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CHAMBERS



# Mediation: How can it work for you?

Garden Court Chambers Mediation Team

5 November 2024



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# AGENDA

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- Introduction to family mediation;
- Civil Procedure Rules amendments;
- Tips and tactics.

Note recent developments:

- Changes to Family Procedure Rules 2010, Part 3 and PD3A (in force 8 April 2024);
- Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839) (in force 1 October 2024).





# Introduction To Family Mediation

Lyndsey Sambrooks-Wright, Garden Court Chambers

5 November 2024



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What family mediation is...

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**Voluntary** (except for Mediation Information Assessment Meeting)

**Confidential** (unless risk of harm or criminality)

**Impartial**

**Quicker and more cost-effective** than Court proceedings.

**Flexible** – often remote and with times to suit client.

**Personalised** - can also be child-inclusive.

69% of cases resolve all or some issues without having to go to court.

Mediation can improve ongoing communication.



## Areas covered in family mediation

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**Arrangements for children**, e.g. contact, schooling, medical treatment, applications to relocate.

**Finances**, including businesses and pensions (can co-mediate or bring in expert advice).

Safeguards can be put in place in cases where there is a power imbalance, including:

- Remote and/or shuttle mediation
- Legal advice
- Support services



# Mediation Information Assessment Meeting

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**Who is required to attend a MIAM?** Anyone applying to the Court for order regarding children or finances (s10 Children and Families Act 2014).

MIAMs should:

- Provide sufficient information about mediation *and other NCDR* to **enable informed choices.**
- Obtain information about individual and family; **assess safety and suitability of mediation.**
- Discuss next steps, including legal advice or financial and emotional support.

Attendance of respondents is strongly encouraged.



# Exemptions to attending a MIAM

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## **Main exemptions:**

- Evidence of domestic abuse (as specified in Practice Direction 3A)
- Urgency
- Where child is subject of child protection plan or section 47 investigation
- Previous MIAM or mediation attendance within last 4 months
- Bankruptcy
- Cannot attend in person or online or no mediator available

[See Part 3 of the Family Procedure Rules 2010 for full list]



## Reinforced commitment to NCDR, including mediation

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### **Judgments emphasising importance of mediation and/or costs:**

- *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416
- *K v K* (Fact-Finding Hearings in Private Family Proceedings) [2022] EWCA Civ 468
- *Re X* (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538 (Fam)

### **Changes to Family Procedure Rules 2010, Part 3 and PD3A** (in force 8 April 2024):

- Court has duty to consider suitable forms of NCDR at all stages of proceedings, including between hearings (rule 3.3)
- Court still cannot direct NCDR (PD3A (10A)) but should ‘encourage’ parties to consider or attend NCDR where appropriate and where time allows (r.34(1A))
- Court can adjourn hearings to allow for such consideration/attendance at MIAM (see PD3A (2), PD3A (10D))



# Reinforced expectation to attend MIAM

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## Tightened rules around MIAM attendance:

- Parties can be required to file and serve FM5 before first hearing setting out their views on using NCDR
- Limits MIAMs exemptions, e.g. removes exemption to attend a MIAM if respondent uncontactable
- *Retains exemptions for domestic abuse and vulnerable parties*
- Mediator must address all forms of NCDR in MIAM
- Amended FPR 3.10 will enable court to consider whether previously validly claimed MIAM exemption is no longer applicable



## Costs implications

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### **PD3A (10E):**

*If the court allows time for parties to attend non-court dispute resolution, or adjourns the proceedings specifically for that purpose, any failure of a party, or parties, to then attend non-court dispute resolution will not affect any substantive decision the court makes in the proceedings. However, the court may take the parties' conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings: see Part 28 FPR.*

### **Consider Re X and amendments to the costs sanctions under FPR 28.3(7):**

*(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –*

- (aa) any failure by a party, without good reason, to—*
- (i) attend a MIAM (as defined in rule 3.1); or*
  - (ii) attend non-court dispute resolution*



## Pathway through mediation (after MIAM)

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**First joint meeting** – sign Agreement to Mediate, agree agenda for future sessions, deal with urgent issues.

**Ongoing joint meetings** – address agenda or new issues. Also often used to gather and review financial disclosure. Sessions usually 1-2 hours.

If agreement reached, recorded in:

- **Memorandum of Understanding** (without prejudice record of discussions; cannot be disclosed in Court ,but usually forms basis for consent order, following legal advice on its contents)
- **Open Financial Statement** (open document setting out financial information based on disclosure; attached to application for consent order)
- **Parenting Plan**



## Pointers and tips

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Mediation is not a protected profession, but **only accredited mediators can sign Form FM1**. Authorised mediators can be found on Family Mediation Council register:  
<https://www.familymediationcouncil.org.uk/find-local-mediator/>

**Legal advice** is often ongoing.

**Family Mediation Voucher scheme** - £500 available towards cost of mediation (<https://www.gov.uk/guidance/family-mediation-voucher-scheme>).

**Legal aid** may be available (means-tested).





# Marina Sergides, Garden Court Mediation

5 November 2024



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# *Churchill v Merthyr Tydfil BC* [2023] EWCA Civ 1416

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- Court of Appeal decision in November 2023. The Law Society, The Bar Council, The Civil Mediation Council, The Centre for Effective Dispute Resolution, The Chartered Institute for Arbitrators, Housing Law Practitioners Association and The Social Housing Law Association all intervened.
- The factual dispute relates to a claim brought by Mr Churchill against his local authority for nuisance. Japanese knotweed (notorious for being difficult to control and causing damage) was growing on the local authority's land, causing damage to his property. The Judge in the lower court held that Mr Churchill's lawyers acted unreasonably, by failing to engage with the LA complaint's procedure. This was contrary to the spirit and letter of the Practice Direction on Pre-Action Conduct and Protocols – BUT, to oblige the unwilling parties to refer their dispute to mediation would be to impose an unacceptable obstruction on their right of access to the court.
- The CA did not agree. It confirmed that the Court could order the parties to engage in ADR.
- An order requiring the parties to engage in non-court-based ADR does not breach either parties right to a fair and public hearing under Article 6 of the ECHR. Whilst is declined to lay down fixed principle on when a court can stay proceedings (for the purposes of ADR), it did consider relevant the factors raised by the Bar Council.



# Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839)

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These rules came into force on 1<sup>st</sup> October 2024. They amend the CPR so that ADR is very much within the court's focus when managing a case – amendments were made to Part 1, 3, 28, 29 and 44.

In respect of ADR, the Explanatory Note states: *“These rules amend the CPR by-*

- *amending Part 1 (overriding objective), with additional amendments in Parts 3, 28 and 44, to promote the use of alternative dispute resolution in response to the decision of the Court of Appeal Churchill v Merthyr Tydfil CBC [2023] EWCA Civ 1416”.*

## **The changes include:**

**CPR r.1** amended to insert:

- “(f) promoting or using alternative dispute resolution (a new r.1.1.(2)(f))
- “(e) ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution” (a new r.1.1.(2)(e)).

ADR is now very much within the overriding objective (!).

## **CPR r.3 Courts general powers of management**

The court may...

- “(o) Order the parties to engage in alternative dispute resolution” (a new r.3.1 (o)).



# Continued...

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## **CPR r.28 (7) (1) The matters to be dealt with by directions under rule 28.2 (1) (directions for management of a fast-track case):**

- “(d) whether to order or encourage the parties to engage in alternative dispute resolution” (a new r.28 (7)(1)(d))

## **CPR r.28.14 The matters to be dealt with by directions under rule 28.2 (1) (directions for interim track case)**

- “(f) whether to order or encourage the parties to engage in alternative dispute resolutions...” (a new r.28.14(a)(f))

## **CPR R.29.2 Case Management of a multi track case.**

- “(1A) When giving directions, the court must consider whether to order or encourage the parties to engage in ADR” (a new r.29.2 (1A))

**CPR r.44.2 Court’s discretion as to costs.** By way of r.44.2 (4), in deciding what order (if any) to make about costs, the court will have regard to all the circumstances included (a) the conduct of the parties. By way of r.44.2 (5) the conduct of the parties includes:

- (e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in ADR” (a new r.44.2 (5)(e))



# *Charles Elphicke v Times Media* [2024] EWHC 2595

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Judgment of Master Victoria McCloud on 14 October 2024:

- A libel case involving Mr Elphicke, a Tory MP.
- He sued The Times but withdrew the case. The Times claimed its costs. The hearing was about his claim that The Times' costs should be reduced. They were by 20%.
- The Judge then ordered mediation (in effect).
- At paragraph 137 of the Judgement, Master McCloud states:

*Order for mandatory pre-detailed assessment ADR*

*137. I shall include a provision of my own motion that the parties must engage in alternative dispute resolution as to the costs claimed by the Defendant. Good reason will need to be shown if the form of that dispute resolution is at any less engaged a level than mediation via Costs Lawyers, given that the Bill here more than justifies Costs Lawyer input. The time for commencing detailed assessment is to be extended until conclusion of any such mediation, or the point at which either party indicates it is not prepared to proceed and wishes to go to assessment. Any party which decides not to engage in ADR, as above or to 'call it off' must be in a position to justify that non-engagement to the Costs Judge and be alert to the provisions of CPR 44.11 and indeed the developing common law since Churchill.*



# COMPULSORY MEDIATION: Civil Procedure Part 26 (Case Management)

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## **CPR 26.6: Referral to the Mediation Service**

26.6.—(1) This rule applies to claims started in the County Court which would normally be allocated to the small claims track pursuant to rule 26.9.

(2) This rule does **not** apply to—

(a) road traffic accident, personal injury or housing disrepair claims; or

**(b) any claim in which any party to the proceedings does not agree to referral to the Mediation Service.**

(3) In this rule, ‘the Mediation Service’ means the Small Claims Mediation Service operated by His Majesty’s Courts and Tribunals Service.

**(4) Where all parties indicate on their directions questionnaire that they agree to mediation, the claim shall be referred to the Mediation Service. [my emphasis]**

(5) If a claim to which this rule applies is settled, the proceedings shall automatically be stayed with permission to apply for—

(a) judgment for the unpaid balance of the outstanding sum of the settlement agreement; or

(b) the claim to be restored for hearing of the full amount claimed, unless the parties have agreed that the claim is to be discontinued or dismissed.



## **NEW: Practice Direction 51ZE and Appendix – Small Claims Track Automatic Referral to Mediation Pilot Scheme**

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- The new Practice Direction 51ZE and the Appendix modify CPR 26.6 (Case Management), CPR 27 (Small Claims) and PD 27A (Small Claims), during the court of the pilot for claims where the pilot applies.
- It came into force on 22 May 2024, and will run until 21 May 2026, and applies to claims issued on or after 22 May 2024.
- For claims to which the pilot does not apply, the Civil Procedure Rules and practice directions will continue to apply without modification.
- It is a compulsory mediation for some claims (see next slide).
- It is a one-hour mediation.
- Provided by HMCTS's Small Claims Mediation Service.



# When does it apply?

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## ***Does apply to:***

- Paper claims or issued through Money Claims Online (MCOL) or through Secure Data Transfers (SDT).
- Where the remedy is for a judgment for a specified sum of money only (amended CPR 26.2 (2)).
- Claims valued at no more than £10,000.
- No more than 2 parties.

## ***Does not apply to:***

- Online claims issues through the Online Civil Money Claims (OCMC) (YET).
- Personal injury claims.
- Housing disrepair claims.
- Road traffic accident claims.
- Professional negligence claims.
- Where there are safeguarding concerns.



# How does it work in practice?

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- Once the parties have filed their questionnaires (post pleadings), the claim shall be referred to the Mediation Service. They no longer need to ‘indicate’ on their questionnaires that they agree to mediation.
- The claim will then be stayed for 28 days and automatically referred to the mediation service, operated by the Mediation Services, HMCTS. The parties will then receive a one-hour mediation appointment. The mediator will speak to each side separately.
- If the claim is settled, the proceedings shall automatically be stayed with permission to apply for –
  - judgment for the unpaid balance of the outstanding sum of the settlement agreement; or
  - the claim to be restored for hearing of the full amount claimed (if the amount remains unpaid), unless the parties have agreed that the claim is to be discontinued or dismissed.



# Potential sanctions:

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There are potential sanctions if a party does not participate in the compulsory mediation.

PD51ZE and Appendix introduced changes to CPR Part 27 (Small Claims Track) and to Practice Direction 27A (Small Claims).

- (6) At a small claims hearing, the court *must* consider whether any sanction is appropriate in all the circumstances **having regard to whether the parties attended mediation provided by the Mediation Service** (inserted after CPR 26.6.5).
- (2A) When considering how to exercise its discretion to order or decline to order costs falling within paragraph (2) (including when considering under paragraph (2)(g) whether a party has behaved unreasonably), **the court may also take into account any failure by a party to attend mediation provided by the Mediation Service** under rule 26.6 (inserted after CPR 27.14.2)
- 1.Each party must deliver to every other party and to the court office copies of all documents on which they intend to rely at the hearing [dates specified] before the hearing. Includes if a party failed to attend mediation provided by the Mediation Service, **that party's explanation for that failure, and any other party's comments on the matter, with any supporting documents** (inserted in PD 27A Appendix B.
- (2A) The court may also make an order under paragraph (1) or (2) on its own initiative in any case **where rule 26.6 (6) applies** (inserted after rule 45.13).



## Other MOJ pilot schemes:

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**The Rental Mediation Service Pilot (ended):** A joint pilot with the Department for Levelling Up, Housing and Communities (DLUHC) to support possession cases during the COVID-19 pandemic. The pilot encouraged settlements without a hearing and helped to sustain tenancies. It was launched in February 2021 and ended in October 2021. The post implementation review published on 22 February 2023 can be found on the MoJ website.

**Support with Making Child Arrangements (SwMCA):** A pilot evaluation that worked with parents and carers to understand if dispute resolution services could help them reach an agreement without going to court. The evaluation found that parents who attended a combination of a SPIP and mediation were more likely to reach an agreement.

**Family Mediation Voucher Scheme:** A pilot scheme under Practice Direction 36V. It expires on 31 March 2025.





# David Watkinson, Garden Court Mediation

5 November 2024



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# Practical Steps Before A Mediation

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- Agreement to Mediate
- Agree the Mediator and Mediation Fee
- Agree date and location
- Sign Written Mediation Agreement
- Prepare Mediation Bundle (to be agreed, if possible)
- Prepare Position Statement (to be exchanged, if possible)
- At some point, consider what offers to make, what will settle for
- Decide who will attend
- Decide who will speak
- Attend with authority to settle



# Procedure at a Mediation

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- Joint session between parties and mediator
- Presentation of Position Statements
- Discussion
- Private session (mediator speaks to parties separately)
- Possibly re-convened joint session
- (Hopefully) Settlement offers/Negotiation/Agreement
- Agreement drafted and signed



# Contents of a Mediation Bundle

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1. Statements of Case, claim form, particulars of claim, defence, counterclaim, reply
2. Witness statements, including expert witnesses, if any
3. Court orders (particularly those referring to mediation)
4. Offers of settlement, including Part 36 offers and responses.
5. Any other correspondence/documents relevant to the mediation
6. Total of costs incurred to date of mediation /estimate of costs if case goes to trial



# When to Have a Mediation

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- Can be at any stage
- Advantages/Disadvantages of early mediation
- Varies from case to case
- Best when parties are willing to discuss settlement
- Avoid having mediation shortly before hearing, if possible



# Thank you

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