


PRIVATE CLIENT BUSINESS

## Mishcon de Reya Solicitors

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### Mediation in Settling Probate Disputes

 Administration of estates; Mediation

*Mediation is an increasingly popular method of dealing with probate disputes. This article contains practical advice on when mediation is appropriate in this area and how to get the best from a mediation.*

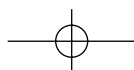
What is mediation? It is the currently favoured method of alternative dispute resolution. The disputing parties are assisted by the mediator (who is a facilitator not an adjudicator) to consider what stage the dispute has reached, what alternatives exist to resolve the dispute and ultimately to reach a mutually acceptable solution. Mediation is driven by the parties, and the mediator merely facilitates the process.

The parties move through the mediation day in a flexible manner. Usually there will be an opening plenary session at which the parties state their position. They then go to private break-out rooms. The mediator moves between the parties seeking to help them reach agreement.

The process is voluntary, without prejudice and not binding unless and until the parties determine that it should be, and, most importantly, it is a confidential process.

#### **Why do people mediate?**

In the early days, advocates for mediation argued that mediation overcame the delays, costs and shortcomings of the formal litigation process. While this is true, I think that today there are other important reasons for mediation. It gives back control of the process to the parties, it often helps strained relationships from deteriorating further, it is confidential and without prejudice and the legal advisers work in a constructive rather than a destructive manner.



### **Mediation in a probate context**

When looking at mediation in the probate context, the critical point is that a vital witness, the testator/testatrix, will not himself or herself participate in the mediation. A number of questions therefore need to be asked, in particular:

- Is this probate case actually one that would benefit from mediation?
- If the answer to the previous question is yes, is this probate matter at a stage that mediation would work?
- Who should be the mediator?
- Preparation for the mediation.
- Preparing your client.
- Tactical points.
- Good faith in mediations.
- Deadlock in mediation.
- Settlement agreements.

*Is this probate case actually one that would benefit from mediation?*

In my experience, it is critical that one's own client is willing to "buy into" the mediation process. I have seen a number of probate cases where the other side have simply wished to engage in a "fishing expedition", hoping to extract useful information to aid them in the on-going litigation during the course of the mediation day, but having no real desire to mediate.

There will be some probate actions where one party needs to establish a legal precedent or the remedy that is required cannot be achieved at a mediation (e.g. an injunction/prohibition) or one party needs court vindication (e.g. of their integrity) and such a case would not be suitable for mediation.

*If the answer to the previous question is yes, is this probate matter at a stage that mediation would work?*

In many probate cases it may be apparent, after certain information has been obtained, that mediation is appropriate. For example, where there is an allegation of lack of capacity, it would be useless to proceed before having sight of the medical evidence, including the deceased's medical notes, the GP's notes and any expert medical evidence that is pertinent.

*Who should be the mediator?*

I am personally a firm believer that probate disputes constitute a specialist area of law, and that many excellent generalists are simply not acquainted with the finer points that arise, and even of the general case law in this area. For that reason, I believe that having a mediator who has specific probate practice and dispute

expertise is very useful. One of the important functions of a mediator is to be able to reality-test, i.e. to explore with each party how they think that a judge considering the evidence to hand would determine the case. If the mediator has no specialist probate practise and dispute experience, I do not believe that such reality-testing can be effectively carried out.

It is also important to consider the personalities involved in the mediation when choosing the mediator, and in my experience, personal recommendation of a mediator is very useful indeed.

The question of location is often very important indeed. Sitting in a cramped windowless room for many hours will inevitably impact on the outcome of the mediation.

### *Preparation for the mediation*

It is essential to establish which issues need to be discussed. It is also important to know the real value of your claim and to carry out a proper analysis of the risks of taking the case to a full hearing. Calculate your client's prospects of success and give due consideration to possible other outcomes. Be aware of your costs position and what the tax and other implications of settlement are.

### *Preparing your client*

Very often clients fail to understand the mediator's role. It is imperative that the legal advisers make the parties aware of the mediator's true role, emphasising that a mediator is a facilitator and not a judge.

Warn your clients that they will be expected to speak and participate.

Most importantly, it is vital to ensure that you have the authority to settle the case, since there is nothing more frustrating to a mediation than to find out at 16.00 that one party only has the requisite authority to settle up to a given sum (see *Good faith in mediations* below), and that they have no way of contacting the person who has authority for settling at a higher sum.

### *Tactical points*

#### Position statements

Well before the mediation you should, with your client, agree the position statement. A good position statement will set out the entire history of the matter and provide the mediator with a clear outline of the dispute. It will then set out the client's case and provide details of the key evidence.

The statement should not be over-long. Very few mediators take kindly to reading a 30 or 40 page position statement.

In certain matters, it is useful to address some of the arguments that have been deployed in the evidence of the other side explaining why it is that you do not feel able to accept what they are saying.

Again, in some cases it is helpful in the position statement to indicate the area where possible concessions might be made, and what are the potential barriers preventing settlement as you see them to be.

### Opening statements

Before mediation day arrives you should agree with your client what your opening statement will be. Again brevity is to be preferred over a long rambling opening. It is seldom useful to use the opening statement as a platform from which to attack your opponents, since this polarises the parties, even in the context of a mediation setting. Listen carefully to the other party's opening statement, since this may help you understand what it is that they hope to achieve, and can inform you as to whether any new information is likely to become available on the mediation day.

### Strengths, weaknesses and flexibility

You should be aware of your own and your opponent's weaknesses and strengths and you should be prepared to anticipate the other side's moves in the mediation, and to prepare your own counter-moves.

It is useful in a mediation to come with an open and flexible mind, and to listen very carefully to what is being relayed to you by the mediator from private sessions with the other side. It is best to avoid ultimatums, and it is useful to keep the lines of communication open, to acknowledge concessions made by the other side and to respond with appropriate responses.

### Understanding negotiation techniques

It is always useful to have a good understanding of negotiation techniques and vital to understand the precise arena into which you are entering in your specific mediation.

Those parties who are inflexible and intent on progressing the mediation in only one direction, will often find that, several hours into the mediation, they come up against a "brick wall".

It has been my experience that in probate disputes, the lawyer must understand the specialist legal points that arise without losing sight of the commercial implications, and be able to combine legal analysis with commercial practicality.

### Client expectation management

One of the usual reasons for non-settlement of probate mediations is that the lawyer has not been able to get the client to accept the lawyer's assessment of the risks involved, or has found it necessary to manage downwards the client's prospects of success, to a point which the client finds unacceptable.

When faced with a mediator who is reality-testing with you in private session, your client often feels that the mediator is taking sides. In fact, the mediator may well be deploying the very same tactics in the other room, but, because your client will see only one part of what is going on, he may become unwilling to make further concessions.

To that end, I have always found it very useful to have a pre-mediation meeting with my client at which their expectations are realistically managed, since while a mediator who knows his job well can help intransigent parties to change their minds, the amount of movement that the mediator can obtain will often depend on what has gone before. In many cases the mediator will be able to assist a lawyer who is trying to help their own client avoid "loss of face", provided that the lawyer has not in pre-mediation meetings pumped the client's expectations to unrealistic levels.

If one party is wholly unrealistic, the mediation may well be doomed to failure. Such an unrealistic party, in my view, will only recognise the sanction of a full-blown hearing before the trial judge at which the judge makes a binding Order to resolve the dispute, and leaves the unrealistic party with a penal costs Order.

### Probate cases involving minors and unascertaineds

One final point to bearing in mind in probate mediations is that where a dispute over a Will trust involves minors and unascertaineds, it may well be the case that the mediation outcome becomes subject to court approval on behalf of the minor or unascertained, and this might mean the mediation result having to be conditional upon such approval being obtained, following provision of an appropriate opinion by those acting on behalf of the minor or unascertained.

Accordingly, it is very important to have those representing the minor or unascertained party to the mediation, since if they are brought in at a later stage, they may well demand some form of "ransom" on behalf of minors and unascertaineds that they represent. Moreover, if they do not participate in the mediation process, they may well find it more difficult to understand the conclusion that has been reached.

### *Good faith in mediations*

Before a mediation, the client may raise the perfectly fair question:

“ . . . what can one do to deal with a situation where the other party does not take part in the mediation in good faith?”; or

“ . . . even where the other party does buy into the process, what can be done if the opposing party becomes intransigent, as the mediation proceeds?”.

Where this is suspected, it may be prudent for the parties to agree to pay the whole of the mediator’s fee up-front as this may achieve better “buy-in” and make the other side more willing to participate fully in the mediation process.

Where a party’s commitment to the process is doubted, it is particularly important that the Mediation Agreement contains a clause that all parties attending the mediation have authority to settle. I have on occasion found that parties (particularly insurers) have been given authority to settle to a certain ceiling figure only, following which they lack the authority, and that they have revealed this as a weapon late in the mediation day.

It is wise to ensure that the position statements are exchanged in such a time-frame as allows each party to consider what the other has determined to say, well before the mediation takes place.

Of course, where a party refuses to attend a mediation, the court can determine that that refusal should be dealt with by a suitable costs Order against that party. One should, however, bear in mind the Court of Appeal in *Halsey v Milton Keynes General NHS Trust*,<sup>1</sup> which stated that there is a difference between urging the parties to attempt mediation and examining their conduct in mediation.

### *Deadlock in mediation*

Often parties may feel that they have reached an insurmountable difficulty which prevents the mediation from moving on, and it useful to have strategies to address that situation.

The ability to apologise or provide adequate explanations is a very real mediation tool, and I have seen this employed to great effect in probate dispute mediations.

Sometimes making a seemingly small concession can have a “waterfall” effect on the other side, and precipitate greater concessions from them.

Often in a probate dispute where the loss of a close relative is still felt to be the subject of high emotions, such issues need to be addressed and not “swept under the carpet”.

<sup>1</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.

Sometimes not having a precise figure but encouraging the parties to think in terms of “ballparks” can help.

A party may determine that it wishes to make a “conditional offer”, namely one that the mediator should disclose to the other side only if specified conditions are met.

If the mediation encompasses say 10 issues, there is no harm in trying to reach agreement on several of the smaller issues, which may then in turn “break the logjam”.

### *Settlement agreements*

If agreement is reached, it is critical that the lawyers draft the settlement agreement and do not leave before the agreement is finalised and signed by all parties.

If there are no formal proceedings in existence, heads of agreement or a full agreement will be signed by the parties at the end of the mediation.

If there are formal proceedings, it will be necessary for the litigation to be dealt with in a formal manner, e.g. a Consent Order combined with a stay of proceedings removable if the payment set out is not made by the due date, or the action being dismissed, or the action being discontinued.

In that connection it was held in *Brown v Rice*<sup>2</sup> that an offer to settle which did not contain a provision for disposal of the litigation was held to be incomplete.

### **Conclusion**

Mediation in the area of probate disputes is on the increase, and I have tried to outline where and how it can assist in this contentious area. The usual cost and duration of a mediation in this arena will often mean that in the fullness of time, after a successful mediation, emotions can be lowered and troubled family relationships be allowed to heal which is often not the case where there has been a formal court-imposed solution.

<sup>2</sup> *Brown v Rice* [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305.