

## Family Law Mediation – A Better Approach

The reactions of practitioners who have attended our Advocacy Courses for Lawyers in relation to the use of Mediation in Family Law disputes has been interesting. Some feel that the Mediation processes naturally lend themselves to resolution of the various issues that arise in Separation or Divorce - and/or to these various issues separately, like maintenance, access etc. Others feel that the mediation techniques - patently powerful in commercial matters - are unsuited to family law cases.



Many practitioners seem to feel that the use of mediation as a means towards ultimately coming to settlement terms is lengthy and tedious - will merely impose another layer of paper and procedure to an already protracted process. Some feel that a “mediated agreement” being presented to them as a fait accompli for the purpose of being “turned into” a legal agreement, very often only presents them with additional difficulties both in terms of advising a client in relation to the terms presented and in terms of being asked to “legalise” something that can not or should not be so formalized. Some feel that the control retained by lawyers in settlement talks is necessary to bring about compromise terms.

One can fully understand all of these reactions in the light of practitioners’ very scant experience of the use of Mediation in Family Law disputes and in the light of our own experiences and baggage. Modern professional mediation is a structure built upon and around the use of techniques and technologies that are designed to assist parties in arriving at resolution of their disputes by agreement.



While a good Mediator will be empathic and compassionate, **mediation is not some sort of pseudo-counselling process: it is formal, structured and issues-focused.** Mediation is fast, effective, confidential and cost-efficient and while regard will be given to postponing or adjourning the process

for particular reasons it will only be done where such reasons are specific, agreed to by the parties and the Mediator and absolutely necessary to the conclusion of the agreement. As a professional structured process it will not succeed if endless adjournments are allowed or if the parties endlessly seek to go back to their solicitors, barristers or other **advisers who are not with them throughout the process - hence our**

**very strong recommendation for the attendance and participation of lawyers at the Mediation.** Legal attendance at the conclusion of an agreement will ensure all proper and necessary drafting of enforceable agreements and voluntary settlements and of agreement to procedures that may need to be adopted thereafter: for example, if the matter needs to go before a Court as a consent divorce or for the making of specific Orders.

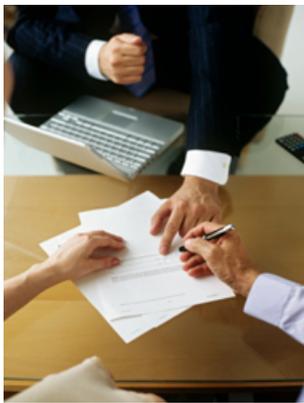
At some level all Family Law solicitors and barristers already engage a mediation mindset in dealing with Family Law matters: we consider our client’s instructions in relation to the issues involved; we consider our opponent’s position; we conjecture as to the likely outcome of a full hearing; we engage in negotiation with the other side, and they with us. On the basis of these considerations and conjecture we very often settle. The great pity is that such settlement frequently only comes at the last minute and after numerous Motions and a long time waiting for the case to be listed for hearing; time during which the parties have become even more polarized and the possibilities for reasonable future relationships for them and their children have been irreparably damaged. Engaging in a mediation process at an early stage with the parties centrally involved can bring about a result months, if not years, earlier, prevent such polarization and give us satisfied clients, closed files and even some personal/professional satisfaction as well.



### **How does Family Law Mediation work in practice.**

Mediation is assisted negotiation wherein the Mediator is a neutral third party who will neither take sides nor give legal advice - s/he will endeavour to guide and facilitate the parties in coming to their own agreement. The Mediation is structured but flexible and not overly formal; it is voluntary and there are no sanctions in the event of an agreement not being concluded; it is totally confidential.

**The process that all mediators at Mediate Ireland use** is to have a short joint session with both parties and advisors together in a room. The purpose of this is to set out the ground rules and let each party give a short opening statement. Then the majority of the rest of the mediation is carried out with the parties in separate rooms, in private & confidential discussions with the mediator. Only if agreement is reached or the mediator feels that a joint meeting between all parties will help towards conclusion of the dispute will the parties again meet face to face.



The Mediator will always be acutely conscious of assisting separating parties to work together as parents after the separation/divorce

**At Mediate Ireland we feel that it is important that a separating couple have their own independent legal advice before, during and after the mediation.** This is very

different from other mediation services providers who specifically exclude lawyers from taking an active role in the mediation. A mediated agreement will usually involve technical arrangements to be drawn up and/or entered into thereafter - to give full legal effect to the couple's own agreement. Whilst we provide services directly to the parties we strongly recommend, that they have Solicitors and/or Counsel with them, or immediately available to them, for the mediation process. The solicitors will understand the parties' own agreement far better if they are present or involved when it is reached - rather than being presented with it later on.

By definition there will be compromise but this will never be forced on participants and will only emerge through the processes in a context of fairness recognized and accepted by the parties and in which neither feels that their needs were ignored - both can accept and so both can move on. Traditionally we view compromise as "middle ground" which may not necessarily be the best ground and which often discounts initial suggestions without reflection upon which of those were more thoughtful, reasonable or fair - thus it can often reward unreasonable initial positions and punish



reasonable offers; we often "set out our stall" by reference to how far we will be prepared to move, we know that the other side will do similarly; sometimes we push our clients to propose positions that are unreasonable so that we will have "room to manoeuvre" - this exacerbates mistrust when mistrust is already at a low point and slows down the process. Thus compromise in Mediation can only be achieved by the full satisfaction and acceptance thereof by both of the parties rather than the arrival at a middle ground by reference to false starting positions



Mediation helps the parties to focus on what is truly important to them and what is not. The parties are in conflict, ergo they are fearful at some level and their minds are filled with a mixture of anger, resentment, fear, doubt and regret. The mediation process will enable and allow the thorough exploration of the needs of both parties through listening, restating, generating alternatives and other options, evaluating these and beginning the process of agreement.

With Mediate Ireland mediation is structured but not too formal; it is empathic but it is not counselling; it leads to enforceable agreements and agreements as to how to proceed to court where appropriate; it facilitates the parties in coming to settlement terms but it never imposes them; it is voluntary and confidential; it is fast, efficient and cost-effective; it seeks to promote future relationships between parties and their children; it can be immensely satisfying for both clients and practitioners

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**Mediate Ireland brings people together to resolve their disputes, QUICKLY, COST EFFECTIVELY, and CONFIDENTIALLY, because people want to move on with their lives.**

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