international FAMILY LAW GROUP LLP

A NEW DIRECTION FOR MEDIATION

Summary

A more directive model of mediation in which the mediator is able to give greater encouragements to settle by expressing views on the likely outcome if the case were to proceed to final hearing and on the merits of the separate claims and offers: often after disclosure, often in parallel with court, often with lawyers present, often in one session, often in cases unsuitable for orthodox mediation, with mediators who are also lawyers experienced in the resolution of difficult cases, and with the sole aim of getting a settlement.

Introduction

Traditional Mediation has a problem.

Family Mediation in England and Wales has not prospered as its architects and founders had anticipated in the 1980s and the 1990s and despite the huge resources invested and commitments made by government, mediators and others. There are many reasons.

One reason is that traditional mediation suffers from a serious handicap. Mediators can help couples explore options, assist communication and produce disclosure. Indeed, mediation receives a high satisfaction rating when a case settles. It is an excellent process. It has worked well and is still fundamentally important. The difficulty arises however when an impasse in settlement is reached.

Mediators can then go no further, they are unable to provide an indication of what is likely to happen if the matter went ahead at court. They can certainly say if any proposals being discussed are outside the very wide range of what a court may order, but that is all. They cannot comment on the respective merits of the claims and arguments. They cannot overtly suggest one party moves their position to produce an outcome. They cannot predict an outcome, as with an FDR judge, with all the benefits that FDRs bring. They cannot suggest what a sensible and fair settlement could be. Mediators are unable to give any strong steer or direct encouragement of any terms on which to settle.

When all the best efforts of the couple in mediation have failed, the parties look in vain for more help from the mediator. As a consequence, the parties leave the mediation room without a settlement, often for want of a more directive approach by the mediator. For many lawyer-mediators, this is an immensely frustrating experience.

The next Australian model

One of the Australian mediation models, known confusingly to English ears as “conciliation”, overcomes this in a manner that finds considerable support with many Australian lawyers and clients. Given increasing pressures in England to resolve matters short of a final hearing, there is a real and urgent need to find a way for mediators to take a more pro-active role to bring about a settlement.

I have been successfully working with the so-called “directive mediation” model since I returned from Australia in 2005. It has been very well received by many clients. Many solicitors referring clients to mediation like to know this model is being operated. Many experienced lawyer mediators operate this model in any event. This paper sets out a structure and the basis for directive mediation.

Directive mediation in practice

Based on orthodox mediation, directive mediation is mediation with a strong input from an experienced family lawyer acting as a neutral mediator to help the couple and their lawyers reach a settlement. The normal rules of mediation apply, save that if the couple struggle to settle, the mediator is able to indicate and predict what he considers might or would happen if the matter were to be litigated at court and/or to propose positive solutions and forms of settlement and/or to comment critically on proposals by either party because they are either unlikely to succeed if litigated at court, or they are not likely to produce a settlement in the case in hand.

The mediator has training as a mediator but, in practice, is selected as much for skills, judgement, knowledge and abilities as a lawyer in negotiating and achieving a settlement.

This model of mediation often takes place after disclosure is concluded and the primary facts are known. The mediation is directed to negotiating and reaching a settlement. This needs prior disclosure.

Often it requires fewer sessions than traditional mediation, perhaps only two or three and for longer than the conventional 90 minutes. This is because there is a greater steer towards what is actively needed either to overcome any disclosure problems or to work towards the most likely form of acceptable settlement. It can therefore be both quicker and cheaper than traditional mediation.

Sometimes because of the experience of the lawyer mediator, the couple may ask the mediator to draw up not only the memorandum of understanding setting out the terms agreed in mediation but also a consent order for filing at court. Some couples believe the mediator has a more neutral stance in the drafting process even if it is then considered by the respective lawyers. A number of lawyer mediators are quite prepared to undertake this aspect of the work.

Invariably this directive mediation works best in financial disputes. When there are issues concerning the children, which may involve the couple in mediation working through past parenting issues, traditional mediation has a more significant role.

There is specifically no therapeutic element as the mediator does not hold out as having specialist therapy skills, although naturally the mediator is very experienced in family dynamics and negotiation dynamics for the purposes of reaching a settlement. If couples seek therapeutic elements of mediation, then the lawyer mediator or the lawyers recommend a more appropriate mediator or a therapist, or a life coach as recommended in collaborative law. This model is purely a dispute resolution process. No more. No less.

Sometimes other experts are needed to help with the process. The mediator may recommend this on reading the papers in advance of the mediation or even suggest that the mediation is delayed until extra information or joint reports are obtained. This is no different from a court being unable to deal with a final hearing due to inadequate evidence or disclosure. It may be agreed at the mediation session that it should be adjourned to obtain expert help or more information.

This model is suitable for final and interim and interlocutory issues. It is suitable before proceedings are commenced or in parallel, including an attempt to resolve before any final hearing. It is best when the disclosure process is complete and the facts are known so that the focus can be on the resolution itself.

Experienced lawyer mediators are invariably aware of the benefits of arbitration and of private early neutral evaluation. Accordingly, if a major dispute arises, it does not mean that mediation has to come to an entire end, such as occurs with collaborative law. The particular discrete dispute can be referred to arbitration or for early neutral evaluation and once resolved, the directive mediation can resume towards a settlement. In similar fashion, arbitrators may well refer parties to mediation, and often the directive form of mediation.

Lawyers at the directive mediation sessions

Lawyers can sometimes be present throughout and take a full part. This is invariably directive mediation but with the additional element of the active involvement of the parties lawyers.

The lawyers address the mediator about the issues and the positions of the parties. They engage in the ongoing negotiations as well as giving advice to clients throughout. Lawyers therefore feel much more comfortable with this mediation model as they are present and know that at all times they can safeguard their client's interests and advise their client as the mediation discussions continue. Clients say as much (or as little) as they want in the mediation round table discussions. It is good practice to make sure that they get a chance to say whatever they want, especially at the outset of the mediation. This will be the equivalent of their day in court - the chance to have their say - as lawyers will appreciate the importance that clients place on having such an opportunity to be heard. But everything that is then said is in the "safety" of the mediation room where the mediator can ensure that what is said does not derail the settlement process.

Often the mediation starts with both parties, their lawyers and the mediator in the same room. The mediator will begin by explaining what mediation is, and what it is not, particularly that it is a voluntary process and nothing can be imposed on the parties at the mediation or referred to openly. The lawyers will then often address the mediator on the issues, the offers already made and other proposals for settlement, with clients contributing as they wish. The mediator often wants to hear directly from the parties including what they want from the settlement in the wider sense rather than specific financial terms. The mediator will have been sent the relevant documents in advance and be aware of the issues between the parties, perhaps even the offers. He is likely to have his own questions to clarify the facts or positions.

Some mediations in this model takes place only with everyone together in one room throughout, with short break out sessions for clients to discuss with their lawyer. For other mediations, after this initial session together, the parties and their lawyers will then adjourn to separate rooms for discussions about further proposals to be made or received with then either everyone returning to the primary mediation room for further combined discussions, or just the lawyers returning, or for the mediator to visit each of the separate rooms to talk to the parties and their lawyers to see how discussions are progressing and to make suitable interventions and proposals to take the discussions forward towards a settlement. How it operates depends on each individual case, the preference of the parties and their lawyers and of the mediator, and may vary during the session.

This model of mediation is invariably conducted at one session, not limited in duration to the orthodox 90 minutes although with a fixed conclusion time. It is quite usual for roundtable meetings and for the FDR process at court to last much longer than 90 minutes. As the parties with their lawyers may be in separate rooms for some periods, and as the clients will be primarily giving instructions rather than engaging in the

intensity of the negotiations themselves, as in orthodox mediation, there is no difficulty in this model of mediation involving sessions lasting longer than 90 minutes. About 30 – 60 minutes before fixed conclusion, the mediator decides if the matter is likely to settle and indicates this to the parties and if necessary invites it to end if there is little prospect. This can produce renewed offers! Time is set aside for drawing up and signing final documentation although often the mediator draws up, and modifies, documentation about terms as the mediation progresses throughout the session. With lawyers present and able to deal with any issues of pressures on clients to conclude a deal and advice on the merits of terms as the negotiations proceed, the mediation documentation can be signed off at the session. The parties leave with, hopefully, signed heads of agreement, perhaps even a draft consent order.

A better option for settlements

I want to see mediation helping the "hard to settle" cases; the ones inappropriate for collaborative law because of the high risk of the issue of proceedings or one party taking action which causes the other to issue; the ones where serious costs have been incurred and there have been several court applications; the ones heading for a final hearing; the ones where the parties can hardly be in the same room and only then when firmly separated by their lawyers; the ones where the lawyers know it should settle but are struggling with their clients to get it settled; the ones not presently settled by mediation or other ADR.

No change of law or court rules is required for this form of mediation. It is fully provided for within Part 3 FPR 2011. It is appropriate for information at MIAMs. I have adapted the standard Mediation Terms of Business which specifically gives the mediator power to give directive assistance. This has been approved by the resolution ADR committee.

It should only be undertaken by lawyers who are very experienced and confident in the particular area of family law and therefore able to give directive assistance on outcome.

Mediators must be clear at the outset about which form of mediation, traditional or directive, is being adopted so that clients and client lawyers are aware in advance.

I commend this form of mediation to experienced lawyer mediators in their work. I hope MIAM information providers will recommend directive mediation for suitable cases. I would like to think the government will give specific endorsement for this form of mediation as being more cost efficient and more likely to reach a swift resolution in family disputes.

David Hodson

david.hodson@iflg.uk.com