



Consultation: Family Mediators Drafting Consent Orders

Introduction

The Family Mediation Council recently updated its Code of Practice (the Code). As part of the discussions when updating the Code, the FMC Board considered the question of whether mediators should be able to draft consent orders at the conclusion of mediations that they have conducted. The old version of the Code was silent on the point, but there has been much discussion in the mediation community recently about whether or not the drafting of consent orders by mediators is currently, or should be, allowed. The FMC decided that, before making any changes to the Code in relation to this issue, it should first consult those with an interest in family mediation. The FMC is therefore asking family mediators and others with an interest in family mediation, from any perspective, whether family mediators should be drafting consent orders.

Background

Under a traditional model of family mediation, participants reach mutually acceptable proposals over their dispute with the assistance of an impartial third party (the mediator) who informs them what the law says, but does not advise on how it might apply to any individual. At the end of a successful mediation, a confidential summary of proposals is prepared and participants are advised to obtain independent legal advice on the proposals. If satisfied, participants can then apply to the court for a consent order to be made – one which both participants have agreed to, based on the summary produced by the mediator. Participants will usually be advised to seek independent legal advice on the preparation of a consent order. Not all will do so.

For some time, there have been anecdotal reports of mediators preparing consent orders themselves. Some mediators draft consent orders as part of the process of producing the confidential summary, with clients then choosing to waive this confidentiality and applying to court for the draft to be made into a court order. Others change the basis on which they are instructed from mediator to lawyer, and, as a lawyer, then draft a consent order which clients can take to court. However, there is no clear evidence of how widespread either practice is.

In August 2015, the Solicitors Regulation Authority (SRA) published guidance which says that a solicitor who is also a mediator may act to draft consent orders for clients at the conclusion of a mediation, on a limited retainer and in their role as a solicitor. The guidance also sets out the criteria to be met in such cases.¹ Crucially one such criterion is that the solicitor is solely reflecting the terms of the consensus reached in drafting the consent order, and not offering either participant advice on its terms.

Although the SRA makes decisions about the regulation of solicitors, and how they may act in that capacity, family mediators who are members of the FMC's member organisations must follow FMC's Code of Practice when acting as mediators. The FMC must therefore make its own determination about whether it is appropriate for family mediators to draft consent applications for clients where a mediation has resulted in a consensus.

The issues we are consulting on

This consultation concerns the model, or models, of mediation that family mediators use. The FMC is keen to learn the views of family mediators, members of the public, and anyone else with an interest in family mediation, about whether drafting a consent order after conducting a successful mediation is likely to affect the role of the mediator as an impartial third party in that mediation, and whether it is appropriate for the

¹ See 'A Question of Ethics'

<https://www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/August-2015.page>

mediator to draft a consent order without giving the participants advice on its terms. A fundamental principle of mediation is that mediators do not give advice to participants. Mediators can give information - including about the law - to the participants. They can tell them of the factors that they could consider. But mediators do not give advice on what is in a person's best interest. Instead, they use their skills in facilitation to assist participants in reaching an agreed solution, while remaining neutral as to the outcome throughout.

The traditional view has been that to draft a consent order for participants at the end of a mediation breaches this principle, as advice on the draft would have to be given, and a mediator would thus be obliged to tell each participant if the proposal reached was favourable or unfavourable to them, which would make it impossible for the mediator to remain an impartial third party. It is therefore argued that allowing mediators to draft consent orders would significantly change the role of the mediator, to one of a professional who has, or purports to have, the ability to provide legal advice or assistance. This is a fundamental issue for mediators, and one that mediators who are opposed to colleagues drafting consent orders believe has very wide implications for the future and unity of the profession.

Furthermore, the drafting of a consent order once a consensus has been reached might deny the participants the opportunity to reflect - before the consent order is drafted - on whether the proposals are right for them.

Four main arguments have been raised on the other hand. First, it is argued that, having been told all relevant information by the mediator, participants should be free not to get legal advice if they so choose. Second, a mediator is capable drafting a consent order without giving advice, because the consent order does no more or less than simply reflect the proposals that have already been freely reached. Third, if mediators are able to draft consent orders, this would increase the choices available to participants. They could still be encouraged to take independent legal advice (as now)

but, if they chose not to, they could have their agreement turned into a draft consent order by a professional and regulated mediator, rather than drafting it themselves or relying on an unregulated McKenzie Friend. Finally, it is just as possible for a mediator to draft a consent order that participants reflect on before it being made into a court order as it is for participants to reflect on a summary, and for the terms of this to be turned into a consent order by somebody other than the mediator.

Limits to consultation

This consultation is limited to the three questions set out below. It is not a consultation about competency - if it is agreed that, in principle, mediators can draft consent orders, there is no question that any individual mediator must be competent to do so in any specific case. The FMC must therefore ensure that there is in place a framework that regulates this practice.

Neither is it a consultation about allowing mediators who are also lawyers to do something that mediators who are not also lawyers cannot do: the drafting of consent orders is not an activity reserved only to lawyers, and mediators who are not lawyers may train to draft such orders.

Finally, this is not a consultation about the effect of the potential changes on insurance premiums.

Issues of competence, insurance and practicalities will all have to be addressed should the FMC decide in due course that family mediators should be allowed to draft consent orders. Our focus at the moment, however, is to look at the issue of drafting consent orders in light of the role of the mediator as an impartial third party and whether drafting a consent order upon reaching a consensus changes that role.

Consultation questions

These are the questions on which your views are sought. When answering, please indicate whether you think there are any different considerations in respect of drafting consent orders relating to financial matters and drafting consent orders relating to arrangements for children.

1. Would the role of a mediator as an impartial third party in mediation be jeopardised by that mediator drafting a consent order, once a mediated agreement has been reached?
2. Is it possible to draft a consent order without giving advice on its terms?
3. Is it appropriate to draft a consent order without giving parties advice on its terms?

Please explain the reasons for your answers.

Responding to the consultation

If you would like to respond to this consultation, please e-mail your response to Helen Anthony at executive@familymediationcouncil.org.uk by 31 January 2017.

In doing so, please indicate whether you are

- An FMCA mediator
- A mediator registered with the FMC, working towards FMCA
- An unregistered mediator
- Responding on behalf of an organisation – if so, please state which organisation
- A member of the public
- None of the above – in which case, please briefly explain your interest in family mediation

This information will help us understand both who we have reached with this consultation and whether there are any emerging themes from people with particular perspectives.