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**Collaborative mediation in cases of separating and divorcing  
couples  
by**

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**Context and Background**

This paper sets out a model of mediation that I believe can address the concerns of Solicitors and Mediators in relation to the present models of mediation for separating or divorcing couples. As a consequence of mediation cases that I have, I have devised a model to mediate with couples where there is high net worth. There is nothing to say that the same model can't be used in most family mediations.

My background is as a litigation Solicitor (litigation partner in A& L Goodbody for 15 years) where I mostly did commercial litigation but also some contentious family cases. I trained as a Mediator with both CEDR and ADR Group and also have attained a Diploma in Mediation from UCD. I have practised mediation for the past 3 years and have over 600 hours of actual mediation under my belt. The bulk of my work is as a workplace and commercial Mediator but my family practice is growing as a percentage of my cases. I am the President of The Mediators' Institute of Ireland and I am on the Council of the Irish Commercial Mediation Association.

Anecdotally, I have heard from Solicitors that they don't want to send their clients to mediation as it is "wishy-washy" and that the agreements reached have, in the main, to be undone and a new agreement arrived at. I have heard it said that

Mediators are too “touchy – feely” and that they don’t deal with commercial or financial issues – for example - the hiding of assets. Mediators complain that when Solicitors raise the possible use of mediation with their clients, they don’t do so in a way that engenders sufficient confidence in the process.

More and more I am being approached to mediate these cases, selected on the basis that I will bring a more business-like approach to the case. That has led me to devise the collaborative family mediation model which seeks to address the issues above. The model is still in formation and if anyone has any suggestions as to how it can be improved please let me know.

### **Basic Tenets of Mediation**

One of the basic principles of mediation is that it is a **voluntary process** – either party or the Mediator may leave the process at any time. There is no notice period and no cooling off period before or after except where the parties agree. Another fundamental principle is that there is **confidentiality** both of and within the process. This, in a way, is less important in a family mediation in relation to advisors but can be a very useful provision to stop the parties from talking to other family members. Having said that I believe that it is not realistic to suggest that in a mediation circumstance (especially when it will be going on over a number of sessions) that the parties may only talk to their professional advisors so I provide for one nominated confidante to be specified in the agreement to mediate. The other party may object to the person selected by the other party but only on reasonable grounds.

The Agreement to Mediate is **legally binding** on the parties and on the Mediator. This agreement is signed at the beginning of the mediation by the two parties and by the Mediator and covers, inter alia, the confidentiality provisions, the fact that the Mediator is in charge of the process, and the fact that the Mediator can’t be called to give evidence or to produce documents in any subsequent process. It will also deal with the fees to be charged and how they are payable.

The agreement specifically refers to both parties having to disclose all of their assets, liabilities, income and expenditure and the fact that they will be required to swear a **Statutory Declaration as to Means**. It provides that in the event of the declaration being found to be inaccurate, then any mediation agreement entered into will be voidable and the confidentiality provisions of the mediation will lift.

The agreement makes it clear that at all times the parties should seek the advice of their Solicitor and notes that they have done so. The onus is on the parties to seek professional advice before the final Mediation Agreement is signed and they are strongly advised to do so.

### **The Role of the Mediator**

It is sometimes easier to define the role of the Mediator by what they aren’t. The Mediator is not an advisor, a judge, an Arbitrator, a therapist, nor a counsellor.

Their role is to facilitate the parties to come to an agreement – in family mediation cases - in relation to the children and in relation to the assets and income.

In the collaborative family mediation model the Mediator is like a project manager who assists the parties in negotiating the parenting plan, co-ordinates the assembly of the information to comprise the schedules of the Statutory Declaration as to Means, who works with the parties and their advisors to divide the assets and agree regular maintenance payments and who coaches and empowers the parties how to negotiate with each other into the future.

It is the Mediator's responsibility to produce the draft Mediation Agreement reflecting the agreements reached by the parties. The draft is taken by the parties to their advisers prior to its being signed. When all are happy with it, it is signed within the mediation and is, and is said to be, legally binding. The parties are welcome to bring their advisers into the mediation.

### **Basic Principles**

This is a collaborative process between the Mediator, the parties and the legal and other advisers. All work together to a common end. The Mediator values the ongoing input from the parties' Solicitors and other advisers and works with them when appropriate and when specific issues arise. The Solicitors are kept in the loop and are encouraged to keep up the relationship with their clients throughout the process. If the process breaks down, the Solicitors may at that stage go the more formal route of litigation. The information that they would have received from the mediation would not have been of such a confidential nature as to constrain them from acting. Unlike in the collaborative law model, the Solicitors retain their clients even in the event that the mediation process ends.

### **Who are the Mediators**

Firstly the Mediator will have to be experienced in carrying out mediations where relationships are involved and will have to be experienced at working with disputing parties in the same room. In family cases the bulk of the work is carried out by the two parties and the Mediator working together in the same room. (This is different to the commercial model where as a rule the parties are kept separately).

The Mediator will have to follow the model so that, for example, even if the Mediator is not legally qualified they will insist on the parties swearing the Statutory Declaration as to Means and going through the various stages of the process.

The selection of the Mediator for each case will depend on the circumstances of the case – if the assets are very complicated or involve companies and / or partnerships and/ or businesses then a Mediator with commercial experience would be selected either to be the sole Mediator or to be a co- mediator for the sessions relating to the assets.

The EMS Mediators would all be on the EMS panel and would also have a current Practising Certificate from The Mediators' Institute of Ireland. A practising certificate from the MII requires a minimum standard of training and skills, requires the Mediator to sign up to the Code of Ethics, to be subject to the complaints and disciplinary processes of the MII and to have professional indemnity insurance.

They would have experience of mediations with a relationship aspect so typically would be family or workplace Mediators. Some will be commercial Mediators who may or may not have experience of mediations involving relationships. A co-mediation model may also be used depending on the complexity of the case.

## **The Process**

### **Initial Contact**

One of the parties or their Solicitor contacts EMS seeking a Mediator and discusses the case with them. If the parties have agreed to go into mediation then an EMS Mediator contacts both parties and / or their Solicitor and arranges to meet the parties separately. If only one of the parties makes the approach then an EMS mediator will contact the other to offer mediation.

### **Pre Mediation meeting**

The Mediator meets each of the parties separately – they may have their Solicitor with them – that is the client's choice. The Mediator will explain the process of mediation and how it works and answer any queries. The Mediator will go through the terms of the Agreement to Mediate with the client and Solicitor. The Mediator will ask the client to answer various questions to establish for the Mediator the decision making capacity of the client, whether there is any history of physical abuse to the partner or to the children, whether there is any substance abuse of either party. The purpose of these questions is to ensure that the parties are able to negotiate with each other on as equal a basis as possible.

The main purpose of the first meeting is to give the client and the Solicitor confidence in the Mediator and in the process. If the parties come without their Solicitor they are strongly advised to consult their Solicitor on their rights before continuing the process.

The Mediator will also inform the clients that there is no clean break; that parts of any agreement they come to may be overturned by the Court; that if there is too long a gap between the mediation and an application for divorce they may have to update the agreement reached and the schedules to the Statutory Declaration as to Means and that agreed access rights to children may be overturned. They will also explain the concept of no fault and of provision rather than division.

### **First Joint Meeting**

The meetings are usually held in a meeting room in a hotel near to where the parties are located. For the first meeting sometimes it is necessary for each party to have their “own base” until they become accustomed to and have confidence in the process and so two rooms will be used. I conduct mediations in a formal way – i.e. I sit at the head of the table and the parties to each side of me with their lawyers on the other side of their clients. Some Mediators prefer not to use tables or use coffee tables but I prefer the use of a table.

Each case depends on its own circumstances but in the main the first meeting is to start getting a handle on the assets and giving to each party a pro forma schedule to assist them to compile their outgoings and income, assets and liabilities. The Mediator will want to get a general sense of the assets at this stage. If valuations of the assets are required then a process of how this is to happen is agreed by the parties.

The children will be discussed, the Mediator finding out relevant information about them to build a picture of the family. A schedule with headings of items to be discussed in relation to parenting will be given to the parties.

The Mediator will help the parties to deal with any urgent issues such as access, holidays, Christmas discipline etc.

Whatever the parties agree to in the mediation session is written down as the mediation goes through and at the end of the session is signed by the parties and by the Mediator. Some of the agreements may be specifics in relation to finance, visiting rights, etc and some may be how the parties will behave with each other in front of the children and that they won't bad mouth each other. I describe the agreements as binding on the parties but of course some of the agreements mentioned above are effectively not enforceable.

The handwritten agreement is then typed up and sent to the parties with a photocopy of the document that they signed.

The reason for getting the signatures and for the Mediator signing is to enforce the concept that this is quite a formal process and that it is a three way agreement rather than just two way. It adds to the concept of the process having to be taken seriously.

The first meeting, like the subsequent ones, tends to take about 3 hours but this is a matter for the parties and the Mediator. If either of the parties is not up to this the meetings will be for a shorter period.

One of the main things that the Mediator is trying to do in the first and subsequent meetings is firstly to model behaviour – i.e. act in a very civilised and mannerly way with the parties so that that is copied when the parties are together. Secondly they are working to help the parties to relearn how to negotiate with each other and to empower them to negotiate directly –the couple will have to make many agreements with each other over the years in relation to children and finance and won't always have or need to have a Solicitor or Mediator to help them.

Before leaving the first meeting the parties are asked to start to compile the information required for the Statutory Affidavit as to Means and the Parenting Plan.

### **Second and Subsequent meetings.**

This usually starts with the Mediator going through the points of agreement reached at the previous session getting updates or information on progress. The financial issues are then progressed with a view to getting the parties to the point where they can both swear the Statutory Declaration as to Means. This takes quite some time and there are discussions between the parties as the information is being compiled as to the veracity of the figures. I encourage open discussion in relation to these issues and encourage the parties to seek legal, financial, tax and pension advice.

The meeting then moves to the parenting aspects both long term and short term issues.

Although nothing is agreed until everything is agreed as the mediation progresses more and more long term agreements start to fall into place – so some of the agreements arrived at in the individual sessions will transfer to the final Mediation Agreement. It is very important for the parties to arrive at agreements on the way through the process and it indicates progress.

Again the Mediator is working to model behaviour and to coach the parties to be able to negotiate with each other.

Agreements as they are reached are written down and signed at the end of each session.

I find that the natural time between meetings is 3 weeks but that depends very much on the circumstances.

### **Swearing the Statutory Declaration as to Means.**

When all of the financial information is available the schedules to the Statutory Declaration are compiled and agreed by the parties and each takes the draft Declaration with the schedules to their Solicitor who advises their client on the requirements in relation to the Oath and what will happen in the event that the information is not correct. Other advisors may also wish to review the information before it is sworn.

The clients are again strongly advised to consult their Solicitors as to their rights particularly after the Statutory Declaration has been sworn as the true picture of the assets may only be known for the first time.

### **Division of assets**

With the benefit of the advice from their Solicitors another financial .tax, pension and accountancy advisers the parties are ready to start the negotiations on how the assets should be split. By this time the parties will probably have been through a number of mediation sessions and will have started to be more comfortable negotiating with each other and they will probably have a concept of what it is that they want in relation to the assets and income.

As items are agreed they are noted. This division will probably not happen in one session and the parties may want to opt now for shorter more frequent meetings interspersed with visits to their advisors.

Finally a financial package is agreed and a final draft prepared.

### **Agreement of Parenting Plan**

At the same time progress is being made in relation to the children which also dovetails with the financial issues – both in relation to where they will live and the maintenance payable in respect of them. The agreement will also cover residency, access, education, health and the items usually to be found in parenting plans – and incorporate appropriate items from the standard Affidavit of Welfare.

### **Mediation Agreement**

A draft of the Agreement to Mediate will be prepared and discussed – this agreement will incorporate not only the financial agreements and the parenting plan but also clauses relating to Succession Rights, future disagreements, and the binding nature of the agreement. The Agreement will also have a “full and final” settlement clause though the clients will be told that this may be overruled by the Court.

When the parties have come to a final but non binding agreement they will again seek the advice of their Solicitors and other advisers as appropriate. The advice sought at this stage should only relate to the specific wording and legality of the draft – the items agreed by the parties in the mediation would usually remain untouched as the Solicitors will have been involved in the process all the way through. Once the Solicitors agree the draft the Mediation Agreement is signed by the parties and the Mediator becomes binding.

### **Divorce**

If the parties wish a divorce they will consult their Solicitor who will manage that process. If the Mediation Agreement is not sufficiently current then the parties will have agreed in the Agreement to go back to mediation to up date the various schedules and the parenting plan to take account of developments since the mediation Agreement. A new Mediation Agreement will then be signed and used to found the divorce application.

## **General Issues**

### **Contact with Parties and advisers between meetings**

I explain to the parties at the beginning that I will work with them and their advisers both jointly and separately as I think best to move the mediation forwards. I agree that I can meet or contact the parties and their advisers in any combination but will keep the clients informed of what is going on.

It is useful to talk to the parties separately before the joint sessions to see if there is any particular aspect bothering them.

### **Solicitors and Advisers at meetings**

I don't have a problem with this but there is no doubt that having other parties in the room changes the dynamic. If the Solicitors and advisers are there to provide information and advice particularly in relation to legal aspects or specific financial issues that can be very helpful. They have to remember that the parties have agreed to mediation, its future focus and desire to come to an amicable agreement. What is not helpful is where they start to take an adversarial role or trying to take the negotiating role away from the parties. As said above at each session the parties are being coached to negotiate with each other into the future without the use of third parties.

Sometimes it is more productive for the Mediator to work with the Solicitors without the clients.

### **Fees**

These are charged on an hourly rate and a fee note is sent at the end of each session.

## **Benefits of Collaborative Mediation**

### **Benefit to Clients**

The main benefit is that the clients get the best of both worlds. They have their Mediator to assist them to coming to an agreement but they also have the comfort of knowing that during the process their advisers are and can be involved within the process to ensure that they are being given the advice and support that they need to make informed decisions.

They have a "one-stop" process which deals with their present and future situations in relation to the interlocking issues of children and finance.

They remain in control of the process and can control the pace.

They can come to a final and binding agreement within the process.

They can be as assured as they can be that all assets have been disclosed by virtue of the swearing of the Statutory Declaration as to Means.

They can resolve the issues between them and negotiate their own outcomes in a non adversarial way.

It is quicker and more confidential than Court processes.

They retain their own advisers even if the process breaks down.

### **Benefit to Solicitors**

They retain the relationship with their clients throughout the process.

They can be involved in and assist in the process

They are involved in the drafting of the Mediation Agreement.

They don't have to give up their clients to another Solicitor if, through no fault of their own or their clients, the process breaks down.

**Benefit to Mediators**

They are assured that the clients are receiving appropriate advice during the process and are negotiating on the basis of it.

They can move the process forwards or aspects of it with the help of the Solicitors or other advisers.

They can get input on current thinking of the Courts in relation to separation and divorce and amend standard clauses appropriately.

They know the clients will be fully advised on their rights and obligations before they swear the Statutory Declaration of Means and the Mediation Agreement.

They know that the clients will be more comfortable that the Mediators and Solicitors are working collaboratively.

If you have any queries or suggestions I would be delighted to hear them. This model is in its infancy and is sufficiently flexible that it can accommodate change.

Thank you

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