St.Mary's
FAMILY LAW SPECIALISTS

To MIAM or not to MIAM?

A word on exemption: Amendments to Family ADR Part 3 FPR

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Many families enter into private arrangements reached entirely informally, with no formal input from any professionals beyond possible background advice. For those families unable to reach a private agreement on their own, there are a number of established alternatives, other than applying to the family court. The most well-known non-court resolution method is mediation, where a trained independent mediator assists the parties to try to reach an agreement between them. If agreement is reached, it can be used to form the basis of a consent order if the parties want their agreement to be legally enforceable. Arbitration, where the parties formally appoint an independent arbitrator to resolve the dispute, leads to a bunding decision. Collaborative law is a lawyer-led method where the parties' lawyers commit to trying to reach agreement by negotiation, with the lawyer(s) precluded from acting for their client if court proceedings are commenced. Less formally, solicitors usually seek to negotiate informally before and after court proceedings are initiated. A newer process is referred to as 'one lawyer, two clients', where a single lawyer meets with both parties, receives relevant background, and gives independent advice about the likely outcome of the dispute, with both parties receiving the same information. A similar process can be undertaken by way of early neutral evaluation, where parties (usually each having their own lawyer) approach a neutral (legal) expert to assess the case and provide an independent assessment.

Despite those alternatives, and though many disputes can be successfully resolved outside of court, the Family courts are under unprecedented pressure. In recent years, more families than ever before are applying to the court to resolve their disputes about children and financial matters, and once at court their cases are taking longer to be resolved. On 4th December 2023 CAFCASS published its annual report and accounts for 2022-23. Within their Press Release CAFCASS noted it had worked with a total of 143,469 children and young people in the 2022-23 reporting year. Approximately one-third of these children were involved in public law proceedings and two-thirds in private law proceedings. The average length of private law proceedings was 61 weeks, which was 22 weeks longer respectively than reported for the same period in 2020. "*These delays continue to have a negative impact on children in respect of the continued stress and uncertainty about the outcome of their proceedings".*

The need to reduce delay by diverting cases to appropriate NCDR methods will be given sharper focus with the **Family Procedure (Amendment No. 2) Rules 2023** dated 30th November 2023, which comes into force in April 2024, and which amends the **Family Procedure Rules 2010** ("the FPR"). Section 10 of the **Children and Families Act 2014** makes provision for prospective applicants for specified types of orders to attend a family mediation information and assessment meeting (referred to in the FPR as "MIAM"). Associated procedural provision about MIAMs is made in the FPR. A MIAM is a short first meeting with a qualified mediator where parties will be provided with information

about mediation as a way of resolving their issues. The mediator will assess whether mediation is an appropriate option and consider whether the issues can be resolved without going to court based on their individual circumstances. Both parties will need to attend a MIAM before undertaking mediation which can be attended together or separately. Parties have to pay for a MIAM first, unless eligible for legal aid.

As well as the Amendment Rules 2023 amending references to "domestic abuse" to align the FPR more closely with the terms used in the **Domestic Abuse Act 2021**, the Rules amend various of those provisions in the FPR in relation to attendance at MIAMs. Though I must confess to neither paying little heed to what tick boxes have been ticked on the C100 as counsel, as by the time I consider a hearing bundle we are typically post FHDRA; nor as a part time Judge, as with a busy DRA list or contested FH one needs to be realistic and proportionate when prepping. However, the new rules make it clear there needs to be a new approach of greater rigour in that consideration going forward in order to secure the new vision for these cases.

History

The House of Lords Children and Families Act 2014 Committee launched a post-legislative scrutiny inquiry on 9 March 2022. The purpose of the inquiry was to determine if the CFA had achieved its aim of improving the lives of children and families. The committee focused on specific policy areas that it felt would benefit from further scrutiny, including the Act requirement that anyone wanting to apply for SGOs or other family orders to attend a family mediation, information and assessment meeting (MIAM). Facilitated by a family mediator, MIAMs provide individuals with information on the mediation process and options for reaching agreements. Following its inquiry, the committee concluded that MIAMs had been "*ineffective and had low engagement rates".* In its House of Lords paper published December 2022 brutally entitled "Children and families Act 2014: A failure of implementation", the committee acknowledged the benefits of mediation but said it was not appropriate in all cases. It accused the government of having an "*excessive*" focus on mediation as a method of reducing the court backlog. It also raised "*serious concern*" about moves that would make mediation "*functionally compulsory*". The committee said individuals would instead benefit from having a source of clear and impartial information on separation and, if necessary, general legal advice which could direct them to various resolution options. It recommended the government should provide and maintain a website which provides impartial advice for separating couples on the family justice system. Additionally, the committee urged the government to reconsider its proposals to make mediation "*effectively obligatory*" and recommended a universal voucher scheme for general legal advice appointments be introduced.

In response, the Government held a consultation from 30 March to 25 May 2023 on early resolution of private family law arrangements. In launching its consultation with stakeholders in March 2023, it said it recognised the positive impact mediation and other forms of dispute resolution could have on families and children. Its mission statement included: "*In encouraging NCDR methods we can spare families, and especially children, the anguish of protracted litigation. Resolving more disputes outside of court will also help enable the courts to focus available resource on the cases that need to be there, including where domestic abuse is evidenced or there are urgent issues, and ensure these are resolved swiftly. This will help us to deliver on the levelling-up agenda by ensuring we improve the experience of parents across the country, including the most deprived areas."*

On MIAMs, the government stated it had been working with the Family Procedure Rule Committee (FPRC) to consider ways of strengthening the MIAMs process, including through attendance at a co-parenting programme alongside mediation to help them better understand their family's options; by introducing a requirement, in appropriate cases, to make a reasonable attempt to mediate before applying to court; and consulting on how costs orders could be used by the family courts to enforce requirements to mediate and discourage unnecessary prolonging of court proceedings.

And so the ideological conflicts with reality: the desire for greater out of court resolution for all the benefits that brings including a reduction in the backlog and duration of family cases, against a backdrop of ever more litigants in person and more and more complex private law cases which are arguably not appropriate for NCDR methods. How to balance that? It seems with the introduction of greater and earlier oversight of when NCDR is appropriate in family law cases, using the parties' views as a starting point, but no longer the definitive end. In November 2023 the Lord Chancellor and senior judiciary shared their vision for the future of the civil and family courts and tribunals system: to improve the experience of accessing and navigating the justice system for everyone: *"We will do this by making it easier for people experiencing legal problems to access high quality information and support at the right time and in the right way. Doing so will help them to understand their options and take the appropriate steps to resolving their issues. We will enable people to resolve their problems earlier and at less cost. For example, through mediation or online dispute resolution. If they are unsuccessful, we will support them in seeking judicial determination through the courts or tribunals."*

The court's duty to consider non-court dispute resolution: Rule 3.3

The FPR currently reads at rule 3.3(1) *The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.* The Amendment Rules goes further in encouraging parties to resolve their disputes outside of the court in various ways:

- rule 6 amends rule 3.3 FPR to require parties to set out their position in relation to engaging with non-court dispute resolution in specified circumstances. Now inserted by the Amendment Rules is a new Section (1A): *When the court requires, a party must file with the court and serve on all other parties, in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings.*

- rule 3(b) substitutes a new definition of "non-court dispute resolution" in the FPR; MIAMs ae not the be all and end all!

- rule 7 amends rule 3.4 FPR to make provision for the court to use the timetabling of proceedings to encourage non-court dispute resolution. Rule 3.4, currently titled: "When the court will adjourn proceedings or a hearing in proceedings"; is renamed under the new Amendment Rules heading to: "**Timetabling proceedings: encouraging non-court dispute resolution**". To my reading this is a change likely to require consistent and robust judicial case management. Paragraphs 3.4(1) and (2) FPR are entirely substituted, from: "if the court considers that non-court dispute resolution is appropriate, it may direct that the

proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate", to a much more directive:

(1) Paragraph (1A) applies when the court considers that non-court dispute resolution is appropriate.

(1A) Where the timetabling of proceedings allows sufficient time for these steps to be taken, the court should encourage parties, as it considers appropriate, to—

(a)obtain information and advice about, and consider using, non-court dispute resolution; and

(b)undertake non-court dispute resolution.";

(2) The court may give directions about the matters specified in paragraph (1A) on an application or of its own initiative.

(2A) Subject to paragraph (2B), the court may give directions referred to in paragraph (2) at any time during the proceedings.

(2B) In proceedings to which Practice Direction 12B applies, the court may give directions referred to in paragraph (2) at any time after the court has received the safeguarding letter or safeguarding report referred to in Practice Direction 12B

As to paragraph sub para 3.4(3) it remains unaltered so that if adjourning the court must give directions regarding the timing and method of update by the parties as to if any of the issues have been resolved, and if parties do not, the Court will then go on to issue a CMO.

- Only mediators who hold 'Family Mediation Council Accreditation' can currently sign court forms to confirm that a MIAM has been attended or that certain exemptions apply. Paragraph 3.3(2) remains but, in considering whether non-court dispute resolution is appropriate in proceedings which were commenced by a relevant family application, the court must no longer take into account whether a mediator's exemption form confirms the exemption rather, only whether a valid MIAM exemption was claimed by the applicant. Thus, the Court will now be looking to the parties to justify the use of an exemption, rather than a third party stating so on their behalf, which of course was an assertion that was until now previously unchallenged and unscrutinised by the court.

All of this means there is thus a clear direction to the judiciary to actively consider adjourning a case at all stages for NCDR.

Changes to the exemptions: Rule 3.8

Rules 11(c) to (l) amend rule 3.8 FPR to modify or remove certain exemptions from the requirement to attend a MIAM. Rule 3.8 in setting out the circumstances in which the MIAM requirement does not apply are more restrictive to take into account the availability of video-link NCDR and omission of mediator granted exemptions; and an applicant will no longer be able to rely on a previously granted exemption forever.

Exemptions as existing and changed are:

- Evidence of DV per PD 3A (unaltered)

- Child Protection concerns (unaltered) (child would be subject to application, or that child or another child of the family who is living with that child is currently –
    - (aa) the subject of enquiries under section 47; or
    - (ab) the subject of a child protection plan

- Urgency (only altered in part re financial hardship):
    - there is risk to the life, liberty or physical safety of the prospective applicant or his or her family or his or her home; or
    - (ii) any delay caused by attending a MIAM would cause –
        - (aa) a risk of harm to a child;
        - (ab) a risk of unlawful removal of a child from the United Kingdom, or a risk of unlawful retention of a child who is currently outside England and Wales;
        - (ac) a significant risk of a miscarriage of justice;
        - (ad) **significant financial** hardship to the prospective applicant (a change from the current wording of *"unreasonable" hardship";* or
        - (ae) irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence); or
    - (iii) there is a significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought in another state in which a valid claim to jurisdiction may exist, such that a court in that other state would be seized of the dispute before a court in England and Wales;

- *Previous MIAM attendance or MIAM exemption HOWEVER*
    - a *previous MIAM or other form of non-court DR attendance must have taken place in the 4 months* prior to making the application for the exemption to apply;
    - participating in another form of non-court dispute resolution relating to the same or substantially the same dispute is still a valid exemption; but
    - there is a new insertion to sub para d(ii) where the person attended a non-court dispute resolution process, there is evidence of that attendance, as specified in Practice Direction 3A;
    - there remains an exemption regarding an application which would be made in existing continuing proceedings and the prospective applicant attended a MIAM before initiating those proceedings;
    - the current exemption on the basis the person filed a relevant family application confirming that a MIAM exemption applied previously in the 4 months prior to making the application in the same or substantially the same dispute is omitted. Similarly a previous MIAM exemption on an application which would be made in existing continuing proceedings is no longer permissible. So a past green light to proceed on the basis of any exemption such as DA will not be forever and a day a reason not to attempt MIAM or NCDR. This will catch I predict a number of C100s varying a CAO make following proceedings involving DA. Changes in circumstances and improved and reparative behaviours that come to light may indicate NCDR, though inadvisable previously, in new later proceedings has legs.

- Evidence that the prospective applicant is bankrupt, and the proceedings would be for a financial remedy (unaltered)

- Previously an exemption could be claimed where the prospective applicant does not have sufficient contact details for any of the prospective respondents to enable a family mediator to contact them for the purpose of scheduling the MIAM. That is now omitted. This in my experience was the exemption most easily invalidly claimed and now DWP directions available unnecessary.

- Applications that would be made without notice (unaltered, understandably)

- Exemptions based on disability are now in my view made more difficult to claim. Previously the applicant could claim an exemption based on his own or the respondent's disability on the basis in difficulty in attending an in person appointment. Now:
    - Only the **prospective applicant's disability** or other inability that would prevent attendance **in person** at a MIAM is permitted as an exemption, and only if appropriate facilities cannot be offered by an authorised mediator;
    - Inserted are new requirements **in addition** that:
        - the prospective applicant evidences he is not able to attend a MIAM online or by video-link and an explanation of why this is the case is provided to the court;
        - the prospective applicant has contacted as many authorised family mediators as have an office within fifteen miles of his or home (or **five** of them if there are **five** or more) (which is up from three on original exemption form), and all have stated that they are unable to provide such facilities; and
        - the names, postal addresses and telephone numbers or e-mail addresses for the authorised family mediators **contacted by the prospective applicant**, and the dates of contact, can be provided to the court; or
        - the prospective applicant or all of the prospective respondents cannot attend a MIAM because he or she is in prison or detained in any other institution, or subject to conditions of bail or licence that prevent contact; but insertion and facilities cannot be made available for them to attend a MIAM online or by video-link (which remains unaltered).

- An exemption based on the prospective applicant or all of the prospective respondents not being habitually resident in England and Wales is omitted entirely, focusing on the possibility of video link hearings and remote means of NCDR.

- Where a child is one of the prospective parties (unaltered)

- Where all the mediators contacted have stated that they are not available to conduct a MIAM within fifteen business days of the date of contact, the provision remains but with an additional para (i) stating:
    - "(ai)the prospective applicant is not able to attend a MIAM online or by video-link and an explanation of why this is the case is provided to the court; and
    - the applicant must demonstrate contacting 5 mediators to satisfy the court virtual NDR unavailable (within fifteen business days of the date of contact)

- Previously a permitted exemption was that there is no authorised family mediator with an office within fifteen miles of the prospective applicant's home. This is amended entirely to read:
    - (i)the prospective applicant is not able to attend a MIAM online or by video-link;
    - (ii)there is no authorised family mediator with an office within fifteen miles of the prospective applicant's home; and
    - (iii)an explanation of why this exemption applies is provided by the prospective applicant to the court.

More effective MIAMs: Rule 3.9

Rule 13(a), (c) and (d) amend rule 3.9 FPR to make revised provision about matters which must be included within a MIAM. Regarding the conduct of MIAMs this is to include:

> …"(e)indicate to those attending the MIAM which form, or forms, of non-court dispute resolution may be most suitable as a means of resolving the dispute, and why; and
> (f)where sub-paragraph (e) applies, provide information to those attending the MIAM about how to proceed with the form, or forms, of non-court dispute resolution in question."

Not just a pre proceedings consideration

Rule 14 amends rule 3.10 FPR to provide for the court to consider whether a previously validly claimed MAIM exemption is no longer applicable; and under **Rule 3.10, where a MIAM exemption is not validly claimed or is no longer applicable,** paragraph (1) is substituted to read:

> "(1) If a MIAM exemption has been claimed, the court will inquire into whether the exemption—
>
> (a)was not validly claimed; or
>
> (b)was validly claimed but is no longer applicable.
>
> (1A) The inquiry referred to in paragraph (1) must be made—
>
> (a)when making the decision on allocation, in private law proceedings to which the MIAM requirement applies; or
>
> (b)when making a decision on allocation (if such a decision is made), and in any event at the first hearing, in proceedings for a financial remedy to which the MIAM requirement applies."

Furthermore, Rule 19 amends rule 28.3(7) FPR to expressly provide for the court to consider as a matter of conduct, when determining whether to make an order for costs in financial remedy proceedings, any failure of a party to attend a MIAM or attend non-court dispute resolution, thus emphasising more robust gate keeping.

Where to now?

There currently exists a Government Family Mediation Voucher Scheme, which came into effect on 26th March 2021. It is designed to support parties who may be able to resolve their family law disputes outside of court. To support this, a financial contribution of up to £500 towards the costs of mediation will be provided, if eligible. The mediator will apply for the voucher funding and it will be paid directly to them once all mediation sessions are concluded.

However, going back to the original Report dated December 2022, the committee had recommended on this issue *"better signposting and education about all non-court-based resolution options, not just mediation, as a solution…Sir Andrew McFarlane recommended signposting to mediation, legal professionals, and books and information about dispute resolution. Similarly, Resolution recommended replacing MIAMs with a broader Advice and Information Meeting (an AIM) earlier in the separation process, and which focuses on all methods of dispute resolution."*

The report goes on: "*MIAMs have been ineffective and had low engagement rates. Their singular focus on mediation combined with no requirement for the respondent to attend and a perception of MIAMs as a form of relationship counselling have hampered their success. Many couples would instead benefit from a source of clear, impartial information on separation and, if necessary, general legal advice which can direct them to non-court or court-based resolution as appropriate. Some couples, having received this information, will still have reasons to continue towards the court to try to resolve disputes. Legal representation in these cases can help improve the efficiency of these cases, but the absence of legal aid in many private law cases has precluded this."*

The recommendation was that: *"the Government produce and maintain a website which provides impartial advice for separating couples, helping them to understand the family justice system and what the courts can resolve, as well as what they cannot. We urge the Government to reconsider its proposals to make mediation effectively obligatory. Instead, we recommend that the MIAMs and mediation voucher schemes be replaced by a universal voucher scheme for a general advice appointment, at which point individuals can be signposted to alternative dispute resolution mechanisms, including mediation. We recommend that the Government urgently evaluate the impact of the removal of legal aid for most private family law cases, considering where reinstating legal aid could help improve the efficiency and quality of the family justice system."*

As to that key change in mindset and greater access to and availability of NCDR beyond MIAMs and mediation, the aim of the Amendment Rules is clear but implementation really relies on the effectiveness of MIAMs going forward and better public awareness of their benefits and aims. For that to come about the litigant needs to be told before issue.

Practical Next Steps: The Midlands Private Law Strategy

In exploring within this paper what will change in April and how the practice of family lawyers, and indeed case management of the judiciary, will need to change with the introduction of the Family Procedure (Amendment No. 2) Rules 2023 introduced at the end of last year after much debate and requests for change, the writer is very much supportive therefore of the launch of the Midlands Private Law Strategy this week which, as well as creative ways in disseminating better information pre proceedings to divert parents away from Court such as via You Tube videos, local authorities' existing early help and community based family hub services, MIAM providers and on the new Midlands Family Justice Hub website, it prescribes the following practical aims:

"We will improve the effectiveness of Mediation and Information Assessment Meetings ('MIAMs') in diverting parents away from court and into alternative means of dispute resolution. We believe more parents would benefit from attending a MIAM, even if existing exemptions can be validly claimed.

a) *Working within the framework of the family procedure rules, the gatekeeping judges and legal advisers will be much more robust about the need for both parents to attend a MIAM.*

b) *Upon receipt of an application, gatekeepers will be much stricter about the need to evidence any claimed exemptions. If an exemption is not properly claimed or evidenced, the application will be stayed for 3 weeks to require MIAM attendance or for further evidence of a claimed exemption to be filed.*

c) *Gatekeeping judges will actively consider whether to use their general case management powers to require the parties to "obtain information and advice" via a MIAM, even where a MIAM exemption has been claimed. Proceedings will be stayed for 3 weeks to allow compliance with such a direction.*

d) *In every case where an application is issued and listed urgently, the judge must consider staying the proceedings and directing the parties to attend at a MIAM once the urgent issue has been resolved.*

Any consent orders received by the court following mediation will be referred to a legal adviser to be considered and granted on the papers once the safeguarding letter is received, unless significant welfare concerns are identified. Consent orders should be clearly marked by the applicant on the C100 to assist in identification by the gatekeeper.

We will improve the provision of information to all parties to proceedings when an application is issued. See, for example, Appendix B. We have produced a suite of YouTube videos which are shorter and more targeted to particular stages of the process…"

Thus a line has been drawn: how strictly and imaginatively the Rules are to be implemented, at least regionally, is clearly set.