



*Law Society of Ireland*

# **FAQS ON MEDIATION IN DISPUTES ARISING IN THE ADMINISTRATION OF ESTATES AND TRUSTS**

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## **1. WHAT IS MEDIATION?**

Mediation is an internationally recognised dispute resolution process where an impartial person facilitates the parties to a dispute to explore the area(s) of a dispute and where possible assist them in reaching a mutually acceptable agreement.

It is an informal private process, which gives the parties the opportunity to resolve the issue themselves.

Other recognised dispute resolution processes are:

- Litigation - an adversarial process fought out in the Courts where there is a winner and a loser.
- Arbitration - an adversarial process differing to litigation only in that it is private and the Arbitrator is paid by the parties.
- Negotiation - direct contact between the parties with no impartial third party which can give rise to a lot of game playing between the parties.
- Neutral evaluation - where judgement is given on usually a very specialised net issue by an expert on such issues. It is also known as expert determination.
- Conciliation - mainly only used in construction disputes where the solution is not binding unless the parties agree.

Mediation is by far the most preferred form of dispute resolution.

*Mediation is not counselling. Mediators have no decision making power.*

## **2. WHY SHOULD I CHOOSE MEDIATION?**

Any important conflict can be a time of great stress. In the middle of a conflict it is difficult both to listen to the other person and also to have your own point of view heard.

This makes reaching agreement difficult.

Mediation is a process designed to facilitate communication, reduce conflict and support the parties

to engage in problem solving in order to reach mutually acceptable agreements that meet the needs of those involved.

A distinguishing feature of mediation is that nobody tells you what to do. You have full control of the solution of the dispute and hold all the decision making power. A trained mediator will assist the parties but unlike other processes a resolution will not be imposed upon you. It is generally quicker than more formal conflict resolution processes and research indicates that conflicts are resolved in about 75% of cases. Judges now expect the parties to litigation to have at the very least considered mediation before a case is presented for hearing before them.

### **3. WHY IS MY SOLICITOR RECOMMENDING MEDIATION?**

Your solicitor is recommending mediation because it has the following merits over litigation;

- it is quicker in that mediation can be organised within 2/3 weeks
- it is confidential, only the parties attending know what occurs
- it is an informal flexible process
- it empowers the parties to the dispute to resolve the issues themselves rather than have a solution imposed upon them by a third party
- it is far less costly
- it preserves the relations between the parties going forward into the future

### **4. WHAT IS THE MEDIATOR'S ROLE?**

The Mediator is in charge of the process which means that the mediator will decide whether or not to see the parties separately or together or both!

The mediator's purpose and goal is to help them settle their differences by:

- creating a climate in which each party can participate in the process in good faith
- encouraging an attitude of co-operation and responsibility between the parties
- supporting the parties in dealing with difficult emotional issues that may be preventing them from reaching agreement
- helping the parties negotiate an agreement that they believe to be fair, equitable and workable.

### **5. WHAT IS THE OUTCOME OF MEDIATION?**

The outcome of mediation is a written legally binding document that sets out the details of the agreements reached.

Final agreement will only be reached after the advantages and disadvantages of each option have been discussed at mediation between the parties with the mediator.

The parties may reach an agreement on some or all of the issues in dispute.

### **6. WHAT IS THE ROLE OF MY SOLICITOR IN THE MEDIATION?**

Your solicitor will initially help you in preparing documentation for the mediation. During the mediation your solicitor's role is, as always, to give you independent legal advice. Your solicitor may attend all or some of the mediation and assist you with the case summary and opening statement or may simply be on call. If an agreement is reached at a mediation which your solicitor attends he/she will be involved in committing it to writing.

## **7. WHO PAYS THE COSTS OF MEDIATION?**

Normally all parties to a mediation will share the mediator's fee between them. However in disputes arising in the context of the administration of a deceased's person's estate or a trust, the executors (in the case of the administration) or the trustees in the case of a trust) may, in the overall interests of the estate or the trust, agree to pay the mediator's fee out of the funds of the estate or the trust.

Parties generally pay their own solicitor's costs for attending the mediation.

## **8. WHERE IS THE MEDIATION HELD?**

The mediation will be held at a neutral venue acceptable to both parties, usually in rooms hired for the day at, for example, a hotel. The parties pay for the cost of room hire. Each party to the mediation will have a separate room and the mediation itself will take place in a third room.

## **9. FOR HOW LONG DOES THE MEDIATION GO ON?**

Some mediations, for example family separation mediations, are comprised of 1 or 2 hour meetings over several weeks in order to give the parties time to consider the issues between sessions. However disputes arising in the administration of trusts and estates or disputes in respect of which Court proceedings have been issued usually have one full day allotted for the mediation. If no agreement is reached on that day the mediation process will conclude.

## **10. HOW/WHERE DOES MEDIATION FIT IN WITH LITIGATION?**

The parties can decide to attempt to resolve a conflict through mediation at any stage whether before litigation has started or during the litigation process. To facilitate mediation the litigation process will be temporarily suspended. If the matter is settled at mediation then the mediated settlement agreement can be treated in the same way as any other settlement agreement. If no settlement is arrived at through the mediation process then the litigation continues.

## **11. ARE EITHER PARTY DISADVANTAGED IN THE LITIGATION PROCESS IF THERE IS AN UNSUCCESSFUL MEDIATION?**

No. The mediation process is entirely confidential and no documents or other evidence produced in the course of the mediation process can be used by the other party in any subsequent litigation. The argument has been made that if the mediation is unsuccessful some party may use something they found out at mediation to their advantage in later litigation. If it does happen that one of the parties finds out something at mediation which they did not already know, it is highly unlikely that that information would not inevitably have come out in the litigation process anyway.

## **12. SO IF THE DISPUTE IS NOT SETTLED AT MEDIATION HAS THE MEDIATION PROCESS THEREFORE BEING AN ENTIRE WASTE OF TIME, MONEY AND EFFORT?**

Most disputes settle at mediation. A very high proportion of those that don't settle at mediation settle shortly afterwards for the simple reason that mediation can clarify the issues for the parties who then subsequently view matters in a different light. Equally the mediation process can have the effect of making it very obvious to all of the parties which party/ies is/are being unreasonable and/or has a conflict of interest and/or is saying one thing but is doing something else. Mediation, even when unsuccessful is seldom of no use whatsoever. From the mediator's point of view, whilst the goal is always to assist in facilitating the parties to reach a solution, the mediator's own code of ethics at the minimum oblige the mediator to "to do no harm".

**13. IF ONE PARTY TO LITIGATION SUGGESTS MEDIATION AND THE OTHER PARTY REFUSES ARE THERE ARE ANY CONSEQUENCES FOR THE LITIGATION?**

*Statutory Instrument 502 of 2010 RSC (Mediation and Conciliation) 2010* now makes provision for there to be a cost sanction awarded by the Judge against a party who refuses to mediate a dispute. Mediation is habitually used in the Commercial division of the High Court and it is anticipated that the costs sanction may be used by Judges increasingly to stop the Courts being “clogged up” with cases.

**14. CAN A MEDIATION AGREEMENT BE LOOKED INTO OR OVERTURNED BY A COURT?**

No. A settlement agreement reached by mediation is the same as any other settlement agreement. The Court will not look behind it. As a matter of policy neither will the Court look into the conduct of the mediation and any mediator who is called before a Court to give evidence of a mediation would plead privilege.

**15. IS IT ADVISABLE THEREFORE THAT THE PARTIES HAVE LEGAL ADVICE AVAILABLE TO THEM THROUGHOUT THE MEDIATION PROCESS?**

Yes it is advisable, especially if the mediation is to settle a dispute in respect of which Court proceedings have already issued.

**16. DOES MY SOLICITOR HAVE TO PREPARE FOR MEDIATION IN THE SAME WAY AS THEY WOULD PREPARE FOR LITIGATION?**

Yes, a solicitor attending a mediation should prepare in advance for it as if it was litigation and should have available to them all information which might be necessary, including property or other valuations, accounts, affidavits, statements, reports, etc.

**17. IF THE MEDIATION CONCERNS A DISPUTE IN RESPECT OF WHICH LITIGATION HAS ALSO ISSUED IS THE QUESTION OF WHO PAYS THE LEGAL COSTS OF THAT LITIGATION A MATTER TO BE DEALT WITH AT MEDIATION?**

All matters which would be part of Court proceedings are also part of the mediation process including payment of costs by one side or the other. All costs therefore of all advisors to the litigation including expert witnesses and all solicitors and barristers fees should be quantified and available for the discussion and settlement of the question of costs at the mediation.

**18. FOLLOWING THE CONCLUSION OF THE MEDIATION DOES THE MEDIATOR HAVE ANY FURTHER INVOLVEMENT WITH THE PARTIES?**

No, unless some further matter arises and the parties wish to go back to mediation concerning that. Sometimes, particularly where the question of the administration of a Trust is involved, the parties may agree to write into any settlement agreement the fact that should another dispute arise they will in the first instance attempt to resolve it through mediation.

**19. ARE MEDIATORS SPECIFICALLY TRAINED?**

If a mediator is a member of a professional mediation body then they are specifically trained. That training would include training in the many theories underpinning mediation, for example communication and systems theories, as well as practical training.

## **20. HOW DO I FIND A MEDIATOR?**

It is important to establish that the mediator you choose is properly trained and preferably has some experience of the area of law in which the dispute has arisen.

There are a number of professional mediation bodies who hold databases of their members for example, The Mediator's Institute of Ireland ([www.themii.ie](http://www.themii.ie)) and Centre for Effective Dispute Resolution (CEDR) ([www.cedr.com](http://www.cedr.com)) from which you can choose a mediator. The Law Society also has a list of solicitors who are qualified mediators and each solicitor's profile sets out their areas of practice. In the practice area of the administration of estates and trusts STEP, the Society of Trusts and Estate Practitioners ([www.STEP.ie](http://www.STEP.ie)) has a list of members who are also mediators.

## **21. WHAT IS THE COST OF MEDIATION?**

Some mediators charge a flat fee for a one day mediation including all of the ancillary work (reading the documents submitted etc.)

Some mediators charge an hourly rate.

Some mediators charge a specific fee for a one day mediation up until 5.30pm, and then an hourly rate thereafter.

All mediators are obliged to give details of their costs in advance and you will be asked to sign an Agreement to Mediate which sets out those costs before the mediation commences.

## **22. IS THERE A LIMIT TO THE AMOUNT OF PEOPLE WHO CAN ATTEND MEDIATION?**

No, but if the numbers are large more than one mediator may act. This is called co-mediation. Co-mediators will see all parties together.

Sometimes a mediator who is newly trained may sit in on the mediation to assist and to learn from the mediator. The same confidentiality binds such a mediator.

## **23. WHAT HAPPENS IF ONE OF THE PARTIES TO A DISPUTE CANNOT ATTEND THE MEDIATION?**

A fundamental tenet of mediation is that all people with decision making power must attend the mediation or sign a Power of Attorney in favour of somebody who is attending the mediation for them.

Your solicitor can assist you in preparing such a power of attorney. In that event the person who granted the Power of Attorney would be entitled to hear from their Attorney the result only of the mediation and not how that result was reached.

## **24. CAN A PARTICIPANT IN A MEDIATION BRING A FRIEND OR OTHER RELATIVE WITH THEM TO SUPPORT THEM?**

The mediator's role is to support the parties through the mediation process. It should not therefore be necessary for "a support" person to attend unless the person taking part in the mediation has an intellectual or other disability.

However it can be agreed in advance with the mediator and with the other parties to the mediation that a "support person" attends, generally on condition that they would be asked not take any part in the mediation process but be present only. Such a person would be bound by the same rules of confidentiality as the participants.