

Legal Services Commission, Volume 3, Part C

20.9 Family Mediation

1. Family Mediation is a separate level of service under the Funding Code, which authorises mediation of a family dispute and an assessment of whether mediation appears suitable to the dispute and the parties and all the circumstances (for the definition of a family dispute, see paragraph 5 of 20.3). Family Mediation is provided under the Family Mediation Specification which forms part of the Unified Contract – see section 20.21 below. Note that the mediator can engage with a child/children in a matter which concerns the child/children as part of the mediation (see para 28 below).
2. All Family Mediation requires an assessment of whether mediation is suitable to the dispute and the parties and all the circumstances. In the Funding Code Procedures this is referred to as an assessment meeting. This assessment will be carried out by a recognised mediator, (i.e. a mediator who is deemed competent by a regulatory body approved by the Legal Services Commission) and may only be provided if the Standard Criteria under Section 4 of the Funding Code are satisfied (Criterion 11.5.1). This includes a test for financial eligibility, which will be carried out by the mediator (Criterion 4.9 and Code Procedures D4.3). Provided at least one of the parties is financially eligible the costs of both parties' assessment meeting(s) will be met (even though one of the parties is not eligible). This is because both parties need to be assessed for the suitability of Mediation. However, if neither party is eligible then no assessment meeting can be publicly funded. These arrangements also apply in a case involving the welfare of children where the Cafcass/Cafcass Cymru officer is of the view that mediation should be considered or the court adjourns a case for mediation to be considered or makes a contact activity direction (under section 11A Children Act 1989) or contact activity condition (under section 11C Children Act 1989) requiring information about mediation to be provided to one or both of the parties in the context of ongoing proceedings relating to contact.
3. For those who are financially eligible all mediation sessions themselves will be funded. In cases where one party is publicly funded, then the LSC will pay a fee for that client and the mediation service will agree a separate payment with the private paying client. Substantive publicly funded Family Mediation beyond an assessment meeting may only be provided where the mediator is satisfied that the mediation is suitable to the dispute and the parties and all the circumstances (Criterion 11.5.2 and Code Procedures D4.3). The mediator must in assessing suitability consider whether the costs of mediation are themselves justified in terms of cost benefit as part of considering whether mediation is suitable for the dispute, the parties and all the circumstances.
4. Family Mediation can be provided following a referral required under the Code Procedures (see below) or otherwise e.g. on a self-referral by the client(s) or a referral from another organisation. All

work carried out under Family Mediation is exempt from the statutory charge, whether or not mediation is successful and regardless of what other levels of service are provided to the client.

The Referral Process

5. The solicitor or client should contact the mediation service to provide their full contact details and those of the second party (if known) and, where appropriate, the solicitor(s).
6. If the second party is willing to attend an assessment meeting and consider mediation, the mediation service must then arrange a meeting and notify the client and their solicitor and, where appropriate, the solicitor of the second party. In cases where either or both parties is/are subject to a contact activity direction/condition, a failure to attend the mediation assessment meeting in accordance with the terms of the contact activity direction/condition will be reported to Cafcass and then to the court.
7. The mediation service should offer the client (applicant) and the second party a meeting within 15 working days from the date they were first contacted.
8. However, where it is not possible to arrange a joint assessment meeting, or where either one of the parties wants to attend a separate meeting, the mediation service should hold the second meeting within 20 working days from the date that they were first contacted. The second meeting can only be held outside this time period if the client agrees.
9. The mediation service should ensure that, however they contact the client and the second party, domestic abuse screening is carried out at or as soon as possible after the initial contact point (Procedures D5).
10. Clients (applicants) (not subject to a contact activity direction/condition – see above) who fail to attend the assessment meeting arranged with the mediator without providing a good reason in advance will only be given a second appointment if it is reasonable to do so in the particular circumstances. Where the second party fails to attend the first arranged meeting, the mediation service should contact the client to ascertain if the client is willing for another meeting to be offered to the second party. If not, the mediation service will deem mediation unsuitable and will complete and sign the standard CLSAPP7 form as “mediation unsuitable”. If the second party fails to attend another arranged meeting, then the mediation service will deem mediation unsuitable and complete and sign the CLSAPP7 form “mediation unsuitable”.

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11. In some cases, having considered the referral the mediator may consider that mediation is not suitable as the client has a reasonable fear of domestic abuse from a potential party to the mediation. In such cases the mediation service will complete and sign the CLS APP7 form confirming that mediation is unsuitable.

The Assessment Meeting

12. Mediation services must always ensure that they inform the client and the second party that meetings can take place either together or separately. The decision whether to attend the meeting together or separately must be left to the client and the second party. Where either party requests separate meetings, the service should offer separate meetings to both parties.
13. Where both the client and the second party attend the same meeting with a mediator, the mediator must ensure that they carry out domestic abuse screening interviews with each party separately prior to a meeting.

Determination of suitability

14. Where the mediation service has attempted to contact the second party to ascertain willingness and:
 - (a) the second party does not respond to a request to attend a meeting within 10 working days of the mediation service first being contacted; or
 - (b) the second party replies to a request, refusing to attend a meeting with a mediator; or
 - (c) the second party is willing and they have attended a meeting but the mediator decides that mediation is not suitable for the dispute, the parties and all the circumstances;

the mediator must complete and sign the CLSAPP7 form dealing with the assessment and either give or send it to the client, or send it direct to the solicitor. This is the case whether or not the first party has attended an assessment meeting, see also para 20.16.

15. Where the CLSAPP7 form is returned to the client because mediation is unsuitable, the mediation service should inform the client that they may consult with their solicitor and that an application can now be made for Family Help (Higher) or Legal Representation. The usual Criteria would apply to any such application.
16. If the mediator determines that mediation is suitable for the dispute, the parties and all the circumstances the client may have access to Family Mediation. The form dealing with the assessment requirement does not need to be completed unless mediation subsequently breaks down.

Mediation during a certificate

17. The requirement to attend on a mediator will be applied not just at the time of the initial application for a certificate but also when an amendment is to be applied for to cover additional proceedings, for example when an existing certificate covering ancillary relief is to be extended to cover residence or contact disputes.

18. In addition, Family Mediation can sometimes be effective during the life of certificate even if it was for some reason unsuitable at the outset. Rule C27.3 gives the Regional Office discretion to place a limitation on a family certificate restricting further work until the client has attended an assessment meeting with a mediator. This is most likely to be considered when representations about mediation are received from another party or when the office is informed that the publicly funded client has refused an offer by the other side to mediate. As in non-family cases all refusals of offers to mediate must be notified to the Regional Office under Rule C43.2 (vi)(c) of the Procedures.

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19. In these circumstances the office will consider placing a limitation on a certificate if there appears to be no good reason for refusing to attend an assessment meeting. Where the solicitor seeks to rely on a previous negative assessment of suitability, then a copy of the relevant form CLSAPP7 should be submitted together with an explanation as to why it is still reasonable to rely on it. If the case is assessed as suitable for mediation by the mediator than the Commission's approach in such cases will be similar to that in non-family proceedings as detailed in section 7.8 of this guidance.

Where mediation breaks down

20. Where mediation breaks down, the mediator must complete the CLSAPP7 form dealing with the assessment requirement. There may be circumstances where agreement is reached through mediation on some but not all of the issues in dispute. In these circumstances the mediator should complete the CLSAPP7 noting on the form that mediation has only broken down in respect of certain issues and list the outstanding issues that are still in dispute.
21. Any certificate that is subsequently issued should be limited to those issues which are still listed on the CLSAPP7 as in dispute. It will be up to the Regional Office to decide on the scope of any certificate issued on the basis of the information provided on the CLSAPP7 and in the application for funding.
22. Where mediation is suitable for some issues but not others e.g. for children issues but not financial ones, then it is appropriate for some elements of the case to continue to be mediated whilst other aspects of the case are dealt with through negotiations or, if it is unavoidable, in court proceedings.
23. The CLSAPP7 form should be returned to the client or sent direct to the solicitor by the mediation service. The mediator must inform the client that they should consult their solicitor and that an application for Family Help (Higher) or Legal Representation may now be made.

Self referrals

24. When a client who has not been referred by a solicitor but seeks Family Mediation him or herself sees a mediator for the first time, the mediator must consider whether to provide funded mediation

and whether the client is or is likely to be subject to the requirement to attend an assessment meeting. This is so that if the client does subsequently apply for funding for representation the delay and expense of an assessment meeting at that point in time can be avoided. If the mediator is in doubt he or she should work on the basis that an assessment will be required rather than not required.

25. The mediator may provide mediation if the mediator considers that to be appropriate in accordance with the Code Procedures and the Code of Practice (Code Procedures D4 and D5).
26. Where mediation is not appropriate, the mediator must complete the CLSAPP7 form dealing with the assessment requirement and recommend that the client consults a solicitor. If there is no material change in the circumstances of the parties or dispute, the form may then be submitted with a future application for funding for Family Help (Higher) or Legal Representation (made up to four calendar months from the date of the assessment) without the client being required to attend a further meeting with a mediator. A client seeking to rely on a previous voluntary attendance as an exemption from the requirement to attend an assessment meeting may only do so where they have voluntarily attended mediation with a mediator “recognised” by the Commission. Where a client has referred themselves to mediation but it has been to a mediator that is not recognised then the client will be required to attend a further meeting with a recognised mediator before they make an application for Family Help (Higher) or Legal Representation, subject to the usual exemptions.

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27. Where clients attend a mediation service as a self referral it is sometimes the case that they may wish to mediate on a greater range of issues than are defined as Family Proceedings in the Funding Code. The mediator must consider whether the issues in dispute are covered by publicly funded family mediation e.g. publicly funded family mediation may not be available for mediation where the only issue in dispute is the potential homelessness of a child.
28. Mediators may, if appropriate, undertake direct consultation with a child but only in accordance with guidelines in their Code of Practice. Furthermore, there is nothing in the Funding Code that requires that a party to the mediation must be over 16 or 18 and if the mediator considers that mediation involving a child is appropriate then they may mediate with a child. However, a mediator should only mediate with a child where they have the necessary skills to do so as set out in their Code of Practice.
29. Mediation in family cases will only be remunerated by way of Family Mediation funded by the Commission. A family mediator’s fees are not recoverable as a disbursement (see also 2.5 Disbursements).