



Appendix 13

Consensual Separations & Maintenance

"Maintenance Obligations: Law and Practice in 2008"
Conference 25 & 26 March 2008
Mediterranean Conference Centre, Valletta

The Chamber of Advocates
Dr. Barbara O'Brien B.A. LL.D.
Adv. Trib. Eccl. Melit.
Family & Child Mediator

What is Family Mediation?

"Family mediation supports parents and children through family change and disruption, particularly where it has occurred as a result of separation, divorce or family restructuring. A family mediator helps families to communicate better and to make their own arrangements for the future, particularly for their children. Mediation can help avoid long, painful and expensive legal battles." (Family Mediation in Scotland)*

Family mediation is a process in which an impartial person assists those involved in family breakdown, and in particular, separating to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues relating to separation, children, finance or property. (in a safe and balanced environment)

Basic Principles of Family Mediation

- The impartiality of the mediator. The mediator must not take sides and there must be no prior relationship or professional involvement as legal advisor or counsellor to one or both parties.
- Decisions belong to the parties and not to the mediator. Participants are assisted to reach their own informed and agreed decisions with as little conflict as possible.
- A private and neutral forum providing suitable facilities for mediation meetings.
- Parents are encouraged to take full account of their children's needs, feelings and views and co-operate over arrangements for children.

Basic Principles of Family Mediation

- Non-binding outcomes: proposals for settlement worked out in mediation are subject to independent legal advice to each party.
- Protection from risk or threats of violence. There are safeguards and ground-rules to manage power imbalances and to control abusive behaviour. Neither party is permitted to put pressure on the other to accept the other party's preferred outcome.
- The mediation process is confidential.

Confidentiality

- Legal Notice 397 of 2003 Regulation 4 (7):- *The spouses and all other persons shall not be required to take any oath and no evidence may be adduced before any Court of anything divulged to the mediator in the conciliation or mediation procedures, of any proposal made by him or any other person during the procedures or of the reaction of either spouse to such proposals.*
- Act No. XVI of 2004 Article 27:-
 - (1) *No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, mediation is admissible in any proceedings, and disclosure of such evidence shall not any may not be compelled in any proceedings.*
 - (2) *All communications or settlement discussions by and between participants in the course of mediation shall remain confidential.*
 - (3) *Except as required under subarticle (4) hereof, a mediator may not submit to any court or adjudicatory body any evidence, report, assessment, evaluation, or finding of any kind concerning a mediation conducted by him other than a report that is mandated by the Court or adjudicatory body, and which only states whether an agreement was reached.*
 - (4) *A mediator may only divulge such information as established under sub-article (3) to a Court of adjudicatory body as long as all parties to the mediation expressly agree in writing.*

Family Mediation Skills

- Process Skills
- People Skills
- Problem Solving Skills

Family Mediation Skills Process Skills

- Setting up the mediation
- Equal contact with both parties
- Remaining impartial
- Explaining Family Mediation
- Agreeing terms
- Discuss and agree agenda
- Structure each stage of the process
- Plan use of time and next steps

Family Mediation Skills People Skills

- Engaging with people
- Acknowledging concerns and needs
- Using communication skills
- Emphasising mutual concerns
- Listening attentively
- Using humour
- Normalising common problems
- Reframing positively
- Noting and encouraging co-operation

Family Mediation Skills Problem Solving Skills

- Identify information needed, collect and share information
- Listen and examine options
- Focus on concerns
- Brain storm ideas and solutions
- Focus on the future and not the past
- Address issues systematically
- Evaluate options systematically
- Break problems into smaller parts
- Test viability

Benefits of Family Mediation

- ↳ Participants are helped to reach their own decisions and to retain control over their own lives, instead of having decisions imposed on them by the court.
- ↳ Disputes can be settled at an early stage, before the parties become entrenched.
- ↳ Participants are encouraged to look towards the future, rather than focusing on grievances about the past.
- ↳ Separated parents are helped to take part in direct discussions about their children and to give as much priority to their children as possible. They are helped to take full account of their children's needs and feelings, as well as their own.
- ↳ Misunderstandings can be cleared up or avoided.

Benefits of Family Mediation

- ✦ The stress, animosity and bitterness of marital breakdown may be reduced.
- ✦ All available options are explored before decisions are taken.
- ✦ Possibilities of reconciliation are not ruled out and emerge in discussions.
- ✦ Arrangements can be worked out to fit particular family circumstances and needs.
- ✦ Meetings are informal.
- ✦ Legal costs may be reduced and the costs of litigation may be avoided altogether.

Legal Notice 397 of 2003

Provisions which facilitate the process of mediation:-

- ✦ Reg. 4 (11) (a):- *“During the mediation period the parties may jointly request the Court to appoint a judicial assistant in order to receive evidence on oath intended to facilitate the proceedings before the Mediator.”*
(b):- *“The judge shall decree on any such demand in camera, after hearing, if he so deems fit, the spouses, the minor children, and, or, their respective advocates and legal procurators.”*
- ✦ Reg. 4 (13):- *“Without prejudice to paragraph 11 of this regulation, any party may during the pendency of the procedures in the conciliation, mediation, pre-trial or trial stages, request the Court to make such provisional orders or to issue such writ or warrant as may be necessary to safeguard its interest.”*

Legal Notice 397 of 2003

Decree agreements on collateral matters

Regulation 5 (1):- *“Where during the conciliation or mediation stage the parties reach an agreement on the payment of an amount for maintenance that may be payable by one of them to the other either in respect of him or herself or in respect of the children, or agreement is reached as to the custody for visitation rights with respect to, the children, or on who is to continue to reside in the matrimonial home, the mediator shall make a note of such agreement which note shall be subscribed by the parties, and shall forthwith transmit such note to the Court which shall decree.”*

(2):- *“Provided that where any party is not assisted by an advocate or legal procurator the mediator shall inform that party of the importance of the agreement and of his or her right to be assisted by an advocate or legal procurator or to take legal advice before subscribing to any such agreement.”*

Maintenance Issues

- Means & Needs.
- Maintenance for spouse – monthly payments, one time lump sum payment.
- Forfeiting (Dekadenza).
- Renouncing (Rinunzja).
- Keeping the other party's share of the matrimonial home as full and final settlement of maintenance – problem of having actual funds.
- Maintenance for children – age, expenses (education, health, extra curricular activities, clothes).
- Looking at the whole financial position in a long term manner and trying to cover as many possibilities as can be envisaged.

Maintenance Recovery

- ☒ Civil Proceedings
- ☒ Criminal Proceedings – only maintenance and not expenses
- ☒ Standing orders
- ☒ Direct payment from employer

References

- ♦ Parkinson L. *Family Mediation* Sweet & Maxwell 1997
- ♦ Laws of Malta
- ♦ Malta Dispute Management notes on Family Mediation
- ♦ www.familymediationscotland.org.uk (*)