



Too late to mediate?

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Rachel Chisholm on keeping divorce costs down by encouraging solutions through mediation

Netflix's *Marriage Story* is a salutary reminder of the emotional and financial strains of entrenched litigation. The film focuses on a family that tries mediation before going down the court route. Unfortunately, communication breaks down and the film ends with the couple spending their only child's college fund on their financial proceedings.

The film highlights the potential for high costs facing couples in contested proceedings. This conversation is not new to those working within the family courts. Judges and practitioners seek to ensure that separating couples are aware of alternative routes through which agreements can be reached without resort to protracted proceedings.

Legal costs can escalate within contested financial remedy proceedings for a number of reasons. In general, they increase when the separating couple is unable to agree on what constitutes a fair outcome. The law can provide for a range of potential outcomes and, even with legal advice on both sides, people can find it difficult to compromise or see another perspective.

Mediation is a cost-effective means to reach agreement and separating couples should be made aware of the option to mediate at the first opportunity. The court will expect parties to proceedings to show that they have attempted mediation by attending a mediation information assessment meeting, or that they are exempt from mediation for specific reasons.

Mediation provides an environment in which the separating couple are assisted in having discussions about what is important to each other and their family. The mediator facilitates the conversation to help them think through the impact of their separation on themselves and on others, such as their children. It is a confidential and privileged space where each participant is encouraged to explore options and further understand each other's concerns.

Mediation offers more choice and greater freedom to agree on a solution that works for each family's individual circumstances. The separating couple can also mediate on satellite issues to the main litigation, in order to reduce the number of issues before the court.

There are other measures built into the family court process intended to facilitate agreements and stem the need for expensive litigation. Generally, the parties will attend a Financial Dispute Resolution hearing (FDR), at which a judge will give an indication of the potential outcome of the matter. The parties are then encouraged to negotiate and reach a settlement at court. The FDR and discussions are without prejudice and kept confidential. The parties may also opt for a private FDR with an agreed-

upon FDR judge, which can often take place sooner than the listed court date for an FDR. There is no impediment on the parties trying to reach agreement through solicitor's correspondence after the FDR and throughout the proceedings.

The flexibility of mediation complements the court process: it can be undertaken at any time before or during proceedings. For instance, the parties may wish to use mediation to further discuss an indication given by the court or consider the impact of a recommendation made by an expert on potential outcomes.

Reducing the areas for conflict between separating couples is crucial in decreasing the costs of separation. The *UK Divorce, Dissolution and Separation Bill* aims to reform the law in relation to divorce and allow for 'no-fault divorce'. This would reduce litigation of contested divorces, but would generally not shrink litigation costs in subsequent financial remedies applications.

There are other alternate dispute resolution options available. Separating couples may:

- take part in a collaborative law process through their solicitors;
- seek an early neutral evaluation of their cases;
- take advantage of the literature about separation and its impact on families from organisations such as Resolution; or
- consider therapeutic interventions, such as counselling, or specialised programmes at institutions, such as Tavistock Relationships, which specialises in couples counselling and psychotherapy.

There is no a simple solution to the problems facing those involved in acrimonious separations. For some couples, alternative resolution options will not be suitable. However, it is crucial that the parties are aware of the available choices and the value in resolving conflicts before embarking on proceedings.