Title of Presentation:
Mediation in Family Law - Developments in the Circuit Court

Presentation by His Honour Judge Keenan Johnson to the Annual Legal Aid Board Conference at Blackall Place, Dublin Wednesday, September 25th, 2019

Good morning everyone and thank you for your kind invitation to speak at your conference. Before I start I want to compliment each and everyone of you for the excellent service provided by the Legal Aid Board and the Family Mediation Service. I never cease to be amazed by the standard and quality of service that the legal aid solicitors and counsel provide to their clients. Likewise, the work undertaken by the Family Mediation Service is invaluable and deserving of wholehearted judicial support. Accordingly, it's a great honour and privilege for me to address you this morning.

Background

The current family law regime in Ireland is administered by the courts. Its scope has expanded considerably over the last 25 years with the advent of legislation and constitutional amendments which have abolished the concept of illegitimacy,[1] given rights to cohabitees[2], recognised divorce[3], recognised same-sex marriage[4] and recognised the paramount rights of children[5]. Accordingly the concept of family now includes heterosexual marriage, same-sex marriage, cohabitation, divorced spouses, remarried divorced spouses and children who are conceived either naturally or as a consequence of donor – assisted human reproduction. The extension of the definition of the family has resulted in an increase in family law litigation and has added to its complexity, given the large variety of highly emotive relationships that come within its ambit. This change of circumstance and growth in case loads, demands a new

[1] Status of Children Act 1987
[2] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
[3] Article 41.3,2 of the constitution as amended following the 15th Amendment Referendum of the Constitution which was approved on 24 November 1995 and signed into law on 7 June 1996; Family Law (Divorce) Act 1996
[4] Article 41.4 of the Constitution as amended following the 34th Amendment Referendum of the Constitution held on 22 May 2015 and signed into law on 29 August 2015: Marriage Act 2015
[5] Article 42 A of the Constitution enacted following the 31st Amendment Referendum held on 18 October 2013

approach instead of the traditional judicial role of adjudicating in the context of an adversarial process.

Family law as practised in Ireland is founded on the adversarial system which is "rights-based" and like our legal system was inherited from the English. Viscount Simon LC commenting on the adversarial system has said that, "A court of law … is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it"[6]. The adversarial system promotes conflict instead of resolution and most child experts agree that high-level conflict between parents is bad for children.[7]

Alternative Dispute Resolution and in particular mediation offers a non-adversarial "interest based" dispute resolution process. It focuses on the interests of the party as opposed to their respective rights and by doing this it can reduce conflict. In family law disputes the parties will have a long history of relationship and because of this and the likely need to maintain that relationship going forward, a resolution that is based on the interests of the parties as opposed to their rights has a better prospect of maintaining the relationship for the benefit of the parties and their family. Acting in a purely adjudicatory role a judge is obliged to determine matters on the basis of the legal rights of the respective parties, often this is inappropriate in family law, as it does not allow the emotional backdrop and feelings of the parties in other words the interests of the parties to be taken into account.

It is fair to say that most family law practitioners adopt a reasonable and considered approach and endeavour to resolve disputes without resort to the courts. However a

[6] Hickman v Peacy [1945] AC 304 at 318.
[7] Catherine H Shelton and Gordon T Harold "Interparental Conflict, Negative Parenting and Children's Adjustment: Bridging Links Between Parents' Depression and Children's psychological Distress" Journal of Family Psychology Vol 22, No. 5. 712 – 724 (2008);

recalibration of the system which puts mediation to the forefront of the dispute resolution process is bound to result in more cases being resolved through negotiation and mediation without having to be litigated.

The implementation of the Mediation Act in 2017 has given a renewed impetus to the resolution of family law disputes through mediation.

What is Mediation and what is a Mediator ?

The Mediation Act 2017 has defined mediation as:

"a confidential, facilitative voluntary process in which parties to a dispute with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute.[8]

The Mediation Act defines a mediator as

"a person appointed, under an agreement to mediate to assist the parties to the agreement to reach a mutually acceptable agreement to resolve the dispute the subject of the agreement."[9]

This definition sets out in clear terms the function of the mediator, which is to assist the parties in reaching a settlement. I am also of the view that this definition is sufficiently wide, to enable the mediator to adopt a flexible position which can meet the differing dynamics that arise in particular mediations. The definition does not

[8] Mediation Act 2017 (Number 27 of 2017), Section 2(1).

A number of alternative definitions for mediation are available including:

Council Directive 2008/52/EC of 21 May 2008 on certain matters of mediation in civil and commercial matters [2008] OJ L 136/3 - '"Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.'

Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Jossey-Bass, 1984) – 'Mediation means a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.'

[9] Mediation Act (Number 27 of 2017) 2017, Section 2(1).

restrict the mediator to acting solely as a facilitator to the exclusion of being an evaluator. The definition allows the mediator, to not alone act as a facilitator, but also to give an evaluation to the respective parties on their respective positions, provided he does not make proposals to resolve the dispute without the prior consent of the parties.[10]

Advantages of Mediation

The resolution of disputes through mediation carries many advantages including:

1.It is less confrontational. It can allow a relationship to be maintained between the parties, which in the family context is extremely important, particularly where the interests of children are at stake.

2.The parties retain ownership of the process and the ultimate settlement represents the fruits of their endeavours to settle matters.

3.The flexibility of mediation allows matters which may not necessarily be appropriate for pleadings or which through error or for some other reason have not been included in the pleadings to be aired.

4. Because the parties retain ownership of the proceedings the implementation of any settlement has a far greater chance of being successful, than a settlement that is imposed by the courts.

5 The process is completely confidential.

6. The process can be expeditious and considerably less costly than litigation.

[10] Mediation Bill 2017 Section 8(4)

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In theory all family law proceedings that do not involve domestic violence, vulnerable individuals or child abuse should be amenable to mediation as the issues involved generally revolve around, custody, access, maintenance, pensions and property matters. Unfortunately the reality is that large numbers of family law cases that should be mediated are being litigated. In my view this situation is neither efficient or desirable.

Factors Inhibiting the Use of Mediation

It would seem to me that there are a number of factors that have contributed to the low take-up of mediation in family law proceedings in Ireland. The main factors would appear to be:

1.The lack of information amongst litigants about the nature of mediation and its benefits. Many litigants believe that partaking in mediation represents an admission of weakness in respect of their case. They do not understand the dynamics involved and the fact that the mediation is voluntary, confidential and takes place "without prejudice" to any existing or pending proceedings.

2.Some legal practitioners fear mediation primarily because of their own lack of knowledge of how it operates. Many see it as an additional layer to litigation which slows up and frustrates the process. Others believe that mediation is "a lawyer free zone" and not something that lawyers should become involved in. In my experience qualified lawyers generally make excellent mediators as they have an ability to see both sides of the argument and an ability to adopt an independent and reasoned approach to conflict and its resolution. Furthermore the best mediated agreements

are those where each of the parties have the benefit of independent legal advice before they sign off on the agreement. The availability of independent legal advice to each of the parties in a mediation ensures that there is an equality of bargaining power between the parties and this can be particularly important in family law proceedings so as to prevent intimidation and bullying by one party of another.

3.The fact that mediation is confidential means that its success is often hidden from public view and therefore not given the credit or recognition it deserves. If this credit and recognition was given it would positively impact on the reputation of mediation and by extension make it more attractive to litigants.

7. Most lawyers do not appreciate or recognise that mediation is far less stressful than litigation as the proceedings are not constrained and restricted by the contents of pleadings and legal procedures, the parties retain ownership of the discussions and proceedings and therefore unlike litigation never lose control of the eventual outcome and from a lawyer's perspective there is an enormous sense of satisfaction when a dispute is successfully mediated and relations between the parties remain intact as opposed to becoming toxic as sometimes happens in litigated proceedings. When practising as a solicitor I always felt a great sense of job satisfaction when engaged in family law mediations. You really felt you were helping and supporting your client negotiate their way through a very difficult emotional stage of their lives.

5. The judiciary may need to be more proactive in determining the application of the various legislative provisions that obligate solicitors and barristers to advise clients on mediation as a dispute resolution mechanism. In this respect it is important that the judiciary are proactive in ensuring that the provisions of sections 14 and 15 of the

Mediation Act which mandate solicitors and barristers respectively to advise clients on mediation and provide them with information detailing the advantages of the process are being implemented. If sections 14 and 15 are proactively implemented as set out in the legislation they should have a considerable beneficial effect in diverting cases away from litigation to mediation.

The Code of Professional Conduct of the Law Society of Ireland emphasises the important role a solicitor has to play in reducing conflict and taking a reasoned approach in order to achieve a fair settlement. The solicitor has a professional obligation from the outset to provide advice and information about ADR including mediation.[11]

Clearly the tide is turning away from litigation and towards mediation. Therefore it behoves the courts and lawyers to embrace this change and proactively encourage mediation. We should strive for a situation where mediation is the primary default position for dispute resolution as opposed to litigation However it is important to emphasise that the voluntary nature of mediation should always be kept to the forefront. As an aside in Italy where mediation is mandatory prior to the institution of proceedings the number of cases mediated has risen exponentially and mediation is now the default position for dispute resolution in Italy.

What steps can be taken to improve uptake of mediation?

1.The introduction of mandatory information sessions on mediation should in theory increase its uptake. The Legal Aid Board had rolled out mandatory mediation information sessions in a number of offices, but I understand that these had to be

[11] Law Society of Ireland. "Family Law Handbook",(2008) Appendix 4 "Guide to Good Professional Conduct for Solicitors", (3rd Edition, 2013).

curtailed due to lack of resources which resulted in mediations being delayed due to the demands that mandatory information sessions imposed on staff. In the UK a similar situation appears to pertain where a cutback in the availability of legal aid appears to have negatively impacted on the effectiveness of mandatory information meetings. One budget friendly suggestion to address this situation is the making of a top-quality information film setting out the process involved in mediation, the benefits of mediation and emphasising that mediation agreements ultimately become orders of court with the same enforceability as a court generated settlement. I would suggest that such an information film contains a mock mediation so that litigants can see how the process operates and also be assured about its non-adversarial nature. Consideration could be given to releasing this film not only to would be litigants, but also to putting it on the Internet and providing a link to it from the legal websites such as the Legal Aid Board, the Law Society, the Bar Council, the Citizen's Advice Bureau and the Court Service. While it is not being suggested that such a film is a substitute for a one-to-one information session, it is suggested that given budgetary constraints such a film might act as a stopgap measure and go some way towards filling the information gap that currently exists in respect of mediation.

2.The co-location of mediation centres with Legal Aid Board offices, will increase and promote the profile of mediation. I note that in June of this year in Portlaoise joint offices for family mediation and legal aid were opened and it will be interesting to see how this development is received and how effective it is in promoting mediation.

3.Educate lawyers on the benefits of mediation from their perspective. In particular emphasise the reduction in stress for lawyers that mediations entail as opposed to

litigation. Lawyers should also be educated on the sense of job satisfaction that successful mediations generate. Furthermore lawyers should be advised that mediations are not a lawyer free zone and that the best mediated agreements are those that have an involvement from lawyers for each of the parties.

4.The establishment of courthouse based mediation, where the mediator is located in the courthouse on the days of family law proceedings has been operating for some time in Dolphin House and in a number of other venues throughout the country at District Court level. My understanding is that these ventures have been reasonably successful. It is against this backdrop that I am now going to highlight some exciting developments at Circuit Court level in respect of courthouse based mediation which are being piloted in Mullingar. It is hoped that from October onwards a mediator will be available to litigants on the initial days of the Circuit Court family law sessions in Mullingar. This mediator will be provided by the FMS. The object of the exercise is to show parties that mediation with the advent of the Mediation Act is now front and centre in the dispute resolution options available to litigants. It is felt that having the mediator in the courthouse will give the process added status and acceptability. In order to prepare for the rollout of mediation in the courthouse a number of meetings have been held with the relevant stakeholders namely, court staff, county registrars, the judiciary and legal practitioners. I am delighted to report that the proposal has received unqualified and wholehearted support from all of the stakeholders. There is an enormous amount of goodwill towards the proposal especially from the district and circuit court judges and the court staff and practitioners. It is felt that the location of the mediator in the courthouse together with the support of the court staff and the judiciary and the buy-in of the legal practitioners will encourage litigants to avail of the

process. The profile of mediation will be considerably improved and increased by having a mediator available in the courthouse on the opening days of the family law sessions. It has been made abundantly clear to legal practitioners that the best mediations are those that involve each of the parties having legal representation.

It is proposed that all litigants will be obliged to attend an information session before legal proceedings are instituted. It is hoped that the sessions will be given individually on a one-to-one basis however this will be very much dependent on the resources available.

We are extremely fortunate and grateful to have the assistance and unstinting support of Fiona McCausland and her team at the FMS. At this stage I must also acknowledge the fulsome and wholehearted support of John McDaid and all at the Legal Aid Board for this initiative. Their vision and support is much appreciated.

A subcommittee consisting of court staff, county registrars, judges, and representatives of legal profession together with the FMS and that the Legal Aid Board has been established to implement the scheme. Thanks to the efforts of Fiona and the experience of her team in other venues it has been clearly established that the identification of and support to the gateways to communication are critical. Accordingly it is essential that front line court staff are familiar with the mediation process and are able to explain it to litigants. Likewise legal representatives including solicitors and barristers must be fully the familiar with the process, be passionate about it and prepared to recommend it. In order to achieve this the subcommittee is hoping to have training days for all the relevant stakeholders.

It could be argued that the imposition of the mandatory requirement to engage in an information session prior to the institution of proceedings, constitutes a breach of

article 6 of the European Convention on Human Rights by restricting an individual's right of access to the courts. However in my view the jurisprudence of the European Court of Human Rights[12] would tend to be supportive of mediation and see it as complimentary to litigation. The imposition of a mandatory information session merely delays rather than inhibits access to the courts. The law Society[13] in its submissions on the Mediation Act and the Law Reform Commission in its report on ADR have both favoured mandatory information sessions.

The Mediation Act 2017 did not impose an obligation of attendance at mandatory information sessions. The explanatory memorandum that accompanied the Mediation Bill 2017 indicated that mandatory mediation sessions for family law and succession cases were included in the bill[14], although I have been unable to find where in the Act it is specifically stated that parties to family law proceedings must attend a mandatory information session. In England the Family Law Act 1996 obligated parties who were seeking public funding for court proceedings to be referred to a state registered family mediator to receive information about mediation. Experience has shown that the opportunity to receive information from a mediator at an early stage results in mediation being accepted by both parties in a significant proportion of cases.[15] The Law Reform Commission noted that international research had indicated that voluntary participation in information sessions on ADR is quite low and so the trend has been to make them mandatory for all parties who seek the assistance of the courts. As I already mentioned in this jurisdiction the Legal Aid Board did introduce mandatory information sessions in a number of venues which

[12] Ashingdane v United Kingdom [1985]ECHR8.(1985) 7 EHRR 528
[13] Law Society of Ireland, 'Submission to the Department of Justice Equality and Defence. Family law – The Future' (Law Society of Ireland, 2014) 26, para 5.13-09
[14] Mediation Bill 2017 Explanatory and Financial Memorandum P5
[15] See SM Cretney, Judith Masson and Rebecca Bailey-Harris, *Principles of Family Law* (Sweet and Maxwell, 2003) 303.

obligated applicants for legal aid to attend an information meeting on mediation before their application for legal aid would be granted. In my view it is regrettable that because of lack of resources the Legal Aid Board had to suspend the mandatory information sessions. The board are to be commended for having the vision and foresight to pilot the scheme. I am absolutely convinced that with the requisite resources such a scheme cannot but have a positive influence by encouraging mediation and reducing acrimony.

In Mullingar litigants will be made aware of s16 of the Mediation Act and the fact that the judge can on the day scheduled for hearing direct the parties to mediation if the judge deems that appropriate. It is hoped that the placing of an early emphasis on the benefits of mediation will reduce the number of cases that are ultimately litigated. Many may argue that the cases that reach the court are not resolvable through mediation or negotiation because if they were they would have settled before the court hearing. There may be some merit in that argument however I am of the view that keeping the mediation option alive during the entirety of the proceedings right up to the hearing will hopefully keep the focus on endeavouring to resolve the dispute through mediation. The fact that the judge may ultimately direct mediation should hopefully increase its chances of success. The fact that the court will have available to it the experienced and highly trained mediators from the FMS means that the litigants will be benefiting free of charge from the skills of highly trained professionals. There are few areas of life where such a valuable service is made available at no cost to the user.

It is hoped that the use of mediation even at the very late stage of proceedings and at the behest of the judge will have a trickle-down effect on the system, thereby

encouraging other litigants to avail of mediation at an earlier stage. Litigants will know from the very start the benefits of mediation and that mediation can be directed right up to the date of the hearing by the trial judge. This should focus litigants minds on the dynamics of mediation and hopefully persuade them to avail of it.

The ultimate sanction of the court to penalise a non-cooperating party to a court mandated mediation by making an order of costs against them is something that has to be used extremely sparingly. The idea of penalising a party for failing to engage in mediation by way of a costs order flies in the face of the voluntary nature of mediation. Some have argued that this provision if widely implemented would bring mandatory mediation in through the back door. Given the voluntary nature of mediation it is essential in my view that it is never seen as compulsory or mandatory. Accordingly the approach must always be to encourage and cajole reluctant litigants into the mediation process by highlighting the benefits namely: retention of ownership of the settlement, likelihood of maintaining relationships which will be to the benefit of the entire family, reduction in costs and greater likelihood of ultimate settlement being adhered to, thereby reducing any further court hearings.

The practicalities of the rollout of mediation in Mullingar are still being worked out. It is important to emphasise the role of case progression and the very important role of the county registrars. It is anticipated that mediators will be available not only on the initial days of the family law sessions but will also be available at case progression courts so that the county registrar can refer litigants for information sessions which will hopefully result in the litigants going on to participate in mediation.

The model envisages mediation being available to parties at any stage they request it during the litigation process with the benefits of mediation being pointed out to the

parties by court staff prior to the institution of proceedings, by their legal representatives prior to the institution of proceedings, by the county registrar at case progression and ultimately by the trial judge. It is hoped that the continual emphasises on the benefits of mediation during the entirety of the litigation process will encourage more parties to avail of it. Obviously the entire proposal is a "work in progress" and will be closely monitored by all the stakeholders and in particular by the FMS and the Legal Aid Board to see how effective it is. Running in tandem with the initiative at circuit court level will be the availability of mediators at the courthouse on district court days in family law. By having mediators operating in both the district court and the circuit court on family law days, it is anticipated that mediation will become embedded in the system and become part of the ethos associated with the resolution of family law proceedings.

An information evening is to be held on 15 October in Mullingar for all the stakeholders at which a large attendance of legal practitioners, court staff, county registrars and judges are expected. Again we are fortunate that Fiona McAusland and her team together with John McDaid will be in attendance to explain in full how the court based mediation is going to operate. So it is a case of "watch this space".

Finally I again want to reiterate my sincere thanks and admiration to each and everyone of you for the excellent work you are doing in difficult and trying circumstances.