

## **ALTERNATIVE DISPUTE RESOLUTION**

### **MEDIATION**

Family mediation is a method of helping couples who have separated, and who may have decided to judicially separate or divorce, to negotiate their own terms of separation, taking account of all the parties' needs, including any children. Mediation is based solely on the decisions of the separating couple and is a confidential service. Mediation brings the parties together to negotiate their terms. Mediation is a form of alternative dispute resolution (ADR) or one could say "appropriate dispute resolution"!

### **MEDIATORS**

Mediators are trained. Mediators are there to assist the parties in facilitating their negotiations only. They are impartial persons who do not offer solutions or suggestions to the parties but rather facilitate the parties in reaching a mutually acceptable resolution to their issues based solely on their own ideas and suggestions. Mediators are not marriage counsellors nor legal advisors, and do not persuade the parties to stay together. Mediators are not judges and do not provide parties with legal advice or impose conditions on parties. A mediator will meet the parties individually initially and thereafter together. The role of the mediator is:

- To facilitate
- To be impartial
- To see both parties individually and together
- To bring the couple together
- To create an atmosphere of good faith
- To create a space where both parties are equals – with neither party dominating
- To ensure both parties are given an equal opportunity to be heard
- To allow the parties to make suggestions to resolve their issues
- To create a space for co-operation and responsibility
- To facilitate parties reaching an agreement which they deem to be fair, equitable and workable.

### **WHAT CAN MEDIATION ACHIEVE?**

Mediation encourages parties to cooperate with each other in working out mutually acceptable arrangements on matters including, but limited to, the following:

- Parenting of children
- Custody, access, guardianship
- Living arrangements
- Education decisions and special occasions
- Maintenance- spousal and child
- Division of assets
- Family home
- Other property

- Finances
- Pensions
- Succession rights/inheritance
- Ancillary issues relating to the separation

## THE LAW

- Deed of separation- a mediated agreement can form the basis of a deed of separation.
- Basis of judicial separation or divorce- a mediated agreement can form the basis of a decree of judicial separation or divorce and ancillary orders.
- The Judicial Separation and Family Law Reform Act 1989- this act provides the legislation under which a decree of judicial separation may be granted
- Family Law Act 1995- this act provides the legislation under which ancillary orders to a judicial separation may be granted.
- Family Law Divorce Act 1996- this act provides the legislation under which a decree of divorce and ancillary order may be granted.
- Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 – this act provides for, inter alia, the regulation of separation of cohabiting couples
- Guardianship of Infants Act 1964- this act provides the legislation under which matters relating to access, custody and guardianship orders may be made.
- Family Law (Maintenance of Spouses and Children) Act 1976- this act provides the legislation under which maintenance orders may be made.
- The legislation prevents the mention of mediation and what occurred in mediation.

A mediated agreement may be translated into orders which could be granted under the various legislation above and granted by a court, and this is particularly pertinent to the advantages of lawyer led mediation.

## ADVANTAGES OF LAWYER LED MEDIATION

Mediation can also be provided by lawyers. The mediator can be a qualified lawyer and the parties can engage lawyers to attend the mediation with the. The advantages of lawyer led mediation encompass all the advantage as above in addition to the following:

- Expert legal knowledge
- No power imbalance between parties
- Immediate legal advice on the mediated proposals
- Ability to agree matter capable of being made orders of the court
- Reduced legal fees, saving the cost of full litigation
- Saving time ensuring the mediation is conducted in manner conducive to making orders
- Saving the double cost of mediator and subsequently lawyers' advice on the mediated agreement.
- Experience of knowing the outcome of agreements and implementation of same
- Expert knowledge of court outcome versus mediated outcomes
- Can provide context of proposals at mediation and expectation of court outcome

- Lawyers can assist the client to explore outcomes and resolutions they may not have thought of
- Lawyers assist with removing the emotion from the process providing the client with the ability to see alternative proposals and resolutions, and narrowing the issues
- Lawyers generate creative resolutions based on their experience
- Lawyers assist in weighing the merits of a settlement proposal

## ADVANTAGES OF MEDIATION

- It is confidential. This is now legislated for by Section 10 of the Mediation Act 2017
- It is non-judgemental
- It is non-adversarial
- The parties are in control
- Encourages channels of communication
- It can be a free service depending on the provider
- Even if one pays for mediation it is usually cheaper than a court process
- It can be less stressful than litigation
- It can be substantially faster to resolve disputes through mediation than through litigation
- Each mediated agreement is particular to the needs of the individuals involved
- Permits creative settlements which may not be achieved through litigation
- The agreement is reached on the basis that it is acceptable to both parties
- The parties can address future needs and situations, with a future proof agreement
- Decisions that are jointly agreed have a better chance of being honoured
- No decision is imposed on the parties
- Parties have an opportunity to communicate directly with one another while also having the comfort of defaulting back to the mediator as facilitator
- Parties as parents have an opportunity to agree a parenting plan particular to their needs and circumstances
- Mediation is a process through which conflict may be avoided
- Mediation is voluntary. Either party can cease participation at any stage
- A mediated agreement can form part of a judicial separation or divorce or any other family law proceedings

## DISADVANTAGES OF MEDIATION

- Not legally binding, however Section 11 of the Mediation Act 2017 states that the parties shall determine if and when a mediation settlement has been reached between them and whether the mediation settlement is to be enforceable between them
- No legal protection
- No court orders
- No facility/penalty in the event of default and in particular no recourse to recoup arrears of maintenance in particular

- Maintenance agreements still need to be made a Court order under the Family Law (Maintenance of Spouses and Children) Act 1976
- No formal pension adjustment orders can be made, meaning the trustees of the pensions are not on notice of any agreement and will still regard the other party as the spouse (if married) in the case of death of the first spouse
- Agreements as to inheritance rights and the agreement to extinguish same can give rise to difficulties in the event of one of the parties' death, wherein the surviving spouse challenges the will and disputes the mediated agreement
- Mediated agreement is not legally binding
- Custody and access, parenting and primary care and control agreements are not orders and are not binding and can be withdrawn at any time with no protection, and will probably necessitate a court application
- Usually still need legal advice
- Can be a fishing expedition by one side to seek out one parties' position
- It will not always result in settlement
- It can be dependent on the quality of the mediator
- It is not appropriate in circumstances where child protection issues arise or there is a severe imbalance of power
- It requires full voluntary disclosure and trust between the parties in this regard

## CONCLUSION

Mediation has been used in family disputes and resolutions for many years and it is surely to rise in the future with such facilities as the mediation which is offered to those already in the court process in Dolphin House (Family Law District Court in Dublin), and given the advice of all solicitors taking on a new family law case, who are now obliged, under the Mediation Act 2017 to advise and encourage mediation. Also, persons engaging in family mediation have the comfort of knowing that they can avoid court by resolving their dispute through mediation but also knowing that if they do not reach a resolution the court process is always open to them. It is envisaged the Mediation Act 2017 will facilitate a rise in mediation, and a fall in court applications, and the use of lawyer led mediation can ensure a mediated agreement capable of implementation by a court.

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5<sup>th</sup> October 2023