

Funding Code Decision Making Guidance

20.10 Referral to Mediation

1. In certain circumstances, the client must attend an assessment meeting with a mediator before an application can be made for Family Help (Higher) or for Legal Representation in family proceedings. The requirement to attend on a mediator is covered in Code Procedures C27 to 29. It applies to applications for Family Help (Higher) or Legal Representation in Family Proceedings, which are within the scope of Section 11.11 or 11.12 of the Criteria, other than proceedings under:
 - (a) Section 37 of the Matrimonial Causes Act 1973 (injunctions to prevent and orders to set aside disposal of property)
 - (b) The Inheritance (Provision for Family and Dependents) Act 1975
It applies to funding applications whether by way of an amendment to an existing certificate to cover additional proceedings (for example, contact where there is an existing certificate covering ancillary relief) or a separate application for funding).
2. Section 11.11 and 11.12 of the Criteria cover private law family proceedings involving children, or financial provision as well as family proceedings not covered by any other Criterion in Section 11. The scope of the mediation requirement therefore covers the great majority of private law cases coming within the definition of Family Proceedings under the Code. This includes property disputes between unmarried couples under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. Note that although proceedings under the Inheritance (Provision for Family and Dependents) Act 1975 are exempt from the requirement to attend on a mediator there is nothing to prevent mediation taking place voluntarily in such cases or in any family proceedings where the mediator deems the case, the parties and all the circumstances suitable.
3. The scope of the requirement for Family Help (Higher) is the same as for Legal Representation. Therefore the requirement does not apply, for example, to an application for Family Help (Higher), which relates to proposed Inheritance Act proceedings. The requirement is that the client may be required to attend an assessment meeting, to assess whether mediation is suitable to the dispute and the parties and all the circumstances before the application can be granted, unless it appears to the Director or Authorised Solicitor that any of the exemptions apply (Procedures C27.2).
4. The exemptions are as follows (Procedures C29):
 - (a) where it is in the interests of justice that Legal Representation be granted as a matter of urgency and the Criteria for emergency representation are satisfied (whether or not any certificate is in fact granted as an emergency certificate). This exemption therefore applies to applications, which are made as emergencies but granted as full certificates because the applicant is passported financially. It does not apply where an emergency application is refused because the emergency criteria are not satisfied;

(b) where a mediator is satisfied that mediation is not suitable to the dispute because another party to the dispute is unwilling to attend an assessment meeting and consider mediation;

However if a client does not fall within any of the other exemptions below and has indicated that they do not wish the mediation service to contact the second party (throughout this guidance a reference to the “second party” covers the second or other party to the dispute) to establish willingness, then they will be required to attend an assessment meeting with a mediator.

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The willingness of the second party will be established by a mediation service attempting to contact them to ascertain whether they would be prepared to attend an assessment meeting. Contact should be attempted by two telephone calls and/or a written letter, depending on the contact details provided. This willingness test may be undertaken by mediators or by appropriately trained and qualified support staff employed by the mediation service.

This exemption does not prevent a client who, after seeing a solicitor, wishes to attend an assessment meeting to obtain further information regarding mediation and its potential benefits from doing so. If they choose to attend an assessment meeting the mediator will assess their suitability and if appropriate only then attempt to contact the second party.

It is likely that, where a second party is unwilling to attend an assessment meeting and consider mediation and the applicant for public funding is therefore exempt from having to attend the assessment meeting, the applicant will then issue proceedings. As a result of proceedings being issued it is possible that the second party will then apply for public funding to oppose the proceedings. If a court date is less than 6 weeks away then the second party will be exempt under the exemption at (c) below.

(c) where family proceedings (i.e. the proceedings which form the subject matter of the application) are already in existence and the client is a respondent who has been notified of a court date within six weeks of the date of the notification;

(d) where allegations of domestic abuse have been made by the applicant against a potential party to the mediation which have resulted in either police investigations or the issue of civil proceedings for the protection of the applicant within the period of 12 months prior to the present application for funding. Details of the abuse and investigation or proceedings should be provided so as to justify the exemption. For these purposes a ‘police investigation’ will be when a report has been made to the police who have attended the relevant premises or interviewed any parties, whether or not any party has been arrested or charged.

(e) otherwise where the mediator is satisfied that the client has a reasonable fear of domestic abuse from a potential party to the mediation and is therefore unwilling and in fear of participation in mediation with them, it is the responsibility of the mediator to assess whether this exemption applies. If the exemption applies then the mediator will complete the CLS APP7 confirming that the matter is not suitable for mediation. Where there has been domestic abuse in the past but the client is still willing to mediate then the

mediation should proceed although the mediator will retain the right to refuse to conduct the mediation if there are significant concerns in regard to the safety of either party or the mediator/s.

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Other circumstances where an exemption to mediate applies includes where:

- (f) the mediation concerns financial issues and either the client or (ex) partner is bankrupt and cannot deal with their own financial affairs;
- (g) the parties are in agreement and there are no issues to mediate on;
- (h) the whereabouts of the second party are unknown, and reasonable attempts to locate them have been unsuccessful;
- (i) there is any other reason accepted by the Regional Office why the client should not be referred to a mediation service. When requesting confirmation that the client may be exempted the solicitor must fax their Regional Office with form CLSAPP7 and details of the reason(s) for exemption. Where this is confirmed, a reference number will be issued (which will be specific to that individual case) which must be entered in the CLSAPP7.

5. Examples of circumstances which may justify an exception under section (h) above include that the only subject of the dispute is parentage (paternity), or the proceedings are nullity proceedings.

6. Subject to paragraph 7 below, where there has been a previous, negative assessment by a mediator of suitability of the parties and the dispute for mediation that assessment may be relied upon and submitted to the Regional Office together with a fresh form CLS APP7 (not completed by the mediator) when making an application for Family Help (Higher) or Legal Representation (including by way of an amendment but excluding Emergency Representation) but only where:

- (a) the application is in respect of the same dispute; and
- (b) on the information available it appears to the applying solicitor that there has been no material change in the circumstances of the parties or dispute (except as to financial eligibility) so as to affect suitability for example the client or other party would now be able to, or is geographically near enough to attend on a mediator; and
- (c) the assessment was made within four calendar months of the application.

7. No fresh assessment of suitability is required where an application is made to amend an existing certificate of Family Help (Higher) to a certificate of Legal Representation in respect of the same dispute.

Solicitors should ensure that clients are made aware throughout the process that mediation may be available as an option to resolving their dispute. Research has shown that many clients benefit from mediation later on in the process even if it was unsuitable at the outset.