In the court process, two separate applications would have to be made, as the children and finances are never dealt with together in the court process. This is often a considerable disadvantage and can be very expensive and time consuming. Solving issues relating to the children are often connected to finance solutions too.



Who pays for family mediation?

Ordinarily, the costs involved are shared equally between the participants. However, on occasion, one party may, by agreement, pay a greater portion of the associated costs, or alternatively pay the costs in full. If you are eligible for Legal Aid, you can minimise your costs and those of your ex-partner, by attending mediation through a company that offers Legal Aid Mediation.

How do meetings take place?

There are different forms of mediation which might suit you and your ex-partner. Round table talks where everyone is in one room have been adapted since Covid 19, and the good news is that mediation, in all its forms, is ideally suited to virtual sessions conducted through Zoom, Teams or WebEx.

Types of mediation

The most common form of mediation is where both parties sit with a mediator in a comfortable room where separating couples are free to discuss matters in a relaxed atmosphere. In some cases, co-mediation - where there are two mediators - can be beneficial, particularly where there are complex dynamics at play.

SHUTTLE MEDIATION, where each party sits in a separate room, or in zoom breakout rooms, works effectively both in person and online. Where there is a strong power imbalance, a high conflict situation, or you simply aren't yet ready to sit together, the mediator can talk just with one person at a time and help to negotiate your settlement without face-to-face confrontation.

HYBRID MEDIATION is conducted by lawyers who have been trained either in resolution in the hybrid model or in the family mediation model. In a typical Hybrid mediation session, you might have your solicitor and a mediator present for each person. This is naturally more expensive. Hybrid mediation is often used in complex family cases where there are significant differences between parents in relation to the arrangements with their children, or in financial remedy cases where the use of other professionals such as accountants, independent financial advisors and divorce planners can be utilised very effectively.

Using experts

Another advantage of mediation is that both parties can agree to bring in the expertise of a specialist to help resolve issues. This might involve instructing a valuations expert to value a company, business, or properties, or bringing in a pensions expert to establish the best way for both parties to reschedule pension investments. It could also involve consulting with an independent financial adviser to help each person in a neutral way to plan budgets, which can be far less expensive than contested court maintenance proceedings. Other experts could include divorce coaches and therapists where one or both parties are finding the emotional side of separation particularly challenging. Mediation is a very flexible process and the use of such experts, although adding to the costs, can be extremely beneficial. It is not necessary to use experts in every case.

When is mediation not appropriate?

Mediation is not appropriate when there is evidence of domestic abuse, or when significant welfare / child protection issues are raised by one or both parties at the initial Mediation

Information and Assessment Meeting (MIAM). One of the key tasks of the mediator at the MIAM is to carry out a safeguarding screening enquiry with each person, to consider if it is both safe and appropriate to mediate. If the mediator does not consider it safe and appropriate to mediate, then mediation will not take place, and you will have to find an alternative means of resolving your differences.

The emotional benefits of mediation

People who have opted for mediation have been found to have a quicker emotional recovery and are thus able to move on with their lives more rapidly than those engaged in protracted court proceedings.

Potential problems with mediation

If either partner has not fully and frankly disclosed all information and documentation relating to their finances, then the mediation cannot proceed. You will then need to consider other forms of resolution.

Mediation sessions can, at times, be intense, challenging and even upsetting, not least because the issues at hand are invariably very important to both parties. A skilled mediator will ensure that the sessions never get out of hand and that time is allowed for each of you to 'recompose'. However, the tension that can be caused in a mediation session is nothing compared with the pressure and anxiety that a contested court case can bring - with the prospect of giving evidence, being cross-examined and someone else [a judge] making decisions about your children and your finances.

Other Forms of Dispute Resolution

COLLABORATIVE LAW

If you prefer to resolve matters with your solicitor present, then collaborative law is something to consider. Collaborative law is

a series of four-way meetings comprising you, your ex-partner, and your respective solicitors. All present need to be committed to achieving the best outcome for the family – as opposed to the individual.

PRIVATE FINANCIAL DISPUTE RESOLUTION (FDR) – EARLY NEUTRAL EVALUATION

Whether you are in court proceedings or not, you can agree to instruct a judge or experienced family law barrister to give their opinion on what they believe a judge would order if your case went to a final hearing. At the end of the process, you get an indication of the outcome, which can be used to help reach an agreement – or at the very least narrow the issues between you.

This process involves paying a dedicated judge to review your case for the day (or half-day if the issues between you aren't too extensive). You are not huddled in court corridors, trying to discuss sensitive issues with your barrister whilst waiting for your case to be heard along with several others, wondering how much time the judge will be able to give you or whether they have had the chance to read all the papers for your case. With a private FDR, you have the luxury of time, and that in itself can be worth every penny.

ARBITRATION

Arbitration is very similar to the court process but has the advantage of both parties agreeing upon the arbitrator (a specialist lawyer) at a time and venue of your choice. As with private FDRs, you will pay the arbitrator's fees. The difference with arbitration, as opposed to mediation and private FDRs, is that the decision of the arbitrator is binding because both of you will have agreed beforehand to be bound by their decision.

In Summary

Any relationship breakdown can be difficult and fraught with emotion but adopting an alternative approach to resolving your disputes can help to lessen the pain, stress, delays, and costs involved in court proceedings. There is no doubt that there is a time and a place for court judgments, but these are not the first or only option. The case studies in this article give some real-life examples where mediation has been used very successfully to assist couples to resolve their issues.



Devorah Greenberg grew up in London. She received her BA (License) at the Sorbonne University in Paris, and her MA at Edinburgh University. She has lived mainly in Israel and London and currently runs a private Family Mediation business - Sage Mediation. Her career has been predominantly in adult and teenage education. She was drawn to mediation whilst working with divorcing couples at the London Beth Din. She currently lives in London with her husband and children, and mediates divorcing and separating families nationally.

CASE STUDY 1:

MARTIN & JANE

BACKGROUND:

Martin and Jane got married in 2011 and separated in 2021. They have two children, Anthony (9) and Melissa (6). Martin and Jane have spent 18 months in court hearings and almost £100,000 in legal fees. They are battle-weary and have very little good will towards each other. They have been advised to consider mediation after their bitter, long journey through court to settle their finances.

PROCESS:

I schedule separate initial sessions with Martin and Jane. In these sessions, known as MIAMS (Mediation Information and Assessment Meetings), each partner separately shares their history of the situation and outlines their objectives for the mediation. I spend time sharing the principles of mediation with each of them and inform them about other forms of dispute resolution that are available to them should mediation not be the correct path for them. It is clear to me that Martin and Jane are in 'fight mode' and will need a lot of in-room conflict management. I opt to use a blend of face-to-face joint sessions, and shuttle mediation when tensions are very high.

CASE STUDY 2:

JOHN & ROSIE

BACKGROUND:

John and Rosie were married for 15 years before they separated in September 2020. They have three children, Billie (14), Jane (10), and Sally (8). John is a data analyst earning £80,000 per annum. Rosie is a part-time teaching assistant earning £15,000, with a side business as a talented seamstress which earns her an additional £10,000 per annum. John and Rosie bought a house in joint names in 2007 and both have pension funds. John approached me after seeking legal advice and conducting an Internet search on mediation.

PROCESS:

After conducting MIAMS for both John and Rosie, they agree to proceed with mediation. They understand that it will cost them an average of £1500, in comparison to a protracted court process which will cost them tens of thousands of pounds. We begin a joint process that unpacks:

- The divorce process – how and when
- Understanding and preparing for financial disclosure
- Clarifying what is in the 'family pot'
- Looking at future living needs
- Weighing up the various options and finding a tailored solution that meets everyone's short and long-term needs.

Through this process, John and Rosie are able to tailor their settlement carefully to their short-term needs (stability for Billie, Jane, and Sally as they finish their education) and their long-term needs (creating financial stability in later life for them both). They consider the most tax-efficient way to divide their assets and seek independent financial advice during the process.

Our sessions focus on improving communication to ensure the best outcome for the children. The first step is to shift the focus away from 'my rights as a parent', towards prioritising the rights of Anthony and Melissa as children. We look at the seven criteria set out in the Welfare Checklist under s1(3) Children Act 1989 and use this checklist to help ascertain the most stable structure of arrangements for Anthony and Melissa.

We create interim arrangements to ease the tension, and a long-term parenting plan which includes a 'Communication Contract' to improve methods of communication between Martin and Jane. We also set up a clear 'Shared Care' schedule for the children giving them time with each parent and setting in place the idea of regular reviews.

Anthony and Melissa are too young to participate in Child Inclusive Mediation, but I ask Martin and Jane: "If I were to sit down with Anthony and Melissa in ten years' time for a coffee and ask them 'What do you remember about your mum and dad's split?' What would you want them to say?" Both parents recognise that their conflict in front of the children is creating a toxic and damaging atmosphere and agree to seek therapeutic support and to participate in a 'Separated Parents Programme' to provide them with ongoing support.

CHILDREN'S ARRANGEMENTS:

I explain to John and Sally the psychological advantage for Billie, Sally and Jane of having their voices heard during this process and suggest to John and Rosie that we set up a meeting for their children with a child inclusive mediator. The children enjoy their informal conversation with the CIM expert, who provides feedback on their thoughts, worries, and wishes to John and Rosie in a separate session. Our discussions are enriched by John and Rosie's understanding of their children's needs, and they design a co-parenting schedule that enables the children to study for their exams, be close to their friends, and ultimately feel that their parents, although not together, are a united parenting team with a shared goal of easing their way into the new world order.

DOCUMENTATION:

At the end of our five sessions, I produce two documents for John and Rosie:

- An **Open Financial Summary** - this document is a snapshot of the family finances. John and Rosie can take this document to their legal advisors and can use it to inform the court of the monies they intend to divide.
- A **Summary of Proposals** – this document is also known as a Memorandum of Understanding and is a detailed summary of John and Rosie's intentions for division of assets, maintenance, and children's arrangements. This document is confidential but can be shown to John and Rosie's legal advisors and be used to create the Consent Order they will need to submit to the court during their divorce process.

For more information on Mediation please contact:

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