

# Alternatives to Court Proceedings

If you have a dispute that needs resolving it can be daunting, nerve-wracking and financially prohibitive to attend Court. So, do you have to go to Court? The short answer is no.

Alternative Dispute Resolution (ADR) is any method utilised for negotiating a settlement without the use of Court proceedings. However, even if you have issued Court proceedings you can still enter into ADR with the agreement of the other party or parties.

There are various forms of ADR, some of which are detailed below, together with the advantages and disadvantages of each; but as a general rule, ADR is less stressful and more cost effective than Court proceedings.

## Kitchen Table/Facilitated Discussions

Kitchen Table is the most basic form of negotiation and involves you and the other party or parties to the dispute sitting together and talking things through with a view to reaching an agreement.

Facilitated Discussions are similar to Kitchen Table, but would include a neutral third party, such as a friend or family member, who would assist you and the other party/parties in reaching an agreement.

### Pros

- No legal fees
- Quick and simple fees

### Cons

- May enter into an agreement not in your best interests
- May not be aware of your full rights and responsibilities
- May not understand the full implications of agreement reached
- Vulnerable people at risk of entering into detrimental agreements
- Agreement not documented
- Unexpected difficulties
- Agreement not binding unless contained in an Order approved by the Court
- Need to prepare own Order and send to Court for approval

## Assisted Joint Negotiation

This is the next step from Kitchen Table and/or Facilitated Discussions. It may be that you first seek advice and information from a lawyer and then enter into Kitchen Table or Facilitated Discussions; or it could be that following Kitchen Table or Facilitated Discussions you would like advice and information before entering into an agreement. Assisted Joint Negotiation simply means that you have had the benefit of discussing matters with a lawyer before, during and/or after Kitchen Table or Facilitated Discussions and are therefore better placed to reach and enter into an agreement as you have a better understanding of the legal requirements and your own rights, duties and responsibilities.

### Pros

- Informed decision making
- Negotiations without acrimony
- Pay as you Go legal advice and assistance
- Minimal legal fees

## Cons

- Your lawyer can only provide limited information and/or advice
- Agreement not documented
- Agreement not binding unless contained in an Order approved by the Court
- Need to prepare own Order and send to Court for approval

## Mediation

A mediator is an independent third party that helps opposing parties resolve conflicts. A mediator does not provide legal advice; mediators are neutral and their role is to enable negotiations by use of an interactive process and facilitate agreement between the parties. Mediation can be particularly beneficial in family matters, whether the dispute is between divorcing or separating couples, grandparents, step-parents or children; or for addressing civil disputes such as separating cohabitants (non-married couples), neighbour disputes, debt or money claims, and various other forms of dispute because it provides a safe environment in which disputes can be aired and is generally considered to be less stressful than Court proceedings. However, mediation is not appropriate for every case and the mediator will assess whether or not your matter is suitable, for example if there is or has been domestic abuse or the parties live in different areas of the country.

Divorcing or separating couples should note that there is a requirement for parties to attend a Mediation Information and Assessment Meeting (MIAM) before they can issue financial proceedings at Court. For divorcing and separating couples, if your matter is not suitable for mediation, the mediator will provide a form that is to be filed at Court with your initial application, and this will detail the reason why mediation is not suitable.

Once you have reached agreement at mediation, it is recommended that you seek independent legal advice on the terms of that agreement and subsequently request your legal adviser to prepare a Consent Order. It should also be noted that, with particular regard to financial matters within divorce or separation, any agreement reached at mediation will not be legally binding until a Consent Order has been approved by the Court, and that the Court has the power to refuse an agreement if it does not feel it is fair and just in all the circumstances.

Agreements in civil matters can likewise be contained within a Consent Order if proceedings have already been issued, or within a Settlement Agreement if proceedings have not been issued. A civil Settlement Agreement entered into voluntarily, without duress and with all parties having had the opportunity to seek legal advice, will be a legally binding agreement.

## Pros

- Less expensive than Court proceedings
- Quicker than Court proceedings
- Safe and neutral environment
- Suitable for children and vulnerable adults
- Can be undertaken in separate rooms
- Privileged discussions (cannot be used against each other)
- Minimal disclosure
- Additional professionals can be brought in to assist with specific issues
- Can narrow areas in dispute
- Can highlight areas in agreement
- Can deal with a single or multiple issues
- Can improve and/or re-establish communication
- Can be used alongside solicitor advice and representation
- Can be used during arms' length negotiations

## Cons

- Mediators do not provide legal advice
- Agreements may not meet minimal legal rights, duties and/or obligations
- Disclosure is minimal
- Will need to take legal advice on the terms of the agreement reached
- Agreement not binding unless contained within a Consent Order approved by the Court
- Will need a solicitor to embody the agreement into a Consent Order or draft an Order yourselves
- Could have mediator's and lawyer's fees

## Hybrid Mediation

Similar to Mediation above but with you and your legal representative in one room and your opponent and their legal representative in a separate room. The idea is that the mediator facilitates an agreement with you having the benefit of legal advice and support throughout the process, the aim being to reach an agreement that day.

Once agreement has been reached it will need to be contained within a Consent Order as per mediation above.

## Pros

- Less expensive than Court proceedings
- Quicker than Court proceedings
- Safe and neutral environment
- Suitable for children and vulnerable adults
- Undertaken in separate rooms
- Privileged discussions (cannot be used against each other)
- Additional professionals can be brought in to assist with specific issues
- Issues are narrowed ahead of mediation
- Can deal with single or multiple issues
- Can improve and/or re-establish communication
- Agreement is reached on the day of mediation
- Solicitor advice and assistance throughout the process

## Cons

- Agreement not binding unless contained within a Consent Order approved by the Court
- Will need a solicitor to embody the agreement into a Consent Order
- Will have mediator's and solicitor's fees
- If agreement not reached will likely need to issue Court proceedings

## Collaborative Law

Collaborative family law involves round-table meetings with the parties and their legal representatives. Disputes are negotiated direct between the parties and their representatives, meaning the parties have the benefit of legal advice immediately and at the point of discussion. This form of ADR is considered to be more flexible than Court proceedings as the parties are not bound by the rigorous constraints that can be imposed by the Court. Collaborative law provides additional flexibility in that the parties can determine the timetable for dealing with the various aspects of the negotiations. As with all financial settlements, any agreement reached will need to be contained within a Consent Order and sealed by the Court (for family matters or civil matters with proceedings already issued at Court) or contained within a Settlement Agreement (for civil matters which do not already have proceedings issued at Court) so as to make it binding and enforceable. By entering into the collaborative process parties are agreeing that they will not enter into or issue Court proceedings.

If either party subsequently decides to issue proceedings this will invalidate any agreement reached through the collaborative process and will also prohibit either of the existing legal representatives from continuing to act for their respective client, thus requiring the instruction of additional and new legal representatives.

### Pros

- Lawyer present to provide advice and support
- Round table meeting with a view to resolving issues
- Less acrimonious than Court proceedings
- Parties are directly involved (not just lawyers)
- High success rates
- Can work outside legal frameworks to find creative solutions
- Can agree timescales
- Open and transparent disclosure
- Views, opinions and feelings of each party heard and considered
- Quicker and more cost effective than Court proceedings
- Additional professionals can be brought in to assist with specific issues

### Cons

- Disqualification clause – if the process breaks down you must dis-instruct your lawyer
- A lack of or bad preparation will result in a greater risk of failure
- You need determination and commitment to work through the literal and emotional difficulties
- Opposing expectations can lead to dissatisfaction and/or frustration in the process and/or the settlement reached
- Higher legal costs than previous options

### Round Table Meetings

Round Table Meetings are similar to Collaborative Law, but instead of the parties being directly involved, it is usually the case that the lawyers will step away and discuss matters between them with a view to reaching agreement reflecting their client's instructions. This can be very oppositional as party views are generally opposites, which can result in each party being focused solely on their wants rather than what is in the interest of both parties to reach a resolution. As with any form of ADR, compromise is key. The main difference between Collaborative Law and Round Table Meetings is that, if the latter fails, the lawyers can continue to represent their client in either another form of ADR or within Court proceedings. Again, it should be noted that any agreement reached will need to be embodied within either a Consent Order or a Settlement Agreement, depending on whether or not Court proceedings have previously been issued.

### Pros

- Effective at reaching a quick settlement
- Can be used as a tool to narrow the areas in dispute
- Can be used to decide exactly what disclosure is required and for what purpose
- Meetings can take place following receipt of disclosure
- Can assist clients to better understand complex matters
- Encourages dialogue and communication between the parties
- Provides an environment for each party to be heard
- Other methods of ADR are not ruled out if unsuccessful
- More cost effective than Court proceedings

### Cons

- Full disclosure is required
- More lawyer-to-lawyer based discussions with less client involvement than Collaborative Law

- Discussions can take place without client input or involvement
- Parties have limited control over the outcome if not directly involved
- Can be a long and arduous meeting
- Pressure on participants to reach agreement within one meeting
- Unintended errors and/or difficulties due to long, arduous meeting
- Can be costly, especially if unsuccessful

### Arm's Length Negotiations

Arm's Length Negotiations take place on your behalf between your legal advisers, which could include both written and/or spoken negotiations. The parties to a dispute will always be consulted and advised upon negotiations as they take place. This type of negotiation is outcome led and largely directed by the client's desired outcome. In the event negotiations fail, any other form of ADR can be pursued or the appropriate proceedings issued at Court.

#### Pros

- Easy for parties to understand the issues as these are all written down
- Transparency between parties involved
- Easy to follow which issues are agreed and/or remain in dispute
- Useful for parties that live in different geographical areas from each other
- Useful for children and vulnerable adults as non-confrontational and indirect
- More cost effective than Court proceedings

#### Cons

- Can be a lengthy process
- Full disclosure is required
- Can increase hostility
- More inclined to misunderstandings and/or miscommunication
- Less opportunity to consider creative solutions
- Can be dogmatic and formulaic
- Costs can quickly escalate

### Arbitration

In essence, arbitration is a private Court. The process requires the parties to submit their dispute to an agreed arbitrator, who in turn will adjudicate the matter (much like a Court Judge) and provide the parties with a binding decision. The parties fund the fees of both the arbitrator and the venue at which the "proceedings" are held. However, timetables for dealing with the matter are agreed between the parties, thus enabling disputes to be resolved within a few months as opposed to conventional proceedings, which can take several years. It is recommended that both parties retain their own independent legal adviser throughout the arbitration process. Any decision made by the arbitrator should be contained within a Consent Order and sealed by the Court so as to make it enforceable, but unlike an agreement reached through mediation, the Court will respect and abide by the arbitrator's decision.

#### Pros

- Court-like system but quicker
- Parties choose and agree the arbitrator
- Parties choose the venue for the 'proceedings'
- No need to attend a MIAM (see mediation)

- 'Proceedings' conducted in private
- More relaxed than Court proceedings
- No need to negotiate either directly or indirectly
- Arbitrator decides the outcome
- Can be more cost-effective than Court proceedings

#### Cons

- Decision-making is given to a third party
- Can potentially cause and/or increase adversarial and/or confrontational attitudes between the parties
- Can potentially cause and/or increase acrimony
- No enforcement for non-disclosure or withdrawal from participation

For further advice or assistance, please get in touch with our bright team of Family Lawyers. You can call us on 01202 499255 or contact us via our website [here](#).

### Further information and assistance

If we can help you with further information, please contact:

Niki Adkins  
Leasehold Property  
Partner  
01202 491712  
nadkins@frettens.co.uk

Anne Albritton  
Leasehold Property  
Associate  
01425 208319  
aalbritton@frettens.co.uk

Hannah Faith  
Leasehold Property  
Executive  
01425 208329  
hfaith@frettens.co.uk

Lucie Luther  
Leasehold Property  
Assistant  
01425 201778  
lluther@frettens.co.uk